MINISTERIAL POWER TO AMEND PLANNING SCHEMES WITHOUT NOTICE: WHAT LIMITS?

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INTRODUCTION

A review of the working of the Victorian Administrative Appeals Tribunal (the AAT) has recently been completed.[1] The review was critical of the power of the Minister for Planning and Urban Growth (as he then was) to override the normal planning process. The review was in particular referring to the Minister's power to 'call in' appeals. The call in power is contained in s 41 of the *Planning Appeals Act* 1980 (Vic). This gives the Minister the power to interfere with the normal appeal process and is contrary to the principle that the body hearing planning appeals should be the only and final body of appeal on planning matters. The AAT is an independent body designed to hear and determine appeals impartially. Where the Minister exercises his 'call in' powers this is no longer the case, because then the government of the day determines the appeal. The review of the AAT also highlights this, stating that the 'call in' of appeals is 'unjustified and can only be a vote of no confidence in the tribunal.'[2] Mr Kennan (the then Attorney-General) in releasing the discussion paper on the AAT defended the call in power on the basis that 'there are matters of overriding State concern which must now and again be subject to some overriding powers on the part of the State Government.'

In addition to the power to call in appeals, the Minister may also exempt himself or herself from the normal requirements of the amendment of planning schemes (ss 17, 18 and 19 of the *Planning and Environment Act* 1987 (Vic) 'the Act') and amend a scheme to facilitate, or prevent a development from occurring. The criticism levelled at the Minister's power to call in appeals is also applicable to the way in which the Minister has used the exemption power recently with regard to amendments of planning schemes. This exemption power has recently been criticised by Murphy J in *Antoniou and Anor* v *Roper*.[3] The power was also used in *Mietta's Melbourne Hotel* v *Roper and Anor*[4] to facilitate a development.

It is proposed to examine the Minister's powers to exempt himself from the requirements of the amendment of planning schemes and whether the reported cases give an indication as to whether or not there are limitations on this power of exemption.

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1 Wren, C (1990) Planning Appeals System Review, Discussion Paper, Melbourne; Victorian Government (Attorney-General's Department).

2 Despite this criticism there is currently before the Parliament a *Planning and Environment (Further Amendment) Bill* which, if passed, will extend the Minister's call-in power to the application stage (clause 9).

3 4 AATR 158.

4 (1989) 1 AATR 354.

THE AMENDMENT OF PLANNING SCHEMES

The *Planning and Environment Act* 1987 introduced a new system of planning for Victoria. Under the Act planning schemes consist of three parts. The State section is a general provision which includes the overall objectives and purposes of planning for the whole State. The second section is the regional section which sets out the purposes and objectives for the particular region. Like the State section the regional section is included in all planning schemes within the particular region. The third section is the local section and provides for the local requirements for an area.

The only means whereby a planning scheme may be altered or changed is by way of amendment of the scheme. Provisions relating to amendment of planning schemes are contained in Part 3 of the *Planning and Environment Act* 1987.

Under the Act the Minister for Planning & Housing approves and brings into effect amendments to planning schemes in Victoria. The normal process of scheme amendments is prescribed by ss 17, 18 and 19 of the *Planning and Environment Act* and includes the following steps:

- initiation of the amendment and its preparation by the planning authority;
- notification of owners and occupiers who may be materially affected;
- lodging of submissions by those affected;
- consideration by the planning authority of the submissions lodged;
- referral to an independent panel of submissions unable to be accommodated by the planning authority;
- hearing of submissions by the panel;
- consideration of the panel's report by the planning authority and adoption or abandonment of the amendment;
- if the amendment is adopted by the planning authority, consideration by the Minister who may approve or not approve it.

Not all these stages may occur, because the Minister has the power under s 20 of the Act to exempt a planning authority (including himself or herself) from the normal exhibition and notification requirements and approve an amendment by a notice in the Government Gazette. It was the exercise of this exemption power which was in issue in *Mietta's* case and *Antoniou's* case.

Under s 8 of the *Planning and Environment Act* the Minister has the power to amend any section of a planning scheme.

