AIAL FORUM

NO 1

MAY 1994

aial AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW (INCORPORATED)

Forum Editor:
Michael Sassella
(06) 244 7047

In this issue....

THE OMBUDSMAN AND THE RULE OF LAW

Dennis Pearce.....1

AMERICAN SOCIAL SECURITY PRACTICE: A PROTOTYPE FOR AUSTRALIA

Bronwyn McNaughton.....6

ENFORCEMENT DISCRETION AND THE US ENVIRONMENTAL PROTECTION AGENCY: USE, ABUSE AND CONTROL

William L Andreen.....12

ATTORNEY-GENERAL (NSW) V QUIN AND THE LIMITS ON THE EXECUTIVE'S RIGHTS TO CHANGE ITS MIND

Keith Mason QC.....19

THE SOCIAL SECURITY APPEALS TRIBUNAL: ACHIEVING CONSISTENCY AND COPING WITH CHANGE

Anne Coghlan.....23

LION HUNTER

Alan Cameron.....29

WAIVER OF SOCIAL SECURITY DEBTS

Stephen Argument.....36

MINDING THE PEOPLE'S MINDER

Dennis Pearce.....42

THE DEFENCE FORCE DISCIPLINE ACT: DISCIPLINARY DREAM OR ADMINISTRATIVE NIGHTMARE

Brigadier William D Rolfe.....45

JUDICIAL REVIEW OF ASC INVESTIGATIONS: THE ADJR ACT

John Kluver.....58

CURRENT DEVELOPMENTS IN CANADIAN ADMINISTRATIVE LAW

John M Evans.....66

THE PRIVACY ACT: REFLECTIONS ON FEDERAL LAW AND ITS RELEVANCE TO STATE ADMINISTRATION

Kevin O'Connor.....74

IS THERE TOO MUCH NATURAL JUSTICE? (1)

Justice Deirdre O'Connor.....82

IS THERE TOO MUCH NATURAL JUSTICE? (2)

The Hon Justice L T Olsson.....87

IS THERE TOO MUCH NATURAL JUSTICE? (3)

Professor Dennis Pearce.....94

REFORM OF JUDICIAL REVIEW IN VICTORIA: IS THE ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT THE RIGHT MODEL?

Annette Rubinstein.....104

A GUIDE TO THE SOUTH AUSTRALIAN WHISTLEBLOWERS PROTECTION ACT 1993

M R Goode.....109

WHISTLEBLOWING: THEORY AND PRIACTICE

David Clark.....119

APPLICABILITY OF ADMINISTRATIVE LAW TO GOVERNMENT BUSINESS ENTERPRISES: THE VICTORIAN PERSPECTIVE UNDER THE *STATE OWNED ENTERPRISES ACT 1992*

Mick Batskos.....130

FOI: KENNETT STYLE

Dr Spencer M Zifcak.....138

PARLIAMENTARY COMMITTEES AND PUBLIC ACCOUNTABILITY

Stephen Argument.....144

WA INC. ROYAL COMMISSION RECOMMENDATIONS: OVERVIEW AND IMPLICATIONS FOR COMMERCIAL DEALINGS OF GOVERNMENT

Michael Barker.....148

A NOTE FROM THE EDITOR

The sixteenth and final edition of the *Australian Institute of Administrative Law Newsletter* was published in December 1993. The note from the editor of that publication foreshadowed that it would be replaced by a new publication.

This, the *Australian Institute of Administrative Law Forum*, is that publication.

Readers will note that it is a different size from the old *Newsletter*. The B5 size will make storage of the new *Forum* more convenient for readers, the B5 format being more commonly employed for official publications than the former A3 format.

This first edition is larger then the *Newsletter* ever was and larger than future editions of the *Forum* will be. It contains reprints of 22 articles that originally appeared in the *Newsletter*. This is to celebrate many of the best moments of the *Newsletter* and to assist readers who might want to dispose of their old copies of the *Newsletter* and concentrate on the smaller format *Forum*. This edition is therefore a bridge between the two publications.

In selecting the 22 articles for this edition the editorial group looked for material that fell into the following categories:

- Material that made a new and unique contribution to knowledge of administrative law.
- Material that identifies and discusses particular problems in administrative law and government and makes observations that remain pertinent.
- Material by senior practitioners in administrative law that provides valuable insights into how they and their institutions operate.
- Material that was topical at the time and contains messages that should not be forgotten.

It is anticipated that the second edition of the *Forum* will appear early in July. Four editions will be published this year.

Thanks are due to Robert Todd, John McMillan, Kathryn Cole and Stephen Argument who contributed greatly to the production of this volume.

Special gratitude is extended to Gordana Bilobrk who did all the keyboard and layout work required to produce this special edition.

Michael Sassella
June 1994

THE OMBUDSMAN AND THE RULE OF LAW

*Dennis Pearce**

First published in AIAL Newsletter No 2 1990.

The cost associated with bringing an action in a court and now also before a tribunal is resulting in an increasing use by members of the public of the Ombudsman as a means for requiring government organisations to comply with the law. Section 15 of the Ombudsman Act (Cth) contemplates that the Ombudsman might intervene in relation to a decision that appears to have been contrary to law or to have been based wholly or partly on a mistake of law. There is, however, a qualification on this power in that s6(2) provides that where a complainant has a right to cause the action to which the complaint relates to be reviewed by a court or by a tribunal, the Ombudsman may decide not to investigate the action if he is of the opinion that it would be reasonable for the complainant to exercise the right of review so provided. The way in which this last mentioned provision is drafted is of considerable significance. It can be seen that the discretion is couched in the form that the Ombudsman may decide not to investigate the matter if it is reasonable for the complainant to pursue the alternative right of review. In a number of the Australian jurisdictions and in the United Kingdom, the discretion is reversed. A complainant must be left to pursue the alternative means of review unless the Ombudsman if of the opinion that it would not be reasonable to expect him or her so to act. This led the UK Court of Appeal to rule that good cause must exist before the Ombudsman can take up a matter that is capable of being challenged in a court. It is not necessary for the Ombudsman to be persuaded of the likely success of the judicial review: it is sufficient if the forum of a court or tribunal is available for jurisdiction to be excluded, unless it would not be reasonable for the judicial route to be pursued: *R v Commissioner for Local Administration ex parte Croydon LBC* [1989] 1 ALL ER 1033. If the Commonwealth Act had been phrased in this fashion, it may well have limited the availability and the preparedness of the Ombudsman to take up matters where they were capable of being reviewed by the Federal Court or the AAT or another tribunal.

This is not to say that the Ombudsman does not exercise the discretion in s6. Particularly in the case of tribunals, a complainant will normally be told to pursue the available means of review. But this is not done as a matter of course. Factors taken into account include the cost involved, which is viewed against the amount at stake, the delays which inevitably occur in bringing an action in a court or tribunal and the impact that such delays will have on the complainant, whether the decision concerned can be said to be a standard administrative decision, and finally the nature of the question of law that is involved. The result of this approach to the discretion has meant that matters have been taken up that the UK style discretion would probably have precluded.

I would, for example, have not hesitated to investigate the facts that were before the Court of Appeal in the case referred to above. They involved a decision relating to which school the complainant's child could attend. The basis of complaint against the decision was that

* *Commonwealth and Defence Force Ombudsman, 1988-1991.*

there had been an inflexible application of policy. While such an argument can found a judicial review application, it also clearly constitutes defective administration and thus falls within the ambit of the Ombudsman Act. It also represents the very type of decision that the Ombudsman was established to investigate and which it should not be necessary for a person to have to go to court to challenge.

Of greater significance, perhaps, are those cases where an amount of money is involved. Traditionally, of course, the courts have always provided the avenue of relief from the wrongful imposition of fees or charges. However, where the amount involved is small, this protection can be meaningless. It is not surprising therefore to find persons coming to the Ombudsman to seek assistance.

No better example of this can be provided than that of the imposition by the Department of Immigration, Local Government and Ethnic Affairs of a fee for seeking review of an adverse decision relating to an application to visit or migrate to Australia. The fee in question was initially $200 and subsequently rose to $240. There was no legislative basis for the imposition of this fee but it was collected over a two year period notwithstanding advice from various quarters that to do so was illegal. An action challenging the validity of the fee was commenced but not continued after legal aid was refused the applicant except on terms that could have involved her in meeting the costs of the action if unsuccessful.

Following my intervention, the Minister conceded that there was no legislative basis for collecting the fee and the practice was discontinued. There is not question that, but for my intervention, the Department would have continued to collect the fee not withstanding its doubtful validity. In practical terms, no action could possibly have been brought to have prevented this occurring because the sum at stake simply did not warrant the risk of costs involved. Shortly after this intervention another agency abandoned its practice of collecting a fee that had no legislative basis following my request that it obtain advice on the question from the Attorney-General's Department.

Another instance of successful Ombudsman intervention where judicial proceedings could in theory have been instituted but reality dictated otherwise was a case involving a breach of copyright by an agency had reproduced material in which the copyright lay with a member of the public. It declined to pay any compensation for its action . The agency file revealed that the legal officer of the agency had indicated that a breach of copyright had occurred and appropriate payment should be made. Management had however taken the line that the amount involved was small (around $600), the likelihood of the agency being sued for a sum of this size was slight and accordingly liability should be denied. Following my intervention, an appropriate sum of money was paid to the member of the public affected by the agency's action.

While the approach followed by the agency is frequently employed in the private sector, I could not see why a government agency should be able to pit the might of the Commonwealth Government against a citizen. So to act constituted an abuse of power but to seek protection through the judicial system was unrealistic.

A further case in which I exercised the discretion to continue to deal with a complaint was based not on the size of the amount at stake but on the fact that the parties had already litigated the issue and it seemed to me inappropriate for the complainant to have to return to court. A successful action had been brought to challenge liability for sales tax. When the complainant sought to recover the tax already paid, the Australian Tax Office

raised an objection to recovery of the overpaid tax that had not been taken before the court and which was, indeed, based on an argument that the use of the word 'may' in the relevant section imported a discretion whether or not to refund the overpaid tax. I took up the issue on the basis that the word 'may' was being used in the permissive sense and did not more than authorise the repayment of the monies concerned. This was accepted by the ATO but a further objection was then raised. This was also countered and the amount involved, some $300,000, was refunded.

As indicated above, the discretion not to intervene is more likely to be exercised where tribunal review is available. However, the practice of most agencies to be represented in actions before the AAT has induced me to look more carefully at instances where a complainant professes to be disadvantaged by not being able to afford legal representation. More obviously, I will take up an objection in tax cases where the effect of the regulations relating to AAT filing fees results in multiple fees having to be paid to attempt to recover a small sum of disputed tax. Likewise, I pursue complaints where the sum at stake does not justify the filing fee, eg compensation for mail lost or damaged by Australia Post.

These are but some recent examples where the Ombudsman has proved to be a more effective means of enabling a member of the public to obtain his or her legal rights than other avenues of review. The matter was highlighted for me as a result of a letter that I received recently from a firm of solicitors concerned with an exemption of certain goods from sales tax. The letter read in part:

> Because we find ourselves unable to accept the arguments that have been advanced to us, we have adopted this approach to you to ask your assistance in attempting to require the Deputy Commissioner to apply the guidelines laid down by the Commissioner of Taxation, the application of which would be to accept that the goods are exempt from sales tax under ... in the First Schedule to the Sales Tax (Exemptions and Classifications) Act. You may be interested to know why we have sought your assistance in this matter rather than pursue it through the provisions in the legislation relating to objections and appeals to either the Administrative Appeals Tribunal or the Federal Court. Our reason is quite simple, namely that we believe that, in this set of circumstances, you can obtain the desired result far more expeditiously, and far more economically, than through the procedures available in the sales tax legislation particularly as the guidelines have been so clearly stated by the Commissioner of Taxation.
>
> The delay in bringing a matter such as this to one of these judicial authorities is estimated at 2 to 3 years and such delay in this case has the effect of placing a sales taxpayer in an invidious position pending the final decision - should he charge tax on goods which he believes to be exempt or should he take the risk which could, in the long run, entail him in a severe financial predicament.

The legal profession seems to me to have been rather slow in appreciating the value of the Ombudsman's office in dealing with complaints. However, this letter illustrates a recognition on the part of one firm at least that the litigation process is not the only way to achieve an end and may indeed be disadvantages to the client.

Another, and in many ways more insidious, threat to the rule of law has come to my attention. I have seen instances where an agency, having lost

before the Federal Court, takes advice as to whether an appeal could succeed and is told that there is a chance of success on appeal. Rather than going on with the appeal, the instant case is conceded but the statement of the law as laid down in that case is not followed. The preferred version that might have been given by the appeal court is that which is adopted. A similar approach is followed if an appeal is pending. Rather than treat the law as being that stated by the judge at first instance, the adverse decision is ignored and the law is continued to be applied in the form that it is hoped that the appeal court will determine. This action is justified on the basis that courts are known to change their minds or that the court has misinterpreted the legislation and that it will be put right by the higher court or by an amendment to the Act.

A similar approach is taken to Administrative Appeals Tribunal decisions that agencies do not like. The stated justification is similar to that applying to courts with the added argument that experience has shown that differently constituted tribunals produce different interpretations of the relevant legislation. In addition, of course, the AAT does not give a binding pronouncement upon the law and a failure to adhere to a ruling, technically speaking, does not constitute a refusal to follow the rule of law.

There is not a great deal that I can do in these latter cases other than attempt to persuade the agency of the folly of its ways or to threaten to expose the action engaged in should the issue come to my attention in a later case.

The preceding cases are examples of circumstances in which the Ombudsman's office provides a means of review notwithstanding the fact that the issue arising involves a question of law and there is nothing flowing from the office of Ombudsman that in itself makes any interpretation of the law by him definitive. This will not always be the approach followed. If the outcome of a complaint does turn on a difficult and disputed question of law, the complainant will be advised that it is not part of the Ombudsman's role to give legal advice or to choose between competing legal arguments. However, even in cases of this kind it may be that the Ombudsman will be persuaded to exercise his discretion and investigate a case - for the reasons set out previously relating to the complainant's circumstances. In such a case, it is common practice to request the decision-making agency to seek advice from the Attorney-General's Department on the legal issue involved. Such advice will constrain the actions of the agency.

There is another way of looking at these examples of the Ombudsman's work. They demonstrate the significance of the Ombudsman in upholding the rule of law. The courts have regrettably become the province of the rich and the legally aided.

It is instructive to look back to one of the most significant early stances by the courts to assert control over the executive. In *Dyson v Attorney-General* [1911] 1 KB 410 it was suggested that the making of a declaration of the application of a taxpayer should not be countenanced by the court because of its likely disruptive effect on administration. The court rejected this argument. Farwell L J said:

> there is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials, having regard to their growing tendency to claim the right to act without regard to legal principles and without appeal to any Court (at 423).

The observation is interesting in the light of the attitude of the agencies alluded to above. An equally pertinent remark from the same judgement is:

> If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression (at 424).

This is as true today as it was in 1911, but regrettably the cost of judicial review has become such that the courts can not always provide that defence to which Farwell L J was referring. The institution of Ombudsman is playing an increasingly significant role in providing a means of protecting citizens from an executive that is inclined to place efficiency and effectiveness ahead of compliance with the law.

AMERICAN SOCIAL SECURITY PRACTICE: A PROTOTYPE FOR AUSTRALIA?

*Bronwyn McNaughton**

First published in AIAL Newsletter No 4 1990.

Much of the practice of administrative law is appropriately the realm of non-lawyers and many of the forums of administrative review have, for good reasons, never been intended as lawyers' forums. Nevertheless, lawyers have a part to play but, to date, administrative law in Australia has rarely, if ever, sustained financially a viable legal practice. Even legal practitioners with a genuine wish to focus on a particular aspect of administrative law have commonly had to sustain their practice with traditional (and more lucrative) 'bread and butter' legal work.

It may be that this pattern will change, as American experience may indicate. Administrative law in the United States is a vast and variable spread. Across the range of State and federal government administration there are well-established review systems, in which legal practitioners play an integral role.

The following description of the system within which an American social security law[1] practitioner works may give some insight into what the future could hold for an Australian administrative law practitioner. Some reform proposals are also mentioned.

* *Secretary to the Senate Standing Committee on Legal and Constitutional Affairs.* *(The author is grateful for the advice and assistance provided in the preparation of this article by Neil Onerheim, a lawyer who specialises in social security law in Lawrence, Mass.)*

The effect of contingency fees and statutory fee-shifting provisions is, of course, a matter of some speculation in Australia. The contingent fee is probably the only way private practice in social security law could be supported.

The social security appeals process

Four successive stages of administrative review are available to the American social security claimant.

The *initial application for review* of a decision is made to the Social Security Administration, which then refers the matter to a State government body which has contracted with the federal government to act as its agent and to carry out medical determinations. The usual time taken for a decision is 1-2 months. Applicants are notified of the initial determination in writing. The notice includes information about appeal rights, and usually too at least an outline of the reasons for the determination, although it may not be an adequate document on which to base an appeal. Often it tends to be rather lengthy and claimants may have difficulty in understanding all the information that is provided.

Reconsideration of the initial determination may be sought from the Social Security Administration, which again refers the appeal to a State agency. This usually takes another 1-2 months, and is the least formal of the stages of review.

Typically, neither of those stages involves a personal hearing, unless, for example, it is proposed to terminate benefits.

A hearing before an *administrative law judge* is the next step. In US practice, they are employees of the departments

which they serve. In the Social Security Administration, for example, the judge's task is to hear appeals arising out of the administration of the social security portfolio, but not otherwise to engage in the work of the Administration.

The hearing before the administrative law judge is often the only formal hearing within the administrative appeal process. It is not adversarial - no lawyers for the government participate. It is on the record and a detailed decision is generally given. Evidence presented to an administrative law judge will often be in written form - for example, medical records. Typically, the administrative law judge will call, for example, vocational experts who will testify as to the availability of jobs in an area of the transferability of a worker's skills to a lighter kind of work. It would be less usual for the judge to call a physician to the hearing.

Substantial delay may occur at this stage. An appeal might not get before a judge for 4-5 months from the date of filing, and another couple of months can elapse before a decision is handed down. The Supreme Court has ruled that interim benefits need not be paid during this time.

Review of the decision of an administrative law judge lies to the central *Appeals Council* of the Social Security Administration in Washington DC. Basically, the grounds of review by the Appeals Council are abuse of discretion by an administrative law judge, error of law, or a decision which is not supported by the evidence.[2] The effect of these grounds of review is that the facts found by the administrative law judge are binding unless they are not supported by substantial evidence. This review is conducted on the papers submitted at each of the previous stages and on the basis of the tape recordings of earlier appeals.

Medical evidence is commonly added at this stage. New evidence may be the basis of remand to an administrative law judge; this would be more usual than the case being overturned by the Appeals Council.

The appellate process from here on becomes decidedly judicial.

Once all administrative appeal rights are exhausted, an appeal may be taken to a federal court where the grounds of review are similar to those which apply to the Appeals Council (see above). First, review may be sought in the *District Court*. A de novo review of the decision of the District Court may be sought before the *Circuit Court of Appeals*. From that Court, appeals lie to the *Supreme Court*. Whether the Supreme Court hears a case is, with limited exceptions, a purely discretionary matter for the Court. It most often deals with constitutional questions or matters in which the precedents from the lower courts differ and a final determination of the issue is required. However, major differences in the rulings of the various circuit courts are a feature of the American federal appeal process and will not guarantee that a matter will be heard by the Supreme Court. For example, the evaluation of pain in social security cases varies widely from circuit to circuit as a result of different answers being given to similar questions asked of various circuit courts.

At each stage, there is a 60 day time limit for the lodging of an appeal, which runs from the receipt of the notification of the determination. At the expiration of 60 days a determination is considered final unless an appeal or a request for an extension of time has been lodged.

The practitioner's role

It is clear that the American social security law practitioner's role, and in all probability the role of any administrative law practitioner, is going to involve a lot

of paperwork. It is only the exceptional case that will call for oral advocacy. But this is nothing new for lawyers.

Regular liaison with the administering department is a must. In this way, familiarity with the practices of both the Administration and the administrators is developed. Invariably this assists the resolution of later cases and time spent in this manner is a worthwhile investment.

Funding legal assistance

One of the reasons the practice of administrative law has not developed as rapidly in Australia as it might have, is that many potential administrative law clients, such as social security recipients and housing department clients, are not in a position to fund legal assistance. Community legal centres, largely overworked and underfunded, bear the brunt of such work in Australia. Similar bodies in the US - there called legal services - also play a significant administrative law role. Their high degree of expertise can benefit clients, and make an invaluable contribution to public discussions and policy formulation.

Contingent fees

American legal practitioners have available to them in administrative law practice, as in other areas, the contingent fee. It is the only reason the private practice of social security law takes place. The essence of the contingent fee is that if a case fails or does not proceed to conclusion, there is no payment for the practitioner's time and services. In social security matters, however, the contingent fee is subject to the approval of the Social Security Administration.

Practitioners will usually negotiate a free agreement with each client at the commencement of any work. Commonly the agreement will secure the agreed fee and the practitioner's expenses by a lien on the claim and any award.

The law limits the contingent fee in social security practice to 25% of the gross amount of retroactive benefit awarded, subject to the approval of the Social Security Administration. The fee does not include out-of-pocket expenses, such as medical reports, investigative expenses, travel, telephone, copying and similar incidentals. The most common expense would be medical reports, which might amount to $20-30 per client. In the interim those expenses may have been paid by the client, or borne by the legal or medical practitioner.

Attorney-fee provisions

Social security regulations[3] provide that a representative of a social security client must file (on a standard form) a written fee request for approval, after the completion of the proceedings. A representative who is not an attorney must also describe the special qualifications which enable him or her 'to give valuable help in connection with [the] claim'.

The regulations provide that it is for the Administration to decide the amount of the fee, if any. It would not be unusual for a fee agreement of 25% to be reduced if the hours of work involved were not considered sufficient to warrant the fee. Interestingly, the regulations also provide that, where the representative is an attorney and the client is entitled to 'past-due benefits', the Administration will pay the authorised fee, or part of it, directly to the attorney out of the past-due benefits.

Where the representative is not an attorney, the Administration assumes no responsibility for the payment of any authorised fee. This does not appear to operate as a significant disincentive, as most such people already work either as para-legals with a legal firm, or as social workers, psychologists, community workers and so on in a legal services context where they would not be

charging a fee for their services in any event.

The regulations set out the factors which are taken into account in evaluating a request for fee approval. Within the framework of 'the purpose of the social security program, which is to provide a measure of economic security for the beneficiaries of the program', the following are considered:

- the extent and type of services provided by the representatives and the level of skill and competence required;
- the complexity of the case;
- the results achieved; and
- the level of review to which the claim was taken.

The regulations specifically provide that the amount of the fee authorised will not be based on the amount of the benefit alone but on a consideration of all the relevant factors. There is provision too for fees to be authorised even if benefits are not obtained, depending on the nature of the case and the efforts of the representative, but it is unlikely that this provision would operate in practice.

Once a fee determination is made, the Administration notifies the client and the practitioner. An application for review of the determination may be filed by either party within 30 days. The review is conducted by a Social Security Administration official who did not take part in the original determination. The decision on review is final.

Under comparable provisions, a court is able to authorise attorney fees for work in its jurisdiction. The Social Security Administration may pay a court-authorised fee directly to the practitioner out of any past-due amounts.

Proposals for reform

A recent report of the Federal Courts Study Committee[4] recommended (by majority) a new structure, including a Court of Disability Claims to which appeals from an administrative law judge would go. Appeals from that Court would lie to the federal courts of appeal on constitutional claims and questions of law. Few such appeals would be anticipated.

Two reasons were advanced for this proposal. In the first place, the appeals procedure is seen as 'cumbersome and duplicative' - 'inadequate administrative review [is] followed by duplicative review [by the courts]' - and disability cases are intrinsically factual and technical. As a consequence, the Committee considered that adjudicative resources should be concentrated at the administrative level. The new court could provide 'a more thorough and expert examination of the facts than federal district courts can provide'. Given that the facts found by an administrative law judge are binding unless they are not supported by substantive evidence, it would seem that the task of the proposed new court would be to review a decision for the existence of substantive evidence rather than to find facts.

In the second place, the Committee noted that the present appeal process had been criticised as vulnerable to 'unhealthy political control'. The report referred to 'controversial efforts' on the part of the Social Security Administration 'to limit the number and amount of claims granted by the administrative law judges', leading to fears that their independence was compromised. The Committee therefore suggested that an independent agency be set up to employ all federal administrative law judges, or alternatively, to insulate the administrative law judges' decisions from the influence of agency superiors.

The employment of administrative law judges by the very agencies whose decisions the judges will be reviewing is a difficult concept for Australians. At a theoretical level it is hard to see how the independence of such judges could be secured, but in practice the judges are generally perceived as independent. Indeed, administrative law judges themselves have rebelled against attempted control of their position and have even filed suit in the courts in instances where they have considered their integrity under threat. In the social security field they have, over the last decade, repeatedly upheld the rights of claimants against the government; last year alone they reversed the denial of benefits in 62% of the cases that came before them.

Proposals for reform have been made also in relation to the fee approval system. The current system that requires approval of detailed and fully documented fee requests, with a right of subsequent appeal, has been criticised as highly bureaucratic, and productive of further cost. A suggested reform is for automatic payment of a lawyer's fees up to $4,000, with a right of objection by either party. Approval would be required only for fees greater than $4,000. This proposal, if indexed for inflation, would seem to have much to recommend it. It would reduce the costs incurred by both the Social Security Administration and the social security practitioner. At the same time, the salutary effect of fee approval would be maintained, and control would not be relinquished over potential windfall cases where huge benefits might otherwise be obtained for negligible work.

Many of the recommendations of the Federal Courts Study Committee have been picked up by the Judicial Improvements Bill of 1990.[5] The recommendations discussed above and the issues with which they deal, however, have not yet been acted upon.

Postscript

In the course of writing this article it was reported that the Social Security Administration, in an effort to maintain its expenditure within budget limits, had suspended hearings for the month of September for people seeking disability benefits. The Administration monthly pays disability benefits to 4.2 million people: 2.9 million disabled workers and their spouses and children. Medicare beneficiaries, some 33 million elderly and disabled people, were also affected. Officials said that they believed this to be the first suspension of hearings ordered because of a shortage of funds. At the time, it was hoped that hearings would resume after 1 October, the beginning of the fiscal year.[6] However, money from a contingent fund was quickly released to avert the disruption of appeals hearings. The Social Security Commissioner was reported to have said that the release of money by the budget office demonstrated that the Administration was 'deeply committed to providing quality public service to the American people'.[7]

Endnotes

1 'Social Security' here refers only to retirement benefits and survivors' and disability insurance (similar to workers' compensation). It does not include other welfare-type pensions, benefits and allowances which, in the US, are administered by the States although they are funded federally.

2 See 20 CFR s404.970. (CFR stands for Code of Federal Regulations.)

3 See 20 CFR s404.1720.

4 *And Justice For All*, Brookings Institution, June 1990. The Federal Courts Study Committee was convened by Senator Joseph Biden (Dem - Delaware), Chairman of the Senate Committee on the Judiciary, to make recommendations in regard to the cheaper and more efficient running of the federal court system. The Committee comprised representatives of the major players in the federal court system in addition to members of the legislature, academics and representatives

of consumer groups. The report was a prelude to legislation introduced by Senator Biden (see f/n 5).

5 S 2648, superseding s 2027, proposed by Senator Biden, currently the subject of extensive public hearings before the Senate Committee on the Judiciary.

6 'US is Suspending Hearings on New Disability Payments', by Robert Pear *New York Times*, 1 August 1990, pp A1, B6.

7 'Budget Office Releases Funds to Restore Benefits Hearings', by Robert Pear, *New York Times*, 2 August 1990, p A14.

ENFORCEMENT DISCRETION AND THE US ENVIRONMENTAL PROTECTION AGENCY: USE, ABUSE AND CONTROL

*William L Andreen**

Presented to the AIAL, 15 May 1991, Canberra and first published in AIAL Newsletter No 6 1991

Introduction

For four years - from 1979 until 1983 - I served as a lawyer, a defensive litigator, with the US Environmental Protection Agency (EPA). During that period, a new president took office, a president who as a candidate for that office had favoured the easing of stringent environmental legislation, had repeatedly attacked the Clean Air Act, and had blamed environmental regulation for slowing the rate of industrial expansion. Given the antipathy of Ronald Reagan and his administration toward environmental protection, one might have expected the White House and EPA to mount a frontal assault upon the statutory culprits, including the Clean Air Act which was, fortuitously for the administration, slated for reauthorisation and amendment. For a while, in fact, the attack seemed imminent as the political leadership at EPA began to work on a weaker version of the Clean Air Act. That strategy, however, was soon abandoned apparently for want of political support.

Despite his electoral success, Ronald Reagan simply never possessed a popular mandate to reverse the environmental progress of the previous decade. Public support for strong environmental protection had not wavered, and Congress, perhaps as a consequence, could not be relied upon as an ally in the fight against existing environmental legislation. It seems clear that a radically revised Clean Air Act would have been 'dead on arrival' in the Democratic House of Representatives and that it would have had a most difficult time in the Republican controlled Senate - where I suspect a number of independently-minded Republicans would have opposed the president.

Unable to muster public support for legislative reform and seemingly unlikely to obtain congressional approval, the Reagan administration adopted a different strategy for weakening EPA - a strategy that avoided the necessity of seeking congressional support for basic statutory change. This alternative strategy involved the use of unilateral, low visibility actions to reshape and dilute environmental regulation - a long series of crippling reorganisations, personnel cuts, the appointment of loyal ideologues unfamiliar with environmental affairs, and a clear, but unstated, policy against vigorous federal enforcement of environmental standards and limitations.

Such a low-profile administrative approach succeeded in reducing environmental enforcement efforts for a considerable period of time. During 1981-1983, the number of administrative and civil enforcement actions plunged dramatically from previous levels. Enforcement lawyers at EPA seemed to have little to do but solve crossword puzzles and speculate about their rather uncertain future.

This neglect of the Agency's obligation to execute faithfully its statutory mission has prompted me to reconsider the wisdom of

* *Professor William L Andreen is a Professor of Law at the University of Alabama School of Law.*

the traditional view that government agencies should possess unfettered enforcement discretion. After considerable reflection, I submit that the discretion to enforce or not to enforce the law is a form of governmental power that should be structured and controlled to the extent possible. Such control would lessen the likelihood that future administrations could engage in administrative sabotage of statutory law. Such control, moreover, would also discourage enforcement personnel from being influenced by any other sort of illegitimate political or personal bias.

The task of creating a system which effectively limits and controls enforcement discretion, without destroying the kind of administrative flexibility that good enforcement programs need, is no easy matter. The field of US environmental law, however, is a logical place to examine the question since Congress has attempted for two decades to check and guide the discretion that it gives EPA.

The advent of modern environmental law

Many commentators have described American federal legislation of the late 20th century as predominantly intransitive in nature - legislation which gives administrative agencies broad discretion to implement congressional goals. This observation is linked to the fact that Congress lacks the time and requisite technical ability to draft detailed legislation in areas of great complexity. Not all modern legislation, however, is intransitive. The environmental legislation of the 70s, 80s had 90s has bucked that trend.

If perceived as necessary, Congress certainly has had the staff capability, the committee structure, and the political desire to craft enormously detailed statutes. And Congress certainly felt the need to do so when it came to modern environmental legislation.

Federal efforts to regulate water and air pollution date back to the 1940s and 1950s. The original legislation, even though repeatedly amended during the 1960s, proved completely ineffective. All of that early legislation suffered from the fact that Congress relied too heavily upon state governments to establish and then enforce air and water quality standards. The states simply were not up to the challenge.

Many states never adopted the necessary standards because they lacked the scientific expertise or the political will. Even when standards were adopted, they tended toward the lowest common denominator since our states are in perpetual competition for new industry and development. Enforcement of those standards, not surprisingly, was almost non-existent - even at the federal level because state governments possessed a de facto veto power over most federal enforcement actions. A strong federal presence was clearly required if the United States was ever going to successfully tackle the continued degradation of its air and water resources.

That strong federal presence was provided by the innovative environmental legislation of the 1970s - the first environmental decade. In both the 1970 Clean Air Act and the 1972 Clean Water Act, Congress placed the primary responsibility for the establishment and implementation of the new regulatory schemes in the hands of the recently created US EPA.

Both statutes, however, did more than transfer most basic decision making to the federal level. Both Acts were extremely detailed pieces of legislation that limited the exercise of administrative discretion by imposing, *inter alia*, a long series of regulatory duties, mandatory schedules, and deadlines on EPA. The statutes, furthermore, created judicial mechanisms that could compel EPA to meet those duties and deadlines.

Why did this legislation evince such a preoccupation with executive discretion? It resulted, in part, from the conjunction of Democratic Congresses and Republican presidents - a situation which prompted Congress to reassert its power as it has from time to time during the course of American history. Congress, moreover, was extremely leery about the ability or even the willingness of the federal bureaucracy to fulfil its statutory mandates. After all, the faith of the American Progressive movement and the New Deal in neutral, scientific administration had tarnished badly over the years. The perception had grown that tired old agencies were likely candidates for regulatory 'capture'. And the experts themselves had fallen from grace - after bringing the country to the brink of nuclear annihilation and ecological devastation.

Congress was more cautious, however, about imposing mandatory enforcement duties to remedy the lack of enforcement under the prior legislation. Consequently, it utilised a broad-gauged strategy to facilitate and encourage vigorous government enforcement action. At times, Congress included the use of mandatory enforcement provisions, but not always. What then were the common ingredients of this approach?

First, Congress eliminated the pre-existing procedural impediments to federal enforcement and also created a wide array of sanctions. Under the Clean Water Act, for example, EPA was authorised (1) to issue administrative orders compelling compliance, (2) to go directly to court to obtain injunctive relief and civil penalties, and (3) to seek criminal penalties. Today - by the way - EPA has the additional option of seeking to impose substantial administrative penalties.

Second, in order to supplement as well as induce government enforcement, Congress empowered private citizens to obtain injunctive relief against violations of the Clean Air and Clean Water Acts. Congress, moreover, gave citizens the right to seek civil penalties under the Clean Water Act.

These citizen suit provisions - as they are commonly known - also authorised citizens to sue EPA for any failure to perform a non-discretionary duty under the respective statute. A major issue, therefore, was whether or not to mandate EPA enforcement action and thereby subject enforcement inaction to judicial scrutiny.

Please note that Congress does not encounter a constitutional - separation of powers - problem by mandating civil or administrative enforcement. Although some may contend that the decision to seek a criminal indictment, involving traditional prosecutorial discretion, implicates a core executive function, American courts have clearly recognised that Congress may compel administrative or civil enforcement of the regulatory programs it has created.

The federal courts, however, labour under a presumption that such enforcement decisions are normally committed to the absolute discretion of the executive branch and hence are unreviewable. In order to rebut the presumption, Congress must indicate an intention to limit agency enforcement discretion and provide standards for defining the limits of that discretion - in other words, Congress must provide some law to apply.

So, although Congress possessed the power, it still had to decide whether to limit EPA's discretion and authorise judicial review for enforcement inaction. The question was not easy to resolve. On the one hand, the courts certainly are not the most desirable forum in which to review decisions about enforcement priorities, agency resources, and so on. On the other hand, Congress was angry about the prior lack of enforcement and quite sceptical about the Agency's ability

to maintain a strong enforcement program.

The Clean Air Act experience

The Senate, accordingly, tried to mandate EPA enforcement in the 1970 Clean Air Act. Its bill provided that upon a finding of violation EPA had to issue an administrative order. If a polluter did not comply with the order, EPA was directed to seek its enforcement in a federal court. The Senate bill also provided that a citizen suit against EPA would lie wherever EPA failed to execute these enforcement duties.

The House version of the bill, by contrast, contained none of these innovations - not even a citizen suit provision. Thus a showdown came during the deliberations of the conference committee. There Senator Muskie, the primary author of the Senate bill, succeeded in obtaining agreement to permit citizen suits against polluters and against EPA in order to enforce its mandatory duties. EPA's enforcement duties, however, were made discretionary. The contours of this compromise may have been shaped by an unusual step taken by the Nixon administration.

It had sent a letter to the conference praising the citizen suit provision in general, but criticising the provision that allowed citizens to challenge enforcement inaction. The administration argued that such suits would reduce the overall effectiveness of the air pollution program by distorting the agency's enforcement priorities. And the administration carried the day.

The Clean Water Act experience

Senator Muskie apparently did not want to experience such a defeat again for his version of the Clean Water Act, introduced in 1971, contained discretionary language relating to federal enforcement. Both Muskie's bill and the bill introduced for the Nixon administration, however, were attacked during the public hearings for that precise reason. The Sierra Club, for example, stated that:

> [T]he time has long passed . . . when the Federal Government should have the choice of acting or not acting in the courts or through other means to curb [water] pollution. These enforcement sections need to be tightened up by substituting the word 'shall', whenever the word 'may' now occurs.

This onslaught did not go unheeded. When the Senate subcommittee released its marked-up bill, it was replete with mandatory enforcement directives. Essentially, EPA was required to institute administrative or civil enforcement proceedings in the case of any violation where a state had not already acted.

The full Senate committee accepted this language, but added a twist in its report. After indicating that enforcement was mandatory, thus subjecting inaction to judicial review, the report stated that EPA, nevertheless, should husband its resources for the most serious cases. While that may seem like a contradiction, I don't think it is. In my opinion, the Senate bill gave EPA some discretion to determine the seriousness of a violation and to set priorities, but also gave district courts jurisdiction to determine whether EPA had, in specific cases, abused that limited discretion.

After the Senate version was merged with the House version, however, the situation became even more confused. The resulting law provides that, upon finding a violation, EPA must issue an administrative order or file a civil suit. Nevertheless, it later states that the filing of a civil action is merely authorised - in other words, discretionary. What in the world was the intent of Congress? The Senate conferees told the Senate that the differences between the two chambers had been resolved in the

following fashion: while the issuance of administrative enforcement orders remained mandatory, the filing of civil actions was made discretionary.

The federal courts have really struggled with this language. At least five district courts have held that the issuance of administrative orders is mandatory, while four have found it discretionary. But the matter has been largely settled by two courts of appeal which have held that EPA enforcement is completely discretionary. I believe that those two decisions were mistaken - neither court read the legislative history completely or sympathetically, both were too keen to conclude that the legislative history was ambiguous, and both seemed too hostile to the notion that Congress can validly and appropriately limit the exercise of enforcement discretion.

Congress, nevertheless, had left the statutory language and its legislative history in a bit of a muddle. Perhaps this problem was caused by the fact that Congress and the courts tend to speak and think in terms of absolute mandatory enforcement, on the one hand, or complete discretion, on the other. One extreme or the other. I believe, rather, that they ought to think in terms of limited enforcement discretion - giving an agency enough discretion to order its priorities while providing safeguards against the abuse of that discretion.

The contemporary situation

Since 1972, Congress - when it has tried to limit enforcement discretion - has done so in exceedingly simplistic fashion. The Safe Drinking Water Act amendments of 1986 provide a good example. Upset by the general fall in enforcement during the early 1980s and dismayed about the nearly total lack of drinking water enforcement, Congress enacted a rather harsh remedy. In the absence of state action, each and every violation of drinking water standards will trigger a mandatory federal duty to issue a compliance order or to commence a civil action.

The problem with such an approach quickly becomes obvious. In 1987, 37,000 public drinking water systems committed over 100,000 violations. Neither EPA nor the states, of course, possess the resources to act against such a large number of violations. And not all such violations really merit formal action since many are relatively minor infractions.

Has this approach - this overbroad approach - encouraged EPA to be more vigorous? Well, the Act is so clear and the anger so palpable that Congress did catch EPA's attention. Federal enforcement efforts under the Safe Drinking Water Act have expanded fivefold since 1987. The National Wildlife Federation, however, has not been satisfied. It wants more and has filed suit to get it.

Such lawsuits, while exposing some possible problems at EPA, may create new ones. Attempts to push the agency toward full enforcement in one program area could well siphon enforcement personnel from other programs where their work is more valuable. And even if one stops short of demanding full enforcement, private litigants could conceivably force the agency to act against minor violations while leaving more serious ones unattended. The possibility that judicial action could cause such distortions at EPA might even prompt a reviewing court to nullify the mandatory nature of this provision by holding that the finding of violation is a discretionary condition precedent to the mandatory duty. That is a lot of rubbish, but the courts have used such devices in the past to avoid distasteful results.

So what should Congress do? Should it abandon the search for a legislative solution and simply increase its oversight of EPA's enforcement program, using

public criticism to encourage vigorous action?

Well, more congressional oversight certainly would be a fine thing, but I seriously doubt whether Congress could consistently summon enough interest in the tedious details of EPA enforcement to be a really effective monitor. And the experience with congressional oversight during the early 1980s appears to support my point.

During 1981 and 1982, it was fairly clear that the EPA enforcement program was being destroyed. The enforcement division had been abolished, its personnel were being shunted continually from one office to another, the number of enforcement actions had fallen precipitously, and thousands of young dedicated civil servants were leaving the Agency. While individual members of Congress decried these developments, the subject apparently was not 'chic' enough to warrant a major congressional inquiry.

Although the administrator of EPA, Anne Gorsuch, and 20 of her top aides were fired or resigned in 1983, it was not due to their attempts to subvert law enforcement at EPA. Rather it was because a really spicy political scandal had emerged. In late 1982, a congressional inquiry uncovered the possibility that the administration had manipulated the superfund program for political ends, that agency officials may have lied under oath about it, and that relevant documents may have been shredded. It was the kind of scandal that Congress seems to relish, and I doubt whether diminishing enforcement efforts alone would have led to such a speedy departure of Reagan's first appointee as EPA administrator.

In order to recover from the public relations debacle emanating from the scandal, the administration eventually appointed Bill Ruckelshaus as administrator of EPA. Soon, EPA's enforcement program returned to an even keel. Today, under the leadership of Bill Riley, the former president of the Conservation Foundation, EPA enforcement is at or near record levels. In 1989, for example, EPA issued over 4,000 administrative orders, referred over 350 civil cases, obtained 72 criminal convictions, and received over $36 million in civil and criminal penalties.

I am afraid, however, that not all political appointees are as well-intentioned or as devoted to the rule of law as Bill Ruckelshaus and Bill Riley. I am also not confident that major political scandals will always coincide with periods of depressed agency enforcement. Private enforcement efforts, moreover, are not an adequate substitute for a concerted and consistent government program.

Most importantly, EPA simply cannot afford to endure another serious hiatus in enforcement. The success of its regulatory schemes and its credibility as an agency depend upon vigorous enforcement. The fiasco of the early 1980s so damaged EPA's reputation, in fact, that the Agency still suffers today from a lingering sense of public distrust.

A possible approach to the structuring of enforcement discretion

Perhaps Congress should take some legislative action that would help ensure that EPA maintains the motivation necessary for a credible and vigorous enforcement program. Such action would involve the creation of enforcement duties the breach of which could be challenged in court. Such duties need not mandate enforcement against every single technical violation. In fact, the duty to act may be tied to cases that satisfy a set of predetermined criteria.

Congress could, for instance, authorise enforcement against all violations of the Clean Water Act, but mandate it for any 'significant violation'. Congress could then order EPA to promulgate an

informal rule to implement that scheme. I suggest, furthermore, that Congress guide that rulemaking by setting forth a number of statutory criteria to be considered when EPA defines 'significant violation'. Such criteria might well include the extent and magnitude of the violation, whether toxic substances were involved, the strength of the evidence, and so on. The Agency, in turn, could turn to its accumulated enforcement experience and existing staff guidance to fashion specific regulations along the lines established by Congress.

I suggest that this be done by administrative rulemaking for three reasons. First, informal notice-and-comment rulemaking would enhance the rationality of the decision making process by providing EPA with a broader range of information and opinion. Second, the utilisation of rulemaking procedures would create a barrier against hasty, ill-informed, or politically motivated changes in enforcement policy. The process would give citizens the time and knowledge they need to seek help from Congress should another administration decide to repeal legislation by simply failing to enforce it. And third, the existence of regulatory criteria would give career civil servants a tool to use against their political superiors - cases satisfying the criteria must proceed as a matter of law, at least until a new rulemaking alters the criteria.

