

# ENVIRONMENTAL DEFENDER'S OFFICE NATIONAL CONFERENCE 2005

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## THE EXECUTIVE AND THE JUDICIARY A POTENTIAL FOR CONFLICT

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Many of you will know of the difficulties in the relationship between the judges and the executive in the United Kingdom. A scholarly reminder of them was given by Sir Anthony Mason in his lectures to the Australian Institute of Administrative Law in 2003. In his third lecture - Australian Administrative Law Compared with Overseas Models of Administrative Law, - Sir Anthony emphasised the diverging approaches in England and Australia to the legitimate intervention by a court in the processes of government. Sir Anthony said:

... although *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1 does not rule out substantive protection, the judgments do not offer much encouragement to the idea. As things presently stand, the difference between English and Australian law on this point illustrates, more strikingly than anything else, the cleavage between the English approach to judicial review and the Australian approach."

In 2003 the problems were emphasised by a blazing controversy fuelled by the Home Secretary, David Blunkett. The spark was provided by asylum seekers. Under the headline "Blunkett hits out at power of courts", the Home Secretary is reported to have said that "the power of the courts to overturn government policy can be a threat to democracy".

The Home Secretary's comments were triggered by a decision of Mr Justice Collins in the High Court who ruled in six test cases, that Mr Blunkett's tough new rules in relation to refugees breached the European convention on human rights which prohibits inhuman or degrading treatment of an individual.

In the Daily Telegraph Mr Blunkett was recorded as saying "I understand the role of the judiciary in seeking to reflect the interests of individuals against the state. If public policy can be always overridden by individual challenge through the courts, then democracy itself is under threat."

The newspaper article went on to say that in an increasingly litigious society Mr Blunkett believed there is a risk people will turn to the courts rather than to parliament. "I want the judges to reflect on this. We've got to be careful that it doesn't snowball out of hand, because if it does, the people will believe that they turn to the courts for satisfaction - not to MPs and democracy".

Mr Blunkett continued:

"Frankly I'm personally fed up with having to deal with a situation where parliament debates issues and the judges then overturn them."

Lord Lester, a London QC and specialist in constitutional law, joined in the debate adding considerable fuel to an already blazing fire. When defending the judges he told the BBC: "Obviously, at the Home Office, power is delightful and absolute power would be absolutely delightful. The moment judges start being attacked in this way it reminds me of Zimbabwe."

In an article in the Guardian, Lord Lester wrote:

"The judge had six test cases to consider. He decided that the decision-making process had in each case been flawed. There had been an initial failure to investigate sufficiently the circumstances in which entry had been achieved; and, where there had been reconsideration, the approach had been coloured by the assumption that a failure to claim at the port of entry would itself be a justification for refusal. He explained that the individual's reasons for not claiming had to be considered.

Section 55(5) empowers the home office not to withhold assistance where it was necessary to avoid a breach of the European human rights convention. So parliament considered it important to comply with convention rights. The judge decided that to breach those rights, it had to be shown that destitution leading to injury to health would occur. He found that insufficient consideration had been given to this. He also held that parliament could not have intended that genuine refugees should be 'faced with bleak alternatives of returning to persecution (itself a breach of the Refugee Convention) or of destitution.' "

Notwithstanding that, the judge gave the Home Secretary permission to appeal, Mr Blunkett entered the public arena offering his strident criticisms. The controversy was further fuelled by the entry of many of London's newspapers into the fray. The Daily Telegraph reported that the Prime Minister is "prepared for a showdown with the judiciary to stop the courts thwarting the government's attempts to curb the record flow of asylum seekers into Britain. He has ordered new legislation to limit the role of judges in the interpretation of international human rights obligations and re-assert the primacy of parliament."

The Daily Mail, not to be outdone, indulged itself with what has been described as "two days' worth of vindictive and highly invective and misleading comment, under banner headlines such as " 'What have our judges got against Britain?' ", " 'Bogus asylum and the judges who have it in for Britain' " and " 'Dictators in wigs'."