EXEMPTION FROM THE NORMAL NOTIFICATION PROCESS FOR THE AMENDMENT OF PLANNING SCHEMES

Section 20(4) allows the Minister to exempt himself from any of the requirements of ss 17, 18 and 19 of the Act and any of the *Planning and Environment Regulations* in respect of an amendment the Minister prepares. The effect of s 20(4) is to allow the Minister to exempt himself from any or all of

the normal notification requirements. If the exemption applies to all of ss 17, 18 and 19 the Minister may amend a scheme by simply publishing a notice in the *Government Gazette*, without the stages of lodging of submissions, consideration of those submissions, panel hearing, and consideration of the panel's report. Exemption may occur 'if the Minister, after consultation with the responsible authority, considers that compliance with any of these requirements is not warranted or that the over-riding interests of Victoria necessitate exemption'. It is not clear as to the meaning of 'consultation' as there is a conflict of authority as to its exact meaning.[5] Consultation with the responsible authority, which would normally be the relevant municipal council, does not necessarily mean that the agreement of the responsible authority must be secured. Even consultation with the responsible authority is not guaranteed, for s 20(5) of the Act provides that the Minister may dispense with it 'if, in the special circumstances of the case, consultation is not reasonably practicable'. The decision as to what consititutes special circumstances and reasonable practicability lies with the Minister. In instances where the Minister is the planning authority, as in the central city area of the City of Melbourne, the Act requires the Minister to consult with himself or herself, so the issues of agreement and reasonable practicability do not arise.

In addition to exempting himself or herself from the normal requirements, the Minister may exempt any other planning authority from any of the requirements of s 19 of the Act. Unlike exemptions granted by the Minister to himself or herself under s 20(4), there are some limitations on exemptions granted to other planning authorities and these are specified in s 20(3).

The wording of the Act is so broad and vague that it really provides no clear guidelines as to circumstances when the exemption power may or may not be exercised by the Minister. These issues were addressed by the Supreme Court of Victoria in two decisions: *Mietta's Melbourne Hotel Pty Ltd* v *Roper and Anor* and *Antoniou* v *Roper.*

MIETTA'S MELBOURNE HOTEL PTY LTD v *ROPER AND ANOR*

The secondnamed defendant, Oakford Properties had applied for and been granted a planning permit for the demolition and development at 121–127 Little Collins Street and 21 Alfred Place, Melbourne. An objector (Mietta's) had appealed against the determination to grant a permit. The appeal was commenced in the Planning Division of the Administrative Appeals Tribunal and adjourned to a later date to allow the application the subject of the appeal to be readvertised by Oakford Properties. The notice of application had not been properly advertised under the provisions of the Act and Regulations. Before the hearing was recommenced before the AAT the Minister (the responsible authority under the Melbourne Metropolitan Planning Scheme)

[5] See editorial comment *Pleasance & Ors* v *Shire of Arapiles* (1990) 40 APAD 413, 418–19.

amended the local section of the planning scheme (Division 6 of the Central Area Development Zone Controls). The effect of the amendment to the Zone was that the proposed demolition and development became an exempt proposal under the Zone controls.

The Minister exempted himself under s 20(4) of the Act from the normal requirements of notification, the consideration of submissions and panel hearings (ie the normal requirements under ss 17, 18, and 19 of the Act). The scheme was amended simply by notice in the Government Gazette. The amendment had the effect of not only making the proposed demolition and development a permissible use but it also had the effect of removing the power of the AAT to continue to hear and determine the appeal on a permit application. The proposed development no longer required a permit. Therefore the existing appeal before the AAT became redundant.

The exercise by the Minister of his power of exemption under s 20(4) of the Act in this instance meant also that any objectors to the amendments had no right to object to the Minister (the planning authority) or make a submission to a panel. No rights existed whereby third parties could air their objections to the amendment in an independent forum.

The objector applied to the Supreme Court for a declaration that the amendment was void because the Minister had failed to comply with the procedures laid down in Part 3 of the *Planning and Environment Act*, including that he acted for improper purposes, namely to render the appeal nugatory so that no proceedings could delay the developer, and failed to observe the rules of natural justice in exempting himself and in adopting the amendment.

With regard to the first part of the plaintiff's complaint, the failure of the Minister to act validly under Part 3, Divisions 1 and 2 of the *Planning and Environment Act*, the Court held that the action could not be brought before it because such an action fell within s 39(3) of the Act.

As it then stood s 39(1) provided that only a person who had been substantially or materially disadvantaged by a defect in procedure could bring an action in respect of such a defect. Section 39(3) provided:

> 'Any action in respect of a failure to comply with Divisions 1 or 2 or this Division must be taken before and determined by the Administrative Appeals Tribunal.'

Furthermore, s 39(2) provided that, once approved, an amendment was not invalidated by a failure to comply with the procedural requirements of Divisions 1, 2 or 3.