There is at least one major problem with this approach. Industry and environmental groups could drag each rulemaking through an exhaustive judicial challenge. And there could be many such challenges since enforcement priorities are bound to change in response to newly perceived problems, redefined priorities, and budgetary expansions or contractions. Since these rulemakings need to proceed fairly expeditiously to keep enforcement policy current, Congress should preclude judicial review for these particular rulemakings. I personally don't care for preclusion as a general matter, but in this instance it seems absolutely necessary for the maintenance of an effective enforcement program. Furthermore, public notice, public scrutiny, and possible congressional oversight should serve to dissuade the Agency, in most instances, from the promulgation of substantively poor criteria.

Under this scheme, a citizen could judicially challenge EPA inaction in the face of an alleged 'significant violation'. In such a case, a federal district court would have to determine, after examining the decision document and any other relevant portions of the administrative record, whether the agency had applied its regulatory criteria in an arbitrary or capricious manner. Such decisions implicate agency expertise and are entitled to some deference. But no deference should shield an irrational refusal to enforce because inaction in that instance would clearly breach EPA's statutory duty to act. Hopefully, such cases will be few in number - since the existence of transparent, publicly available, and legally binding enforcement guidance should encourage the prudent exercise of enforcement discretion.

Conclusion

In the absence of a scandal or serious difficulties with EPA enforcement, I am afraid that Congress is unlikely to turn to such remedial measures. When enforcement problems arise, however, it will be too late. Perhaps, therefore, Congress should consider some new agency-forcing approaches that seek to ensure that EPA will continue faithfully to enforce the law.

ATTORNEY-GENERAL (NSW) V QUIN AND THE LIMITS ON THE EXECUTIVE'S RIGHT TO CHANGE ITS MIND

*Keith Mason QC**

Presented to the New South Wales chapter of the AIAL, 13 June 1991, Sydney and first published in AIAL Newsletter No 7 1991.

The High Court's decision in *Attorney-General (NSW) v Quin*[1] contains fascinating discussion on a number of issues relevant to modern administrative law. These include Brennan J's doubts whether it is appropriate to seek judicial review with respect to advice tendered to the Governor (at 26); and his stress upon the need for caution in the making of declarations in administrative law when the availability of a substantive remedy is doubtful (at 31). The case also contains strong statements against confusing administrative law review and review on the merits; and a scattergun of positions about the role of legitimate expectation in public law.

This note is however confined to the comments in the case about the legal limitations upon the Executive's right to change its mind.

The key provision in the *Local Courts Act 1982* simply stated that 'the Governor may, by commission under the public seal of the State, appoint any qualified person to be a Magistrate' (s12). Initially the Executive decided not to appoint five of the 101 former magistrates in circumstances which were held in *Macrae's Case*[2] to involve a denial of natural justice. Subsequently the Attorney-General effectively undertook to ensure that the applications of the excluded magistrates would be considered on their merits by a fresh panel and excluding the Briese allegations of particular unfitness that had led to the *Macrae* decision unless an opportunity to respond to them was given. The Government case was that the decision in *Macrae* went no further than this and the majority of the High Court so held.

In 1984 the decision had been taken to appoint all serving magistrates other than the five plaintiffs in *Macrae*. The reason for excluding those plaintiffs was that the Government acted on specific adverse comments without giving the plaintiffs any opportunity of responding. In 1987 the Government announced that it would permit the excluded magistrates to apply but that it intended to appoint the most suitable persons offering without any special regard for the position of the former magistrates. This involved a change of the criteria for exercise of the otherwise general discretion to appoint 'any qualified person'. Mason CJ and Dawson J held that the Government was able to change the ground-rules in this way since the new decision was still within the scope of the statutory discretion. In doing so their Honours discussed the extent of the Executive's right to change its mind. Each stressed the general proposition that an unfettered statutory liberty could not be fettered by reference to an earlier practice or even an earlier indication that particular criteria would be applied in the selection process. In particular the Chief Justice cited a number of cases in support of the proposition that:

> The executive cannot by representation or promise disable itself from, or hinder itself in, performing a statutory duty or

* Keith Mason QC is the Solicitor General for New South Wales.

> exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of the power (at 17).

He pointed out that:

> this principle extended beyond legislative powers and duties to common law powers and functions of the Crown or the Executive when they involve the making of decisions in the public interest (at 18).

What is interesting however is that various justices noted four possible limits upon the Executive's power to change its mind notwithstanding its liberty to exercise public duties and discretions.

The first, specific to the type of case involved in *Quin*, was quickly dismissed by the Chief Justice when he noted (at 16) that 'there is nothing in the materials which would support any suggestion that the change of policy was motivated by a desire to take into account the adverse materials regard to which gave rise to the decision in *Macrae*'. This statement is slightly ambiguous in that it leaves open whether the Chief Justice was concerned about a denial of natural justice arising from the lingering effect of the Briese allegations, or about the more direct contravention of the *res judicata* established by the declaration in *Macrae* itself. Perhaps both were encompassed. Neither of the other two justices in the majority seemed to advert to this matter, although each was at pains to confine the decision in *Macrae* to a past breach of the obligation of natural justice (Brennan J at 32, Dawson J at 50).

By contrast the dissenting justices saw the Government's change of policy in 1987 as contravening the decision in *Macrae*. To them further relief as sought by Mr Quin was called for in order to provide (in Deane J's words at 48) 'partial protection from the continuing injustice of a denial of procedural fairness' (see also Toohey J at 69). Citing *FAI Insurances Ltd v Winneke*[3] the dissentients noted the capacity of the Court to mould its relief consequent upon a finding of denial of natural justice in a way which will prevent the consequences of that denial becoming entrenched. Two possible methods of such entrenchment which were mentioned by Deane J were the unavoidable delays of litigation and the unilateral decision of the Executive to change the rules of the game (at 46). It is interesting that his Honour noted, without comment, that the law had not recognised a cause of action for damages for denial of procedural fairness. This issue is discussed at length in an interesting article by Professor Enid Campbell.[4]

A second and more general limitation upon the Executive's legal right to change its policies is found in the recognition by Mason CJ (at 18 and 23) and Toohey J (at 68) that there could be circumstances in which an estoppel could arise against the Executive, arising from conduct amounting to a representation, when holding the Executive to its representation does not significantly hinder the exercise of the relevant discretion in the public interest. This was said to derive from the fact that the public interest necessarily comprehends an element of justice to the individual. The Chief Justice noted the observations of Lord Denning in *Laker Airways v Department of Trade*[5] which supported this notion and the criticism of it by Gummow J in *Minister for Immigration v Kurtovic.*[6] Although not cited by his Honour, this idea of some limited role for estoppel in public law matters may be traced back to his discussion in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth.*[7]

In a passage that would I think be anathema to Brennan J and Dawson J,

Mason CJ (at 23) contemplated that legitimate expectations of receiving a benefit or privilege might possibly, in an appropriate case, give rise to a right to substantive protection from the court provided that the court did not thereby cause detriment to the public interest intended to be served by the exercise of the relevant statutory or prerogative power. Toohey J is also clearly of this view because he cited with approval a statement from *Attorney-General (Hong Kong) v Ng Yuen Shiu*[8] (cited in *Quin* at 68) that 'when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty'. What is interesting is that Toohey J applied this passage outside of a case involving a promise of procedural fairness (as in the *Attorney-General (Hong Kong) Case*) to a case where the promise was of a substantive nature (ie to treat former magistrates in a special category). He, unlike the majority justices, saw no difficulty in point of public policy in holding the Executive to this promised policy: see also Deane J at 48-49. It is not clear whether Deane J would go this far, since his decision in *Quin* seems to be based on narrower notions of *res judicata* flowing from the earlier case of *Macrae*. However other indications suggest that he could give support to the notion of fairness having a substantive content.

This concession of a judicial right to perform yet another balancing act will doubtless be an encouragement for those judges who have few qualms about second-guessing the Executive. There have already been some indications that the window of opportunity thus opened in these dicta will be seized upon. In the case about the Woolloomooloo Finger Wharf[9] Cole J saw no difficulty with the proposition that the State would have been liable in damages had it been party to a contract with an implied term that the State promised to override a planning refusal of the Sydney City Planning Committee.

A third rider noted by the Chief Justice, but left for examination on an appropriate occasion, was the 'conflict of authority upon the question whether a person who is adversely affected by a change of policy has a legitimate expectation which enables him to make representations' (at 24). Dawson J expressed the view (at 60) that it would only be in circumstances of a special kind that an individual would be entitled to a hearing before a departure from an administration policy affecting his other interests occurred. This proved to be a minority position when a differently constituted High Court heard *Haoucher's Case*.[10]

A fourth possibility of putting a break upon the Executive's right to change its mind was adverted to by Dawson J when he distinguished the case where 'a particular decision involves, not a change of policy brought about by the normal processes of government decision making, but merely the selective application of an existing policy in an individual case' (at 60). That was not an issue in *Quin*. However the open-endedness of notions that are based on a court's perception of the 'normal processes of government decision making' and 'selective application' of criteria, especially coming from Dawson J, shows the fecundity of administrative law. What to one judge might be seen as unfairness, to another will be lack of proportionality, and to another unreasonableness. In any case we are light years away from the time when, as one judge wrote to Lord Atkin after *Liversidge v Anderson*:[11]

> Bacon, I think, once said the judges were the lions under the throne, but the House of Lords has reduced us to mice squeaking under a chair in the Home Office.

Endnotes

1 (1990) 170 CLR 1.

2 (1987) 9 NSWLR 268.

3 (1982) 151 CLR 341.

4 'Liability to compensation for denial of a right to fair trial', (1989) 15 *Monash Law Review* 383.

5 [1977] QB 643 at 707.

6 (1990) 92 ALR 93 at 121-122.

7 (1977) 139 CLR 54 at 75.

8 [1983] 2 AC 629 at 638.

9 *Pivot Group Ltd v State of NSW* (unreported, 17 July 1990).

10 (1990) 169 CLR 648.

11 [1942] AC 206.

THE SOCIAL SECURITY APPEALS TRIBUNAL: ACHIEVING CONSISTENCY AND COPING WITH CHANGE

*Anne Coghlan**

Presented to the AIAL, 25 July 1991, Canberra and first published in AIAL Newsletter No 7 1991

Specialist tribunal

The impact of administrative review and its role in improving decision making within the social security field has been well traced in a number of areas. I have myself looked at several areas in detail and traced the Government's and the Department of Social Security's response to issues raised in the course of administrative review.[1] We can see how manual instructions have changed or legislation has been amended to clarify matters in response to matters raised.

The specialist tribunal is particularly well placed to quickly identify areas of difficulty and to bring those matters to the attention of decision makers so that any adjustments can be quickly made and so that the system operates fairly and justly for all concerned. In the Social Security Appeals Tribunal (SSAT), during the course of a review, some matter may come to notice where there is a problem with forms, or Departmental instructions or procedures, or where the legislation operates harshly; in these cases, members are asked to bring those to attention. The matter is then taken up by the National Secretariat and sent to the Minister or Department for their information and as they see fit for any appropriate action.

* *Anne Coghlan is the National Convener of the Social Security Appeals Tribunal.*

In the social security portfolio, processing times for appeals now are such that the area of responsibility will get feedback from us via the SSAT Liaison Section of the Department quite promptly. It is quite possible, though I am not familiar with any details, that they will also have had feedback through the Department's own internal review system. There is the opportunity then for the matters raised to be addressed quickly so that future clients can be assisted.

You may be interested in the sorts of matters that we have recently brought to the Government's and the Department's attention.

The matters that are brought to the Minister's attention generally relate to any anomalies in the legislation that are highlighted or where a particular class of cases might indicate that the law is operating harshly or unfairly. They would only relate to particular cases the Tribunal has dealt with, as it is not the Tribunal's role to comment generally on policy. These matters would generally be referred to in my Annual Report to the Minister.

For example, we have recently raised concerns about the limited scope for granting double orphan's pension. We have raised the anomaly of payment of additional benefit for a new born child only from date of notification whereas family allowance is paid from date nearest birth if the claim is lodged within 28 days. We have expressed concern about the harsh effect of short-term work on eligibility for resumption of rent assistance and its effect as a disincentive to work. We have continued to draw attention to the lack of discretion to pay family allowance unless a claim has been lodged within 4 weeks of a child's birth.

We have brought to the Minister's attention the continuing large number of illegal entrants applying for refugee status who cannot be paid special benefit or any pension or benefit and yet have been given permission to work in this country, but can be left destitute.

Liaison with the Department on matters that arise in the course of review is far more frequent. These can range from simply bringing to their attention mistakes or omissions on forms to, say, highlighting what in our view are major problems in processing certain matters. Again, the issues arise because someone has applied to us for review.

As I said, the issues we raise might be quite simple, and yet the solutions can be quite difficult. We have had quite a few appeals from parents concerning payment of family allowance arrears where, following notification of the rejection of a claim for Austudy, the Department is notified of the rejection within 28 days, therefore preventing payment of arrears. The problem here is that family allowance is paid to a parent, and the Austudy claim is made by the family allowance child. The child, then, is the only one who is notified of the rejection, which can cause problems for the parent. Apparently the Department of Employment, Education and Training does not have the capability to record parents' details but has arranged for details of the 28 day restriction to be included in the rejection advice which is sent to the student.

We would quite often come across situations where the Department's advices to their clients have not been sufficiently clear, or where they have failed to give advice and have therefore created problems. As we would all appreciate, it is very difficult to express something that might be quite complicated in a simple and straightforward manner, especially where the audience may have difficulty with the language anyway.

Situations we have quickly highlighted were, for example, the failure to advise on the Unemployment Benefit First Income Statement of the potential effect of moving residence on future payment of benefit. As you could imagine. this would have had a devastating effect on some clients. I was advised in due course that all 'continuation forms' had been amended to advise clients of the need to contact the Commonwealth Employment Service (CES) before considering a change of location, and to the possibility of a non-payment period being imposed. Another situation is the case where there is lack of clear advice. For example, advice that both members of a couple have to notify, for example, changes in the income of one member. To the elderly pensioner who carefully notifies a change of circumstances it is hard to understand that the Department needs to be separately notified by the their spouse, particularly if it is a wife's pension that is involved.

There are those classes of cases too where, in our view, the procedures or processes adopted by the Department have not been in accordance with the legislation. We raise our concerns with the Department. The Department of course may take a different view of the law from us. The problem here is what has been done has been done and the cases come to us for review. The Department will then quite rightly appeal the matter to the Administrative Appeals Tribunal (AAT) and await for the outcome of such an application. It is unfortunate that this may all take some considerable time and the area of doubt not be resolved perhaps as speedily as it should be.

Whilst it is never pleasant to have difficulties or problems brought to one's attention, it is helpful to no one, particularly not to clients of the Department, to insist that the SSAT has got it wrong and to persist with a particular course of action. The SSAT is not infallible but it does have the

advantage of seeing matters afresh and will often read words as they are written and not as they were meant to be written.

You may be wondering whether the Minister or the Department raises with the Tribunal any matters arising out of our review of decisions. Neither the current nor the previous Minister has ever done so. The Department, if it disagrees with our decisions, would simply appeal the matter to the AAT. The Department may occasionally let me know what their view of some interpretation of the law may be, but this would be rare and from memory only in a situation where they had chosen not to appeal the matter. Then, of course, we may still not agree with their view.

If we look at the most recent statistics, over the latter 6 months of 1990, approximately 3,400 appeals were lodged with the Tribunal. During that period 465 AAT applications about or on SSAT decisions were finalised, although these finalised matters of course are not related to those lodged with us. Of those finalised by the AAT, the Department had appealed approximately 6% of our decisions and our clients had appealed approximately 9%. However,only one third actually went to a hearing, the balance being withdrawn, conceded or dismissed prior to the hearing. Of those heard, approximately half our decisions were affirmed. These rates of hearing and determination do not markedly vary.

The *Social Security Act 1991*

I am not aware how many of you here will have had the opportunity to look at the new style Plain English *Social Security Act 1991*. If you have, what first strikes you is its size, and this can be quite daunting. For the professional, used to using legislation, this is something completely new and many no doubt may take one look at it and just say it's terrible. We need to remember that it has been prepared with the non-professional in mind. The legislation has been set up in modules, one for each pension, benefit and allowance. One will be able, for instance, to go straight to the module of interest, and find out in that part all one needs to know. It is full of 'notes', 'sign posts' and 'examples' to make it easy to use.

The Tribunal will be the first external body to look closely at the legislation and, of course, to apply it and for us it is an exciting challenge.

With 180 part-time members and 20 full-time members, how have we gone about tackling this new legislation? We tackled it in a very practical way, and ran workshops in 5 locations throughout Australia. Background papers were prepared and sent ahead. These covered the background and structure of the new Act, how the transitional provisions worked, and some basic material on interpreting legislation.

Actual case situations were then used and workshopped in groups, so that members had actual practice working their way around the Act. The general feeling was that now that members had had a go using the legislation it was not as daunting as it first looked. It was important that members shared their concerns and realised it was new to everyone. Professor Pearce's book *Statutory interpretation in Australia*[2] has proved very useful in assisting with interpretation of the transitional provisions and was also used extensively in one workshop case, where we covered a situation where the new legislation said something different from the old and our example went through the process of how one should present such a case.

On the question of interpretation of the law, of course I do not have the power to direct members how to interpret the law. However, in relation to the operation of the transitional provisions, if any member wishes to take a different view from the one that has been expressed to be our preferred view, they have been asked to

argue their view fully and address all the issues raised in the very detailed and comprehensive background paper prepared by one of our legal members, and on which my general instruction has been based.

A recent example of very successful co-operation with the Department has been with the transitional provisions for the new 1991 Social Security Act. When we started to look at this legislation which would operate from 1 July 1991, it became clear that our view on which legislation would apply when a matter was reviewed by us where the delegate's decision was made before 1 July 1991, differed from the Department's. In our view, the legislation was clear and agreement was reached with the Department, so that we all took the same view. We were happy to provide the Department with the background papers that had been prepared for our use. However, the legislation was not so clear in relation to an undetermined claim as at 1 July 1991. Given that the new legislation should not have changed anyone's rights, and mindful of s15AB(3) of the *Acts Interpretation Act 1901* and 'the need to avoid prolonging legal or other proceedings without compensating advantage' we are taking the same view as the Department and determining these matters under the new Act.

Consistency

My last comments lead me to talk briefly about how we endeavour to achieve consistency.

As I said, I cannot direct members on how to interpret the law nor of course on questions of fact.

If a new issue arises that involves an interpretation of the law, that case is generally circulated. In the initial stages, the views on interpretation may vary, but they generally settle quickly. If a member does wish to take a different view, it is expected that they will fully address all the arguments. In this way we strive to be consistent in our approach and deliver the same level of justice and fairness wherever one may be in Australia.

One must remember that our cases involve legal merits review, with different facts in each case. It is of course a nonsense to talk about consistency when facts are different. However, one might hear it said that 'the SSAT does not make consistent decisions in *de facto* marriage cases'. I often think that this comment arises from a misunderstanding. Of course the facts in each case are different, but it is also important to remember that, in deciding such a case, the legislation requires that five factors be considered. The legislation, however, does not say what weight is to be given to particular factors and still requires the decision maker to have regard to all the circumstances of the relationship. It would be most inappropriate to fetter the discretion of decision makers by directing what particular views should be taken on, or weight given to, any of the factors considered.

The Tribunal has also introduced its own internal issues folders. These are on separate topics and enable members to consider any background material, AAT or Federal Court cases and, of course, other SSAT decisions. This helps with consistency and also relieves members from continually reinventing the wheel.

Newstart program

This program involves a further change for the Tribunal. We will now be reviewing decisions made by CES officers who have certain delegations under the Social Security Act.

CES is part of the Department of Employment, Education and Training and there is no history of external review of decisions that may have been made in the past.

We are particularly keen to see that things go smoothly, and have assisted in some of the training of their review officers. We hope we give some context to the process of administrative review and to impress the need to refer to the legislation and to explain to an applicant why a particular decision was made.

We will be looking forward to giving CES as much feedback as we can, particularly as it is all so very new for them.

If we do strike problems with their procedures or their instructions, again we trust we will be in a position to raise this quickly so that such matters can be addressed as early as possible which is of benefit to all concerned.

Many of the matters under Job Search Allowance and Newstart Allowance will of course be fairly familiar to us. We will still be looking at matters to decide, for example, if someone has failed the work test, or reduced their prospects of employment by moving, in the same manner as we did with the previous legislation. What will be new to us will be reviewing the Newstart Activity Agreements. I imagine the cases that come to us will generally be whether or not someone has complied with the terms; on those questions we have power to make decisions. When it comes to actually reviewing the terms of a Newstart Activity Agreement we are only able to affirm the decision or set it aside and send it back for reconsideration in accordance with any recommendations we may make. Whether this will cause uncertainty or confusion for applicants we will only know as the program is implemented. If we become aware of particular difficulties we will of course be bringing those to attention as appropriate.

Disability and sickness support

There is legislation currently before Parliament that will introduce major reforms to income support for people who are disabled or sick.[3] Invalid pension will be replaced by disability support pension (DSP), which will have revised qualification criteria.

Sickness benefit will be replaced by sickness allowance (SA) with the idea that it will clearly not be payable on an indefinite basis. There will be a greater emphasis on rehabilitation and assistance to return to the labour market.

The challenge for the Tribunal then will be applying this new legislation. The Tribunal will be the first external body to review the legislation. There will be Tables for the Assessment of Impairment that will form part of the legislation, and all members equally will be expected to be able to use and apply these.

We will of course be ensuring that our members are given training in the use of the new legislation and in how to use the Tables, to ensure that they can take on this task in a confident and fair manner.

The new impairment tables will operate on diagnosed conditions and I imagine that in many ways the cases that will come to us may not be too different from many we already hear, where an applicant is saying that they have various symptoms, but for which there is no diagnosis. Looking at the tables, if one has diagnosed conditions it will not be difficult to actually cross the 20% threshold. The new challenge will probably be in other areas, for example, in deciding whether someone is severely disabled in portability cases or whether a person has a continuing ability to work.

Conclusion

What I have referred to in this paper is only a small part of our functioning. Yet it highlights for the specialist tribunal just how much there is to cover and thus how difficult it is to ensure that all Australians receive the same standard of review wherever they live. It is a challenge that I am confident that all members take on

with enthusiasm and with a sense of striving to achieve our objective, which is to conduct review of decisions in a 'fair, just, economical, informal and quick' manner.

Endnotes

1 A Coghlan 'Can review bodies lead to better decision making?', paper delivered at 'Fair and open decision making: 1991 administrative law forum', 30 April 1991, Canberra.

2 D C Pearce and R S Geddes *Statutory Interpretation in Australia* (3rd ed 1988).

3 The *Social Security (Disability and Sickness Support) Amendment Act 1991* was passed by both Houses of the Parliament on 12 September 1991 and received the Royal Assent on 10 October 1991.

LION HUNTER

*Alan Cameron**

Presented to the AGM of the AIAL, 26 September 1991, Canberra and first published in AIAL Newsletter No 7 1991.

My immediate predecessor was fond of quoting an American commentator to the effect that while the office of an ombudsman was 'not very well equipped for hunting lions, ... it can certainly swat a lot of flies'. A disrespectful commuter to this national capital may be forgiven for observing that, when summer finally arrives, someone will have to swat the flies, so it may just as well be the Ombudsman. However, I think the time may have come to change the emphasis within my office, so that we set out to hunt more lions, on the basis that, thereby, that which attracted the flies in the first place will be reduced and the flies will tend to go away of their own accord.

Tempting though it is to seek to continue this analogy throughout this talk, there is a distinct risk of scatological humour replacing serious analysis; therefore, let me now speak unambiguously of what I mean. My office now receives over 30,000 approaches a year. Fortunately around 20,000 are misplaced - the caller is really looking for a state ombudsman, or an industry ombudsman or is simply complaining about private enterprise, or is looking for a telephone number - an increasing phenomenon now that directory assistance has become slower and less user friendly. But that still leaves over 10,000 contacts which require some consideration, by a total staff of around 70.

* *Commonwealth and Defence Force Ombudsman, 1991-1993.*

Again fortunately, many of these can be dealt with virtually instantly, because it is obvious that we cannot help, or should not because they have another remedy open to them, or whatever.

But the sheer number of complaints which remain and require action by my office, ranging from a telephone call, or a letter, means that my staff tend naturally and inevitably to concentrate on handling that person's immediate concern. The person is frequently emotionally involved in the cause of their complaint, and I do not want my staff to be so remote and detached from their complainants' feelings that they have no emotional reaction in response. But this natural desire to remove the immediate cause for complaint, and move on to do the same for the next, may mean that we do not achieve the optimum result overall.

For example, underlying deficiencies in departmental training or practices are less likely to be identified and drawn to the department's attention. A second consequence, which I mention but immediately concede is trivial, is that annual reports of such an office would be rather boring. A third, of far greater significance, is that the staff of such an office would tend to be preoccupied with processing the complaints, rather than giving them individual attention. We all know that the chief characteristic of fly swatting is that it is a process that never ends.

But what concerns me is that unless we do occasionally seize upon major issues, we will miss out on or work having any exemplar effect. Unless there is the occasional *cause celebre*, the incident which brings the Ombudsman to bureaucratic and public attention quite forcibly, the Office runs the risk of being thought to be trivial, and perhaps being trivial, because it only deals with matters

identified by others as trivial, even if highly important to those directly concerned.

I have therefore sought to introduce some changes in how the Office works, in order to increase the chance of the exemplar effect having a chance to apply. The Deputies and I now constitute an executive, to which investigation officers are encouraged to refer matters of moment at an early stage. Despite our notorious lack of resources, a policy task force has been established to seek to ensure that any such matters can be given due priority; unless there are investigation officers who do not receive the calls and letters which flood in and distract them from the priority matters, those matters will rarely come to attention.

To a person brought up on the 'grievance man' concept of the Kerr Committee,[1] this may well seem heretical. That Committee thought in terms of individual complainants receiving individual solutions, but that seems to me to be too limited. Nevertheless, I want to stress that I am not just talking about identifying and remedying what are usually called systemic problems; I am seeking to have an impact in part by highlighting issues which require attention because of their general impact, even when no particular remedy can be found.

Incapable of determination

One area where action by my office in one or two instances might have significant flow-on effects is in the police complaints area. At present, as most of you would know, our role is in practice confined to reviewing and reporting on the results of investigations conducted by the Internal Investigations Division (IID) of the Australian Federal Police. It was not the intention of the Law Reform Commission that this should be our sole role, but a shortage of resources has prevented any significant investigations by my office. At the same time there has continually been a high proportion of complaints under the *Complaints (Australian Federal Police) Act 1981* which cannot be determined one way or the other, a source of frustration to complainants and officers alike.

The proportion of complaints which were not capable of resolution was 26% in the year to 30 June 1991. This is clearly quite unsatisfactory, and we will address that this year. Hopefully, with the assistance of extra staff to be recommended by the Senate committee reviewing my office,[2] it will be possible to conduct some of the investigations of those matters which on first blush are clearly going to involve a conflict of evidence. Such investigations will enable my staff to form an opinion as to who should be believed in cases of a stark dispute to the facts; but there may need to be a legislative change as well.

When the police complaints regime was originally proposed, the Law Reform Commission suggested that the civil standard of proof then in operation before the Police Appeal Board should continue: I quote from para 167 of ALRC Report No 1:

> Although the standard is the civil standard, the degree of satisfaction will, quite naturally, depend upon the seriousness of the charge laid. The Common Law has in this regard proved itself a flexible and appropriate instrument as is shown by a reading of the decisions of the High Court of Australia in *Briginshaw v Briginshaw* (1938) 60 CLR 336, *Helton v Allen* (1940) 63 CLR 691 and *Rejfek v McElroy* (1965) 112 CLR 517. In the Commission's view the present position should not be changed. Indeed to do so might well put at nothing the power of the Tribunal to determine that class of misconduct by police which, while not warranting criminal prosecution, must be punished if the good order

and discipline of the force are to be maintained.

Nevertheless, a regulation was promulgated in 1985 making all disciplinary proceedings subject to proof on the criminal standard. That seems to me to be unreasonable; and puts police officers in a preferred position over public servants. (The *Complaints (Australian Federal Police) Act 1981* was amended in 1987 to allow for the standard of proof to be the subject of regulations, and there should therefore be considerable doubt about the validity of the 1985 regulation.) I propose to suggest its repeal, thereby allowing the return to the flexible standard espoused in *Briginshaw*, which for those who have forgotten, provides in the words of Mr Justice Dixon, that 'when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found... The seriousness of an allegation made, ... or the gravity of the consequences flowing from a particular finding ... must affect ... whether the issue has been proved to the reasonable satisfaction of the tribunal'. That standard ought to hold no fears for an officer; the criminal standard tends to dissuade my office and the IID from pressing matters where reasonable satisfaction is felt, but not beyond reasonable doubt.

Nor am I convinced that my office is necessarily restricted at present to reporting based on the criminal standard. The complainant, the Commissioner and the officer are entitled to my office's view of the complaint, even if disciplinary proceedings cannot ultimately be taken. That is no more unjust than the process of a Royal Commission or other commission of inquiry.

It is a worldwide phenomenon that police complaints are hard to resolve, but our strike rate is not satisfactory to the police officers or the public.

Reports to Parliament

Taking on major cases, especially ones where the government already has a strong view, may well lead to more cases coming to the point where a report to the Parliament has to be considered. The assumption at the time the Ombudsman Act was drafted was that Parliament would intervene to require the Executive to remedy a problem identified by the Ombudsman.

The lack of action on each of the only two s17 reports to date may throw some doubt on the assumption, but my concern now is whether I can take the 'risk' of lodging any more s17 reports. I have decided recently not to take two matters to the Parliament, on the basis that, while the cases were persuasive, they were not compelling. It was certainly in my mind, however, that if I were to report to Parliament and again be rebuffed, it may look to some people as though my office were incompetent of ineffective, and this may be a difficult claim to negate. My personal perspective is that history shows that the instances at Commonwealth level of Ombudsman recommendations which are controversial with government are so few that the government ought to be prepared to go quietly even when it disagrees with the Ombudsman.

Is there an alternative? There may be. Several witnesses at the Senate Committee raised the possibility of the Ombudsman being entitled to designate a report to Parliament as a category of disallowable instrument, so that it would take effect unless either house of parliament moved to disallow it within 15 sitting days. The recent determination of the NSW Legal Fees and Costs Board provides an example of the device and its effect, as it was duly disallowed. At the risk of killing the proposal before it has got off the ground, I mention that the *Remuneration Tribunal Act 1975* also provides a model for this suggestion.[3] The advantage is that the government

can choose to prohibit the decision if it regards it as unworkable for financial reasons or because of the dangerous precedent it would set; on the other hand, if the decision relates to a body like the Australian Broadcasting Corporation (ABC), over which the government is unwilling or unable to exercise control, the decision is taken without its having to act. I look forward to a debate on the desirability of such a change - I know that in one important respect, it breaks the rules of ombudsmanship, by providing a determinative power, but in substance if not in form, the power is given to the Parliament. (It would not be a disallowable instrument as defined in s46A of the *Acts Interpretation Act 1901*, however, in order to ensure that a mere notice of motion was not sufficient to prevent it taking effect. The instrument may well have to be in the form of a requirement to pay compensation.)

Finding the right remedy

Another lion at which my predecessors have taken aim from time to time but been unable to do more than wound, is the tendering process. The recommendation in the Industrial Sugar Mills case that the unsuccessful tenderer should be compensated for its loss of profit was not accepted by the government, or acted upon by the Parliament, even though supported by the Senate Standing Committee on Constitutional and Legal Affairs.[4] There also being a convincing case that the appropriate remedy in such cases is the reimbursement of the costs of the tender, I propose to continue Dennis Pearce's policy of restricting my recommended remedy in most cases to such reimbursement. Dennis explains the reasoning so well in the 1987-88 annual report that I will leave you to read that.

The question of appropriate remedy is one that continues to arise in quite difficult circumstances. Let me construct a hypothetical case. Assume a veteran complains that he had been misled about his eligibility for a Defence Service Loan, with the result that he had committed himself to acquiring a swimming pool to be funded by the loan, before he was told that there had been an error and he was not in fact so entitled. He had certainly acted with alacrity, in that he had committed himself to the construction of the pool on the same day that he claimed to have been misled, with the result that the correction of the error the following day was too late to prevent his loss. you may say, what loss? Well, the pool company apparently told him that to cancel the contract would cost him $6,000 of the $12,000 price; he sought no legal or other advice on that proposition. He used other money which he had to pay for the pool, but still wanted compensation for the lost opportunity to use the loan to which he believed he had an entitlement. By the time we came to consider the matter, he had completed the construction of the pool, which with surrounding works cost closer to $20,000. But he had also sold the house and moved on. He produced a letter from the real estate agent saying that the pool had added only $12,000 to the value of the home.

I find it difficult to see that such a complainant has really suffered a loss of a kind which merits an act of grace payment. I cannot find such material which sets out the principles underlying the calculation of act of grace payments, but it seems to me that those rules must include the following:

1. Claimants must themselves take reasonable steps to mitigate their loss. In this case, I would query whether failing to take steps to cancel the contract was reasonable. Perhaps the loss was the nominal amount to which the contractor would have been entitled on termination, but once the complainant chooses to go ahead and build the pool, even that 'loss' may have been subsumed.

2 The result must not be to enrich the claimant, meaning that subsequent events can and should be taken into account to decide whether there was a loss and of what amount. In the hypothetical case, the benefit of having the pool and the subsequent sale at a price which substantially recouped the cost of the pool, have to be taken into account.

3 Any set of principles worthy of the name would have three elements. I cannot think of a third which is entirely satisfactory, but let me venture for discussion the proposition that the overall reason of the case must be considered. The posited situation has some unreasonable features but assume that at the time you are considering the claim, you become aware that the same person has lodged a further claim, on the basis that he has visited another office, explained his veteran status over the counter, again been told that it seems that he is entitled, and goes out and makes a commitment, only to be informed quite correctly within 24 hours that he is not and never has been entitled. Such a person would seem to have made an art form out of so describing his history as to create the impression that he has an entitlement; clearly one should reject the second claim, in my view, but should that affect the first? One does not seek to exclude the claim of the gullible, but should one by sympathetic to the guileful?

Ombudsman as plaintiff; as simple as ABC

When I was preparing to address students at Wollongong University recently, I was told by the lecturer that he still had a problem convincing students to take the ombudsman part of the course seriously, because there were so few cases in the law reports. That is certainly true, and perhaps the reason is that ombudsmen do not want to take the risk of losing. My predecessor and I have both gone on record as saying that we consider it inappropriate to litigate the dispute over jurisdiction with the ABC; the uncertainty may well come to an end shortly, with the government about to release a white paper on the subject. There is also a private member's bill before the parliament which will explicitly put the ABC within my jurisdiction for all purposes - the mover has said that it is his aim to make the Ombudsman the 'arbiter of good taste' on the ABC.[5] Some would say that would be a part-time job.

Be that as it may, the Attorney-General's Department submission to the Senate Committee suggested that it would not be inappropriate to resolve this question by litigation - after all, the Parliament had specifically amended the Ombudsman Act to provide for the referral of such matters. Having regard to that comment, and the fact that user-pays for legal services comes in next July; if the government does not resolve the ABC issue one way or the other quite soon, I do intend to review the possibility of a Federal Court action. I suppose that in the context of lions as targets, an organisation run by David Hill is in the category of a mountain lion.

I am making my own contribution to the judicial workload at present, if unwillingly. For the first time, a complainant to my office has applied to the Federal Court for judicial review of my decision not to re-open his complaint. The Senate Committee has been interested in where complainants dissatisfied with the Ombudsman's office could go for redress - the answer at present is generally to the Ombudsman himself. Parliamentary committees, whether general or specific, do not provide an appropriate vehicle for reviewing the handling of individual complaints. I might say that the lack of a

formal appeal is no more unusual in my view than the finite number of appeals available in the court system; it is because the Ombudsman has no determinative power that no more obvious appeal mechanism is needed. I look forward with real interest to the Court's hearing and decision

Access to administrative review

A research project of the Administrative Review Council, conducted under the aegis of the Multicultural Australia Project, has found a low level of understanding of the administrative review system generally in various ethnic groups which it surveyed. The Report, which was launched on Monday by the Attorney-General in Melbourne and in a shameless publicity stunt by me (almost) simultaneously in Sydney, recommends that my office act as a central reference point for those who are dissatisfied with a government decision, but who do not know what remedies are available. It is also suggested that my office adopt a leading role in the dissemination of information about administrative review, particularly the basic message that one can complain or appeal. Subject to resources permitting, I will be happy to do so.

Coincidentally, I have noticed that I am not alone in considering the issue. The Ontario Ombudsman's Annual Report 1990-91 noted that it had been one of her major objectives to deal with public awareness of how to access the Ombudsman's services, correct knowledge as to what those services are, and public access to the services. To assist in achieving this objective, she commissioned a survey on public awareness, which confirmed her suspicion that 'far too few people were aware of the Ombudsman - particularly the people who might be more vulnerable to unfairness and who have limited resources to deal with the problems which result'.

The survey, conducted by telephone of randomly selected Ontario residents, revealed the following:

> one person in five said they had a complaint in their dealings with government administration, most frequently about delay or unfairness; most had done nothing about it;
>
> those most vulnerable (defined as membership of a racial minority, arrived in Canada within the last five years, a single parent, or limited in daily activities for health reasons) have a higher proportion of complaints;
>
> 0.6% (six people in every thousand) contacted the Ombudsman about their complaint);
>
> 69% were aware of the Ombudsman, and generally had an accurate perception of the Ombudsman's jurisdiction and mandate - but awareness was positively correlated with education, negatively correlated with vulnerability. And awareness was low compared to the Ontario Human Rights Commission (95%) and the Worker's Compensation Board (97%).
>
> 52% of Ontarians feel that they are not well protected against unfair government action. This sense is particularly marked among those who are most vulnerable.

To place the level of recognition for the Ontario Ombudsman in context, for I believe it is very high, I should say that she has one of the largest and best funded Ombudsman offices in the world, with a network of offices, and a staff of 120. Nevertheless, I wonder what your guesses would have been as to the level of knowledge in the community at large in Australia of the jurisdiction and mandate of the Ombudsman; of course, in this room, I would expect a perfect score of

100%. The menu for dinner tonight doubles as a survey form, but in flagrant violation of relevant privacy principles will not be anonymous, I hope in any event to have given you food for thought.

Endnotes

1 Commonwealth Administrative Review Committee. Its *Report* is reproduced as Parliamentary Paper No 144/1971.

2 The Senate Standing Committee on Finance and Public Administration.

3 See s12DD.

4 See Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Commonwealth Ombudsman's Special Reports*, Parliamentary paper no 446/1986.

5 The Ombudsman Amendment Bill 1991 was introduced by Mr MacKellar MP. A Private Senator's Bill in similar terms was introduced in the Senate by Senator Herron.

WAIVER OF SOCIAL SECURITY DEBTS

*Stephen Argument**

First published in Newsletter No 9 1991.

On 8 July 1991, the Minister for Social Security, Senator Graham Richardson, issued a notice in the following terms:

> Having regard to the importance of recovering public moneys paid in excess of entitlements authorised by Parliament, the longstanding approach under the Commonwealth *Audit Act 1901* to the recovery of debts, the obligations placed on social security recipients by the *Social Security Act 1991* (the Act) to notify changes in their circumstances and the importance of deterring fraudulent activity, and having regard to subsections 1237 (2) and (3) of the Act which require the Secretary of the Department of Social Security (the Secretary) to act in accordance with directions issued by me from time to time, I hereby direct that the power of the Secretary in section 1237 to waive the right of the Commonwealth to recover from a person the whole or part of a debt must, subject to the attached schedule, be exercised in the following circumstances only ...

The notice goes on to set out the circumstances in which debts can be waived by the Secretary. This article will discuss the background to the issuing of this notice as well as the substance of the conditions referred to above.

Write-off and waiver of debts

Section 251 of the *Social Security Act 1947* (the 1947 Act) gave the Secretary of the Department of Social Security the power to write-off or waive debts owed by social welfare recipients to the Commonwealth under that Act. The relevant debts generally arose as a result of recipients being overpaid, whether as a result of mistake or fraud on the part of the recipient or as a result of so-called 'administrative error'

on the part of the Department of Social Security (DSS).[1] In October of 1988, the Social Security Amendment Bill 1988 was introduced. That Bill contained proposed amendments to s251 of the 1947 Act, the effect of which were to allow the Minister for Social Security to issue directions to the Secretary as to the exercise of his or her discretion to write-off or waive debts. The effect of the amendments was to make such guidelines formally binding both on the Secretary and also the Social Security Appeals Tribunal (the SSAT) and the Administrative Appeals Tribunal (the AAT), should they be required to review a decision by the Secretary.

Though the directions were to be tabled in the Parliament, the amendments made no provision for the Parliament to disallow the directions. Despite suggestions from the Senate Standing Committee for the Scrutiny of Bills that, given their binding effect, not only on the Secretary but also on the SSAT and the AAT, the directions should be disallowable,[2] and in spite of amendments to that effect moved in the Senate by the Australian Democrats, the amendments to s251 were passed into law without any requirement that the Minister's directions be subject to disallowance by the Parliament.[3]

In December 1990, the Social Security Bill 1990 was introduced. This Bill, which was the end result of a considerable period of both drafting and also consultation with interest groups, was a

* *Stephen Argument is the Secretary to the Senate Standing Committee for the Scrutiny of Bills. Any views expressed in this article are those of the author.*

'Plain English' re-draft of the 1947 Act, intended to repeal and replace the earlier Act. Clause 1237 of the Bill essentially re-stated s251 of the 1947 Act (as amended), though the unclear concept of 'write-off' was omitted. The Bill was passed by the Parliament without amendment to clause 1237, becoming the *Social Security Act 1991* (the 1991 Act) and commencing on 1 July 1991.

Throughout this period, no directions pursuant to either s251 of the 1947 Act or s1237 of the 1991 Act were issued.

In June of 1991, amendments to both the 1947 and 1991 Acts were moved in the Senate to make directions issued pursuant to the relevant sections disallowable instruments for the purposes of s46A of the *Acts Interpretation Act 1901*. This had the effect of rendering any directions subject to disallowance by either House of the Parliament, in a similar manner to the way that regulations are subject to disallowance. Consequently, when the Minister finally issued directions (pursuant to s1237 of the 1991 Act) on 8 July 1991, it was open to either House of the Parliament to disallow those directions. On 6 November 1991, Senator Meg Lees, Deputy Leader of the Australian Democrats, moved in the Senate that the directions be disallowed.[4]

Content of the directions

Before considering the attempt to disallow the directions, it is useful to set out the substance of those directions. As indicated above, the effect of the directions issued by the Minister was to allow the Secretary to waive a debt only in certain prescribed circumstances. Those circumstances are:

(a) where the debt was caused solely by administrative error on the part of the Commonwealth *and* was received by the person in good faith *and* the recovery would cause financial hardship to the person;

(b) in respect of the remainder of a debt, where it is cost-effective for the Commonwealth to accept a lump sum of money (not less than 80% of the debt) and the person does not have the capacity to repay a greater proportion;

(c) where a debt has been written-off on the ground of lack of means on the part of the person or the inability of DSS to locate the person and where those circumstances remain after six years;

(d) where a court has indicated that it imposed a longer custodial sentence in view of the person's inability or unwillingness to repay the debt;

(e) where DSS has settled a civil action for less than the full amount of the overpayment, the difference can be waived;

(f) where qualification for Family Allowance is accepted as existing (though not actually paid) in respect of a period in which a pension, benefit or allowance has been overpaid, the amount of Family Allowance that would have been payable (in the three years prior to the end of the period in which the overpayment has been made) is to be deducted from the overpayment;

(g) where, in the opinion of the Secretary, special circumstances apply, such that the circumstances are extremely unusual, uncommon or exceptional (as discussed by the Federal Court in *Beadle v Director-General of Social Security*[5]).

The schedule to the Minister's notice also states that certain debts 'must' be waived, namely:

(1) a debt which is, or is likely to be, less than $200, as long as it is not (a) a debt arising out of the payment of an unemployment benefit or a jobsearch or newstart allowance which could be deducted by instalments pursuant to s1223 (1) of the 1991 Act, or (b) a debt arising out of the payment of a family or child disability allowance or a double orphan pension which could be deducted from such allowance or pension pursuant to the same subsection; and

(2) a debt which is owed by a person whose annual rate of pension, benefit or allowance is calculated under the assets test provisions of the 1991 Act and where a) the debt arose because the person (or, in the case of a couple, his or her partner) underestimated in good faith the value of particular property (including that of his or her partner) *and* b) the value of the particular property was not readily ascertainable.

