ADMINISTRATIVE LAW AND THE CHURCHES

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Introduction

I remember quite well the occasion I was here last. At that time, I was a Barrister and Procurator of the Presbyterian Church and I commented on a paper by Justice Peter Young. I remember quite clearly that we were sitting around a table on that occasion and it was more of an informal chat than any kind of formal presentation of a paper. So I prepared myself for today on the basis that we were just going to be chatting around a table, until I found out that it was going to be somewhat more formal because the numbers would not fit around a table. You will have to forgive me if I still retain a degree of informality in what I say.

I have changed my role somewhat since that last occasion. I am no longer Procurator of the Presbyterian Church. I am now a Federal Court judge, but the reality is, I spend only a small part of my time in the Federal Court itself. The bulk of my time is really at the coal face of administrative law. My primary role, for which one has to be a Federal Court judge, is President of the Administrative Appeals Tribunal. In that role, I manage a Tribunal of some 90 or more members. It is a national tribunal and we deal with a huge range of matters. I am sure that many of you are aware of the sort of work that the AAT does. It ranges from multi-million dollar tax cases at one end of the scale down to small social security cases at the

other end. The work of the Tribunal is very varied. I heard a case recently which involved determining how the wine growing areas in North East Victoria should be divided up. That was quite an interesting and satisfying case to hear. I spent a time in Wangaratta visiting the wine growing parts of North East Victoria. I am also one of the people responsible, if you read the papers a year or so ago, for the eight Asian elephants that came to the zoos in Sydney and Melbourne. The original decision was made by the Minister for the Environment but there was an appeal from that decision to the Administrative Appeals Tribunal. So, it is quite an interesting and diversified job, but certainly it is at the coal face of administrative law. As a result, I am very pleased to be able to talk to you about administrative law and the churches.

Administrative Law

Given that I have been asked to address the topic of administrative law and the churches, I thought it appropriate to first of all look at what is administrative law. In one sense, administrative law is irrelevant to churches. You will see why I say that as I develop my thoughts.

Administrative law is that body of law that regulates the actions of the executive government, or the administration. From that starting premise, you can see why I say that it may not be particularly relevant to the churches. Administrative law has its strongest roots in judicial review and the real heart of administrative law is that it is the separation of powers doctrine combined with the rule of law in action. As a consequence of the rule of law, not even government is above the law. The executive government ultimately needs to answer to the law through the courts. The way in which that happens most frequently is through the mechanism of judicial review. The courts will intervene to prevent unlawful conduct by the executive.

The traditional tools employed by the courts in response to unlawful conduct by the executive are the so-called “prerogative writs”. These are orders of courts that quash or nullify certain decisions, or prevent implementation of the decisions, or require the executive to act when there is an obligation to act. I will not give you the Latin names for the writs. We used to call them prerogative writs, but the High Court

has now told us that when we are using them in a federal arena we should call them “constitutional writs”.

There have developed, over the years, some additional remedies to the constitutional writs. The courts’ armoury has expanded to include the device of declaratory judgments, which involve simply declaring what the law is.

The courts over centuries have exercised this supervisory role but I think it would be fair to say that, in recent times, the courts have become more and more active in reviewing administrative decisions. We now have statutory regimes that cover the old common law grounds of judicial review. For example, at the Commonwealth level there is an act called the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

One of the well-established grounds for judicial review is what is known as a breach of natural justice. I think that is what I have been asked, primarily, to talk about tonight in connection with the churches. The principles that govern the circumstances in which courts will interfere following a breach of natural justice are likely to be similar to those that apply in other areas of unlawful activity. I have called it “natural justice” and that is what lawyers for centuries called it until Sir Anthony Mason, before he became Chief Justice of Australia, in the landmark decision of the High Court in *Kioa v West*, told us that we really should call it “procedural fairness” rather than natural justice.[1] So you will find lawyers talking as much now about procedural fairness as natural justice and, broadly speaking, they mean the same thing.

Evolution of the Law of Procedural Fairness

What is procedural fairness or natural justice? It has historically been divided into two categories, again with Latin tags that I will not bore you with. One we can call the bias rule and the other we can call the hearing rule.

[1] (1985) 159 CLR 550 at 583-586.

