CROSSING THE INTERSECTION: HOW COURTS ARE NAVIGATING THE 'PUBLIC' AND 'PRIVATE' IN JUDICIAL REVIEW

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I recently discovered (or, more accurately, my associate[1] discovered) an American 'blog' on the Internet that had as its question for discussion 'The End of Judicial Review?' Posted there was a paper by well-known academic Mark Tushnet. In it, Professor Tushnet describes judicial review as a 'false god' which stands in the way of self-government[2] and he proposes an amendment to the US Constitution (I think facetiously) called the '*End Judicial Review Amendment*'.

I do not propose to consider directly whether judicial review is a false god or not. I will leave that question to the bloggers. My topic does, however, deal with this question indirectly because it hopefully demonstrates the increasing importance of judicial scrutiny of both the functions of government and what have been traditionally regarded as governmental functions. In particular, I believe that, if anything, such an important safeguard against the abuse of executive power should be strengthened and adapted to cope with modern circumstance — not abolished.

In Australia, judicial review represents the most important element in the administrative justice system. It is an aspect of the rule of law which guarantees that executive action is not unfettered or absolute but is subject to legal constraints. The duty of the courts is to determine those constraints. To quote Chief Justice Marshall in *Marbury v Madison*: 'It is emphatically the province and duty of the judicial department to say what the law is.'[3] Or, to use the words of our own Sir Gerard Brennan:

> 'judicial review is neither more nor less than the enforcement of the rule of law over executive actions.'[4] Like most of the common law, those statements go back at least to the writings of Sir Edward Coke. In fact, Coke would have gone even further by promoting the idea (long since abandoned) that fundamental laws are superior to the king's (or in our case the legislature's) and that government answers to a 'higher authority'.

The power of the court to review administrative action does not go beyond the declaration and, if necessary, enforcement of the laws which determine the limits on administrative power. The merits of the action must be distinguished from the legality. Nevertheless, as is increasingly becoming apparent, the gateway to merits review is being wedged open through review of a decision's 'reasonableness'. It may be opening even further by allowing review on the ground of 'faulty reasoning' and 'proportionality', but those thorny issues are for another day.

Initially, under the common law, courts had jurisdiction to scrutinise the exercise of statutory powers and to grant appropriate remedies. The courts acted to ensure that the repository of a statutory power did not act in excess of the power, did act when there was a duty to do so, and exercised the power in accordance with the conditions governing its exercise.[5]

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In Australia, the Supreme Courts of each State received the supervisory jurisdiction of the English courts and so face no constitutional constraints. On the other hand, the High Court derives its jurisdiction to grant prerogative relief (now called 'constitutional writs') from s75(iii) and (v) of the Constitution. The Federal Court's jurisdiction has several sources, in particular the *Judiciary Act 1903*, which confers the same powers as has the High Court, and the *Administrative Decisions (Judicial Review) Act 1977* (ADJR). Both the High Court and the Federal Court's supervisory jurisdiction, being constrained by the Constitution, may be narrower in scope than that enjoyed by State courts.

The grounds of judicial review are not always easy to define. Generally speaking, the role of the court in conducting judicial review is to consider what could be called the three 'I's:

- 'illegality' (whether the body has misdirected itself in law),
- 'irrationality' (whether the body's decision is so unreasonable that no reasonable decision-maker could have arrived at it) and
- 'impropriety' — procedural impropriety that is — which concerns whether there has been a departure from any procedural rules governing the conduct or a failure to observe the basic rules of natural justice.[6]

The grounds have been extended in the UK and may yet be extended by Australian courts.

The issue that I wish to consider is one that has come to the forefront of public law because of the changing patterns of modern-day government and the so-called 'shrinkage of state apparatuses'. I refer to the privatisation or outsourcing to private bodies of functions which had previously been performed by government itself. Most dramatic of all in Australia is the privatisation of public utilities, which have replaced various public monopolies with substantial elements of private monopoly power.

I propose to consider how judicial review has developed to respond to these changes and how it should progress. I will not discuss the scope of review. I am chiefly concerned with questions of amenability and how courts can approach the task of determining, within the law, when a private or quasi-private body, that is performing what were once public functions, is susceptible to judicial review.