Lord Lester remarked further:

"The judge could not answer back, and the Lord Chancellor, who heads the judiciary so as to protect judicial independence from political interference, chose to remain silent. If democracy is under threat from anywhere, it is not from the judiciary but from a home secretary who does not accept fundamental British constitutional principles, and whose populist utterances appear to have support from the prime minister. It is the function of the parliament to make the law, of the executive to carry it out under law, and of the judiciary to interpret and apply the law. By enacting the Human Rights Act 1998, parliament required the courts, where possible, to interpret and apply both statute law and common law compatibly with the fundamental rights and freedoms protected by the European Convention."

Against the possibility that you might think this was an isolated incident providing newspaper copy for a few days I should tell you of some statements reported in the Guardian as recently as 26 April 2005. Under the headline "Judges speak out against erosion of independence by government" Lord Donaldson, who will be familiar to you as a former Master of the Rolls, said:

"There has always been a tug of war between the Home Office and the Lord Chancellor's Department. I would like to see much less power in the Home Office because it doesn't seem to me that it has the same respect for the rule of law and the independence of the judiciary as, in the past, has the Lord Chancellor's Department."

In the same article Robert Stevens, former master of Pembroke College, Oxford and author of the book *The English Judges*, is quoted as saying:

"The truth is that the judges, most recently faced with a government which was unsympathetic to human rights, took a lot of power on themselves. I think the Labour government has a strong streak of authoritarianism and the judges are very sensitive and have been very courageous in opposing the worst excesses of the changes in the law. When you look at what has happened in the last eight years to the criminal law, there's a massive shift in the balance of power from defence to prosecution."

Returning to the controversies of 2003, Stevens is reported as saying;

"I think the judges were a little paranoid in thinking that David Blunkett would become lord chancellor but their concerns are legitimate - that somebody like Blunkett could be lord chancellor or somebody who really wasn't a civil libertarian. When you look back at some of the lord chancellors over the last fifty years you can say they're not particularly civil libertarian, but they do have a sense that you have to follow decent procedures."

In the same article, Jeffrey Jowell, Professor of Public Law at University College London, said this:

"I was amazed at this new Prevention of Terrorism Act. Although there seems to be judicial supervision they sort of pulled a fast one at the end, the provision that the judge can only overturn the minister's decision about a control order where the decision of the minister is 'obviously flawed'. They've introduced a test there whereby it's going to be very, very difficult for the courts to overrule the minister on a detention order.

When they attack the judges in the way that Blunkett did - he probably comes to the closest of any recent politician to attempting to subvert the legitimacy of the judiciary and confidence in the judiciary - it seems to me they aim at two targets.

One is the public with a populist appeal, seeking to represent the judges as out of touch, unelected, unanswerable, unaccountable. But secondly they aim at the judges, they try to cow them to some extent and make them to be more deferential. This hasn't happened by and large. ...

Some judges would have been very tempted to imply within our unwritten constitution, which after all allows a certain flexibility, the notion that access to the courts is an inherent part of constitutional democracy, and that any act against it should be struck down. Sovereignty of parliament is a common law rule and therefore there's nothing in our constitutional theory to stop the judges saying another common law rule which is of equal importance - perhaps of more importance these days - is that the citizen should have access to the courts and the judges."

No doubt there are many forces at work in England which explain why this controversy has arisen. The apparent strength of the anti-Iraq vote in the recent British elections suggests that different forces may be operating in the United

Kingdom than are at work in the political process in Australia. Although in Australia there have been public controversies in relation to refugees reflected in tensions between the executive and the courts, they have not been manifested with the level of intensity revealed in the material to which I have referred.

Environmental law provides significant opportunity for conflict between the executive and the judiciary. Those who seek to undertake development projects and those who must approve them are required by the relevant legislation to obey the law. Where a breach occurs the Land and Environment Court is provided with jurisdiction at the suit of any person to determine whether it has been made in accordance with the law and grant appropriate relief which may, of course, mean bringing the project to a halt. On many occasions the Court has intervened to declare invalid decisions of local councils and relevant ministers and restrain the implementation of a project. Some of the decisions relate to major projects, others less so.

