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PROSPECTS AND PROBLEMS

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The Hon. Justice M.D. Kirby, CMG*

THE JUDGES AND 'FORMALISM TRIUMPHANT'

The English have an attractive regard for understatement. In 1982, Lord Justice Griffiths, since elevated to the House of Lords, exhibited this endearing characteristic when he declared that "administrative law is in a phase of active development" and that "the judges will adapt the rules applying to the issue of prerogative orders to protect the Rule of Law in a changing society".[1] He reminded any who had forgotten of the remarks uttered in the previous year, in the speech of Lord Diplock in Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Limited[2], that any "statements on matters of public law if made before 1950 are likely to be a misleading guide to what the law is today".[3] And he cited and applied the words of Lord Roskill in the same case.[4]

> "... in the last 30 years - no doubt because of the growth of central and local government intervention in the affairs of the ordinary citizen since the Second World War, and the consequent increase in the number of administrative bodies charged by Parliament with the

> performance of public duties - the use of prerogative orders to check usurpation of power by such bodies to the disadvantage of the ordinary citizen, or to insist upon due performance by such bodies of their statutory duties and to maintain due adherence to the laws enacted by Parliament, has greatly increased. The former and stricter rules determining when such orders, or formerly the prerogative writs, might or might not issue, have been greatly relaxed."

Fortified by these remarks of the Law Lords, Lord Justice Griffiths, rejected arguments advanced in the case before him that a long line of authority required, for the grant of prerogative relief, that the reviewing court should confine its attention to the record and the order and should not have regard to the reasons in any judgment delivered below, unless the same were part of that record and order. He declined, as he put it, to put "the clock back to the days when archaic formalism too often triumphed over justice."[5]

> "The argument for the [respondent] is that it is only if the inferior court chooses to embody its reasons in its order that it becomes part of the record, for only then does it exist as a document for which the Court of Queen's Bench can call and examine. So if at the end of the judgment giving the reasons the judge or chairman adds the words "and I direct that this judgment be made part of the order," the court may look at it, but not otherwise. It seems to us that it would be a scandalous state of affairs that, if having given a manifestly erroneous judgment, a judge could defeat any review by this court by the simple expedient of refusing a request

to make his judgment part of the order. That would indeed be formalism triumphant."

This essay is about the triumph of the common law over its tendency to formalise. It is about the efforts of the judges of the common law, in a number of its jurisdictions, to address a very relevant and modern question of power. It is a tale illustrating how fecund is the common law and how useful and relevant it has proved itself in the field of public law generally and the review of administrative action in particular. It addresses a problem common to all of the countries of the common law - but especially pressing in the advanced democracies in which the power and role of public administration has expanded greatly in recent years in the ways described by Lord Roskill.

It is not uncommon to see in judgments of the courts of the common law (including those more recently than 1950) and in texts of distinguished academic authors analysing those judgments, the suggestion that, in the absence of statutory or procedural rules requiring the giving of reasons, there is no general legal duty to do so imposed by the common law.[6] The statement is made emphatically in certain English texts. It is principally justified by reference to the "not unreasonable assertion" that the principles of natural justice cannot be expected to impose upon administrators what the courts do not prescribe for themselves. There being no obligation on the courts to give reasoned judgments, it is suggested to be unreasonable for the courts to impose upon decision makers of lesser experience, making decisions typically of less importance, the duty to assign reasons for what they do.

By reference to a number of Australian cases (and decisions in other jurisdictions, including some in New Zealand) it is the thesis of this paper that the common law has now, at least in some jurisdictions, taken the step which scholarly commentators have long been urging and which, in some jurisdictions, the Parliament, impatient of the interstitial development of the common law, has proceeded to enact in general terms. I refer to the step of requiring, at least in some circumstances, that those decision makers who have conferred upon them by or under legislation the power to make discretionary decisions should, unless for some good reason exempted, provide persons affected by their decisions, if asked, with the reasons for the decision.

The notion is not a new one. The Committee on Ministers' Powers in the United Kingdom in 1932 recommended that:

> "[a]ny party affected by a decision should be informed of the reasons on which the decision is based ... in the form of a reasoned document ... [which] should state the conclusions as to the facts and to any points of law which have emerged."[7]

The Committee declared this to be its "third principle of natural justice".[8] It was regarded by the Committee as one of the "canons of judicial conduct ... implicit in the rule of law", the observance of which was "demanded by our national sense of justice".[9]

These words, in a report the effects of which are still rippling through the common law world as it adjusts to the enlarged public administration of the 20th century, may seem to some lawyers excessively strong. Especially would this be so if

those lawyers were blinded to the social changes which have occurred in the education of the citizenry, the growth, complexity and importance of public administration, the enlargement of administrative discretions enjoyed by officials and the consequent importance of efficient, consistent and fair administrative decision making. Some lawyers are excessively fascinated by the "formalism" which Lord Justice Griffiths, rightly said too often triumphed in the past or are insufficiently alert to the legitimate creative role of the judges of the common law, responding to these changes. Their sensitivity to modern, civic expectations and needs of administrative fairness is blunted. But those who can see the great changes that are occurring, and the proper creative role of the judiciary in responding to those changes, will be aware of the potential of the developing notions of natural justice and administrative fairness, to provide what any educated citizen, unversed in the law, would insist upon as a fundamental and legitimate expectation in dealing with those who, sometimes with irony, are pleased to call themselves the public's servants. Ask a citizen of even modest education and experience, whether it is "fair" that a public official, enjoying discretionary powers conferred on him by legislation (enacted by the representatives of the citizens) should have, if asked, to provide reasons for a decision affecting him or her and there is no doubt what the answer would be. He would not expect the lengthy reasoning of a judge to justify the answer. He would not anticipate detailed references to statutes and precedents. But I venture to suggest that today, in Australia and New Zealand, he would regard it as illegitimate - bordering on the abuse of power - that the official should