Courts have traditionally interfered, in cases where it was considered appropriate to do so, on the basis that the decision-maker has an interest in the decision. It might be a personal interest, or, more importantly, because the law has always thought that property rights are at the highest level of importance, it might be a pecuniary interest. Broadly speaking, the relevant proposition is that somebody should not be determining a dispute or making a decision affecting rights if that person has an interest in the outcome. That is the bias rule.

The other rule is the hearing rule. That rule requires a fair hearing of any issue that is going to determine somebody's rights. The hearing rule, again historically, but not so importantly nowadays, was divided into two parts. First, the person whose rights might be affected by the hearing was entitled to know what was being said against or about the person. They were entitled to notice of the claim that was being made. Secondly, they were entitled to an opportunity to put their case. I underscore that what they were entitled to was an opportunity to put their case, not to examine every nuance of every thought that the decision-maker might be entertaining, or to be given notice of every point or matter, however minor, that might be relevant. Rather, they were entitled to be told, broadly speaking, what the claim was, with particulars of the claim, and given the opportunity to put their case.

I emphasise this because the way the law has developed with respect to migration decisions in recent years has, in a way, tended to push it more towards requiring decision-makers to make known, with great particularity, what it is that they might consider, what they might act on and so forth. I think that is a development which is really driven by the very large number of migration cases and, particularly, refugee claims that we now have in Australia.

The historical principle then is that a decision-maker is required not to have an interest in the outcome and is required to ensure that the party that is the subject of the hearing knows what is being said and has an opportunity to put a case. That is what natural justice or procedural fairness is all about.

Executive action is now unlawful at common law and, frequently, by statute as well where the rules are breached. In effect, all executive action at state or federal level

or, for that matter, local level, which relevantly affects rights, is going to attract the rules of natural justice. But it was not always like that. This is an area in which the law has developed. Originally, the obligation to accord natural justice was confined to courts themselves. It was courts that had to ensure that parties knew the case and had an opportunity to deal with the case. Indeed, one of the reasons why Sir Anthony Mason said we should stop calling it natural justice and call it procedural fairness was because he considered that the phrase natural justice was irretrievably tied up with the concept as it applied to hearings by courts.

So, originally, it was only courts that had to accord natural justice. In due course, the courts began extending the application of the rules to the executive, or the administration. They did this by finding that various bodies had what they called "a duty to act judicially". This is not so long ago. When I was a law student in the sixties, this was a significant mantra. Did the particular body, tribunal or whatever it was that was said to have an obligation to accord natural justice, have a duty to act judicially? More and more the answer to that question was yes, until the question just dropped off the scene. The point I want to make to you is that the law of procedural fairness or natural justice has been developing over many, many years. We have got to the point, or I have got to the point now in this account, in which the law has moved from applying to courts to applying to the executive. Originally, it applied to tribunals as part of the executive. Now, in effect, it applies to any decision-maker, even, depending upon the circumstances, somebody behind a counter in a Centrelink office dealing with a social security claim. However, while the law has developed a long way, so far it has not got to the point where it applies automatically to anything outside the executive.

Traditionally, in its application to the executive, there were two questions that had to be asked in any case. The first was: did the rules apply? In other words, was there a duty to act judicially? The second question was: what did the rules require? Generally, the rules required, as I have said, notice of the case and an opportunity to put submissions.

That all changed when the High Court gave its decision in *Kioa v West*. Although Sir Anthony Mason was not then Chief Justice and was only one of the judges of the

High Court, he has the reputation of being one of Australia's great administrative lawyers and it is, in reality, to his judgment in *Kioa v West* that all lawyers wanting to find something to help them initially turn. One of the things that he said in *Kioa v West*, commenting on the two questions that were traditionally asked (whether the rules apply and what they require), was that it is not so much a question of whether the rules apply, but rather, "what does the duty to act fairly require in the circumstances of the particular case?"[2] This signalled a movement right away from a focus on the function of the decision-maker, and whether they have a duty to act judicially, to focusing on the effect on the subject. That is a very significant change in the law. It gave life to another development that had started to occur, namely, the application of these rules outside of a traditional administrative law context. The rules began to apply not only to executive government, but to areas of private law.

