Judicial Review of Prerogative Power in Australia: Issues and Prospects

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1. *Introduction*

It is commonplace to observe that by virtue of a series of landmark decisions since the early 1960s, courts in England and Australia have transformed the law relating to judicial review of administrative action. *Ridge v Baldwin*,[1] *Padfield v Minister of Agriculture, Fisheries and Food*[2] and *R v Toohey; ex parte Northern Land Council* ("*Toohey*")[3] each heralded a considerable expansion in judicial control of the administrative decision-making process.

This paper examines the continuing development of the common law in this regard. Until recently it was accepted that the manner of exercise of prerogative power was not reviewable in the courts, a view reflected in the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) which applied only to decisions made "under an enactment".[4] The decision of the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service*,[5] hailed as yet another landmark in the development of administrative law, has now altered that position in England. They held that executive action was no longer immune from judicial review merely because it was carried out in pursuance of prerogative power. The Federal Court has applied *Council of Civil Service Unions v Minister for the Civil Service*,[6] but the High Court is yet to directly consider the question.

The traditional immunity from review of the manner of exercise of prerogative power is explored in Part Two of this paper, along with the factors which have led courts in recent times to question that rule. Part Two explains why the High Court will follow the House of Lords and apply administrative law principles to the exercise of prerogative power and goes on to anticipate yet another expansion in the law of judicial review — this time into the non-prerogative common law powers of the Crown. Part Three of the paper is concerned with issues of justiciability. It is clear that not every decision made or action taken in exercise of the prerogative will be amenable to review by the courts. It is the "subject matter" of a prerogative decision which provides the relevant controlling factor. Part Three pursues

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1 [1964] AC 40.

2 [1968] AC 997.

3 (1981) 151 CLR 170. See also *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

4 Section 3(1) in definition of "decision to which this Act applies".

5 [1985] AC 374.

6 *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218.

this point by discussing the susceptibility to review by subject matter of a selection of prerogative powers; the defence prerogatives, the prerogative of mercy, the Attorney General's prerogative power to file an ex officio information and the treaty prerogative. Part Four then considers the grounds of review applicable to the manner of exercise of prerogative power. In so doing, it explores the theoretical foundation for judicial review of administrative action and, in particular, the theory of an autonomous common law of judicial review.

One qualifying point about the scope of this paper should be made at the outset. It does not deal with what might loosely be termed the "constitutional prerogatives" — the prerogative powers to summon, prorogue and dissolve parliament, to assent to bills and to appoint ministers and judges. Such powers, which go to the heart of the functioning of government itself, form a discrete topic of study for another occasion.[7]

2. *The Threshold Issue: is the Manner of Exercise of Prerogative Power Necessarily Immune from Judicial Review?*

A. The Traditional Immunity Principle

"[P]owers which . . . derive from the royal prerogative are unreviewable on any ground whatsoever."[8] So wrote Professor de Smith in 1959 in the first edition of Judicial Review of Administrative Action. De Smith's view was based on weighty authority. Blackstone wrote "[i]n the exertion . . . of those prerogatives, which the law has given him, the king is irresistible and absolute".[9] Chitty accepted that "in the exercise of his lawful prerogatives, an unbounded discretion is, generally speaking, left to the king".[10] In a series of cases, both this century and last, courts in England and Australia repeatedly disclaimed jurisdiction to review the manner of exercise of prerogative power: *R v Prosser*,[11] *R v Allen*[12] (Attorney General's prerogative power to enter a *nolle prosequi*); *Horwitz v Connor*,[13] *Hanratty v Lord Butler of Saffron Walden*[14] (prerogative of mercy); *Chandler v DPP*[15] (prerogative power to control the disposition of the armed forces); *Blackburn v Attorney-General*[16] (treaty-making prerogative); *Laker Airways*

7 See Sawer, G, *Federation Under Strain* (1977) at 147-50 for a brief discussion of the application of principles of judicial review to these powers. As Sawer points out, in Australia these powers are generally to be found in the various written Constitution Acts and, as such, are not even "prerogative" in the strict sense of the term.

8 De Smith, S A, *Judicial Review of Administrative Action* (1959) at 118.

9 Blackstone, W, *Commentaries on the Laws of England* (1783) Vol 1 at 251.

10 Chitty, J, *A Treatise on the Law of the Prerogatives of the Crown* (1820) at 6. See also Dicey, A V, *Introduction to the Study of the Law of the Constitution* (5th edn, 1897) at 353-55; Holdsworth, W, *A History of English Law* (1938) Vol X at 361-68.

11 (1848) 11 Beav 306 at 315; 50 ER 834 at 838.

12 (1862) 1 B & S 850; 121 ER 929.

13 (1908) 6 CLR 38 at 40.

14 (1971) 115 Sol J 386.

15 [1964] AC 763 at 791 per Lord Reid; at 814 per Lord Pearce.

16 [1971] 1 WLR 1037.

Ltd v Department of Trade[17] Lord Denning MR, (prerogative power exercised under a treaty); *Gouriet v Union of Post Office Workers*[18] (Attorney General's prerogative power to grant consent to relator proceedings); *Barton v The Queen*[19] (Attorney General's prerogative power to file an ex officio information). As recently as 1980 in *Barton v The Queen* three members of the High Court suggested the existence of a "general principle that a prerogative power [is] not examinable by the courts".[20]

For the most part, these writers and judges proceeded on the footing that the exercise of prerogative power was unexaminable per se.[21] Few bothered to explain why this should be so. The individual and collective responsibility of ministers to parliament was sometimes said to be sufficient check on possible abuse of prerogative power,[22] but at least three other factors appear relevant. The older cases and commentaries reflect a general reluctance to expose the acts of the Crown (whether referable to statute or prerogative) to judicial review,[23] a wariness rooted in the principle "the King can do no wrong"[24] and the view expressed in *Australian Communist Party v Commonwealth* that the "counsels of the Crown are secret".[25] In more recent times, judges have claimed of some prerogative discretions that they are unexaminable by reason of their "subject matter",[26] or because their exercise involves matters of "political judgment"[27] which matters are not appropriate for judicial determination. And it has also been said that prerogative powers

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17 [1977] QB 643 at 718 per Roskill LJ; but cf at 705-06 per

18 [1978] AC 435 at 478 and 482 per Lord Wilberforce; at 487-88 per Viscount Dilhorne; at 505-06 per Lord Edmund-Davies; at 518 and 524 per Lord Fraser.

19 (1980) 147 CLR 75 at 89-91, 94 per Gibbs ACJ and Mason J (with whom Aickin J agreed); at 103 per Stephen J; at 110 per Wilson J (with whom Murphy J agreed "generally").

20 Id at 90 per Gibbs ACJ and Mason J (with whom Aickin J agreed).

21 A point noted by Mason J in *Toohey* above n3 at 219.

22 Blackstone, W, above n9 at 251-52; Chitty, J, above n10 at 8; Dicey, A V, above n10 at 395; Holdsworth, W, above n10 at 366-68; *R v Allen* (1862) 1 B & S 849 at 855; 121 ER 929 at 931 per Cockburn CJ; *London County Council v Attorney-General* [1902] AC 165 at 168 per Lord Halsbury LC; *Chandler v DPP* [1964] AC 763 at 791 per Lord Reid; *Gouriet v Union of Post Office Workers* [1978] AC 435 at 524 per Lord Fraser; *Barton v The Queen* (1980) 147 CLR 75 at 91 per Gibbs ACJ and Mason J. This argument has been applied to the exercise of the Attorney General's prerogative powers as "first law officer of the Crown" and to the prerogative acts of the Crown or Crown Representative given that the Crown acts in accordance with ministerial advice.

23 As to which see Hogg, P W, "Judicial Review of Action by The Crown Representative" (1969) 43 *ALJ* 215. But see now *Toohey* above n3; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 and *South Australia v O'Shea* (1987) 163 CLR 378.

24 Discussed in *Toohey* above n3 at 217-18 per Mason J. See also *Duncan v Theodore* (1917) 23 CLR 510 at 544 per Isaacs and Powers JJ.

25 (1951) 83 CLR 1 at 179 per Dixon J.

26 An expression used by Mason J in *Toohey* above n3 at 220. See also *Hanratty v Lord Butler of Saffron Walden* (1971) 115 Sol J 386; *de Freitas v Benny* [1976] AC 239 at 247; *Barton v The Queen* (1980) 147 CLR 75 at 95 per Gibbs ACJ and Mason J; at 107 per Murphy J; at 110-11 per Wilson J.

27 *Gouriet v Union of Post Office Workers* [1978] AC 435 at 524 per Lord Fraser, using the expression "political judgment" in the sense of "weighing the relative importance of different aspects of the public interest". See also *Blackburn v Attorney-General* [1971] 1 WLR 1037.

lack the limitations in scope, purpose and criteria which render so many statutory powers amenable to broad grounds of review.[28]

Nevertheless, the royal prerogative has never been regarded as beyond the reach of the courts entirely. Prerogative powers are common law powers and since Coke's day courts have ruled on the existence and scope of prerogative power.[29] The existence and scope of the prerogative is frequently obscure,[30] and any inquiry into the extent of an alleged prerogative involves a high degree of judicial choice and discretion. But in exercising this discretion the courts have not deferred to the executive. To the contrary, their role has been an active one. They have denied the existence of prerogative rights asserted by the executive even when this has precipitated direct conflict with the King[31] or involved the judges in matters of defence in time of war.[32] In the light of this activist approach to questions of *vires* in the narrow sense, steadfast refusals to review the manner of exercise of prerogative power have long appeared somewhat of an anomaly.

B. *The Rejection of the Traditional Immunity Principle*

Only in the last decade have the courts critically examined the law governing judicial review of prerogative power. The House of Lords clung to the traditional immunity principle as recently as 1977,[33] the High Court as recently as 1980.[34] Yet it is now generally accepted that executive action is no longer immune from judicial review merely because carried out in pursuance of prerogative power. This is the position in England following *Council of Civil Service Unions v Minister for the Civil Service ("CCSU").*[35] In a series of decisions beginning with *Toohey,*[36] members of the High Court have foreshadowed a similar position in Australia. The Federal Court, in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* ("*Peko-Wallsend*"),[37] has already discarded the old rule. Although much has

28 *Toohey* above n3 at 219 per Mason J. This in turn raises the difficult question of the theoretical underpinning of review for denial of natural justice and abuse of power, an issue discussed below at 462-466.

29 See, eg, *Case of Monopolies* (1602) 11 Co Rep 84b; 77 ER 1260; *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352; *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508; *Barton v Commonwealth* (1974) 131 CLR 477.

30 Winterton, G, *Parliament, The Executive and The Governor-General* (1983) at 115. See, eg, *Nissan v Attorney-General* [1970] AC 179 at 213 per Lord Reid; at 236 per Lord Wilberforce (referring to the prerogative as "this elusive concept") and cf 227-229 per Lord Pearce; *Attorney-General of the Duchy of Lancaster v G E Overton (Farms) Ltd* [1980] 3 All ER 503; *R v Secretary of State for the Home Department; ex parte Northumbria Police Authority* [1988] 1 All ER 556.

31 *Prohibitions Del Roy* (1607) 12 Co Rep 64, 77 ER 1342.

32 *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508; *Burmah Oil Co v Lord Advocate* [1965] AC 75. See also *Barton v Commonwealth* (1974) 131 CLR 477 where the High Court considered the scope of the prerogative power to seek and accept the surrender of a fugitive from a foreign state.

33 *Gouriet v Union of Post Office Workers* [1978] AC 435.

34 *Barton v The Queen* (1980) 147 CLR 75.

35 Above n5.

36 Above n3.

37 (1987) 75 ALR 218.

been written about *CCSU* and *Peko-Wallsend*[38] a brief summary of each is called for in the present context.

(1) CCSU and Peko-Wallsend

CCSU concerned a branch of the civil service known as Government Communications Headquarters ("GCHQ"). GCHQ performed a number of communications functions which were vital to national security. In December 1983, the Minister gave an instruction under Order in Council to the effect that contrary to past practice, GCHQ staff would no longer be permitted to belong to national trade unions. The Order in Council[39] was issued under what was described in the House of Lords as the "prerogative" power to regulate the home civil service.[40] Evidence showed a well-established practice of prior consultation between management and staff when conditions of service at GCHQ were to be significantly altered. The Minister had not consulted those affected prior to issuing the instruction, and the applicants[41] sought a declaration that the Minister's instruction was invalid for failure to accord procedural fairness.

The House of Lords decided that the applicants' case failed as the instruction was given without prior consultation for reasons of national security. But it was stressed that had national security not been involved, the applicants would have been entitled to the relief sought by reason of the practice of prior consultation.[42] Accordingly, the fact that the decision-making power derived from the prerogative was in itself no bar to judicial review. Lord Diplock was the most direct: "I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should *for that reason only* be immune from judicial review".[43] Lords Scarman and Roskill agreed that it was not possible to exclude judicial review of a decision simply because it was taken in the exercise of a prerogative power.[44] Lords Fraser and Brightman were prepared to treat an exercise of power under the Order in Council in the same manner as an exercise of statutory power. They did not decide whether powers exercised "directly" under the prerogative (as opposed to the exercise of delegated powers conferred under the prerogative) were open to judicial challenge.[45]

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38 See, eg, Walker, C, "Review of the Prerogative: The Remaining Issues" [1987] *PL* 62; Harris, M C, "The Courts and the Cabinet: 'Unfastening the Buckle'?" [1989] *PL* 251, and the articles referred to therein.

39 Civil Service Order in Council 1982, art 4 of which provided: "As regards Her Majesty's Home Civil Service — (a) the Minister for the Civil Service may from time to time make regulations or give instructions — . . . (ii) for controlling the conduct of the service, and providing for the classification of all persons employed therein and . . . the conditions of service of all such persons".

40 Doubt has been expressed as to whether the Crown's powers of control over the civil service (to the extent that they survive in the United Kingdom) can be described as "prerogative" in the strict sense of that term. See below 446-447.

41 The Council of Civil Service Unions, the Secretary of CCSU and certain individual union members employed at GCHQ.

42 [1985] AC 374 at 401 per Lord Fraser; at 407 per Lord Scarman; at 412-13 per Lord Diplock; at 420 per Lord Roskill; at 423 per Lord Brightman.