The original s 39 was intended to provide a quick and inexpensive avenue of redress via the AAT for a person disadvantaged by any procedural defect in the preparation of an amendment, whilst reducing court challenge to the validity of amendments on technical points. Section 39 has subsequently been repealed and substituted and the new provision will be discussed below.[6]

[6] Section 39 was repealed and substituted on 5/12/1989 in the *Planning and Environment (Amendment) Act No 86/1989.*

The plaintiffs had contended that s 39(3) did not remove the court's jurisdiction to hear the matter as the section was only concerned with the procedural requirements and did not include ultra vires of a wider sense, such as acting for an improper purpose. The court refused to accept this submission, holding that if the Minister granted himself an exemption from the requirements for an improper purpose, that was a failure to comply with Division 1 of Part 3 of the Act, for he would not have formed one or other of the opinions on which the exemption power is predicated by s 20(4).

The Court examined s 39(3) and in particular the meaning of the words 'in respect of' and referred to and applied *The Trustees Executors and Agency Co Ltd* v *Reilly* [1941] VLR 110, at 111 where Mann CJ said:

> 'The words "in respect of" are difficult of definition, but they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject matters to which the words refer'.

The Court concluded that if the Minister did act for an improper purpose and his decision was ultra vires and amounted to a failure to comply with Part 3 of the Act, then any action with regard to that failure must be taken before and determined by the Administrative Appeals Tribunal. The effect of s 39(3) was to vest exclusive jurisdiction in the Administrative Appeals Tribunal.

The Supreme Court went on to consider whether the principles of natural justice apply to the Minister for Planning & Environment exercising his power under s 20(4) of the Act or whether they have been excluded by the legislature. In answering this question the Court referred to and adopted the approach of Brennan J in *Kioa* v *West*.[7] The first question to be determined (the threshold question) is whether the terms of the statutory provisions displayed an intention to exclude the rules of natural justice. To determine this Beach J examined the legislative provisions contained in Divisions 1, 2 and 3 of Part 3 of the *Planning and Environment Act* to determine whether or not the legislature had addressed the question as to whether or not the rules of natural justice applied to persons affected by an amendment to a Planning Scheme.

Beach J concluded that:

> 'in drawing up the provision appearing in Divisions 1, 2 and 3 of Part 3 of the Act in the manner it has, the legislature has gone to some lengths to design a code which affords persons affected by an amendment to a planning scheme the right to make submissions and to be heard in support of their submissions. However, at the same time, it has given the minister power to exempt himself from the requirements of certain of those provisions. It is clear, therefore, that the legislature has addressed itself to the question as to whether a person should be heard in relation to a proposed amendment to a planning scheme, has laid down an appropriate code in

[7] (1985) 159 CLR 550, 609. Since the decision of the High Court in *Kioa* and the decision in *Mietta's* case there have been further decisions by the High Court illustrative of the law with regard to the exclusion of the rules. See *State of South Australia* v *O'Shea* (1987) 73 ALR 1; (1987) 163 CLR 378; *Annetts* v *McCann* (1989) 97 ALR 177; (1990) 170 CLR 596.

> relation to the matter but, at the same time, has determined that, in certain circumstances, the Minister shall have discretion as to whether or not that code shall be followed. In that situation, has this Court any warrant to vary the code?'[8]

His Honour, after referring to the judgment of the High Court in *Twist* v *Randwick Municipal Council*,[9] wherein the court held that:

> 'the legislature may displace the rule [natural justice] and provide for the exercise of such a power without any opportunity being afforded the affected person to oppose its exercise.'[10]

decided that the answer was 'No'.

Beach J, in applying the principles in *Twist's* case to the case before him, concluded that the legislature in the provisions of the *Planning and Environment Act*:

> 'has addressed the question of what natural justice should be afforded persons affected by an amendment to a planning scheme and it is not open to this Court to vary the code it has laid down'.[11]

The Court concluded that the rules of natural justice did not apply to the Minister when exercising his exemption powers under s 20(4) of the *Planning and Environment Act*. Beach J however stated that in striking out the plaintiff's proceedings he did so:

> ' "with regret" because I consider the plaintiffs have a legitimate grievance concerning the Minister's behaviour. They had a justifiable expectation that their appeal to the Planning Division of the Administrative Appeals Tribunal would be heard and determined by that Tribunal. It would now appear that their endeavours in that regard have been thwarted'.[12]

ANTONIOU AND ANOR v *ROPER*

The limits on the Minister's discretionary power to exempt himself from the notice requirements prior to the amendment of a planning scheme, and his 'behaviour' in amending or purporting to amend a scheme without notice were again central issues in *Antoniou and Anor* v *Roper*.