Procedural Fairness in a Private Law Context

This, I believe, is what is really relevant for me to talk about tonight. I mentioned at the outset some hesitation about the application of administrative law to the churches. When we say "administrative law" in this context, we in fact mean that body of rules that was developed in relation to the executive, or administration, but which has now moved out of that area into areas of private law.

Following *Kioa v West*, the test was no longer whether one was dealing with a court or the nature of the obligation of a decision-maker. The focus was on the outcome. Did the decision affect rights and what did fairness require in the circumstances? Immediately a new dimension appeared. Administrative action, the separation of powers doctrine and the rule of law lead easily to the development of restraints on unfair government action, whether the unfairness relates to substance or procedure. Unfair procedures will inevitably lead to unfair action. So the way, for example, procedural fairness developed in connection with government action was not subject to any limitation or restraint as a general rule. However, when one transfers those principles across to private bodies, which, unlike government, do not act coercively and do not behave in a way which is unavoidable or irresistible so far as the subject

[2] Ibid at 585.

is concerned, a different dimension arises. If rules relating to administrative action and, particularly, to concepts such as procedural fairness are to carry over to private conduct, are there some limitations which should exist? That is an important aspect of understanding how the law has developed in relation to procedural fairness and voluntary associations.

The rules of voluntary associations, whether they amount to contracts or compacts, will, if they provide for the taking of adverse action against, for example, a member of the association, generally provide some mechanism relating to how the body should go about making a decision in relation to such action. Given that the members of this association have agreed to be bound by these rules, the question immediately arises: why should the common law intrude and impose some different obligation?

The most fruitful area for issues relating to procedural fairness in the private law arena relate to dismissals from some position or role. Frankly, if you look at the cases, that is what they are about. They involve people being expelled from a church, a trade union, a political party, a sporting club, or otherwise disciplined for some so-called breach. I should note that there is a lot of interest surrounding the issue of employment and the churches. I do not propose to discuss this, except to say that the dismissal of employees is an area heavily regulated by statute. The rules of procedural fairness, while they are likely to apply to such decisions, tend not to be agitated because unfair dismissal law effectively “covers the field”.

I come now to the crux of what this talk is really about and what, to my mind, is the present law so far as it relates to voluntary associations such as churches. In particular, I want to address the differences between the way the rules of procedural fairness apply to churches and the way they apply to government action.

Relevant Considerations

In dealing with any procedural fairness case involving a voluntary association, I think it is necessary to look at four matters:

1. Does the claim relate to property, a civil right or reputation?
2. Is the outcome, as contrasted with the procedure, unlawful?

3. Is there a reasonable internal mechanism for the resolution of disputes?
4. Is there something about the association's rules which requires a modification of the rules as they would be at common law?

Nature of the Claim

The first matter one has to look at is the nature of the claim that is being considered by the voluntary association. The relevant question is: does it relate to property, a civil right or reputation? Originally, the courts insisted that the decision must affect property or a civil right in order to be justiciable. Reputation has recently been added because the courts decided that claims relating to property and civil rights do not go far enough. If, as a result of a decision, you are not going to lose anything which affects your property or your civil rights but you are going to go away with your reputation in tatters, as you might if you were dealt with by a church court and some finding of improper conduct is made against you, then that alone, it seems, is now enough.

Nature of the Outcome

The next consideration is whether the outcome, as contrasted with the procedure, will be unlawful. Is it contrary, for example, to the rules against restraint of trade? In that event a court will be more likely to interfere. I am looking now away from procedural fairness as such. The focus is on the outcome, in terms of the effect on the person and whether it is unlawful, as opposed to merely contrary to the rules of the association.

Nature of the Internal Dispute Resolving Mechanism

The third matter one needs to address is the nature of the internal mechanism within the association that provides for the resolution of disputes. Where there is a mechanism providing a reasonable procedure, courts are unlikely to interfere, even though the common law might provide a better mechanism. This involves looking at the mechanism both in principle and in practice. A church might have an impeccable system for dealing with disciplinary matters relating to one of its members and the first thing it requires is the giving of particulars of the charge. So it has a good system. However, if a court were to find that, notwithstanding the system, the particulars that were given of the charge were unsatisfactory, the court would be

likely to interfere. Having the perfect system is not the end of it. If you have applied the perfect system perfectly, then you are in good shape! Even if you have got only a reasonable system, falling short of what the common law might otherwise require, in the right case, the court is going to say: that is what the members of this body agreed to, they got what they agreed to, it is reasonable and we will not interfere.