decline to give reasons insisting, by inference, upon nothing more than his power and relying, by assertion, upon nothing more than the enjoyment of that power. The notion "Nanny knows best"[10] dies hard in the public administration of English-speaking countries. In the United States, appeals can always be made to the revolutionary tradition and the fundamental notion that government exists by the consent of the governed. In our more traditional monarchies, we have no such Grundnorm to appeal to. Yet in laying down a requirement of reasons, our Parliaments have been busy establishing both general[11] and specific duties to provide them. As will be shown, the judges have been increasingly insistent, in virtually every jurisdiction of the common law, upon higher standards of reasoned justice for judicial officers. With increasing clarity, courts in a number of places have begun to take the additional step and to insist upon reasons by administrators, even where no general or specific legislative duty to provide reasons exists. These developments have all occurred, in the manner traditional to the common law of England - step by step. In a way that may become more common, because of the shared legal traditions and problems before the courts, there has been a willingness in this area to borrow between the jurisdictions of the Commonwealth of Nations to an extent not now generally so frequent, because of the contracting jurisdiction of the Judicial Committee of the Privy Council. The willingness of judges in many lands to take cautious steps forward in expanding the notion of administrative fairness and the duties required by natural justice under the common law should not be seen as "judicial imperialism". Nor is it judicial adventurism or the

unacceptable intrusion of the judges into the legislative realm. Without pausing to debate the question reserved by Sir Robin Cooke, as to whether [at least in a country like New Zealand] there may be some common law rights which "go so deep that even Parliament cannot be accepted by the courts to have destroyed them"[12], it is surely right to say with Justice Richardson that judicial innovation is more accepted in areas of the common law than in statutory interpretation. And there is no "wide disagreement as to the manner in which the courts have developed the principles of natural justice and fairness".[13] For my part, I would go even further and say that our citizens look to the judges in this regard to keep pace with the times and to fashion the wonderful instruments of the common law, which represent the precious legacy of eight centuries, to ensure that they are kept bright and relevant to the problems of today.

One such problem is the legitimate expectation of citizens, affected by the exercise of the administrative discretions reposed in officials, to know, at least in general terms, why such officials have acted as they have - particularly where their conduct affects them adversely.

By reference to a number of decisions in the past year in my own jurisdiction and a passing glance at the development of the law in New Zealand, and other countries of our tradition, the point will be made that the common law may sometimes require the furnishing of reasons. This is a developing jurisprudence. The judgments and academic literature on the subject grow apace. It is not possible to do more than to refer to a few recent decisions of the courts. Through them, a thread

of Ariadne will be found. And it leads in the direction of administrative justice.

OSMOND'S CASE

In time, the turning point in this development of the common law in our region may be seen to be the decision of the Court of Appeal of New South Wales in Osmond v Public Service Board of New South Wales[14], just as an earlier decision of that Court in Pettitt v Dunkley[15] has undoubtedly influenced court decisions in many jurisdictions since. I say "may", because the High Court of Australia gave special leave to the Public Service Board to appeal from the majority decision of the Court of Appeal in Osmond. Argument has been completed before that Court and the matter stands reserved. The case is complicated by the existence of a privative clause in s 116 of the Public Service Act 1979 (NSW) purporting to make "final" a decision of the Board. A preliminary question therefore arose in the Osmond case as to whether that provision ousted the supervisory jurisdiction of the Court of Appeal. By majority[16] the Court held that it did not. It is not necessary for present purposes to explore that question although the assertion by the courts of common law of their supervisory jurisdiction, notwithstanding privative clauses, would itself provide an illuminating topic for a seminar on administrative law.[17]

Mr. Osmond had joined the New South Wales Public Service in 1954. He had a number of qualifications and appointments as an experienced surveyor. He rose from a cadet draftsman to acting Deputy Surveyor for Goulburn, a major provincial town. In 1981 he was appointed District Surveyor for Armidale, likewise an important country centre. In 1982 he applied for appointment by way of promotion to the vacant position of

Chairman of the Local Lands Board, an appointment made by the Governor on the recommendation of the departmental head. There were a number of eligible applicants. The departmental head recommended someone other than Mr. Osmond. He then appealed, as he was entitled to do under s 116 of the Public Service Act 1979 to the Public Service Board ("the Board"). His appeal was heard by the Board in February, 1983. Soon afterwards he was informed orally that the appeal had been dismissed. The Judge at first instance held that:

> "[n]o formal written notification of this decision has ever been given to him. Requests to the Board for a written decision setting out its reasons for the dismissal of the appeal have been refused, upon the ground that it is not the Board's practice to give such reasons."[18]

Just consider that situation. Here is a senior, experienced and, let it be assumed, loyal and talented officer of the Public Service. Here also is a Board of experienced and capable administrators. Here is an appeal, provided solemnly by the Parliament and guaranteed to Mr. Osmond by law. The processes of appeal are exhausted. A decision is reached. It must be assumed that reasons existed for the decision, for it may not be expected that such a body of such persons exercising such powers would do so arbitarily, on idiosyncratic grounds, on the whim of its members or because they did not like the cut of the appellant's clothes, the colour of his hair or his religion. Yet, although they may be presumed to have reasons, this loyal officer is to be turned away with not the slightest knowledge of why he failed and another succeeded - although he was more senior and on the face of things had the same or better

qualifications. He has no way of checking that extraneous considerations have not intruded into the decision. He has no means of scrutinising this decision for its consistency with others. His facility for securing the relief of prerogative review (beneficially provided by the courts as guardians of the Rule of Law and fair procedures) is significantly qualified. He is simply told, in effect "Nanny knows best". And when a reason is advanced as to why no reasons are advanced, the only explanation afforded by this highly talented and well paid statutory body, with its functions delegated by the representatives of the people in Parliament, is the wholly unconvincing and circular one - no reasons are given because no reasons are given.