The Antonious (the applicants) purchased land in the Shire of Flinders in 1986, intending to build a house. An application was made to the responsible authority, the Shire Council, for a town planning permit. Section 52 of the *Planning and Environment Act* 1987 requires the responsible authority[13] to give notice of any such application to various parties, including owners and occupiers of adjoining allotments, and any other persons who may suffer material detriment if a permit is granted. Notice may be given by placing a

[8] *Mietta's* (1989) 1 AATR 354, 365.
[9] (1976) 136 CLR 106.
[10] Ibid 109.
[11] *Mietta's* 366.
[12] Id 366.
[13] Or the applicants in certain circumstances: see s 52(1)(a) and s 53(1).

sign on the land, or a notice in a local newspaper.[14] However, such notice need not be given if the responsible authority is satisfied that the grant of the permit would not cuase material detriment to any person. In this instance it was determined by the responsible authority that advertising of the application was not required, and thus no objections to the granting of the permit were received, possibly because no-one knew of the application.

Some four months elapsed without decision from the Council regarding the application. The applicants, as a result of this delay, lodged an appeal to the then Planning Appeals Board on 16th November 1987, seeking that the matter be determined. In fact, before the matter was heard, the jurisdiction to hear planning appeals passed to the Planning Division of the Victoria Administrative Appeals Tribunal (AAT). It was this body which eventually heard the matter.

However, prior to that hearing the Deputy Chief Chairman of the Planning Appeals Board ruled that notice of the pending appeal need not be advertised, despite the fact that the initial application had not been advertised either. Consequently, when the matter was eventually heard on 14th October 1988 knowledge of both the initial permit application and the appeal was apparently limited to the applicants, the Council, (the Responsible Authority), and the Tribunal. Potential objectors had not at any stage, it seems, been notified of the proposed building, or given an opportunity to air any grievances.

At the hearing only the Council and the applicants were represented. The Tribunal heard submissions and undertook a view of the proposed building site. The Council, having decided to oppose the granting of a permit, argued that the building should be sited further down the slope of the land to reduce its visibility. However, the Tribunal allowed the appeal and directed that a planning permit issue for the erection of the building in accordance with the plans submitted. In its reasons for decision the Tribunal stated (inter alia) that the area would be 'considerably enhanced by the proposal', and concluded that both building and landscaping were 'well and thoughtfully designed', and once established would not be visible against the skyline.

Residents living in the vicinity of the applicant's land did at this time become aware of the situation and were also concerned about the proposed location of the dwelling and decided to take action. The residents made an application to the AAT pursuant to ss 87–89 of the Act seeking cancellation of the permit on the basis that neither the application for permit nor the notice of appeal had been advertised and that there had been a 'material mistake' made in granting the permit. This resulted in a second hearing by the Tribunal. This time the applicants, the Council and the residents were all represented. The hearing took place on 17th March 1989 and the Tribunal reserved its decision.

Prior to that reserved decision being handed down however, several events took place. The residents made representations to their local Member of the

[14] Section 52(2).

Legislative Council, Mr Allan Hunt,[15] and to the then Minister, Mr Roper. Presumably as a result of these representations the Minister wrote to the Registrar of the AAT asking that his 'concerns' regarding the matter be conveyed to the Tribunal. The letter was hand-delivered to the Registrar on the day before the Tribunal's decision was handed down. A copy of the letter was apparently not sent to the applicants, who became aware of it and obtained a copy after making an application under the *Freedom of Information Act*, although a copy was, it seems, sent to the residents. The significance of this communication will be discussed later.

On the 13th April 1989, the Tribunal determined that the application for cancellation of the permit should be dismissed.

The applicants, having 'at all times acted in strict accordance with the law' and after spending 'two years endeavouring, in accordance with the provisions of the Act, to obtain an approval to build a home on their land',[16] and with two decisions of the AAT in their favour, began to take what they must have anticipated were the final steps necessary to facilitate the building of their new home.

That was not to be the end of the matter, however. Unknown to the applicants, the Minister had authorised the preparation of an amendment to the Flinders Planning Scheme. The amendment effectively placed the applicants' land in a 'View Protection Area' in which no building could commence without a permit from the Minister himself. The Minister would replace the Shire of Flinders as the responsible authority for this 'view protection area' only.