In considering what actors should be amenable to review in this day and age, it is convenient to begin with what acts and actions have traditionally been accepted as justiciable. Before the 1980s, judicial review was confined to the exercise of power conferred by statute. Now it is clear that almost every executive decision is amenable to review. There are still some exceptions, including certain decisions in exercise of the prerogative like the power to enter into war, and so-called 'political' or 'policy' decisions.[7] Such decisions have always been immune from the costs and vagaries of superior court litigation,[8] although one cannot predict how long such immunity will last. In New Zealand, for example, the immunity given to the prerogative to grant mercy has been questioned.[9]

The principles of judicial review and amenability are not and have not remained stagnant. They have developed in response to changing social and administrative circumstances. Unfortunately, this is one area where our English peers have been (to use the words of Lord Cooke) more 'liberated' than ourselves.

The liberation began — predictably — in the 1960s. The case was *The Queen v Criminal Injuries Compensation Board; ex p Lain*.[10] It concerned a scheme for compensating victims of crime. The scheme was not established by statute or regulated by Parliament, but was promulgated under prerogative powers and funded with public moneys. Decisions relating to compensation were made entirely by a Board constituted by the executive. The Court held that the Board was amenable to the court's supervisory jurisdiction because it was a body of

'public', as opposed to purely private or domestic, character, with power to determine matters affecting subjects. The fact that the Board was constituted under the prerogative power and not by statute was no bar to justiciability.

Lord Parker CJ noted that the exact limits of certiorari had never been, and were not, specifically defined — the only limit consistent throughout was that the body was performing a *public* duty. He did not say what he meant by 'public duty'[11] but clearly concluded that the Board fell within this rubric. In reaching this conclusion, he noted that the Board was a servant of the Crown, that it had the recognition of Parliament in debate, and that Parliament provided the money to satisfy its awards.[12]

Lain's holding in relation to the amenability of the prerogative was confirmed by the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service*.[13] There, the Minister for Civil Service exercised the prerogative to vary the terms and conditions of the employment of staff at the Government Communications Headquarters to prevent them from belonging to national trade unions without prior consultation. The Law Lords found that executive action of this kind was not immune from judicial review merely because it was carried out in pursuance of a prerogative power. On the other hand, they confirmed that a decision may be immune from judicial review if its 'subject matter' was not properly justiciable.[14] As the Minister's decision was made in the interests of national security, this was an area in which the government was given 'the last word'.[15]

The 'liberation' continued into the 1980s, with *The Queen v Panel on Takeovers and Mergers; ex p Datafin*, a very important case.[16] Its importance is in the fact that the impugned decision was of a non-governmental private body. The decision-maker was the Takeovers and Mergers Panel. It had sole responsibility for enforcement of the code on Takeovers and Mergers. The code had received statutory recognition and there were sanctions in place for its breach, which the relevant Department or the Stock Exchange had statutory power to penalise. The Panel itself was an unincorporated association. It had no statutory or prerogative power. But it had immense powers to investigate and report breaches of the code and to apply or threaten sanctions.

In finding the Panel amenable to review, Sir John Donaldson MR described its lack of a statutory base a 'complete anomaly'.[17] Following *Lain*, he found that the Panel, without doubt, performed a 'public duty'. Although its powers were directly derived from the consent of institutions and members, ultimately the 'bottom line [was that] the statutory powers exercised by the Department … and the Bank of England.'[18] The other judges reached similar conclusions.

This was a significant change to the law. The question of amenability no longer depended upon the 'source' of the power, nor on whether the power derived from statute or not, but rather whether the body in question was exercising 'public functions or duties'. As I will later discuss, this criteria is broad and somewhat question begging.[19] How does one — more importantly, a judge — determine what is a *public* function or duty?

The English cases in which certain bodies have been found *not* to be amenable may be of assistance. Not surprisingly, they have typically involved social or cultural bodies — the Jockey Club, the Royal Life Saving Society, the Football Association, the Chief Rabbi.