The motion to disallow the directions

In moving her motion to disallow the directions, Senator Lees told the Senate that, in her opinion, the directions were 'yet another attempt by this Government to fetter the discretionary power of courts and tribunals.'[6] The Senator went on to say:

> Indeed, it represents, as the Welfare Rights Centre in Sydney has accurately noted, an attempt to bind independent tribunals with administrative directions which carry a political agenda.[7]

Senator Lees went on to note that, over a period of time, the AAT and the courts had suggested that a number of factors were relevant in exercising the discretion to waive debts, the intention being 'to lay down broad principles around which the discretion can be exercised, taking into account all the individual factors in each specific case.'[8] The Senator noted that the criteria most often referred to with approval by the AAT were those laid down by the Federal Court in 1983, in *Director-General of Social Services v Hales*.[9] Senator Lees summarised those factors as follows:

(1) the fact that a person has received public monies to which he or she was not entitled;

(2) the way in which the overpayment arose, whether by innocent mistake or fraud;

(3) the financial circumstances of the person;

(4) the prospect of recovery;

(5) whether a compromise is offered;

(6) whether recovery should be delayed if there is a prospect that the person's financial conditions might improve; and

(7) compassionate considerations, bearing in mind that this is social welfare legislation.[10]

Senator Lees stated that in her discussions with various interested parties about the directions she had been unable to find anyone who believed that 'these well established judicial principles did not provide an appropriate balance between [DSS] and its clients.' She further stated that there was 'simply no evidence that the current system of occasionally waiving debts is not working.'[11]

The Opposition parties in the Senate did not support Senator Lees' motion for disallowance of the directions. Speaking against the motion, Liberal Senator Kay Patterson noted that Senator Lees' concerns mirrored concerns put forward to the Welfare Rights Unit in a letter to the Opposition spokesman on Social Security, Senator Richard Alston, dated 2 October 1991. Senator Patterson told the Senate that that letter set out four particular concerns: that the direction (a) would fetter the discretion of tribunals to waive debts; (b) would substantially narrow the circumstances in which debts could be waived; (c) was based on the false premise that tribunals had gone soft on the recovery of debts and were not interested in deterring fraud; and (of lesser significance for the purposes of this article) (d) paid insufficient regard to the special circumstances of assurance of support debts.[12] Senator Patterson proceeded to refute the arguments put forward by the Welfare Rights Unit.

In relation to the question of the powers of tribunals being fettered by the direction, Senator Patterson suggested that it should not be forgotten that the SSAT and the AAT were tribunals and not courts of law, noting in particular that the SSAT was a creature of the legislation which produced the decisions

that the tribunal was empowered to review. Senator Patterson said:

> It is both illogical and inappropriate that [a body such as the SSAT] should be allowed to develop its own criteria, by way of case law, for reviewing decisions made by DSS. If the waiving criteria had been specified in the Social Security Act from the beginning - a move which the Welfare Rights Unit itself has supported - then these tribunals would have had little or no opportunity to diverge from these criteria. The SSAT and the AAT have only been able to develop their own precedents in relation to waiver decisions because the circumstances in which waivers should and should not be granted have not been clearly defined in the Social Security Act.[13]

Senator Patterson went on to say:

> It must also be remembered that just as [the SSAT and the AAT] are not courts, neither are they an arm of either the Government or the Parliament. It is the role of the Government and the Parliament, and not the responsibility of these tribunals, to decide the circumstances in which debts owed to the Commonwealth should and should not be waived.[14]

On the question of whether or not the direction narrowed the circumstances in which a debt could be waived, Senator Patterson made two main points. First, she noted that the direction had taken up some of the recommendations made by the Senate Standing Committee on Legal and Constitutional Affairs in its 1990 report entitled *Debt recovery under the Social Security Act and the Veterans' Entitlements Act*.[15] In particular, she suggested that paragraph a) of the direction implemented recommendation 13 of that report, which was that where a client receives an overpayment in the honest belief that it is part of his or her entitlement and where that overpayment occurs solely as a result of administrative error or unreasonable delay, then recovery should only be sought if DSS can show that recovery would leave the client in no worse a position than he or she would have been in if the correct payments had been made. Senator Patterson also noted that the offsetting of family allowance payments provided for in the schedule to the directions was in accordance with another recommendation of the Legal and Constitutional Affairs Committee.[16]

The second limb of Senator Patterson's argument was that the directions put into place the very factors relied upon by the Federal Court in *Hales*.[17] These *Hales* factors are largely taken up in paragraph a) of the directions, which refers to the cause of the overpayment and the likelihood of recovery causing financial hardship. It should be remembered, however, that while the Federal Court in *Hales* referred to overpayments for which the 'substantial or dominating cause' was a failure on the part of DSS to perform its functions, the direction refers to debts 'caused solely by administrative error on the part of the Commonwealth'. Further, paragraph a) of the directions imposes the additional pre-requisite that the payments be received by the person in good faith (though, as noted by Senator Patterson, this was in accordance with the recommendations of the Legal and Constitutional Affairs Committee).

Senator Patterson referred to the difference between the directions and *Hales* in refuting the third Welfare Rights argument:

> It is worth noting that one of the major differences between this direction and *Hales* is that the former provides that the debt must be 'caused solely by administrative error on the part of the Commonwealth', while the latter allows for a combination of administrative error and client failure. The question is not so much whether the tribunals have gone soft, but whether it was open for them to go soft in a way that fundamentally contradicted DSS's own guidelines.[18]

Without the support of the Opposition, Senator Lees' disallowance motion was

defeated and the directions continue in force.

Comment

Without wishing to traverse the merits of the arguments put forward by Senator Lees (and the Welfare Rights Unit), on the one hand, and by Senator Patterson, on the other, the history of the directions which are now in force provide an interesting case study on the subject of what has been called 'quasi-legislation'. As section 251 of the 1947 Act and section 1237 of the 1991 stood at various times, they provided the Minister with the power to, in effect, alter the operation of the legislation by issuing guidelines as to how a particular discretion under the social security legislation was to be exercised. Despite having a consequent effect which approached that of a piece of legislation, those directions were to be immune from any sort of review by the Parliament, the body empowered by the *Constitution* to make such legislation. The amendment of the 1947 and 1991 Acts to make those directions disallowable went a long way toward redressing the legislative anomaly which this situation presented.

The motion for disallowance of the directions issued by the Minister in July of 1991 (and the consequent debate) was an example of a 'quasi-legislative' instrument being subject to the kind of Parliamentary scrutiny which, arguably, it deserves. Though the directions were, in the final analysis, neither made by nor disallowed by the Senate, they *were* subject to a careful and considered analysis by the Senate before being allowed to pass into law. In the circumstances, it is difficult to imagine what more could have been expected.

Finally, as to the subject matter of the directions themselves, it seems clear that (whatever else they may or may not do) the directions will, at least, provide debtors, their advocates, DSS and, ultimately, the tribunals with a much clearer guide as to what criteria are to be applied when deciding whether or not a debt should be waived. Senator Patterson summed up this point as follows:

> In effect, this ministerial direction sets in concrete those circumstances in which [DSS] and the appellate tribunals can waive debts or overpayments. It provides very clear guidelines as to when a debt owing to DSS can and cannot be waived. To this end, this direction can result only in greater consistency, greater certainty and greater equity between decisions in relation to the waiving of social security debts.[19]

If the directions actually achieve these worthy goals, it is difficult to see how they are anything but 'a good thing'.

Endnotes

1 See, generally, Senate Standing Committee on Legal and Constitutional Affairs, *Debt recovery under the Social Security Act and the Veterans' Entitlements Act* (Parliamentary Paper No 91 of 1990), especially at pp10-11. See also S Argument 'Prevention better than cure?', (1990) 15 Legal Services Bulletin 158 which discusses that report.

2 Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report* of 1988 (Parliamentary Paper No 402 of 1988) pp 264-266.

3 See Senate. *Hansard.* 13 December 1988. p 4070.

4 See Senate, *Hansard,* 6 November 1991, pp 2503-2511.

5 (1985) 7 ALD 670.

6 Senate, *Hansard,* 6 November 1991, p 2503.

7 Senate, *Hansard,* 6 November 1991, p 2504.

8 Senate, *Hansard,* 6 December 1991, p 2505.

9 (1983) 47 ALR 281.

10 Senate, *Hansard,* 6 November 1991, p 2505.

11 Senate, *Hansard,* 6 November 1991, p 2505.

12 Senate, *Hansard,* 6 November 1991, p 2507.

13 Senate, *Hansard,* 6 November 1991, p 2507.

14 Senate, *Hansard*, 6 November 1991, p 2507.

15 Parliamentary Paper No 91 of 1990.

16 Recommendation 15, para 5.32 of the *Report*.

17 Senate, *Hansard*, 6 November 1991, p 2508.

18 Senate, *Hansard*, 6 November 1991, p 2509.

19 Senate, *Hansard*, 6 November 1991, p 2507.

MINDING THE PEOPLE'S MINDER

*Dennis Pearce**

An edited version of an article which appeared in the Canberra Times in March 1992 and was first published in AIAL Newsletter No 9

To have an Ombudsman makes a government look good. To underfund the office ensures that it is not too troublesome. After three years as Commonwealth Ombudsman I realised that no matter how strong a case for increased resource was put by the Ombudsman's Office, nothing would be forthcoming from those who manage the Commonwealth's money. Why should the Executive finance a body that is going to call it to account as a result of complaints from members of the public affected by the Executive's decisions? Governments like to point to the fact that an independent person is available to review their decisions but they do not want that review body to be too powerful or too well known lest citizens be inclined to take frequent advantage of the office.

It seemed to me that the only way that the government could be obliged to acknowledge that the Ombudsman was not being funded sufficiently to carry out its statutory obligations would be for an independent body to review the operation of the Ombudsman and make recommendations to the government accordingly. I suggested to the then Prime Minister, Mr Hawke, that a Senate Committee might undertake this task but was a little apprehensive when the matter was referred to the Senate Standing Committee on Finance and Public Administration. That Committee has not always been gentle with the agencies whose activities it has reviewed, and it has generally strongly supported notions of a leaner public service run in accordance with the many managerialist tenets.

At the outset it did appear that the Committee felt that it was capable of applying the razor to the Ombudsman's office. However, as the collection of evidence proceeded, it became apparent that the Committee was becoming steadily more sympathetic to the office, and the Report that it finally issued is a remarkable endorsement of both the need for an Ombudsman and the contribution already made by the Commonwealth Ombudsman. Such criticisms of performance as are contained in the Report stem from the very reason why the inquiry was established in the first place - inadequate resourcing of the office to carry out its statutory function.

The Report presents a challenge to the Government, but before considering this it is worth noting some of the major recommendations.

The ABC has long frustrated efforts by the Ombudsman to deal with complaints by individuals and organizations that they have been misrepresented on ABC programmes. The ABC has asserted that complaints of this kind do not fall within the Ombudsman's jurisdiction. The Committee was of the view that persons should be able to seek review of the ABC's actions and recommended that legislation be enacted to make it clear that the Ombudsman does have jurisdiction.

There is at present something of a gap in the Ombudsman's jurisdiction to deal with employment related grievances. While the office may investigate some pre-and post-employment related matters, such as decisions made in relation to superannuation and compensation, grievances arising from action taken during the course of a person's employment must be taken to the Merit

* *Commonwealth and Defence Force Ombudsman, 1988-1991.*

Protection Review Agency (MPRA). Not all government authorities are covered by the MPRA. For example Australia Post, Telecom and the Australian National University do not come within its aegis, and employees of these agencies have no ability to seek external review of grievances arising in the course of their employment. The Committee proposes that the MPRA's grievance function be transferred to the Commonwealth Ombudsman (together with the resources that are devoted to this function). The promotions appeal functions would, however, remain with the MPRA. (This would leave it with so little work that it is more than likely that it would be absorbed into another body.)

The recommendation of the Committee is ambiguous as to whether or not all complaints relating to employment decisions of Commonwealth authorities should be dealt with by the Ombudsman or only those presently reviewable by the MPRA The reasoning supporting the transfer of the MPRA's jurisdiction would suggest that the wider function should be entrusted to the Ombudsman also. The Ombudsman, in the capacity of Defence Force Ombudsman, presently deals with the full range of employment grievances that may be raised by Defence Force personnel.

The benefit of having one Ombudsman deal with all complaints against government authorities is endorsed by the Committee's suggesting that the function of the Telecommunications Ombudsman that is to come into being with the changes in the telecommunications industry should be carried out by a specialist unit within the office of the Commonwealth Ombudsman. The Committee also recommends that other specialist Ombudsman functions should be performed within the office of the Commonwealth Ombudsman. The proliferation of Ombudsman type offices to receive citizens' complaints presents a problem of recognition for members of the public. This recommendation takes advantage of the fact that the Commonwealth Ombudsman has offices in each State and experienced persons within those offices. It also goes far towards preventing what is a major problem for specialist review offices - being 'captured' by the organisation that they are established to review.

The Committee rejected the long held view that being subject to an Ombudsman unfairly prejudiced government corporations that are in competition with the private sector. Evidence presented to the Committee indicated that government business enterprises recognised that there was value to their operation in Ombudsman review. The upshot was a recommendation that government companies and all other government bodies be treated as within the Ombudsman's jurisdiction unless specifically excluded for good reason. This fits in with the moves in some private sectors such as banking and insurance to establish Ombudsman review bodies.

Other matters that it was suggested should be brought within the Ombudsman's jurisdiction included the administrative actions of the parliamentary departments and of court and tribunal registries.

The Committee did not propose the removal of any jurisdiction of substance from the Ombudsman, but it did make a most significant recommendation in relation to the Ombudsman's jurisdiction to investigate complaints against the Australian Federal Police. This has probably been the most unsatisfactory aspect of the Ombudsman's performance. The difficulties have stemmed from the lack of resources available to the Ombudsman to independently investigate matters that have initially been investigated by the Internal Investigation Division of the AFP. The Report notes that the Ombudsman has been able to carry out only one full investigation of a police complaint and has been obliged simply to oversight investigations performed by the police themselves. The Committee said that this state of affairs should continue and throws down the gauntlet to the government by recommending that either the Ombudsman be adequately resourced or the jurisdiction relating to

the investigaton of complaints against the police be removed from the Ombudsman's jurisdiction. The Committee does not make any suggestion as to who might then take over the police complaints function.

The Committee was satisfied that the existence of the Ombudsman's office was not known to all members of the community, particularly those in the low income or disadvantaged groups. The Committee was strongly of the view that it was necessary for the Ombudsman to engage in more extensive promotion campaigns but acknowledged that this could only be done if adequate resources were provided to the office.
The Committee encouraged the Ombudsman to engage in reviews of activities of agencies that would improve the performance of the agency overall. It said that the Ombudsman's role should not be seen as limited to resolution of particular complaints. Efforts should be made to ensure that the reason why the complaint arose in the first place is addressed by the decision making agency. It was somewhat surprising that the Committee wrote in these terms as it is in fact the function that the Ombudsman already carries out. This was acknowledged by the heads of the major departments such as Social Security and Immigration Local Government and Ethnic Affairs who stated that Ombudsman identification of deficiencies in performance was a significant tool in their management of their Departments. The Committee did, however, make a very useful suggestion in proposing that there be established a special investigation unit within the Ombudsman's office that would be responsible for investigating major complaints. It has proved impossible for the office to conduct such investigations except at the cost of not dealing with a very large number of individual complaints.

There are many other recommendations contained in the Committee's Report, but those set out above give an adequate taste of the general endorsement given to the office. The test now will be to see whether the newly appointed head of the Department of the Prime Minister and Cabinet, Dr Michael Keating, will be able to move away from his Finance background and look at the broader issues that being head of Prime Minister's Department entails. Dr Keating showed no particular affection for the office of Ombudsman when he was head of the Department of Finance. Strong administrative review systems do not fit readily within the managerialist principles that he espoused so vigorously when in that position. The amount involved in turning the Commonwealth Ombudsman's office around from one which is able to carry out a limited role competently to one that can be relied upon to carry out its statutory function properly would be of the order of $1M. This is a minimal sum necessary to achieve the functions that the Senate Committee recognises that the office should be permrming. However, the extra resources that the Committee proposes should be allocated to the Ombudsman's office will not be forthcoming unless Dr Keating is willing to support their availability.

THE DEFENCE FORCE DISCIPLINE ACT; DISCIPLINARY DREAM OR ADMINISTRATIVE NIGHTMARE

*Brigadier William D. Rolfe**

Presented to the AIAL, 4 March 1992, Canberra, and first published in AIAL Newsletter No 10 1991.

The general subject of this paper is the *Defence Force Discipline Act 1982*, proclaimed in mid 1985, and its impact on formal disciplinary measures. I intend to make a number of introductory remarks about military discipline in its social context, as that subject is at the root of concerns over formal disciplinary provisions, and to then explain some of the provisions of the Act. That should create a context for discussion of several High Court cases and the possibilities for management of the disciplinary system that flow from them. The particular cases are: *Re Tracey; Ex parte Ryan* (1989) 63 ALJR 250; *McWaters v Day* (1989) CLR 289; *Re Nolan; Ex parte Young* (1989) 172 CLR 460

It is important to look to social context and to the substance of the subject of discipline. There is no doubt that a matrix of factors including technology, social environment, and political and economic forces, impact on the military organization and influences internal and external perceptions of its role, structure, place in society and its needs as a professional organization. This has been no more evident in our history than in the present day. It is not necessary, and perhaps not even possible, to place the influence of such factors in any order of precedence or to delineate any particular time or period as more important than another. However, for my part I see the conclusion of our involvement in the socially divisive Vietnam war as a convenient point at which to mark the commencement of a period of quite dramatic change for the Defence Force. Australian troop withdrawal from Vietnam ended a period of over 30 years during which some element of our forces had always been deployed on active service. I do not disregard the recent deployment to the Gulf war of our ships or our involvement in multinational or United Nations peacekeeping operations but I draw a distinction between them and the combat operations conducted throughout World War II, Korea, Borneo, Malaya and Vietnam. From the Vietnam era which saw a Task Force of about 8000 personnel (at the height of our involvement) employed on 12 month tours of duty, the percentage of personnel in the forces with combat/active service experience has declined to miniscule proportions. For the last 20 years our forces have been employed in what would once have been termed garrison duties, well removed from the active service which provides a part of the *raison d'etre* for discipline.

At about the time of the withdrawal from Vietnam I recall, in general terms, a Fabian Society paper published by Mr Barnard, Minister for Defence in the Whitlam government, wherein he referred to a certain tension between the military and Labor governments but prophesied the removal of the last vestiges of the military caste structure and the convergence of civilian and military styles of management and civilian and military skills. It seems to me that he paid insufficient regard to the strength of self supporting military conservatism (not always a bad thing) but in many ways his views were remarkably prophetic. Perhaps the first significant step in the process he envisaged was the defence reorganization based on the Tange Report, which saw the development of a defence bureaucracy combining the civil and military elements of the Defence

* Director General, Defence Force Legal Services.

Department, and which laid the basis for command of the Defence Force by the Chief of the Defence Force (CDF) and the joint administration of the Defence Force by the Secretary of the Department and the CDF. In more recent times, and continuing at the moment, we see the natural development of that process in the Defence Regional Support Review which combines core departmental and single service functions in single Defence Centres in each State.

During the same period we have seen the development of a relatively low profile Armed Forces Federation which, in traditional terms, cuts across the relationship between leaders at all levels and the troops. That event perhaps refocussed and even to some extent revitalized the position of traditional defence lobby groups such as the RSL, but at the same time drew a distinction between the military forces of yesteryear and the defence forces of the modern era. That distinction waxes and wanes: the emotive Sydney march of Vietnam veterans evokes memories of 'our boys' and their service to country, at least for the older generation, while the very existence of a Defence Force Remuneration Tribunal seems to represent the industrial focus of the present force. The Dibb Report refocussed strategy and led to reassessments of role and functions. The Wrigley Report raised the possibility of an almost European style defence - perhaps along the lines of the Swedish total defence model. The Force Structure Review has led to quite dramatic changes in manning and the first intake of the Ready Reserve (one year full time, four years part-time) is now in training.

In all these activities there is constant pressure on resources, and underlying that factor, as always, is the question of cost. New ways must be found to extend the capacity of resources limited by cost to reduce the cost. There is constant examination of 'contracting out', and greater reliance on existing infrastructure, and competing questions of whether the contractor will be there when the bullets fly or whether the infrastructure can cope in a variety of circumstances. Whatever the merit of the arguments the inexorable fact is that there is a discernible convergence of military and civilian management to achieve the defence aim. It is likely that this will increase. There is and will be increasing interchange of skills, work practices and management styles. Issues of equal opportunity employment, privacy, occupational health and safety, and conditions of employment are becoming matters of 'common' parlance between civilians and servicepersons. That is not to say that they have never been issues for the military, but in yesteryear they were raised in an entirely military context.

So where has this convergence left the warrior class, which despite all remains a focal point of the defence aim. At this point we move to the other end of the continuum and look to the impact of this evolution on our military force. It is trite that we are all products of our environment.

It is a traditional and basic tenet that discipline in all its forms is at the heart of the effective fighting force. Discipline is an essential element of combat power, that is the total means of destructive force that a military organization can bring to bear on an opponent. The most modern military technology in the hands of an undisciplined force will not guarantee the decisive application of combat power. So what is discipline?

Our British heritage seems to have promoted two general concerns on the subject. First, parliamentary control of the military beast to ensure the protection of the public and its institutions and secondly, promotion of the efficiency and effectiveness of the force. Unlike many third world countries where militarism continues as a reaction to weakness in civil institutions our history has firmly established control of the military by government: accordingly I put to one side the historical concern to maintain discipline for the protection of the public and concentrate on the concern to promote efficiency and effectiveness. There is much mythology about Australian military discipline from the two world wars and we tend naturally to cling to the heroic aspects: 'mateship' is a central theme, along with disregard for

rules and regulations. There is nothing wrong in this, but a clinical examination of the subject raises a myriad of factors which reveals the naivete of reliance on the heroic aspects.

The Army Handbook on Leadership, mirrored I am certain in publications in our sister Services, introduces the subject by stating that the existence of discipline ensures a readiness to obey willingly and to take appropriate and intelligent action. It proposes that discipline training is mental and moral training towards voluntary and swift compliance with a code of behaviour, and that the crux of the issue of discipline is the conscience of the person who conforms. Discipline is a matter of suasion rather than force, and the imposed discipline of recruit training becomes, with sound leadership, intelligent self discipline which will sustain persons in adversity, promote intelligent obedience, promote respect among peers subordinates and superiors, and promote cohesion among individuals - the whole leading to the capacity to apply combat power effectively. The regimentation of persons, a popular perception of military discipline, is far too simplistic a manner of description of this process.

The process places a heavy burden on leadership, but an equally serious obligation on individuals to conform to standards that will promote the effectiveness of the group.

At times the leadership will fail, or individuals will resist the process. A range of measures are available to continue efforts at persuasion, preventative measures such as fault checking, counselling, or formal warnings but where these measures fail, there exists the formal disciplinary system. But even in the final resort to punishment, essential aspects of discipline must be applied. Deputy Judge Advocate Robert Carey CB writing on military law and discipline in 1877 in London had this to say:

> 'Discipline and efficiency can only be secured by a careful study of individual character, by attention to the most minute details of all that concerns the health, comfort or necessities of soldiers, by impartiality, by experience, and by a determination to enforce obedience to all the rules and regulations of the service. To a certain extent this can only be attained by punishment, and at times by severity. It is however not only necessary to know what punishment can be legally awarded but also to discriminate and to decide what punishment ought to be awarded, when punishment can be dispensed with, or when it must be resorted to, and when the object desired to be attained will be best secured by a slight or severe award.'

In a more succinct statement of some these issues, writing nearly one hundred years later in the American *Criminal Law Review*, General William C. Westmoreland said:

> A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline.

At first glance it seems that these lessons of history were considered in the development of the *Defence Force Discipline Act 1982* and that policy framers and the drafter took note of the 'convergence' theory articulated by Mr Barnard.

The Discipline Act had its genesis in the 1946 Reed Committee Report to the Minister for the Army upon the trial and punishment of offences against military law. The Report found overwhelming evidence that the form of military law was unsatisfactory and confusing and recommended that all offences, punishments and all matters relating to the trial and punishment of offences against military law should be in a separate code incorporating provisions that are applicable in both peace and war. In 1949 an interdepartmental committee was set up to review Defence legislation, including disciplinary legislation. During the next ten years numerous separate Service disciplinary

Bills were prepared for presentation to Parliament, 11 in all I believe, but none were enacted. In this period and in the ensuing decade, considerable reliance was placed on the Reports of the Select Committees for the British House of Commons but then in 1965, on a Navy initiative, a decision was taken to prepare a 'uniform disciplinary code' for the three Services. Over the next seven or so years a Working Party under the chairmanship of a representative of the Attorney-General's Department developed comprehensive proposals against a backdrop of public disinterest, inherent military conservatism and competing Service positions. In 1973 the Working Party received new impetus with the receipt of Ministerial Directives as to matters to be incorporated in the disciplinary code. Included were:

(a) right to representation by counsel;

(b) right to legal advice;

(c) right to have a transcript of proceedings;

(d) suspension of sentences;

(e) inclusion of sentencing criteria;

(f) incorporation of rights under the Human Rights Bill;

(g) the need to keep Service encroachment on personal liberty and rights closely equated to the ordinary civil law.

A report and draft legislation was presented to the Minister in late 1973 and tabled in 1974. Armed with the resulting comments, the Working Party presented a second draft in 1975. In the late 1970's the Defence Minister in a new government indicated that he was concerned about needless technicalities, and excessively generous provisions relating to legal representation. He took the view that simple disciplinary transgressions should be dealt with summarily and that there should be limited scope to involve legal procedure. A compromise was settled upon and the Defence Force Discipline Bill was enacted in 1982. An interesting side issue at the time was the contemplation of the Criminal Investigations Bill. It was envisaged that the Bill would shortly be enacted but to ensure the modernity of the Discipline Act, many of the comprehensive investigatory provisions were incorporated. It is history that agreement could not be reached on the Investigations Bill and it lapsed - but many provisions were included in the Discipline Act.

The result of this 30 odd year gestation was not a 'code' of service discipline, despite the existence of several effective State codes of criminal law, nor is the legislation entirely uniform for the three Services, the latter requirement having foundered on the rock of naval requirements for summary discipline. The legislation has been described as:

> ... new and contemporary legislation, capable of meeting the perceived needs of the Defence Force over coming decades, subjecting all Australian Defence Force personnel to one readily identified and cohesive body of law which will provide for what it is realistic to call common offences and evidentiary rules, common requirements as to the composition of courts martial and the procedures observed therein, a common system of review of all trials, and so far as is feasible to adopt them, common forms of administrative practices for handling disciplinary matters throughout the 3 Services.

Without more the development of homogenous Australian legislation for the three Services was a significant advance. For the rest the Discipline Act has been described as 'evolutionary' rather than 'revolutionary'. The proponents of the Bill contended that the change was not change for the sake of change, and that the driving motives were not those of reforming zealots. The intentions had been to:

> replace the existing systems [which were complex] with a sound new system which will match the perceived national, political, social

and juridical aspirations of the day, and of ... tomorrow.

It is not inappropriate to note that this global intention made no specific mention of 'military' aspirations. A generous interpretation would indicate that military needs are naturally incorporated in the scope of such a broad aim and that it marked a milestone in the convergence of military and civilian practices. A less generous approach, perhaps in danger of being described as a traditional military approach, is that insufficient account was taken of peculiarly military needs and circumstances and that the result was not so much a convergence as a subordination of traditional military requirements to civilian processes.

At this point a thumb nail sketch of the Act at time of proclamation is necessary and instructive. You will forgive me if, where it is necessary, I employ Army terms as descriptors that will apply in equivalent circumstances in the other two Services.

Broadly speaking there are three levels in the hierarchy of disciplinary tribunals: the summary level, the courts martial level, and the courts martial appeal level.

The explanatory notes indicate sub-levels in those levels of tribunals. In order to place their respective functions in perspectice, I provide you with the following figures:

Number of trials in 1990

<u>Navy</u>

Subordinate Summary Authorities	2139
Commanding Officers	1132
Superior Summary Authorities	Nil
Defence Force Magistrate	8
Restricted Court Martial	3
General Court Martial	2

<u>Army</u>

Subordinate Summary Authorities	2092
Commanding Officers	1388
Superior Summary Authorities	1
Defence Force Magistrate	53
Restricted Court Martial	19
General Court Martial	2

<u>Air Force</u>

Subordinate Summary Authorities	335
Commanding Officers	140
Superior Summary Authorities	1
Defence Force Magistrate	3
Restricted Court Martial	1
General Court Martial	1

When the figures from the three Services are combined they give figures of, at the summary level 7228 trials, and at the court martial level, 92 trials. In 1990 three appeals from court martial proceedings were conducted.

The broad figures from the three Services also reveal that there are different policies at play in the approach to disciplinary questions. in some cases driven by different circumstances, but I disregard that matter for the purpose of this paper. They indicate that an overwhelming majority of offences are dealt with at a sub unit or unit level. I am also able to inform you that the vast majority of these offences relate to minor disciplinary infractions (a fact borne out by the Independent Review of Defence Force Discipline - of which more later) and that over 90 per cent of such trials involve guilty pleas.

It is clear that the Commanding Officer is at the centre of summary proceedings. A subordinate summary authority exercises his jurisdiction in respect of offences notified to him/her by the Commanding Officer. It is open to the Commanding Officer to refer matters to a Superior Summary Authority but it is clear that such a procedure has fallen into disuse. A Superior Summary Authority may also be a Convening Authority charged with the responsibility of Convening Courts Martial in respect of matters referred to him by a Commanding Officer - this is one of a number of factors which has led to the decline in exercise of summary jurisdiction by that superior summary authority.

The proceedings conducted by summary authorities are 'trials' involving the application of rules of procedure as established by the Judge Advocate General (a statutory appointment under the Act), application of the rules of evidence in force in the Jervis Bay Territory, a record of the proceedings, a prosecutor and, if requested, a defending officer. Effectively, summary proceedings reflect the formal proceedings of a court martial. The Act draws a clear distinction between the administrative decisions made preliminary to a summary disciplinary proceeding and the summary 'trial' of the offence. A commanding Officer has jurisdiction to 'deal with' any charge against any person being a defence member or a defence civilian - the latter being a civilian who accompanies the Defence Force and agrees to subjection to the Act - but has a limited jurisdiction to 'try' offences. If the offender is two or more ranks junior and the offence is not prescribed, the matter falls within his trial jurisdiction. I have set out s104, 107 and 110 of the Act under the heading 'jurisdiction of Commanding Officer' in note 2 of the explanatory notes in the hope that the relevant sections will provide an insight that my brief words cannot.

I turn now to the offences.

The jurisdiction of a Commanding Officer is to try 'service offences' that are 'not prescribed'. 'Service offence' means an offence against the Act or regulations, or an ancillary offence, committed when the person was a defence member or defence civilian. Under the Act an offence is 'ancillary' if it contravenes ss6, 7, 7A and 86(1) of the *Crimes Act 1914* (Clth) - dealing respectively with, in broad terms, accessory after the fact, attempts, inciting or urging the commission of an offence, and conspiracy.

Service offences are set out in ss15 to 60 and in s62 of the Act. The offences range from purely military offences such as mutiny (s20) desertion (s22) absence without leave (s24) to offences clearly recognised in the ordinary criminal law, such as assault (s33 and see also assault on a superior officer at s25, assault on a guard at s30 and assault on an inferior at s34) stealing and receiving at s47 and false statement in relation to application for a benefit at s56. Section 61 incorporates as a service offence acts or omissions which, if they took place in the Jervis Bay Territory, would constitute 'Territory Offences'. We now approach, at last, the crux of the concern of this paper. Territory offence is defined in s3(1) and means an offence against a law of the Commonwealth in force in the Jervis Bay Territory (other than the Discipline Act), an offence punishable under the *Crimes Act 1900* (NSW) in its application to the Jervis Bay Territory as amended by Ordinances in force in that Territory, and an offence against the *Police Offences Act 1930* of the Australian Capital Territory in its application to the Jervis Bay Territory.

In relation to a Commanding Officer, recall that he may 'deal with' any offence, but his jurisdiction to 'try' is limited by reference to prescribed offences. The prescribed offences include treason, murder, manslaughter, bigamy (yes bigamy) and certain sexual offences, offences ancillary to those offences, and service offences in respect of which a person is liable to more than two years imprisonment (other than an offence against s43 (intentional destruction of service property), s48 (false evidence) and certain other offences where circumstances may allow that they be dealt with as relatively minor matters. Particular other offences are also prescribed, they relating to endangering morale, dangerous behaviour, loss or hazard to a service ship and unauthorized disclosure of information. The latter are particular offences which Service authorities considered warranted trial at a higher level. The effect of the definition of 'prescribed offence' in s104 is to remove serious criminal offences and the vast majority of Territory offences from the trial jurisdiction of the Commanding Officer - particularly most of the offences under the *Crimes Act 1900* (NSW) as applied in the Jervis Bay Territory, and offences under the Commonwealth Crimes Act. Nevertheless he is able to 'deal with' such offences and refer them to a Convening Authority for decision as to

their trial by Defence Force Magistrate or Court Martial.

There is a further general limitation to jurisdiction contained in s63 of the Act. This limitation has already been referred to as it is also reflected in the definition of prescribed offence in s104. Section 63 is to the effect that proceedings for offences caught by s61 NSW Crimes Act in its application to the Jervis Bay Territory shall not be instituted in Australia without the consent of the Director of Public Prosecutions (necessarily the Commonwealth Director of Public Prosecutions, despite the following reference to State offences) where the relevant offence is treason, murder, manslaughter or bigamy, or certain of the serious sexual offences (ss92A-E of the NSW Crimes Act in its application to the Jervis Bay Territory - being serious sexual assaults, sexual intercourse without consent and sexual intercourse with young persons).

The result of this brief survey is that a wide range of offences under the Discipline Act, which include offences such as assault and stealing and receiving, together with offences under the NSW Crimes Act in its application to the Jervis Bay Territory and offences under the Crimes Act (Commonwealth) - and other Commonwealth legislation creating offences, are caught by the disciplinary offence net. Commanding Officers do not have jurisdiction to 'try' many of these offences but may refer them to a Convening Authority for his consideration as to convening a court martial or referring the offences to a Defence Force Magistrate.

It will be readily apparent to you, as it was to Service authorities in 1985, that there were likely to be problems with the operation of this expanded disciplinary jurisdiction and the overlap of civil and military law. It is pertinent to point out that s190 of the Act purported to deal with the jurisdiction of *civil courts* in relation to offences. In broad terms the section sought to remove the possibility of double jeopardy - perhaps a sound step in light of the development of a comprehensive, modern disciplinary system which appeared to all intents and purposes to operate parallel to the criminal justice system of the States and the Commonwealth.

The problem was not new as courts in the United States had dealt with the issues of interaction of the military and civilian jurisdictions for some time, particularly in the landmark cases *O'Callahan v Parker* (1969) 395 US 258 and *Relford v Commandant United States Disciplinary Barracks Ft Leavenworth* (1971) 401 US 355. When the possibility of jurisdictional problems arose between the DPP (Commonwealth) and the military it was to these cases that attention was directed. In the earlier case the United States Supeme Court had held that military jurisdiction under the Uniform Code of Military Justice depended upon the 'service connection' of the offence. The latter case pointed to factors which were relevant in deciding whether that service connection existed. Not unusually they became known as the 'Relford factors'.

These factors formed the basis of guidelines arrived at in 1986 by consultation between military authorities and the Office of the Commonwealth DPP. The 'mutual' arrangement was considered preferable because doubt was expressed as to whether the Services would fall within the category of persons to whom guidelines could be furnished or directed under the DPP Act. In very broad terms the guidelines:

(a) recognized a legitimate role for military law in complementing the ordinary criminal law;

(b) generally defined the military interest as offences created by Part III of the Discipline Act (ss15-60);

(c) stated the DPP's interest in offences constituting an identifiable breach of the ordinary law, most obviously the offences incorporated by s61;

(d) set out criteria to be applied in assessing a service connection which would justify the application of military jurisdiction (a development of the Relford factors); and

(e) established a process of consultation.

The underlying concept in the guidelines was phrased in this manner:

> The basic question to ask is whether there is any reason why the exercise of jurisdiction by a service tribunal would not be appropriate rather than to begin from some underlying assumption that civil jurisdiction should be exercised unless inappropriate.

These guidelines appeared to operate quite satisfactorily for several years although minor and conflicting warning signals on the operation of the disciplinary system as a whole were being sounded. It became apparent to Service authorities that guidelines similar to those arranged with the DPP should be in place in relation to the criminal laws of the States. In fact the likelihood of a closer relationship with State jurisdictions, rather than the Commonwealth, had been intimated in the Commonwealth guidelines. It remains a relatively innocuous but unusual provision that the Commonwealth DPP is the authority to be approached should Service authorities seek to deal in disciplinary fashion (in Australia) with offences of murder, manslaughter, bigamy and certain sexual offences. Clearly such offences against the person are the subject of State laws and the appropriate officer would be the relevant State DPP. Service efforts to make arrangements in respect of State laws promoted awareness of the overlap in criminal and military laws.

On a different tack an article prepared by Dr R A Brown, then a Professor of Law at the University of Tasmania and an officer of the Army Reserve in the Legal Corps, called in question the constitutionality of service tribunals under the Act (see 59 *ALJ* 319). He argued that service tribunals exercised the judicial power of the Commonwealth and violated s72 of the Constitution. The proposition has now clearly been denied by the High Court but it created some consternation.

At about the same time the case of *Solorio v United States* (1987) 97 Law Ed (2d) 364 quite changed the direction of the military jurisdiction issue in overturning the two cases earlier referred to. As was subsequently pointed out in the High Court of Australia the United States Supreme Court concluded that it was a sufficient foundation for the jurisdiction of courts martial that the person charged was a member of the armed forces at the time of the offence charged (see *Re Tracey: Exparte Ryan* 166 CLR at 545). The Relford factors on which our guidelines were based were denied, the Supreme Court majority pointing to the confusion created by the complexity of the service connection requirement and the considerable time and energy expended in litigating the issue.

A provision in the Discipline Act itself, providing for the appointment of an independent Defence Force Discipline Legislation Board of Review after three years operation of the Act, next placed formal disciplinary measures under a spotlight, at least within the Services. After a quite searching inquiry the Board, headed by retired Federal and ACT Supreme Court Judge Mr Xavier Connor, QC, concluded that the Act was operating 'reasonably satisfactorily' and was 'generally accepted' within the Services but that it was important that some changes be made. The Board identified some 40 odd issues relating to offences, punishments, and procedures. In particular, the Board considered it quite inappropriate that minor breaches of discipline should be equated with offences, be dealt with by elaborate legal procedures, and be finally entered on a conduct record in a way that may permanently stain the member's character in both service and civil life. The Board recommended the creation of a Discipline Officer empowered to deal with minor infringements of about seven offences. The infringements would not constitute offences, and the Discipline Officer would not be a service tribunal.

In relation to proceedings before the summary tribunals the Board considered it odd, 'and bordering on the bizarre', to impose on the service relationship (commanders and their subordinates) a set of legal rules designed to govern

proceedings before judges and magistrates where accused persons are complete strangers to them and the only relationship is the temporary one arising out of the trial itself (see paragraph 3.12 of the Report of the Board). The Board recommended that the rules of evidence not be applied to summary proceedings, but that principles of natural justice be observed and that the best evidence available be led in such proceedings.

The recommendations of the Board constitute a step back from what seemed a headlong rush to constitute 'courts' at every level.

Against this general backdrop the first of several cases on the issue of military/civil jursidiction was raised in the High Court.

In *Re Tracey* Staff Sergeant Ryan was charged with absence without leave and with making a false entry in a service document. He raised the constitutional argument foreshadowed by Professor Brown and applied to the High Court for a writ prohibiting the Defence Force Magistrate from proceeding to try the charges. In one of the subsequent cases, *Re Nolan*, Chief Justice Mason and Dawson J. described the *Re Tracey* judgements thus:

> Re Tracey presented the Magistrate with a very considerable problem. There was no majority for any one of the three opinions expressed in the judgements; indeed there was a majority rejection at least by way of preferred view, for each of the three opinions.

Chief Justice Mason and Justices Wilson and Dawson took what might be called the 'service status' view (by reference to the United States Supreme court decision in *Solorio* on which they implicitly relied) namely that it is open to Parliament to provide that any conduct that constitutes a civil offence also constitutes a service offence if committed by a defence member. The Parliament's view will prevail so long as the proscription of that conduct is relevant to the maintenance of good order and discipline. Justices Brennan and Toohey took a more restrictive view, akin to that of earlier United States cases namely that military proceedings may be brought against a member if, but only if, those proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing discipline. Justice Deane restricted the issue further, holding that the comprehensive jurisdiction purportedly conferred upon service tribunals is valid in relation to offences in Australia in time of peace only to the extent that it deals with *exclusively disciplinary offences*. Justice Gaudron's position was not dissimilar. It is also important that the judgements clearly struck down s190(3) and (5) of the Act, which I have earlier referred to generally as the 'double jeopardy' provision.

In implementing the *Tracey* judgement in practice the military was obliged to rely on what Professor Brown, ruefully and critically examining the decision (13 *Crim L J* 263) referred to as the 'highest common factor', that being the joint judgement of Justices Brennan and Toohey.

In *McWaters v Day* (1989) 168 CLR 289, Sergeant Day was charged by civil police with a drink driving offence under the Queensland Traffic Act in relation to an accident that occurred on a road in Enoggera Barracks. Day sought prohibition on the ground that the Traffic Act had no application because s40(2) of the Discipline Act (use of vehicles) entirely covered his situation. Accordingly there was an inconsistency and the Commonwealth law should prevail. The High Court held that there was no inconsistency as the Discipline Act is supplementary to and not exclusive of the criminal law. It does not deal with the same subject matter or serve the same purposes as the ordinary criminal law.

In *Re Nolan: Ex Parte Young* (1991) 172 CLR 460 Sergeant Young, an Army pay representative, was charged with two offences in respect of each of seven documents. The offences involved falsification of a service document under s55(1)(a) of the Discipline Act and using a false instrument under s61 of the Discipline Act, picking up s135C(2) of the

Crimes Act 1900 (NSW) in its application to the ACT (this case arising prior to amendment of the Discipline Act which now applies the *Crimes Act 1900* (NSW) in its application to the Jervis Bay Territory).

In the intervening period, since *Tracey's case*, Mr Justice Wilson had retired to be replaced by Mr Justice McHugh. In the event Chief Justice Mason and Justice Dawson found no reason to resile from the view they expressed in *Re Tracey*. Justices Brennan and Toohey adopted the same line that they had taken in *Re Tracey*, although it could be said that some substance was added to the bones of principle that they then enunciated insofar as they clearly indicated that it could reasonably be said that the maintenance and enforcement of service discipline would be served by proceeding on all charges against Young before a service tribunal. The charges in this case, you will recall, included s135C of the *Crimes Act 1900* (NSW) in its application in the ACT. In *Re Tracey* they had suggested that in assessing whether the substantial purpose of prosecution is *reasonably* able to be regarded as for the maintenance and enforcement of service discipline, factors of convenience, accessibility to, and appropriateness of, civilian courts loomed large. The factors of convenience and accessibility would seem, in peacetime, to weigh in favour of civilian courts so that the issue of appropriateness must have taken on added significance. The significance is perhaps found in their words:

> Perhaps Sergeant Young's alleged service offences might have been charged as offences under the law of South Australia ... but, however that may be, it would usually be prejudicial to service discipline to exempt an offender from service punishment when the offence consists in the malperformance of his service duties. Service discipline is not merely punishment for wrongdoing. It embraces the maintenance of standards and morale in the service community of which the offender is a member, the preservation of respect for and the habit of obedience to lawful service authority and the enhancing of efficiency in the performance of service functions.

Mr Justice Deane maintained his firm position enunciated in *Re Tracey* and took the view that it was an imperative judicial necessity that he adhere to that view, it being impossible to identify in the earlier decision any general principle accepted by the majority as justifying the actual decision. Justice Gaudron was in essential agreement with Justice Deane and Justice McHugh adopted the reasons expressed by Justice Deane in *Re Tracey*.