I state these circumstances with emphasis, so that lawyers may begin to see this instance of injustice in the same way as the victims of unreasoned justice do - in the way that scholarly writers of distinction for decades have done and in the way that judges and lawyers of other traditions would do. The unreasoned exercise of discretionary power conferred by law may be oppressive. It is in these circumstances that the "justice of the common law"[19] provides remedies to the litigant.

It is not my purpose to trace in detail the reasoning of the majority in Osmond. It is in the law books. There seems little point in reviewing what is there said. Suffice it to say that the courts in England during the 1950s and 60s, under the stimulus of Lord Denning, appeared to be moving towards the view that, in some circumstances at least, Ministers and other officials might by law be required to give reasons, at least where a failure to do so would frustrate the policy and objects of the legislation under which they were acting.[20] This move

was set back, as so often happens, by a hard case. Two French nationals, seeking to purchase controlling shares in an old established London gaming club sought the reasons for the refusal by the Gaming Board of their application for a certificate. Relying principally on the fact that magistrates are not bound to give reasons for their decisions, the Court of Appeal held that nor was the Gaming Board.[21] Since that decision, the English courts appear to have resumed the march towards a right to reasons as an attribute of natural justice and fair administrative procedures.[22] Sir John Donaldson, as President of the National Industrial Relations Court in 1974, stated bluntly that "[f]ailure to give reasons ... amounts to a denial of justice and is itself an error of law".[23] Although other decisions pull back from the generality of this statement[24] they do so with language which allows the legitimate expectation of people coming before statutory bodies that they will know, either expressly stated or inferentially stated what it is to which the decision maker has addressed his mind and the basis of fact upon which the conclusion has been reached.[25] The process of refining the common law principle and taking it to its next and higher stage requires time. It involves incremental steps. This much is shown by the developments in England before Osmond and those that have occurred since.[26]

A similar course has been followed in Australia, New Zealand and other countries of the common law. Some of the cases are referred to in the majority judgments in Osmond. Certainly a critical turning point was reached when the New South Wales Court of Appeal in Pettitt v Dunkley[27] intervened in a case where a District Court judge had declined to give a

reason for entering a verdict for a defendant in a motor car case where a pedestrian was struck in a marked crossing. It may be suggested that the principle in that case can be explained by reference to the existence of a statutory right of appeal, which was not to be frustrated by a refusal to give reasons. It might also be suggested that the essential rationale of the case was the judicial nature of the proceedings and the obligation which falls upon judges, as such, to give reasons - an expectation not to be imposed upon "lesser" decision makers.

These suggested interpretations of Pettitt v Dunkley are unsatisfactory for reasons which I endeavoured to show in Osmond. In the first place, a long line of Australian authority suggests the obligation of administrative decision makers who are not judges, to give reasons in order properly to perform their statutory duties and to facilitate appeal review.[28] Furthermore, a later line of authority in the New South Wales Court of Appeal drew attention to the wider principle at the heart of Pettitt v Dunkley namely that it is the operation of the judicial process that must be upheld, not simply the right, where it exists, to exercise a statutory appeal. Mahoney, JA in Housing Commission of New South Wales v Tatmar Pastoral Co Pty Limited put it thus:

> "[T]he statement of reasons may be necessary to enable the party to exercise his right of appeal or such other rights as he may have to contest the decision: this is one of the conventional functions of the requirement: see Pettitt v Dunkley ... But, in my opinion, the requirement that reasons be given should not be limited to cases where there is an appeal. There is as yet no finally

authoritative decision on this question. I think that the requirement should be seen as an incident of the judicial process."[29]

NEW ZEALAND DEVELOPMENTS

In New Zealand a series of cases has applied the principle stated in Pettitt v Dunkley. Some of the decisions are expressed in strong language which would seem to herald the step taken in Osmond. The convenient starting point is Connell v Auckland City Council.[30] That was an appeal against conviction by justices, where no reasons were given for the conviction. Justice Chilwell, reflecting the principles stated in Pettitt v Dunkley said:

"It is my judgment that the duty to provide reasons is fundamental and unless there is specific statutory provision to the contrary all judicial persons are obliged to give reasons, particularly where rights of appeal are involved."[31]

It is important to note that the principle was not confined to judges, as an attribute of the judicial office. It was assigned to "all judicial persons" and applied in the case to justices who are not judges. Secondly, although reference was made to the relevance of rights of appeal, this was taken to be a point that would add emphasis to the necessity to state reasons. It was not suggested that it was an essential prerequisite for reasons that a right of appeal should exist. Thirdly, it was conceded that specific statutory provisions could control or limit the obligation so that the prima facie rule, imposed upon judicial persons as such, was stated as the rule of reasoned justice.

A similar approach was adopted by Justice Bisson, in Duncan v Thames-Coromandel District Council & Ors.[32] In that case it was held that reasons had to accompany the decision of a council pursuant to town planning legislation and failure to do so would attract the facility of judicial review in the High Court. However, the case turned on the statutory provisions requiring reasons and providing for appeal.