In *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan*,[20] the applicant sought review of the Disciplinary Committee's disqualification of his horse and imposition of a fine. Many of the elements which one would have thought met the *Datafin* test were present — the Jockey Club was established by royal charter, it was acknowledged as regulating an important national activity, it exercised powers affecting the public, and if it did not exist the government would probably have stepped in. This notwithstanding, the Court of Appeal

decided that the Club's Disciplinary Committee was not amenable to judicial review. Why this seemingly odd result? According to the Court of Appeal, it was because the source of the Club's powers was not underpinned by any governmental interest, rather by the consensual agreement between the parties. The Club was not, in its origins, history, or constitution a 'public' body and it had not been woven into any system of governmental control.[21] Thus, while the Club's powers were in many ways 'public' they were in no sense 'governmental'.[22]

The distinction is, perhaps, made more clearly in *The Queen v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Cth; ex p Wachmann*.[23] There, Justice Simon Brown found that the decision of the Chief Rabbi to terminate a rabbi's employment was not amenable. He held that, to attract the court's supervisory jurisdiction, there must be 'not merely a public *but potentially a governmental interest* in the decision-making power in question.'[24] The Chief Rabbi was not performing a public function in the sense of regulating a field of public life that the government did or would ever seek to regulate.[25]

Are these cases correctly decided? Some commentators think not and have put them down to a 'relapse' into the 'source-based' test[26] while others, like Lord Woolf, have been content (or perhaps wise) enough to simply label them 'questionable'.[27] Rightly or wrongly, the decisions suggest that (in England at least) private or quasi-private bodies will only be amenable to judicial review if they are underpinned by 'governmental' action or are at least recognised by government. In assessing whether they are so underpinned or recognised, the English Courts will look at various factors – foremost being the source of the power (that is, whether it is statutory), and then other elements, including: the historical role of the state in the activity, whether the body relies on public funds, whether its decisions are recognised by statute or parliament or have public consequences, and whether they are supported by sanction.

In the United States, as one might expect, there is considerable jurisprudence on the effect of transferring governmental powers to private bodies, which have come to be known as the 'fifth branch of government'.[28] Of course, the constitutional setting in the US shapes the judicial treatment somewhat differently from Australia. But by analogy, it offers some food for thought.

Federal courts in the US have been willing to impose constitutional requirements on private actors. The Due Process Clause prohibits States from interfering with constitutional rights and there have been many challenges to private acts which have been argued to be 'State acts' that infringe on constitutional rights.

The US Supreme Court has admitted that its case law in this area has 'not been a model of consistency'.[29] It has adopted various 'State action tests' to determine when private participation in public duties might be deemed to be 'State action'. Despite the confusion, a number of themes emerge.[30]

First, the Supreme Court has made it clear that the relevant question is not simply whether the private body is performing a 'public function'.[31] The bar is set higher than that. In one case, the Court held that a finding of State action was available only when the function in issue had 'traditionally and exclusively' been reserved to the State.[32] Merely providing the services to the public or performing a function that government also performs is not sufficient. Depending on the State for funds is also not influential.[33] This test is somewhat hindered by the fact that, in the US at least, not many functions historically have been reserved exclusively to the State.

Another key test for amenability (if I can use the Anglo-Australian term) is the 'joint participation' inquiry. The question being whether the State has 'so far insinuated itself into a

position of interdependence' with the private actor that it must be recognised as a 'joint participant' in the challenged activity.[34]

Another test, the 'nexus' test, focuses on the extent of government regulation of the private activity. Here, the inquiry is whether there is such a 'close nexus between the State and the challenged activity' that seemingly private behaviour 'may be fairly treated as that of the State itself.'[35] This, to me, does not seem very different from the joint participation test. And, again, the nexus must be close indeed. Even the most extensive involvement with government will rarely lead to a finding of State action.

It is sometimes said that there must be a 'symbiotic' relationship between the two. That is: the private entity may be a state actor when it is 'entwined with governmental policies or when government is entwined in its management or control.'[36] In *Brentwood Academy v Tennessee Secondary School Athletic Association*, for instance, the Supreme Court found that the Association's nominally private character was overborne by the meshing of public institutions and public school officials in its composition and workings (such as its Board and governing bodies). Where government is seen to have a controlling interest in the body's governance, the body may have to answer to the Constitution. For example, Amtrak, a body incorporated by statute to provide train services in the US, has been held to be a government entity or, alternatively, a private entity acting for the government.[37] The Court has held that Amtrak was created explicitly for the furtherance of governmental objectives under the direction and control of directors, almost all of whom were appointed by the President.