What is the effect of the matters I have raised with you: what is the position of the military?

As always there is good news and bad news. In my opinion, and I stress that the following comments are my personal views, the advantage flowing from the High Court cases is that the military is in a position to conduct its disciplinary business in pretty much the same way as it has done since inception of the Discipline Act. Judgements will have to be made as to whether the disciplinary jurisdiction is appropriate, but that situation has applied since the Act was implemented. There is some express support for the exercise of disciplinary jurisdiction, even where substantially similar civilian offences are involved, as long as it can reasonably be regarded as substantially serving the purpose of maintaining or enforcing discipline. So far as the recommendations of the Defence Discipline Legislation Board of Review are concerned there is a quite firm indication that summary proceedings should be less technical and more in keeping with the ethos promoted in service life. The proposal for a Discipline Officer is reminiscent of a proposal of the Discipline Working Party in 1973 (subsequently discarded) when the Working Party stated:

> ... The basic reason for the introduction of a two tier summary system is our reluctance to extend the features of a criminal trial to minor breaches of discipline which

should not be classified as crimes and which, in the industrial setting would be regarded as management problems.

This proposal, along with the recommendation to eliminate application of the rules of evidence of the ACT (to be replaced with rules of natural justice and the best evidence available), will likely have the dual effect of reducing the administrative burden that has resulted from the conduct of essentially criminal trials at unit level and will tend to realign some of the Service positions on summary proceedings with that of traditional allies such as Canada, the United States, Great Britain and New Zealand. Broadly speaking these countries rely on what the United States terms 'non judicial' procedures and punishments to deal with day to day minor disciplinary infractions.

These positive results are consistent with the military requirement to have in place a disciplinary system which operates effectively in peace or in war service and at home or overseas. The requirement for discipline has not ever been seriously challenged but questions remain about the manner of its maintenance. Our traditional western allies have also wrestled with this issue. The *Solorio Case* in the United States resolved the issue in favour of military tribunals. In some European countries the issue has been resolved in favour of the civil courts although many other social factors are at play in those countries. In the case of Germany, for example, there was real concern at the possibility of resurgence of an elitist military and stringent steps were taken to eliminate what were seen as privileges and elitist traditions. The same issue has not been raised to that extent in this country although you may recall that I earlier referred you to Mr Lance Barnard's prophecy of the elimination of the last vestiges of the military caste structure.

That brief digression leads me to the bad news. As Mr Justice Deane points out in *Nolan's Case*, there is no identifiable general line of reasoning in *Tracey's case* in relation to service-related offences enjoying the support of a majority of the seven Justices. The present break up of opinion is two, two, three with the 'highest common factor' being based on the judgement of Justices Brennan and Toohey, namely whether proceeding on charges of service offences can reasonably be regarded as serving the purpose of maintaining and enforcing service discipline. That highest common factor appears to be a recipe for further litigation, as was demonstrated in the range of cases in the United States following *Relford*. Chief Justice Rehnquist in delivering the majority decision of the Supreme Court in *Solorio* said:

> 'Since *O'Callahan* and *Relford*, military courts have identified numerous categories of offences requiring specialized analysis of the service connection requirement. For example, the courts have highlighted subtle distinctions among offences committed on a military base, offences committed off base, offences arising from events occurring both on and off a base, and offences committed on or near the boundaries of a base. Much time and energy has also been expended in litigation over other jurisdictional factors, such as the status of the victim of the crime, and the results are difficult to reconcile.'

In addition to that possibility a dispute of sorts has arisen with the Office of the Director of Public Prosecutions (DPP) over the exercise of disciplinary jurisdiction where the disciplinary offence reflects an offence against the ordinary criminal law. It seems to be the position of the DPP that in every situation where such an overlap arises, the relevant DPP (Commonwealth or State) should be approached for a decision as to whether the disciplinary jurisdiction can be exercised. This position appears to me to reflect something of the view of, for example, Mr Justice Deane, who would limit disciplinary jurisdiction to purely disciplinary infractions, but at the same time concedes that disciplinary tribunals may exercise jurisdiction over disciplinary offences which overlap the ordinary criminal law, if the DPP agrees to the exercise.

In my view that position is contrary to the Discipline Act and out of step with the 'highest common factor' to be gleaned from *Tracey's Case* and *Nolan's case*. In *Tracey's Case*, after reciting the test I have now often referred to, Justices Brennan and Toohey stated that:

> In the application of this test, much depends on the facts of the case and the outcome may depend upon matters of impression and degree, especially on the needs of service discipline.

They later continued:

> ... the test is an objective one. It must be applied by those in whom the Discipline Act vests certain procedural powers. The repositories include the Attorney-General (s.63(1)) [now amended and replaced by the DPP (Cth) in respect of the serious criminal offences therein set out - treason, murder, manslaughter, rape and particular sexual offences] a convening authority (ss 103(1), 129A(1)) a commanding officer (s 110(1)) ...

In my view the plain procedural powers in the Act place the decision as to whether a disciplinary issue is involved in the hands of disciplinary authorities. A contrary view would place the discipline of the Defence Force in the hands of the respective Commonwealth and State DPP's.

I add for the sake of completeness that the Justices went on to point out that decisions that proceedings be taken on a charge of a service offence seem to be excluded by schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) from review under that Act. In fact decisions made under the Defence Force Discipline Act are not amenable to appeal or review in any forum other than those referred to in the Act itself and in the Defence Force Discipline Appeals Act.

Specifically, no rights of appeal or review are created under the following provisions:

> Administrative Decisions (Judicial Review) Act (Schedule 1 paragraph (o));
>
> Ombudsman Act (s19(5)(d));
>
> Administrative Appeals Tribunal Act (no right of appeal in DFD Act as required by s25 of AAT Act); and
>
> Defence Force redress of grievance system (Defence Force Regulation 82(1)).

I add also that where, for example, a Defence Force Magistrate decides that there is no military jurisdiction, there is presently no appeal available to a Convening Authority, who has quite clearly, in referring the matter to a DFM, made a decision that the discipline of his command has been affected.

The view that military authorities decide whether or not to institute disciplinary proceedings in respect of offences that have counterparts in the ordinary criminal law creates a range of other philosophical and practical issues. It is said that the serviceman is subject to both the disciplinary and the criminal jurisdiction. If the disciplinary jurisdiction vindicates the disciplinary issue in an 'overlapping' offence of say, theft, how is the community interest to be vindicated? Section 190(3) and (5) of the Act purported to protect servicemen against double jeopardy but were struck down as involving an unconstitutional intrusion. Section 4C of the Commonwealth Crimes Act may provide protection aginst double jeopardy in respect of Commonwealth offences, but that section does not purport to preclude the prosecution and punishment of an offender for any offence against a law of a State. If a State prosecution for a criminal offence were maintainable following prosecution for a substantially similar disciplinary offence, serious questions would arise if different results were reached. There is also the issue of punishment, bearing in mind the fact that the punishments for 'overlapping' offences are most likely to be the same in the disciplinary and the criminal jurisdiction.

Where the military identifies one of these overlapping offences and decides to prosecute in the disciplinary jurisdiction, these issues will arise for, most likely, State authorities. Where State authorities discover an offence which has significant disciplinary connotations and prosecute it as a criminal offence, they are under no duty to notify military authorities, and the State prosecution will preclude any formal disciplinary action for an offence.

There is no easy answer, if indeed there is an answer, to these concerns. The military organization has not relied and will not rely solely on the legislative provisions which appear to give it both the responsibility and authority to prosecute a wide range of offences dealt with under the ordinary criminal law. The military has social responsibilities in the community too. At the same time it is charged with maintaining an effective force ready to meet the legitimate demands of government, and must balance this obligation, within its authority, with other social needs. In relation to disciplinary matters the discipline legislation supplements the ordinary criminal law, it does not supplant it. This is well recognized and there are many instances where military authorities have referred particular matters to civil police as the most appropriate investigatory agency.

The matters I have dealt with do not provide a clear answer to the implicit question in the title I adopted for this paper. There is no doubt in my mind that the 'convergence' process raised by Mr Barnard in the early 1970's is taking place and at an increasing rate. In my view there are limits to the process but they are as much subject to fluctuation warranted by technological and sociological developments as is the process itself. It is a dynamic process and that is reflected in societal issues such as military disciplinary procedures. Our disciplinary legislation has been evolving as distinctly Australian legislation for some time and I see no end to the evolutionary process. The Discipline Act represented a quite dramatic step in the process, but it was consistent with other developments underway. The Connor Review took stock of practice, and in my view called for a temporary respite in the headlong application of civil courtroom procedure and practice to ensure that sight was not lost of the objectives in maintaining a disciplinary system. The difficulties created as a result of the differing opinions in the High Court can be seen in the same light. There is no doubt of the requirement for a disciplinary system to support effectiveness and efficiency in our Defence Force, but the means and measures of its process are in a state of flux. The discipline of the Defence Force is not threatened, and real opportunities to cast off obsolete practices and to propose and develop new ones more suited to the modern force are presenting themselves. It seems to me that a sound foundation for a disciplinary system which meets our military and societal needs has been laid. It is not perfect, the disciplinary dream, but neither is it a nightmare of administration. A balance is being maintained which ensures that we will not be hampered by the last war's equipment in dealing with the modern threat.

JUDICIAL REVIEW OF ASC INVESTIGATIONS: THE ADJR ACT

*John Kluver**

First published in AIAL Newsletter No 10 1992.

Application of ADJR Act to ASC Investigations

By virtue of the Australian Securities Commission Act and Law (ASCA) s244, the Administrative Appeals Tribunal has no substantive role in the review of ASC investigations. Equally, much of the case law on ASC investigations does not involve the Administrative Decisions (Judicial Review) Act (ADJRA). The role of this Act is to provide a mechanism to regulate challenges to administrative activity. It has no application (except pursuant to a relevant cross-claim) where an action for compliance or breach is initiated by the ASC.

With this in mind, many of the recent leading cases on the ASC investigative powers fall away. The most common situation leading to litigation is by virtue of an application for compliance under ASCA s70, eg *ASC v Graco* (1991) 5 ACSR 1; *ASC v Zarro* (1991) 6 ACSR 385; *ASC v Lord* (1991) 6 ACSR 350; *ASC v Dalleagles* (1992) 6 ACSR 674 (subject to an ADJRA based cross-claim).

In some other situations the parties have proceeded pursuant to an application for a declaration heard by consent, eg *Dalleages v ASC* (1991) 6 ACSR 498 (whether certain documents were covered by legal professional privilege); *Johns v Connor* (1992) 10 ACLC 774 (whether a notice complied with the requirements of ASC s.19(3) (a) to state the 'general nature of the matter that the Commission is investigating').

* *Executive Director, Companies and Securities Advisory Committee.*

It is only in the more limited situation where a person initiates a challenge (or enters a relevant cross-claim) that the ADJRA applies. The number of cases where the ADJRA has been referred to, let alone argued at length, are far from numerous. Looking back over the period since 1 January 1991, the list is relatively short eg *Bell v ASC* (1991) 5 ACSR 638; *Financial Custodian Corp v Taylor* (1991) 6 ACSR 215; *Little River Goldfields v Moulds* (1991) 6 ACSR 299 (possibly the most significant decision); *ASC v Dalleagles* (1992) 6 ACSR 674 (a continuing case); *Johns v ASC* (1992) 10 ACLC 684 (first instance); Full Federal Court (19 June 1992); and *Allen Allen & Hemsley v ASC* (Federal Court, 29 May 1992).

Overview of ADJRA

Under the ADJRA, the Federal Court reviews only the legality of administrative decisions; it does not remake decisions on the merits as can the AAT under s43 of the AAT Act. Thus the mere fact that the Federal Court might have made a different decision if left to its own devices does not mean that it will interfere with an ASC decision on ADJRA review. Only if the decision maker has made an error of law in reaching a decision (as interpreted in ss.5-7) will the Federal Court intervene.

In relation to State Supreme Courts, s9(1) of the ADJRA expressly provides that a State Supreme Court has no power to review any decision, conduct or failure to decide, falling within ss5-7 of the ADJRA.

Under the ADJRA, the key remedies which an applicant may seek are:

- a statement of reasons from the decision maker;
- review of the legality of a decision.

Right to a statement of reasons

As we know from *Public Service Board v Osmond* (1985) 159 CLR 656, the common law does not require the giving of reasons as an aspect of natural justice. Accordingly the right under s13 to seek a statement of the decision maker's reasons may be a crucial aspect of the remedies provided by the Act.

The fact that little or nothing may be known about how and why the decision was reached is precisely what makes it difficult in many cases to mount a successful challenge to an administrative decision. The information obtained under s13 can fill crucial gaps in the applicant's understanding of the decision making process and either identify defects in that process or suggest that the applicant's doubts about the propriety and correctness of the decision were misplaced.

Given this, to obtain a statement of reasons under s13 will often be a very useful preliminary step in determining whether or not to commence a formal action under the Act. In essence, the s13 procedure acts in fact as a form of 'particulars' of the Government's case.

Any person making an application for a statement of reasons by the ASC, in the context of current investigations, faces two fundamental hurdles:

- the statement of reasons applies only to decisions which are subject to s5. For actions short of a s5 decision, s13 has no application. I will review this later when discussing *Little River Goldfields v Moulds* (1991) 6 ACSR 299;

- Schedule 2 (e). This excludes from the operation of s13 decisions relating to the administration of criminal justice and, in particular, decisions in connection with the investigation or prosecution of persons; decisions in connection with the appointment of investigators or inspectors for the purposes of such investigations; decisions in connection with the issue of search warrants; and decisions requiring the production of documents, the giving of information or the summoning of persons as witnesses. Schedule 2(f) contains a similar exclusion for decisions in connection with the institution of civil proceedings, including pecuniary penalties.

The terms of Schedule 2 para (e) were discussed by Davies J in *Hatfield v Health Insurance Commission* (1987) 77 ALR 103. This case discusses the outer limits of decisions coming within this particular paragraph. However it is clear that decisions centrally related to investigations, eg to issue notices for production of books or attendance at examinations fall squarely within the Schedule. Thus s13 has little utility for current ASC investigations. However the ASC has provided reasons, under s13, concerning a past investigation: *Allen Allen & Hemsley v ASC* (Federal Court, 29 May 1992, Ryan J).

Before leaving this area, I wish to draw your attention to ADJRA s13A. This provides that in other circumstances where the ASC may be required to provide reasons (eg pursuant to non-investigative decisions under the Corporations Law) it may exclude from that statement information supplied in confidence to the ASC or information furnished to the ASC by a third party 'in compliance with a duty imposed by an enactment'. The effect is that the ASC may exclude from any statement of reasons information provided to the Commission pursuant to its statutory investigative and other information gathering powers. This ensures against 'back door' compulsory disclosures of investigative material.

Reviewing the legality of a decision

Under s11(1) of the ADJRA, an application for review of a decision must be made in the prescribed manner, set out the grounds for the application, and be made within the prescribed time. The Court has power to strike out parts of an application eg where they disclose no ground for review under the ADJRA but, conversely, an applicant is not limited to the grounds set out in the original application. The Court has a discretion

under s11(6) to permit the addition of new grounds. The Court also has a discretion to extend the time for lodgement of an application in appropriate circumstances. This is discussed further below.

Analysis of the relevant provisions.of ss5-7 and s11 disclose that there are six hurdles which must be successfully negotiated before a person will be entitled to remedies under s16 of the ADJRA namely:

- there must be a decision, or conduct for the purpose of making a decision (or failure to make a decision), to which the ADJRA applies;
- the decision must not be 'excluded' from review;
- the applicant must be a 'person aggrieved';
- the application must be made within time;
- the applicant must establish one of the statutory grounds set out in ss5-7; and
- the case must not be one where the court in its discretion regards it as inappropriate to grant relief.

First element: there must be a relevant decision or relevant conduct (failure) for the purpose of making a reviewable decision

Section 3(1) of the ADJRA defines 'a decision to which this Act applies' as:

- a decision;
- of an administrative character;
- made under an enactment.

Also, s3(8) provides that decisions of a delegate or lawfully authorised representative are deemed to be decisions of the principal.

Decision

We are all no doubt aware of the High Court decision in *ABT v Bond* (1990) 170 CLR 321. However this does not render unnecessary consideration of the pre-Bond decisions, which, I suspect, are not disturbed to the extent first contemplated when the *Bond* decision was handed down. There are a number of taxation cases which, I suggest, are still good law and would have equal application, by analogy, to ASC investigations. For instance, it was held in *FCT v Citibank Ltd* (1989) 85 ALR 588 and *Allen Allen & Hemsley v DCT* (1989) 86 ALR 597 that a decision to exercise the powers under s263 of the Income Tax Assessment Act to obtain access to premises or documents constituted a reviewable decision. Likewise, a decision to serve a notice under s264 of the Income Tax Assessment Act seeking information, evidence, or the production of records constituted a reviewable decision, eg *Perron Investments Pty Ltd v DCT* (1989) 90 ALR 1.

Overall, we might say that prior to *ABT v Bond*, the Courts had taken a pragmatic and broad approach to the question of identifying a relevant decision, thus ensuring that applicants were not blocked off from the possibility of a remedy on technical or narrow grounds.

Post ABT v Bond

It was feared by some that the *Bond* decision, and the test formulated in it, intentionally narrowed the scope of 'decisions' covered by the ADJRA, by excluding 'intermediate' decisions from review. However subsequent cases that impinge on ASC investigations suggest that *Bond*, properly understood, does not in practical terms significantly narrow the grounds for review.

Before turning to ASC decisions, I would like to refer quickly to a number of other cases which have interpreted *ABT v Bond*. The first, and the one most favouring a narrower interpretation, is *Edelsten v Health Insurance Commission* (1990) 96 ALR 673. In that case the Full Federal Court held that a decision to refer to the Minister for consideration

allegations of medical over-servicing did not constitute a reviewable decision because the Minister was under no duty to act on the reference. Secondly, and possibly more relevantly, a subsequent decision by the Minister's delegate to refer the allegations to the Medical Services Committee of Inquiry did not constitute a reviewable decision because it merely required the Committee at the preliminary stage to consider whether Dr Edelsten may have rendered excessive services. This case is therefore support for the proposition that the mere commencement of an investigation does not constitute a reviewable decision for the purposes of the ADJRA. This point is further taken up and applied, although without specific reference to the *Edelsten* case, in *Little River Goldfields NL v Moulds* (1991) 6 ACSR 299, as to which see later.

The next case is *FCT v McCabe* (1990) 21 ALD 740. In that case Davies J of the Federal Court pointed out that conduct not constituting a decision may still be relevant to the *evaluation* of a decision. He quoted Mason CJ in the *Bond* case then added:

> Those words do not convey that a finding of fact which is not itself a decision but is made in the course of the reasoning leading to a decision is not examinable. His Honour said that such a finding must be examined only in the context of the review of a decision. Thus a decision may be invalidated on the grounds of unreasonableness if, taking into account the reasoning process leading to it, it was a decision to which no reasonable decision maker would have come.

This does not overcome the hurdle of attaching your case to a reviewable decision; but it does suggest that in the context of ss5-6, the course of reasoning leading to a decision, as well as the ultimate decision itself, can be reviewed by the Court.

The outer limits of the meaning of 'decision' for the purposes of the ADJRA is exemplified in *Pegasus Leasing Ltd v FCT* (1991) 104 ALR 442. In that case, O'Loughlin J held that an advice by the ATO to a taxpayer did not constitute a decision for the purposes of the Act. The Court pointed out that the Income Tax Assessment Act did not require the Commissioner to make any such communication; the communication was only advice, and it did not have the character and quality of finality. As the Court pointed out:

> 'The whole tone of the letter is suggestive of on-going investigations and opinions - all of which would most probably lead, in due course of time, to a decision'.

There are four cases under the national scheme laws that have touched on the concept of a decision.

In *Bell v ASC* (1991) 5 ACSR 638, Pincus J accepted an application under the ADJRA to review the 'decision' of an inspector relating to the right of attendance of the legal representative of the examinee, pursuant to ASCA s23. The ASC did not dispute the 'decision' point.

In *Financial Custodian Corp of Victoria v Taylor* (1991) 6 ACSR 215 an application was made pursuant to ADJRA s15 (stay of proceedings) to suspend the operation of a certain 'decision' - being the decision to issue and serve three notices under ASCA Part 3, Division 3 to produce documents. Again this was conceded without argument.

The next case, and the only one to apply *ABT v Bond* so as to place restrictions, is *Little River Goldfields v Moulds* (1991) 6 ACSR 299. In this case Davies J ruled that the exercise of the power under ASCA s13 to initiate an investigation 'does not confer a power upon the Commission to take a decision which is an ultimate or operative determination [as in *ABT v Bond*]. Section 13 merely confers a power upon the Commission to commence an investigation when there is reason to suspect that there may have been committed a relevant contravention.' His Honour also took the view that the original report which initiated the investigation, the internal approval given to investigate, or the mere

carrying on of the investigation did not constitute reviewable decisions. By contrast 'the notices [to attend at examinations and to produce books: ASCA ss19, 31, 33] stand, however, in a different position for they are formal acts which impose obligations upon the recipients. Counsel for the Commission accepted that those notices were reviewable'.

The ruling in this case in regard to commencement of an investigation under ASCA s13 is consistent with *Edelsten v Health Insurance Commission.*

A recent relevant decision is *Johns v ASC* (1992) 10 ACLC 684. In that case Heerey J held that the relevant 'decision under an enactment' for the purposes of the ADJRA was the decision of the ASC on 11 February 1991, reflected in the resolution in the formal Minutes of an ASC Commission meeting of that date, to make available to the Victorian Royal Commission into the affairs of Tricontinental the services of certain ASC officers, including the delegation of certain investigative powers to them. It was resolved at the ASC meeting that the Commission execute an instrument to give effect to the Commission's decision concerning the delegation of power.

It would seem unwise for the ASC, in the light of this case, to make a general practice of initiating a s13 investigation through a formal procedure. To so do may provide grounds for distinguishing *Little River Goldfields v Moulds* and attracting ADJRA remedies.

There is another area, at the other end of the investigative context, where an ASC decision could be subject to challenge. ASCA s25, for instance, allows the ASC to pass on information gathered in investigations to private litigants. Tony Hartnell in a speech in March to an Australian Institute of Criminology Conference described third party civil litigation as 'a major part of the enforcement weaponry available to the ASC. It clearly underpins a Government philosophy to encourage enforcement of the Corporations Law through private actions and not just rely on action by the ASC'.

A key question is whether the ASC is obliged to comply with requests under ASCA s25 for release of information. In *Ex Parte Wardley Australia Ltd* (1991) 5 ACSR 786, the Full Supreme Court of Western Australia in interpreting the forerunner of ASCA s25(1) held that, when requested by a private litigant, the NCSC had a duty, rather than a discretion, to provide information, upon satisfaction of the statutory pre-conditions. It could decline disclosure only for good reason, eg anticipated prejudice to a continuing investigation. However the NCSC retained a general discretion under the forerunner of ASCA s25(3) to provide the information to any other party.

It is doubtful whether this case is still good law on ASCA s25(1). The Corporations Law s109ZB(3), which had no equivalent in the Companies Code, indicates that the word 'may' in ASCA s25(1) and (3) confers a discretion on the Commission whether to act. ASC Policy Statement 17 (March 1992) sets out the considerations that the Commission will take into account in determining applications. For instance 'Generally the ASC will not release information under [ASCA] s25 unless the investigation to which the examination relates is completed or is sufficiently advanced so that the release of the information would not jeopardise the continuing investigation': para 6, 21. Judicial review pursuant to the ADJRA ss5, 6 could be sought either by a rejected applicant or other 'aggrieved person', eg (as in *Johns v ASC*) the provider of the information to be released: ADJRA s3(4). Alternatively, an applicant may seek the information from the ASC by way of a *subpoena duces tecum.* The court may enforce the subpoena, notwithstanding the general duty of confidentiality on the ASC under ASCA s127.[3] The ASC could resist production, where appropriate, on the grounds of public interest immunity: *Zarro v ASC* (1992) 10 ACLC 831.

The decision must be of an administrative character

In various cases, the courts have tested the boundaries between decisions of an administrative, legislative and judicial

nature. There is little doubt that any investigative decision would be of an administrative nature. Clear precedent is found in *FCT v Citibank*; *Allen Allen & Hemsley*; and *Perron*. See also the early case of *Houston v Costigan (No1)* (1982) 5 ALD 90, where it was held that decisions by a Royal Commission to examine witnesses and pursue a particular line of inquiry constituted a decision of an administrative character.

The decision must have been made 'under an enactment'

The term 'enactment' covers Commonwealth Acts. By virtue of the terms of Part 8 Div 2A of the Corporations Act, and equivalent provisions in the Corporations [name of State] Acts, any ASC decisions satisfy this element. The concept of 'under' an enactment was reviewed in *Century Metals and Mining NL v Yeomans* (1988) 16 ALD 406, where French J said at 421 that a decision will be made 'under an enactment' if it is made 'in pursuance of' or 'under the authority of' the Act. Any decision relating to the exercise of ASC investigative powers would appear to establish a sufficient nexus between the enactment and the making of the decision.

Conduct for the purpose of making a decision

Section 6 allows a review of conduct undertaken by the decision-maker for the purpose of making a reviewable decision. Setion 3(5) provides that this includes the doing of any act or thing preparatory to the making of the decision. In *ABT v Bond*, Mason CJ concluded that 'conduct' for the purposes of ADJRA s6 is essentially procedural and not substantive in character.

One could possibly describe the initiation of an investigation under ASCA s13 as conduct which may well lead to a decision, eg to issue notices. Whether it would be conduct 'preparatory' to making that decision is another matter. I would suggest, based on tax cases, particularly *DCT v Clark and Kann* (1983) 15 ATR 42, that the courts would see the relationship as too remote to describe it as being preparatory to making a decision. However this line of attack on the ASCA s13 commencement procedure may be argued in a future case.

Second element: the decision must not be one excluded from review

Certain decisions which would otherwise be reviewable are expressly excluded from review. These are set out in Schedule 1 to the ADJRA. No paragraph in Schedule 1 applies directly to ASC decisions. Incidentally, the exemption in paragraph (e) referring to decisions making or forming part of the process of making or leading up to the making of tax assessments is not wide enough to encompass a decision to issue a s264 notice under the Income Tax Assessment Act. (*DCT v Clark & Kann* (1983) 15 ATR 42 at 47, per Sheppard J).

Third element: the applicant must be a 'person aggrieved'

This is defined under s3(4) of the ADJRA. Under these provisions, as applied in numerous cases, a person aggrieved is (broadly) any person whose interests are (would be) affected by the decision. A person aggrieved must be able to show a grievance which will be suffered as a result of the decision complained of beyond that which he or she has as an ordinary member of the public. The grievance may be shown because the decision directly affects his or her existing or future legal rights. On this reasoning a suspect may be able to challenge a notice issued to a third party.

Fourth element: the application must be made within the prescribed time

This is set out in s11 of the ADJRA. The policy behind s11 was neatly summarised by Hill J in *Victorian Broadcasting Network v Minister for Transport and Communications* (1990) 21 ALD 689 at 690 where His Honour commented that:

> The policy of s11 is quite clear. Applications to review decisions to which the Act applies are to be made without undue delay. Many decisions, which are reviewable under the Act, are decisions

> essential to implementation of Government policy and administration. The relevant Government authority must know, within a relatively short time whether that decision is under attack, and if it is, the grounds upon which the review is to be sought. It is for this reason that the legislature has set a short period (28 days) in which a person aggrieved by a decision must commence his or her proceedings in the Court.

His Honour also discussed the meaning of the term 'a reasonable time' as set out in s11(4). His Honour said:

> The question of what is a reasonable time must be considered in the light of the facts of each particular case ... Nevertheless, in considering the reasonableness of a period of time, it will clearly be relevant to consider any prejudice that may result to the decision maker ... so too, the complexity of the issue will be a relevant matter.

The Court has the discretion pursuant to s11(1)(c) to permit an applicant to lodge the application within 'such further time as the court (whether before or after the expiration of the prescribed period) allows'. That is, the Court has an unfettered discretion to allow extensions of time for lodgement. Various criteria have been identified in *Victorian Broadcasting Network* and other cases, including

- the period of delay involved;
- the conduct of the parties in connection with the delay (eg whether and when the applicant voiced dissatisfaction with the decision);
- whether the application raises matters of public importance; and
- whether any prejudice would be suffered by the decision-maker if the application under the ADJRA were to be permitted despite the delay.

This power was recently exercised in *Johns v ASC* (1992) 10 ACLC 684. In February 1991 the ASC entered into arrangements with the Victorian Royal Commission into the affairs of Tricontinental to make available the services of certain ASC officers. Heerey J ruled that this constituted the relevant 'decision under an enactment' for the purposes of the ADJRA ie from when the 28 day prescribed period commenced. In July 1991 Mr Johns, through his solicitors, was advised in writing by solicitors for the Royal Commission of the use of a transcript of his examination in a way of which he later sought to complain. He entered no protest until January 1992. In the meantime the Royal Commission proceeded. When the action came before Heerey J in April 1992, the ASC opposed an extension of time. Notwithstanding the delay the extension was granted.

> In my opinion, considerations of public policy weigh strongly in favour of a grant of the extension sought. An attack has been made on the legal validity of the Royal Commission's proceedings in a fundamental respect (ie use of information supplied by the ASC). This has now been fully argued over a trial lasting five days. I think there would be a substantial risk to public confidence in the Royal Commission's conduct of its proceedings and any subsequent report were these issues to remain unresolved. This is particularly so when a contributing cause to the delay by Mr Johns in bringing his complaint before a court was a persistent refusal of the Victorian Government to grant him legal assistance until quite recently, notwithstanding that all other major figures appearing before the Royal Commission had substantial legal representation (most of them at public expense) and despite the Royal Commission's recommendation for such a grant as long ago as 28 March 1991.

This ruling was upheld by the Full Federal Court on appeal (*Johns v ASC*, 19 June 1992).

Fifth element: the applicant must establish one of the statutory grounds set out in the ADJRA

The grounds of review under ASCA ss5-7 are really an elaboration of common law administrative law principles, including denial of natural justice, failure to take into account relevant considerations, taking into account irrelevant considerations, improper purpose and error of law.

There are a liberal sprinkling of investigative orientated cases under these provisions particularly under Trade Practices Act cases such as *Melbourne Home of Ford Pty Ltd v TPC* (1982) 39 ALR 565, and tax cases such as *Perron Investments Pty Ltd v DCT* (1989) 90 ALR 1.

There is really very little to report under the ASC regime. Claims of *ultra vires*, error of law, failure to take into account relevant considerations, taking into account irrelevant considerations, improper purpose and a general ground of unreasonableness were contained in the cross-claim against the ASC in *ASC v Dalleagles Pty Ltd* (1992) 6 ACSR 674.

In *Johns v ASC* (1992) 10 ACLC 684 the plaintiff claimed breaches of s5(1) (c) (d) (e) (f) (g) and s5(2) (c) (j). None of these claims were successful. Heerey J ruled that aiding a Royal Commission was a proper purpose for which the ASCA conferred power on the ASC. The Court noted that the subject matter of the Royal Commission's enquiry - the collapse of the Tricontinental Group - was squarely within the province of the ASC. The ASC had 3 courses open to it: do nothing, conduct its own investigation or aid the Royal Commission. Heerey J noted the terms of ASCA s127(4) and ASCA s25(3) and concluded that these provisions expressly authorised the disclosure of ASC material to the Commission. Furthermore 'such authority [to disclose information] is not conditional on the consent of the person who provides the information to the ASC'. It was not a case of an unauthorised and unlawful breach of confidentiality. This ruling was upheld by the Full Federal Court on appeal (19 June 1992).

The most detailed analysis of the application of ADJRA s5 to the ASC is found in *Allen Allen & Hemsley v ASC* (Federal Court 29 May 1992, Ryan J). This case dealt with a decision by the ASC under ASCA s127A (2) (c) not to disclose to the applicant information obtained by the NCSC in an earlier investigation. The Court discussed various grounds raised by the plaintiff, including taking into account irrelevant considerations, failure to take into account relevant considerations, exercise of power for an ulterior purpose, unreasonable exercise of power, abuse of power, error of law, and absence of evidence or other material to justify the decision. Ryan J concluded that the ASC's exercise of its discretion may have miscarried only by failing to take into account a relevant consideration concerning the 'public interest' element in ASCA s127A (2) (c), namely that its decision, in the circumstances, could unfairly treat different parties to relevant civil litigation. The matter was referred to the ASC for further consideration, but with no order as to costs.

Sixth requirement: the case must not be one where the Federal Court regards it as appropriate to exercise its discretion to refuse a remedy

Applicants who satisfy the statutory requirements in ss5-7 of the ADJRA will be entitled prima facie to a remedy under the Act. The powers of the Federal Court are set out in s16. However the Federal Court has under s16 a discretion as to whether or not to grant a remedy and in appropriate cases will refuse to do so even where the applicant establishes a statutory ground, eg where the making of an order would be futile.

CURRENT DEVELOPMENTS IN CANADIAN ADMINISTRATIVE LAW

*John M Evans**

Presented to the Inaugural meeting of the Victorian chapter of the AIAL, Melbourne, 13 May 1992 and first published in AIAL Newsletter No 11 1992

The growth of administrative law in the last twenty years or so has been remarkable and is a phenomenon that most common law countries have witnessed. In one form or another, the law has come to be seen as an important part of the answer to the free-fall of public confidence in the political process and its traditional institutions and mechanisms. No longer are they regarded as adequate for redressing individual grievances arising from the administration of government programs, for ensuring open public participation in both the making and implementation of public policy and, more generally, for enhancing governmental accountability for the decisions made within the public sector. Whether as a result of the expanded role of law in government or because of it, agencies of the state are increasingly expected to respect the 'rights' claimed by both individuals and by groups.

It has become quite clear during the years of deregulation and privatisation that the importance of administrative law does not depend on the perpetuation of the older forms of state regulation of the economy. Indeed, just the opposite seems to be the case. First, the move that has been taking place in some countries from government-run enterprises to publicly-regulated private enterprises is likely to increase the role of lawyers and administrative law. Regulatory agencies of the kind familiar in North America typically hold hearings before making significant changes to their policy and before deciding how the law and any relevant policies should be applied in individual cases. Second, public expectations that government should tackle new (or newly-identified) problems show little signs of abating. In recent years, demand for occupational health and safety, freedom from discrimination on grounds of race, ethnic origin and sex, protection from environmental hazards and consumer protection, for example, have all required the enactment of legislation and the creation of administrative structures to implement it.

At a general level, the concerns of administrative law are broadly similar, regardless of jurisdiction. They include the protection of individual rights and the redress of grievances that arise from the administration of programs, the quality of the decisions made and the efficiency of the bureaucracy and a concern to preserve democratic values such as fidelity to statutory mandate, public participation, accountability and transparency. In comparison to some other countries, including Australia, Canada has not recently engaged in any comprehensive examination of its system of administrative law. At the federal level, there is no Ombudsman, and no body, like Australia's Administrative Review Council, to monitor the operation of the system, to identify points of difficulty and to recommend corrective measures.

I have no doubt that the enormous quantities of energy and resources that have been devoted to dealing with the constitutional crises through which Canada has struggled over the last ten years has diverted attention from other, less pressing issues of public law reform. However, Canadian law has made some

* *Osgoode Hall Law School, York University, Toronto.*

interesting and significant contributions to the development of administrative law that are, I believe, of interest.

Refugee determination

An issue currently facing many countries of the developed world is that of dealing with claims for refugee status made by individuals who present themselves at a port of entry or on a deserted beach, or who have been admitted temporarily in some other capacity (visitor or student, for example) and seek to avoid deportation when their leave to remain expires. Claims made by a comparatively small number of Cambodians seem to have thrown Australia's refugee determination process into a state of crisis and have provoked the Commonwealth Parliament into passing legislation in the middle of the night that retrospectively validates the detention of the Cambodian boat people and removes the jurisdiction of the courts to order their release. The success rate of the approximately 300 refugee claims being made each month in Australia is less than 10 per cent. Ultimate decisions are made by the Minister, on the basis of recommendations made by officials, and by a review committee whose members are drawn from Government departments. There is no shortage of critics who claim, with considerable justification, that Australia's current scheme is both inefficient and unfair. The lack of any oral hearing is seen as a particular flaw.

In 1989, Canada introduced a system for the determination of inland refugee claims that has produced remarkable results. Its origin can be found in a decision of the Supreme Court of Canada that held that the scheme then in place was a denial of liberty and security of the person, other than in accordance with the principles of fundamental justice and thus a breach of s7 of the *Canadian Charter of Rights and Freedoms*. The Court held that the principles of fundamental justice required that no claim should be rejected without first affording the claimant an oral hearing, given both the potentially life-and-death nature of the decision to be made and the importance of credibility in most refugee claims.

The administrative structure created by the new Act is notable in two respects. First, it vests the responsibility for determination of refugee status in an independent administrative agency, the Immigration and Refugee Board. Secondly, it provides for a non-adversarial hearing for all claimants. Especially impressive has been the sheer size of the resources that the Canadian Government has been prepared to devote to ensuring a high quality of administrative justice. The Board is by far the largest administrative agency in Canada, with a full-time membership of 250 (of whom all but 20 are assigned to the Refugee Division of the Board) and a support staff of 750. In 1990-91, the operating budget of the Board was $90 million, while another $30 million was spent on legal aid for claimants. In addition, the provision of welfare benefits to claimants pending the final disposition of their claims and the additional departmental staff required have made significant demands on public resources, especially at a time of public sector fiscal restraint and a level of unemployment that might be expected to create a public opinion that is hostile to the admission of refugees.

The work load of the Board and the time taken to process the claims indicate a high level of efficiency. Currently, about 3 000 claims enter the system each month and the Board renders approximately 2 700 decisions a month. Perhaps most telling of all is the fact that the success rate for claimants is currently running at about 70 per cent, a figure that masks a much higher rate for claimants from major refugee producing countries (such as Sri Lanka, Somalia, Ethiopia and El Salvador). The bold decision of the Canadian Government to legalise the refugee determination process has made

a significant contribution to administrative justice in Canada and is a beacon in an area of human rights that in many other countries is one of gloom.

Limits of the judicial paradigm: doctrinal developments

One of the great dangers of the legalisation of public administration is that public administration will be forced to conform to judicial paradigms that are inappropriate and an impediment to the effective discharge of their statutory mandates. Let me give you two examples of very different contexts in which, despite their *quasi*-judicial appearance, the distinctive nature of the administrative agencies has been recognised.

The independence of tribunal members

The issue of tribunal independence that has traditionally captured attention is that of the independence of its members from the Executive. Recently, however, the attention has been given in Canada to the relationship between the administrative tribunal as a corporate entity (and in particular its Chair) and individual members who sit to hear particular cases. Broadly, the issue raised is to what extent the tribunal as a whole has a responsibility for the quality of the decision rendered by individual members sitting as a panel of the tribunal and how this institutional responsibility can be accommodated to notions of procedural fairness.

In an important recent case, *Consolidated-Bathurst Packaging Ltd v International Woodworkers of America*,[1] a challenge was made to a long-standing practice of the Ontario Labour Relations Board. The Board, I should explain, has jurisdiction over the certification of trades unions as the sole collective bargaining agent for groups of workers and over allegations of unfair labour practices. The Board typically sits in panels of three; a representative each of labour and management and an independent chair. Many of the Board's members are part-time appointees, although the Chair and Vice-Chair are full-time appointees.

The case arose out of a determination by a panel that the company was guilty of an unfair labour practice by breaching its statutory obligation to bargain in good faith. The complaint was made by the union when the company shut down its plant, soon after negotiating a new collective agreement with the union. The panel approved an earlier Board decision holding that bargaining in good faith required a company to reveal to the union that the plant might close, provided that the decision-making process had reached a point that this was very possible, even though no formal decision to close had been taken. This information is obviously of great importance to the union, because it would cause the union to focus its bargaining on issues relating to the laying-off of workers, rather than on wage increases. The company obviously has its own reasons to delay the publication of its corporate plans.

The Board's practice has been to hold meetings of the full Board to discuss cases heard, but not yet decided, by panels that raised difficult or important issues of labour law and policy. The panel that had heard the *Consolidated-Bathurst* case wanted it discussed. At these meetings, the Chair invites members of the panel to outline the issues as they see them and to indicate the conclusion that they have tentatively reached. There is then a discussion by all the Board members at the meeting, at the end of which the Chair expresses the wish that the panel has found the discussion helpful, reminds them that the ultimate decision is theirs alone and tells them that the Board looks forward to reading the reasons for decision, whatever they might be. Needless to say, counsel who appeared before the panel in the cases under discussion are not invited to attend these full Board meetings. Shortly after this meeting, the panel handed down its decision, finding

the company guilty of bargaining in bad faith and imposing a fine of $0.75 million.

An application for judicial review was made by the employer, on the ground that the discussion of the case at the meeting of the full Board in the absence of the parties raised an apprehension of bias and breached that aspect of the rules of natural justice which provides that only those who hear a case may decide it. The Supreme Court of Canada, by a majority, dismissed the application, pointing out that a multi-member Board that sits in panels faces a particular administrative difficulty, especially when many of the members are part-time and may be relatively inexperienced. The difficulty is to ensure that the decisions rendered by panels across the Province are consistent and are properly informed by an understanding of the implications of the issues in the wider context of labour relations law and policy. The Court emphasised that there was a strong public interest in the quality of the Board's decisions, because the development of equitable and harmonious labour relations was important for the economic well-being of the Province of Ontario.

It concluded that a member of the Board was no more guilty of bias as a result of discussing a case that she had heard, but not decided, than was a member of the Court of Appeal who consulted other members of the Court who had not sat on the appeal. Moreover, since responsibility for deciding the case remained squarely with the panel members who had heard it, there was not a breach of the *audi alteram partem* rule. However, said the Court, its approval of the full Board procedure was subject to two limitations: first, the facts of the cases discussed were to be taken as given and not debated; second, if a new point emerged for the first time at a meeting it should be put to the parties for their comments before the panel made its decision.

While basing its decision on a legal recognition that the Labour Relations Board performs functions and has public policy responsibilities that courts of law do not, the Supreme Court appeared not to notice important institutional differences. In particular, its acceptance of an analogy between the discussions of individual cases among members of the Court of Appeal and the meetings of the full Board overlooks the more strongly hierarchical nature of the Board and, especially, the important position occupied by the Chair in the decision made by the Minister on whether members' appointments should be continued. Might not a losing party reasonably suspect that, if the Chair or another senior member of the Board expresses a view about the way that a given matter should be decided, it would require a particularly strong-minded panel member to ignore this advice?

A somewhat similar issue has been raised about the practice of the Chair of the Immigration and Refugee Board in issuing Board position or policy papers on the interpretation of various provisions of the Immigration Act that have not been the subject of an authoritative judicial pronouncement. There are also policy papers advising the members on the approach favoured by the Board to the exercise of the various statutory discretions conferred on the Board. As I have already indicated, this is a large administrative tribunal, with some 250 members sitting, typically, in panels of two across the country. Consistency and the quality of decisions is a matter of grave concern to the Board. Incidentally, the Chair is described in the statute as the Chief Executive Officer of the Board.

These position papers are not issued under statutory authority and are therefore not legally binding on Board members. Indeed, if they purported to be, they would be unlawful fetters on the decision-making powers of the Board members hearing the case. The status and propriety of these Board policy

statements are the subject of some controversy among Board members. Some members of the Board, particularly those geographically furthest-removed in a westerly direction from Ottawa, have suggested that they represent improper pressure from Board headquarters, because it has been made clear to them that members are expected to give considerable deference to the position papers and, except in the most compelling instances, to give effect to them. Again, the influence of the Chair in the reappointment of members is seen by some as a powerful inducement to members to comply.

Whether the issue of these position papers is an unlawful fetter on the performance by members who hear cases has not yet been litigated in the courts. It is my view, however, that this proactive initiative by the Board is a commendable attempt to maintain the quality of the Board's work and of the level of administrative justice that it dispenses. Traditional notions of 'judicial independence' must be accommodated to the institutional nature of this agency. Statutory powers are conferred on members in their capacity as members of an institution, not as individuals operating entirely on their own.

It is important to point out that the Board's policy or position papers are available to the public and are the product of extensive consultation both within the Board and outside. Those that I have seen are of a very high quality indeed. If members feel constrained normally to defer to the collective wisdom of their colleagues, that is, in my opinion, quite appropriate. Allegations of bias and lack of independence connote the apprehended influence on decision-makers of some improper kind of pressure and there is nothing improper in the assertion of corporate responsibility by the Board for the quality of its members' decisions. To the extent that the independence of members is diminished, the benefits accruing from consistent and fully- informed decisions outweigh the costs.