The Minister purportedly exempted himself from the requirements of notice of amendment pursuant to s 20(4) of the Act. The 'amendment' was adopted and approved by the Minister and notice of it was published in a special edition of the Government Gazette. Notice of the 'amendment' was tabled before the Legislative Assembly pursuant to s 38 of the Act.

The applicants, who were by this stage attempting to obtain final building approval from the Shire of Flinders, learned of this apparent 'fait accompli' when they received a letter from the Shire building surveyor. They were advised by him of the 'amendment' to the planning scheme affecting their land and told they now had to apply afresh to the Minister for a planning permit. The applicants tried, in vain, to speak to the Minister at this point.

Effectively the applicants were back to square one. Their existing permit was 'put to nought'.[17] It was against this background that the applicants took action in the Supreme Court of Victoria. They made application to the court pursuant to s 3 of the *Administrative Law Act* 1972, (Vic) calling upon the Minister to show cause why his decision to prepare and adopt the amendment should not be subject to judicial review.

The applicants (the plaintiffs in this action) brought the action on a number of grounds. They contended that the amendment had been prepared and

[15] The then shadow spokesman for Planning and Environment.
[16] *Antoniou and Anor* v *Roper* 4 AATR 158, 167.
[17] Ibid 182.

adopted for an improper purpose, that is to prevent them obtaining building approval. Further, that the Minister had failed to comply with the rules of natural justice, by hearing the residents' representations without hearing them, and that he had failed to comply with mandatory requirements in the Act, and had acted unreasonably.

The matter was heard by Murphy J who held that the purported preparation, adoption and approval of the amendment to the Flinders Planning Scheme was a nullity.

It was argued on behalf of the Minister, relying of course on the decision of Beach J in *Mietta's* case, that the Supreme Court had no jurisdiction to hear the matter. It was submitted that s 39(3) of the *Planning and Environment Act* provided that only the AAT could hear and determine complaints regarding procedural defects occurring in relation to an amendment to a planning scheme, including, it was submitted, complaints that the Minister had acted ultra vires.

The Plaintiffs relied on s 66A(2) of the *Planning Appeals Act.* The section provides that although generally the Supreme, County or Magistrates Courts will not have jurisdiction to hear and determine planning matters, if special circumstances justify such a hearing then the court may make a direction to that effect and hear the matter. *Mietta's* case, it was submitted, was distinguishable because no reliance had been placed on s 66A(2) in those proceedings.

Despite Beach J's earlier decision in *Mietta's* case, Murphy J rejected the argument that he had no jurisdiction to hear the matter. He held that s 39(3) applied only where 'defects in procedure' where in issue. That did not include, and was not intended to apply in a situation where an approved amendment was prepared and adopted in a manner which 'flagrantly flouts altogether the provisions of Division 1, 2 or 3, and is to be seen as an ultra vires or arbitrary exercise of power by the Minister'.[18] This was not, he said, an action brought because of a 'failure to comply' with the procedure for amendments, which did come within the scope of s 39(3), and was thus required to go before the AAT. This was an action 'reliant on excess of jurisdiction, encompassing as such actions do, denial of natural justice, bias, mala fides, unreasonableness and the like',[19] and quite distinct from an action contemplated as being within the scope of s 39(3). Even if that were not the case, His Honour held, s 66A would justify the court hearing the matter where special circumstances justified it and accordingly he ruled that such circumstances did exist.

With regard to s 39(2) which, as set out above, protects amendments which have been approved from invalidity as a result of procedural defects, Murphy J held that the provision did 'not save' the amendment. He found that 'the purported preparation, adoption, *approval* (our emphasis) and publication of [the amendment] was a nullity not because of procedural defects but because these actions were "in excess of jurisdiction" in the manner described by

[18] Id 180.
[19] Id 181.

Lord Reid in *Anisminic Ltd* v *Foreign Compensation Commission.*'[20] Consequently, as the Minister's preparation and approval of the amendment was rendered void, s 39(2) apparently did not have an 'approved' amendment to protect. Whilst it is not within the scope of this article to examine generally judicial reaction to and interpretation of ouster clauses, Murphy J's approach is open to the criticism that the wording of s 39(2) revealed a clear intention that amendments not be invalidated once approved. Consequently, his narrow interpretation, that the provision was capable of protecting only 'validly' approved amendments thwarts such an intention.[21]

However, it is submitted that his approach is consistent with the approach in *Anisminic*, where the Court held that only 'valid' decisions could be protected by the ouster clause in question. Murphy J's approach again exemplifies judicial reluctance to give a wide reading to such provisions, especially where to do so will prevent a court intervening in a situation where it considers such intervention necessary.