On some occasions the government has legislated to remove the potential for judicial intervention, eg Westfield and Eastgardens, Walsh Bay. On other occasions parliament has legislated to authorise a project which the Court has declared illegal eg Parramatta Park (*Parramatta City Council v Hale* (1982) 47 LGRA 319); Bengalla Mine (*Rosemount Estates Pty Ltd v Minister for Urban Affairs and Planning & Bengalla Mining Co Pty Ltd* (1966) 90 LGERA 1); Clyde Waste Terminal (*Drake & Ors; Auburn Council v Minister for Planning and Anor; Collex Pty Ltd* [2003] NSWLEC 270); Fairmont Resort (*Annie Winters v Council of the City of Blue Mountains & Ors*, unreported, Land & Environment Court, 18 December 1984). On one occasion the Court was asked by the State Attorney to intervene and declare

illegal the decision of the Minister for Planning (*Attorney-General (NSW) v Minister for Planning & Environment* (1984) 54 LGRA 189).

There are too many decisions for me to refer to all of them tonight. Many of them you will know. Notwithstanding the significance of these projects to individuals or the state, most of the court's decisions have been accepted without public controversy. I am not aware of any significant attack upon the judges of the court for exceeding their proper role - no one has suggested that the judges are subverting the democratic process.

The same has not always been true of the judges. I was present when the late Jim McClelland, the first Chief Judge of the Court, expressed his anger at the fact that parliament had legislated to allow the development of Parramatta Stadium which his Honour had declared illegal, a decision which was endorsed by the Court of Appeal. On the occasion of his retirement and in the presence of the Premier, Jim said words to the effect of:

"What Jim denies, Neville provides." The Premier, who was present, did not respond.

It is important to understand why the judges of the Land and Environment Court have not drawn criticism similar to that in England. It may guide the future development of administrative law both under statute and the common law. Sir Anthony Mason gives us a clue. Again quoting from his third lecture Sir Anthony said:

"The principles of English Administrative Law place great emphasis on good administration, substantive fairness and consistency and equality of treatment. These principles are designed to promote and protect substantive integrity of administrative decision-making. By way of contrast, the principles applied in Australia are less instrumental and directed rather substantive and procedural due process. The strict approach to *Wednesbury* unreasonableness is as close as the Australian principles get to substantive fairness. These principles reflect a continuing concern - some might say an undue concern - with the prospects of judges engaging in merits review.

This concern may stem from the dual system which operates in Australia - judicial review and merits review. It has no counter part in England. The difference, however, may well have deeper roots. It may well lie in a stronger Australian political culture which is resistant to broad ranging judicial review, whether justified or not, while accepting merits review by administrative tribunals. It may well also lie in the emergence of a different political and judicial culture in England flowing from its engagement with Europe where the long tradition of strong bureaucratic government has not been confronted in the past by a stronger parliamentary tradition of the kind that has prevailed hitherto in Australia and the United Kingdom. It may also lie in the emerging differences in judicial methodologies that is applied in the two jurisdictions and as well the pervasive influence of the separation of powers doctrine in Australia compared with an emphasis on rule of law considerations in England."

The Land and Environment Court, as you know, embodies both the judicial and administrative review processes. Judges sit to determine challenges to the legality of projects as well as sitting to review the merits of applications which may have been refused or which, in relation to designated development, may have been approved by the relevant decision-maker.

By contrast with some other states in Australia, New South Wales does not provide for all decisions favourable to a project to be subject to merit review. No doubt some judicial challenges are initiated because of the fact that there is otherwise no remedy available to a neighbour or other interested party effected by the project. This component of the Court's work has the potential to generate controversies similar to those which exist in the United Kingdom. That this has not occurred may reflect the



fact that from the outset the parliament provided standing to any person to challenge the lawfulness of an approved project (s123 of the *Environmental Planning & Assessment Act 1979*) thereby creating a greater expectation that there could be intervention by a judge. It may also be explained by the fact that having accepted a role for judges in administrative review of environmental decisions, the granting of authority to judges to intervene and declare a decision by the executive invalid has not been seen as such a significant intrusion into the role of the executive government.

*Rosemount Estates v The Minister (Rosemount Estates Pty Ltd v Minister for Urban Affairs and Planning & Bengalla Mining Co Pty Ltd (1990) 90 LGERA 1)* was the first significant attempt in the Land and Environment Court to broaden the capacity for judicial review in environmental matters previously confined to a *Wednesbury* challenge. Accepted orthodoxy was modified by Stein J who decided at trial that proportionality was an available tool for the judges of the Court when reviewing a decision of the executive.