The similarities between the criteria applied by the US courts in deciding amenability to constitutional requirements and those used by English courts in deciding amenability to judicial review are identifiable. Both look to a number of factors, including the historical role of government and the body's place in the regulatory framework. Nevertheless, the requirements seem to be reasonably strict in the United States perhaps because of a concern that judicial scrutiny would otherwise go too far.

What of developments at home?

Our courts have not been as 'liberated' as the English. But they are slowly making some progress.

For starters, the decision of the House of Lords in *CCSU*[38] that the prerogative is reviewable has been accepted.

In *Peko-Wallsend*[39], involving a challenge to Cabinet's decision to nominate part of Kakadu National Park for inclusion on the World Heritage List, the Full Federal Court held that the courts should accept responsibility for reviewing Executive decisions, subject to the exclusion of non-justiciable matters. This was notwithstanding that a decision may be carried out in pursuance of a common law or prerogative power. As it turned out, the impugned decision, concerning as it did issues relating to the environment, indigenous rights, mining and the economy, was 'beyond review'.

In *Victoria v Master Builders Association*,[40] the Full Court of the Supreme Court of Victoria also found justiciable the decisions of a body established under the prerogative and exercising non-statutory power. The Building Industry Task Force was established by the State government to deal with corruption in the building industry. It published a blacklist of proscribed builders. Its decision to do so was found to be amenable to review because it was taken in the exercise of a 'public duty'. The elimination of corrupt practices in the building industry was a matter of public importance and the Task Force directly represented the State of Victoria. Interestingly, Tadgell J described the Task Force as being the State's 'alter ego'

– similar to the US notion of a 'symbiotic' relationship.[41] In Eames' J words, there was a clear 'public law basis' to the Task Force, through which the State was addressing an issue of public importance.[42]

But what of the review of decisions by bodies that are not and do not represent the government?

Australian courts are moving towards acceptance of the English test that asks whether the body is exercising 'public functions' or making decisions of a 'public character'. Cases such as *Typing Centre of NSW v Toose*[43] and *Dorf Industries Pty Ltd*[44] have applied the *Datafin* test.

In *Masu Financial Management Pty Ltd*,[45] for example, the Financial Industry Complaints Services Ltd, which administers a complaints resolution scheme in relation to financial services was found amenable to review. The scheme was established under the Corporations Regulations and an ASIC policy statement, but the body itself was a private body not underpinned by statute. The New South Wales Supreme Court noted various elements which gave the decision a 'public character', making them amenable to review. Some elements are similar to those cited in the English and US cases, including: that the government was responsible for appointing a substantial proportion of members of the Board and the complaints panel; that the scheme was constituted in compliance with a policy statement issued by the government and was established under the umbrella of regulation; and that a decision could result in cancellation of a licence within the scheme.

A major stumbling block toward broader application of judicial scrutiny has been legislative — in the form of the ADJR Act.[46] Whilst acknowledging its beneficial effects, some have suggested, and I agree, that the Act has retarded the development of the common law of judicial review.[47] It is difficult to justify the Act's restriction to decisions 'under an enactment'.[48] The practical effect of the test means that the Act draws an unrealistic line between what is 'public' and what is 'private' such that decisions that are not 'under an enactment' are relegated to the private realm and are immune (barring private remedy).[49]

As terms such as 'administrative' and 'under an enactment' are undefined by the Act, the interpretation of the concepts falls on the courts. So far, the High Court has resisted adopting an interpretation that would broaden the avenues of scrutiny. Indeed, some judicial statements by the High Court seem to foreshadow a preference for a more narrow common law approach to amenability.