In T. Flexman Limited v Franklin County Council[33], Justice Barker, held that the failure of the Council to state the grounds of its decision apportioning the expense of extinguishing a fire amongst the occupiers concerned amounted, in the circumstances, to unfairness. The legislation conferred a right of appeal from the Council, an administrative body, to a magistrate's court, a judicial body. Justice Barker, whilst expressing the view that the duty to give reasons was not part of the rules of natural justice, emphasised that a statute might impose such a duty either in general terms or by specific provisions. He referred to the "good discipline" which Professor Northey had stressed as a justification for reasons. He accepted in general terms that there was "a duty on judicial officers to give reasons for their decisions, especially where there is a right of appeal", lest the right of appeal be diminished. However, the "clinching argument" in favour of a requirement to give reasons in that case was the provision in the legislation of mandatory considerations to be taken into account:

> "If the reasons for the award are not stated, then the magistrate's court, on appeal, or this Court on a motion for review, does not know whether all necessary considerations have been taken into account."[34]

Failure by an administrative body to exercise the powers in the way required by the statute would make its acts ultra vires and attract the intervention of the court.

Then came the decision of the New Zealand Court of Appeal in R v Awatere.[35] The case involved charges arising out of a street demonstration against a tour to New Zealand by a rugby football team from South Africa. The District Court Judge convicted Ms Awatere of various offences. He gave a short oral judgment finding in favour of the prosecution upon a direct conflict of evidence concerning identification. She urged that she was entitled to have express findings of credibility and "at least brief reasons as to why the evidence of the defence witnesses was being rejected in preference to that of prosecution witnesses". The case is rather unsatisfactory because Justice Vautier, who heard it at first instance, expressed the conclusion that the District Court Judge:

> "did quite clearly, as a perusal of the records shows, make findings on credibility and gave reasons for so doing."

It may be that the binding principle of the decision is to be limited to this simple conclusion in the particular circumstances of the case. However, Sir Owen Woodhouse, P, delivering the judgment of the Court of Appeal, made a number of general observations. After referring to the Gaming Board case in England, he mentioned Pettitt v Dunkley which, as he pointed out, concerned a civil proceeding. He also referred to Connell and stressed, emphatically, the desirability of the giving of reasons. The variability of factual situations was emphasised as a reason against a general rule. Sir Owen Woodhouse, then concluded:

"In the end the matter of providing reasons for a decision and the extent to which they might need to be spelled out are matters of practice for domestic determination by this Court in the New Zealand environment. And when the infrequency of the problem is weighed against the volume of cases coming before the District Court, together with the present powers of the High Court to ensure that justice will be achieved by one means or another, we have concluded that it would be both undesirable and impractical to lay down an inflexible rule of universal application that would result in ... and "indiscriminate requirement of reasons". Nevertheless, Judges and Justices should always do their conscientious best to provide with their decisions reasons which can sensibly be regarded as adequate to the occasion. Indeed failure to follow that normal judicial practice might well jeopardise the decision on appeal. It could do so because a potential appellant might seem to be unduly prejudiced or it could do so by leaving it open for the appellate Court to infer that there are in fact no adequate reasons to support it and so in either case more readily than otherwise it would have done to order a rehearing or to rehear the case itself or to make an order that proper and adequate reasons are to be supplied or even to quash the verdict outright.[36]"

It has been said that this decision has "blunted" the development of the common law reasons requirement in the administrative as well as the judicial sphere in New Zealand.[37] See for example R v MacPherson.[38] It has been claimed that the decision is having "a chilling effect on the common law

development of a reasons requirement in the administrative tribunal sphere".[39] It is suggested that the decision in Awatere exposed no acceptable legal principle, merely postponing the adoption of a satisfactory general rule by reference to the general satisfactory nature of the decision making of judicial officers in New Zealand, the absence of a large problem and therefore the adequacy of an injunction to such officers to "do their conscientious best". However, it seems likely that, whilst such a rule continues as the charter of judicial officers in New Zealand, arguments that the common law imposes on non judges, beyond circumstances expressly or by implication provided for by statute, the duty to state reasons, are likely to fall on barren ground.

Nonetheless there are signs which might be called hopeful by those who believe that reasons should generally be required by law.

First, since Awatere, a number of judgments have been at pains to distinguish the case, usually on the grounds that a statutory right to give reasons exists in terms or can sufficiently be inferred from the scheme of the legislation.[40]

Secondly, later decisions of the New Zealand Court of Appeal, the court then being differently constituted, lay emphasis upon the extent to which natural justice, as required by the common law, obliges those exercising statutory powers of decision making, to do so in a way that will ensure an adequate opportunity to answer prejudicial material.[41] One such case involved the procedures adopted by the State Services Commission. Although not dealing specifically with a right to reasons for the Commission's decision, the case was concerned with the processes of decision making and the facility which

the common law rules of natural justice will provide to safeguard fair procedures and to ensure that statutory office holders perform their functions (and are seen to do so) in a fair and reasoned way. The concept at the centre of this case is, in my view, the same as was reflected in the majority decision in Osmond.

Thirdly, there is the development of freedom of information legislation, affecting as it does the basis of the relationship between public administration and citizens affected by it.[42] The Danks Committee, which preceded the enactment of the New Zealand legislation, considered access to information held by courts and admistrative tribunals to be outside its terms of reference so that no consideration was given to the matter. It is presumably for this reason that courts and, in relation to judicial functions, tribunals are excluded from the definition of "department" and "organisation" under the Act.[43] Discussing this exclusion in a report on the reform of the Act prepared at the direction of the New Zealand Minister of Justice, Ian Eagles and Michael Taggart concluded:

> "Those bodies vexed by this question presumably either objected to being duty bound upon request to give a reasoned decision pursuant to s 23 or do not want one or more of the parties to the proceeding to be able to use the Act to gain access to official information held by the body. Frankly we feel no sympathy for the bodies concerned on either count.
>
> The arguments against giving reasoned decisions have always been overstated and are unconvincing. The more so now in the light of s 23 which demands so much of the most lowly counter clerk in any Government Department.