As stated above the original s 39 was repealed on 5th December, 1989 and replaced with a new and much longer s 39. Under the new provision a person substantially or materially affected by a failure of a Planning Authority (including a Minister) to comply with procedural requirements has one month to appeal to the AAT regarding an amendment which has not yet been approved. Section 39(8) provides that a person cannot bring any other action in relation to an amendment which has not been approved.

The requirement in the original s 39(3) *any* (our emphasis) action must be taken before the AAT is not retained. The main thrust of the new section is to provide for AAT review of amendments which have *not* been approved. Where an amendment has been approved, s 39(7) provides, in substantially the same terms as in the previous s 39(2), that the amendment is not made invalid by any failure to comply with specified procedural requirements. Consequently, if Murphy J's approach is followed, s 39(7) will not, as s 39(2) did not, protect an amendment which has 'purportedly' been approved where the actions complained of amount to more than defects in procedure and are ultra vires in the wider sense.[22]

Having decided the preliminary issue, Murphy J began his consideration of the substantive issues by comparing the process by which Planning Schemes are usually amended with those provisions of the Act empowering the Minister to use what might be called the 'fast track' process of amendment. The most important provisions as discussed above are ss 20(4) and (5).

First, Murphy J dealt with the requirement of 'consultation' in s 20(5). He concluded that the provision did *not* empower the Minister to simply exempt

[20] [1969] 2 AC 147, 171.

[21] Compare *R* v *Commissioner of Police (NT), Ex parte Holroyd* (1965) 7 FLR 8, where it was held that an ouster clause expressed to protect decisions 'made or purporting to be made' was effective.

[22] The new s 39 was inserted, as previously stated, in December 1989. The decision in *Antoniou* was delivered on 1/3/1990. Onc can only speculate whether s 39(7) would have been differently worded, in an attempt to strengthen it to protect 'purported' approval of an amendment, had the decision been available prior to the drafting of the new s 39.

himself from consultation. The Minister was entitled to dispense with consultation only if 'in the special circumstances of the case' consultation was not 'reasonably practicable'. His Honour said whether or not consultation was reasonably practicable was a question of fact, and that in the instant case there had been nothing put before him to suggest consultation was not reasonably practicable, in fact it was quite to the contrary. Therefore the Minister's purported exemption from the requirement of consultation was in His Honour's view unreasonable and ultra vires.

Secondly, with regard to the power to exempt himself from notice requirements pursuant to s 20(4), it was His Honour's opinion that the Minister could *only* exercise the power to exempt himself from compliance with usual notice requirements if the Minister considered compliance was 'not warranted' or if 'the overriding interest of Victoria necessitated exemption'.

In Murphy J's opinion the Minister had to form an opinion *himself* (our emphasis) that compliance was not warranted, and that there were good and sufficient grounds for non-compliance, that is, that the usual procedure was not justified. It was His Honour's view that such a conclusion could be reached where the amendment proposed was procedural or 'of such a trifling nature that the purpose which lies behind s 19 [that those who may be materially affected should be given the opportunity to object to the proposed amendment] would not be done a disservice if its stringent requirements were not followed'. However, he continued:

> 'If the proposed amendment is one which interferes with a basic use or development to which the land affected by the amendment could have been put, say the building of a home, before the making of the amendment, it would not in my opinion be reasonable for any Minister to consider that compliance with the requirement that, before its adoption, the owner of such land should be notified and given an opportunity to make submission, was not warranted.'[23]

He concluded that in the case before him:

> 'This was not a mere procedural amendment which might not warrant the elaborate notice requirements of s. 19. It was an amendment which, if adopted and brought into force, would stultify the expensive endeavours of the Antonious over the preceding two years to build a home acting at all times in accordance with the provisions of the Act and the original Planning Scheme.'[23]

In His Honour's view the Minister could not reasonably form the opinion that compliance was not warranted in such circumstances, 'to assert in the face of detailed provisions of the Act that notice to those most vitally affected by the amendment was not warranted, is not open.'[24]

In considering the Minister's power of exemption on the basis that the overriding interests of Victoria necessitated the use of the alternative procedure His Honour said:

[23a] *Antoniou* 4 AATR 158 at 173.
[23] Ibid 174.
[24] Id 174.