Statutory interpretation and jurisdictional review

The second important area in which relevance of the judicial paradigm to administrative decision-making has been called into question concerns the interpretation of agencies' enabling statutes and the scope of the courts' power to review for jurisdictional error administrative decisions that are protected by a strong statutory preclusive clause. I should add that the Supreme Court has held that provincial legislatures lack the constitutional power to exclude judicial review for jurisdictional error. 'No *certiorari*' clauses in Canadian legislation are largely confined to tribunals operating in the area of labour relations, although the courts have recently held that simple finality clauses also have the effect of limiting judicial review to jurisdictional issues.

In the last few years, the Supreme Court of Canada has proved remarkably volatile in its approach to the review of labour tribunals' interpretation of their enabling legislation. The contested ground has been the proper allocation of responsibility between courts and tribunals for the interpretation of administrative statutes and, more particularly, the extent to which the courts are prepared to recognise that traditional attitudes to the interpretation of legislation are not necessarily appropriate for tribunals when interpreting the statutory framework within which they must discharge their regulatory responsibilities.

In the early 1980s, the Supreme Court of Canada reformulated the test of jurisdictional review in a way that explicitly recognised that the legislation administered by tribunals often provides no clear answer to a problem, usually because Parliament had not foreseen the particular issue that has arisen. And in

filling the silences and resolving the ambiguities of the statutory text, said Chief Justice Dickson, the labour relations expertise of the members of the specialist tribunal is just as relevant as the techniques and skills traditionally brought by the judiciary to the interpretation of statutes. In many ways, the most remarkable thing was that these statements were made in a case (*CUPE v New Brunswick Liquor Corporation*) in which the issue of statutory interpretation was whether an adverb that follows two verbs qualified both verbs, or only the verb immediately preceding it. The Court said that there was no 'correct' answer to this question and that the tribunal's decision should only be set aside if the tribunal had placed an interpretation on the legislation that was 'patently unreasonable'.

If the Court was prepared to recognise that the interpretation of legislation involved the exercise of implicit discretion in the context of the kind of syntactical issue that judges have traditionally regarded as peculiarly within their province, then one might have expected the Court to adopt a position of curial deference in a great many cases. Unfortunately, the judicial paradigm of statutory interpretation seems to have recaptured the imagination of the Supreme Court and judges are once again proceeding on the assumption that, even when legislatures have created specialist tribunals to administer a regulatory scheme and have protected their decisions with preclusive clauses, those provisions in the legislation that confer or limit the jurisdiction of the tribunal must be interpreted 'correctly' by the tribunal if the decisions are to be afforded legal authority as within its jurisdiction.

You will not be surprised to learn that it is about as easy to identify a 'jurisdiction conferring' clause in a statute as it used to be to distinguish a 'preliminary' or 'collateral' question from one that went to the 'merits' of the tribunal's decision. It is equally important to note that the resurgence of judicial activism in this area has been very much to the advantage of the employers' side of labour relations disputes.

The Canadian Charter of Rights and Freedoms

The adoption, in 1982, of a constitutionally-guaranteed bill of rights has added an important new source of public law in Canada. Approximately half of the cases that have been decided under the *Charter* have concerned criminal law and procedure but the *Charter* has also had a significant impact on public administration in Canada.

The provisions of the *Charter* that have been of most importance to public administration have been the right to freedom of expression and of the press (s2), the right to life, liberty and security of the person and the right not to be deprived thereof other than in accordance with the principles of fundamental justice (s7), and the right to equality before and under the law and the right not to be discriminated against on grounds that include ethnic and national origin, sex, race and religion (s15). Section 1 of the *Charter* expressly recognises that none of the rights protected by the *Charter* is absolute and that measures that infringe them may still be upheld if they are reasonable limits prescribed by law that are demonstrably justifiable in a free and democratic country. Finally, I should add that while the *Charter* is part of the supreme law of the land (and states that laws that are incompatible with it are inoperative) many *Charter* rights - but not s2 - can be expressly overridden by legislation, a power that legislators have in the main been reluctant to invoke. The difference between Canada's constitutional guarantee that can be expressly overridden and New Zealand's statutory affirmation that requires other enactments to be interpreted consistently

with it whenever possible, is one of degree, not of kind.

In a remarkably short time, the Canadian *Charter* has become an integral part of our system of law and government. It has prompted public servants, politicians, the courts and public opinion to measure legislative and administrative action against its guarantees of basic civil liberties. On the whole, our courts have interpreted the *Charter* provisions in a manner that recognises that government plays an important role as the provider of goods, services and benefits and as the regulator in the public interest of much economic activity.

As Chief Justice Dickson once observed, the *Charter* is not an invitation to the judiciary to roll back the frontiers of the regulatory and welfare state.

Let me make one last general observation about the *Charter*'s impact. It has increased enormously the importance of lawyers within the public service, where they are expected to advise on potential *Charter* difficulties posed by proposed legislation and administrative action. Lawyers in the public service have undoubtedly moved closer than ever before to the centre of policy making. In addition, the private Bar has benefited enormously from the litigation generated by the *Charter* and constitutional law has rapidly permeated all branches of the practice of law.

As for the courts, their public profile has undoubtedly been raised considerably as many of the social issues of the day come before them: abortion, refugee determination, restrictions on advertising children's toys on television, and tobacco, mandatory retirement at age 65, the extradition of fugitive offenders to jurisdictions where they face the death penalty and the compulsory payment of union dues, for example. The volume and difficulty of litigation produced by the *Charter* has undoubtedly put significant strain on the judiciary. The increase in the judiciary's importance has also turned the spotlight on the appointment of judges, especially to the Supreme Court of Canada.

Nonetheless, courts rarely have the last word on an issue, even when they strike down legislation on *Charter* grounds. As often as not, the issue is returned to the political process for rethinking. The end product is generally better than the original. The courts' role is often to put back onto the political or legislative agenda an issue to which the Government has given a low priority or with which the Government would rather not deal because of its politically volatile nature. Abortion and refugee determination are good examples.

Let me give you some examples of the kinds of impact that the *Charter* has had upon public administration. As far as the hearing process of administrative tribunals is concerned, the courts have invalidated the previous refugee determination scheme for lack of an oral hearing, held that a presumption that certain tribunal proceedings be held in private (especially professional disciplinary hearings) was a violation of the freedom of the press and established that inmates appearing before prison discipline tribunals on serious charges have the right to be represented by counsel. In addition, challenges have been made to the independence from the Executive of members of tribunals with power over liberty and security of the person and it has been held that the principles of fundamental justice include the right that administrative proceedings be concluded without unreasonable delay. This latter use of the *Charter* may force some administrative agencies to conduct rigorous efficiency and effectiveness audits of their operations, especially since the prospects of additional public funding are less than promising in the present climate.

The equality guarantee of the *Charter* has also had a significant impact on

public administration. For example, it has been used to expand the reach of statutory anti-discrimination legislation. Thus, the Ontario Court of Appeal held that the exemption from the Act of the rules of sporting organisations respecting single-sex sports teams was itself discriminatory on grounds of sex, and was struck out. Benefits targeted to adoptive parents but not extended to actual parents have been impugned in the Federal Court of Appeal. The Court held that the appropriate remedy was the extension of the benefit to all parents and not the total invalidation of the program. A union representing agricultural workers in Ontario has attacked on equality grounds the provision in the Labour Relations Act that excludes agricultural workers from the benefits of being represented by a union certified by the Labour Relations Board. Finally, the broad interpretation given by the courts in recent years to anti-discrimination statutes may also be, in part, the result of the constitutional entrenchment of a right to equality and freedom from discrimination. Indeed, the Supreme Court has gone so far as to describe these statutes as *quasi*-constitutional in nature, a far cry from the not-so-distant past, when they were construed narrowly, on the ground that they restricted freedom of contract and the right to dispose of property.

Conclusions

As I hope I have indicated, public law in Canada is very much alive and kicking. The difficulties of holding our improbable country together have not absorbed all the public law energy of our bureaucrats, commentators and lawyers. Needless to say, there is a vast array of administrative law issues that I have not been able to deal with but I hope that I have said enough to arouse your interest in Canadian developments, not only in the area of the *Charter* - with which you may have to acquire some familiarity - but with broader issues of administrative law as well.

Exercises in comparative public law are rarely straightforward. The law relating to government is always to a degree specific to the political culture, institutional arrangements and constitutional traditions of the particular jurisdiction. However, in a rapidly shrinking world, it would be extremely short-sighted if we public lawyers thought that we had nothing to learn from our respective experiences in tackling governmental and administrative problems that, in one form or another, face all liberal democracies: how to advance public welfare without sacrificing individual rights, how to enhance the transparency and accountability of the modern administrative state and how to ensure that concerns for effectiveness and efficiency in the way that we are governed are not pursued to the exclusion of democratic values.

Endnote

1 (1990) 68 DLR (4th) 524.

THE PRIVACY ACT: REFLECTIONS ON FEDERAL LAW AND ITS RELEVANCE TO STATE ADMINISTRATION

*Kevin O'Connor**

Presented to the Victorian chapter of the AIAL, Melbourne, 28 July 1992 and first published in AIAL Newsletter No 11 1992.

I am pleased to have the opportunity today to address the Victorian chapter of the Australian Institute of Administrative Law on the Federal Privacy Act and its possible relevance for adoption by State governments.

The *Privacy Act 1988* came into operation on 1 January 1989 and at that time had two spheres of operation. Those spheres related to, one, all personal information handling activities of almost all Commonwealth government departments and agencies; and, two, the use of a particular category of information - the tax file number and information linked to that number - within the whole Australian community. Since that time, the Privacy Commissioner has been given responsibility for ensuring the effective operation of Commonwealth law limiting the use and disclosure of old conviction information (the relevant provisions being contained in Part VIIC of the *Crimes Act 1914*) and, more significantly, responsibility for implementing a complex array of new requirements in relation to the handling of credit reporting and other credit history information affecting consumers, contained in Part IIIA of the Privacy Act.

Part IIIA of the Privacy Act became fully operational on 25 February 1992. Two aspects of the Privacy Commissioner's brief in relation to Commonwealth administration have since been the subject of detailed statutory provisions: data-matching using the tax file number by the Department of Social Security (the *Data-Matching Program (Assessment and Tax) Act 1990*) and the operation of the Pharmaceutical Benefits and Medicare Schemes (s135AA of the *National Health Act 1953* and related amendments).

I have recorded the work of my office in my annual reports to the Attorney-General, which are tabled in Parliament. The first annual report covers the first six months of operation of the office to 30 June 1989. The second and third annual reports cover the years 89/90 and 90/91 respectively. At the moment, I am preparing my fourth annual report, dealing with the period 91/92. I mention these reports as they probably provide the most comprehensive view of the work of the office and would, I feel, be instructive to any governments contemplating adoption of Privacy Act standards in their own jurisdictions.

Influences leading to Privacy Act

The Privacy Act was the product of two policy influences at work in Federal administration during the 1980s. The first influence was the work of the Australian Law Reform Commission (ALRC) and, in particular, its then Chairman, Justice Michael Kirby. In 1983, the ALRC handed down its report entitled *Privacy*, comprising two large volumes, being the product of almost seven years of work, following a reference given to it in the early days of the Fraser Government by

* *Kevin O'Connor is the Commonwealth Privacy Commissioner.*

(then) Attorney-General Ellicott. During the period of that reference, Justice Kirby was involved in the work of the Organisation for Economic Co-operation and Development (OECD) in seeking to develop international guidelines on the protection of the privacy of personal data. The OECD work culminated in 1980, with the adoption by the OECD of guidelines on the protection of the privacy of personal information and the regulation of transborder data flows.

The ALRC report of 1983 dealt with the two major strands of privacy concern: one, electronic and physical intrusions into privacy, usually by means of surveillance devices; and, two, the privacy issues raised by modern practices and developments in relation to the collection, use and dissemination of personal data. The ALRC's recommendations in relation to the second matter involved the suggestion that there be enacted a Federal Privacy Act which laid down a series of information privacy principles regulating the collection, storage, use and dissemination of personal information. The ALRC information privacy principles were influenced by, to some extent, the language of the OECD guidelines. But, in many respects, the ALRC's information privacy principles were more specific than the OECD guidelines. The administrative model recommended for implementation of the information privacy principles was to give responsibility to an office of Privacy Commissioner attached to the Human Rights Commission. The Privacy Commissioner would essentially have an Ombudsman-like role, with a power to examine issues of concern, make proposals as to policy and give advice to the areas affected by the legislation. But there would be no formal sanctions in respect of any alleged contraventions of the information privacy principles. The ALRC model envisaged that the information privacy principles would apply to the public sector and generally within the Territories.

The other major influence on the development of the Privacy Act was, of course, the proposals which emanated from the high-profile economic summit of 1986. At the summit, Mr Eric Risstrom of the Australian Taxpayers' Association had floated the idea that there be a universal identity number and card system developed by the Government to assist in the administration of various government functions. That idea was later picked up by the Government and formed the basis of the development of the Australia Card policy. As you will recall, considerable controversy surrounded that proposal. One of the elements of the Australia Card package was that there be a Privacy Bill introduced, to apply safeguards in relation to the handling of personal information in Commonwealth administration. Responsibility for ensuring that the Australia Card system operated within the boundaries set by the law and that information generally in Commonwealth administration was adequately protected by privacy safeguards was given by the Australia Card Bill to a Data Protection Agency, working in conjunction with a Data Protection Advisory Committee.

The proposal for an Australia Card was eventually dropped in 1987 and agreement reached between the Government and the Coalition to proceed with an upgraded tax file number system to assist in the administration of the tax system. That agreement was subject to the condition that the Privacy Bill be proceeded with. A number of revisions were made to the contents of the previous Bill (the one introduced as part of the Australia Card package). Responsibility for oversight of the legislation which applied information privacy principles to Commonwealth administration was given to a retitled office of Privacy Commissioner, attached to the Human Rights and Equal Opportunity Commission.

The information privacy principles were made legally binding, with contravention entitling the Privacy Commissioner to issue a formal determination against a Commonwealth agency, which might include an order for damages. The 1988 Bill, subsequently enacted, did not give the Privacy Commissioner any formal jurisdiction over the general community, other than in the area of the tax file number system. Instead, the Privacy Commissioner was given a function to encourage corporations to adhere to the OECD guidelines and their information-handling practices. The preamble to the Privacy Act referred to international instruments as providing part of the basis for the Federal Parliament's intervention in this area - namely clause 8 of the International Covenant on Civil and Political Rights, which refers to the protection or privacy as a human right and, more significantly, the OECD guidelines of 1980, which have been adopted by Australia.

The Privacy Act as a code of administrative procedure

For administrative lawyers, the legislation is particularly interesting. What it does - and in this regard I suspect it is unique within the framework of Australian administrative law - is lay down a legally-binding code of procedure to apply to the everyday personal-information-handling activities of Commonwealth administration. I recall that the only unacted-upon element of the administrative law package put forward to Commonwealth administration by the Kerr Committee in the early 1970s was that which related to the enactment of a code of administrative procedure to apply in relation to Federal Government administrative decision making. It could be argued that, to some extent, the Privacy Act fills that gap. But the Privacy Act provisions do not depend for their application on there being an endpoint decision to which the process is directed, as would presumably be the case for an administrative procedure code to apply.

Information Privacy Principles

The Information Privacy Principles are set out in section 14 of the Privacy Act. As you will see, they lay down standards in relation to: the practices to be followed by agencies in collecting information either directly from the individuals concerned, or from third parties; the storage and security of that information; the notice to be given to the public of the existence of data systems; access and correction (where the principles reinforce the requirements of the *Freedom of Information Act 1982*); and the use of information and the disclosure of that information. The principles do not directly address issues to do with the retention and destruction of data, as these are left to the oversight of the Archives Office, under the *Archives Act 1983*.

Systematic activity

My office's work has focussed on systemic issues in the area of Commonwealth administration. This focus reflects the emphasis on those issues in my statement of functions (see ss27, 28 of the Privacy Act as to the Commonwealth sector) and is in line with the role envisaged for the office by the ALRC in its 1983 report (see especially items 4, 13, 62 and 88 of the Summary of Recommendations - Report No 22 (1983), vol 1).

Policy Development

This month, I am issuing data-matching guidelines for adoption on a voluntary basis by Commonwealth agencies. Earlier in the year, I issued covert surveillance guidelines for adoption on a similar basis. Both resulted from long and detailed consultation processes with agencies. In some areas, my guidelines have legally-binding status. These include those on tax file numbers and on the data-matching program at the Department of Social Security (DSS) involving the tax file number. I have also been given power to issue binding

guidelines affecting the operation of the pharmaceutical benefits and Medicare systems. I have declined to act on that brief to date due to technical difficulties with the enabling legislation. I reported formally to that effect to Parliament during May.

Formal investigations and reports

The development of guidelines has generally occurred outside the framework of any particular public controversy. But incidents which have given rise to public concern have on occasions provided the basis for my office making proposals for systemic improvements to agencies.

Examples are -

- The report issued in August 1990 relating to allegations first made in the *Age* newspaper in September 1989 of a 'trade' in passenger data as between various officials in Commonwealth administration and also with private detectives. While I found no evidence to support the main allegations, I did detect weaknesses in administrative procedures which could lead to improper disclosures occurring or improper access being obtained to the data. Various recommendations, accepted by those agencies, were made to the Department of Foreign Affairs, the Australian Customs Service and the Department of Immigration to better control the flow of microfiche copies of passenger movement data.

- During this year, I have issued reports on mail-out errors at DSS and the Australian Taxation Office, with a report pending in relation to the Department of Employment, Education and Training (DEET).

- Most recently, I issued a report on the release by the Australian Federal Police (AFP) of an arrest list of AIDEX demonstrators to DSS. Again I have recommended that there be a tightening of procedures, this time in the AFP and at DSS. That report is being examined by a working party.

Audit

Audit is the final way in which systemic observance of the Information Privacy Principles is sought to be achieved. I have several staff devoted full-time to visiting Commonwealth agencies and auditing their practices. Audits have been undertaken in relation to aspects of the operations of the Cash Transaction Reports Agency (CTRA), DSS, DEET and the Australian Customs Service. An account of this work will be included in the next annual report.

The audit program seeks to respond to the difficulty that individuals do not know or may not understand what happens to their data in the hands of administration. The audit program seeks to ensure that privacy principles are observed behind the fours walls of administration.

Individual complaints and inquiries

Complaints often only give a limited insight into the satisfactoriness or otherwise with which administration complies with privacy standards. Often complaints are one-off, concerned with isolated incidents or are relatively trivial. Some, of course, are more significant and have agency-wide importance.

It is not advisable for me to discuss publicly the details of complaints and inquiries made to my office, but the following statistics may give you an insight into the operation of my office in this area:

General inquiries

There were 16 600 general inquiries in the year 91/92, divided as follows: 2 266 involved 'complaints' about alleged breaches of privacy by a variety of bodies in the country, of which only a very small

number turned into formal statutory complaints; general information requests - 9 954, with the majority of these in the credit reporting area; 3 634 requests for publications; and 1 181 classified as 'other'. Over 100 000 pamphlets and over 9 000 copies of the credit reporting code of conduct were issued.

Formal statutory complaints

In the year 91/92, there were 201 formal complaints, 140 being in relation to alleged breaches of the Information Privacy Principles by Commonwealth agencies.

Some complaints prove to be unfounded. Of those regarded as reasonably raising a concern, almost invariably Commonwealth agencies are prepared to resolve them by negotiation. Usually, the agency agrees to modify its conduct or remedy the particular harm with which the complainant is concerned.

So far, in three and a half years, I have not made a final formal determination of a complaint. One has been the subject of a preliminary determination which has yet to be finalised. Several others which have not been capable of resolution in the usual way are not proceeding to determination.

Sectoral approach

Perhaps drawing on the example of other Western democracies and the constraints imposed by the Australian Constitution, the Australian approach to privacy has been 'sectoral', with the initial area regulated being Commonwealth government administration. There is some incidental protection of information privacy interests at State level by way of freedom of information legislation and confidentiality provisions. The Federal spent convictions legislation and the credit reporting legislation have had an impact on the State and private sectors.

Need for greater uniformity

The need for greater uniformity of standards in relation to information privacy protection - as between the Commonwealth and the States in relation to the public sectors, and as between the public sector as a whole and the private sector - is becoming more urgent. In its report of 1983, the ALRC identified the promotion of uniform approaches to data protection throughout Australia as a major role for its envisaged Privacy Commissioner.

At present, a number of important trends are occurring in government administration which underscore the need for greater attention to be given to the need for uniformity. These include -

(1) Within the Commonwealth administration, greater use of multi-agency strategies

- directed to the needs and problems of individuals eg DSS-Commonwealth Employment Service - Health, Housing and Community Services joint approach to Jobsearch and Newstart

- to protect agencies against fraud - an issue currently being examined by a Parliamentary committee.

(2) As between Commonwealth and State administration, greater sharing of information such as in law enforcement (eg CTRA's arrangements to share its data with State police forces made under memorandum of understanding); health services; and the management of the electoral roll.

(3) Greater use by Commonwealth agencies of 'outsourcing' arrangements, with the result that Privacy Act protections are reduced.

(4) The privatisation or corporatisation of functions formerly performed in the public sector, eg telecommunications, accompanied by removal of Privacy Act protections.

If the Coalition is elected to government at the next election, its policies as outlined in *Fightback!* will, if implemented, tend to heighten the trends to which I have referred, especially in the third and fourth areas that I have mentioned - 'outsourcing' and 'privatisation' or 'corporatisation'. Consequently, it was with particular interest that I noted that recently in a major speech the Opposition Spokesman on Science and Technology, Mr Peter McGauran, referred to the consequences for privacy protection of outsourcing and similar strategies. In his speech, he noted that a Coalition Government would contract out up to an estimated $1 billion in public service computer technology requirements. He said:

> We would have to have proper regard to privacy requirements and legislation, [but] I think we can work our way through that. For all but sensitive private matters there should be contracting out.[1]

State developments

It may be useful if I recount the position in the States and Territories, in particular, recent developments.

New South Wales

The New South Wales Privacy Committee is one of the world's longest-operating privacy protection bodies. It has a wide brief and can look at both intrusions and information privacy issues.

The *Privacy Committee Act 1975* established the NSW Privacy Committee. The Committee performs the role of a privacy ombudsman. The Committee may:

- Investigate/conciliate complaints
- Make reports and recommendations to the Minister.

A NSW Privacy and Data Protection Bill, incorporating some of the recommendations made by the Committee for the Independent Commission Against Corruption (ICAC), introduced as a Private Member's Bill (by Mr Tink), was tabled in December 1991. Due to a lapse in time, the Bill will need to be tabled again. It is anticipated that the Bill will not be discussed until September or later.

Queensland

Queensland had a Privacy Committee (*Privacy Committee Act 1984*), however this was abandoned in 1991. A discussion paper was circulated in 1990, proposing the formulation of privacy guidelines akin to the Information Privacy Principles and establishing a Privacy Commissioner. Reform in this area is in abeyance and it is uncertain as to when reform, if any, will come to fruition.

South Australia

A Privacy Committee was established in July 1989. Its main functions are to make recommendations to the Attorney-General affecting privacy, to improve access to government-held information, and to refer written complaints to the appropriate authorities.

A Privacy Bill advocating a 'tort of privacy' was introduced as a Private Member's Bill (by Mr Groom). The Bill was supported by the Government and its carriage was transferred to the Attorney-General. The Bill created widespread opposition from media, business and industry. The Bill was referred to a parliamentary committee in response to a widespread opposition and was subsequently reintroduced into Parliament. As amended, the Bill excluded media and business from the

tort and this was passed by the House of Assembly. However, when the Bill was introduced to the Legislative Council, the Australian Democrats moved a significant number of amendments to the Bill. These included the establishment of a Privacy Committee, with both government and community representatives, to handle complaints relating to both government agencies and the private sector. It involved roles for the Ombudsman and the Police Complaints Authority, and the establishment of a new set of privacy principles (based on the NSW Private Member's Bill). The Privacy Committee was to be given widespread powers to delegate its functions.

The Government proceeded with the Bill until Parliament rose in May 1992. The Attorney-General now intends to reintroduce a 'clean' Bill in August 1992. The revised Bill is intended to take into account all views expressed so far, with a view to it becoming law by the end of the year.

Victoria

The Victorian Law Reform Commission (VLRC) has a privacy reference and advocates developing guidelines which would give effect to the OECD guidelines. However, Victoria already has a degree of legislation where avenues are available for people to make complaints in relation to breaches of confidence (eg freedom of information, public records and credit reporting). VLRC may look at the possibility of incorporating administration of the Freedom of Information Act with administration of privacy legislation by the Attorney-General's Department.

Northern Territory

Cabinet has agreed to establish administrative instructions in relation to information privacy and freedom of information. These proposals will go to Cabinet in September. The intention is for there to be a privacy committee, however, there is no precise formula for this as yet.

Western Australia

A committee was proposing to bring forward a Privacy Bill as part of a freedom of information package, however this issue is in abeyance at present.

Australian Capital Territory

The ACT Administration is subject to the Privacy Act and to my jurisdiction.

Tasmania

I am not aware of any action on this issue in Tasmania.

Privacy agencies meetings

In early 1990, with a view to encouraging greater sharing of experience and to assist States and Territories contemplating information privacy legislation, I initiated a national meeting of privacy agencies. Since its first meeting in February 1990, this group has met regularly at approximately 6-monthly intervals.

Participating have been representatives of privacy bodies from New South Wales, South Australia, the Commonwealth and, until its body was disbanded, Queensland.

Invitations to attend have been given to jurisdictions without privacy bodies and all except Tasmania have attended on one or more occasions.

Applicability of the Privacy Act scheme to the States

As no doubt you might expect me to say, I do see State adoption of information privacy principles as desirable. But, equally, I acknowledge that it may not be realistic to expect the States to duplicate entirely the Commonwealth privacy protection scheme. While I regard the

'systemic' area as the one where an office of this kind can have the most impact, it may be that to some extent a State regulator can take advantage of the work being done by my office without having to revisit the entire subject. The framework of the national privacy agencies meeting could also be used to avoid duplication.

The nature of the personal data often held in State (or Territory) administration provides a significant reason for States adopting an information privacy policy. State government functions are often 'closer to the people', with a tendency for greater personal detail to be collected in State administration as compared to many areas of Commonwealth administration, eg prisons, police, community services, hospitals, educational institutions.

In the institutional areas mentioned, the data is often gathered in a 'case work' setting. Fine-grained data of the 'case-work' kind has not been seen traditionally as being as amenable to computer storage as basic category data of the kind often collected in Commonwealth administrative schemes. 'Case-work' data is more likely to be held in manual files and stored in manual systems. Insofar as the argument for detailed privacy protections is driven by concerns about computerised storage and dissemination, this factor may be seen as counting against the need for State laws. But the trend seems to be towards more reliance on computer systems, even in this area. In South Australia, for example, the State government has a computerised Justice Information System which, as I understand it, links the various departments and courts concerned with welfare and justice and contains a significant amount of personal data.

During my time as Privacy Commissioner, I have had informal discussions with a number of State offices and some State Ministers on the possibility of applying the Commonwealth model to the States. My advice as to what might be feasible has gone along the following lines:

- Adopt information privacy principles, with any modifications/changes to meet any necessary differences between State and Federal environment.
- Vest responsibility for their implementation in an independent agency
  - short of creating a new agency, options might be Ombudsman or Equal Opportunity Commissioner.
- Encourage regulators to take advantage of Federal work in the systemic area and encourage States as a whole to look at common standards on issues such as education records, hospital records, prisoner records. Federal office could play a role in this.
- If existing office chosen as regulator, engraft IPP-complaints onto the complaints-mechanism already in use in that office.
- Question remains of application of information privacy standards to private sector generally.

Endnote

1 See *The Australian*, 20 July 1992, pp 17, 20.

IS THERE TOO MUCH NATURAL JUSTICE? (1)

*Justice Deirdre O'Connor**

Presented to the South Australian chapter of the AIAL, Adelaide, 10 September 1992 and first published in AIAL Newsletter No 12 1992.

The theme of this seminar is: 'Is there too much natural justice?' I am going to speak on the Federal administrative law experience, particularly the experience in administrative tribunals. While there are many ways in which tribunals such as the Administrative Appeals Tribunal (AAT) and the Social Security Appeals Tribunal (SSAT) might be improved, I would suggest that one way we could make these institutions less effective is to throw out the rules of natural justice.

Natural justice is, of course, more accurately referred to as procedural fairness. Fairness is a flexible concept, and what is fair in one situation may not be fair in another. It is for this reason that the content of the rules of procedural fairness are not fixed and immutable, but vary with the circumstances. In a case where a person's livelihood is at stake, the content of the rules is pretty much the same as the rights of a party in court proceedings. The party whose interests may be affected by the decision is entitled to notice that the decision may be made, an oral hearing with an opportunity to cross-examine witnesses and adduce evidence, and to be represented by a legal practitioner.

The factors which can affect the contents of the rules of natural justice include the nature of the interest affected and the nature of the power to be exercised.

Ultimately, however, it is a question of what a statute bestowing a decision making power intended. The two limbs of the natural justice are the right to be heard and present evidence, and the right to have a matter determined by an unbiased adjudicator. I would have thought that there was not much quarrel with the bias rule. Rather, it is the right to be heard that raises the question: 'Is there too much natural justice?'

Federal administrative review system

One feature of the Federal administrative review system is that, in some areas, there is a two tiered system of review. These areas are, notably, social security, veterans' entitlements and students' assistance matters. In these areas, decisions of boards and tribunals (such as the SSAT) can themselves be reviewed by the AAT.

In this context, it is necessary to keep in mind that the rules of procedural fairness which the first-tier review bodies are required to apply are affected by the very fact that there is another tribunal by which the decisions of first-tier bodies can be reviewed. In addition, statutory modification of the right to be heard is quite usual. For instance, in the case of the SSAT, the Secretary of the Department of Social Security (DSS) has no right at all to make representations to the tribunal.

Procedural fairness

As mentioned before, the rules of procedural fairness are variable. It is very important to recognise that they are not an injunction to behave like a court.

The rules of procedural fairness are sufficiently flexible to allow for the following:

* *President of the Commonwealth Administrative Appeals Tribunal.*

- Tribunals can limit the number of witnesses called by a party. If the number of witnesses being called by a party is such that the hearing of a matter becomes too lengthy, then the tribunal can refuse to allow more witnesses to be called. Of course, the tribunal must always be prepared to hear why these additional witnesses are necessary.

- Similarly, if a witness is unlikely to establish anything that has not already been established, or if a witness simply adds 'more of the same' to the evidence, then the tribunal can refuse to hear the evidence. The same applies to other forms of evidence.

- The rules of procedural fairness only require cross-examination when there is no other equally-effective means of controverting material which has been placed before the decision maker. What advocates and parties often try to achieve by cross-examination can be more effectively achieved by bringing evidence in rebuttal, whether it be by bringing a new witness or some other evidence. No tribunal is required to allow cross-examination just because advocates feel like doing battle with the weapons with which they are most familiar.

- Indeed, there is no general right to cross-examination. In *O'Rourke v Miller*,[1] the High Court held that there was no denial of procedural fairness in circumstances where a police officer's probationary appointment was terminated on the basis of complaints from two members of the public. The officer was not given the opportunity to cross-examine the two members of the public. The Court (Deane J dissenting), on a construction of the relevant regulations, considered that a probationary constable only has a right to have the opportunity to be presented with the material against her or him and to present material in response.

- At the level of the AAT, it will generally be the case that a party is entitled to cross-examine a person whose oral evidence forms part of the case against her or him. Nonetheless, any tribunal has wide discretion to control its processes, including the power to avoid irrelevancies and to curb repetition (*Wednesbury Corporation v Minister of Housing and Local Government*[2]).

- The classic case where cross-examination is useful is where a witness's credit is in issue. Where there is medical evidence, cross-examination may help to define the limits of what a doctor has said or to establish that the medical opinion is based on a particular set of facts. Other evidence may then establish that this basis for the opinion is in fact wrong.

The essential point is that the rules of procedural fairness are flexible. Of themselves, these rules cannot be ossifying, as they are inherently flexible.

However, this flexibility itself is a source of problems. Because the rules of procedural fairness are flexible, there can be a tendency for decision makers to apply them at the highest level. If parties (and, more particularly, their legal representatives) are allowed to do what they want and to control the proceedings then there will be no denial of procedural fairness. There is a temptation to apply the maximum rules of procedural fairness for the reason that this obviates the need to worry about whether a response tailor-made for the individual situation will stand up to judicial review. This can also be in some cases a form of laziness on the part of the decision maker.

In the AAT, the tendency to give maximum content to procedural fairness

is compounded by the fact that most of the members of the Tribunal have been trained as lawyers. Many parties before the Tribunal are represented by lawyers. The result is that the proceedings of the Tribunal are sometimes conducted with more regard to the procedures of the courts than with regard to the question of fairness.

The AAT is required by its Act to conduct its proceedings with 'as little formality and technicality, and with as much expedition, as the requirements of this Act and of every relevant enactment and proper consideration of the matters before the Tribunal permit'.[3] However, this requirement does not feature highly in judgments of the Federal Court. It has not prevented the Federal Court holding that a party is entitled to withhold material evidence until the hearing of a matter in order that the party may use it in cross-examination of the other party. On appeal from the AAT, the Federal Court will find an error of law if procedural fairness has not been accorded. It will not find an error of law because there has been insufficient informality, flexibility or expedition, although these are factors relevant to the question of what constitutes fairness in the circumstances. It is perhaps unrealistic to expect members of the AAT whose decisions are subject to review by the Federal Court to apply the rules of fairness flexibly and efficiently if, on appeal, the decision will be set aside if the Court does not agree with the Tribunal's assessment that, in the circumstances, procedural fairness was accorded to the party. In these circumstances, it is natural to err on the side of giving as much fairness as possible.

Reasons for procedural fairness

We cannot reject the application of the rules of procedural fairness if, in the circumstances, to do so is to lose more than we gain.

The notion underlying procedural fairness is that, by ensuring that the process is fair, the chances that an unbiased decision maker will make the best decision in the circumstances is maximised. That is why a party must be able to bring all the relevant evidence before the decision maker. Cross-examination is designed to test the accuracy and truthfulness of evidence.

The purpose of administrative review is to get better decisions made. Without achieving this goal, administrative review would be futile. If a review body simply repeats the exercise engaged in by the primary decision maker then its decisions are unlikely to be significantly better.

In making their decisions, review bodies need to base their decisions on the best quality evidence available. One side of the story is not the best quality evidence available. The SSAT does not hear both sides of the story and, from time to time, cases come before the AAT where the SSAT's decision would have been a lot better had the Secretary of DSS put the other side of the story. In one such case recently, DSS made a decision to recover overpayments of unemployment benefit from a recipient, on the basis that he had not declared his wife's income. The recipient's case was that he was not living with his wife but was entitled to benefit at the married rate because he was living with another woman in a marriage-like relationship and she was not employed. In such a case, the credit of the persons concerned is crucial. The SSAT had no reason not to accept the veracity of what it was told by the recipient.

Under cross-examination at the AAT hearing, the recipient was asked about a fishing trawler. He denied any knowledge of it. On the next day of hearing, the recipient was taken by his counsel through documents relating to a fishing trawler and signed by a person using the same name as that of the recipient. He denied it was his signature. On the final

day of hearing, the recipient changed his entire story, admitting that he had owned the fishing trawler. In light of these admissions, the Tribunal was not able to accept the version of events put by him in relation to other matters in which it was necessary to prefer the recipient's evidence over that of other witnesses.

The usefulness of cross-examination is also often apparent in veterans' cases heard by the Tribunal. In cases where a veteran has operational service, he or she will be entitled to a disability pension if it is established that there is a reasonable hypothesis connecting the disability with war service. Medical experts often give opinions heavily influenced by notions of scientific proof and feel understandably uncomfortable with a concept that a mere hypothesis can be said to establish a causal link. In the result, there is often a situation in which a medical witness for the veteran says that there is a hypothesis linking a disability and war service. The Repatriation Commission then presents evidence from an expert that the two are not linked. However, when asked under cross-examination 'would you say the hypothesis is not reasonable?', it is not unknown for the expert to be unwilling to go this far. In this way, cross-examination can be a great help in clarifying just what the positions of the various members are.

It is also important to recognise that, by broadening the type of evidence which can be admitted in tribunal proceedings to include hearsay, opinion and other evidence which the courts have traditionally regarded as unreliable, there is a need to ensure that other safeguards are adequate. One of these safeguards is procedural fairness.

Criticism of procedural fairness

Criticism of procedural fairness arises because the process which is perceived to result is seen as defective. The process is seen as legalistic. It is seen as lengthy and costly. It is seen as inaccessible. But these defects in the process are not always the result of procedural fairness.

It is very popular to criticise tribunals such as the AAT for being too legalistic. To a degree, some of this legalism is unavoidable. The *Administrative Appeals Tribunal Act 1975* provides for the presidential members of the AAT to all be lawyers and allows for parties to be legally represented. As I mentioned above, the presence of lawyers is one factor which tends to make proceedings legalistic. It has to be recognised that there are plenty of cases before the AAT in which all the trappings of court proceedings are entirely appropriate. For instance, in one matter I heard last year, the parties were all either government agencies or major corporations. The parties other than the government agency were all represented by QCs. The agency was represented by a barrister. In such a case, the parties may well operate most efficiently in a court-like environment, simply because that is the environment with which they are most familiar.

Of course, that is not a typical case. There are many cases in which the tribunal should try to be as flexible as possible. But legalism is a product of the inflexible application of procedures, not the product of giving too much fairness. The same can be said for the criticism that the Tribunal is too slow and is inaccessible. It is not the application of procedural fairness that makes it so. It is the application of procedures in inappropriate circumstances.

There is a down-side to procedural fairness. It is time-consuming. We cannot totally eliminate that.

The real question is: 'How can we ensure that fairness is given without applying procedures inappropriately?' An interesting example is provided by the proposed Refugee Review Tribunal. It is proposed that the rules of procedural

fairness will be applied by spelling-out the procedures to be followed. The Refugee Review Tribunal will operate on a non-adversarial system, similar to that of the existing Immigration Review Tribunal. Failure to follow these procedures would be a ground of judicial review. This would replace the ground that the rules of natural justice were not observed.[4] This seems to be an attempt to preserve the essence of the rules of procedural fairness while minimising the down-side.

The AAT is attempting to make hearings happen more quickly and last for a shorter period when they do. One way the Tribunal is doing this is by having more rigorous pre-hearing processes, in the course of which, parties can attempt to settle disputes and define issues. Evidence can be outlined in advance and statements of facts and contentions and issues used to help see exactly where there is a dispute.

There is also a need to be more flexible in hearing processes, especially where there are unrepresented parties involved. Inappropriate language, such as words like 'discovery' and 'cross-examination', make unrepresented applicants feel as if they are in over their heads. Instead, parties should be told precisely what it is they are being asked to do. For instance, instead of saying 'you may now cross-examine the witness' we should be saying 'you can now ask the witness a few questions'.

Procedural fairness, properly understood, is a question of nothing more than fairness. When it is understood in these terms, then the question 'Is there too much natural justice?' becomes little more than 'Is there too much fairness?'. Preventing people having their say can be convenient. But is it fair?

Endnotes

1 (1985) 156 CLR 342.

2 [1966] 2 QB 275.

3 *Administrative Appeals Tribunal Act 1975*, s33.

4 Press release by the Minister for Immigration, Local Government and Ethnic Affairs, 15 July 1992.

IS THERE TOO MUCH NATURAL JUSTICE? (2)

A STATE PERSPECTIVE

*The Hon Justice LT Olsson**

Presented to the South Australian chapter of the AIAL, Adelaide, 10 September 1992 and first published in AIAL Newsletter No 12 1992.

Introduction

The theme of this seminar is (and, no doubt, is intended to be) provocative.

I gather that, in large measure, it stems from the suggestion made by Professor Julian Disney earlier this year that 'natural justice' will often be the enemy of real justice, when pursued with obsessive legalistic vigour.

The point then being made by the Professor arose in the course of his consideration of the chain of forms of procedure currently and typically to be found in some Federal systems of administrative review. He was particularly focusings upon the existing complexity of processes in some first-tier tribunals in Federal systems within which, as he perceived the situation, the adoption of complex procedures to comply with traditional principles of natural justice has meant that many people are effectively prevented from getting any form of justice at all. He argued that there was a danger that well-meaning lawyers could encrust the system of review at lower levels with a whole range of apparent safeguards which, in practice, are counter-productive.

However, I take my brief to range somewhat wider than that aspect and to extend to the implications of the general concept of natural justice as it is known to the common law.

Against that background, it becomes necessary to commence by sketching some contrasts between the Federal and State administrative review processes.

State review processes

It is fair to say that, in contradistinction with the Federal environment, with its present fairly extensive (and, at times, complex) processes of administrative review, the evolution of formal, tiered systems of review of administrative decisions in South Australia is still in its relatively early and embryonic stages. Apart from resort to the Ombudsman, the remedies for review of primary decision making authorities available to an aggrieved member of the public are relatively limited and, in the main, based on resort to the established common law courts.

In addition to the general activities of the various major government Departments and agencies there are, of course, a significant number of bodies or administrative boards and tribunals (many of the them of a licensing or regulatory nature) which are established by State legislation and make important decisions having the potential to affect profoundly the lives and activities of a wide variety of members of the public.

In some instances, there are formally-established review processes but, certainly so far as day-to-day public administration is concerned, there is no *general* right of access to a body of the

* *A judge in the Supreme Court of South Australia.*

nature of an Administrative Appeals Tribunal or the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977.*

Formal appellate processes are provided for in relation to decisions of regulatory-type bodies in most cases. However, these are very much the province of the lawyer and the appeal normally lies to the District or Supreme Court. It may be an appeal *stricto sensu* or an appeal by way of re-hearing. In this paper, I do not attempt to analyse or discuss these. I will concentrate solely on decision making processes in relation to which no such appeal lies.

Often the sole legal remedy available, in relation to general administrative decisions of the Departments of State and Government bodies or agencies, is by way of a formal application for judicial review to the Supreme Court - once more, very much the province of the lawyer.

It is only in a limited number of situations, such as the administration of the Workcover scheme, that a multi-level, true administrative review system has been established. There, the first-tier review is intended to be a fairly informal, internal, inquisitorial-type procedure, followed by a more traditional type of appeal to a quasi-judicial review tribunal. There is yet a further right of appeal, limited to questions of law, from the Tribunal to the Supreme Court.

It follows that the type of procedural problem specifically adverted to by Professor Disney does not tend to exist in the State sphere. Certainly in the Workcover area, it has never been suggested that the process is complex, inappropriate and generally inimical to processes of good administration or the legitimate interests of persons affected, although the drafting of the legislation leaves a good deal to be desired.

One is tempted to suggest that, on the contrary, at our present stage of development, there may well not be enough natural justice. Indeed, it may fairly be said that, in some situations at least, there are not really any effective, practical remedies for aggrieved persons affected by first instance public administration processes at the State level at all.

The concept of natural justice applied

No-one would, I think, seek to quarrel with the assertion that efficiency in public administration must clearly be one major goal of any modern community and that certainty and expedition are important aspects of efficiency.[1] Equally, it may reasonably be conceded that absolute fairness in decision making may, to some extent, be an unattainable dream in pragmatic terms. A proper balance may need to be struck between the need for practical efficiency and the notion of fairness to those affected by decisions taken.

Be that as it may, there is (and always has been) an inherent tension between, on the one hand, the public sector decision maker who desires to get on with the job without hindrance and, on the other, the long-suffering (and somewhat cynical) members of the public who, in Australian parlance, have a not unnatural desire to 'keep the bastards honest'.

In many instances, the only means of doing so in this State has been by way of a formal action in the Supreme Court, seeking the exercise of its inherent jurisdiction to conduct a judicial review of the decision sought to be impugned.

It should be said that, until relatively recent times, actions of this type were quite infrequent. However, particularly since the old prerogative writ procedure was abolished and was replaced (in the 1987 Rules of Court) with a less technical and rather more extensive remedy, the

Court has, not infrequently, been called upon to consider a fairly wide range of problems.