> Surely the members of quasi-judicial tribunals should at least be held to the same standard. Moreover there is a need for legislative intervention here because the promising initiative of the courts in this area has been blunted by recent cases. ... One of us has argued elsewhere that the legal requirement that Judges give reasoned decisions "should be imposed by the ... courts themselves, rather than by Parliament." However, in the light of recent cases, it seems that for the moment at least the Courts are unwilling to do so."[44]

The recent cases referred to by the authors of the report included Awatere, MacPherson and Mohu. It remains to be seen whether the New Zealand Parliament will embrace the reform proposed by Eagles and Taggart. Or whether the courts themselves will accept as judicial and quasi-judicial bodies the disciplines of reasoned justice. Some recent decisions of the New Zealand courts indicate continuing caution.[45] Others, on the other hand, suggest the judicial reform may yet eventuate.[46] It should never be forgotten that the developments of natural justice are classic areas of legitimate judicial development where, as Justice Richardson, has pointed out, the community seems well satisfied.

Furthermore, the existence of legislative reforms, even expressed in terms of generality is not necessarily a reason for judges to stay their hand. As Lord Diplock observed in his speech in Erven Warnink Besloten Vennootschap & Anor v J. Townend & Sons (Hull) Limited & Anor[47] legislation may reflect the views of successive Parliaments as to what the public interest demands in a particular field of the law. Judicial development of the common law in that part of the same field

which has been left to it "ought to proceed upon a parallel rather than a diverging course".[48] The enactment of so many statutory requirements, in general and specific terms, obliging those having the statutory discretion to make decisions to give reasons for those decisions is not a reason for the judges necessarily to withdraw, leaving this requirement of administrative fairness exclusively to the legislature. The legislative provisions simply reflect the same community expectations, which are sometimes expressed in terms, but which, if not so expressed, the courts may nonetheless require.

CASES POST OSMOND

In considering the developing jurisprudence of the common law right to reasons, it is instructive to mention a number of decisions of the New South Wales Court of Appeal during 1985 in which the obligation of reasoned justice were considered.

In June, 1985, the Court dealt with the case of the cancellation by the Director of National Parks and Wildlife Service of a bird trapper's licence. The Director had acted without warning or explanation and although the applicant trapper had followed his peculiar occupation for many years and had been licensed for many years. The Court rejected the contention that, because provision was made in the statute for an appeal to the Minister, it should decline relief to the applicant. Indeed it even held that the fact that an appeal had been lodged did not constitute a waiver.[49] In the course of my judgment, I referred to Osmond but held that whatever the duty upon the donees of statutory power to state reasons for the exercise of such power, there could be no dispute that the appellant had not been accorded "the most rudimentary entitlements" of natural justice. Specifically he had been

afforded no opportunity to influence the Director before a decision was made "so fundamentally affecting his rights".[50]

Justice Samuels, observed:

> "[W]hat is, after all, central to the notion of the doing of natural justice or to the resolute pursuit of fairness in cases where a citizen is likely to be affected in his or her personal property by administrative action is that without such rules, great damage and prejudice may be caused. The purpose of the rule which requires a person to be given the chance to be heard before such action is taken is to prevent the damage which may ensue from the unbridled exercise of bureaucratic power."[51]

His Honour referred to the decision of the High Court of Australia in Twist v The Council of the Municipality of Randwick[52] and concluded that action without notice would cause irreparable harm, justifying intervention of the Court.

Justice Mahoney, was prepared to concede that a licence might be terminated or not renewed by reason of policy considerations without an obligation to hear the licence holder.[53] But if reasons personal to the licence holder were apt to be involved, he was inclined to agree with Justice Samuels, that the licence should not be cancelled without appropriately informing the licence holder.

Although the views of Justice Samuels, and Justice Mahoney, appear to be based on a narrower footing than the general duty of donnees of statutory power to provide reasons for the exercise of that power, the result in that case was the same. The exercise of unexplained decision making - and the failure to provide reasons to the person affected, vitiated the administrative action and attracted the protective intervention of the Court.

In October 1985 the Court dealt with the scope of the duty of judicial officers to provide reasons for their decision. A District Court Judge had expressed his reasons "in the briefest possible terms".[54] He had referred to the notation of counsel's submissions. However, they were not noted either in his judgment or elsewhere in the transcript. This want of explanation and record caused difficulties to the Court. I observed:

> "The judgment here was, as Priestley, JA has explained, expressed in the briefest possible terms. Indeed, so brief is it that, with respect to his Honour, a most experienced trial judge, it is quite unclear. The judgment refers to the notation of submissions in respect of a Postal Services Act, 1975 (Cth). However, the submissions are not noted in the judgment or anywhere else in the transcript. Perhaps they were noted in the judge's own record. In any case the notation was not before this Court. It is highly desirable, where submissions of law are made, that they should be noted with sufficient clarity in the transcript of the trial, or in the judgment of the court below to ensure that, in the event of an appeal, this Court can be fully apprised of the issues that are being argued below.
> Nor did his Honour's judgment disclose the reasons for the rejection of [certain] oral evidence ... Making every concession for an appropriately abbreviated oral judgment in a busy trial court, it is desirable that reasons should be stated for contested rulings of this kind, particularly where, as here, they lead to the collapse of the appellants' case at the trial and where the evidence which was excluded by the ruling was obviously vital to the appellants' case at the trial."[55]