43 Id at 410.

44 Id at 407 per Lord Scarman; at 417 per Lord Roskill.

45 Id at 398 at 400 per Lord Fraser; at 423-24 per Lord Brightman. This difference of opinion

The Full Federal Court in *Peko-Wallsend* concluded that *CCSU* should be followed in Australia. Federal Cabinet had, in the exercise of prerogative power, nominated Stage II of Kakadu National Park for World Heritage listing under Article 11 of the World Heritage Convention. Peko held mineral leases over land in Stage II and instituted proceedings claiming that in making the decision Cabinet was bound by the principles of natural justice to afford it a hearing but had failed to do so. The Federal Court rejected this claim, but not because prerogative power was involved. To the contrary, the Court maintained that it was no longer possible to exclude judicial review merely because what was in issue was a prerogative decision.[46] Peko's claim was dismissed on the basis that an adequate hearing had been given,[47] and because the decision was not justiciable being a decision of Cabinet involving Australia's international relations[48] and a number of other "complex policy questions relating to the environment, the rights of Aboriginals, mining and the impact on Australia's economic position of allowing or not allowing mining".[49]

(2) *Factors Underpinning the Rejection in CCSU and Peko-Wallsend of the Traditional Immunity Principle*

At first blush, this recently expressed willingness of the House of Lords and the Federal Court to review the manner of exercise of the prerogative sits uneasily with previous decisions.[50] There is as yet no authoritative High Court pronouncement on the topic[51] and in strict law the question whether (and, if so, to what extent) Australian courts can inquire into the propriety of the exercise of the prerogative remains unresolved. But there is little doubt that, when called upon to do so, a majority of members currently on the High Court will follow the lead of the House of Lords and the Federal Court. The judgments in *CCSU* and *Peko-Wallsend* may be "landmarks", but they are not revolutionary. They draw from general developments in the law of judicial review since the early 1960s.[52] These developments have undermined the justifications traditionally offered for the complete immunity from review

between Lords Fraser and Brightman and the other Law Lords is explored in part below n83. It has been pointed out that in terms of strict precedent, *CCSU* left undecided whether "direct" exercises of prerogative power can be subject to judicial review. See Walker, C, "Review of the Prerogative: The Remaining Issues" [1987] *PL* 62 at 78-79. However, subsequent English and Australian cases have not taken this distinction. See *R v Secretary of State for the Home Department; ex parte Ruddock* [1987] 2 All ER 518 at 532; *Peko-Wallsend* (1987) 75 ALR 218; *R v Secretary of State for Foreign and Commonwealth Affairs; ex parte Everett* [1989] 2 WLR 224; and see also *R v Secretary of State for the Home Department; ex parte Harrison* [1988] 3 All ER 86; but cf *Hallett v Attorney-General* [1989] 2 NZLR 87 at 91 per Gallen J and *Burt v Governor-General* [1989] 3 NZLR 64 at 73 per Greig J.

46 Above n37 at 224 per Bowen CJ; at 226 per Sheppard J; at 249 per Wilcox J.

47 Id at 228 per Sheppard J; at 254 per Wilcox J.

48 Id at 253 per Wilcox J. He also concluded that the decision was not otherwise such as to attract the obligations of natural justice.

49 Id at 224 per Bowen CJ.

50 Above 432-433.

51 The High Court refused an application for special leave to appeal from the decision of the Federal Court in *Peko-Wallsend* (13 November 1987 — Mason CJ, Brennan and Dawson JJ).

52 In both *CCSU* and *Peko-Wallsend* the judges were anxious to place their reasons in the context of these changes. See [1985] AC 374 at 407 per Lord Scarman, at 410 per Lord Diplock, at 414 per Lord Roskill; (1987) 75 ALR 218 at 223 per Bowen CJ, at 244-48 per Wilcox J.

of the manner of exercise of prerogative power and, as such, repay close attention both from the point of view of anticipating High Court acceptance of *CCSU* and *Peko-Wallsend* and as an indication of yet another expansion in the law of judicial review — this time into the non-prerogative common law powers of the Crown, a prospect which is discussed below.[53]

Most cases taking a narrow view of judicial power to review exercises of the prerogative were decided at a time when the courts took a narrow view of their ability to review ministerial statutory discretion.[54] Since *Padfield v Minister of Agriculture, Fisheries and Food*[55] and *Murphyores Incorporated Pty Ltd v Commonwealth*[56] decisions made by ministers of the Crown in the exercise of statutory power have been regularly reviewed in both English and Australian courts. It is well documented that ministerial responsibility, once upheld as the citizen's defence against abuse of executive power is no longer adequate to the task in the context of modern "big" government.[57] As Bowen CJ, himself a former federal minister, observed in *Peko-Wallsend*:

> The increasing activities of government affecting citizens has led to a situation where ministerial responsibility is not able to reach down far enough to supervise the detailed dealings of government with members of the public. As a consequence the courts have increasingly been brought in to resolve disputes arising between aggrieved members of the public and the administrative arm of the government.[58]

This increasing judicial interventionism led the High Court in *Toohey*[59] to hold open to review for improper purpose a decision of the Crown Representative taken in the exercise of statutory power. Thus, in a landmark case,[60] the High Court showed itself no longer unwilling to review acts or decisions of the Crown, at least when referable to statutory authority.[61] In reaching this decision, the High Court rejected a number of arguments commonly raised for excluding review of prerogative and statutory discretions alike. Of the members of the Court, Mason J paid most attention to prerogative powers.[62] He rejected the secrecy of Crown counsels (identified by Dixon J in *Australian Communist Party v Commonwealth* as the reason underlying the general immunity from review of acts or decisions

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53 Below at 442-448.

54 Evans, J M, *De Smith's Judicial Review of Administrative Action* (1980) at 287.

55 [1968] AC 997.

56 (1976) 136 CLR 1.

57 If, indeed, it ever was. See, eg, the authorities cited in Allars, M, *Introduction to Australian Administrative Law* (1990) at 18-19. As Mason J points out in *Toohey* above n3 at 222 the "new administrative law" is premised on a consensus that ministerial responsibility "is not in itself an adequate safeguard for the citizen whose rights are affected".

58 Above n37 at 223.

59 Above n3.

60 See, eg, (1982) 56 *ALJ* 323 describing the decision in *Toohey* as "indubitably one of a landmark nature in the field of Australian constitutional law".

61 The decision in *Toohey* was promptly followed by the High Court in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 in which it was held that a decision of the Victorian Governor in Council in the exercise of statutory power was open to review for denial of natural justice. *Toohey* and *FAI* left unresolved the question whether it is possible to impugn the personal acts of the sovereign.

62 (1981) 151 CLR 170, 218-221.

of the Crown)[63] as an acceptable basis for continuing to exclude Crown acts, whether under statute or prerogative,[64] from judicial review given "modern notions of freedom of information and secrecy".[65] As he pointed out, following *Sankey v Whitlam*,[66] Executive Council documents are no longer necessarily immune from disclosure.[67] Dixon J's view in the *Communist Party* case has since been further undermined by suggestions that decisions of Cabinet are not necessarily immune from judicial challenge.[68] And as Gibbs CJ observed in *Toohey*, if evidence is available to make out the ground relied upon, then it is difficult to see why it should not be acted upon.[69]

Of the principle that the King can do no wrong, Mason J in *Toohey* appealed to constitutional and political reality:

> . . . it is at least questionable whether it should now apply to acts affecting the rights of the citizen which, though undertaken in the name of the Sovereign or his representative, are in reality decisions of the executive government. In the exercise of the prerogative as in other matters the Sovereign and her representatives act in accordance with the advice of her Ministers. This has been one of the important elements in our constitutional development. *The continued application of the Crown immunity rule to the exercise of prerogative power is a legal fiction.*[70]

In a similar vein, Lord Roskill in *CCSU* attacked contemporary reference to the acts of the sovereign as "irresistible and absolute" as impeding the development of administrative law by harking back to "the clanking of mediaeval chains of the ghosts of the past". Whether the executive acts under prerogative or acts under statute "the act in question is the act of the executive. To talk of that act as the act of the sovereign savours of the archaism of past centuries".[71]

Arguments to the effect that prerogative powers lack the limitations in scope, purpose and criteria which render so many statutory powers amenable to broad grounds of review were referred to above. In *Toohey*, Mason J suggested that this distinction was still a vital one:

> The statutory discretion is in so many instances readily susceptible to judicial review for a variety of reasons. Its exercise very often affects the right of the citizen; there may be a duty to exercise the discretion one way or another; the discretion may be precisely limited in scope; it may be

63 Above n25 at 179.
64 Above n3 at 219.
65 Id at 222.
66 (1978) 142 CLR 1.
67 Above n3 at 222.
68 At least on natural justice grounds in situations where "Cabinet is called upon to decide questions which are much more closely related to justice to the individual than with political, social and economic concerns". See *South Australia v O'Shea* (1987) 163 CLR 378, especially at 387-88 per Mason CJ and at 415-16 per Deane J; *Peko-Wallsend* (1987) above n37 at 226-27 per Sheppard J, at 244-49 per Wilcox J. See generally Harris, M C, "The Courts and the Cabinet: 'Unfastening the Buckle'?" [1989] *PL* 251.
69 Above n3 at 193. *Peko-Wallsend* was claimed to be such a case. See (1987) above n37 at 245 per Wilcox J. Dixon J's view in the *Communist Party* case has since been further undermined by *Church of Scientology v Woodward* (1982) 154 CLR 25 and *Alister v R* (1984) 58 ALJR 97.
70 Above n3 at 220 (emphasis added).
71 Above n5 at 417.

> conferred for a specific or an ascertainable purpose; and it will be exercisable by reference to criteria or considerations express or implied. The prerogative powers lack some or all of these characteristics.[72]

But prerogative powers today do not necessarily fit this description and the characteristics which distinguish a prerogative discretion from a statutory discretion need to be reassessed. *CCSU* illustrates how the exercise of prerogative power may have a direct and immediate effect upon individual rights or legitimate expectations. *R v Secretary of State for Foreign and Commonwealth Affairs; ex parte Everett*,[73] in which the English Court of Appeal held that the Secretary of State's prerogative decision to refuse to issue a new passport to a British citizen residing abroad was amenable to review by the courts, provides a further illustration of how exercise of the prerogative may affect the "right of the citizen".[74] As to limitations in scope, purpose and criteria, recent English case law has shown that administrative rules or guidelines may structure the exercise of a prerogative discretion,[75] in contrast to which courts in England and Australia have applied principles of judicial review to the exercise of statutory discretions virtually unstructured by Parliament.[76] The phenomenon of "enacted prerogatives" of the sort at issue in *Coutts v Commonwealth*[77] (prerogative powers enacted in legislative form without further definition) has further blurred the dividing line between statute and prerogative.[78] Put simply, if a broad, virtually unstructured statutory discretion like that under consideration in *Murphyores Incorporated Pty Ltd v Commonwealth*[79] is amenable to judicial review, then on what basis can a prerogative discretion (whether expressed in legislative form or otherwise) be distinguished? If legislative intent provides the rationale for judicial review for denial of natural justice and abuse of power then there does exist a valid distinction based on source of power.[80] But there is reason to believe that judicial review, at the very least on natural justice grounds, can now be seen as "an autonomous part of the common

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72 Above n3 at 219.

73 [1989] 2 WLR 224.

74 Other illustrations may be readily envisaged, involving, eg, the prerogative of mercy or the Attorney General's prerogative discretions.

75 *R v Criminal Injuries Compensation Board; ex parte Lain* [1967] 2 QB 864 (approved by the House of Lords in *CCSU*); *R v Secretary of State for the Home Department; ex parte Ruddock* [1987] 2 All ER 518; *R v Secretary of State for the Home Department; ex parte Harrison* [1988] 3 All ER 86; *R v Secretary of State for Foreign and Commonwealth Affairs; ex parte Everett* [1989] 2 WLR 224.

76 See, eg, *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1.

77 (1985) 157 CLR 91.

78 The enacted prerogative in *Coutts v Commonwealth* was contained in Air Force Regulation 72(1) (Cth) which provided that an "officer shall hold his appointment during the pleasure of the Governor-General". Under the prerogative power of command of the armed forces, an officer holds his or her appointment at pleasure. Enacted prerogatives were also the subject of judicial consideration in *Barton v The Queen* (1980) 147 CLR 75 and *Macrae v Attorney-General for New South Wales* (1987) 9 NSWLR 268.

79 (1976) 136 CLR 1.

80 A point made extra-curially by Brennan J. See Sir Gerard Brennan, "The Purpose and Scope of Judicial Review" in Taggart, M, (ed), *Judicial Review of Administrative Action in the 1980s* (1986) at 26-27.

law".[81] This point is elaborated in some detail below.[82] Thus, as Lord Fraser said of the prerogative power in *CCSU*:

> if the Order in Council of 1982 had been made under the authority of a statute, the power delegated to the Minister by article 4 would have been construed as being subject to an obligation to act fairly. I am unable to see why the words conferring the same powers should be construed differently merely because their source was an Order in Council made under the prerogative . . . whatever their source, powers which are defined, either by reference to their object or by reference to procedure for their exercise, or in some other way, and whether the definition is expressed or implied, are in my opinion normally subject to judicial control to ensure that they are not exceeded.[83]

There is discernible in this passage and like passages in the judgments in *CCSU* an undercurrent of concern that if the manner of exercise of the prerogative were to remain immune from judicial challenge, then the executive would be tempted whenever possible to rely on the prerogative to achieve its goals in preference to securing the enactment of legislation, a situation which would threaten the values protected by conformity to the rule of law.[84] Seen in this light, *CCSU* is yet another rejection of the classification of powers approach to judicial review.[85]

Of the justifications traditionally offered for the complete immunity from review of the manner of exercise of prerogative power, it remains to consider those based on subject matter. Taken by itself, the subject matter of a particular prerogative decision may render judicial review inappropriate;[86] or

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81 To borrow the words of Sir Gerard Brennan, ibid at 26. It would seem, however, that Brennan, J would not accede to the theory of an autonomous common law of judicial review. See, eg, his judgment in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

82 Below at 462-466.

83 Above n5 at 399. See also at 410 per Lord Diplock and at 417 per Lord Roskill. It should be remembered in this context that Lords Fraser and Brightman were only prepared to treat an exercise of power under art 4 of the Order in Council in the same manner as an exercise of statutory power. They did not decide whether powers exercised "directly" under the prerogative (as opposed to the exercise of delegated powers conferred under the prerogative) were open to challenge in the courts. This seems to have been because the Order in Council "defined" the prerogative sufficiently to render it amenable to judicial control (at 399 per Lord Fraser, at 424 per Lord Brightman). But if a "direct" prerogative is sufficiently "defined" why should the propriety of its exercise be immune from review? This distinction drawn by Lords Fraser and Brightman between "direct" and "indirect" exercises of the prerogative is discussed in Walker, C, "Review of the Prerogative: The Remaining Issues" [1987] *PL* 62 at 78-80, the author concluding that there is no good reason for allowing judicial review to be affected by these concerns. See now *R v Secretary of State for the Home Department; ex parte Ruddock* [1987] 2 All ER 518; *R v Secretary of State for the Home Department; ex parte Harrison* [1988] 3 All ER 86 and *R v Secretary of State for Foreign and Commonwealth Affairs; ex parte Everett* [1989] 2 WLR 224. In each of these cases the court entertained an application for judicial review of a "direct" exercise of the prerogative, although the point was expressly reserved in both *Ruddock* and *Harrison*. The Australian cases have not taken this "direct"/"indirect" distinction and it will not be further discussed.