Indicative of these have been applications to review:

- decisions of correctional services authorities concerning the treatment of prisoners;
- decisions of public sector authorities related to discipline and dismissal of employees;
- decisions of the health authority concerning rationalisation and projected closure of country hospitals;
- a decision of a Minister concerning the exercise of a discretion as to a scheme related to the rationalisation of a prawn fishery; and
- decisions of a licensing authority bearing on the grant or refusal of fuel re-selling licences;

to identify but a few.

These clearly reflect an increasing consciousness within the community that public sector decision makers are by no means infallible or immune from a proper questioning of the validity of their processes.

It may fairly be commented that, since the landmark decision of the House of Lords in *Ridge v Baldwin & Ors*,[2] the Australian courts have adopted a reasonably robust attitude towards the nature and scope of the remedy of judicial review. They have conceded the applicability of such a remedy to a wide range of executive, ministerial and administrative functions on an open-class basis, where it has been considered that the relevant decision making must, in the absence of statutory provision to the contrary, be carried out in what has been termed a spirit of judicial fairness[3] or, to otherwise express it, in discharge of a duty to act fairly.

It is trite to say that the courts have consistently held that the judicial review process is limited in its scope. The Court is not concerned with the merit or otherwise of the substance of the decision making but only to ensure that there is procedural fairness in the decision making process.

So it is that Dawson J recently commented in *Attorney-General (NSW) v Quin*[4] that:

> In recent years the trend has been to speak of procedural fairness rather than natural justice in order to give greater flexibility to the extent of the duty than is possible merely by reference to a curial model.

He went on to express the warning that, in the context of judicial review, care must be exercised to ensure that the duty to act fairly is identified only with procedural obligations. There is some danger that the duty formulated in such a way may prove elastic.

What has given rise to some difficulty is the formulation of the nature of the duty, when it arises, and who may seek to enforce it. The law has by no means been static in these areas and the courts have deliberately kept their options open to meet new and changing situations as they arise.[5]

So it is that one logically commences with the dictum of Mason J (as he then was) in *Kioa & Ors v West & Anor*,[6] to the effect that:

> The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the

clear manifestation of a contrary statutory intention.

In *Quin's* case the High Court accepted the general ambit of the remedy of judicial review, as expressed by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*[7] in these terms:

> To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:
>
> (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
>
> (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

In *Quin*, Dawson J commented that such a definition was now to be preferred to the earlier summation of Lord Upjohn, in *Durayappah v Fernando*,[8] where he said:

> In their Lordships' opinion there are three matters which must always be borne in mind when considering whether the principle should be applied or not. These three matters are: first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined.

He made the point that this passage:

> ... may no longer be wholly apt to describe the considerations which give rise to a duty to observe the principles of natural justice or procedural fairness. It is now clear that the first of the matters mentioned must be taken to include something less than a right - a legitimate expectation. What the passage does make plain is that, if a legitimate expectation is the basis of the duty to observe a fair procedure, it is because that legitimate expectation is of an ultimate benefit which is, in all the circumstances, entitled to the protection of that procedure and not because the procedure itself is legitimately expected.

As Mason CJ stressed in *Quin* (at p 13) the list of circumstances in which a legitimate expectation may arise is by no means closed.

From the point of view of the decision making authority, the critical practical problem is to be able to discern who may have *locus standi* to seek judicial review and, thus, to whom due notice ought to be given and from whom appropriate representations ought to be entertained and considered. As has been said, 'notice is truly at the very heart of natural justice'.

This is a topic which I had occasion to canvass in my recent judgment in *Walsh & Others v Motor Fuel Licensing Board*.[9] As I there pointed out, the published authorities render it clear that the law is far from definitive as to when *locus standi* will be accorded.

The decided cases render it clear that, *prima facie*, a person whose rights, interests or legitimate personal expectations are affected in a direct or immediate way will normally be entitled to invoke the remedy of judicial review. Conversely, the Court will be slow to entertain an application by a person who is only affected by a decision in an indirect and consequential manner.

Although that may be an accurate general summation of the situation, there can be no doubt that, at the end of the day, there nevertheless remains a residual discretion in the Court to accord *locus* where it is satisfied that the particular circumstances fairly warrant it doing so. (See, for example, the discussion of this question in *The Queen v The Corporation of the City of Burnside; ex parte Ipswich Properties Pty Ltd and Another*[10]). The concept of possession of a 'real' or 'substantial' interest as a basis for *locus standi* has found favour in some cases (see *Forster v Jododex Australia Pty Ltd & Anor*,[11] *Phillips & Anor v New South Wales Fish Authority*,[12] *Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corporation*[13] and *Green v Daniels & Ors*[14]) but these are only non-definitive statements in relation to specific, anecdotal circumstances in which a discretion has *in fact* been exercised.

It follows that, on the State scene, public sector decision makers need to be vigilant, to ensure that procedures leading to decisions having the potential to affect adversely the legitimate interests of members of the community accord those persons what the North Americans like to term 'due process', before decisions are made. But I see none of the complexity adverted to by Professor Disney. Nor have I seen any substantial indications that the present situation is reacting oppressively and adversely in relation to public sector decision making.

If there are defects in current processes, they rebound mainly against those persons who would like to seek judicial review. They arise by reason of the fairly restricted remedy available in most areas and the very considerable cost of seeking that remedy by an action in the Supreme Court. Even given a far better awareness by the community of what litigious remedies are available, there are, in fact, relatively few actions for judicial review commenced.

My researches indicate that, in 1991, only 31 such actions were commenced. Certainly it is my anecdotal experience that, where such cases have been run, they have had a significant impact on improving the decision making processes involved rather than impeding such processes in an undesirable manner. My main concern is that the range of remedies within the State area of jurisdiction is simply far too restricted, with the result that persons who have a legitimate grievance do not take action, because they have neither the desire nor the financial capacity to engage in major litigation to test the situation. No doubt public sector decision makers are not unaware of that situation.

From my perspective, the question posed by the theme of the seminar must be answered in the negative. We have yet to experience any of the difficulties associated with the scenarios referred to by Professor Disney. Hopefully, our legislators will learn from the Federal experience.

At the moment, it is difficult to judge what developments are likely to take place in South Australia concerning review of public sector decision making and when. In general, this State has, for example, been slow to embrace the concept of

erecting a general administrative appeals tribunal. Instead, it has adopted something of a band-aid approach of creating some specialist first instance appeal bodies related to specific areas. Often, these are primarily constituted by lay persons, although some have a legally-qualified presiding officer.

With the long-awaited advent of freedom of information legislation, there may be some upsurge in activity directed towards review of decision making, not only as to process but also as to merit.

I would have thought that the present piecemeal approach to this area is both inefficient and expensive and that there is much to be said for some simple, cohesive structure of the nature of a single, general administrative appeals tribunal. Quite apart from the economy and efficiency of such a structure, it would provide members of the public with a relatively inexpensive, simple and well-understood means of seeking redress as to both substance and process. The present legalistic approach falls far short of that description.

Finally, I should mention that, in the course of this discussion, I have primarily focused upon natural justice as related to primary decision making. It is stating the obvious to say that it also has an important part to play in relation to the review processes themselves, and aspects such as bias, and the requirement to disclose to parties material proposed to be taken into account and afford an opportunity to respond to it. Indeed, these aspects are no less relevant to primary decision making, particularly (but not exclusively) by tribunals or bodies to which the normal rules of evidence are not applicable. (*Sobey v Commercial and Private Agents Board,*[15] *Mahon v Air New Zealand,*[16] *R v Deputy Industrial Injuries Commissioner; ex parte Moore.*[17]) Given the obvious public policy exceptions adverted to in authorities such as *Minister for Immigration and Ethnic Affairs v Pochi*[18] and *R v Secker; ex parte Alvaro,*[19] these are fundamental and well-understood. This is a major topic which is well traversed in the essay of TJH Jackson reproduced in Harris and Waye, *Administrative Law.*[20]

I merely make the point that this is, on any view, such a basic requirement to fair decision making that it can, in my view, scarcely be suggested that its due observance can properly be said to contribute to the existence of too much natural justice. Without an insistence upon it the prospect of potential injustice is simply too acute to ignore.

Endnotes

1 H Whitmore and M Aronson *Review of Administrative Action* (1978).

2 [1946] AC 40.

3 *Perre Brothers v Citrus Organisation Committee* (1975) 10 SASR 555.

4 (1990) 93 ALR 1 at 38.

5 *Gaiman & Ors v National Association for Mental Health* [1970] 2 All ER 362.

6 (1985) 159 CLR 550 at 584.

7 [1985] AC 374 at 408.

8 [1967] 2 AC 337 at 349.

9 (1992) 162 LSJS 337.

10 (1987) 46 SASR 81.

11 (1972) 127 CLR 421 at 438.

12 (1969) 72 SR (NSW) 297.

13 [1977] 1 NSWLR 43.

14 (1977) 13 ALR 1.

15 (1979) 22 SASR 70.

16 [1984] AC 808.

17 [1965] 1 QB 81.

18 (1980) 31 ALR 666.

19 (1986) 44 SASR 60.

20 'Administrative tribunals and the doctrine of official notice: "Wrestling with the angel"', in M C Harris and V Waye (eds), *Administrative Law* (1991).

IS THERE TOO MUCH NATURAL JUSTICE? (3)

*Professor Dennis Pearce**

Presented to the South Australian chapter of the AIAL, Adelaide, 10 September 1992 and first published in AIAL Newsletter No 12 1992.

At various times in history, judges have been warned to be slow to mount the unruly horse of public policy. There are similarities with the vigour with which judges should mount the natural justice horse. Certainly it is unlikely to win a dressage competition. It may, in fact, be more like a Thelwell pony - ever willing to unseat those that it is designed to assist.

The basic natural justice proposition is simple and entirely proper:

- a person should not be adversely affected by a government decision without being able to put a case that is relevant to their own concerns;
- a decision maker should not be biassed.

The question nowadays is not whether these propositions should be abandoned but rather *how* they should be implemented. No one questions the original propositions - any decision making that offends them should not be regarded as valid. It is interesting to note that the courts and, indeed, the administration no longer debate the question as to when should the basic natural justice principles be implemented. This is one of the great contributions of the courts to our social order. It is salutary to remember that *Ridge v Baldwin*[1] was decided less than 30 years ago. Prior to that, we had witnessed a period in which the executive was able to make decisions almost without any constraint being imposed by the courts. The power of the executive was enormous and individuals were left with few means to question decisions which adversely affected them. The breakthrough came with *Ridge v Baldwin* talking about the need for natural justice to be adhered to when rights were affected, but even that was not sufficient, because of the problems surrounding the ambit of 'rights'. Thus, one saw the courts develop the law through such issues as whether the issue and renewal of a licence was a 'right': whether a person might have an expectation that a particular decision would be taken such as to attract a hearing: and rulings that decisions of ministers, governors, etc, were subject to the hearing rules.

Ultimately, the High Court, in *Kioa v West*,[2] brought the matter to the virtual point where any government decision affecting a person will attract 'procedural fairness'. Some points of nicety surrounding the question as to when is a person affected by a decision still remain to be resolved by the courts: see for example the decision in *Annetts*[3] relating to coronial inquiries and *Ainsworth*[4] relating to a report of the Criminal Justice Commission. The right to a hearing where a decision applies to the community generally continues to cause some problems in relation to the right of a hearing. However, the position now can be fairly seen as being that stated by Deane J in *Haoucher*:[5]

> The law seems to be moving towards a conceptually more satisfying position where common law requirements of procedural fairness

* *Dean of the Faculty of Law, Australian National University.*

will, in the absence of a clear contrary legislative intent, be recognised as applying generally to government executive decision-making.

The question then becomes what is meant by 'procedural fairness'. The discussion of natural justice has always embraced what has been known as the variable content notion - that what might be regarded as procedurally fair in one case is insufficient in another. Conversely, a decision can be made without the full panoply of a judicial-type hearing being followed and yet be regarded as having satisfied procedural fairness. The real question that this seminar raises is whether the content of procedural fairness in relation to a particular decision may be so great as to defeat the object of fairness being provided to the individual concerned. We are not here concerned with a question of whether there should be procedural fairness - that is assumed - but the question is what form should it take.

In considering this matter, one needs to look to the concerns of most persons affected by government decisions - what it is that they seek in the decision making process. I suggest that the principal requirements are:

- Speed
  - persons who are affected by government decisions are often destitute, homeless, sick, etc. What is essential to them is a quick decision.
- Finality
  - much the same issues arise. A person will often need to know what their position is and not be required to be subjected to a series of appeals and re-hearings to resolve the matter.
- Cheapness
  - few persons affected by government decisions have the wherewithal to spend on an expensive system of decision making.
- Accessibility
  - persons affected need to be able to receive a decision with the minimal formality on their part.

A system of decision making that guarantees ultimate correctness or accuracy in decision making is likely to run counter to these desirable essentials of the decision making process. Detailed fact-finding, careful balancing of issues, etc, will be slow. Some persons affected by government decisions can afford to have this occur but they will be few in number.

A hearing process that is adversarial will deter persons from using it. If representation is essential, problems of cost and the forbidding nature of the whole process will prevent those affected from entering upon the field. Even formal procedures without representation will deter those who cannot cope with matters that are generally outside the ordinary range of their day-to-day living experience. Of course, the more formal the procedures the more likely representation will be required and the more probable that cost will be incurred that is beyond the means of persons affected by the decisions in question.

What I am saying here is that the adoption of procedures that may be seen as providing a fair means by which persons may achieve a decision favourable to them from a government may, in fact, be counter-productive because they will limit applications by the person affected. An elaborate review procedure is also vulnerable from an entirely different angle. It may be seen as being too expensive to be tolerable by a

government that is looking to reduce expenditure. This decision will be made easier if the number of instances when the review procedure is used is low in proportion to the number of decisions. And yet it may well be that this lack of use is not because of a happiness with the original decision making process but because the procedures adopted have deterred persons from making use of the review process.

One can see examples of tribunals functioning in what would appear to be a manner that breaches the procedural fairness rules but which is nonetheless justifiable because of advantages that flow from those apparent breaches. The presence of a departmental officer on the Social Security Appeals Tribunal, on the face of it, would seem to raise a breach of the bias rule. However, it has the effect of avoiding what would otherwise probably be seen as a need for the Department to be represented before the Tribunal which would, in turn, almost certainly lead to a need for representation by the applicant. Secondly, the presence of a departmental officer on the panel avoids the need for formal proof of many policy issues that are germane to the Tribunal's decision, thus reducing the formality of proceedings and increasing its speed of decision making.

The absence of lawyers from the operation of the Immigration Review Tribunal could well be seen to represent a lack of procedural fairness, having regard to the significance of the issues that have to be dealt with by that Tribunal. However, the reduction in cost that has flowed from the absence of representation, together with the consequential increase in the speed of decision making, has produced a circumstance in which the Tribunal proceedings have not been seen by the Department as disadvantageous. The extraordinary reluctance of the immigration authorities to allow review of their decisions, which has been the hallmark of their approach in the past, has been overcome by the approach adopted at the tribunal hearings. The apparent breach of the rules has thus advantaged clients by ensuring that a review mechanism is available.

Another way in which this question of the extent of natural justice in decision making can be looked at is by having regard to the overall continuum of decision making. The standard pattern nowadays is for there to be an original decision, facility for an internal reconsideration of that decision and then an external review body in the form of a tribunal. The question arises whether natural justice should be accorded a person at each stage of this process. The answer to that is, clearly, 'yes' but the issue really turns on the level of procedural fairness that should be followed. The overwhelming number of cases will be resolved at one of the first two stages, ie, the original decision or on internal reconsideration. The factors mentioned previously of speed, cost and informality are of significance in determining the procedure to be followed at these points. If one dresses up the decision making process with all the trappings of natural justice at each point in the continuum of decision making, the system will grind to a halt and that is not to the advantage of the citizen, let alone the government. Visa applications are, for example, processed at overseas posts in some countries at a rate of about one a minute. To require greater consideration of each visa application would result in many fewer being processed or markedly greater costs having to be assigned to the consideration process. It is unlikely that the latter would occur and so the Department opts for quick consideration, knowing that, if in fact it makes a decision adverse to the applicant, natural justice issues can be picked up at a later stage in the process, through internal reconsideration or external review.

The attitude of the courts in cases of this kind is significant. One can see instances where the court has been strongly influenced by the fact that appeal mechanisms exist and has found that it is not necessary for a wide range of procedural safeguards to be accorded at the lower level decision making points. However, often a decision is based on a perceived injustice in a particular case. A precedent is thereby established for the management of that particular range of decisions but that precedent does not necessarily have regard to the implications of the procedure required for a large number of decision. The point at issue is that the applicant's position should not be weighed only against the interests of the decision making agency. Other individuals have a stake in the procedure that is adopted and setting too high a level of procedural fairness can, for the reasons mentioned previously, operate adversely to a large number of the persons affected by the decision making process.

I have been speaking of lower level decision making - decisions that involve many individuals or persons who are dependent upon the government for the provision of services. There will always be individual instances that will raise very difficult considerations and for it to be apparent that the processes adopted have not provided procedural fairness to the bodies affected.

Procedural fairness is the great protection against bureaucratic unfairness. The question is not whether we have too much natural justice - the principle of natural justice must drive decision making. The real issue is that those who are creating models for the procedure to be followed, whether they be public servants or judges, need to be aware that an excess of procedure can be counter-productive. It cannot be assumed that the provision of additional procedural steps will necessarily be to the advantage of persons affected by the decisions in question.

Endnotes

1 [1964] AC 40.

2 (1985) 159 CLR 550.

3 *Annetts v McMann* (1990) 97 ALR 177.

4 *Ainsworth v Criminal Justice Commission* (1992) 106 ALR 11.

5 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 93 ALR 51, at 53.

14 YEARS' EXPERIENCE WITH THE ADMINISTRATIVE LAW ACT - SUCCESS OR FAILURE?

*Emilios Kyrou**

Presented to the Victorian Chapter of the AIAL Seminar entitled "Reforming Judicial Review in Victoria", Melbourne, 8 February 1993 and first published in AIAL Newsletter No 13 1993.

Introduction

Whether the *Administrative Law Act 1978* ("the ALA") has been a success or failure depends on the criteria you use to judge it.

The criteria I propose to use in judging the ALA are:

(1) Is the ALA used frequently?; and

(2) Has the ALA brought about changes to public administration in Victoria?

In my view, the answer to both questions is "no" and accordingly, in my opinion, the ALA has been a failure.

Such a conclusion is probably too harsh. It ignores the limited aims of the ALA at the time that it was enacted. It was always intended to be a modest little Act. Nevertheless, although the ALA has some positive features and has been useful in some cases, having regard to the rapid changes in the public administration law in Australia since 1978 it is my clear view that the ALA is incapable of meeting the needs of judicial review in Victoria in the 1990s. The Act should be replaced by legislation similar to the Commonwealth *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) as soon as possible.

* Mallesons Stephen Jaques, Melbourne.

Limited use of Act

To the best of my knowledge, only approximately 100 written decisions have been made by the Supreme Court under the ALA since its commencement on 1 May 1979. This is in direct contrast to the extensive use that is made of the ADJR Act.

The ALA is little used because it is not well known. It is not well known because its scope is very narrow.

Because the ALA is little used, very few public servants in Victoria have been exposed to its operation. Many do not know about it and accordingly have not made any adjustments to the way they carry out their duties in light of the ALA. For this reason, the ALA has had minimal impact on public administration in Victoria.

The same cannot be said for other administrative law legislation in Victoria. The Administrative Appeals Tribunal Act, the Freedom of Information Act are well known to public servants in Victoria. I am personally aware of the manuals that have been written and the training sessions that have been conducted to educate public servants about the Freedom of Information Act. To my knowledge, very little has been done to educate public servants about the ALA.

Challenges to administrative decisions under the Freedom of Information Act and the Ombudsman Act receive publicity from time to time and this has heightened the awareness of the public, as well as administrators, of the availability and usefulness of that legislation. By contrast, the ALA receives very little publicity and this is another reason why it

is not a dynamic and popular piece of legislation.

Limited scope of the Act

The ALA is little known and little used because its scope is limited.

The scope of the ALA is governed by the definitions of 'tribunal', 'decision' and 'person affected' in s3 of the ALA. Those definitions are as follows:

> 'Tribunal' means a person or body of persons (not being a court of law or a tribunal constituted or presided over by a judge of the Supreme Court) who, in arriving at the decision in question, is or are by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice.
>
> 'Decision' means a decision operating in law to determine a question affecting the rights of any person or to grant, deny, terminate, suspend or alter a privilege or licence and includes a refusal or failure to perform a duty or to exercise a power to make such a decision.
>
> 'Person affected' in relation to a decision, means a person whether or not a party to proceedings, whose interest (being an interest that is greater than the interest of other members of the public) is or will or may be affected, directly or indirectly, to a substantial degree by a decision which has been made or is to be made or ought to have been made by the tribunal.

Narrow definition of "tribunal"

The ALA applies only to bodies which satisfy the definition of 'tribunal'. One of the weaknesses of the ALA is that there is considerable uncertainty as to whether a particular body satisfies the definition of 'tribunal' because this in turn depends on whether that body is subject to the rules of natural justice. The answer to this question may change over time as changes take place in the law of natural justice. Moreover, at any given time the same body may be subject to the rules of natural justice for some of the decisions it makes (and thereby be a 'tribunal') and may not be subject to those rules (and thereby not a 'tribunal') in respect of those decisions. The position is clearly unsatisfactory.

There is another important limitation on the definition of 'tribunal'. Because that definition contains within it the word 'decision', it has been held that the ALA applies only to public or semi-public tribunals and authorities exercising statutory power: *Monash University v Berg* [1984] VR 383. It was held in that case that the words 'operating in law' in the definition of 'decision' referred to decisions having force by virtue of statute or prerogative as distinct from private contract.

Accordingly, bodies which make decisions derive their status, operation and effect from private contract are not 'tribunals' within the meaning of the Act. It has been held that private commercial arbitrators (see *Berg's* case), trustees of private superannuation funds (see *Dominik v Eutrope* [1984] VR 636) and the committee of the Victoria Racing Club (see *Vowell v Steele* [1985] VR 133) are not subject to the ALA.

The definition of 'tribunal' makes it clear that the ALA does not extend to courts of law or tribunals constituted or presided over by a judge of the Supreme Court. In *Trevor Boiler Engineering Co Pty Ltd v Morely* [1983] VR 716, a wide interpretation of the expression 'a court of law' was adopted and this further limits the scope of the ALA.

In recent years, a number of Acts have provided either expressly or impliedly that certain decisions made under those Acts

are not reviewable under the ALA. Examples are the *Professional Boxing Control Act 1985*, the *Health Services (Conciliation and Review) Act 1987* and the *Corrections Act 1986*. Such legislation has further eroded the utility of the ALA.

Where there is any doubt over whether a particular body is governed by the ALA it is usual in Victoria to rely on the judicial review procedure in Order 56 of the Supreme Court Rules instead of the ALA. In some cases Order 56 and the ALA have been used concurrently as alternatives but this is not as frequent today because in many cases Order 56 in sufficient and there is no need to rely on the ALA.

In comparison to the ALA, the ADJR Act has a wider scope. It applies to administrative decisions made under an enactment. There is no requirement that the person or body who made the relevant decision be subject to the rules of natural justice. This is a significant difference between the two Acts and explains, in large part, why more use is made of the ADJR Act.

Narrow definition of 'decision'

I have already referred to the reading down of the definition of 'decision' by reference to the expression 'operating in law'.

The ALA has limited application to pre-decisional conduct. The Supreme Court has held that there must be a direct connection between a decision and its effect on a person's rights or privileges. In *Nicol v Attorney-General* [1982] VR 353 at 361 the Full Court held that the granting of consent by the Attorney-General to a prosecution pursuant to s381(2) of the *Companies Act 1961* was not a 'decision' within the meaning of the ALA because it did not, of itself, affect any rights or privileges.

A further narrowing of the definition of 'decision' has been brought about by the High Court Decision in *Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321* which drew a distinction between substantive decisions and procedural decisions. That distinction was recently applied by J D Phillips J in *Mapel Nominees Pty Ltd v Whitvam Pty Ltd* (20 October 1992, unreported).

In comparison to the ALA, the ADJR Act has a wide definition of 'decision' and expressly extends to pre-decisional conduct.

Definition of 'person affected'

The aim of the definition of 'person affected' was to overcome 'the technical rules relating to locus standi': Second reading speech of the Attorney-General, Mr Haddon Storey. The ALA sought to provide a uniform test of standing for all the prerogative remedies that are available under the ALA.

Back in 1978, this would have been seen as an improvement on the common law of standing. Since 1978, however, there has been considerable liberalisation of the common law tests of standing. The statutory definition of standing may now in fact be narrower than the common law because of the requirement that the person must be affected to a 'substantial degree' by the relevant decision. In *Charlton v Members of the Teachers' Tribunal* [1981] VR 831 at 854 Mr Justice Garvie favoured the view that 'substantial' meant 'significant, in the sense of being more than trifling'.

The definition of 'person aggrieved' under the ADJR Act has been interpreted liberally and is now a well known and widely accepted test of standing in the context of judicial review. It is preferable to the ALA test of standing.

Grounds of review

The ALA does not set out any grounds of review. Accordingly, the common law grounds of review apply.

Although the common law grounds of review have been developed and expanded since 1978, some of them are still narrow in scope and are limited by technical considerations. In comparison, the ADJR Act codified and expanded the grounds of review and this has widened the scope of judicial review under that Act.

Remedies

Unlike the ADJR Act, the ALA does not contain its own tailor-made remedies. Section 7 of the ALA makes it clear that the only remedies that are available are the common law judicial review remedies, namely certiorari, prohibition, mandamus, declaration and injunction. Although s3(6) of the *Supreme Court Act 1986* changed the form of the prerogative writs to ordinary orders which provide the substance of the relief previously conferred by the prerogative writs, the substantive law of the prerogative writs still applies and this further limits the scope and utility of the ALA.

For example, in *Monash University v Berg*, it was held that s7 of the ALA means that where a particular remedy is not available against a body under the general law, then it is also not available under the ALA.

Reasons for decision

One of the aims of the ALA was 'to ensure that people are not prevented from challenging erroneous decisions merely because they cannot find out what was the tribunal's reason for deciding against them': Second reading speech of the Attorney-General, Mr Haddon Storey.

This aim is reflected in s8 of the ALA which enables a person affected by a decision of a tribunal to request the tribunal to furnish him or her with a statement of reasons for decision. The request may be either oral or in writing, and must normally be made within 30 days from the date notice of the decision is received. The statement of reasons must be in writing and furnished within a reasonable time. If a statement is not furnished within such time, the Supreme Court may order the tribunal to provide a statement within the time specified in the order. A statement of reasons need not be furnished where, in the Court's opinion, to furnish the reasons would be against public policy or the requester is not primarily concerned in the decision and to furnish the reasons would be against the interests of the party primarily concerned.

It has been held that s8 applies only in respect of bodies which satisfy the definition of 'tribunal' in s2 of the Act: *Footscray Football Club Limited v Commissioner of Payroll Tax* [1983] VR 505 at 512. Many public bodies refuse to supply reasons on the ground they are not a 'tribunal'. In such a case, the only way reasons can be obtained is by an application for a court order. The costs and delay associated with such an application are usually sufficient to deter persons aggrieved from pursuing what is often a legitimate complaint against administrative action taken by a public body.

Another limitation of s8 is that it does not specify what the statement of reasons must contain. This is sometimes a source of disputation as to whether a particular statement of reasons contains sufficient particulars for the purposes of section 8. Another source of disputation is what constitutes a 'reasonable time' for the furnishing of the statement of reasons.

In comparison, s13 of the ADJR Act is much clearer and much wider in its

scope. Requests for reasons for decision under s13 are a regular feature of administrative review at the Commonwealth level. In contrast, s8 of the ALA is little used.

Procedure

One of the key aims of the ALA was 'to set up a new procedure by general order for review which will enable persons complaining of administrative decisions to seek a review without having to select a particular prerogative writ that fits their case'. Second reading speech of the Attorney-General, Mr Haddon Storey.

This aim of the ALA is a key to its limited scope. The ALA was never intended to revolutionise judicial review in Victoria. It was merely intended to overcome some of the procedural and technical obstacles to the making of judicial review applications which existed in 1978. That procedure is set out in sections 3 and 4 of the ALA. The procedure relies on the granting of an order nisi for review at first instance which is considered in detail on the return of the order nisi when the order nisi is either made absolute (if the case for judicial review is made out) or is discharged if the applicant fails to substantiate a case for judicial review.

This procedure was a useful reform in 1978. Since that time, however, amendments to the *Supreme Court Act* and the Rules of the Supreme Court have overcome some of the difficulties that existed in 1978 such that the reforms effected by the ALA are not as relevant today.

Furthermore, the ALA has attracted its own set of technical requirements which are often a trap for those using the ALA for the first time. For example, the 30 days time limit for the making of an application for review is mandatory (see *Quality Packaging Services Pty Ltd v City of Brunswick* [1990] VR 829) and failure to include all relevant parties as respondents to the application is fatal (*Charalambos v Carideo* [1988] VR 604).

Stay

Section 6 of the ALA enables the Master to grant a stay of the decision under review at the time of making an order nisi. A stay may also be granted under s9.

This is a useful remedy but once again it is not as important today because similar interim relief may be obtained from the Supreme Court under the Supreme Court Rules.

Ouster clauses

Section 12 of the ALA renders ineffective ouster clauses in legislation passed before the commencement of the ALA.

There are two major problems with the section. First, it does not apply to ouster clauses in legislation passed after the commencement of the ALA. The second major problem is that the section probably affects only direct ouster clauses and does not affect indirect ouster clauses such as ouster clauses which merely limit the grounds of review or the time within which an application for review may be made rather than exclude judicial review altogether.

Conclusion

If one asks the question 'did the ALA achieve the limited aims for which it was passed in 1978', the answer is a qualified 'yes'. Those aims were to simplify the procedure for judicial review, establish a procedure for obtaining reasons for decision, simplify standing and repeal 'ouster clauses'. Judged by the position that existed in 1978, the ALA did bring about some useful changes in these areas.

When one, however, judges the ALA by the circumstances and needs of judicial review of public administration in 1993,

the inescapable conclusion is that the ALA is inadequate and needs to be replaced by legislation similar to the ADJR Act. I was of that view in 1985 when I reviewed the ALA at a conference organised by the Law Institute of Victoria and I remain of that view today.

REFORM OF JUDICIAL REVIEW IN VICTORIA: IS THE ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT THE RIGHT MODEL?

*Annette Rubinstein**

Presented to Victorian Chapter of the AIAL Seminar entitled "Reforming Judicial Review in Victoria", Melbourne, 8 February 1993 and first published in AIAL Newsletter No 13 1993.

I would like to start with a cautionary tale for law reformers, which might be called, with apologies to Rudyard Kipling, 'How the Administrative Law Act got its definitions'.

The problems that have been outlined earlier stem largely from the fact that the purpose of the legislation was radically enlarged between its conception and its eventual enactment, without corresponding changes being made to its structure. The ALA began life in 1968 in a report of the Chief Justice's Law Reform Committee. The original draft bill had an even more modest purpose than the Administrative Law Act itself. It was intended to clear up some practical difficulties in obtaining a writ of certiorari for error of law on the face of the record, in order to facilitate judicial review of statutory tribunals. At that time, the legislation establishing many such tribunals had no provision for appeals on a point of law.

There were three main difficulties facing applicants for certiorari. First, they were often unable to discover the grounds on which the Tribunal had made its decision. Secondly, even if reasons were given, and disclosed an error of law, the decision was not reviewable unless the error appeared on the fact of the record. Thirdly, the decision might be protected from review by a privative clause.

The main provisions of the bill were a requirement that tribunals give written reasons for their decisions, a statement that such reasons form part of the record, and a provision negating privative clauses in existing legislation. The definition section of the Bill was framed with this narrow purpose in mind. 'Tribunal' was defined as a body bound to act judicially to the extent of observing one of the rules of natural justice because, in 1968, it was accepted that certiorari was restricted to these bodies. This doctrine was a corollary of the other early twentieth century heresy that only bodies exercising judicial, as opposed to administrative, power were bound by the rules of natural justice, an error laid to rest by the House of lords in *Ridge v Baldwin* in 1964. However, it was not until the decision of the Court of Appeal, then years later, (*R v. London Borough of Hillingdon; ex parte Royce Homes Ltd* [1974] 2 All ER 643, 648) that it was made clear that certiorari would lie whenever a body had legal authority to determine a question affecting rights, regardless of whether it was obliged to act judicially. Consequently, in adopting its much maligned definition of 'tribunal', the Chief Justice's Law Reform Committee was merely defining, as economically as possible, the bodies amenable in 1968 to certiorari. Exactly the same reasoning was behind the definition of a 'decision' as one operating in law to determine a question affecting the rights of any person in law to determine a question affecting the rights of any person or to grant, deny, terminate or suspend a privilege or licence.

---

* Barrister at law.

Other limitations on the scope of the ALA are similarly explicable by reference to its origin. Courts were excluded, because their decisions, unlike those of many tribunals, were subject to appeal. Therefore certiorari was rarely used to quash decisions of courts. Standing was granted to any person whose interests are, or were likely to be, affected to a substantial degree, in order to overcome the very restrictive definition of standing by the Privy Council in *Durayappah v Fernando*.

If the draft Bill had been enacted as it stood, it probably would have served its limited purpose reasonably well. Instead, it was adopted by the Statute Law Revision Committee of the Victorian Parliament as a vehicle for general procedural reform of judicial review. Sections were tacked on permitting a person affected by a decision of a tribunal to make an application for review to the Supreme Court, and empowering the Court, on the return of an order for review, to grant any of the prerogative writs, a declaration or an injunction. The definitions of 'tribunal', 'decision' and 'person affected' were left untouched. As a result, many decisions which were reviewable by mandamus, declaration and injunction were not reviewable under the ALA because the applicant could not satisfy the more stringent test for certiorari. Instead of establishing a single, simplified procedure for judicial review, the result was the creation of two parallel systems, and an entirely new set of procedural traps for litigants.

I think it is worth dragging up this ancient history because there appears to me to be a very real risk of falling into much the same trap by adopting the ADJRA as a model for reform of judicial review in Victoria. The major criticism of the ALA seems to be that its coverage is not wide enough. Too many decisions can only be reviewed using the old remedies, without the benefit of reasons for decision. If the primary aim of legislative reform of judicial review is the creation of a single system of review which will cover the overwhelming majority of cases currently reviewable by the old remedies, then the ADJRA, at least in its present form, may not be the right model, for the same reason that the Chief Justice's Law Reform Committee's draft bill was not. It was drafted for a somewhat different purpose.

I think it would be fair to describe the purpose of the ADJRA as the simplification and partial codification of the law relating to the review of a particular category of decisions, the administrative exercise of statutory power. It is entirely understandable that legislative reform should have concentrated on this class of decisions. At the time the ADJRA was under consideration, before FOI and the AAT, these were the decisions least susceptible to scrutiny or challenge. Cutting judicial review free of the technicalities surrounding the old remedies, and setting out in statutory form the grounds for review and the available remedies, undoubtedly made the whole process more comprehensible, both to decision makers and to those affected by their decisions. However, the price paid for codification is the restricted coverage of the Act.

Legislation which, like ADJRA, was restricted to decisions of an administrative character, would inevitably fragment the system of judicial review in a State jurisdiction. There are not too many cases in the Federal jurisdiction in which litigants have fallen at this particular barrier. There are two reasons for this. The first is the wide definition of 'administrative' adopted by the Federal Court. The second, and more significant for State reformers, is the constitutional restriction on bodies other than Chapter III Courts exercising the judicial power of the Commonwealth. It has been held on a few occasions that, although a decision maker is not exercising the judicial character, but such cases are understandably rare. Decisions of a

judicial character in the Federal jurisdiction are almost always made by Courts, and are readily identifiable as such.

Of course, there is no equivalent restriction on the exercise of the judicial power of the States. Bodies which are not courts can and do exercise judicial power; clear cut examples include the Small Claims Tribunal, the Credit Tribunal, the Residential Tenancies Tribunal and the Equal Opportunity Board. Decisions of these bodies are currently reviewable under the ALA.

To make matters worse, some Victorian tribunals exercise powers which are not easy to categorise; do the Mental Health Review Board, the GAB, the Racing Appeals Tribunal and the Police Discipline Board make decisions of the administrative or a judicial character? Might the answer depend on the particular issue before the Tribunal? Judicial power has been characterised as involving a determination of a question as between defined persons or classes of persons as to the existence of a right or obligation *(R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361). Some Tribunals which review administrative decisions, most notably the AAT, do so by substituting their decisions for those of the original decision maker. The decisions of the review tribunal in these cases would appear to be administrative in character. However, other review tribunals, such as the recently abolished Accident Compensation Tribunal, adjudicate between the original decision maker and the person affected, and make determinations binding on both parties. Is this an exercise of judicial power? If so, whether a tribunal could be reviewed under a state ADJRA would often depend on matters of form rather than substance.

The requirement that a decision be of an administrative character would also preclude decisions concerning the validity of subordinate legislation being reviewed under the ADJRA type Act. Although such decisions in most cases cannot be reviewed under the ALA, they can be reviewed using the old remedies.

A further limitation on the coverage of the ADJRA is the requirement that the decision be made under an enactment. Decisions holding that the ALA does not extend to tribunals which do not derive their authority from statute, such as commercial arbitrators or the Victoria Racing Club, have been much criticised. Of course, these tribunals would also be excluded from review under ADJRA, although in some circumstances non-statutory judicial review may be available. The same is true of some decisions made under the royal prerogative.

The question that naturally springs to mind is 'could these limitations be overcome by expanding the definition of 'decision' in an ADJRA type Act to include both administrative and judicial decisions?' I think the answer is no, unless changes are made to the codification of the grounds of review. The existing grounds of review are appropriate for the review of bureaucratic decisions, and to narrow them would unjustifiably restrict the rights of those affected. However, they are considerably wider than the common law grounds for reviewing judicial decisions, namely jurisdictional error and error of law on the face of the record. In fact, incorporation of judicial decisions in to the ADJRA as it stands would have the potential to create an entire alternative system of appeal, extending to interlocutory decisions. Section 5(3)(b) of the ADJRA, which allows a decision to be reviewed on the ground that the decision maker based the decision on the existence of a fact, and the fact did not exist, would, if it were applied to judicial decisions appear to allow decisions of courts to be reviewed on the facts. Consequently, it would be desirable to have separate grounds of review for judicial decisions, or at least decisions of Courts. Obviously the

difficulties of categorisation would remain. However, since in borderline cases grounds would be pleaded in the alternative, this would be less likely to lead to disaster for litigants than using these same categories to define the scope of the Act. It would be relatively easy to incorporate review of justiciable decisions made under the Royal Prerogative and review of the validity of subordinate legislation in an ADJRA type Act. However, I have a lot of difficulty in seeing how review of domestic tribunals could be incorporated. Some decisions of such tribunals have been held to be susceptible to judicial review based on the old remedies, most notably the decisions of the English Panel on Takeovers and Mergers, which possessed neither statutory nor contractual power, and remarkably, had no legal authority of any kind. Whether judicial review is available appears to depend greatly on the facts of the particular case, including factors which are not readily susceptible of incorporation into a statutory definition, such as whether the existence of the body has dissuaded the Government from establishing a statutory body to carry out its functions. The price of adopting a definition which was too wide would be the shifting of what are essentially private law contractual disputes into the administrative law field.

What are the alternatives to adopting the ADJRA as a model? The main alternative approach, adopted in the UK, NZ, Ontario and British Columbia, is to adopt a uniform, simplified procedure for applying for judicial review. This approach has also been adopted in the Queensland legislation for decisions not covered by the part of the Act based on the ADJRA. On an application for judicial review, the court may grant an order in the nature of a prerogative writ, or a declaration or injunction, but only if the applicant would have been entitled to that particular form of relief outside the judicial review legislation.

Different restrictions have been adopted in the various jurisdictions to restrict applications for judicial review by way of declaration or injunction to traditional public law matters. In NZ, BC and Ontario, declarations and injunctions are only available in relation to the exercise of statutory powers. In the UK they are available if it would be appropriate, having regard to the nature of the matters in relation to which prerogative writs may be granted, the persons against which they may be granted and the circumstances of the case, a definition which could be said to lack a degree of certainty. The Queensland definition resembles that in the UK.

The major limitation of this approach is that it requires continued knowledge of the circumstances in which the prerogative writs were available. It does not permit the litigant to obtain a remedy not available at common law, giving fresh life to technicalities like the rule that mandamus does not lie against a Crown employee acting as an agent of the Crown, but does lie if he or she exercises power as *persona designata*. The attempt to limit judicial review by way of declarations and injunctions to public law matters created some nasty procedural traps in both Canada and the UK.

It seems to me that some of the limitations of legislation of this type could be removed by including a provision enlarging the power of the Court to grant remedies. A litigant could apply for an order to review in any case where he or she could apply for a prerogative writ, or in any case where the exercise of a statutory or prerogative power would be reviewable by declaration or injunction. An order to review could grant any of the remedies set out in s16 of the ADJRA, regardless of the specific type of relief available in relation to that particular decision at common law. So, for example, an injunction would be available against the Crown. A statutory requirement that reasons for decision be given could be added, together with a

uniform test of standing, based on the provisions of the ADJRA. This approach ought to pick up all decisions currently reviewable by the old remedies, since in those cases in which review of a body not exercising statutory or prerogative powers was permitted, the prerogative writs were held to lie. The price for this wide coverage would be that eligibility for review would depend on a definition unintelligible to anyone but an administrative lawyer. However, the more restrictive coverage of the ADJRA, at least in its present form, may be an even higher price to pay for more accessible legislation.

A GUIDE TO THE SOUTH AUSTRALIAN WHISTLEBLOWERS PROTECTION ACT 1993*

*M R Goode**

First published in AIAL Newsletter No 13, 1993.

The decision to enact whistleblowers protection legislation was grounded in the policy recommendations of the Fitzgerald Royal Commission[1], the Ontario Law Reform Commission[2], the Gibbs Committee[3] and so on. That was, in many ways, the easy part. The hard part was to fashion legislative principles and hence legislation which would be clear, accessible, and which would not create intolerable difficulties. Moreover, while there seemed to be a general level of support for the principle amongst interested groups and people, that surface consensus masked divisions about the defensible limits of the idea. As ever, for example, the interests of the media lay in as much protected disclosure as possible. By contrast, for example, the Local Government Association was generally concerned about the preservation of a deal of confidentiality. As ever, one's perspective always depends on where one sits. I am not saying that either the media interest or the local government interest was wrong. I am saying that they are examples of forces pulling in different directions.

The first thing to do was to set about the broad principles. The draft Queensland Bill produced by the Electoral and Administrative Review Commission contained no less than 70 sections, several pages of definitions and was highly bureaucratic[4]. It involved, for example, the establishment of a Whistleblowers Counselling Unit in the statute. We did not like this at all. We wanted something that could, so far as is possible, be read by the public with some chance of understanding. We did not want to create another bureaucracy - and we thought that we had enough authorities with investigative powers around the place to deal with issues without having another to stumble over - or by legislating another set of investigative rules which may be at odds with their own.

Nevertheless, the Queensland Bill pointed to some decisions that we had to take to start with. First, what institutions should be subject to the regime of protected whistleblowing? The key problem here turned out to be whether to extend it to the private sector. The Queensland recommendations were that it should[5]. We thought that to be right. Here are the reasons:

- In terms of the public interest, the distinction between private and public sector is blurred now and there is every indication that it will be even more blurred in the future. The influence of privatisation is the most obvious example of this.
- The consequence of excluding the private sector entirely would mean that, if one council did its own rubbish disposal and did it appallingly, it could have the whistle blown on it, but if it contracted out the same appalling service to a private company, it could not. This makes no sense.

---

* *LLB (Hons), LLM, Senior Legal Officer, Attorney-General's Department, South Australia.*

- There are hard cases at the overlap. For example, are Universities public or private sector[6]?

However, it did make sense to discriminate between private and public sector in terms of matters in which the public interest in having the information revealed outweighs the private interest in having something not nice concealed. We took the view that the private sector could hardly argue that it should be able to conceal information about criminal activity, or about the improper use of public funds, or about conduct that causes a substantial risk to public health, safety or the environment. But we also thought that, while there is a public interest in disclosure of information which tends to show that an officer in the public sector is incompetent or negligent, for example, that is not so about the private sector. If a company wants to keep secret the fact that its managing director has shown incompetence - well, so be it. The legislation is structured to reflect those decisions. Later we discovered that the Western Australian Royal Commission came to a similar conclusion.