Justice McHugh, was even more emphatic:

> "It is the duty of counsel to ensure that points of law and points which may be the subject of appeal are properly taken. Any such points together with any admissions should be noted by the judge and recorded on the transcript where one is taken."[56]

Also in October 1985, the Court delivered its decision in Riley v The Parole Board of New South Wales.[57] The case involved the interpretation of the Probation and Parole Act 1983 and the unsatisfactory forumlae provided under that Act for the calculation of the components of prisoner's sentence. One matter which the majority did not find it appropriate or necessary to decide (but which I felt driven to consider) was the requirements of natural justice in relation to a prisoner before the Parole Board. One complaint was of the alleged lack of reasons for the decisions of the Parole Board, or the inadequacy and stereotype nature of the reasons given. In the result I considered that the complaint was premature in the circumstances of the case. But it is worth noting that, as a result of remarks made by members of the Court arguendo, certain changes were adopted in the practices of the Parole Board in relation to the information supplied to prisoners given in advance of the formal determination by the Board. After referring to this reform and to a number of New Zealand decisions, I remarked:

> "[W]ithout disclosing every detail, or unacceptably revealing confidences, it should be possible for the Board to give a prisoner sufficient indication of the materials being considered by it in order to enable the prisoner to make meaningful written submissions to the

Board, for which its new procedures provide. By doing this, the Board will not only enhance the manifest fairness of its proceedings. It may also, on occasion, contribute to the improvement of the data upon which its decisions are made. As such decisions affect the liberty of prisoners, the highest importance is to be attached to the fairness of the procedures by which they are arrived at and the quality of the information upon which they are based."[58]

Also in October 1985 the Court returned to the duty of judges of the District Court to provide reasons for essential elements in their decisions.[59] The case was one where a District Court judge reserved his decision for some twenty months and then dealt in his judgment only with an alleged written contract. He failed to deal with an oral contract alleged by the appellant. Because of the absence of reasons, the Court, referring to Pettitt v Dunkley, granted the appellant leave to appeal, although out of time.

In December 1985, the Court had to consider whether statutory provisions requiring the provision of "grounds" imposed a narrower duty than the duty to provide reasons for an administrative decision.[60] A departmental secretary, upon whom was cast a statutory duty to state the "grounds" of an adverse decision furnished a letter of refusal in very general terms. The Court held that this inadequately stated the "grounds" of his decision and he was ordered to comply with the statute and to provide the "grounds". In the course of his judgment Justice Hope, (who, with Justice Glass, agreed in the orders proposed by me) said:

> "Although a refusal of an application is not required to be accompanied by reasons, the grounds must be sufficiently specific to enable the applicant to know precisely the ground or grounds of refusal. As Kirby, P has said in his judgment, which I have had the advantage of reading, the applicant is entitled to this precision for two reasons at least; to enable him to decide whether or not to appeal, and if he decides to appeal, to have the necessary material before the appellate tribunal to support his case; and, if it is necessary, to remedy any alleged deficiency or lack of evidence."[61]

Also in December 1985, in the decision in Azzopardi v Tasman UEB Industries Limited[62], I called attention to the history of appeals from judges on questions of law and fact. Rules developed in earlier times when questions of fact in disputed hearings were virtually always determined by a jury which gives no reasons and is not accountable, are not relevant or precisely applicable to the modern situation where judges sit alone and are under a general duty to state reasons. By analogy, as more disputes in society are committed to the decision of statutory appointees, including those made up by lay people, it is inappropriate to persist with rules developed in earlier times for a quite different institution (the jury) typically composed of people of lower general standards of education. The increase in the number, variety and importance of statutory decision makers and the enhanced facilities for the due provision of reasoned justice change the circumstances upon which the law operates and make the facility of reasons both possible and expected.[63]

CONCLUSIONS

There is no point in retracing the policy reasons which favour the courts now taking the comparatively small step of insisting upon a general rule that those who enjoy statutory power should be expected by the Parliament to act in a reasoned way and, at least when asked, to expose their reasons. Some of the policy considerations I referred to in Osmond.[64] Others are summarised in Dr. Flick's book on natural justice.[65] Still others are collected in the essays by Professor Bridge on "The Duty to Give Reasons for Decisions as an Aspect of Natural Justice".[66] The reasons that have restrained the courts of the common law may be traced, in my view, ultimately to historical considerations now elsewhere discarded.[67] If courts generally insist that administrative decision makers should hear both sides and give opportunities to those who will be adversely affected to submit information to them, it is but a small step to oblige such decision makers to make known, if asked, the reasons which they presumably have for their decisions. Only in this way can the courts perform their duty to ensure that such decision makers do not act arbitrarily.[68] Only in this way can they assure themselves, those affected and the public that the decision maker has acted in a principled fashion and so structured the exercise of his discretion as to demonstrate that it is within power.[69] It is intellectually unsatisfactory to rest the duty of those who enjoy power to furnish reasons upon the designation or title of their office (judges) rather than the nature of what they do. Nor is it satisfying to limit the obligation to a case where an appeal facility lies.For there are other important attributes of "the judicial process". They include the famous and ancient relief of the prerogative

writs. Indeed, where appeal facilities lie, there may sometimes be less need for reasons than where a powerful administrator is specifically given the last word. It would be a case of unacceptable formalism now to limit the duty of reasons to an incident of appeal, leaving utterly unprotected those who may be most in need of the justice of the common law.

Nor do the courts typically wait for legislation where important attributes of natural justice are at stake. In some jurisdictions such as India[70] and New South Wales[71] legislation has long been promised. The Parliament can always refine the duties imposed by judges. But to wait indefinitely for Parliament may be to sanction prolonged unfairness at a time when other legislatures have already evidenced the social need by legislation.