However, his Honour's decision did not survive in the Court of Appeal which firmly found that his Honour had intruded into the merits and rejected proportionality as heresy. You will find in that decision a statement of orthodoxy in relation to the Australian approach to judicial review. Perhaps the result would have been different if the battle had been fought in England.

It may be, and I think it likely, that Australia will continue to confine judicial review to the process of decision-making rather than its qualitative aspects. Notwithstanding

the development of the concept of jurisdictional fact, which gives legitimacy to judicial intervention in some environmental disputes where judges have previously feared to tread (see *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 136 LGERA 288), it is more likely that the challenge accepted by the courts in Australia, and in particular the Land and Environment Court, will be to enhance the quality of administrative decision-making by the way it approaches the making of merit review decisions. The need for sustainable development principles to inform all decision-making in relation to the environment is now undoubted (see *BGP Properties Pty Ltd v Lake Macquarie City Council* [2004] NSWLEC 399). However, whether as yet those working at the coalface sufficiently reflect those principles in their decision-making may be open to question.

Until recently the merit review decisions of the Land and Environment Court were seen to have little value beyond the resolution of the individual dispute. This is a stark contrast to the position which prevailed when development appeals were determined in the Land and Valuation Court. The remarkable collection of planning principles devised by the judges of that court are reflected in the wealth of the reported decisions in the early volumes of *Local Government and Environment Reports of Australia*. For some reason when the same decisions came to be made by assessors or commissioners an assumption was made that their value was diminished and that no opportunity was available to provide guidance for decision-makers when faced with similar problems in other cases.

In her recent article, "The Special place of tribunals in the system of justice: How can tribunals make a difference?" (2004) 15 PLR 220 Professor Robin Creyke said at 234:

"There are broader systemic interests behind the need for tribunals to publish their output. For agencies to heed tribunal rulings, they must know of those rulings, respect them, and be able to understand their implications. That involves tribunals extrapolating principles from the cases that come before them, publicising these to the target audience, and developing standards which can be applied easily by officials. In other words, tribunals need to develop a larger and more coherent picture of the operation of law on government. That is a step that they are uniquely able to take, and by so doing, tribunals can demonstrate that they are capable of adding value to agency decision-making."

I have no doubt this is correct. Apart from the role which administrative review can play in ameliorating individual disputes within the community it has an equally valuable role in providing a body of informed decisions accompanied by considered reasons which can not only inform future decisions of that tribunal but also the decisions of primary decision-maker. Unless the opportunity is taken by the tribunal to state its reasons by reference to a body of evolving principles a significant opportunity is lost; diminishing the legitimacy of the review process and reducing the quality of those future primary decisions. And if the merit review process is not effective the pressure for judges to use the tools of judicial review increases.

As you will be aware the Land and Environment Court has now moved to express its merit review decision by reference to adopted principles. I cannot pretend that all of our decisions or the principles which are evolved will meet with universal approval. However, by providing an opportunity for a rigorous discussion of the appropriate principles and their development over time the Court is able to make a contribution to

environmental decision making which cannot be provided by any other body. The Court is, of course, bound to obey the statutory controls and will be guided by other controls adopted by the primary decision-maker (see *Stockland Development Pty Ltd v Manly Council* (2004) 136 LGERA 254) but beneath those controls are many issues which require resolution. The resolution of those issues is most likely to take place without irrational or unnecessary controversy when they are made in accordance with identifiable principles.

That said, we can be certain that the relationship between the judiciary and the executive will continue to evolve. As Spigelman CJ said in his lecture in April 2004 entitled "The Integrity Branch of Government":

"The legality/merits dichotomy does not involve a bright line test. The boundary is porous and ill defined. Policing the boundary is a continual task, particularly of the appellate courts."

Perhaps, because the *Land and Environment Court Act* 1979 provides an opportunity for the merit review of some projects, particularly those which are more controversial, as well as providing for the judicial review of the legality of an approval, the appellate courts will have less work to do in policing the boundaries with respect to environmental law.

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