84 Allars, M, above n57 at 47.

85 As Mason J observed in *Toohey* (1981) above n3 at 225: "the modern view, now received doctrine, is that the classification of powers is not a sound criterion for the operation of precise rules of law".

86 See, eg, *Peko-Wallsend* (1987) above n37 at 224-25 per Bowen CJ.

the subject matter of a particular prerogative power may be such that it would be inappropriate for the courts (save in exceptional circumstances) ever to inquire into the propriety of its exercise.[87] But "subject matter" in this sense provides no foundation in principle for a blanket immunity rule covering every exercise of every prerogative. The prerogative powers which remain in the hands of the Crown are diverse[88] and the circumstances of their exercise infinitely varied. Whether the subject matter of a prerogative decision presents a barrier to review by the courts is thus a matter for consideration in the circumstances of each individual case. The subject matter of prerogative decisions and the issues of justiciability arising therefrom are examined in greater detail later in this paper.[89]

(3) *Australian Prospects*

There is thus every indication that when the matter comes directly before it, the High Court will adopt a *CCSU* approach to judicial review of the manner of exercise of prerogative power. The foundations of the old rule have been swept away by the course of judicial decision. To retain it would be in deference to history. The law of judicial review in the last three decades has not been characterised by uncritical adherence to precedent. It has evolved in tune with the growth of executive government, the decline of parliament and increased public demand for administrative accountability, a process hastened by statutory reform.[90]

A number of recent High Court observations show a preparedness to reconsider the supposed immunity from review of the manner of exercise of prerogative power. Typical of these is the statement of Mason J in *Toohey* that:

> there is much to be said for the view . . . that the exercise of a discretionary prerogative power 'can be examined by the courts just as any other discretionary power which is vested in the executive'. The question would then remain whether the exercise of a particular prerogative power is susceptible of review and on what grounds.[91]

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87 The treaty-making prerogative is such an example. See below at 457-459.

88 See, eg, the list of prerogative powers in Allott, P, "The Courts and the Executive: Four House of Lords Decisions" [1977] *CLJ* 255 at 267-68. Note, however, that some of the prerogative powers referred to by Allott have no application to Australian conditions or have been superseded in Australia by legislation. See also Winterton, G, above n30 at 111-22; *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 at 114 per Viscount Radcliffe.

89 Below at 448-461.

90 For example, enactment of the *Administrative Appeals Tribunal Act* 1975 (Cth) and the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

91 Above n3 at 220-21 quoting Lord Denning MR in *Laker Airways Ltd v Department of Trade* [1977] QB 643 at 705. Aickin and Wilson JJ in separate judgments also showed a preparedness to reconsider the supposed immunity from review of exercises of the prerogative. See at 254, 261 per Aickin J and 282-83 per Wilson J. In other cases, members of the High Court refused to endorse the traditional immunity from review of the manner of exercise of prerogative power when they might have done so. See *A v Hayden* (1984) 156 CLR 532 at 549 per Gibbs CJ, at 590 per Brennan J; *Coutts v Commonwealth* (1985) 157 CLR 91 at 99-100 per Wilson J, at 115 per Deane J; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, at 23 per Mason CJ, at 45 per Deane J; but cf Brennan J in *Kioa v West* (1985) 159 CLR 550 at 611 and extra-curially in Sir Gerard Brennan, "The Purpose and Scope of Judicial Review" in Taggart, M, (ed), *Judicial Review of Administrative Action in the 1980s* (1986) at 26-27. See also the decision of the Supreme Court of Canada

And even more recently, three members of the High Court in *Annetts v McCann*[92] quoted with apparent approval the view expressed by Deane J in *Haoucher v Minister for Immigration and Ethnic Affairs*[93] that the law seemed to him:

> to be moving towards a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognised as applying generally to governmental executive decision-making.[94]

It seems then that the High Court will follow the majority position in *CCSU*. For the Court to do otherwise would fly in the face of its own observations and would entrench as law an outmoded rule whose justifications no longer held good.

C. *Is the Manner of Exercise of Non-Prerogative Common Law Power Necessarily Immune From Judicial Review?*

Conceptually, the Crown is a legal person; at common law it possesses, in addition to its prerogative powers, certain of the rights and capacities of a private citizen. Just as a private citizen may enter into a contract, make inquiry of others, or own property (whether real or personal), so too may the Crown.[95] This principle supports many important governmental powers, but in the words of one commentator "must not be pressed too far. It can be applied only when the executive and private actions are identical, but this will rarely be so, because governmental action is inherently different from private action."[96] This principle is also subject to the need for an appropriation by parliament of any monies to be spent by the executive and, in the Australian context, to the division of powers effected by the Commonwealth Constitution. This paper, as apparent from its title, is concerned with judicial review of prerogative power. Nevertheless, if the expansion in the scope of judicial review heralded by *CCSU* and

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in *Operation Dismantle v The Queen* (1985) 18 DLR (4th) 481 where it was held that the Canadian Cabinet was bound by the Canadian Charter of Rights and Freedoms in respect of decisions made pursuant to both statutory and prerogative power. Although this followed from the terms of the Charter itself, (s32(1)(a) thereof), Wilson J added that: "[s]ince there is *no reason in principle to distinguish between Cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative*, and since the former clearly fall within the ambit of the Charter, I conclude that the latter do so also" (at 498, emphasis added).

92 (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ.

93 (1990) 169 CLR 648.

94 Id at 653.

95 In relation to the Crown's contractual powers, see *New South Wales v Bardolph* (1934) 52 CLR 455 at 475 per Evatt J: "No doubt the King had special powers, privileges, immunities and prerogatives. But he never seems to have been regarded as being less powerful to enter into contracts than one of his subjects". In relation to the Crown's power of inquiry, see *Clough v Leahy* (1904) 2 CLR 139 at 156-57 per Griffith CJ (with whom Barton and O'Connor JJ agreed). In relation to the Crown as landowner, see *"Sydney" Training Depot Snapper Island Ltd v Brown* (1987) 14 ALD 464 and Richardson, J E, "The Executive Power of the Commonwealth" in Zines, L, (ed), *Commentaries on the Australian Constitution* (1977) at 57.

96 Winterton, G, above n30 at 121. See also Wade, W, *Constitutional Fundamentals* (rev edn, 1989) at 70-71.

Peko-Wallsend is to be fully appreciated, some mention should be made of these non-prerogative common law powers. More particularly, to what extent is the manner of exercise of these powers amenable to review by the courts? Are the courts confined to questions of *vires* in the narrowest sense, or do the developments described above in relation to the prerogative demand a more extensive form of judicial oversight?

Dicta in both *CCSU* and *Peko-Wallsend* suggest that the latter is the case. In *CCSU*, Lord Diplock stood alone in expressing doubt as to whether the Crown's common law powers of control over the civil service could properly be described as deriving from the prerogative in the strict sense of the term.[97] But Lord Diplock was not compelled to decide this point for he formulated rules for determining the availability of judicial review which drew no distinction between sources of governmental power, focusing instead on the nature and effect of the relevant decision:

> For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have [consequences on private rights or legitimate expectations].[98]

And he went on to observe more starkly:

> I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should *for that reason only* be immune from judicial review.[99]

In *Peko-Wallsend*, Bowen CJ expressed a similar view. Although it was an exercise of prerogative power which was before the Federal Court in that case,[100] he further ventured, stating that subject to the exclusion of decisions non-justiciable by reason of subject matter:

> the courts of this country should now accept responsibility for reviewing the decisions of Ministers or the Governor-General in Council notwithstanding the decision is carried out in pursuance of a power derived not from statute but from the *common law or the prerogative*.[101]

The full implication of these passages from the judgments of Lord Diplock and Chief Justice Bowen has been somewhat overlooked in most analyses of *CCSU* and *Peko-Wallsend*. Yet these passages repay close attention. As a matter of principle, the rejection of the traditional immunity from review of the manner of exercise of prerogative power compels a like rejection of any lingering immunity attached to the Crown's other common law powers. To hold open to review one category of the Crown's common law powers, but not the other, would deny the developments of the last thirty years and

97 Above n5 at 409.

98 Ibid.

99 Id at 410. Lord Diplock's remarks, downplaying source of power as a criterion of reviewability, were relied upon by the English Court of Appeal in *R v Panel on Take-Overs and Mergers; ex parte Datafin Plc* [1987] QB 815 in concluding that it had jurisdiction to entertain applications for judicial review of decisions of the Panel.

100 Above n37 at 223-24 per Bowen CJ, at 226 per Sheppard J, at 244 per Wilcox J.

101 Id at 224 (emphasis added).

mark a return of the law of judicial review to formal distinctions based on the classification of powers. The exercise of the Crown's rights and capacities as a juristic person may have a direct and immediate effect upon individual rights or legitimate expectations. An oft cited example is the removal, without a hearing, of a contractor from a list of approved government contractors because the minister believed that the contractor had contravened the terms of some government policy,[102] a not implausible scenario.[103] Similarly, a decision by a minister to refuse to grant an application for payment (out of monies voted by parliament) under the terms of a government compensation scheme could also, in certain circumstances, impact directly upon individual rights or legitimate expectations.[104] In fact, the only apparent distinction between the prerogative and non-prerogative common law powers of the Crown, when considering susceptibility to judicial review, is that the latter are shared by the Crown in common with all, whereas the former are unique to the Crown.[105] But the availability of review by the courts never seems to have turned on the singular nature, in this sense, of a governmental power or capacity — witness the role played by judicial review in the context of public sector employment.[106] Whether a decision of the executive is referable to prerogative or non-prerogative common law power, the decision is an act of government involving the exercise of public power and (frequently) the expenditure of public monies. This alone should be sufficient to attract to the decision-making process, at least on a prima facie basis, the principles of judicial review.

Of course, it does not follow that the manner of exercise of the non-prerogative common law powers of the Crown should, in every case, be amenable to review by the courts, or that such review as is undertaken should proceed in an identical fashion to the review of statutory or prerogative power. For instance, judicial review may not be appropriate, or may be appropriate only in a limited form, where the relevant decision is made in connection with a government activity or enterprise intended to operate, and in fact operating, in full competition with the private sector.[107] It is not possible within the confines of this paper to develop a comprehensive theory as to when judicial review of the Crown's non-prerogative common law powers should or should not be available; but whether such review should

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102 Evans, J M, above n54 at 289.

103 See Daintith, T, "Regulation by Contract: The New Prerogative" (1979) 32 *CLP* 41 at 41-42.

104 *CCSU* above n5 at 409-10 per Lord Diplock. Consider also *R v Criminal Injuries Compensation Board; ex parte Lain* [1967] 2 QB 864 and *R v Secretary of State for the Home Department; ex parte Harrison* [1988] 3 All ER 86.

105 See below at 446.

106 Cf, however, *Burt v Governor-General* [1989] 3 NZLR 64 at 73 per Greig J. It should also be noted that in construing the expression "decision of an administrative character" (an element in the definition of "decision to which this Act applies") in s3(1) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), the Federal Court has rejected arguments that such decisions must be "of a nature unique to government". See *Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd* (1985) 60 ALR 284 at 287. See also *Hamblin v Duffy* (1981) 34 ALR 333 at 341 and *Evans v Friemann* (1981) 35 ALR 428.

107 See Arrowsmith, S, "Judicial Review and the Contractual Powers of Public Authorities" (1990) 106 *LQR* 277 at 291.

be limited by reference to "the public/private distinction",[108] or by reference to "specific policy factors",[109] or some other criterion, the need to place limitations on the scope of review provides, in itself, no justification for an assumption of unreviewability in the case of this category of the Crown's common law powers, but not (now) the other.

This conclusion — that both categories of the Crown's common law powers should be open to review by the courts — is reinforced by the longstanding dispute as to what actually amounts to an exercise of the royal prerogative (strictly so-called) as opposed to the mere exertion by the Crown of its rights of legal personality.[110] One definition of the royal prerogative, which has found favour with many members of the House of Lords, would apply that term to virtually any executive act not referable to statute. This broad usage can be traced to the writings of Dicey who described the prerogative as:

> nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown . . . Every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative.[111]

Of significance in the present context is the fact that Lords Fraser and Roskill in *CCSU* referred with apparent approval to what was termed "Dicey's classic statement" of the prerogative.[112] This in turn suggests that Lord Roskill, in asserting the absence of any logical reason for excluding judicial review of a decision simply because it was taken in the exercise of prerogative as opposed to statutory power, was contemplating judicial review of the manner of exercise of *all* the Crown's common law powers, using the term "prerogative" in its broad Diceyean sense.[113] Although his judgment is

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108 A criterion hinted at by Wilcox J in *"Sydney" Training Depot Snapper Island Ltd v Brown* (1987) 14 ALD 464 at 465 (although his Wilcox J seemed to suggest that an exercise by the executive government of a power conferred other than by statute or the royal prerogative could not raise a matter "in the realm of public law"). The distinction between matters falling within the domain of public law and those falling within the domain of private law has received little attention in Australia, but is the subject of a growing body of jurisprudence in the United Kingdom in light of the Order 53 procedure for making an application for judicial review. See, eg, Woolf, H, "Public Law — Private Law: Why the Divide? A Personal View" [1986] *PL* 220 and Cane, P, "Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept" in Eekelaar, J and Bell, J, (eds), *Oxford Essays in Jurisprudence* (Third Series 1987).

109 Above n107 at 291.

110 As to the existence of this dispute see, eg, *Davis v Commonwealth* (1988) 166 CLR 79 at 108 per Brennan J.

111 Dicey, A V, above n10 at 354-55 adopted in *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 at 526 per Lord Dunedin (but cf Lord Parmoor at 571-72: "A right common both to the Crown and all subjects is not in the strict sense a prerogative right of the Crown. Royal prerogative implies a privilege in the Crown of a special and exclusive character"); *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 at 99 per Lord Reid, at 137 per Lord Hodson, at 148 per Lord Pearce, but see at 164-65 per Lord Upjohn.