... while the primary purpose of our proposal is to protect our system of government from the actions of public officials, this inquiry has revealed that it can be the actions of persons in the private sector that put public funds and government itself at risk. For this reason, while the Commission does not now positively recommend that its proposed whistleblowing legislation be extended generally to the private sector, a step which has been taken in the United States of America and which in modified form has been recommended by EARC in Queensland, it is essential at least that it extend to allow disclosures about companies and persons dealing with government where those dealings could result in fraud upon, or the misleading of, government.[7]

The next question was to sort out what sort of protection to offer a genuine whistleblower. There was no lack of options. The core of debate centres around the protection of the employment of the whistleblower - from victimisation because of his or her disclosure of confidential information. Working from the principle that we should not create another agency or bureaucracy if we already had one that could do the job, we could not follow the Queensland model centering on a Criminal Justice Commission. The normal industrial grievance tribunals were a possibility, but that would be complex because of the bifurcation between private and public sector rules about dismissal and so on, and avenues of appeal. The Ombudsman has the reputation, the powers and the procedures - but again, if we stuck to our decision to keep the private sector in, we would have to amend his legislation to widen the scope of his powers. The clue to the solution came from the very conservative Gibbs Committee recommendations, which suggested that unlawful discrimination in Commonwealth Government employment could be dealt with via their Merit Protection and Review Board. The Equal Opportunity Commissioner has the powers, the procedures - and covers both private and public sector employment. Further, the Commissioner fits the bill - she deals with discrimination in employment on grounds deemed to be contrary to public policy. This all seemed to make sense.

When the Bill was debated in the Legislative Council, the Opposition moved to, in effect, create a tort of victimisation as an additional option for the victimised whistleblower, subject to the proviso that a person must elect which of the two alternative remedies he or she will pursue. A civil remedy is, strictly speaking, unnecessary - the Equal Opportunity system contains the power to make the equivalent of injunctive orders and award compensation for loss or damage[8]. The Government decided, in

the end, that it would accept the amendment. The real argument against giving a victim a choice of remedy is that the equal opportunity route is designed to reduce confrontation, and encourage conciliation and education if possible, unlike the court-based option. The real question was whether that outweighed the choice aspect. In the end, it was decided that it did not.

The other central component for protection was obvious - protection was civil and criminal liability. That is common to all schemes. The other options for protection were the creation of a criminal offence of taking reprisals and a public sector disciplinary offence. In the end, we rejected both of these. The criminal offence was rejected as overkill, and contrary to the general principle of parismony in the criminal process; that is, that the blunt weapon of the criminal law should only be employed where the need is clear and the offence will go at least some way to meeting it. The public sector disciplinary offence was a possibility - but that failed to take into account the private sector part of the legislation, and, in any event, would reveal a certain lack of faith in the ability and willingness of the Commissioner for Public Employment to take appropriate action against a member of the public service who failed to comply with legislative directions in the public interest. So we stayed with the shield of immunity and the sword of unlawful discrimination. The tort, of course, was added later.

That leads naturally to the central building blocks of the legislation. It seemed to us that the core of whistleblowing was, in non-technical terms, the disclosure of information in the public interest to an appropriate body for genuine reasons. There are three elements to that: (a) what information engages the public interest sufficiently to warrant this protection?; (b) what is the test for genuineness in a whistleblower?; and (c) what restrictions, if any, should the legislation impose on the ability of the whistleblower to 'go public'? Each of these questions has key implications for the scope of the measure.

What we came up with one the first question was a definition of 'public interest information'. Here is what was in the Bill originally:

'public interest information' means information that tends to show -

(a) that an adult person(whether or not a public officer), or a body corporate, is or has been involved (either before or after the commencement of this Act) -

  (i) in an illegal activity; or

  (ii) in an irregular and unauthorised use of public money; or

(b) that a public officer is guilty or impropriety, negligence or incompetence in or in relation to the performance (either before or after the commencement of this Act) of official functions;....[9].

This definition turned out to be *relatively* uncontroversial, but some features of this definition require further commencement[10].

- A number of people or organisations consulted questioned the restriction of the first part of the test to adults. The answer to this is an excellent example of the real power of this measure, and an illustration of why it is necessary to be cautious. The reason why the provision was limited to information about adults was to preserve the confidentiality of the identity, or information that might disclose the identity, of children who are either the victims of crime or who are offenders or alleged offenders. It was thought that the legislation should not invade that area of confidentiality. On the other hand, that has the consequence that the

conduct of a 16 year old (for example) poses a substantial risk to the environment remains uncovered by the Bill. We simply could not devise an effective way to frame the legislation to resolve that hiatus.

- A number of the organisations and people consulted felt uncomfortable with the possible width of the term 'incompetence'. It was there originally because the term appears in the Queensland Bill[11]. On the other hand, the first New South Wales Bill covers 'maladministration' which is quite extensively defined.[12]. This was repeated in the second Bill[13]. The Gibbs Committee recommendations are far more restrictive in a number of ways and would require 'gross mismanagement'[14]. The WA Royal Commission referred to the necessity of coverage of allegations about 'the protection of public funds from waste, mismanagement and improper use'[15]. The Interim Report of the (Finn) Integrity in Government Project also recommended the coverage of 'maladministration'[16]. This was a matter concerning which there was clearly no consensus. In the final analysis, it was the Local Government Association which came up with a very persuasive argument for changing it. They argued, in effect, that the public interest was with the *effects* of incompetence rather than the mere fact that it existed. Maladministration is the effect. We thought that to be entirely persuasive. so we amended the Bill to replace the concept of 'impropriety, negligence or incompetence' with the word 'maladministration' and defined it to include 'impropriety and negligence'.

- There was also some discomfort with what was perceived to be the vagueness of the descriptive language used. We would have been most interested in any attempt at definition which would not sacrifice flexibility for certainty, but the very difficulty of the task had the result that the expressed discomfort was not accompanied by a suggested precision. The problem is that any attempt to cast a net which would adequately cover the range of possible misconduct of public interest in both private and public sectors would necessarily contemplate a toleration of a deal of uncertainty. That this is so is demonstrated by the fact that the same kinds of words are used in all Bills and reports on the issue. Because these words and phrases are essentially words of degree - that is, they were designed not to have a fixed meaning but to convey a spectrum or continuum of meaning within the parameters of the ordinary meaning of the words - they would be resistant to definition but would rather require description - using other words of similar meaning which would then be susceptible to criticism as being vague[17]. This would complicate the Bill to no sound end.

- When the Bill was debated in the Legislative Council, the Opposition moved to amend the definition to add 'the substantial mismanagement of public resources'. This was agreed by the Government. It was thought that the Bill covered this conduct in any event, but there could be no objection to spelling it out in this way.

The next problem was the question of disclosure to whom? The first question was whether protection should be restricted to disclosure via 'the proper channels' or whether and if so in what circumstances the whistleblower could go to the media. This forced us back to the basic rationale for the legislation. The reasoning went as follows.

If the Bill makes it too hard for whistleblowers to obtain the protection that it offers, then they will ignore it and

take the risk of reprisals as they do at the moment. That would not be a good result both because the martyrdom of the whistleblower obscures the truth or otherwise of his or her allegation - and that is the heart of the matter - and because one of the points of legislating is to try to offer encouragement for whistleblowers to do the right thing and go to a responsible authority if that is the reasonable thing to do in the circumstances. Equally, on the other hand, if the legislation makes it too easy to obtain the protection in the sense of sensational allegations in the media, it would have a tendency to undermine the integrity of government and the justifiable need for a politically neutral and impartial public service to keep some matters confidential while serving the government of the day; or alternatively, undermine the integrity and corporate ethos of a private sector employer and put at risk justifiable commercial and industrial confidentiality.

Setting that balance is not an easy task. But stating the matter in that way led us to reject the position taken by the Gibbs Committee and the New South Wales Bills that protection was conditional on disclosure via an official channel. We agreed with the Queensland and Western Australian recommendations on this. There was another reason for that. Common law contains a vague and ill-defined public interest exception to certain kinds of legal action in relation to the unauthorised disclosure of information, known as the 'iniquity' rule[18]. There is some authority on it and it is inconclusive[19]. But the point for present purposes is that there is an argument that it might allow for a defence in some cases in which the whistleblower goes beyond the proper channels. The last thing that we intended to do was to restrict existing rights. So we decided to put a non-derogation clause in the Act to say that[20] - and we decided that we had to allow a certain going outside the authorities. This also entailed the very significant advantage that, as we shall see, we did not have to list every single appropriate authority for every single possible eventuality.

The course we have adopted in the Act is to say that in order to get the protection, one had to disclose to a person 'to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure.'[21]. I submit that it is hard to quarrel with that. Then we deemed disclosure to an appropriate authority to be reasonable and appropriate. Then we listed what we thought to be the main ones. We thought that a Minister of the Crown was always appropriate. In relation to illegal activity - the police. In relation to the police - the Police Complainants Authority. In relation to fiddling public funds - the Auditor-General. In relation to public employees - the Commissioner of Public Employment. In relation to a judge - the Chief Justice. In relation to public officers not police or judges - the Ombudsman. And in any event, a responsible officer of the relevant government unit. And so on[22]. Because of the decision we had made, we did not face the unenviable task of specifying who is right when the disclosure is about the Chief Justice, or the Ombudsman, or the Auditor-General (for example)[23].

Once we had made it clear in the drafting that the system was that you could go to anyone if that was the reasonable and appropriate thing to do in the circumstances, there was little agitation expressed about the appropriate authorities list. There are, however, three brief points to make about it.

- There was some pressure to make MPs 'appropriate authorities'[24]. We could not agree to this. The Bill enacts a very powerful weapon indeed, once a disclosure falls within its scope. It provides very complete protection against all legal action. It follows that it potentially protects the leakage of confidential information from all levels of the public service. If a Member of Parliament was, as

such, an 'appropriate authority' in terms of the Bill, then any member of the public service could with impunity leak information to any Member. This would seriously compromise the integrity of any Government.

- The Commissioner of Police made the point that the Anti-Corruption Branch of the Policy Force should be an appropriate authority in relation to allegations of corruption and the like. We considered this very carefully. Our response in the end was to say that the reason was that the ACB was to act as a clearing house for information of this kind, and that it would be better to write this role into the legislation directly. Even so, we had to amend the Bill in the Legislative Council to make sure that this role did not conflict with the jurisdiction and role of the Police Complaints Authority.

- It was put to us that there may well be new 'appropriate authorities' created in the future. The most obvious example was the announced policy of the Government to introduce legislation to set up an Environment Protection Authority. Clearly, the EPA would be the appropriate authority in relation to at least environmental matters. That is why we amended the legislation to give a regulation making power to add and delete appropriate authorities.

The third building block was the hardest one. In general terms, how do you define a genuine whistleblower? The leads one to consider, also, for example, the research and anecdotal evidence on the nature of whistleblowers themselves. Who are we dealing with here? What kind of behaviour and motivation is involved? De Maria, summarising the available research, distinguishes between whistleblowers, informants, perpetual complainants, and activist groups. De Maria continues:

'All participants appear to define wrong-doing in their own moral terms, usually as a breach of some absolute rather than relative ethic, and all want to do something to improve the situation, whatever it is. Beyond these matters there appear to be big differences. Perpetual complainants express their grievances randomly to any sympathetic ear, their behaviour being cathartic rather than change-oriented. Unlike whistleblowers, informants are usually not bureaucratically contexted in the same setting in which the breaches occur.... Informants and whistleblowers also differ in terms of motive. When the informant discloses a serious breach, he or she could be motivated by a desire for prosecutional immunity. Whistleblowers are usually motivated by a concept a public interest..... An attempted working definition would go something like this. The whistleblower, born of frustration with bureaucratic unresponsiveness, is a lone dissident, usually in a public authority, who observes a practice in the course of work, that is personally judged as wrong in law or ethics. At the risk of reprisal.... the whistleblower plans and executes a media-sensationalised and often clumsy strategy of public disclosure.... The purpose of the disclosure strategy.... seems to be to correct a part of the total, rather than seeking a transformation of the organisation's world view.'[25].

A senior Canadian public servant has also taken the trouble to point out the difference between 'public heroes' - the whistleblower to be admired and protected - and 'vile wretches' - what De Maria would call the perpetual complainants. In the passage which follows, he essentially blames what he sees to be the poor record of the American system on a failure to distinguish between the two:

'One reason for these relatively fruitless results is that compulsive moralists tend to be difficult people, and it has been hard for the special counsel to separate reprisals perceived to be due to

whistleblowing from those due to personality defects that make these employees such a pain in the neck to work with. They 'tend to exhibit a distinctive approach to moral issues and decision-making'. By 'distinctive' it is plain that the authors mean 'at odds with peer group values'. During my career I've run across a few of these compulsive moralists. They grieve everything grievable, appeal every competition they lose, incite other employees to complain, and generally make nuisances of themselves. As a class, they are the ones who deliver 'brown envelopes' to opposition members and to media people'.[26].

The Laframboise piece is also valuable for pointing out a more subtle clash of policy values. Contrary to Laframboise's analysis, some research indicates that true whistleblowers are not neurotics or troublemakers and that they blow the whistle precisely because they are highly committed to the public interest goals of the organisation for which they work. This may be as good a distinction as any between the whistleblower and the perpetual complainant - the difference being that one is committed to the public interest which provides the motivation, and that the other is committed to the private interests of individual morality and self righteousness. But it is simply not possible to accurately reflect the complexities of this behaviour in legislation, even if it was desirable - and even if people did conform to the stereotype rather than, as is normally the case, they exhibit characteristics of many kinds.

This is not the place to enter the lists on the subject of whether or not there are absolute moral values and whether or not moral relativism is an abandonment of principle - but if one accepts that moral and ethical issues commonly consist of shades of grey rather than black and white, then one must also accept that the ethics of whistleblowing will depend very much on the individual case and will have both good and bad effects. If that is so, then legislation can do very little more than sketch the boundaries within which judgement must be made and trust specific application to dispute resolution mechanisms (such as courts and tribunals) set up for the task.

Nevertheless, the perceptions of the behaviour do shape the legislation in subtle ways. The legislation does exhibit a desire to mark out a boundary between the whistleblower and the perpetual complainant. It does so by providing that the victimisation remedy should not be available where a person alleged to fall within the protection of the legislation has had the issues fully aired in some other forum - such as a court or a grievance procedure. This remedy is not intended to allow a person to have two or three bites at the cherry[27].

The issue of genuineness is all the more central because of the possible consequences. For example, Goldring states:

'There is a problem when public servants go to the media: if they do so without good reasons the result could be disastrous. There are unnecessary restrictions on public servants' communication with the media, but when people are revealing corrupt conduct, maladministration or substantial waste they ought to be protected..... However, an unfounded or malicious complaint can do untold harm to the career and personality of officials. The interests must be balanced.'[28].

Easier said than done. We started with a position which was, on reflection, not coherent and showed how hard the problem was and our own confusions about it. A major part of the problem was that we had genuineness in three places. First, the whistleblower had to genuinely believe that the information was true - in order to be a 'whistleblower' for protection purposes. Second, we had a defence to a victimisation allegation if 'the disclosure

is false or not made or intended in good faith'. Third, we had a criminal offence of making a false allegation knowing it to be false and misleading.

Consultation quickly revealed that this did not hang together, and that we had to rethink it all. The first thing was that no-one approved of the defence to an action for victimisation - so we took it out. The second matter was that we had to keep an offence to deal with what might loosely be described as malicious complaints. Now, we decided that, for these purposes at least, if the information was true, then it did not matter if the motivation was malice. So the offence should be concerned with disclosures of false information. Next, we appreciated the concern that some had shown about the uncertainty inherent in the word 'misleading'. It is one thing to tolerate a degree of uncertainty in dealing with discretionary remedies - but the criminal law should be as certain as possible. False should stay - misleading should go. That left us with an offence that covered a disclosure of information that is false knowing, or being reckless about, the fact that it is false.

Respondents to the consultation process were not happy with the requirement that the whistleblower genuinely believe that the information is true. There were two reasons for this. The first was that, as a general proposition, many were concerned that it catered too much for a person who was very credulous and/or self-deluding, and, further, that a person could genuinely believe that the information was true - thus attracting the protection - and still be aware of the possibility that it was false - thus also being guilty of the offence.

We started from the proposition that if the disclosure was true, then there was no need for any further objective test. The objectivity lies in the truth of the disclosure. Further, for example, it does not matter if the disclosure is made in bad faith or for all of the wrong reasons, because the public interest lies in the disclosure of the truth of those defined categories of information[29].

The problem arises in an acute form once one examines what the test should be if the disclosure is false. In that case, we could only say that we preferred reasonable belief to reasonable suspicion. Further, we could not justify a test which was different according to whether the information was true or not. We could not bear to contemplate the metaphysical decisions that would be required and the minute dissection of possible complex information and statements that that would involve.

As it happened, the respondents in consultation preferred the test in the Queensland Bill[30] that there must be a belief on reasonable grounds that the information is true. We agreed for the above reasons and that is the test.[31].

The second point is a little more subtle. The Commissioner for Equal Opportunity commented that the requirement that the person genuinely believe that the information is true created an unfair distinction. The distinction is best put as follows:

'As a matter of fairness it would seem to me that the Act ought to protect the fair-minded and objective person, who is unable to make up his or her own mind about the truth of the allegations, to the same extent as it protects the person who rashly accepts and believes everything he or she hears.'

That seemed right to us. So that went in too. That is why the test of belief on reasonable grounds is supplemented by an alternative as follows:

'..... is not in a position to form a belief on reasonable grounds about the truth of the information but believes on reasonable grounds that the information may be true and is of sufficient significance to justify

its disclosure so that its truth may be investigated.'[32]

That explains, I think, where we came from and where we finished up and why the journey took the course that it did. It will, of course, be necessary for there to be a good public awareness campaign to educate the public about what the legislation says and what it is intended to mean. I look forward to co-operating with all concerned parties to do that. Hence, I hope that this seminar is just a beginning.

Endnotes

1 *Report of a Commission of Inquiry Pursuant to Orders in Council, 1987-1989.*

2 Ontario Law Reform Commission, *Report on Political Activity, Public Comment and Disclosure by Crown Employees* (1986).

3 Review of Commonwealth Criminal Law, *Final Report* (1991).

4 See Electoral and Administrative Review Commission, *Report on Protection of Whistleblowers* (1991).

5 This was a replication of the current state of the argument in Queensland. There is a summary in Legislative Assembly of Queensland, Parliamentary Committee for Electoral and Administrative Review, *Whistleblowers Protection* (1992).

6 See *The Age*, 10 August 1992 for a story on the whistleblowers who exposed fraudulent research.

7 *Report of the Royal Commission Into Commercial Activities of Government and Other Matters* (1992) at 4.7.10.

8 *Equal Opportunity Act 1984*, s 96.

9 Whistleblowers Protection Bill 1993, clause 4(1).

10 There are other isues of detail which cannot be covered in the text. For example, when the definition referred to a person generally, it was not necessary to include a corporate body because of the operation of s 4 of the Acts Interpretation Act, but once we said 'adult person' that may have carried an exclusionary implication. We also agreed with a submission which said that the legislation should apply to information about conduct occurring before the Act came into operation. It does not, of course, apply to disclosures of information made before the Act comes into operation.

11 Whistleblowers Protection Bill clause 11(1)(b).

12 Whistleblowers Protection Bill 1992 clause 9(2).

'For the purposes of this section, conduct is a kind that amounts to maladministration if it involves action or inaction that is:

(a) contrary to law; or

(b) unreasonable, unjust, oppressive or improperly discriminatory; or

(c) based wholly or partly on improper motives.

13 Whistleblowers Protection Bill 1992 (No.2), clause 11(2).

14 Review of Commonwealth Criminal Law, *Final Report* (1991) at 32.32.

15 *Report of the Royal Commission Into Commercial Activities of Government and Other Matters* (1992) at 4.7.9.

16 Finn, *Official Information: Integrity in Government Project: Interim Report 1* (1991) at 51.

17 A good example is the attempt in New South Wales to define 'maladministration'. That is contained in a note above. The definition is clearly descriptive and indicative - but not more certain.

18 So called after the phrasing in its first real appearance in *Gartside v Outram* (1856) 26 LJ Ch 113 at 144. Gibbs CJ considered the doctrine without enthusiasm in *A v Hayden* (1984) 59 *ALJR* 6. See generally Starke, 'The Protection of Public Service Whistleblowers - Part 1' (1991) 65 *ALJR* 212 at pp 213-219; Stewart and Chesterman, 'Confidential Material' (1992) 14 *Adelaide LR* 1 at pp 14-21.

19 The Queensland EARC found that the common law protection was uncertain, uneven, potentially costly, and it does not protect a person against all of the different forms of overt or subtle retaliation....' See Legislative Assembly of Queensland, Parliamentary Committee for Electoral and Administrative Review, *Whistleblowers Protection* (1992) at 7. The Australian Press Council says that the current law is 'unsatisfactory, ambiguous, time consuming and discouraging.': Australian Press Council, *Submission to EARC On Protection of Whistleblowers* (1991).

20 This is also meant that we had to discourage 'double dipping':

21 *Whistleblowers Protection Act 1993* s 5(2)(b).

22 During debate in the Legislative Council, the Opposition moved to add two new ones: in relation to MPs, presiding officer of the relevant House, and in relation to local government, a responsible officer of that local government authority. Both were eminently sensible additions.

23 This is all done in *Whistleblowers Protection Act 1993* s5(3), (4).

24 The Australian Democrats moved an amendment to the Bill to achieve this. The amendment was defeated.

25 De Maria, 'Queensland Whistleblowing: Sterilising the Lone Crusader' (1992) 27 *AJSI* 248 at pp 252-253.

26 Laframboise, 'Vile Wretches and Public Heroes: the Ethics of Whistleblowing in Government' (1991) 34 *Can Pub Admin* 73 at p 76.

27 *Whistleblowers Protection Act 1993*, s 9(3). As a matter of detail, this issue also arises in the test for victimisation. The test which we settled on says [s 8(1)] that discrimination exists where the action is on the ground, or substantially on the ground, that the person is a whistleblower. 'Substantially' is, of course, subjective - but our view was that this reflected the test that already exists in s6(2) of the Equal Opportunity Act and to require that it be the only reason would make the task of the victim impossible while making it any part of the reason would make the task of the employer impossible.

28 Goldring, 'Blowing the whistle', *Alternative Law Journal*, 1992 at pp 299-300.

29 Finn, *Official Information: Integrity in Government Project: Interim Report 1* (1991) at p 66.

30 And, as it happens, one part of the test recommended by Profesor Finn: see Finn, *Official Information: Integrity in Government Project: Interim Report* (1991), at pp 63, 66-67.

31 *Whistleblowers Protection Act 1993*, s5(2)(a)(i).

32 *Whistleblowers Protection Act 1993*, s5(2)(a)(ii).

WHISTLEBLOWING: THEORY AND PRACTICE

*David Clark**

Presented to the AIAL, South Australian Chapter of AIAL seminar entitled 'The Whistleblowers Protection Bill', Adelaide, 7 April 1993 and first published in AIAL Newsletter No 14 1993

Introduction

Modern administrative systems that face problems of governance, including a legitimation deficit, have usually responded in one or two inter-related ways. Either they have pursued greater openness by revealing more about their operations, or they have sought to create multiple channels for accountability such as the Ombudsman and the ICAC (in the New South Wales case)[1]. Of course these two techniques are related in that the latter two institutions are given privileged access to governmental information in order to investigate complaints. In some cases greater openness has taken the form of freedom of information laws together with greater intrusiveness by the media.

The central difficulty with these methods is that they tend to leave in place a dominant ethos of secrecy within the bureaucracy which, as we shall see, makes access to information and accountability less effective that it might otherwise have been.[2] All governments have secrets, and not even in very open systems is all information revealed to the public. There and not even in very open systems is all information revealed to the public. There and not even in very open systems is all information revealed to the public. There are obvious categories, such as defence, foreign affairs and commercial secrets, as well as current law enforcement issues that remain hidden from view, though the exact parameters of these categories are usually the subject of considerable debate.

It is also clear, and the evidence for this grows daily, that organizational secrecy is often used not merely to cover up embarrassment but to cover up fraud, breaches of the law and other forms of maladminsitration, including waste and incompetence. The question then arises as to whether public officials within bureaucracies who encounter such conduct should be allowed to reveal this to outsiders, and whether, if this is accepted in the public interest, they should be protected against organisational retaliation. The dilemma for the public official is of either being disloyal to his or her employer or of deceiving the public and betraying his or her conscience.[3] This paper considers these questions in the light of the interest in and experience with 'whistleblower' laws. In particular we will consider whether the American experience, which is the most sophisticated and extensive available, shows that whistleblower protection laws actually work.

Clearly it is difficult to devise measures by which laws are actually said to achieve their stated objectives but, in this case, since the laws are supposed to prevent the victimization of those who blow the whistle, it is obviously relevant to consider whether all those who seek their protection actually do so. As a general point it may be asserted at the outset that accountability in developed administrative systems deserves to be taken seriously and that multiple channels of control are usually better than single channels that are prone to disruption or failure. In such a case a

* *Associate Professor, Legal Studies, School of Humanities, Flinders University Adelaide Australia.*

backup by-pass system is better for the health of the body politic.

One further preliminary: a whistleblower is an American term that refers to persons, whether in the private or public sectors, who discover fraud, waste, abuse of power or criminal behaviour in the organisation and who then reveal this (ie blow the whistle) to outsiders, whether this be the media or not. The emphasis in this paper will be on the public sector experience, though it should be noted that the same phenomenon exists in the private sector.

The interest in whistleblowing

Interest in this subject other than the United States has been greatest in Australia[4]. There have been major papers in Queensland, following the Royal Commission of 1987 into corruption in that state,[5] South Australia has a Whistleblower Protection Bill before the State Parliament, which is likely to be law by April 1993, while the recent Royal Commission into WA Inc in Western Australia recommended such legislation.[6] There is also a Bill before the New South Wales Parliament which has been criticised as not being effective enough[7].

Outside Australia the best account of the subject remains the Ontario Law Reform Commissioner's Report of 1986 which recommended legislation, though nothing has eventuated.[8] The only place outside the United States to pass legislation has been Queensland, which provided limited whistleblower protection for persons helping the Criminal Justice Commission,[9] but only for a limited period.[10]

The existing law

The existing law (both statutory and common law) resists disclosures that are not authorised. In the case of public servants, disclosures may not be made unless authorised nor may such a servant 'comment on any matter affecting the public service or the business of the public service'. If they so act they may be liable to disciplinary action.[11]

At common law an employee is oblilged to obey lawful and reasonable orders. Conversely this means that orders that are not lawful need not be obeyed.[12] An employee is not under a legal duty to disclose their own fraud or wrong doing but they may be obliged at common law to reveal the wrong doing of their subordinates if there is a term to that effect in their contract of employment.[13] In reality it would be a very brave public servant who decided to so act; and most unlikely of all in the case of a subordinate, though instances are known.[14]

An intelligence agency is bound by the law and cannot break the law nor can it refuse to reveal information eg the names of agents and thereby thwart a criminal investigation. In *A v Hayden* (1984) 156 CLR 532 a group of Australian intelligence operatives broke into the wrong hotel room during an exercise and assaulted a civilian. They subsequently refused to cooperate with a Victorian police investigation, on the grounds that their identities were a matter of national security. The High Court of Australia said that there is no defence of superior orders; that the identities could be revealed and that any contract between the operatives and the Crown forbidding them from revealing the information could not override the law nor could this be used as an excuse to thwart the processes of the law.

The exception for inequity[15]

Desipite the foregoing, the common law recognised that there could be no confidence in inequity (*Gartside v Outram* (1856) 26 LJCh 113, 114).[16] A number of legal cases in England in recent times suggest that the common law will recognise a public interest exception where information is leaked, usually to

the media, but also to relevant external regulatory bodies. To illustrate the point: where an agency covers up acts that might harm the public (eg unsafe medical practices), this information may be revealed to the press (*Belhoff v Pressdram* Ltd [1973] 1 All ER 241, 260(ChD)) as may breaches of a regulatory statute in which case the disclosure to the external regulatory body will be protected (*In re Company's Application* [1989] 3 WLR 265(Ch D)).[17] Even if the information disclosed proves to be baseless, no harm will be done if the disclosure is to a regulatory body that is obliged to keep the disclosed information confidential. The problem with this doctrine is that it involves the operation of a balancing test and the courts do not always support disclosures to the press. If the material shows an egregious abuse of power, such as corruption by the police (*Cork v McVicar*, The Times, October 31, 1984(ChD)), disclosure to the media may be allowed. Equally, if serious flaws in an administrative procedure, such as faulty breathalyser equipment that resulted in the conviction of many people (*Lion Laboratories v Evans* [1984] 2 All ER 417 (CA)) publication by the press may proceed unscathed.

On the other hand, if the material shows a serious defect, even one that may threaten the public, there may be countervailing considerations that compel non-disclosure. This arose in *X v Y* ([1988] 2 All ER 648(QBD)), in which the press published an article that showed that some medical practitioners were HIV positive but the courts refused to allow their names to be published, since it was argued that the AIDS crisis could only be tackled if those with the disease, including doctors, could be assured of complete anonymity.

Similarly, in the Spycatcher cases in Britain and Hong Kong, despite evidence of wrong doing by the intelligence services the balance of the public interest was said to lie against disclosure.[18] As Dickson CJC put in a Canadian case '... in some circumstances a public servant may actively and publicly express opposition to the policies of the government. This would be appropriate if, for example, the government were engaged in illegal acts, or if its policies jeopardised the life, health or safety of the public servant or others....'[19]

The American position

Common law

At common law the American law of dismissal allows for dismissal at will (ie, in Commonwealth terms, summary dismissal) which meant that if employers wanted to retaliate against 'whistleblowers' they were free to do so. However, the 'at will' doctrine is subject to a number of exceptions, the most important of which is very similar to the 'public interest disclosure doctrine' in English law. In a number of cases involving nuclear safety (*English v General Electric Co* 110 L Ed2d 65(US SC, 1970)), and other public health threats, such as the sale of contaminated milk (*Garibaldi v Lucky Food Stores Inc* 726 F2d 1367(9th Cir, 1984)), as well as other forms of conduct where employees refused to violate enactments (*Sterling Drug Inc v Oxford* 743 SW2d 380 (Arkansas, 1988)), the courts carved out a public policy exception such that employees could not be dismissed for refusing to break the law. The problem with this approach was that not all states recognised it (see *Perdue v JC Penney Co* 470 F Supp 1234(SD NY, 1979)) and its effects were, like the English rules on public interest disclosure, uncertain in their operation. Moreover there was neither an agency to provide protection to 'whistleblowers' nor was there a way around the problem that workers might be legitimately dismissed for an unrelated matter.

The move towards statutory protection: the first phase, 1967-1988

Beginning in 1967[20] commentators began to recommend that special statutory provisions be passed to provide for a more reliable form of protection for whistleblowers. These same commentators noted that, as early as 1912, civil servants had been provided protection by statute from disclosing wrongdoing to Congress by petition.[21] The difficutly with this legislation was that such disclosures were not permitted if they were irresponsible and unjustified, and since a civil servant could never be sure of the outcome, even if they acted in good faith, few actually used this legislation for fear of retaliation.

Following these commentaries in the 1970s a number of specialist statutes providing whistleblower protection, especially in environmental matters,[22] were passed, beginning in Michigan in 1981.[23] Subsequently a number of other states passed whistleblower protection legislation.[24] The most important Federal development was the passage of the *Civil Service Reform Act 1978* (CSRA), which created the Office of Special Counsel (OSC) and was the first national legislative protection for whistleblowers on a broad scale. The OSC has an ombudsman-like role of providing an independent channel to whom whistleblowers could go with allegations and it was then left to the OSC to investigate the matter.[25] The Act dealt with violations of any law, rule or regulation together with mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. Complaints actuated by malice were not protected, nor was mere criticism of government policy. What was sought was actual information. The general conditions allowing for protection on the basis mentioned just above was qualified, since if the matter was specifically prohibited from disclosure by a law, or was specifically to be kept secret in the interests of national defence or the conduct of foreign affairs, the CSRA did not assist the whistleblower. The primary personnel effect intended by the new legislation was that certain types of adverse personnel action were prohibited whilst a complaint was being investigated by the OSC (for up to 15 days which might then be extended by the MSPB). Such adverse action included appointments, promotions, transfers or reassignments, performance evaluations, decisions concerning pay, benefits or awards including education and training, or 'any other significant change in duties or responsibilities which is inconsistent with the employees salary or grade in an agency'.[26]

This legislation had mixed results in the early years of operation. There were many delays in case processing, there was poor communication with whistleblowers, inadequate follow up of agency's responses to the OSC investigations, and under the Reagan regime from 1980 on the budget of the office was cut, despite that administration's drive against waste in government. A related defect was that the operation of the OSC was not independent of the Merit Systems Protection Board (MSPB) on which the OSC was financially dependent.[27] In principle the parallel enactment of the *Inspector General Act 1978* was also supposed to provide further institutional assistance to whistleblowers.[28] The third element in the late 1970s reforms in the United States was the passage of the *Code of Ethics for Government Service Act 1980*[29] which imposed a duty to expose corruption and most importantly required civil servants to 'Put loyalty to the highest moral principles and to country above loyalty to persons, party or government department.'[30] This was a complete turn around from the British position most recently upheld in *Ponting* ([1985] Crim L Review 318), where such higher loyalties were said not to exist in law. In that case a judge directed a jury in an Official Secrets trial that the duty of

the civil servant who leaked documents from the defence department concerning the 1982 Falklands war to a member of Parliament, was to the Government of the day and that there was no overriding duty to the public or the Parliament.[31]

Legally the test in the CSRA was a very strict one. The employees had to argue that the retaliation by the employer for the whistleblowing was for making a report and that this was the reason for the dismissal or other retaliatory action: the so-called 'but for' test.[32] That is, the employee had to show that the sole reason for the action was the whistleblowing and that action had not been taken for some other reason.[33] It was not hard for employers to argue that there were other reasons. One consequence of these strict tests is that many whistle blowers found that their cases were beyond the jurisdiction of the OSC, ie were not eligible for OSC protection and in practice the OSC was the last place whistleblowers approached for help.[34] In practice the CSRA failed,[35] partly because Congress underestimated the scale of the problem: a key assumption in the legislation was that retaliation would be very rare.[36] One American study concluded that between 1979 and 1984 only 16 out of a total of 1500 adverse actions complained of by whistleblowers in the Federal civil service resulted in corrective action on behalf of the employee.[37] The same study concluded that the legislation 'had had no ameliorative effect on employee expectations or experience in regard to reprisals'.[38] One reason for this conclusion is that despite the congressional assumption that retaliation would be rare, in practice whistleblowers feared retaliation in very high numbers, while approximately one quarter actually experienced retaliation or were threatened by it.[39] The consequences of a sustained campaign against whistleblowers was also otherwise serious since many found it difficult to get jobs after they had left the service and many experienced financial problems as a result of the high costs of fighting their case; still others needed medical assistance.[40] Other defects in the legislation included the fact that it explicitly excluded senior officials and any position determined by the President on the grounds that it was necessary and warranted by the conditions of good administration, as well as Government corporations, the CIA, FBI, National Security Agency, the Defense Security Agency and the General Accounting Office[41].

The pre-1980 US empirical evidence[42]

The empirical evidence suggests that for whistleblowers the risks of retaliation are greatest if they reported a matter internally within their organisation or to the press, rather than to an external governmental agency whether state or federal.[43] The reasons for this are that in the case of a purely internal complaint the internal disciplinary system tends to assume that subordinates who complain are disruptive forces and are therefore a discipline problem. One effect of a complaint is to call in to question the supervisory system even if the complaint is not about a superior directly. In the case of external complaints to the media the internal stakes are raised, given the external pressures, and the fact that resistance from those threatened increases. Complaints to external governmental agencies are more often less 'dangerous' to the employee because the agency acts as a counterweight to internal pressures and the external agency may itself be able to impose sanctions on superiors who threaten to employ retaliation.

Despite the anecdotal evidence from individual studies that whistleblowers are not 'trouble-makers or neurotics',[44] it has been suggested that organisations see them as obsessives who are difficult people and who do not fit into the organisation.[45] In practice those who blow the whistle are better educated than those who do not, and are actually more

highly committed to the organisation than their co-workers.[46] It is precisely because such people take the official goals of the organisation more seriously than do their co-workers that they are inclined to report wrong doing. They are in fact an exceptional group, since the American evidence suggests that the vast majority of people who are aware of corruption within organisations do not report it, even though such wrong doing is an open secret within the organisation.[47] One reason for this is that they are relatively junior and vulnerable to pressure. Another reason for low rates of corruption reportage is that such people are weakly committed to the organisation and its goals.[48] On the other hand, in the case of government agencies the existence of an effective external monitoring agency seems to be a major factor in inducing people to blow the whistle, especially if they are likely to be protected by it and there is a perception on the part of the whistleblower that the external agency will be committed to the discovery of wrong doing.[49]

Despite the defects in the American system, there is evidence that in some cases whistleblowing actually produces policy change and in some cases systemic abuses of power were tackled.[50] What is not clear is how often this happens. What is known is that the whistleblowers must be unusually determined, have a supportive political environment to which they can turn (such as a legislative committee that is investigating waste or fraud, or a specialist anti-corruption agency) and be able to rely upon extensive and sympathetic media coverage and on the assistance of pressure groups.[51] Normally, only relatively senior officials with good political contacts and skills are in a position to achieve these results.

The Whistleblower Protection Act 1989[52]

In view of the well known defects in the 1978 legislation, a second attempt was made in 1989 to provide statutory protection for whistleblowers. At one level the legislation is well supported. Opinion poll evidence shows consistently strong support for it, whatever the actual results in practice.[53] The 1989 legislation still requires complainants to approach the OSC but the special counsel now have 120 days to report and must also concentrate on retaliation cases. Thus while personnel discipline is important it is to be overborne by the protection of complainants as a paramount consideration.[54] In practice the cases are complex, but actually are treated seriously. In the first year of operation only 250 complaints were received out of a total work force of 3 million.[55] Whether, in view of the distrust in the Official of Special Counsel, this is a good result is open to question. In the opinion of those in the OSC, the fact that a stay of disciplinary action can now be imposed and that agencies generally take notice of the investigations is an improvement over the 1978 Act.[56] The other major changes are that appeals are now permitted to an administrative law judge and not to the MSPB. The latter was primarily concerned with organisational efficiency and merit, while an administrative law judge is obliged to consider the fairness of the individual case. Lastly, the 1989 Act has altered the legal test of retaliation from one where the whistleblower had to show that the retaliation was the sole factor in the personnel action taken, to a case where it is merely a contributory factor, ie one of several considerations.[57]

Conclusions

It must not be assumed that the whistleblowing experiment has failed. Even if all of the institutions described above were dismantled, the problems of fraud, waste and breaches of the law would remain. In fact insiders are in a unique position and are usually privy to far more wrong doing than any external agency, which can normally only be activated when it receives information

from inside the bureaucracy, though this is often combined by media attention after 'leaks' have occurred. Of course not every person who thinks that they have discovered fraud, abuse and breaches of the law within the bureaucracy are correct in so thinking. Sometimes they are wrong and there are also misguided persons who are the bureaucratic equivalent of the vexatious litigant, a point the advocates of whistleblowing tend to ignore. Still, if a public service is truly serious about stamping out corruption it should strengthen the existing institutions and accept that wrongly made complaints will be rare and are an acceptable price to pay for effective public accountability.

The evidence suggests that the following institutional and legal conditions need to be in place for a 'whistleblower protections' system to work effectively:

(a) Effective external agencies that both provide a channel of communication for whistleblowers and which possess the necessary powers to investigate their complaints. It should be noted that the Criminal Justice Commission in Queensland is obliged to protect sources from harassment and to prevent prejudice to a whistleblower's career. It is also provided in the same legislation that disclosures to the Commission are not a breach of confidence nor are the providers of information liable to any disciplinary action.[58]

(b) It would help, however, if the personnel rules within the civil service were altered to protect 'whistleblowers' from retaliation. No disciplinary proceeding should be allowed to go forward against whistleblowers while other investigations are in train.

(c) An alteration in the civil service laws on secrecy and confidentiality to permit a public interest exception in the case of whistleblowers.

(d) Providing a statutory basis for the media to justify the publication of 'leaked' material from whistleblowers on the basis that it is *prima facie* in the public interest. Unfortunately even in systems with constitutional protection of free speech public officials may be subject to restrictions in what they may say to the media.[59]

(e) On the other side of the fence there is currently no privilege that attaches to the press. This means that a media person who receives material in confidence cannot refuse to disclose it to a court or other legal proceedings such as a Royal Commission.[60] One possibility is to provide that while confidences that also go to the heart of a judicial proceeding must be revealed, journalists and their employers who publish confidential material in good faith about matters of the public interest are protected from adverse legal proceedings. That is, the media could be compelled to reveal information so as not to thwart judicial proceedings, but not be themselves the subject of civil or criminal proceedings in receiving the information. The public interest would include materials concerning the operation of public organisations, not just the civil service, and would extend to private organisations that carry out public functions, eg private laboratories.[61]

This is not of course an ideal solution, since the real target of actions to uncover sources is not the journalist but the source itself. As recent media cases in South Australia suggest, a whistleblower may wish to remain anonymous under current legal conditions and may refuse to release the journalist from the undertaking of confidentiality.

All of this is aside from the question whether the source is correct or not. A whistleblower system does assume that fraud and wrongdoing exists, but not that

all whistleblowers are correct. The American evidence suggests that retaliation still takes place despite the existence of agencies to protect the whistleblower. Whether this means that the experiment has failed or merely means that effective protections are still needed is for others to judge. The US evidence is revealing for another reason. Irrespective of the effects on the whistleblowers themselves, the effects in key areas where abuses were common have been beneficial with major reforms resulting in better levels of public safety.[62]

The public and the government of South Australia ought to give thought to these developments. Of course any such debate must recognise the limits of legal/institutional changes, especially as these seek to change long held attitudes about the primacy of confidentiality in the public service. Ideally any such laws would be coupled with internal efforts to change a predominant 'organisational culture' through education, cooperative committees with external agencies to identify problems, and managerial accountability to prevent the abuses against which whistleblowing is ultimately aimed.

Endnotes

1 Or possibly in South Australia if the Independent Commission Against Crime and Corruption Bill 1992 (No 24 of 1992 read for the first time September 9, 1992) is passed.

2 Whether this will be eroded by the *Freedom of Information Act 1991* (SA) remains to be seen.

3 H Collins, *Justice in Dismissal* (1992) pp 204-205.

4 For other Australian literature see: J McMillan, 'Whistleblowing', in Peter Grabosky (ed), *Government Illegality* (Canberra: Australian Institute of Criminology Proceedings, No 17, 1987) 193-200, J McMillan, 'Blowing the Whistle on Fraud in Government' (1988) 56 *Canberra Bulletin of Public Administration* 118-123; Commonwealth of Australia, *Review of Commonwealth Criminal Law; Final Report* (December 1991) 335-355 (Canberra: Commonwealth Parliamentary Paper No 371 of 1991); J G Starke, 'The Protection of Public Service Whistleblowers - Part 1', (1991) 65 *ALJ* 205-219; J G Starke, 'The Protection of Public Service Whistleblowers - Part 2', (1991) 65 *ALJ* 252-265.

5 For the Queensland material see: *Report of a Commission of Inquiry Pursuant to Orders in Council* (1987-89) (sometimes known after its chairman as the Fitzgerald Inquiry) (Brisbane: Government Printer, 1989) 133-134; *Electoral & Administrative Review Act 1989* (Qld) (No 106) (Schedule: Item 16 as a research matter); G Sorenson, 'Fitzgerald Reform Agenda Under Way in Queensland', (1990) 1 *Public Law Review* 205-216; Queensland, Electoral & Administrative Review Commission, *Report on Protection of Whistleblowers* (Brisbane, October 1991). *Whistleblowers (Interim Protection) Act 1990* (Qld) No 79. The recommended legislation has not been passed, however. See: Queensland, Electoral & Administrative Review Commission, *Review of the Preservation and Enhancement of Individuals' Rights and Protections.* (Issues paper No 20) (Brisbane: Government Printer, June 1992) 9; W De Maria, 'Queensland Whistleblowers: Sterilising The Lone Crusader' (1992) 27 *Aust J of Social Issues* 248-261; John McMillan, 'Legal Protection of Whistleblowers', in Scott Prasser, et al (eds), *Corruption and Reform: The Fitzgerald Vision* (St Lucia: UQP, 1990) 203-211.