Nature of the Compact as a Whole

The fourth matter that you need to look at is whether there is something about the whole essence of the compact which requires a modification of the rules as they might be at common law. The best example of that, and I know very much the practical nature of this problem from my time as Procurator of the Presbyterian Church, is where you have a committee that, in effect, both legislates and then rules or adjudicates on disciplinary matters. In the Presbyterian Church, for example, the General Assembly is the legislative body of the Church but it is also the body which sits as the highest court within the church to determine, for example, disciplinary matters. So where that is of the essence of the body, a court is generally not going to decide that it is contrary to the rules of procedural fairness and strike down some decision made by a committee on the basis that it passed the very rule whose breach is to be considered in the proceeding.

Approaching a Procedural Fairness Case Involving a Church

The considerations that I have been discussing lead to three necessary steps in approaching a procedural fairness case involving a church:

1. Will the court entertain an application?
2. Do the rules of procedural fairness apply?
3. What do the rules of procedural fairness require?

Step 1: Will the Court Entertain an Application?

The first question – whether the court will entertain an application – is relevant whether the case relates to procedural fairness or any other question of illegality. Courts have a tradition of not interfering with domestic tribunals or voluntary associations unless one of a number of alternative tests is satisfied. The leading case is a celebrated Presbyterian Church case from the first few years of the life of

the High Court of Australia, *Macqueen v Frackelton*.[3] A Minister was dismissed and he challenged the validity of his dismissal. It was not a procedural fairness case. The question was whether the law had been properly applied. The Minister sought to challenge a report which lead to his dismissal. The High Court refused to even look at the report, because it did not affect any property or civil rights. However, in relation to the actual dismissal decision, which had an effect on his income, the High Court said that there was jurisdiction. Another very important decision of the High Court, *Cameron v Hogan*,[4] which related to a political party, continued the *Macqueen v Frackelton* approach that if rights or property are not affected then no remedy can follow.

One of the cases I argued in my role as Procurator was *Bartholomew v Ramage*,[5] which was heard by Justice Brownie in the Supreme Court of New South Wales. It related to the ordination of women. Unfortunately, to my regret, the Presbyterian Church, having previously admitted women to be ordained as Ministers, then, after 1977 (which some people call "Union" but I have always called "Division"), retracted that development. Joy Bartholomew, who is now the Minister of that wonderful Presbyterian Church at the foot of Parliament House in Canberra, brought proceedings to challenge the decision. She was already ordained. One of the things that the Assembly said when changing the Code, either deliberately or accidentally, was that anyone who had already been ordained had been ordained by God and that was that. So Joy Bartholomew and about three others survived. The result was that there was nobody whose pecuniary interest was affected, because there was no ordained Minister whose ordination was threatened.

The real issue, when you got down to it, was as much to do with whether women should be ordained or not. However, Brownie J, I think, decided that he did not particularly want to buy into that argument, so he upheld my submission which simply said he should not even consider this matter, because there were no

[3] (1909) 8 CLR 673.
[4] (1934) 51 CLR 358.
[5] Unreported, NSWSC Eq Div, Brownie J, 4 September 1992, No. 6148/91.

pecuniary interests or civil rights affected. A similar decision, around the same time and involving the Anglican Church, is *Scandrett v Dowling*.[6]

Notwithstanding these cases, it is, to my mind, unquestionable that there has been a move towards increasing the involvement of courts in the regulation of the affairs of voluntary associations. In a case not involving a voluntary association but a true administrative law case involving the Criminal Justice Commission of Queensland and their inquiry into poker machines, the High Court of Australia said that it would extend this concept that you had to have a property or civil right involved to some issues of reputation.[7] That case was taken further in another decision of the High Court,[8] which was the case, you may remember, arising out of an inquiry into two young men who were lost and ultimately died from exposure in remote Western Australia.

Step 2: Do the rules of procedural fairness apply?