> 'In my opinion, it is not possible to imagine that any Minister could reasonably consider that "the overriding interests of Victoria" (whatever that expression may mean) are in any way involved in the case or that if they are they necessitate exemption. This is simply a situation in which private citizens intend to build an architect designed home on privately owned land located . . . in a relatively remote part of the Peninsula'.[25]

After this consideration of the limits to the Minister's power of exemption imposed by the provisions of the Act itself, His Honour concluded that common law principles governing the exercise of discretionary powers also placed limitations on the exercise of the exemption power.

These principles set out in the now famous and often quoted passages of *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation*[25a] require a discretionary power be exercised in a proper manner. For instance, the power must only be 'exercised after all relevant considerations have been taken into account, irrelevant matters must be disregarded'. The power must be exercised bona fide, not in bad faith or for improper purposes and must not be an 'unreasonable or arbitrary exercise of power'.[26] These principles, Murphy J stated, are said to be 'well understood' by administrators. However, he continued, in the circumstances of the case before him he could only conclude that if the Minister had understood them he had 'done nothing to attempt to comply with them'.[27]

The plaintiffs alleged, inter alia, that the Minister's exercise of the exemption power was ultra vires because he had acted for an improper purpose and unreasonably. His Honour, as discussed above, held that the Minister had exercised his power unreasonably by exempting himself from the requirement of notice to the owners of the land affected by the amendment. With regard to the question of whether the power had been exercised for an improper purpose, ie to 'thwart the effect of the issue to the plaintiff's of a planning permit', he did not decide the issue, preferring to base his decision on other grounds. He did, however, indicate that the argument was not without merit.

Finally, with regard to the plaintiff's submission that they had been denied natural justice when, after hearing representations by the residents, the Minister had refused their request to make their own representations, Murphy J had 'no hesitation' in concluding they had been denied natural justice.

In so far as the issue of natural justice was concerned His Honour said it was 'fundamental to the Act's philosophy that rights are not to be taken away, willy-nilly, without a person affected being given notice and an opportunity to make submissions'. Rights could not be affected at the 'whim of the Minister', by 'purporting to prepare, adopt, approve and publish an amendment, designed specifically to affect adversely the plaintiff's use and enjoyment of their own land, without notifying them in any way and after hearing one side only'. His Honour was prepared to infer from the Minister's reasons that he

[25] Ibid.
[25a] (1948) 1 KB 223.
[26] Lord Greene 228–9.
[27] Antoniou 4 AATR 158 at 175.

'prejudged' the issue without hearing the plaintiffs, despite the decisions of the AAT 'of which the Minister was aware but, [which he] apparently disregarded'.[28]

It was argued on behalf of the Minister that he was not subject to the principles of natural justice in making a decision pursuant to s 20(4) of the Act, as the action was 'political in nature'. Murphy J rejected the argument which he said 'appears to accord with that which was unsuccessfully argued in the High Court in *FAI Insurances Ltd* v *Winneke* (1982) 151 CLR 342'. It was decided in that case that 'a statutory authority (in that case the Governor in Council) having power to affect the rights of a person is bound to hear him before exercising the power'. Rights in a strict sense need not be involved, the rule extends to include an interest or privilege, or a legitimate expectation. Murphy J concluded the plaintiffs in the case before him had obtained a permit and were 'entitled reasonably' to anticipate their right to proceed under that Act, after winning two appeals, would not be negated by an amendment adopted and approved without notice to them, or an opportunity to be heard.[29]

Thus, Murphy J was 'not able to accept the apparent view of Beach J that the Minister when exempting himself [from notice] is not bound by any of the rules of natural justice'. He was of the opinion that the rules of natural justice had not been excluded, indeed to the contrary, he was of the opinion that 'the vital and recurring purpose and intent of these statutory requirements is to ensure that those who may be materially affected by the amendment shall have an opportunity to put their viewpoint to the planning authority before the adoption and approval of the amendment.'[30]

It may be argued that it was Parliament's intention to ensure, through the enactment of s 20, that a Minister have the power to amend a planning scheme without notice to those vitally affected and without being subject to the rules of natural justice when circumstances warrant it. Murphy J's decision does not give effect to such an intention. However, it is submitted that Parliament itself limited the circumstances in which notice could be dispensed with in exercising the powers in s 20 and Murphy J's judgment interprets those limitations in a manner consistent with legislation in which the main purpose and intent is to *give* notice to such persons.