This is not the place to debate the fundamental reason why the common law has set about confining administrative discretion. It has been traced, in the American context, to the separation of powers and the American Republic's love affair with the judiciary, by which manifest accountability to judicial scrutiny may require reasons as an aspect of constitutional due process.[72] In Australia and New Zealand we may express our first premise differently. But like the Americans, in the tradition of the common law, we lay great emphasis upon procedure. The administrator is ultimately to be accountable to the judge for the manifest fairness of his conduct. Without reasons this essential judicial function may be set at nought, at cost to the individual, to society and to good public administration itself.

The fears that an obligation to give reasons would be excessively burdensome are exaggerated. The courts have shown

manifest good sense, as have other writers in this field. For example, lately it has been said that reasons need not necessarily be in writing[73], can be shortly expressed[74], may not be applicable in private as distinct from public tribunals[75], may sometimes be appropriately reduced to a standard check list[76], and may vary in accordance with local practice and conditions and the particular needs of the case.[77] All of this was acknowledged by the majority in Osmond.[78] As with analogous rulings of the common law, the jurisprudence will develop. Particular circumstances will impose particular obligations.

But the notion that administrators, who are the public's servants, can nowadays exercise power, which the legislature has conferred upon them and, hiding behind their power and their discretions assert that they need give no reasons (and that it is not their practice to do so) amounts to an unacceptable administrative arrogance. The common law, defensive of our citizens, will not condone it. The developments in our public law in the past twenty years have been a happy example of the judges rising to an opportunity, as the community expects and as the times demand.[79] In Australia, it will now be for the High Court to determine whether, and if so upon what terms, an entitlement to reasons as an attribute of administrative justice is required by the common law. In New Zealand, it is for you to decide whether it is an idea whose time, at last, has come.

FOOTNOTES

* President of the Court of Appeal of New South Wales. Formerly Chairman of the Australian Law Reform Commission and Member of the Administrative Review Council (1975-83). Judge of the Federal Court of Australia 1983-4. The views expressed are personal views only.

1. R v Knightsbridge Crown Court; ex parte International Sporting Club (London) Limited & Anor [1982] 1 QB 304, 315.
2. [1982] AC 617.
3. ibid 640.
4. id, 656.
5. [1982] 1 QB 304, 314.
6. See eg De Smith, Judicial Review of Administrative Action (3rd ed) 1973, 128; Garner, Administrative Law (5th ed) 1979, 133; Wade, Administrative Law (4th ed) 1977, 463.
7. Committee on Ministers' Powers, Report, 1932, Cmd 4060, 100.
8. ibid, 80.
9. id, 76. Cf Report of the Committee on Administrative Tribunals and Enquiries 1957, Cmnd. 218, 24.
10. James Michael, The Politics of Secrecy, Penguin, 1982, 18.
11. Tribunals and Inquiries Act 1958 (GB) s 12; Administrative Appeals Tribunal Act 1975 (Aust) s 28; Administrative Decisions (Judicial Review) Act 1977 (Aust) s 13. Cf Official Information Act 1982 (NZ) s 23.
12. See Cooke, J in Fraser v State Services Commission [1984] 1 NZLR 116, 121.
13. I. Richardson, "The Role of an Appellate Judge" (1981) 5 Otago L Rev 1, 9.

14. [1984] 3 NSWLR 447; [1985] LRC (Const) 1041.

15. [1971] 1 NSWLR 376.

16. Kirby, P and Priestley, JA (Glass, JA dissenting).

17. Cf Anisminic Limited v Foreign Compensation Commission & Anor [1969] 2 AC 147.

18. Osmond v Public Service Board of NSW & Anor, Hunt, J [1983] 1 NSWLR 691 693.

19. Byles, J in Cooper v The Board of Works for the Wandsworth District (1863) 14 CB(NS) 180, 194; 143 ER 414, 420.

20. R v Northumberland Compensation Appeal Tribunal. Ex parte Shaw [1952] 1 KB 338; Padfield & Ors v Minister of Agriculture, Fisheries and Food & Ors [1968] AC 997.

21. R v Gaming Board for Great Britain, ex parte Benaim & Khaida [1970] 2 QB 417.

22. Cf Breen v Amalgamated Engineering Union & Ors [1971] 2 QB 175.

23. Alexander Machinery (Dudley) Limited v Crabtree [1974] ICR 120 at 122.

24. See eg R v Immigration Appeal Tribunal, ex parte Kahn (Mahmud) [1983] QB 790, 793, 794.

25. ibid, 795.

26. See eg Eagil Trust Co Limited v Pigott-Brown & Anor [1985] 3 All ER 119; R v Social Security Commissioner, ex parte Sewell, The Times, 2 February, 1985 (QB); Bone v The Mental Health Review Tribunal [1985] 3 All ER 330, The Times, 20 February, 1985 (QB); R v Secretary of State for the Environment, ex parte Hammersmith and Fulham LBC, The Times, 18 May, 1985; Banaskiewicz v Mulholland, The Times, 19 April, 1985, p.4.

27. [1971] 1 NSWLR 376. For a recent application see King Ranch Australia Pty Limited v Cardwell Shire Council [1985] 2 QdR 182.

28. See eg Giris Pty Limited v The Commissioner of Taxation of the Commonwealth of Australia (1969) 119 CLR 365, 373; The Commissioner of Taxation of the Commonwealth of Australia v Brian Hatch Timber Co (Sales) Pty Limited (1971-72) 128 CLR 28, 60; Kolotex Hosiery (Australia) Pty Limited v The Commissioner of Taxation of the Commonwealth of Australia (1974-75) 132 CLR 535, 541.