In *Neat Domestic Trading Pty Ltd v AWB Ltd*,[50] the applicant sought relief under the ADJR Act in relation to the refusal by AWB (International) Limited to approve certain export transactions proposed by it which resulted in the Wheat Export Authority refusing its consent. The AWBI is the privatised version of the former Australian Wheat Board, effectively a monopolist wheat purchaser and exporter. Its monopoly is established by the *Wheat Marketing Act 1989*. Three members of the High Court (being a majority) held that the AWBI's decision was not a 'decision' under the ADJR Act because it was not of an 'administrative' character as required. In reaching this conclusion, the majority focused on three related considerations. First, the structure of the approval regime and the roles of the AWBI and the Authority; second, the 'private' character of the AWBI and its commercial objectives; and, third, the incompatibility of imposing public law obligations on the AWBI while at the same time accommodating the pursuit of its private interests.[51]

The decision may reveal the Court's predisposition towards questions of amenability generally. In particular, the statements relating to incompatibility between public and private objectives may indicate that when it comes to private and quasi-private bodies, commercial objectives may be a factor in rendering what might otherwise be amenable acts and

decisions impervious to review. But the importance of such comments for common law review will likely depend on whether the test for what is an 'administrative decision' can, or should be, equated with the inquiry at common law.

Interestingly, Gleeson CJ (who was not a member of the majority) expressed an inclination towards the view that the decision was a decision of an 'administrative character', focusing on the potential statutory monopoly the Board had, which he saw as being not only in the interests of growers but also in the national interest.[52] He rejected the focus of the majority's inquiry on the 'private' interests represented by the body.

Earlier this year, the High Court faced the issue again in *Griffith University v Tang* with much the same result. The decision focused mainly on whether the University's decision was a decision 'under an enactment' for the purposes of the Queensland *Judicial Review Act 1991*. But Justices Gummow, Callinan and Heydon also remarked, *obiter*, that the phrase 'administrative character' had an 'evident purpose' to exclude decisions of a 'legislative or judicial character'[53].

Let me now return to the problem I posed when I began.

The 'privatisation of the business of government' has resulted in private bodies occupying public roles and wielding what are, in effect, public powers. It is the private business person that the citizen now meets and deals with in ever increasing areas, not the public servant. Of course, there is a wide spectrum of ways in which private actors are involved in the delivery of what were formerly government functions. It may be achieved by statute, by authorising an existing private entity to perform the function, or by completely (or partially) privatising the function. From prisons to telecommunications services, numerous examples can be given.

The question for the courts will be: what test is appropriate to decide whether a private or quasi-private body is amenable to judicial review? Before getting to the 'what', we should perhaps first consider the 'why'.

Why should private or quasi-private bodies that have somehow become enmeshed in the functioning of government or bestowed with a monopoly that was previously public be susceptible to judicial scrutiny?

One answer is that these so-called hybrid bodies are just as much a concern to the citizen as public authorities. As Lord Denning recognised many years ago, such bodies have 'quite as much power as statutory bodies … They can make or mar a man by their decisions.'[54] It would be a lacuna in our law if there were no remedy to ensure that a corporation's power to, for example, regulate prison life, is exercised lawfully. Executive government should not be the only supervisory authority. In some cases, members of the public may have no other remedy if public law does not step in.

The function of the courts should be to ensure that all bodies — private or otherwise — that perform public functions do so in accordance with the law.

Of course, the commercial realities of the market and the demands of shareholders means that public law regulation should not be too all-embracing or strict. The majority in *NEAT* were not entirely mistaken in noting the potential incompatibility between private and public obligations. As we have seen from recent news events, private corporations owe duties to shareholders and, generally speaking, have a motive for profit above all other things. But just because private bodies have private concerns, this does not preclude them from also having public duties. Administrative law is, or should be, capable of accommodating the dual roles of these bodies.[55]

Turning to *how* Australian courts can draw the line between what is amenable and what is not: there is no simple litmus test.[56]

An obvious and easy inquiry is to consider the *source* of the relevant body's power. This is a test found in the ADJR Act and its State equivalents. If the power being exercised is derived from statute, such as in the case of the Australian Wheat Board or Telstra, then the body is presumptively amenable. Of course, there may be some difficulty in establishing that the power being exercised by a private body is 'public' in the first place. Moreover, there may be important exceptions to amenability where the decision is of a kind that is beyond the court's purview — I am speaking here of decisions that the cases sometimes describe as 'political'. If the decision-maker is 'government', the 'political' character of the decision may make it unreviewable. If the decision-maker is a private, for profit organisation, perhaps a decision's overriding commercial character may lead to the same result. It is in this area where the comments in *NEAT* may intrude.