112 Above n5 at 398 per Lord Fraser, at 416 per Lord Roskill.

113 Id at 417. As noted earlier, Lord Fraser did not decide whether a power exercised "directly" under the prerogative was open to judicial challenge. To the extent to which he was prepared to concede the reviewability of an "indirect" exercise of prerogative power, it is arguable that he too was using the term "prerogative" in its Diceyean sense. See id at 398-99.

not unambiguous in this regard,[114] it may be that additional support for the reviewability of the manner of exercise of the Crown's non-prerogative common law powers is to be found in this fashion in *CCSU* itself.

The competing definition of the term "prerogative", and that adopted in this paper, is generally expressed in the words of Blackstone who described the prerogative as:

> that special pre-eminence which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in it's [sic] etymology, (from *prae* and *rogo*) something that is required or demanded before, or in preference to, all others. And hence it follows that *it must be in it's* [sic] *nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others* . . . for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer.[115]

That prerogative powers comprise only those common law powers unique to the Crown has been accepted by the modern text writers,[116] by several members of the High Court, and by certain members of the House of Lords.[117] But acceptance of this second definition of the royal prerogative begs the question of which non-statutory executive powers can truly be described as "singular and eccentrical" in Blackstone's sense. Sir William Wade has explored this question in some depth.[118] Wade argues that Blackstone's definition of the prerogative should be strictly applied and he criticises several recent judgments for use of the term when "no genuine prerogative power was in question at all".[119] *CCSU* is one such judgment. Although it was held in that case that the Crown's powers of control over the civil service (to the extent that they survive in the United Kingdom) derive from the royal prerogative, Wade challenges this finding arguing that "in their essence" such powers "are merely the powers which any employer has over his employees".[120] De Smith also casts doubt on whether the Crown's powers in relation to the civil service are rightly described as prerogative,[121] although other English writers reject this view, arguing that "the legal relationship between the Crown and Crown servants is an aspect

114 Lord Roskill does not positively state that he is using the term "prerogative" in its Diceyean sense. However, it is submitted that this is a fair inference given his comments id at 416.

115 Blackstone, W, above n9 at 239 (emphasis added).

116 *Halsbury's Laws of England* (4th edn,) Vol 8 para 889; de Smith, S A, *Constitutional and Administrative Law* (1985) at 139-40; Wade, E C S and Bradley, A W, *Constitutional and Administrative Law* (10th edn, 1985) at 245, 247; Zines, L, *The High Court and the Constitution* (3rd edn, 1992) at 216-17; Wade, W, above n96 at 58-62. See also Evatt, H V, *The Royal Prerogative* (1987) at 12, but cf Winterton, G, *Parliament, The Executive and The Governor-General* (1983) at 111-12.

117 See, eg, the cases referred to by Winterton, G, id at 296, n 12. See also *CCSU* above n5 at 409 per Lord Diplock.

118 Wade, W, *Administrative Law* (6th edn, 1988) at 240-42, 391-94; *Constitutional Fundamentals* above n116 at 58-62.

119 Id (1989) at 58.

120 Wade, W, *Administrative Law* above n118 at 242. Wade's view of the source of the power in *CCSU* was adopted by Greig J in *Burt v Governor-General* [1989] 3 NZLR 64 at 71.

121 Evans, J M, above n54 at 289.

of the prerogative since it differs markedly from the normal contractual relationship between employer and employee".[122] The point is that if one accepts Wade's analysis of *CCSU*, it follows that the House of Lords in that case conceded the prima facie reviewability of the manner of exercise of one of the Crown's non-prerogative common law powers, although, with the possible exception of Lord Diplock, it mistakenly attributed that exercise of power to the prerogative. Seen in this light, *CCSU* provides further support for judicial control of the manner of exercise of *all* the Crown's common law powers.

But even more importantly, and leaving aside technical analyses of *CCSU*, the above discussion is testament to the inability of the courts (and the commentators) to draw a neat division between the two categories of executive common law power. The question "what is prerogative" is fraught with difficulty — it is not without good reason that Lord Wilberforce once described the prerogative as "this elusive concept".[123] Should something so elusive as the distinction between the prerogative and non-prerogative common law powers of the Crown mark a boundary beyond which the modern law of judicial review cannot go? Should the availability of relief to an aggrieved person turn on technical legal analysis as to whether an exercise of power by the executive was truly "singular and eccentrical" in Blackstone's sense? The answer must be no. It was surely with an eye to avoiding such formalism that Deane J recently offered the observation (already quoted above) that the law seemed to him:

> to be moving towards a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognised as applying generally to governmental executive decision-making.[124]

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122 Wade, E C S and Bradley, A W, above n116 at 247. Sir William Wade's criticism of *CCSU* can also be directed to *R v Criminal Injuries Compensation Board; ex parte Lain* [1967] 2 QB 864. That case concerned a non-statutory scheme, described by the court (and subsequently the House of Lords in *CCSU*) as an emanation of the prerogative, for compensating victims of violent crime by way of payments from sums voted by parliament. It was held in *Lain* that *certiorari* would issue to quash decisions of the Board which were not reached in accordance with the published terms of the scheme, a finding hailed somewhat belatedly in *CCSU* as signalling the end of the traditional immunity from review of the prerogative. But should *Lain* be analysed in terms of the prerogative? Is not *Lain* a classic example of the exercise by the Crown of its non-prerogative common law powers? As Lloyd LJ said in *R v Panel on Take-Overs and Mergers; ex parte Datafin Plc* [1987] QB 815, 848 surely there is "nothing unique in the creation by the government, out of funds voted by Parliament, of a scheme for the compensation of victims of violent crime. Any foundation or trust, given sufficient money, could have done the same thing". See also Wade, W, above n118 at 242 and *Constitutional Fundamentals* above n96 at 59-60.

123 *Nissan v Attorney-General* [1970] AC 179, 236.

124 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 653.

3. *The Subject Matter of Prerogative Decisions — Issues of Justiciability*

A. *General Principles*

> Certainly the House of Lords decided in the *CCSU* case that the fact that a decision is made or action is taken in exercise of the prerogative is no reason why such a decision or action should not be amenable to the control of the courts by way of judicial review. What they did not decide, however, was that every decision made or action taken in exercise of the prerogative was for that reason alone amenable to judicial review.[125]

While *CCSU* and *Peko-Wallsend* mark a considerable theoretical expansion in the supervisory jurisdiction of the courts, what has been achieved in practice is a less than dramatic increment in the scope of judicial review. *CCSU* and *Peko-Wallsend* did not decide that the prerogative decision-making process was reviewable in all cases. Instead, the availability of judicial review was said to depend on the nature and subject matter of the relevant decision. In the words of Lord Scarman in *CCSU*:

> if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review . . . Today . . . the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter.[126]

It will be recalled that the House of Lords refused to classify the mode of exercise of the Crown's powers of control over the civil service as a priori non-justiciable.[127] The applicants' case failed because the Minister had shown that the instruction altering conditions of employment at GCHQ had been issued in disregard of the practice of prior consultation for reasons of national security, the House of Lords indicating that they were not prepared to question the Minister's judgment in this regard.[128] Similarly, in *Peko-Wallsend*, the reviewability of a prerogative decision was said to turn on its "subject-matter"[129] or "nature and effect".[130] Accordingly, the subject matter of the prerogative to act under or implement an existing treaty, coupled with its exercise in a context involving a range of complex social, economic and environmental policy questions[131] led Bowen CJ and Wilcox J to their conclusion that the Cabinet decision was non-justiciable.

There is no doubt that the High Court will also accept "subject matter" in this sense as a relevant limitation on the amenability to review of

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125 *R v Civil Service Appeal Board; ex parte Bruce* [1988] 3 All ER 686 at 691-92 per May LJ.

126 Above n5 at 407. See also at 398 per Lord Fraser, at 411 per Lord Diplock, at 418 per Lord Roskill.

127 Id at 398 per Lord Fraser, at 407 per Lord Scarman, at 412-13 per Lord Diplock, at 418 per Lord Roskill.

128 Id at 402 per Lord Fraser, at 406-407 per Lord Scarman, 412-13 per Lord Diplock, at 420-23 per Lord Roskill.

129 Above n37 at 223, 224 per Bowen CJ.

130 Id at 249 per Wilcox J.

131 Id at 224 per Bowen CJ, at 253 per Wilcox J. Wilcox J also held that the Cabinet decision had no direct or immediate effect on Peko's rights or legitimate expectations and, as such, did not attract the obligations of natural justice (at 252-53).

prerogative decisions. In *Toohey*, Mason J observed that there was "much to be said for the view" that the exercise of discretionary prerogative power "can be examined by the courts just as any other discretionary power which is vested in the executive"[132] adding that the "question would then remain whether the exercise of a particular prerogative power is susceptible of review and on what grounds."[133] Wilson J considered that in the case of prerogative powers "the subject matter of the power will be of primary importance in determining whether the manner of exercise of the power is justiciable",[134] a view which he repeated in *Coutts v Commonwealth*.[135] Indeed, the only judicial statement in either Australia or England which has endorsed judicial review of the manner of exercise of prerogative power without setting limits to that jurisdiction by reference to subject matter, is that of Lord Denning MR in *Laker Airways Ltd v Department of Trade*.[136] However, Lord Denning's views in this regard must be taken as superseded by *CCSU*, Lord Roskill expressly referring to them as "far too wide".[137]

Central to this notion of the subject matter of a prerogative decision is the individual prerogative power concerned. What follows is an examination of the susceptibility to review by subject matter of a number of prerogative powers relevant in the Australian context: the defence prerogatives; the prerogative of mercy; the Attorney General's prerogative power to file an ex officio information; and the treaty prerogative. Bearing in mind *CCSU* and *Peko-Wallsend* it should not be forgotten, however, that the subject matter of a prerogative decision as a criterion of reviewability embraces some broader issues of justiciability relevant to the exercise of both statutory and prerogative discretions alike. A discretionary executive power (whether statutory or prerogative) may be exercised in a context involving national security, "fiscal emergency",[138] international relations or other complex policy matters. In the past, the courts were frequently able to avoid pronouncing upon the amenability to the judicial process of decisions involving such matters by invoking the shelter of one or other of a range of doctrines such as the immunity from review of acts of the Crown Representative, the immunity from review of Cabinet decisions as well as the traditional immunity from review of the prerogative decision-making process. With the steady erosion of these blanket immunity doctrines, issues of justiciability have loomed larger across the law of judicial review as a whole to the point where justiciability has been described as the "most potent

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132 Above n3 at 220-21 quoting Lord Denning MR in *Laker Airways Ltd v Department of Trade* [1977] QB 643, 705.

133 Above n3 at 221. A Justice at the time and now Chief Justice, he has since repeated this view extra-curially. See Sir Anthony Mason, "Administrative Review: The Experience of the First Twelve Years" (1989) 18 *FLR* 122 at 124.

134 Above n77 at 100. In *Macrae v Attorney-General for New South Wales* (1987) 9 NSWLR 268 at 281-282 Kirby P also indicated that review of prerogative executive action was dependent on subject matter.

135 Above n3 at 283. Aickin J at 261 indicated that he too would look to the subject matter of a prerogative power in determining whether the manner of exercise of the power was reviewable in the courts.

136 Above n17 at 704-706.

137 Above n5 at 416.

138 Id at 420 per Lord Roskill.

question for the administrative lawyer".[139] This concept is now the subject of an emerging Anglo-Australian jurisprudence which seeks, broadly speaking, to characterise an executive decision as either a "policy decision" because of its high policy content or essentially political nature, or, on the other hand, as an "individualised decision" determinative of individual rights and involving no (or limited) policy or political factors.[140] In an extra-curial commentary, Sir Anthony Mason has described this "new concept of justiciability" as:

> whether the issue is determinative rather than political in character, that is, of a kind that invites a judicial, rather than a political, solution. The answer to that question in a given case would depend on a number of factors, not least of them being the nature and importance of the policy considerations and the degree to which it can be said that the decision is determinative of the rights or interests of an individual.[141]

This developing concept of justiciability may ultimately provide a general test for determining when prerogative action will attract judicial review. Nevertheless, it is reasonable to suppose that the particular prerogative power underlying a prerogative decision will continue to constitute a key factor in any justiciability equation.

Before discussing the susceptibility to review by subject matter of those prerogative powers mentioned, one point of judicial technique requires explanation. A feature of recent decisions in this area is the extent to which older authorities, once thought to establish the complete immunity from review of the manner of exercise of prerogative power, have not been cast out by the courts but, to the contrary, have been reinterpreted and reaffirmed on the basis of the nature and subject matter of the decision in question. Cases like *Barton v The Queen*[142] and *Blackburn v Attorney General*,[143] have received new life in this fashion. Hence the relevance to the discussion that follows of some such older cases, not wholly discredited by *CCSU* and *Peko-Wallsend*, but now open to a fresh interpretation.

B. Susceptibility to Review — Particular Prerogative Powers

(1) The Defence Prerogatives

There is judicial consensus to the effect that the royal prerogatives relating to war and the control of the armed forces are not, by reason of their nature and subject matter, susceptible to review by the courts.[144] This view has been

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139 Allars, M, above n57 at 2.

140 See, eg, Harris, M C, "The Courts and the Cabinet: 'Unfastening the Buckle'?" [1989] *PL* 251 at 279-86; Waye, V, "Justiciability" in Harris, M and Waye, V, (eds) *Administrative Law* (1991); Harris, B V,"Judicial Review of the Prerogative of Mercy?" [1991] *PL* 386 at 397-400. See also Williams, D G T, "Justiciability and the Control of Discretionary Power" in Taggart, M, (ed), *Judicial Review of Administrative Action in the 1980s* (1986) and *South Australia v O'Shea* (1987) 163 CLR 378, especially at 387 per Mason CJ.

141 Sir Anthony Mason, above n133 at 124.

142 Above n19. See below at 455.

143 Above n16. See below at 457-458.

144 *Toohey* above n3 at 220 per Mason J, at 281, 283 per Wilson J; *CCSU* above n5 at 398 per Lord Fraser, at 406 per Lord Scarman, at 418 per Lord Roskill; *Coutts v Commonwealth* above n 77 at 100-101 per Wilson J.

frequently expressed,[145] but only rarely explained. Why does the subject matter of such powers render judicial review inappropriate?