29. Housing Commission of New South Wales v Tatmar Pastoral Co Pty Limited & Anor [1983] 3 NSWLR 378, 386. Emphasis added. See also Priestley, JA in Samad v Public Service Board of New South Wales, Court of Appeal, 14 September 1983, unreported, cited [1984] 3 NSWLR at 459.

30. [1977] 1 NZLR 630.

31. ibid, 633.

32. (1980-1) 7 NZTPA 65, 71.

33. [1979] 2 NZLR 690.

34. ibid, 698.

35. [1982] 1 NZLR 644.

36. ibid, 648-9 (Woodhouse, P on behalf of himself, McMullin, J and Sir Clifford Richmond).

37. See comment on Mohu v Attorney General, in (1984) 10 NZ Recent Law, April 1984. 77, 78.

38. [1982] 1 NZLR 650.

39. See I. Eagles, M. Taggart and W.D. Baragwanath, Access to Official Information in New Zealand, forthcoming, 1986.

40. See eg Smith v Waikato County Council, (1983) 9 NZTPA 362, (Barker, J).

41. Fraser v State Services Commission [1984] 1 NZLR 116.

42. Official Information Act 1982. See Eagles, Taggart & Baragwanath, above.

43. Official Information Act 1982 (NZ) s 2.

44. I. Eagles and M. Taggart, Report on Reform of the Official Information Act 1982 prepared at the direction of the Hon. G.W.R. Palmer, Minister of Justice and Attorney General, mimeo, October 1984, paras 1.24, 1.25 and 1.28.

45. See eg. Davidson, CJ in Poananga v States Services Commission, unreported, High Court of New Zealand, Wellington, A 29/83, 29 May 1984 ("I think the Commission did give adequate reasons for the transfer. However, it is not a breach of natural justice for it not to do so: Flexman v Franklin County Council [1979] 2 NZLR 690, 698-699; R v Awatere [1982] 1 NZLR 644, 646" (p 34).

46. See Barker, J, Vautier, J and Tompkins, J in H (a law practitioner) v Auckland District Law Society [1985] 1 NZLR 8, 22, 25

47. [1979] AC 731.

48. ibid, 743.

49. Ackroyd v Whitehouse (Director of National Parks and Wildlife Service), unreported, CA 26 June 1985; (1985) NSWJB 143.

50. Kirby, P, 14.

51. Samuels, JA, 8.

52. (1976-77) 136 CLR 106, 110, 113.

53. See Gardner & Anor v Dairy Industry Authority of NSW [1977] 1 NSWLR 505.

54. Cunningham-Hankins & Anor v Sun Alliance Insurance Limited, CA 8 October 1985; (1985) NSWJB 236.

55. Kirby, P, 8-9.

56. ibid, 10.

57. Riley v The Parole Board of New South Wales, unreported, CA 29 October 1985; (1985) NSWJB 244.

58. Kirby, P, ibid, 50-51.

59. Field Force Media Representatives Pty Limited v Overdrive Publications Australia Pty Limited, unreported, CA, 21 October 1985; (1985) NSWJB 255.

60. Cf In re Glenorchy District Football Club [1965] Tas SR 219, 223. For the discussion of the difference between "grounds" and "reasons" in the context of the Official Information Act 1982 (NZ) see Eagles, Taggart and Baragwanath, above n 39.

61. Algoni Pty Limited & Ors v Secretary, Department of Industrial Relations, unreported, CA, 19 December, 1985. See Hope, JA ibid, 4.

62. Azzopardi v Tasman UEB Industries Limited, unreported, CA 20 December 1985.

63. Cf the reference to the relevance of the modern facility of shorthand in R v Knightsbridge Crown Court, ex parte International Sporting Club (London) Ltd & Anor [1982] QB 304, 315.

64. See [1984] 3 NSWLR 447, 462.

65. G.A. Flick, Natural Justice: Principles and Practical Application (2nd ed) Butterworths, Sydney, 1984, 118 ff.

66. J.W. Bridge, "The Duty to Give Reasons for Decisions as an Aspect of Natural Justice" in D. Lasok, A.J.E. Jaffey, D.L. Perrott and C. Sachs, Fundamental Duties, 1980, Pergamon Press, 81 ff.

67. Cf R. Burnett, "The Giving of Reasons" (1983) 14 Fed L Rev, 157.

68. A. Chatterji, "Natural Justice and Reasoned Decisions" (1968) 10 J. Indian Law Inst. 241, 242.

69. M.P. Singh, "Duty to Give Reasons for Quasi-Judicial and Administrative Decisions" (1979) 21 J. Indian Law Inst. 45, 72.

70. ibid, 73.

71. NSW Law Reform Commission, "Appeals in Administration" LRC 16, 1973. See [1984] 3 NSWLR 447 465, 482.

72. M. Shapiro, Book Review (1978) 26 Am J Comp Law 656, 658.

73. R v Secretary of State for the Home Department; ex parte Gunnell, unreported, The Times, 3 November, 1983, p. 14.

74. R v Secretary of State for the Home Department, ex parte Dannenberg [1984] 2 WLR 855, 863.

75. MacDonald v Windsor-Essex County Real Estate Board (1982) 38 OR (2d) 589.

76. Singh, 72.

77. R v Awatere, above.

78. See Osmond [1984] 3 NSWLR 447 at 467 f.

79. Cf Lord Diplock's comment [1982] AC 617 at 641, that public law developments are "the greatest achievement of the English Courts" in his lifetime.