The second question, if the answer to the first question is yes, is do the rules of procedural fairness apply? The rules apply when the case involves rights, interests or legitimate expectations.[9] That, actually, is the words again of Sir Anthony Mason. He did not mention reputation, but I think we can probably now add that in as well. A very important decision of the English Court of Appeal, *Lee v The Showmen's Guild of Great Britain*,[10] in 1952, set the courts on this way. It was primarily the decision of Lord Denning. It related to someone being expelled from a Guild, the Showmen's Guild, and Lord Denning said very clearly that procedural fairness would apply in that situation. In 1980, in a case called *Calvin v Carr*, which related to the Australian Jockey Club,[11] the English Privy Council, hearing one of the last appeals from Australia, proceeded to consider whether the rules of procedural fairness had been breached in suspending a horse owner from racing, without even specifically asking whether the rules applied. Provided you get through the first hurdle, that is, whether the courts will entertain an application, there is really little question about whether the rules of procedural fairness apply.

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[6] (1992) 27 NSWLR 483.
[7] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.
[8] *Annetts v McCann* (1990) 170 CLR 597.
[9] *Kioa v West*, above at 582.
[10] [1952] 2 QB 329.

Another example is *Plenty v The Seventh-Day Adventist Church*,[12] a decision in a most remarkable and convoluted set of proceedings in South Australia. Justice Kevin Duggan of the Supreme Court of South Australia said very clearly that procedural fairness applied in that case. The Church there may have had good rules, but he said they did not provide sufficient particulars of the Plentys' charges and that was a denial of procedural fairness.

Step 3: What do the rules of procedural fairness require?

The third issue, having got to the point where the rules are going to apply, is whether the rules of procedural fairness apply as they would in a court or an administrative tribunal. I think, however, that that is not exactly the right question. The reason I say that is because of those observations of Justice Mason, as he then was, in *Kioa v West*. Justice Mason freed up the idea that the rules could be discovered by looking at the relevant case law and he recast the question as "what does the duty to act fairly require in the circumstances of the particular case?". I have to say that the High Court has a habit of invoking what I call the "whatever is a fair thing principle". It sounds fine in the High Court but it does not necessarily help magistrates and lower judges or lawyers at the coal face to know exactly what it is that is the fair thing to do in the circumstances. Nevertheless, that is what the rule requires. It is not a matter of saying: does the rule require the same thing in the case of a church committee or court as is required of a civil court? The rule requires you to ask, taking into account all the circumstances: what does fairness require? It is a wonderful question. You could not criticise it at all. However, it is not necessarily an easy question to answer until you have got the subjective view of a judge in a hearing (dressed up, mind you, as an objective view) as to what fairness did require in the circumstances.

In determining how the rules apply, one needs to look at the structure of the church itself, if we are dealing with a church. It is relevant to look at matters such as how the compact operates, the nature of the existing mechanisms, how fairly those

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[11] [1980] AC 574.
[12] (2003) 226 LSJS 214; [2002] SASC 68.

mechanisms operate or do not operate and, finally, the way in which the particular matter has been dealt with.

There are several decisions that are illustrative of courts' approaches to the rules of particular associations. If the compact provides for internal appeal mechanisms, exhausting them will generally be a prerequisite to judicial review.[13] However, I do not think a court would say that all mechanisms should be exhausted if there is something inherently unfair about the procedure. The courts have upheld rules that permit a situation where the rule-maker ultimately becomes the dispute-resolver.[14] Finally, there is a decision, which may or may not ultimately carry sway, that the bias rule, in its application to voluntary associations, requires malice. In other words, there must be some evidence of actual bias as opposed to apprehended bias (that is, where a reasonable person would form a view that somebody might not bring a fair mind to the matter).

Conclusion

I have outlined the issues that I think anyone considering procedural fairness in a church setting needs to address. I am conscious of the fact that I have been speaking in generalities, but I really think that is the appropriate way to deal with this. I think it is the big picture approach that matters. That is partly because of what I said to you about the application of Sir Anthony Mason's view, that it is what is fair in the circumstances that is relevant. What is fair in the circumstances is not generally going to be assisted by poring over three or four cases and analysing the facts and circumstances that arose there. It is going to be better achieved by an attempt to understand overall, as I have attempted to do tonight, where the principles go, what are the matters to be thinking about and what are the values to be acting on. Thank you.

[13] *Webb v Confederation of Australian Motor Sport Ltd* [2002] NSWSC 1075.
[14] *Maloney v NSW National Coursing Association Ltd* (1978) 3 ACLR 404.