In the first place, decisions to declare war and make peace and concerning the control of the armed forces in time of war are quintessentially policy or political decisions in the sense that certain individual interests must inevitably suffer to secure the overriding public goal of national survival. The balance between these competing interests is unsuitable for determination in adversarial proceedings which tend to stress the individual over the societal interest,[146] and which may also be both protracted (in a rapidly changing wartime situation) and expensive. Related to this is a recognition by the courts that effective national defence in time of war demands a strong central leadership with wide powers at its disposal. The judicialisation of defence decisions in wartime could seriously undermine the executive's capacity to strike swiftly at the enemy. In the words of Lord Reid in *Burmah Oil Co Ltd v Lord Advocate*:[147]

> The reason for leaving the waging of war to the King (or now the executive) is obvious. A schoolboy's knowledge of history is ample to disclose some of the disasters which have been due to parliamentary or other outside attempts at control.[148]

Nevertheless, the strength of these justifications for the unreviewability of the defence prerogatives is somewhat diminished in peacetime conditions. And it should be borne in mind that the prerogative power relating to the armed forces ranges from the power to control troop movements to the power to regulate individual employment conditions in what is now a career military service.[149] What is so striking about the "subject matter" of a decision by the Governor-General in Council to terminate the appointment on medical grounds of a career Air Force officer serving in an administrative post in peacetime conditions that would render such a decision unreviewable in the courts? In *Coutts v Commonwealth*,[150] a majority of the High Court held that such a decision was not reviewable on natural justice grounds given that appointments to military service are held "at pleasure" which in turn implies a power "to dismiss [which] may be exercised at any time and for any reason, or for no reason or for a mistaken reason".[151] But if the officer concerned were given repeated assurances of a hearing before any such decision were reached, which assurances were not made good, would the "subject matter"

145 For some older authorities asserting the unreviewability of the defence prerogatives see *China Navigation Co v Attorney-General* [1932] 2 KB 197 at 214 per Scrutton LJ, at 234 per Lawrence LJ, at 242-43 per Slesser LJ; *Chandler v DPP* [1964] AC 763 at 791 per Lord Reid, at 796 per Viscount Radcliffe, at 814 per Lord Pearce; but cf 810-11 per Lord Devlin.

146 *CCSU* above n5 at 411 per Lord Diplock.

147 [1965] AC 75.

148 Id at 100. This attitude of judicial deference towards the executive in time of war, although by no means absolute, can be detected in decisions of the High Court concerning the wartime scope of s51(vi) of the Constitution and the executive's regulation making power under the *National Security Act*.

149 See Allott, P, "The Courts and the Executive: Four House of Lords Decisions" [1977] *CLJ* 255 at 268.

150 Above n77.

151 Id at 105 per Brennan J. See also at 104 per Wilson J and at 120-22 per Dawson J.

of the decision necessarily render judicial review inappropriate? One would think not.[152]

It should be added that the employment of members of the armed forces in Australia is today largely governed by statute. The decision of the Governor-General in Council in *Coutts v Commonwealth* was referable to regulation 72(1) of the Air Force Regulations (Cth) which provided that "[a]n officer shall hold his appointment during the pleasure of the Governor-General". The introduction of such legislation does not, however, render the position at common law irrelevant. In *Coutts v Commonwealth*, Wilson J described regulation 72(1) as a restatement of the common law[153] and quoted from the judgment of Dixon J in *Commonwealth v Welsh*[154] that:

> The relation to the Crown of members of the armed forces is no new subject; the rules of the common law define it. The regulations are not to be read in disregard of those rules and of the long tradition to which they have contributed.[155]

Brennan J and Dawson J took a similar view.[156] Hence the position at common law remains a critical factor in understanding the relationship between the armed forces and the Crown.

(2) *The Prerogative of Mercy*

To date, the courts have said that they will not review the manner of exercise of the prerogative of mercy. In *Toohey*, Aickin J countenanced the review of some (unspecified) prerogative powers, but expressly excluded the prerogative of mercy from this category.[157] He cited the early High Court decision in *Horwitz v Connor*[158] but did not elaborate. In *CCSU*, Lord Roskill said that the prerogative of mercy was unexaminable by reason of its subject matter,[159] a justification which was also not pursued. The question arose directly before a single judge of the New Zealand High Court in *Burt v Governor-General*.[160] The plaintiff in that case had been convicted of murder

152 Note also the observation in the dissenting judgment of Deane J in *Coutts v Commonwealth* that "the very possibility of dismissal without reason being given may, in some circumstances, make 'it all the more important' for the person dismissed 'to be able to state his case and, if denied the right to do so, to be able to have his dismissal declared void'" (id at 113 quoting Lord Wilberforce in *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 at 1597) and his warning that "there is an obvious need 'to view warily the notion that common law remedies should, upon grounds of alleged public policy, be denied to those who serve the Crown'" (id at 115 quoting from *Groves v Commonwealth* (1982) 150 CLR 113 at 128).

153 Id at 101.

154 (1947) 74 CLR 245.

155 Id at 268.

156 Above n77 at 105-106 per Brennan J, at 121 per Dawson J. But cf the views of Deane J at 108-109, 115. See also Nettheim, G, "Do Members of the Armed Forces Have Any Rights in their Employment?" (1973) 5 *FLR* 200 at 202-203.

157 Above n3 at 261.

158 (1908) 6 CLR 38 in which it was said that "no Court has jurisdiction to review the discretion of the Governor in Council in the exercise of the prerogative of mercy" at 40 per Griffith CJ, Barton, O'Connor, Isaacs and Higgins JJ. No specific reasons were assigned for this conclusion.

159 Above n5 at 418.

160 [1989] 3 NZLR 64.

and sentenced to life imprisonment. After exhausting his remedies before the criminal courts, he petitioned the Governor-General for a full pardon on the basis that "evidence favourable to [him] was withheld and/or mis-stated" at his trial. The Governor-General, acting on ministerial advice, declined to exercise the prerogative of mercy. The plaintiff then applied for judicial review of this decision, whereupon Greig J (on the Attorney General's application to dismiss the plaintiff's proceedings at the outset) was asked to consider the threshold issue — was the manner of exercise of the prerogative of mercy amenable to review by the courts?

Greig J answered in the negative, offering essentially three reasons for this conclusion. In the first place, he took a narrow view of the effect of the decision in *CCSU*, observing that that case did nothing to disturb the traditional immunity from review of a direct exercise of prerogative power, using the term "prerogative" in the strict sense attributed to it by Blackstone.[161] Secondly, he suggested that mercy decisions had a "substantial policy content"[162] and that it was "impossible and inept for a Court [as opposed to Parliament][163] to attempt to question and to investigate and to review what are in the end policy decisions."[164] But he did not identify the policy considerations informing either the decision before him or mercy decisions generally. This was an unfortunate omission, because as pointed out by Harris in a recent article on this topic, the prerogative of mercy is today commonly invoked to correct mistakes made by the criminal justice system.[165] As that author suggests, where a pardon is sought on this basis (as it was in *Burt's* case) the decision whether or not to exercise the prerogative of mercy may not necessarily involve a high policy content.[166] To the contrary, it will be "individualised", both in terms of its process (involving an investigation into the circumstances surrounding the petitioner's trial and appeal) and its direct and immediate effect. This is not to deny that other prerogative of mercy decisions may be dictated by considerations tending towards the societal rather than the individual — Harris instances the pardoning of military service resisters or deserters[167] — but surely this only highlights the need for a flexible, case by case, approach to the application of the principles of judicial review in this area; not an outright prohibition on review.[168]

The third factor in Greig J's finding against judicial review of the exercise of the prerogative of mercy was the least clearly articulated. Greig J depicted the petition for pardon as "a direct prayer to the Crown after all legal

161 Id at 73. In other words, Greig J characterised the Crown's powers of control over the civil service as of a kind "which any subject might undertake lawfully . . . by way of ordinary employment" id at 71.

162 Id at 74.

163 Id at 73.

164 Ibid.

165 Harris, B V, "Judicial Review of the Prerogative of Mercy?" [1991] *PL* 386 at 388. This article contains an expansive treatment of the topic under immediate consideration.

166 Id at 398.

167 Ibid.

168 A point emphasised by Harris' hypothetical (id at 399) illustrating how the presence of a policy element in a prerogative of mercy decision may not necessarily weigh in support of non-reviewability.

remedies have been exhausted",[169] having earlier adopted the words of the Privy Council in *de Freitas v Benny*[170] that "[m]ercy is not the subject of legal rights. It begins where legal rights end".[171] To the extent that such views draw on theocratic notions of Kingship,[172] they must now be regarded as outmoded; in relation to the exercise of the prerogative of mercy, the Crown acts on ministerial advice. And as Harris points out, these statements "are more in the nature of descriptions, rather than being reasons for the non-availability of review."[173] It may be that such statements reflect a concern that judicial review of the prerogative of mercy would be contrary to the public interest in the finality of litigation, or would amount to a "second-guessing" of the actions of the criminal courts. Although Harris argues that review of the grant or refusal to grant a pardon would involve the courts in a quite different inquiry to that raised at trial or on appeal ("[t]he focus of the reviewing court would not be the propriety of the conviction, but rather whether the [decision-maker] had complied with the principles of administrative law when deciding upon the petition for mercy"),[174] it is submitted (as Harris concedes) that the courts would nevertheless have to maintain tight control over the conduct of any review proceedings in order to avoid the possibility of collateral attack.[175]

It follows that although there are reasons for the courts proceeding cautiously in this regard, the decision of Greig J in *Burt v Governor-General* should not be taken as the final word on the availability of judicial review of the prerogative of mercy, any more than the obiter comments of Aickin J in *Toohey* or Lord Roskill in *CCSU*. There is no *a priori* reason for excluding judicial review of the prerogative of mercy in all cases. To the contrary, the interests of administrative justice would be better served by conceding the possibility of review, but then refusing relief in those cases where, for example, a strong policy element would render judicial intervention inappropriate.

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169 [1989] 3 NZLR 64 at 74.

170 [1976] AC 239.

171 Id at 247.

172 See, eg, Rolph, C H, *The Queen's Pardon* (1978) at 16-17, noting that in taking the coronation oath the monarch still swears to administer justice "in mercy".

173 Harris, B V, "Judicial Review of the Prerogative of Mercy?" [1991] *PL* 386 at 401.

174 Id at 401-402.

175 It should be added that in *Hanratty v Lord Butler of Saffron Walden* (1971) 115 Sol J 386, Lord Denning MR offered a further justification for judicial refusal to intervene in the exercise of the prerogative of mercy. In that case, the parents of a man hanged for murder commenced an action against a former Home Secretary claiming damages for negligence in relation to his decision not to advise the reprieve of their son. In the course of striking out the parents' statement of claim as disclosing no reasonable cause of action, Lord Denning said that the reason why the law would not inquire into the manner in which the prerogative of mercy was exercised was plain; "to enable the Home Secretary to exercise his great responsibility without fear of influence from any quarter or of actions brought thereafter complaining that he did not do it aright". This was "part of the public policy which protected judges and advocates from actions being brought against them for things done in the course of their office". It is submitted, however, that this rationale for non-intervention turns very much on the nature of the cause of action in negligence. See Harris, id at 400.

(3) *The Attorney General's Prerogative Power To File an Ex Officio Information*

The courts insist that they will not review the manner of exercise of the Attorney General's prerogative power to initiate a criminal prosecution by the filing of an ex officio information.[176] In the last decade, this view has been attributed to the subject matter of the power, rather than its source in the prerogative.[177] But as in the case of the defence prerogatives and the prerogative of mercy, the courts have been slow to identify those features attending the subject matter of the power which render the prerogative decision to prosecute non-justiciable. A close reading of the cases suggests that a number of factors may be relevant. Although no single judgment draws these factors together, it is submitted that they combine to make a strong case for judicial refusal to review.

The first such factor is the most compelling. In *Jago v District Court (NSW)*,[178] Gaudron J spoke of the "incompatibility" of judicial review of the decision to prosecute with the role of a court in a criminal trial.[179] Gaudron J cited in support a passage from the judgment of Gibbs ACJ and Mason J in *Barton v The Queen*[180] in which it was said that it would be surprising if the Attorney's information were subject to review:

> [i]t has generally been considered to be undesirable that the court, whose ultimate function it is to determine the accused's guilt or innocence, should become too closely involved in the question whether a prosecution should be commenced.[181]

This view was reiterated in *Hallett v Attorney-General*,[182] a New Zealand decision which dealt with review of both statutory and prerogative prosecutorial discretions. Gallen J said:

> I think it must now be accepted as clear law that where a decision as to whether or not prosecution action should be initiated is reposed in a particular officer, the Courts will not review the exercise of the discretionary power concerned. There are good practical reasons for this principle. If the Courts were to indicate that prosecution action should have been initiated, this is very close to indicating an attitude towards the outcome of the particular situation and since the Courts are charged with the determination

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176 *Reg v Comptroller-General of Patents* [1899] 1 QB 909 at 914 per AL Smith LJ; *Gouriet v Union of Post Office Workers* [1978] AC 435 at 487 per Viscount Dilhorne; *Barton v The Queen* (1980) 147 CLR 75 at 89-96 per Gibbs ACJ and Mason J (with whom Aickin J agreed), at 103 per Stephen J, at 107 per Murphy J, at 109-111 per Wilson J; *Toohey* above n3 at 220 per Mason J, at 283 per Wilson J; *Steiner v Attorney-General* (1983) 52 ALR 148 at 153 per Beaumont J; *Hallett v Attorney-General* [1989] 2 NZLR 87 at 91ff per Gallen J; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 38-39, 45 per Brennan J, at 77 per Gaudron J. See also Sir Anthony Mason, "Judicial Independence and the Separation of Powers — Some Problems Old and New" (1990) 13 *UNSWLJ* 173 at 182. For the historical background to this particular prerogative power see Edwards, J L J, *The Law Officers of the Crown* (1964) at 262-67.

177 See, eg, *Toohey* above n3 at 220 per Mason J, at 283 per Wilson J; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 77 per Gaudron J.

178 (1989) 168 CLR 23.

179 Id at 77. See also at 38-39 per Brennan J.

180 Above n19.

181 Id at 94-95. See also at 110-111 per Wilson J.

182 [1989] 2 NZLR 87.