A further key test is to consider the nature of the function performed, a test that has been applied since *Datafin*. Are the functions or powers 'public' in character? Do they seek to regulate areas of importance in public life?

History may also help in this regard. There are certain functions that have traditionally been regarded as an essential part of government and which, by their nature, should be subject to public law. Like Lord Woolf, I can see no justification for the law allowing quasi-private or privatised bodies to adopt lower standards to those previously required to be maintained when the power was exercised by a public body — or would be, if exercised by one.

A private company selected to run a prison, for example, although motivated by considerations of profit, should be regarded as subject to public law because the purpose and nature of imprisonment is a matter of public concern.[57] The provision of health services and utilities are similar examples of traditionally governmental functions. They may be contrasted with the activities of Jockey Clubs and rabbis, which are areas that governments have rarely sought to regulate.

If the decision or body has statutory underpinning, this will also be a significant factor. Also, as pointed out in the US cases: if the non-governmental body is so enmeshed in the governmental structure — if the State is its 'alter ego' — so that it operates as part of a regulatory system, it should be amenable to review. It may assist also to look at whether government is involved in the composition of the executive or board of the relevant body.[58]

One inquiry to come out of the English cases is to look at the consequences of the particular act performed or decision made. That is: does the act or decision have consequences in the field of public law? For example, are the body's decisions bolstered by statutory penalties or sanctions? Will the body's decision result in the loss of a licence?

Still another factor is to consider the rights and interests of the individual that are said to be affected. By this, I do not mean that one should consider the gravity of the impact on the individual of a particular decision.[59] Rather: does the act or decision impact upon the citizen as citizen?

In *CCSU*[60] Lord Diplock set out a test for assessing amenability, requiring the decision to either:

(a) alter the private rights or obligations of the person; or
(b) deprive him (or her) of some benefit or advantage which either (i) he had in the past been permitted to enjoy and which he could legitimately expect to be permitted to

> continue to enjoy or (ii) he had received assurance from the decision-maker that it would not be withdrawn without first giving him an opportunity to contest its withdrawal.

If applied to private bodies, this inquiry avoids the problem that arises when government uses different vehicles to deliver public services — the effects on the citizen are the same so why should public law apply any differently?

There may also be other, less tangible, factors courts need to consider to determine amenability. For instance: are there any public interest or policy factors which demand that the decisions or the acts of the body in question be afforded the safeguard of judicial review? Activities that affect civil liberties, for example, might arguably be open to judicial review for this reason.

Of course, all of the factors I have discussed may depend on what Oliver Wendall Holmes called 'a judgment or intuition more subtle than any articulate major premise'.[61] They may be as 'much a matter of feel as deciding whether any particular criteria are met.'[62]

But this should not dissuade — or exempt — courts from the task. Deciding complex questions like these has always been a feature of the common law, as Lord Reid famously pointed out: there are no words that will magically reveal for the judge the (right) result.[63] We do not believe in fairy tales in other areas of the law and public law is no exception.

Even if judicial review is available it unfortunately is not a panacea. Even if a certain power, exercised by a particular body, is found to be amenable to judicial review, the scope of review is limited – some might say 'minimal'. And courts in Australia are still (for the time being at least) barred from judging the merits of the exercise of administrative power.

Further, we cannot patch up the remedies against private bodies by pretending that they are organs of the state.[64] Private power does affect the public interest and the livelihoods of many individuals and it will continue to do so. But that does not necessarily always subject it to the rules of public law.[65]

On the flip side, I should note that the news isn't all bad for private corporations or bodies covered by public law. Some of these bodies might prefer judicial review to other (private) avenues of redress. That way, the body would enjoy the benefit of what Lord Diplock described as the safeguards imposed in the public interest against groundless, unmeritorious or tardy attacks upon decisions.[66] The application of public law scrutiny also bolsters the perceived accountability of such bodies in the eyes of the public. This will no doubt become more important as privatisation of public functions increases, particularly in the face of some resistance from the community.