It is further submitted that Murphy J's approach is consistent with the approach taken by Mason CJ in *Kioa*, that there is a common law duty to afford procedural fairness to a person whose rights, interests or legitimate expectations are adversely affected by an administrative decision, unless there is a *clear* (our emphasis) manifestation of a contrary intention in the statute.

One further issue, which was considered by His Honour in the course of these proceedings, was the propriety of the Minister's action in sending a letter to the AAT prior to its decision being handed down.

[28] Ibid 176–80.
[29] Id 178.
[30] Id 179–80.

The Minister had written to the Registrar expressing 'deep concern' about the matter being considered by the Tribunal, along with his opinion that 'it would appear that . . . [the lack of advertisement of the application] has raised a fundamental question of procedural fairness. In the normal course of events . . . [after advertisement] . . . the residents [would have been] given a reasonable opportunity to object and subsequently be a party to any appeal'. He then requested the Tribunal give its 'closest attention to those issues'.[30a] It should not be forgotten that this letter was forwarded to the Tribunal *after* it had conducted its second hearing, instituted by the residents, who had been represented at that hearing by Counsel.

Murphy J, took the view that for any person 'to attempt to influence the thinking of the Tribunal in connection with an appeal — that person being not a party — and to do so outside the formal hearing, and when both parties are not present and the decision is reserved is anathema to the basic principles of natural justice'. Any judicial body in Victoria, he said, 'would consider such conduct to be scandalous'. Yet, he went on to find that the letter 'was an endeavour by Mr Roper, the Minister, to influence the Tribunal' in his view 'improperly' and that it 'flouted the appearance of impartiality which the *Planning Appeals Act* 1980 is at pains to give the Tribunal'.[31]

As His Honour pointed out, the letter was not invited by the Tribunal and its existence was not revealed to the plaintiffs. More importantly, he said, the fact that the Minister's advisers had communicated with the Registrar regarding the timing of the Tribunal's decision and, having learned that it was already with the typing pool, had advised that the letter be hand-delivered, was cause for 'grave disquiet'. This was so, despite His Honour's confident opinion the Tribunal would in any event have remained uninfluenced by the Minister's intervention, even though 'the Minister controls the reappointment of a member of the Tribunal'. He continued . . . 'It has often been said that it is difficult to conceive that a person could be seen to act with judicial independence when his reappointment depends upon the continued good graces of any Minister or of the Government of the day. The truth of this observation is accentuated by a consideration of the Minister's action in this case.'[32]

CONCLUSIONS

Ministerial powers of exemption from notice requirements when amending a Planning Scheme pursuant to the *Planning and Environment Act* must be exercised, like other discretionary powers, according to law. The important decision of Murphy J in *Antoniou* clearly shows that a Minister's action can be challenged by way of judicial review where the plaintiff can establish that mere 'procedural defects' in the preparation and/or approval of an amend-

[30a] Id 169.
[31] Id 168.
[32] Id at 168.

ment are not in issue, rather that the ministerial action is in 'excess of jurisdiction' or ultra vires because of denial of natural justice, unreasonableness, improper purpose and the like.

A decision to amend a scheme cannot be made 'at the whim of the Minister' or to achieve a politically convenient decision. A decision will be scrutinised to determine if there is compliance with the provisions of the Act itself. A minister can only exempt himself or herself where there a 'good and sufficient grounds' for an opinion that compliance with notice provisions are 'not warranted', or that 'the overriding interests of Victoria necessitate exemption'. Clearly Murphy J's judgment places some limitation on the circumstances in which a conclusion that compliance is not warranted might validly be reached. Notice it seems will at least be required to be given to those 'most vitally affected' (ie the owners or occupiers of land affected) by an amendment which is one which goes beyond the 'procedural' and 'interferes with a basic use or development' of the land.

It remains to be seen whether a conclusion that notice to owners or occupiers of adjoining land is not warranted would amount to a 'reasonable opinion'. Arguably, it would not, as an amendment which interferes with the basic use and/or development of adjoining land can have very severe and lasting effects such that the purpose of the notice requirements would be done a grave 'disservice' if they were not followed.

Apart from the limitations on the exemption power to be found in the Act itself, the well settled common law principles governing the exercise of discretionary powers will also ensure that if the power is exercised for improper purposes, unreasonably, in breach of the rules of natural justice, etc, it will be struck down.

It is submitted that the approach taken by Murphy J, which has not been the subject of an appeal, is the correct one. It allowed the Supreme Court to remedy the obvious injustice which the Antonious had suffered.