> of prosecutions, the outcome could well be prejudiced by the decision requiring prosecution action to follow. This would be clearly unjust and quite contrary to principle.[183]

The second factor militating against judicial review of the Attorney General's prerogative decision to prosecute is the undesirability of fragmenting the criminal process, a consideration described by the High Court in *Vereker v O'Donovan*[184] as "so powerful . . . that it requires no elaboration by us."[185] The Federal Court has also made reference to the need to preserve the integrity of the criminal process in the context of applications made under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("*ADJR Act*") for an order of review in respect of committal proceedings and statutory decisions to prosecute. The Full Federal Court in *Newby v Moodie*[186] held that a decision of the Director of Public Prosecutions under ss6 and 11 of the *Director of Public Prosecutions Act* 1983 (Cth) to institute and maintain a prosecution for an indictable offence against the laws of the Commonwealth was a decision to which the *ADJR Act* applied, being a decision of an administrative character made under an enactment.[187] However, the Court held that its power to make an order of review in respect of such a decision should not be exercised save in exceptional circumstances because "once criminal proceedings have been commenced they should be allowed to follow their ordinary course".[188] If this factor demands such a response in the setting of the *ADJR Act*, then *a fortiori* it must weigh heavily against judicial review of the prerogative decision to prosecute.

To the undesirability of blurring the functions of prosecutor and of judge and the need to preserve the integrity of the criminal process may be added the consideration that some prosecutorial decisions are not wholly referable to personal circumstances but are informed in part by matters of policy relating to the cost to the public of criminal investigations and prosecutions.[189] Financial constraints force the executive government to prosecute certain categories of offences more vigorously than others. In so doing, the executive responds to community attitudes concerning the harmful effects of crime — it is no accident that our drug laws are pursued more faithfully than those relating to prostitution or homosexuality. The courts have frequently stated that they are "ill-equipped" to deal with such budgetary and planning matters.[190] When such budgetary and planning matters bear upon the institution of criminal proceedings, they would seem even less

183 Id at 94, to which the Judge added the related consideration that the courts in their civil jurisdiction should not deal with criminal matters "as they may deprive those concerned of safeguards embedded in criminal proceedings".

184 [1988] 6 *Leg Rep SL* 3 (application for special leave to appeal).

185 Ibid.

186 (1988) 83 ALR 523.

187 Id at 527.

188 Id at 529. See also *Lamb v Moss* (1983) 49 ALR 533 at 545-46, 564 per Bowen CJ, Sheppard and Fitzgerald JJ; *Wouters v Deputy Commissioner of Taxation (NSW)* (1988) 84 ALR 577 at 585-86 per Bowen CJ, Wilcox and Lee JJ; *Stergis v Boucher* (1989) 86 ALR 174 at 192-94 per Hill J.

189 See, eg, *Jago v District Court (NSW)* (1989) 168 CLR 23 at 39 per Brennan J.

190 Ibid; Sir Anthony Mason, "Judicial Independence and the Separation of Powers — Some Problems Old and New" (1990) 13 *UNSWLJ* 173 at 183.

amenable to judicial scrutiny. Although the sometime presence of this "policy element" could not, of itself, justify judicial refusal to review in all cases, it nonetheless weighs against judicial intervention in conjunction with the other factors here mentioned.

In essence then, the refusal of the courts to review the manner of exercise of the Attorney General's prerogative decision to prosecute is soundly based. Nevertheless, it may still be possible to contemplate departures from this rule in exceptional circumstances bordering, perhaps, on bad faith or fraud.

(4) The Treaty Prerogative

The treaty prerogative, like most prerogative powers (particularly the defence prerogatives) is exercisable in varying forms and circumstances. It is convenient at the outset, however, to draw a distinction between prerogative power to enter into a treaty, and prerogative power exercised under a treaty. The former is not as a rule susceptible to the judicial process, but the latter may be.

In *CCSU*, Lord Roskill denied the existence of any jurisdiction to review the manner of exercise of the treaty-making prerogative, observing that the courts were not the appropriate forum within which to determine whether a treaty should be concluded.[191] This view was shared by Wilcox J in *Peko-Wallsend*. He referred to the decision of the High Court in *Koowarta v Bjelke-Petersen*[192] in which Mason J described the possibility of the Court reviewing the decision of the federal executive that Australia stood to benefit from entry into a treaty as "bristling with problems for the Court".[193] Wilcox J characterised the decision before him to seek World Heritage listing for Kakadu Stage II as raising "the same problem for the courts as a decision to enter into a treaty".[194] This contributed to his conclusion that the decision was non-justiciable.[195]

The nature of this unspecified "problem for the courts" in reviewing a decision to enter into a treaty was touched upon by the English Court of Appeal in *Blackburn v Attorney-General*.[196] The plaintiff in that case sought declarations to the effect that in signing the Treaty of Rome (and thus entering the Common Market) the British Government was acting unlawfully. The Court, led by Lord Denning MR, dismissed these claims. Such action was not reviewable because when "[m]inisters negotiate and sign a treaty . . . they act on behalf of the country as a whole".[197] The Court thus emphasised that the treaty-making prerogative is not exercisable by reference to individual circumstances, but is invoked in the national interest. Nor is its exercise directly determinative of individual rights. Under our system of law,

191 Above n5 at 418. See also at 398 per Lord Fraser. Lord Roskill had earlier expressed this view in *Laker Airways Ltd v Department of Trade* above n17 at 718.

192 (1982) 153 CLR 168.

193 Id at 229. See also *Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 125-26 per Mason J.

194 (1987) 75 ALR 218 at 253.

195 Ibid.

196 [1971] 1 WLR 1037.

197 Id at 1040 per Lord Denning MR, with whom Salmon and Stamp LJJ concurred. The Court of Appeal also relied on the prerogative source of the power as another reason supporting their conclusion.

some further step is generally required before accession to an international treaty can have domestic legal significance.[198] The decision of the executive government to enter into a treaty is thus a policy or political decision and does not exhibit the characteristics generally associated with reviewability.[199]

Six years after the decision in *Blackburn v Attorney-General*, Lord Denning MR observed in *Laker Airways Ltd v Department of Trade*[200] that:

> it seems to me that when discretionary powers are entrusted to the executive by the prerogative — in pursuance of the treaty-making power — the courts can examine the exercise of them so as to see that they are not used improperly or mistakenly.[201]

This statement can be reconciled with *Blackburn* when it is appreciated that *Laker Airways* involved not the treaty-making prerogative, but prerogative power exercised under an *existing* treaty.[202] The British Civil Aviation Authority granted Laker Airways a licence to operate a passenger service between London and New York. Before this service could commence, a treaty between the United States and the United Kingdom required that Laker Airways be officially "designated" by the British Government for the route. The British Government issued this designation. A permit for the service was then granted by the United States Civil Aeronautics Board and sent to the White House for the formal approval of the President. But before this final approval was obtained there occurred a change in British government policy. The administration decided that the service should not now proceed and took steps under the treaty to withdraw Laker Airways' designation. Laker Airways had spent several million pounds preparing for the service and challenged the government's actions in this regard. Lord Denning MR held that the prerogative power to withdraw Laker Airways' designation under the treaty had been fettered by statute.[203] He indicated, nonetheless, that this purported exercise of prerogative power had many of the characteristics of reviewability. It was exercised in a commercial context as a routine administrative response to a change in civil aviation policy and had a singularly detrimental effect upon Laker Airways. It was not the high act of state considered in *Blackburn*. In *Peko-Wallsend*, Bowen CJ grappled with a like situation. He noted that the Cabinet decision was referable to an existing treaty but that this circumstance was not sufficient to render the decision non-justiciable.[204] It was instead "the whole subject-matter of the decision" to nominate Kakadu Stage II for World Heritage listing — the environmental, social and economic policy questions involved — in

198 See, eg, *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 at 347 (Privy Council); *Blackburn v Attorney-General* [1971] 1 WLR 1037, at 1039 per Lord Denning MR; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 212 per Stephen J.

199 See also to this effect *Ex parte Molyneaux* [1986] 1 WLR 331 at 336 per Taylor J; *Re Ditfort; ex parte Deputy Commissioner of Taxation (NSW)* (1988) 83 ALR 265 at 284 per Gummow J; *R v Secretary of State for Foreign and Commonwealth Affairs; ex parte Everett* [1989] 2 WLR 224, 228 per O'Connor LJ, at 231 per Taylor LJ.

200 Above n17 at 643.

201 Id at 706.

202 Id at 704 per Lord Denning MR.

203 Id at 706-707. Roskill and Lawton LJJ also held that the prerogative power to withdraw the designation had been fettered by statute.

204 Above n37 at 224.

conjunction with its relationship to the Convention that placed the decision beyond the reach of the court.[205]

It is submitted that these views of Lord Denning MR and Bowen CJ represent a measured approach to judicial review of the manner of exercise of the treaty prerogative. The unreviewability of the treaty-making prerogative does not demand that prerogative powers exercised under existing treaties should attract the same rule. *Laker Airways* and *Peko-Wallsend* indicate that the latter powers may be exercised in a variety of circumstances. As those circumstances may not always involve a large policy content or strong political flavour, a flexible approach to judicial review is warranted in the interests of administrative justice. It is submitted that the spirit of Mason J's warning in *Koowarta v Bjelke-Petersen* is not infringed by such an approach, and it should be noted that the treaty prerogative received no mention in *Toohey* — a reflection perhaps of the subtle approach it demands.

C. A Model for Determining the Justiciability of a Prerogative Decision

Having considered the subject matter of a prerogative decision as a criterion of its reviewability, it remains to consider a framework or model within which to apply this criterion. In *CCSU*, Lord Roskill classified certain prerogative powers by virtue of their subject matter as unreviewable in all cases:

> Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process.[206]

Thus, on Lord Roskill's analysis, only if a prerogative decision invokes a prerogative power falling outside these "excluded categories"[207] will review be possible. There is in effect a "condition precedent" to review based on the prerogative power concerned. Only if this condition precedent is satisfied will the prerogative decision be examined as a whole in order to ascertain whether it otherwise presents the characteristics generally associated with reviewability. This approach appears also to have been favoured by Lord Fraser.[208] Lord Diplock, on the other hand, eschewed the outright categorisation of certain prerogative powers as reviewable or unreviewable in all cases. He was inclined instead to an approach that would require the balancing of all aspects of the subject matter of the decision (including the prerogative power concerned) in conjunction with the purported ground of review.[209] Under this approach, the fact that the power exercised is, for example, one of the defence prerogatives, does not necessarily mean that judicial review is excluded; it simply provides an indication to this effect

205 Id at 224-25.
206 Above n5 at 418.
207 Ibid.
208 Id at 398.
209 Id at 408-11.

which may be outweighed by the other features of the case. This approach appears to have been favoured by Lord Scarman.[210]

Of these two approaches, Lord Diplock's is to be preferred. Whereas Lord Roskill's approach has the advantage of certainty, it is inflexible. Whatever the position in the past, prerogative powers are today exercised in a variety of circumstances and are as capable of abuse as any other powers. The one prerogative may be invoked both at the level of act of state and in everyday administration. Its exercise may affect the whole nation or an individual. Review may be sought for unreasonableness or bad faith. Lord Diplock's approach accommodates these varying circumstances and allows them to be taken into account in determining amenability to review. Lord Roskill's approach shuts them out. In *Peko-Wallsend*, Bowen CJ considered the reviewability of the Cabinet decision in a manner close to that of Lord Diplock. He refused to classify the treaty prerogative as justiciable or non-justiciable. The fact that the decision related to a treaty *and* involved complex policy questions relating to the environment, Australia's economic position and the rights of Aboriginals led him to conclude that it was not amenable to the judicial process.[211] The approach of Wilcox J, however, was less clear. Wilcox seemed to regard the manner of exercise of the treaty prerogative as *a priori* non-justiciable, but also concluded that the Cabinet decision had no direct or immediate effect on the rights or legitimate expectations of Peko.[212]

It is to be hoped that the High Court will favour the Diplock approach to determining the justiciability of a prerogative decision. The rejection of the traditional immunity from review of the manner of exercise of prerogative power affirmed Mason J's warning that "the classification of powers is not a sound criterion for the operation of precise rules of law".[213] The Roskill approach falls foul of this "labelling" trap. To admit that the exercise of some prerogative powers will nearly always be unsuited to review does not demand that the exercise of those same powers be removed from judicial reach entirely.

4. *Grounds of Review Applicable to the Manner of Exercise of Prerogative Power*

A. *General Principles and the Theoretical Foundation for Judicial Review of Administrative Action*

The statutory decision-making process is amenable to review on the grounds of denial of natural justice and abuse of power. An abuse of power occurs when a statutory discretion is exercised in bad faith, or for an improper purpose, or taking into account irrelevant considerations, or without taking into account relevant considerations, or so as to amount to a decision "so

210 Id at 407.
211 Above n37 at 224-25.
212 Id at 249-253. Sheppard J did not discuss this aspect of the case.
213 *Toohey* above n3 at 225.

unreasonable that no reasonable authority could ever have come to it".[214] It remains to consider in the final section of this paper whether all or any of these grounds of review can apply to the exercise of prerogative power.

It has been accepted in a number of cases that natural justice or procedural fairness may be a ground for judicial review of a prerogative decision. In *CCSU*, it was indicated that had national security not been involved, the Minister's instruction banning GCHQ staff from membership of national trade unions would have been invalid on this ground.[215] In *Peko-Wallsend*, the Full Federal Court agreed that the exercise of prerogative power was reviewable for denial of natural justice.[216] There it was held, however, that in the circumstances of the case the Cabinet decision was not such as to attract the obligation of natural justice,[217] and, in any event, that Peko had been given a fair opportunity of being heard of which it took full advantage.[218] In *Macrae v Attorney-General for New South Wales*,[219] Kirby P accepted that certain decisions made in the exercise of prerogative power were open to review on natural justice grounds.[220] And more recently, in *R v Secretary of State for Foreign and Commonwealth Affairs; ex parte Everett*[221] the English Court of Appeal held that the decision of the Secretary of State to refuse to renew the applicant's passport, which decision was described as an exercise of the prerogative, had been made in a procedurally unfair manner. Nevertheless, as this omission had not resulted in any prejudice to the applicant, the Court exercised its discretion against granting relief.[222]

Although natural justice has won the most ready support, there is authority to the effect that judicial review of prerogative power is not confined to this ground. In particular, Lords Scarman and Diplock in *CCSU* and Sheppard J in *Peko-Wallsend* have suggested that if prerogative powers are to be exposed to judicial scrutiny then an applicant for relief should be able to invoke "all the usual grounds".[223] Some of these "usual grounds" have indeed been

214 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230 per Lord Greene MR. It is possible that the emergent "no evidence" ground of review may also fit under the umbrella of abuse of power. See Allars, M, above n57 at 193-95.

215 Above n5 at 401 per Lord Fraser, at 407 per Lord Scarman, at 411-13 per Lord Diplock, at 419-20, 423 per Lord Roskill, at 423 per Lord Brightman.