Whatever the inherent limitations of judicial review, there is no denying its importance to the healthy functioning of the rule of law. It helps secure legitimacy, accountability and transparency in ways that private remedies cannot. And, to the extent that the courts are impeded from exercising judicial review of public decisions, 'the rule of law is negated'.[67]

Lawyers have an important role to play in these developments because it is their duty to speak up and test the principles at their earliest stages. The value of those endeavours cannot be understated. There is a real need to continually evaluate the means by which our society scrutinises administrative or public action, more so because such action is constantly evolving.

The Courts must also adapt. As one commentator has put it: judges will have to develop 'x-ray vision' to see through the private law forms or techniques that modern governments are

increasingly using.[68] Other courts seem to be acutely aware of the need to develop this capacity. It is time Australia caught up.

Endnotes

1 In addition to surfing the Internet, my associate Ms Eloise Dias spent much time undertaking research for this paper. I also wish to acknowledge the assistance of Ms Rebecca Taube, a researcher employed by the Federal Court.
2 Mark Tushnet, 'Democracy versus Judicial Review' (2005) *Dissent Magazine* Spring 2005, http://www.dissentmagazine.org.
3 5 US 87, 111 (1803).
4 *Church of Scientology v Woodward* (1980) 154 CLR 25, 70. In *Attorney General (NSW) v Quin* (1990) 170 CLR 1, 36, his Honour stated that that the purpose and extent of judicial review of administrative action is to enforce 'the law which determines the limits and governs the exercise' of administrative power. See also *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135, 157 (Gaudron J citing *Aala*).
5 Sir Gerard Brennan, 'The Review of Commonwealth Administrative Power: Some Current Issues' in Creyke and Keyzer (eds), *The Brennan Legacy* (2002) 22.
6 See Lord Diplock's statement of the grounds for judicial review in *CCSU v Minister for Civil Service* [1985] 1 AC 374, 410, as being what he would call 'illegality', 'irrationality' and 'procedural impropriety'.
7 See *CCSU v Minister for Civil Service* [1985] 1 AC 374, 418 (per Lord Roskill). See also Fiona Wheeler, 'Judicial Review of Prerogative Power in Australia: Issues and Perspectives' (1992) 14 *Sydney Law Review* 432, 451-460.
8 *Craig v South Australia* (1995) 184 CLR 163.
9 *Burt v Governor-General* [1992] 3 NZLR 672.
10 [1967] 2 QB 864.
11 Ibid 882.
12 Ibid 881.
13 [1985] 1 AC 374.
14 Ibid 406-7.
15 Ibid 412 (per Lord Diplock), see also 420 (per Lord Roskill).
16 [1987] 1 QB 815.
17 Ibid 835.
18 Ibid 838.
19 *Hampshire County Council v Beer (t/as Hammer Trout Farm)* [2004] 1 WLR 233, [16] (per Dyson LJ).
20 [1993] 1 WLR 909.
21 Ibid 923 (per Sir Thomas Bingham MR).
22 Ibid 923 (per Sir Thomas Bingham MR), 932 (per Lord Hoffmann LJ).
23 [1992] 1 WLR 1036.
24 Ibid 1041.
25 Ibid.
26 Murray Hunt, 'Constitutionalism and the Contractualisation of Government in the United Kingdom' in Michael Taggart (ed), *The Province of Administrative Law*, 33.
27 Lord Woolf, *The Importance of Principles of Judicial Review*, 71 (unpublished address, Hong Kong, 1996).
28 Eg, Harold Abramson, 'A Fifth Branch of Government: The Private Regulators and Their Constitutionality' (1989) 16 *Hastings Constitutional Law Quarterly* 165.
29 *Edmonson v Leesville Concrete Co*, 500 US 614, 632 (1991) (O'Conner J diss) cited by Scalia J for the Court in *Lebron v National Railroad Passenger Corporation*, 513 US 374, 378 (1995).
30 See Jodi Freeman, 'The Private Role in Public Governance' (2000) *New York University Law Review* 543, 575ff.
31 *Rendell-Baker v Kohn*, 457 US 830, 842 (1982). In that case, the Court had to consider whether the actions of a privately-owned and operated school for maladjusted students were properly described as "state actions". The Court held that although there was no doubt that the education of such students was a public function that was "only the beginning of the enquiry". The fact that the school depended on the state for funds was not seen as influential. See also *Jackson v Metropolitan Edison Co*, 419 US 345 (1974), *Edmonson v Leesville Concrete Co*, 500 US 614 (1991); *Lugar v Edmonson Oil Co*, 457 US 922 (1982).
32 *Jackson v Metropolitan Edison Co*, 419 US 345 (1974).
33 *Rendell-Baker v Kohn*, 457 US 830 (1982).
34 *Jackson v Metropolitan Edison Co*, 419 US 345 (1974).
35 *Jackson v Metropolitan Edison Co*, 419 US 345, 351 (1974); *Rendell-Baker v Kohn*, 457 US 830, 838 (1982).
36 *Brentwood Academy v Tennessee Secondary School Athletic Association*, 531 US 288 (2001).
37 *Lebron v National Passenger Corporation*, 513 US 374 (1995).
38 [1985] 1 AC 374