216 Above n37 at 227-28 per Sheppard J, at 249-53 per Wilcox J. The judgment of Bowen CJ assumes this point.

217 Id at 253 per Wilcox J. Bowen CJ and Sheppard J did not discuss this point, but indicated that they agreed "generally" with the reasons of Wilcox J.

218 Id at 228 per Sheppard J, at 254 per Wilcox J.

219 (1987) 9 NSWLR 268.

220 Id at 281.

221 [1989] 2 WLR 224.

222 Id at 229-30 per O'Connor LJ, with whom Nicholls and Taylor LJJ agreed. That a prerogative decision may be reviewable for denial of natural justice was also assumed in *R v Secretary of State for the Home Department; ex parte Ruddock* [1987] 2 All ER 518; *R v Secretary of State for the Home Department; ex parte Harrison* [1988] 3 All ER 86; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 23 per Mason CJ; *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ.

223 *Peko-Wallsend* above n37 at 227 per Sheppard J; *CCSU* above n5 at at 407 per Lord Scarman, at 411 per Lord Diplock (although he indicated that very few prerogative decisions would be open to attack upon the "irrationality" ground). See also *Laker Airways Ltd v Department of Trade* above n17 at 705-706 per Lord Denning MR.

applied to exercises of the prerogative (although without success so far); for example, in *Peko-Wallsend* Wilcox J considered whether the Cabinet decision was void for unreasonableness.[224] This neat correlation between the grounds of review available in respect of both statutory and non-statutory executive power has also been accepted in at least one leading commentary.[225]

Yet all these authorities, whether they have simply endorsed judicial review of the prerogative on natural justice grounds, or gone further and suggested the availability of review for abuse of power, have in either case expressed these views with a minimum of accompanying explanation or analysis. The foundation for the imposition of these particular constraints upon the manner of exercise of prerogative power is not explored, a surprising omission given that the role of the courts in this regard cannot be explained by reference to the will of parliament.[226] Legislative intent has provided the traditional justification for judicial control of the exercise of statutory executive power. According to this theory (and in the words of a leading text) the principles of natural justice and abuse of power are "implied limitations in Acts of Parliament", part of the "art of statutory construction". The courts realise "that their task is to protect the citizen against unfairness and abuse of power". Thus they have devised a body of rules of administrative law which parliament is taken to have attached to statutory grants of power. In effect, "Parliament legislates against a background of judge-made rules of interpretation, which place the necessary restrictions on governmental powers so as to ensure that they are exercised not arbitrarily but fairly and properly".[227] It follows that when intervening in relation to an administrative decision arrived at in violation of these rules, the courts are simply carrying out the will of parliament.[228] Viewed in this way, judicial review of statutory power derives its legitimacy from parliament itself. For the leading Australian proponent of this traditional model, the direct link with legislative intent is vital. Speaking in *Kioa v West*[229] in the context of natural justice doctrine, Justice Brennan said:

> The supremacy of Parliament, a doctrine deeply embedded in our constitutional law and congruent with our democratic traditions, requires the

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224 Above n37 at 255-56. In *R v Secretary of State for the Home Department; ex parte Harrison* [1988] 3 All ER 86, Stuart-Smith LJ considered whether the decision of the Secretary of State to refuse to grant the applicant an ex gratia payment (which decision was described as an exercise of the prerogative) was unreasonable in the *Wednesbury* sense, concluding in the negative.

225 Walker, C, "Review of the Prerogative: The Remaining Issues" [1987] *PL* 62 at 71-78. In *Toohey*, Mason J left open the question of which grounds of review can apply to the exercise of prerogative power. See above n36 at 221.

226 A point also noted in Harris, M C, "The Courts and the Cabinet: 'Unfastening the Buckle'?" *PL* [1989] 251 at 261.

227 Wade, W, above n122 at 40-42. See also Hotop, S D, *Principles of Australian Administrative Law* (6th edn, 1985) at 220-21; Oliver, D, "Is the Ultra Vires Rule the Basis of Judicial Review?" [1987] *PL* 543; *Kioa v West* above n227 at 609 per Brennan J.

228 See, eg, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 234 per Lord Greene MR and the cases referred to by Brennan J in *Kioa v West* (1985) 159 CLR 550 at 610. For one view of the origins of this particular conception of the law of judicial review see Craig, P P, *Public Law and Democracy in the United Kingdom and the United States of America* (1990) at 19-26.

229 (1985) 159 CLR 550.

> courts to declare the validity or invalidity of executive action taken in purported exercise of a statutory power in accordance with criteria expressed or implied by statute. There is no jurisdiction to declare a purported exercise of statutory power invalid for failure to comply with procedural requirements other than those expressly or impliedly prescribed by statute.[230]

Brennan recently reaffirmed his adherence to the traditional model in *Attorney-General (NSW) v Quin*:[231]

> In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power.[232]

It is apparent, however, that legislative intent can provide no warrant for judicial review of the exercise of prerogative power. The theoretical justification for judicial intervention in relation to the prerogative must be wholly supplied by the common law. Brennan J, troubled by the notion of unreviewable discretionary power, has conceded that such an approach may be possible. In *Kioa v West*, he referred to *CCSU* and observed that:

> In England, a jurisdiction judicially to review executive action carried out in pursuance of the prerogative was asserted . . . although there was no statutory foundation for that jurisdiction. It may be that, as constitutional tradition favours a government of laws rather than a government of men, there is an inducement for the courts to declare the law which should govern the exercise of what would otherwise be unreviewable executive power and to exercise their ordinary jurisdiction to review executive action according to the law thus declared. It may be that the common law determines not only the scope of the prerogative but the procedure by which it is exercised. That problem does not fall for consideration here.[233]

This approach mooted by Brennan J proceeds from the premise that prerogative power is as capable of abuse as is statutory power and that it is the role of the courts to protect individual rights against overreaching by the executive. If statutory executive powers are to be construed against "a background of common law notions of justice and fairness"[234] which operate to condition the valid exercise of such powers upon observance of the principles of natural justice and abuse of power, then the same process of reasoning can be applied to the prerogative with like results. It is for the courts to determine the legal limits of prerogative power. If those limits are drawn in the light of common law values, then surely those values may import the same requirements of procedural fairness, relevancy, purpose and reasonableness as apply to the exercise of statutory power.[235] The supremacy of parliament is not threatened by such a course. It is possible then to adhere to the legislative intent theory of judicial review of statutory power, while at

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230 Id at 611.

231 (1990) 170 CLR 1.

232 Id at 36. See also *Annetts v McCann* (1990) 170 CLR 596 at 604 per Brennan J.

233 Above n229 at 611. See also Sir Gerard Brennan, "The Purpose and Scope of Judicial Review" in Taggart, M, (ed), *Judicial Review of Administrative Action in the 1980s* (1986) at 26-27.

234 *Kioa v West* above n227 at 609 per Brennan J.

235 See, eg, Sir William Wade, above n122 at 393. The judgment of Lord Denning MR in *Laker Airways Ltd v Department of Trade* [1977] QB 643 at 705-706 hints at such an approach.

the same time finding a theoretical foundation for judicial intervention in relation to the prerogative on the grounds of natural justice and abuse of power.

Ultimately, however, it may not be necessary to resort to this analysis in order to justify judicial scrutiny of the prerogative on all the "usual grounds". There is every reason to believe that Brennan J is fighting a losing battle in defence of his conception of judicial review as implicit in statutory construction. A majority of his High Court colleagues appear ready to embrace the theory of an autonomous common law of judicial review, at least as regards natural justice doctrine.[236] In both *Kioa v West* and *South Australia v O'Shea*,[237] Mason CJ described that doctrine as imposing a "common law duty to act fairly in the making of administrative decisions which affect the rights, interests and legitimate expectations of an individual, subject only to the clear manifestation of a contrary statutory intention."[238] In *Haoucher v Minister for Immigration and Ethnic Affairs*,[239] Deane J foresaw the law moving towards the position where the "common law requirements of procedural fairness will . . . [apply] generally to governmental executive decision-making."[240] These statements of Mason CJ and Deane J were endorsed by Mason CJ, Deane and McHugh JJ in *Annetts v McCann*.[241] In *Attorney General (NSW) v Quin*,[242] Dawson J was even more explicit:

> It follows, I think, from the acceptance of the notion that the duty to observe procedural fairness may arise in the circumstances of the individual case that it stems from the common law itself, not as the result of an implied legislative intent. In *Cooper v Wandsworth Board of Works*, Byles J said: "although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature." That much quoted observation must now be taken to mean that the right to procedural fairness is the product of the common law and not the construction of a statute, although a statute may exclude the right if the intention to do so appears sufficiently clearly.[243]

The competing view of the jurisdictional underpinning of judicial review on natural justice grounds reflected in these observations — that it is a common law implication drawn from the adverse effect of a decision on individual rights, interests or legitimate expectations — has much to commend it. The broadest statutory discretions, silent as to procedural protection for affected individuals, have been held subject to the rules of natural justice.[244] To attribute such findings to the "true intention of the

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236 In relation to the notion of an autonomous common law of judicial review, see generally Oliver, D, "Is the Ultra Vires Rule the Basis of Judicial Review"? [1987] *PL* 543. It has been argued that the judiciary originally conceived of judicial review of administrative action in these terms, and that the statutory interpretation theory only took hold from the mid-nineteenth century. See Craig, P P, above n228 at 21-26.

237 (1987) 163 CLR 378.

238 Id at 386; *Kioa v West* above n227 at 584.

239 (1990) 169 CLR 648.

240 Id at 653.

241 (1990) 170 CLR 596 at 598.

242 (1990) 170 CLR 1.

243 Id at 57-58.

legislature" is to resort to legal fiction and to misrepresent the process of statutory construction as involving no element of judicial choice or discretion.[245] Arguments to the effect that this is a "necessary artificiality",[246] that judicial review must be forced into the mould of statutory ultra vires in order to ensure that the courts have jurisdiction to declare an administrative decision invalid, smack of legal formalism.[247] Such *ex post facto* rationalisations scarcely conceal what the courts are actually doing. In reality, the judges have developed a body of common law rules designed to protect the citizen against the arbitrary exercise of executive power, which rules condition the administrative decision-making process. These rules derive their legitimacy both from their object, an ideal consistent with the values which inspire the rule of law (as one writer has put it, the rights to seek judicial review and to receive a fair hearing before administrative bodies "are of such fundamental importance in a democratic society that it is vital that some independent body has the power to protect these rights from any but the most limited statutory abridgement"),[248] and from the fact that they have been applied by the courts and accepted by parliament, the executive and the general public for many years (surely as a consequence of their object).[249]

Returning to *CCSU* and *Peko-Wallsend*, it is unclear whether these cases proceeded upon the theory of an autonomous common law of judicial review (applicable to the exercise of both statutory *and* prerogative power) or adopted the more cautious approach to the application of the grounds of review outlined by Brennan J. As noted above, both judgments are silent on this issue. What is important for present purposes, however, is that on either approach it is possible to find a conceptual foundation for the application to the prerogative of the principles of natural justice and abuse of power.

B. *Practical Application of Grounds of Review*

Having discussed questions of theory, it remains to consider whether it is possible in practice to apply these grounds of review to the manner of exercise of prerogative power. The relevance of the principles of natural justice may be readily conceded in the light of *CCSU*, *Peko-Wallsend* and *R v Secretary of State for Foreign and Commonwealth Affairs; ex parte Everett*. What is less clear is how the abuse of power grounds can be made to operate in relation to the prerogative. It is proposed to concentrate on this

244 See, eg, *Kioa v West* above n227.

245 A point taken up by Cane, P, *An Introduction to Administrative Law* (1986) 12 and Detmold, M J, *Courts and Administrators* (1989) at 3-5, 56-58.

246 To borrow the words of Sir William Wade in *Administrative Law* above n122 at 41.

247 Even Brennan J has conceded that an autonomous common law of judicial review would relieve the courts of the necessity "to pay lip-service to the notion that the jurisdiction judicially to review administrative action depends upon the intention of Parliament." See Sir Gerard Brennan, "The Purpose and Scope of Judicial Review" in Taggart, M, (ed), *Judicial Review of Administrative Action in the 1980s* (1986) at 26. See also Cranston, R, *Law, Government and Public Policy* (1987) at 84-85.

248 Cane, P, *An Introduction to Administrative Law* (1986) 14. See generally, Allan, T R S, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" [1985] *CLJ* 111.

249 Sophisticated theories of judicial review along this model are now emerging in the literature. See, eg, Detmold, M J, *Courts and Administrators* (1989).

latter point, considering in turn (albeit briefly) review for bad faith, relevancy, improper purpose and unreasonableness.

(1) Bad Faith

Bad faith as a ground of review connotes dishonesty,[250] fraud or corruption[251] — knowingly doing the wrong thing. Although it is difficult to find cases in which an allegation of dishonesty was sustained,[252] the courts have repeatedly acknowledged that a statutory discretionary power must not be exercised in bad faith. As Kitto J said in *R v Anderson; ex parte Ipec-Air Pty Ltd*:[253]

> [i]t is a general principle of law . . . that a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself.[254]

In relation to prerogative powers, this requirement of honesty can be readily distilled from the common law and applied to the decision-making process despite the absence of a statutory framework.[255] In *Toohey*, Mason J warned that prerogative powers may lack the limitations in scope, purpose and criteria which render so many statutory powers amenable to broad grounds of review.[256] But the existence of a statute has never been central to review for bad faith in the same way that, for example, a statute has traditionally been central to the identification of criteria of relevancy and irrelevancy.[257] In *British Oxygen Co Ltd v Minister of Technology*,[258] Lord Reid conceded that the exercise of an "unqualified discretion" was open to review for bad faith.[259] And it is clear that the notion of bad faith runs through many areas of the law, both public and private, vitiating all manner of acts. As Lord Denning said of the related concept of fraud, it "unravels everything".[260] If money payments were accepted by a minister in return for

250 *Cannock Chase District Council v Kelly* [1978] 1 WLR 1 at 6 per Megaw LJ.

251 *Smith v East Elloe Rural District Council* [1956] AC 736 at 770 per Lord Somervell.

252 As Lord Somervell said, ibid, the effects of *mala fides* "have happily remained mainly in the region of hypothetical cases." See also Aronson, M, and Franklin, N, *Review of Administrative Action* (1987) at 44-45. The problem is largely one of proof. See *R v District Council of Berri; ex parte Eudunda Farmers Co-operative Society Limited* (1982) 31 SASR 342 at 353.

253 (1965) 113 CLR 177.

254 Id at 189. See also *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757-58 per Dixon J; *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 12 per Stephen J; *ADJR Act*, s5(2)(d).

255 It was once thought that it was not open to impute *mala fides* to the act of the King or his Representative. See *Duncan v Theodore* (1917) 23 CLR 510 at 544 per Isaacs and Powers JJ and *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 179 per Dixon J. However, this view was decisively overturned in *Toohey*.

256 Above n36 at 219.

257 See below at 468.

258 [1971] AC 610.

259 Id at 624. See also *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 12 per Stephen J.

260 *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712. He said: "No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud.

initiating a prosecution, entering a *nolle prosequi* or advising Her Majesty to confer a knighthood, who could doubt that such exercises of power would be struck down if challenged in review proceedings? It may even be that the exercise of the treaty-making prerogative is reviewable for bad faith.[261]

It follows that bad faith may be available as a ground of review in relation to the exercise of many prerogative powers (like the Attorney General's prerogative discretions) widely regarded as non-justiciable. It is instructive to recall the competing approaches adopted by Lords Diplock and Roskill in *CCSU* for determining the justiciability of a prerogative decision. Lord Roskill's approach would bar review of the defence prerogatives, the prerogative of mercy and other prerogative powers falling within his "excluded categories" in all circumstances, even for bad faith. Lord Diplock's approach, on the other hand, would weigh the fact that review of the defence prerogative (or some other prerogative power frequently termed non-justiciable) was being sought for bad faith against all the other circumstances of the case in reaching an overall conclusion as to justiciability. The superiority of Lord Diplock's flexible approach is apparent.

(2) *Relevant and Irrelevant Considerations*

These separate grounds of review contemplate the failure to take a relevant consideration into account in the exercise of a power and the taking into account of an irrelevant consideration in the exercise of a power.[262] They can be conveniently considered together because their application to the prerogative raises like issues.

As Mason J foresaw in *Toohey*,[263] there are difficulties in applying the relevancy grounds of review to the prerogative decision-making process. The existence of a statute has traditionally been integral to their application, the "subject-matter, scope and purpose of the Act" supplying the criteria of relevancy and irrelevancy.[264] In the case of failure to take into account a relevant consideration, the existence of a statute is doubly significant. The relevant consideration must be one which the decision-maker was bound to

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Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever."

261 The High Court has held that the Commonwealth Parliament's power to legislate under s51(xxix) of the Constitution in order to implement the terms of an international agreement to which Australia is a party is dependent upon such agreement having been entered into in good faith (and not merely as a device for attracting federal domestic legislative competence). See the authorities collected in Zines, L, *The High Court and the Constitution* (3rd edn, 1992) at 237-38. In propounding this view, is the High Court countenancing judicial review of the exercise of the treaty-making prerogative for bad faith?

262 See ss5(2)(a) and 5(2)(b) of the *ADJR Act* described by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 as "substantially declaratory of the common law".

263 Above n3 at 219.

264 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 per Mason J. See also *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 228 per Lord Greene MR; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030 per Lord Reid; *R v Australian Broadcasting Tribunal, ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 50 per Stephen, Mason, Murphy, Aickin and Wilson JJ.

take into account, the factors which a decision-maker is bound to take into account being determined (again) by construction of the enabling Act.[265] The relevancy grounds can also be applied more readily when the power concerned is narrow in scope. The more broadly a power is cast, the more difficult it becomes to determine what is legally relevant and irrelevant to its exercise.[266] This creates problems in relation to the prerogative, for prerogative discretions are frequently ill-defined and, of course, lack the fixed verbal form of their statutory counterparts.[267] To this must be coupled the fact that prerogative powers in Australia are generally exercised either by the Crown Representative or those holding ministerial rank. This points to the relevance of a broad range of considerations, for as Mason J observed in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[268] "where the decision is made by a Minister of the Crown, due allowance may have to be made for the taking into account of broader policy considerations which may be relevant to the exercise of a ministerial discretion."[269]

It follows that prerogative powers will not be readily reviewable on relevancy grounds. Yet despite these difficulties, and, in particular, the absence of a statutory framework, it remains possible to identify criteria of relevancy and irrelevancy structuring the exercise of a prerogative power. In *Murphyores Incorporated Pty Ltd v Commonwealth*,[270] Stephen J said that:

> [i]t will be seldom, if ever, that the extent of the power cannot be seen to exclude from consideration by a decision-maker all corrupt or entirely personal and whimsical considerations, considerations which are unconnected with proper governmental administration.[271]

This statement would seem, as a matter of principle, to be applicable to the exercise of all governmental executive powers, whether statutory or prerogative. Taking an example based on *Laker Airways Ltd v Department of Trade*, if the official designation of Laker Airways for the transatlantic route had been withdrawn in part because of the political beliefs of persons associated with the airline, would not an irrelevant consideration have been taken into account in the exercise of the power (whether or not review for bad faith could also be made out)? It is also possible that the subject matter, scope and purpose of a prerogative power may supply criteria of relevancy

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265 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 per Mason J. See also *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 375 per Deane J.

266 See, eg, *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 758-59 per Dixon J; *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-506 per Dixon J; *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 12-14 per Stephen J, at 24-25 per Mason J.

267 See, eg, *Nissan v Attorney-General* [1970] AC 179 at 213 per Lord Reid; 236 per Lord Wilberforce; *Barton v Commonwealth* (1974) 131 CLR 477; *R v Secretary of State for the Home Department; ex parte Northumbria Police Authority* [1988] 1 All ER 556.

268 (1986) 162 CLR 24.

269 Id at 42. Mason J was speaking in the context of an exercise of statutory power. This principle had earlier been applied by the High Court in *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1 where it was held that a broad discretionary power to relax an export prohibition on certain goods vested by statute in a federal minister was "wide enough to embrace every consideration reflecting advantage or disadvantage, benefit or prejudice to Australia" (at 24 per Mason J). See also at 12-14 per Stephen J.

270 Ibid.

271 Id at 12.

and irrelevancy. The fact that many prerogative discretions are ill-defined does not mean that basic restraints cannot be distilled from their terms. The very subject matter of the prerogative of mercy, for example, might be thought to demand that the decision-maker take into account the personal circumstances of the applicant. A third possibility is that administrative rules or guidelines may structure the exercise of a prerogative discretion providing a touchstone for review on relevancy grounds. There are many English examples of the formulation and publication of such guidelines,[272] but whether the Australian courts would be willing to treat such guidelines as the source of legally binding criteria of relevance and irrelevance remains to be seen.[273]

(3) *Improper Purpose*

An exercise of power for a purpose other than a purpose for which the power is conferred constitutes an abuse of power.[274] It is now clear that decisions of the Crown Representative (and *a fortiori* decisions of ministers of the Crown) taken in the exercise of statutory power are not immune from review on this ground.[275] Nevertheless, the prospect of review of the prerogative for improper purpose raises the same problems for the courts as does review of the prerogative on relevancy grounds. The absence of an enabling statute from which to ascertain proper and improper purposes,[276] the broad and uncertain extent of many prerogative discretions and their exercise at a high level of government suggest that only rarely will the courts be able to pronounce the purpose for which a prerogative power is exercised to be improper.[277] For example, if the Minister in *CCSU* had exercised her so-called "prerogative" power in order to weaken the trade union movement, would this be an improper purpose? If done because the Minister viewed organised labour as a political threat, her decision would be reviewable for bad faith; if done because the Minister honestly believed less union activity to be in the national interest, then bearing in mind the level of government concerned and doubts surrounding the scope of the civil service prerogative, it is submitted that only a brave court would pronounce the purpose of weakening union power to be unauthorised.

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272 See, eg, *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864; *R v Secretary of State for the Home Department; ex parte Ruddock* [1987] 2 All ER 518; *R v Secretary of State for the Home Department; ex parte Harrison* [1988] 3 All ER 86; *R v Secretary of State for Foreign & Cwlth Affairs; ex parte Everett* [1989] 2 WLR 224. Each of these cases concerned a non-statutory power described by the court as "prerogative".

273 See *Minister for Industry and Commerce v East West Trading Co Pty Ltd* (1986) 64 ALR 466; *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 68 ALR 441; *Gunaleela v Minister for Immigration and Ethnic Affairs* (1987) 74 ALR 263; *Broadbridge v Stammers* (1987) 76 ALR 339.

274 See, eg, *Municipal Council of Sydney v Campbell* [1925] AC 338; *Thompson v Randwick Corp (1950) 81 CLR 87; Samrein Pty Ltd v MWS&DB* (1982) 41 ALR 467. See also *ADJR Act*, s5(2)(c).

275 *Toohey* above n3. For earlier expressions of opinion see above n255.

276 The purposes or objects confining a statutory grant of power are ascertained by construction of the enabling Act. For a recent example in the context of the *ADJR Act* see *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649 at 659ff per Mason CJ, Brennan, Deane, Dawson, Toohey and McHugh JJ, at 664 per Gaudron J.

277 Even leaving aside the evidentiary problems associated with this ground of review.

But whereas review for improper purpose may be difficult to establish in relation to an exercise of prerogative power, it should not be excluded altogether. In particular, it is possible to identify at least some permissible and impermissible purposes bearing upon an exercise of prerogative power. The passages referred to above from the judgments of Kitto J in *R v Anderson; ex parte Ipec-Air Pty Ltd* and Stephen J in *Murphyores Incorporated Pty Ltd v Commonwealth* suggest that all dishonest, corrupt or whimsical purposes actuating a prerogative decision would be improper. In addition, it may be that certain prerogative powers bear purpose on their face. Arguably the war prerogative, like its legislative counterpart in s 51(vi) of the Constitution, is purposive in nature and must always be exercised for defence purposes.[278] Such a requirement has been hinted at in the cases, Warrington LJ observing of this prerogative in *In re A Petition of Right*[279] that:

> the act in question, having regard to existing circumstances, must be necessary for the public safety and the defence of the realm, and on this matter the opinion of the competent authorities . . . provided they act reasonably and in good faith, should be accepted as conclusive.[280]

Other prerogative powers may be purposive in this sense, notably the Attorney General's prerogative power to file an ex officio information which could be said to be exercised unlawfully if exercised for purposes unconnected with the due administration of justice.

(4) *Unreasonableness*

An administrative decision "so unreasonable that no reasonable authority could ever have come to it" will be set aside for abuse of power.[281] As Wilcox J observed in *Peko-Wallsend*, it is never easy to establish this ground of review.[282] What is required is "something overwhelming" before the courts will find the test to be satisfied.[283] The test itself is circular, in consequence of which the text writers have struggled to identify a concept of unreasonableness which stands free of the other grounds of review without undermining the legality/merits distinction.[284]

Despite these difficulties, both the House of Lords and the Federal Court have adverted to the application of the unreasonableness ground of review to decisions taken in the exercise of prerogative power. In *CCSU*, Lord Diplock said:

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278 Winterton, G, above n30 at 139.

279 [1915] 3 KB 649.

280 Id at 666. See also *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 at 115-16 per Viscount Radcliffe and the cases referred to in Winterton, G, above n30 at 139.

281 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230 per Lord Greene MR. See also *Parramatta City Council v Pestell* (1972) 128 CLR 305 at 327 per Gibbs J; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41-42 per Mason J; *Peko-Wallsend* (1987) 75 ALR 218 at 255-256 per Wilcox J; *ADJR Act*, s5(2)(g).

282 Above n37 at 255.

283 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230 per Lord Greene MR.

284 See, eg, Allars, M, *Introduction to Australian Administrative Law* (1990) above n57 at 186-193.

> While I see no a priori reason to rule out "irrationality" as a ground for judicial review of a ministerial decision taken in the exercise of "prerogative" powers, I find it difficult to envisage in any of the various fields in which the prerogative remains the only source of the relevant decision-making power a decision of a kind that would be open to attack through the judicial process upon this ground. Such decisions will generally involve the application of government policy. The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another — a balancing exercise which judges by their upbringing and experience are ill-qualified to perform. So I leave this as an open question to be dealt with on a case to case basis if, indeed, the case should ever arise.[285]

These words were quoted with approval by Wilcox J in *Peko-Wallsend*.[286] Peko claimed in that case that the Cabinet decision was void for unreasonableness given its effect in rendering less valuable (without payment of any compensation) Peko's mineral leases in Kakadu Stage II. Wilcox J rejected this argument. He emphasised the difficulty in establishing unreasonableness in relation to a decision involving "a significant policy element".[287] In his words:

> The decision was one going beyond the personal interests of Peko-EZ. It involved important questions of national policy and international relations. In relation to unreasonableness, it can never be enough to say that the effect of a particular decision was to disadvantage, without compensation, a particular individual. That must often be the case. The whole effect of the decision must be considered before it may be described as being devoid of justification.[288]

It would appear then that considerations of justiciability will forestall the successful challenge of many prerogative decisions on the basis of unreasonableness. Nevertheless, the same could be said of the application of this ground of review to the exercise of many statutory discretionary powers and the exceptional case must be allowed for. This paper has attempted to show that the prerogative is exercisable in a wide variety of circumstances, some (to borrow the words of Mason CJ) "more closely related to justice to the individual than with political, social and economic concerns".[289]

In the case of "individualised" prerogative decisions, an applicant for relief should not be denied the same opportunity of establishing unreasonableness as would exist were the source of the relevant decision-making power statutory.

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285 Above n5 at 411.
286 Above n37 at 255. Bowen CJ and Sheppard J did not discuss this aspect of the case. However, they agreed "generally" with the reasons of Wilcox J.
287 Ibid.
288 Id at 256.
289 Above n23 at 387.

5. *Conclusion*

This paper has argued that Australian courts will reject the traditional immunity from review of the manner of exercise of prerogative power and has sought to identify and discuss the main issues which arise in connection with the application to the prerogative of the ordinary principles of judicial review. It has been emphasised that the prerogative powers of the Crown are not a homogeneous group; that they are both diverse in nature and exercisable in a wide variety of circumstances. Accordingly, the courts should adopt a flexible approach to judicial review of prerogative power, looking not just to the subject matter of the relevant prerogative decision, but also to the ground of review upon which judicial intervention is sought. The courts should be slow to label certain prerogative powers as reviewable or unreviewable in all cases. The question whether or not a particular prerogative decision is amenable to the supervisory jurisdiction of the courts (and on what grounds) should depend upon the nature and effect of the decision itself, not upon the application of pre-determined classifications. The traditional immunity from review of the manner of exercise of prerogative power was such a pre-determined classification writ large. The new law in its place should not repeat the mistakes of the past.