39 *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 279 (per Bowen CJ).
40 [1995] 2 VR 121.
41 Ibid 137.
42 Ibid 164.
43 Unrep.,15 December 1998, SCNSW
44 *Dorf Industries Pty Ltd v Toose* (1994) 54 FCR 350.
45 *Masu Financial Management Pty Ltd v Financial Industry Complaints Services Ltd (or FICS)* (2004) 50 ACSR 554.
46 *Re Minister for Immigration & Multicultural Affairs; ex parte Applicant S20/2002* (2003) 77 ALJR 1165, [157] (per Justice Kirby).
47 Ibid. See also C Mantziaris, "'Wrong Turn' on the Public/Private Distinction: *Neat Domestic Trading Pty Ltd*" (2003) 14 *Public Law Review* 197, 200 (describing the formulation in the Act as 'anachronistic').
48 Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2004) 15 *Public Law Review* 202, 207.
49 Geoff Airo-Farulla, '"Public" and "Private' in Australian Administrative Law' (1992) 2 *Public Law Review* 186, 190.
50 (2003) 198 ALR 179. The *Wheat Marketing Act 1989* (Cth) provided for consent to export wheat in bulk to be obtained by the Wheat Export Authority whose consent, in turn, depended on the consent from the relevant grower company, here the AWBI.
51 Ibid 193.
52 Ibid 187.
53 [2005] HCA 7, at 63
54 *Breen v Amalgamated Engineering Union & Ors* [1971] 2QB 175 at 190
55 Margaret Allars, 'Public Administration in Private Hands' (2005) 12 *Australian Journal of Administrative Law* 126, 143.
56 *Hampshire County Council v Beer (trading as Hamer Trout Farm)* [2003] EWCA Civ 1056, [12] (per Dyson LJ).
57 *R v Cobham Hall School; Ex parte "GS"* [1997] EWHC 943, [3-031].
58 See, eg, *Lebron v National Passenger Corporation*, 513 US 374 (1995) where the Supreme Court held that Amtrak was created explicitly for the furtherance of federal governmental objectives under the direction and control of directors, almost all of whom were appointed by the President.
59 See *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Cth; Ex parte Wachmann* [1992] 1 WLR 1036, 1042 (per Simon Brown J): 'whether or not a decision has public law consequences must be determined otherwise than by reference to the seriousness of its impact upon those affected.'
60 See above at fn 7.
61 *Lochner v New York*, 198 US 45, 76 (1905) (in relation to constitutional decisions). In that case, Holmes objected to the Court's use of substantive due process to invalidate New York's maximum hours legislation for bakers.
62 *R v Director General of the National Crime Squad* [2003] ICR 599, [13] (per Scott Baker LJ).
63 Lord Reid, 'The Judge as Lawmaker' (1972-3) 12 *Journal of Public Teachers of Law* 22.
64 *R v Jockey Club; Ex parte Aga Khan* [1993] 1 WLR 909, 933 (per Lord Hoffman).
65 Ibid.
66 *O'Reilly v Mackman* [1983] 2 AC 237, 282.
67 Sir Gerard Brennan, 'The Review of Commonwealth Administrative Power: Some Current Issues' in Creyke and Keyzer (eds), *The Brennan Legacy* (2002) 14.
68 Michael Taggart, 'Corporatisation, Privatisation and Public Law' (1991) 2 *Public Law Review* 77, 104