6 *The Weekend Australian*, November 14-15, 1992 1, cols 1-3; *Report of the Royal Commission into Commercial Activities and Other Matters Part 2* (Perth: Government Printer, 1992) 4.14 to 4.20.

7 *Whistleblowers Protection Bill 1992 (No 2)* (NSW); J Goldring, 'Blowing The Whistle', (1992) 17 *Alternative Law Journal* 298-300.

8 Ontario Law Reform Commission, *Report on Political Activity, Public Comment & Disclosure by Crown Employees* (Toronto, 1986) See also: H L Laframboise, 'Vile Wretches and Public Heros: The Ethics of Whistleblowing in Government', (1991) 34 *Canadian Public Administration* 73-77.

9 Created by the *Criminal Justice Act 1989* (Qld).

10 *Whistleblowers (Interim Protection) and Miscellaneous Amendment Act 1990* (Qld) s11.

11 *Government Management and Employment Act 1985* (SA), s67(h). The previous legislation repealed in 1985 also prohibited unauthorized disclosures and made such acts a criminal offence: *Public Service Act 1967* (SA), s58(j). See also Regulation 21(1)(c)(i) & (iii) made under the 1985 Act: Government Gazette, (SA) June 26, 1986 p1668, which allows disclosures provided that it does not create a reasonably foreseeable possibility of prejudice to the Government in the conduct of its policies or is not made contrary to any law or lawful instruction or direction.

12 *Parrish v Civil Service Commission of Almeda* 425 P2d 223 (Cal SC, 1967): *Morish v Henly (Folkestone) Ltd* [1973] 2 All ER 137, 139G (Nat Ind Rels Ct) (refusal to falsify records); *Gregory v Ford* [1951] 1 KB 121, 123H (Notts Assizes) (refusal to drive an uninsured vehicle).

13 *Swain v West Butchers Ltd* [1936] 3 All ER 261 (CA); *Sybron Corporation v Riochem Ltd* [1983] 2 All ER 707, 715H-J, 717F-G(CA).

14 A teacher was threatened with disciplinary action recently for making public comments about alleged safety problems at his school: *The Advertiser*, 23 January 1993, p4, cols 1-3.

15 The other exceptions are that there may be a higher duty to another authority, and a balancing of the public interest: P D Finn, 'Confidentiality and the Public Interest' (1984) 58 *ALJ* 497, 505-507.

16 A view reiterated in more recent cases such as: *Initial Services Inc v Putterill* [1986] 1 QB 396, 405 (CA); Y Cripps, 'Protection From Adverse Treatment by Employers: A Review of the Position of Employees Who Disclose Information In The Belief That Disclosure is In The Public Interest' (1985) 101 *Law Quarterly Review* 506-539.

17 For discussion of this case see: E Lominicka 'The Employee Whistleblower and His Duty of Confidentiality' (1990) 106 *Law Quarterly Review* 42-46. See also *Hasselblad (GB) Ltd v Orbinson* [1985] 1 QB 475, 504 (CA).

18 The same conclusions were reached in other cases involving intelligence officers in Britain: R Pyper, 'Sarah Tisdall, Ian Willmore, and the Civil Servant's Right to Leak' (1985) 56 *Political Quarterly* 72-81. For a summary account of most of these uses as well as the failed Spycatcher litigation in Australasia see: A Stewart & M Chesterman, 'Confidential Material: The Position of the Media' (1992) 14 *Adelaide Law Review* 1, 8-12.

19 *Re Fraser and Public Service Staff Relations Board* (1985) 23 DLR(4th) 122, 133 (SCC).

20 L E Blades, 'Employment at Will vs Individual Freedom: On Limiting the Abusive Exercise of Employer power' (1967) 67 *Columbia Law Review* 1404, 1432.

21 M J Lindauer, 'Government Employee Disclosures of Agency Wrongdoing: Protecting The Right to Blow the Whistle' (1975) 42 *University of Chicargo Law Review* 530, 545, fn 88; Note, 'The Right of Government Employees to Furnish Information to Congress: Statutory and Constitutional Aspects' (1971) 57 *Virginia Law Review* 885-919. It should be noted that in Australia disclosures by witnesses to certain parliamentary committees are protected and retaliatory action against such witnesses is forbidden: *Public Works Committee Act 1951* (Cth), s32; *Public Accounts Committee Act 1969* (Cth), s19(2). In English law, if a constituent discloses wrong doing by public officials to a member of parliament, and in the letter defames the official concerned, the MP has a privileged occasion defence in receiving the letter: *R v Rule* [1937] 2 KB 375, 380 (CCA); *Beach v Freeson* [1972] 1 QB 14, 21-22 (QBD).

22 *Willy v Coastal Corporation* 855 F2d 1160 (5th Cir, 1988); (1992) 140 *Federal Rules Decisions* 219, 221.

23 M H Malin, 'Protecting the Whistleblowers From Retaliatory Discharge' (1983) 16 *University of Michigan Journal of Law Reform* 277, 304.

24 Note, 'State Law Protection of At Will Employees Who 'Blow the Whistle' (1988) 65 *University of Detroit Law Review* 551, 553, fn 5 lists 10 states with legislation. For a detailed discussion of three of the earliest state statutes see: T M Dworkin and J P Near, 'Whistleblowing Statutes: Are They Working?' (1987) 25 *American Business Law Journal* 241-264. For a list of the state statutes see: M P Miceli & J P Near, *Blowing The Whistle* (New York: Lexington Books, 1992) 260-273, where 35 state enactments are briefly described.

25 *Frazier v MSPB* 672 F2d 150, 162 (DC Cir, 1982).

26 *Civil Service Reform Act 1978* PL 95-454; 92 Stat 111 s2302(a)(2)(A).

27 B C Indig, 'The Rights of Probationary Federal Employee Whistleblowers Since The Enactment of the Civil Service Reform Act of 1978' (1983) 11 *Fordham Urban Law Journal* 567, 596.

28 K W Muelenberg & H J Volzer, 'Inspector General Act 1978' (1980) 53 *Temple Law Quarterly* 1049-1066.

29 PL 99-303; 94 Stat 855-856.

30 *Ibid* item IX in the Code.

31 Citing the views of Lord Devlin in *Chandler v DPP* [1964] AC 763, 807 (HL(E)).

32 J L Martin, 'The Whistle Blower Revisited' (1985) 8 *George Mason University Law Review* 123, 129.

33 *Frazier v MSPB* 672 F2d 150, 165 (DC Cir, 1982).

34 P H Jos, *et al*, 'In Praise of Difficult People: A Portrait of the Committed Whistleblower' (1989) *Public Administration Review* 552, 554, Table 2.

35 US General Accounting Office, *Whistleblower Complainants Rarely Qualify for Office of Special Counsel* (Washington DC: Government Printer 1985) 18 as cited in G A Caiden & Judith A Truelson, 'Whistleblower Protection in the USA: Lessons Learnt and To Be Learnt' (1988) 47 *Australian Journal of Public Administration* 119, 123.

36 *Frazier v MSPB* 672 F2d 150, 165 (DC Cir, 1982).

37 G A Caiden & Judith A Truelson, 'Whistleblower Protection in the USA: Lessons Learnt and To Be Learnt' (1988) 47 *Australian Journal of Public Administration* 119, 122.

38 *Ibid* p122. The same pessimistic conclusion was reached in T M Dworkin and J P Near, 'Whistleblowing Statutes: Are They Working?', (1987) 25 *American Business Law Journal* 241, 258-259.

39 J A Truelson, 'Blowing the whistle on systematic corruption: On Maximizing reform and minimizing retaliation' (1987) 2 *Corruption and Reform* 55, 57. P H Jos, *et al*, 'In Praise of Difficult People: A Portrait of Committed Whistleblower'. (1989) *Public Administration Review* 552, 554, Table 1 shows that only 1% did not experience retaliation.

40 Jos *id* put this figure at 57%.

41 Ontario Law Reform Commission, *Report on Political Activity Public Comment & Disclosure by Crown Employees* (Toronto, 1986) 236.

42 For two excellent accounts of this see: M Glazer & P Glazer, *The Whistleblowers* (New York: Basic Books, 1989) and M P Miceli and J P Near, *Blowing the Whistle* (New York: Lexington Books, 1992).

43 E S Callahan, 'Employment At Will: The Relationship Between Societal Expectations and the Law' (1990) 28 *American Business Law Journal* 455, 462-463.

44 M A Parmalee, et al, 'Correlates of Whistleblowers'. Perceptions of Organisational Retaliation' (1982) 27 *Administrative Science Quarterly* 17, 32-33.

45 H L Laframboise, 'Vile Wretches and Public Heroes: The Ethics of Whistleblowing in Government' (1991) 34 *Canadian Public Administration* 73, 76.

46 M P Miceli and J P Near, 'Individual and Situational Correlates of Whistle-blowing' (1988) 41 *Personnel Psychology* 267-281; Mary Brabeck, 'Ethical Characteristics of Whistle Blowers', (1984) 18 *Journal of Research in Personality* 41-53.

47 J A Truelson, 'Blowing the whistle on systematic corruption: on maximizing reform and minimizing retaliation' (1987) 2 *Corruption and Reform* 55, 56 reports that in one US study by the MSPB 70% of federal employees claiming personal knowledge of corruption did not report it.

48 M P Miceli et al, 'Who Blows the Whistle and Why?' (1991) 45 *Industrial and Labour Relations Review* 113, 125-126.

49 *Ibid* 127.

50 R A Johnson and M E Draft, 'Bureaucratic Whistleblowing and Policy Change' (1990) 43 *Western Political Quarterly* 849-874.

51 *Ibid* p869.

52 *Public Law* 101-12 (10 April 1989); 103 Stat 16.

53 E S Callahan, 'Employment At Will: The Relationship Between Societal Expectations

and The Law' (1990) 28 *American Business Law Journal* 455, 480.

54 *Whistleblowers Protection Act 1989* PL 101-12; 103 Stat 16, s2(b)(2)(A).

55 (1991) 133 *Federal Rules Decisions* 392, 399.

56 Ibid pp 400-401.

57 (1992) 140 *Federal Rules Decisions* 219, 221.

58 *Criminal Justice Act 1989* (Qld) ss3.31 & 3.32.

59 *Mt Healthy School District Board of Education v Doyle*, 50 L Ed 2d 471, 482 (US SC, 1977); *Pickering v Board of Education*, 20 L Ed 2d 811 (US SC, 1968); *Connick v Meyers*, 75 L Ed 3d 708 (US SC, 1983); *US v Richey*, 924 F2d 857, 860 (9th Cir, 1991). First amendment rights are not absolute, for a balance may need to be struck between their interest as a citizen and the interst of the state, as an employer in promoting the efficiency of the public services it performs though its employees. The same ideas have been accepted in Canada: see Re *Fraser and Public Service Staff Relations Board* (1985) 23 DLR (4th) 122(SCC); *Re OPSEU and Attorney-General of Ontario* (1988) 41 DLR (4th) 1, 16((SCC).

60 See: Australia: *State Bank of South Australia v Hellaby (1992)* 168 LSJS 1(FC) *Kerrisk v North Queensland Newspapers Co Ltd* [1992] 2 Qd R 398 (FC); *John Fairfax & Son Ltd v Cojuanco* (1988) 165 CLR 346 (HCA); *The Herald and Weekly Times Ltd v The Guide Dog Owners" and Friends' Association* [1990] VR 451; *McGuiness v Attorney-Geneal of Victoria* (1940) 63 CLR 73(HCA). Britain: *Attorney-General v Mulholland* [1963] 2 QB 477; *Attorney-General v Clough* [1963] 1 QB 773; *Maxwell v Pressdram Ltd* [1987] 1 WLR 298; *X v Morgan-Grampian (Publishers) Ltd* [1990] 2 WLR 1000(HL(E)); The United States: *Branzburg v Hayes*, 33 L Ed 2d 626(US SC, 1972); *Cohen v Cowles Media*, 115 L Ed 2d 586 (US, SC, 1991). Canada: *Moysa v Labour Relations Board* (1989) 60 DLR (4th) 1(SCC). For disucssion see: T R S Allen, 'Disclosure of Journalists' Sources, Civil Disobedience and the Rule of Law' (1991) 50 *Cambridge Law Journal* 131-162; S Walker, 'Compelling Journalists to Identify Their Sources: 'The Newspaper Rule' and 'Necessity' (1991) 14 *University of NSW Law Journal* 302-324; A Stewart & M Chesterman, 'Confidential Material: The Position of the Media' (1992) 14 *Adelaide Law Review* 1-34.

61 The issue in *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417(CA) concerned the leaking of information that showed that the testing of blood alcohol limits was highly unreliable and that the private manufacturers knew this. On the basis of the findings produced by faulty equipment the police and the Home Office continued to use this equipment in traffic law enforcement.

62 M P Glazer & P M Glazer, *The Whistleblowers: Exposing Corruption in Government and Industry* (New York: Basic Books, 1989) 240-246.

APPLICABILITY OF ADMINISTRATIVE LAW TO GOVERNMENT BUSINESS ENTERPRISES : THE VICTORIAN PERSPECTIVE UNDER THE *STATE OWNED ENTERPRISES ACT 1992*

*Mick Batskos**

Presented at the Victorian Chapter AIAL seminar entitled 'Administrative Law and Government Business Enterprises', Leo Cussen Institute, Melbourne, 26 May 1993 and first published in AIAL Newsletter No 14 1993

Introduction

The *State Owned Enterprises Act 1992* (Vic) ('the Act') was assented to on 26 November 1992 and by 2 December 1992 the whole of the Act was in force.[1]

The Act establishes a framework for the reorgansation of Victorian government business towards a corporate model. It applies to existing entities and can also accommodate the introduction of new ones.[2] In discussing the effect of the Act, this paper will concentrate on the conversion or reorganisation of existing entities into new corporatised or privatised bodies, namely a State Business Corporation ('SBC') or State Owned Company ('SOC'). They are each types of State owned enterprises ('SOEs').

Although there are mechanisms within the Act for accountability of SBCs and SOCs to a Minister or 'the government', there are few *public* accountability mechanisms. In fact, public accountability is seriously eroded by the potential for removal of SBCs and SOCs from the operation of the *Freedom of Information Act 1982* (FOI Act) and the *Ombudsman Act 1973*.[3]

There is also an argument that SBCs and/or SOCs may not be subject to judicial review. This paper argues, however, that judicial review should and probably does continue to be available against such bodies despite attempts by the government to move these bodies across the dividing line between public and private.

Before embarking on a discussion of the administrative law consequences of the Act, it is important to briefly touch on the way the Act operates. The Act sets up the framework for the transition from existing statutory corporation to corporatised body and, if desired, to a privatised body. In addition, it facilitates the creation of a new entity (rather than converting an existing entity) described as a State body (which I will not discuss in this paper).

For the purposes of illustration of how the Act operates, I will assume two different examples. First, say that the government wishes to reorganise an existing statutory corporation into a 'corporatised' body, namely, an SBC but the existing statutory corporation has an inappropriate management structure.

In the second example, assume that the government wishes to convert an existing statutory corporation into a 'privatised' company, namely, an SOC but that its current structure is inappropriate for that purpose.

Reorganisation to SBC

In the first example, two steps will need to take place. First, the existing statutory corporation is declared to be a *reorganising body* by Order of the Governor in Council published in the

* Senior Associate, Mallesons Stephen Jaques, Melbourne

Government Gazette.[4] The constitution of the board of a reorganising body can then be changed by a further Order in Council published in the Government Gazette.[5] The Governor in Council can by that Order change the number of members, qualifications of members, appoint persons as members, remove members (without any entitlement to compensation for loss of office) and may 'make such other changes to the constitution of the board as the Governor in Council determines'.[6]

The Treasurer, after consulting with the Minister administering the Act constituting the statutory corporation, may then *direct* a reorganising body to, among other things, sell off assets, acquire or form a wholly owned subsidiary and generally reorganise its affairs in anticipation of becoming an SBC.[7] The reorganising body must comply with any direction.[8] The Treasurer also determines the amount and value of the initial capital upon which the reorganising body must pay a dividend to the State, in a manner determined by the Treasurer.[9]

The second step in the reorganising process is for the Governor in Council to declare the reorganising body to be an SBC.[10]

Part 3 of the Act contains machinery provisions for SBCs covering, among other things:

- the constitution and proceedings of the Board;
- appointment, vacancies, resignation and removal of directors;
- directors' duties;[11]
- changes to and repayment of capital;
- dividends, accounts and audits.

Converting to SOC

Turning to the second illustration, the first step in a statutory corporation becoming an SOC is to be declared a *converting body* under s50 of the Act by Order of the Governor in Council published in the *Government Gazette*. Part 4 of the Act sets out provisions which ensure that the statutory corporation becomes a body with a corporate structure, with a name reserved under the Corporations Law, which adopts a memorandum and articles of association which an SOC would be obliged to have, with shares issued to the State (its nominee, a statutory corporation or an SOC), which applies to become registered as a company under the Corporations Law, and which will ultimately convert to an SOC.

It is interesting to note that once a converting body is registered as a company under the Corporations Law, the constituting Act of the statutory corporation which became the converting body continues to apply to the carrying out of functions and exercise of powers by the body after its registration as a company.[12]

The final step in becoming an SOC is for the converting body, having become registered as a company, to be declared to be an SOC by Order of the Governor in Council published in the *Government Gazette*.[13] Part 5 of the Act goes on to provide for, among other things, the transfer of assets and liabilities to an SOC; the legal status of an SOC;[14] the terms of the memorandum and articles of association of each SOC; the Treasurer to require information, business plans, annual reports or other matters; the Treasurer to be required to table in Parliament the memorandum and articles, accounts and other financial reports.[15]

Government direction or control: The need for public accountability

I agree with the statements in the Administrative Review Council ('ARC') discussion paper on Government Business Enterprises that 'government control is the chief factor calling for some form of public accountability' in government business enterprises.[16] When the government has control, its political branch could sometimes decide outcomes affecting how those business enterprises are conducted. Control exists because the government is in a position to achieve a result desirable to it through action or inaction by the business enterprise.[17] The Act is sprinkled with specific examples where the government can exercise that control or direction, either through the Governor in Council, the Treasurer or the Minister administering the Act constituting the statutory corporation which was converted.

In the case of a reorganising body, the Treasurer can direct a body to sell assets. The Treasurer also determines the amount and value of capital on which dividends must be paid in a manner determined by the Treasurer.[18]

In the case of an SBC, the Minister (with the Treasurer's approval) may direct an SBC to perform or cease to perform functions the Minister considers to be in the public interest but which could cause the SBC financial detriment, or to cease to perform functions considered not to be in the public interest. The board of the SBC must comply with that direction.[19] Although there are no express provisions to cover the situation where the board does not comply, no doubt board members would have in the back of their minds the knowledge that the Governor in Council may remove any or all directors from office[20] and that they hold office on terms and conditions determined by the Minster and Treasurer.[21]

By contrast, there is no equivalent provision whereby the Minister can *direct* the performance of activities by an SOC. However, there is power for the Minister (with Treasurer approval) to *agree* with an SOC that it perform or cease to perform activities the board considers is not in the commercial interest of the SOC to perform. This is coupled with a power to reimburse to the company the cost of complying with such an agreement.[22] Therefore, although 'direction' is not present, a result desirable to the government is still able to be achieved by other means of control in a broad sense. It should also be remembered that government direction can also be achieved by the fact that the State is the sole shareholder of an SOC and shareholder approval is required by the articles of an SOC for certain things, for example, the selling or disposal of the assets making up an SOC's main undertaking.[23]

FOI and the Ombudsman

Inherent in the notion of governmental control is the need for public accountability. As the ARC discussion paper states:

> The existence of government control and direction by being the sole or majority shareholder and the investment of public moneys in GBEs as a result of government ownership are both sufficient nexus with the public sector to require that GBEs be subject to public sector accountability mechanisms. Both of these features give the public an interest in GBEs.[24]

Part of this public accountability function is performed by administrative law mechanisms of the FOI Act and independent investigations by the Ombudsman. These mechanisms have been seriously eroded by the Act and been supplanted by less 'public' means of accountability, mainly in an economic sense.

Section 90 of the Act relevantly provides[25]:

(1) A State owned enterprise:

(a) that, but for this subsection, would be a prescribed authority within the meaning of the *Freedom of Information Act 1982*; and

(b) that is prescribed for the purposes of this subsection-

is to be taken not to be a prescribed authority within the meaning of that Act.

(2) A State owned enterprise:

(a) that, but for this subsection, would be an authority within the meaning of the *Ombudsman Act 1973*; and

(b) that is prescribed for the purposes of this subsection-

is to be taken not to be an authority within the meaning of the *Ombudsman Act 1973.*

Therefore, if a State owned enterprise ('SOE') is prescribed by regulation[26] for the purposes of subsection 90(1) of the Act, that SOE is not subject to the FOI Act. Similarly, if an SOE is prescribed for the purposes of subsection 90(2) of the Act, that SOE would not be able to be investigated by the Ombudsman under the *Ombudsman Act 1973.*

Freedom of Information

In my view, there is no need for a provision which permits the Governor in Council to determine that the FOI Act not apply to particular SOEs. As a matter of practicality, this involves a politically influenced decision on whether or not an SOE will be excluded from the FOI Act. No indications are provided as to the criteria to be applied and the circumstances in which an SOE will or will not be excluded. Although not determined by a Parliamentary Committee, as suggested by the Administrative Review Council,[27] it is a way of deciding on a case by case basis whether a body faces sufficient competition to merit exemption from the FOI Act. However, I believe there is sufficient existing protection in the FOI Act against the disclosure of commercial documents which could affect competition.[28]

Admittedly, s90 of the Act is not as severe as the equivalent NSW provision which globally excluded SOEs from the operation of the NSW *Freedom of Information Act* 1989.[29] But the better position is that advocated by a 1989 New Zealand Parliamentary Committee, which recommended that equivalent legislation[30] should continue to apply to SOEs and in fact should be expanded to make subsidiaries of SOEs also the subject of that equivalent legislation.

Ombudsman

Similarly, I believe that the Ombudsman should have jurisdiction over SOEs without the possible exclusion from that jurisdiction by a politically motivated decision and regulations made by the Governor in Council. As with the FOI Act exclusions, there are no criteria to indicate the basis on which an SOE will be excluded from the jurisdiction of the Ombudsman. As things stand, the Ombudsman does not generally have jurisdiction over SOEs that are companies. In my view the Ombudsman Act should have been expanded to cover this rather than providing an outlet in the Act by which the jurisdiction can be excluded.[31]

The New Zealand Parliamentary Committee also recommended that the New Zealand *Ombudsman Act 1975* should continue to apply to SOEs and be expanded to their subsidiaries.

In his 1991/92 Annual Report, the Victorian Ombudsman has expressed his

belief that since there have been 638 complaints against the main public utilities between 1 July 1991 and 31 March 1993,

> this demonstrates a need to ensure that corporatisation or privatisation of the public utilities of Gas and Fuel Corporation, State Electricity Commission and Melbourne Water does not leave members of the public without an effective, impartial, independent agency to investigate complaint against those organisations.[32]

Without the avenue of the Ombudsman, there is no publicly accessible avenue of investigation. The Act does provide for appointment of special investigators who may be appointed by the Treasurer to investigate specific matters or generally as directed by the Treasurer. However an SOE must be prescribed for the purposes of Part 6 to be investigated[33] and it is unlikely that an investigation would take place as often as if the Ombudsman had jurisdiction. Further, there is no guarantee that complaints will be pursued. This conclusion is based on the express purpose of the investigator provisions as stated in the parliamentary debates, namely, providing for appointment of special investigators to investigate affairs of statutory corporations other than companies (which are subject to the Corporations Law and Australian Securities Commission investigations where appropriate).[34]

Further, I agree with the view of the Victorian Ombudsman that even though an SOE faces competition, and an individual consumer can shop around or seek private law remedies, these factors are not enough to provide justice in individual cases:

> ....[C]ompetition and private law remedies do not provide adequate fairness and accountability in the market place. There is still a need for formal accountability mechanisms and an effective agency which can independently and impartially pursue complaints.[35]

Other accountability mechanisms

Other accountability mechanisms similarly do not provide for justice in individual circumstances and are not as publicly accessible as use of the FOI Act and the Ombudsman. For example, the obligation for SBCs to give half yearly reports to the relevant Minister and Treasurer[36] and annual reports which must be tabled[37] are not directly relevant to individuals who may have a specific complaint about the provision of goods or services by the SBC. The limited accountability to the public is illustrated by the fact that no part of a corporate plan is able to be published or made available without prior approval of the board of an SBC, the Treasurer and the relevant Minister.[38]

Judicial review

Judicial Review in Victoria is available in two main ways. First, under the *Administrative Law Act 1978* ('ALA') and, secondly, at common law. For the purposes of this paper I will assume that an SOE is unlikely to fall within the scope of the ALA, as it will be rare that an SOE will be required to apply one or more of the rules of natural justice and therefore come within the definition of tribunal within the ALA.

At common law, judicial review is available for, among other things, the exercise of statutory decision making as well as decisions within the prerogative power of the government. However, I will in this paper focus on the question of whether judicial review is available against an SOE under the Act.

Recent cases in the United Kingdom suggest that judicial review is available against a body which although deriving its power from a source other than

legislation or the prerogative, performs a function of a public character. The main case in this area is *R v. Panel on Take-overs and Mergers; Ex parte Datafin PLC and Anor.*[39] The English Court of Appeal held that a body's source of power was not the only determinant in testing whether a body was subject to judicial review. The nature of the functions being performed by the body is also relevant. In particular, whether the power exercised has a public law element.

Without going into the details of that case, the following features were considered by the Court of Appeal in determining that the panel was subject to judicial review:

(a) it was performing a public duty; an important one; it was exercising public law functions and its activities were of a public nature rather than a purely or domestic nature;

(b) the rights of citizens were indirectly affected by the panel's decisions;

(c) it had a duty to act judicially;[40]

(d) the panel wielded enormous power and so long as there was a remote possibility that it could abuse those powers, it would be wrong for a court to abdicate its responsibility;

(e) there was an implied devolution of power by the government to the panel. 'Power exercised behind the scenes is power nonetheless;'[41]

(f) its source of power was consensual submission to jurisdiction;

(g) the fact the body was self-regulating was more reason why it was appropriate for judicial review.

Therefore, if these statements are applied to SOEs, it is in my view possible that decisions of SOEs whose functions have that public element may still be amenable to judicial review. David Pannick has suggested that:

> The courts have adopted a simple test of 'public element' in relation to a body which does not act pursuant to powers conferred by statute, statutory instrument or prerogative: but for the existence of that body, would the state be likely to have enacted legislation to confer statutory powers on a comparable body to regulate the area of life over which the body has de facto control?

Taking that quote in reverse, it would seem that a body has the necessary public element if, before it was changed into an SOE it had the powers Pannick describes.

This is further supported by the existence in ss18 and 69 of the Act of the principal objective of each SBC and SOC respectively to perform their functions *for the public benefit*, by operating efficiently as possible and maximising its contribution to the economy and well being of the State. This may be the 'public element' nexus between an SOE and judicial review. It is arguable that a failure by an SOE to act for the public benefit and well-being of the State could make it subject to judicial review.

Another feature of the Act is that both SBCs and SOCs are empowered to exercise the functions conferred on them under their original constituting Act.[42] This nexus in my view brings SOEs closer to the 'public' side of the public/private spectrum than the panel in the *Datafin* case.

Professor Taggart of the University of Auckland has suggested[43] that perhaps the strands of judicial support such as in the *Datafin* case might be drawn together to support judicial review of the exercise of significant market power by privatised and private bodies. Further, he suggests that there may be a resurrection of old common law doctrines analogous to the

requirement that persons or corporations engaging in common callings (such as innkeepers, ferrymen and common carriers) be required to serve all comers and charge only reasonable prices. In the past, the courts also developed controls over persons or corporations which had a monopoly in the provision of services to the general public. These providers were required to serve the public at reasonable prices and without discrimination.

This branch of law grew into the public utilities law in existence in America, where privately owned public utilities must serve the public adequately and at reasonable prices. Unfortunately, the English Courts were reluctant in the 18th and 19th centuries to burden the equivalent providers of essential services in England.

In my view Professor Taggart's prediction or hypothesis that such privatised bodies, especially bodies like the SEC, Gas & Fuel and Melbourne Water (if and when they become privatised) may be subject to judicial review is not one which should be disregarded as fanciful, but one which should be closely analysed. It is this area of administrative law which I believe will grow at a rapid pace as more and more bodies come within the Act.

The views expressed in this paper are those of the speaker and are not to be taken to represent the views of Mallesons Stephen Jaques, nor should they be relied upon as legal advice.

Endnotes

1 Sections 1-6 and 76-85 commenced on the date of assent, 26 November 1992, and the remainder of the Act commenced on 2 December 1992.

2 Victoria, Legislative Assembly, *Parliamentary Debates*, 10 November 1992, p 634.

3 Section 90 of the Act. Unless otherwise stated, references to sections are to sections of the Act.

4 Section 7(1).

5 Section 8.

6 Section 8(2)(d).

7 Section 9(1).

8 Section 9(2).

9 Section 10-13.

10 Section 17.

11 If a director breaches his or her duties and either the director made a profit or the SBC suffered a loss or damage, that amount can be recovered as a debt by commencement of proceedings by the Minister administering the Act constituting the statutory corporation which became an SBC: ss36, 37.

12 Section 65(2), but only to the extent it is not inconsistent with the memorandum and articles: s65(4).

13 Section 66.

14 Including that the company is not and does not represent the State: s70.

15 Section 75

16 Administrative Review Council, Discussion Paper. *Administrative Review of Government Business Enterprises*, p 45, para 4.15ff. ('Discussion Paper').

17 I Thynne and J Golding, *Accountability and Control: Government Officials and the Exercise of Power*, (1987) 2.

18 Sections 9, 10.

19 Section 45.

20 Section 30(3).

21 Section 26(2).

22 Section 72.

23 Articles of Association, cl 4, Part B, Sched 1 of the Act.

24 *Discussion Paper*, p 46 para 4.17.

25 I do not discuss the impact of the Act on the *Subordinate Legislation Act 1962* or the *Public Authorities (Dividends) Act 1983.*

26 The Governor in Council has power under s92 of the Act to make regulations for things required to be prescribed to give effect to the Act.

27 *Discussion Paper*, p 49, para 4.35.

28 Section 34 FOI Act.

29 Section 37 *State Owned Corporations Act 1989* (NSW).

30 *Official Information Act 1982* (NZ).

31 I generally agree with the proposed changes to the Ombudsman Act (Cth) suggested by the Administrative Review Council with respect to a discretion in the Ombudsman to decline to investigate complaints arising out of the competitive commercial activities of bodies within the Ombudsman's jurisdiction.

32 Victoria, Ombudsman, *Nineteenth Annual Report*, 30 June 1992, p 3.

33 Section 76.

34 *Parliamentary Debates*, p 635.

35 Ombudsman, *Nineteenth Annual Report*, p 26.

36 Section 55.

37 Section 57.

38 Section 41(6).

39 [1987] QB 815. See also *R v. Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864. Also, in *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 and (No 2) at 181, where a private sporting body was subject to judicial review for making a decision of national importance.

40 A body need not act judicially to be subject to judicial review: *O'Reilly v. Mackman* [1983] 2 AC 237, 279.

41 *Id* 849, per Lloyd LJ.

42 Sections 19 and 65(2). The latter applies to converting bodies, but there is nothing to suggest that the functions are lost upon conversion to an SOC. Section 69 refers to the SOC's objective to 'perform its functions' which arguably derives from the functions it has as a converting body.

43 M Taggart, 'The Impact of Corporatisation and Privatisation on Administrative Law', paper presented to RIPAA/AIAL (NSW) Conference at Sydney on 20 March 1992; and, by the same author, 'Corporatisation, Privatisation and Public Law', (1991) 2 PLR 77-108. I rely heavily on these papers.

FOI: KENNETT STYLE

*Dr Spencer M Zifcak**

Presented at the Victorian Chapter of the AIAL, Melbourne, on 27 July 1993 and first published in AIAL Newsletter No 15 1993

Introduction

When the Kennett Government's new freedom of information legislation was introduced earlier this year, it was met with mixed reviews. In the press, critics praised the extension of the Act to Local Government but expressed powerful reservations about many other changes that were proposed.

In response, the Government has issued a number of statements in its defence. The nature of this defence may be summarised in the following set of propositions each of which has been contained in one or another of the Government's written statements about the recent amendments:

1. The new freedom of information legislation strengthens the operation of the FOI Act.
2. In the alternative, if it does not strengthen the Act, then at least it does not detract from it.
3. In the alternative, if it does detract from the Act, then it does not do so to nearly the extent that the Cain Government before it had planned to do.
4. In any case, even if one accepts that the Act has been weakened it remains the most liberal in Australia.

At least three of these propositions are contestable. These are that the changes strengthen freedom of information, that they do not detract from if and that they make the legislation the most liberal in Australia.

The changes weaken the legislation both theoretically and practically and it is no longer the most liberal piece of legislation in the country as it once was.

To illustrate that argument I refer to three of the changes in particular - the abolition of the ceiling on charges, the exemption of state owned business enterprises and the expansion of the Cabinet documents exemption.

Before doing so, however, I want to make clear the areas of amendment with which I agree.

Areas of Agreement

First, there is no doubt that the extension of the Freedom of Information Act to local government is a major achievement. It corrects a longstanding anomaly. While the Commonwealth and Victorian Governments have been covered by FOI Acts for more than a decade, local government fought a long, fierce and poorly justified campaign against its own inclusion. To its discredit, the Cain Government succumbed to this pressure. The Kennett Government has not.

Prompted by parliamentarians like Victor Perton and Mark Birrell, the Kennett Opposition promised that, if it were elected, local government would be covered. It has now delivered on that promise.

---

* *Senior Lecturer in Law (formerly first Director of the Freedom of Information Policy Unit, Victorian Attorney-General's Department).*

For the first time, Victorians will have access to municipal documents. Armed with that information they will be in a far better position to challenge local government decisions. One may quarrel, as I do, with the inclusion of special exemptions for certain categories of local government documents but nevertheless it needs to be recognised that the extension of FOI to local government is a major victory for more open government.

Second, the inclusion of a provision to control voluminous requests is long overdue. When I administered freedom of information in Victoria, vast undifferentiated requests were the bane of my existence.

I remember vividly, Alan Brown's request for all documents that related to the redevelopment of Flinders Street Railway Station, a request on which he would not negotiate for many months. Or even worse Bruce Reid MLC's request for access to every account the Victorian Government had not paid within six weeks of its receipt - and he wanted to see the originals. That again took months to resolve.

Third, the restriction on repeated requests for the same information is also sensible. Under the FOI Act there was nothing to prevent an applicant from making a request, having it refused, taking the matter to the Administrative Appeals Tribunal and, on having their appeal rejected, beginning the whole process again - and there were some that did.

Fourth, the amalgamation of the publication requirements of Part II of the Freedom of Information Act with those of departmental annual reports also makes a great deal of sense. There had been substantial overlap between the two, leading to considerable, unnecessary work.

The amalgamation should remove the duplication and, incidentally, make it easier for members of the public to access information about a department's structures and functions.

Fifth, in a letter to 'The Age' Victor Perton argued that the changes made by the amending Bill were in many respects far less draconian than those proposed by the Cain Government. On that we are also agreed. John Cain argued, for example, that there should be no judicial review whatsoever of the government's decisions to exempt Cabinet documents. The only avenue of review, he thought, should be to that most disinterested of tribunals, the Premier him or herself. This position is not, thankfully, one which Mr Kennett has embraced.

However, it is one thing to say that the changes that have been made are less restrictive than those the Cain Government might have introduced. It is quite another to assert that the changes, taken as a whole, do not detract from and indeed strengthen open government in the State. This view is, at best, questionable.

Areas of Disagreement - Fees and Charges

If the freedom conferred by the Act is to be meaningful, it must be capable of exercise. A freedom that is unaffordable is no freedom at all. The new legislation removes the ceiling on fees replacing it with a charging regime based on the user pays principle. In doing so, it will inevitably and significantly deter requests for policy and administrative documents, those which, more than any other, should be disclosed in order to enhance government's accountability to its constituents.

To demonstrate this proposition one need only look to the Commonwealth's experience since 1986 when a similar user pay system was introduced.

Reviewing the first year of the new fee regime, the Senate Standing Committee

on Constitutional and Legal Affairs (1987) concluded that too much emphasis had been placed on the costs of FOI at the expense of the social, administrative and political benefits that had resulted from it. Therefore, it recommended that clear, maximum limits be placed on charges.

Similarly, the Legal and Constitutional Committee of Victoria's Parliament heard and accepted copious evidence that the effect of the Commonwealth's user pay system had been to discourage many public interest groups from pursuing their rights under the Act; that the charges levied had been prohibitive and that estimates of charges had sometimes been deliberately inflated to deter applicants from pursuing contentious requests.

To quote the former Shadow Attorney-General, Neil Brown:

> "From examining ... responses from agencies, I have concluded that the charges levied are in some cases deliberately inflated to make the application as expensive as possible. In other words, not only are the charges a deterrent to the use of the Act, but they are, at least in some cases, being used with the intention that they will be a deterrent."

In the face of this evidence, and with the support of all Liberal and National Party members, the Legal and Constitutional Committee rejected the adoption of the Commonwealth scheme for Victoria. Yet it has been resurrected in the new legislation.

It is sparse consolation that an exception will be made where a person lodges a request in the public interest.

Which Minister or senior public servant is likely to acknowledge the existence of such an interest where the documents requested are sensitive or contentious?

Which applicants will have the personal commitment and financial resources to pursue through the courts an argument that their request is in the public interest without any clear assurance that the argument will be successful and with the almost certain knowledge that, even if it were, the request itself will still be vigorously resisted?

Perhaps only the media will do it. And yet the Attorney has already stated that requests from the media are unlikely to meet the public interest requirement.

The public interest exception has been with us for some time. It is rarely invoked and even more rarely accorded.

So, the cardinal fact remains that, in the absence of some assurance that the costs they incur will be capped, individuals and public interest groups will shy away from exercising their right of access to important state and local government information.

Had the Government wished to obtain more revenue from FOI, it should, in my view, have retained the ceiling but indexed it to the rate of inflation.

It could also have backdated the indexation to 1982 leaving Victorians with a maximum fee of some $250 instead of the present $100. This would have been equitable and kept the price of FOI within range.

But, by adopting a policy of full cost recovery, the Government has not strengthened the FOI Act. It has weakened it substantially.

Areas of Disagreement - Exemption of Agencies

The Victorian Freedom of Information Act confers a legally enforceable right of access to documents in the possession of government agencies. This right, objects of the Act assert, is to be limited

only by exemptions necessary for the protection of essential public interests.

Prior to recent legislative amendments, the right extended to all agencies over which the government was in a position to exercise control. Regrettably this is no longer the case.

Following a trend established by the Cain Government which exempted the State Bank and the Rural Finance Commission from its ambit, the Kennett Government has gone further and paved the way for the exemption of other state owned business enterprises. This is despite the fact that it was the Cain Government's mismanagement of such enterprises that led, in part, to its downfall.

Agency based exemptions of this kind are wrong in principle. There should be no agency in which the government has a significant interest, whether commercial, semi-commercial or public, that should be free from the structures of accountability that freedom of information imposes.

This is not to say, however, that the competing public interest in maintaining the confidentiality of commercially sensitive documents should be ignored.

This confidentiality must, of course, be protected and upheld. But the way to do this is not to exempt agencies but rather to ensure that the existing exemptions in the Act which protect commercial confidentiality are sufficiently robust to achieve the degree of secrecy that is required.

If there are defects in the existing exemption provisions they should quickly be rectified. But, in the absence of evidence that the exemptions are in any way deficient - I am not aware of any and the Legal and Constitutional Committee could not find any - the exemption of state owned business enterprises is both unnecessary and undesirable.

Agency based exemptions compromise the generality of FOI's application and, given the trend - come avalanche - to corporatisation, deprive the public of an extremely important avenue through which the operation of an increasing number of its enterprises may be scrutinised.

Areas of Disagreement - Cabinet Documents

Finally, I turn to the most important deficiency in the amending legislation. This is the very substantial expansion which if effects in the scope of the Cabinet documents exemption. Having fought tooth and nail to oppose the Cain Government's attempts to widen the Cabinet exemption, the Kennett Government has introduced a new definition of Cabinet documents which closely resembles that which it had previously rejected. In doing so, it has provided a ready avenue by which almost any sensitive document can be removed from public view.

Now Cabinet secrecy is, of course, necessary. It is the natural corollary of collective ministerial responsibility. the convention that each member of the Cabinet assume personal responsibility for government policy serves an important political purpose in that it ensures that all members of the government can be held accountable to parliament and the public. The routine disclosure of Cabinet's deliberations would, therefore, bring an abrupt end to the convention and defeat the purpose it serves.

In addition, the preservation of Cabinet secrecy ensures that decision making and policy development by Cabinet is uninhibited. The quality of Cabinet decision making would be prejudiced severely if options before the Cabinet could not fully and freely be canvassed.

To acknowledge this, however, does not resolve the dilemma with which we are

concerned. That is, which documents should properly be considered as Cabinet documents? The answer is, I think, straightforward.

Only those documents whose disclosure would prejudice the operation of collective ministerial responsibility should be kept secret. That is, only those documents the release of which would have the effect of fracturing Cabinet's unity should be exempt. Only those documents which would disclose the 'views or votes of Ministers in Cabinet', to use Justice Blackburn's terms, warrant protection as Cabinet documents.

Recently, and fortunately for me, this view received the High Court's endorsement in its decision in *The Commonwealth and the Northern Land Council* (1993) 67 ALJR 405.

There, the majority drew a distinction between documents which recorded the deliberations and decisions of Cabinet which merited the strictest protection and documents prepared outside Cabinet such as background reports and submissions for which a lesser degree of protection was deemed appropriate.

The reason for the distinction was that, in the first case, it was clear that the convention of ministerial responsibility would be prejudiced if the actual discussions and resolutions of Cabinet were disclosed. In the second case, it was far less likely that Cabinet's deliberations would be impeded since background papers do not, in and of themselves, disclose the nature and content of Cabinet's discussions.

It is somewhat ironic that at the very time the High Court was clarifying its position as to Cabinet documents, the Victorian Government was formulating an exemption that goes far beyond what is required to ensure that Cabinet solidarity is secured.

The existing exemption properly exempts from disclosure any documents that reveal the deliberations and decisions of Cabinet and any documents prepared by a Minister for the purpose of submission to Cabinet.

To this, the new section has added a clause exempting any documents that have been considered by Cabinet and which relate to matters that are or have been before Cabinet.

It also exempts documents prepared for the purpose of briefing a Minister for the purpose of Cabinet discussion whether or not these documents are actually considered by Cabinet.

It goes further and abolishes the requirement that in order to qualify for protection, a document must have been prepared specifically for the purposes of consideration by Cabinet.

What this means in theory is that, with the not unimportant exception of factual documents, any document that a Minister or Cabinet considers, whether or not it discloses Cabinet's deliberations or decisions and hence fractures Cabinet's unity, will be exempt from disclosure.

What it means in practice is that any documents that Ministers or officials wish to hide can now be hidden either by a Minister organising for a document to be seen as a briefing document, for example, by depositing a copy on the relevant departmental file, or by adopting the simple expedient of passing the document over the Cabinet's table or the table of its many committees.

Let me illustrate the dangers of this by reference to FOI's first cause celebre, the case of *Public Service Board v. Wright* (1986) 160 CLR 145. Mr Max Wright was a courageous and independently minded public servant who, in 1984, was regional director of the then department of Community Welfare Services. This department then consisted of the Office

of Corrections and the Department of Community Services.

The Government took a decision to split the two. This disadvantaged Mr Wright because his regional responsibilities were diminished. So, he sought access to documents which would enable him to determine the rationale for the division.

In particular he sought access to an options paper on the subject which had been prepared by a Committee known as the Effectiveness Review Committee. This consisted of the Secretary of the Department of Premier and Cabinet, the Secretary of the Treasury and the Chairman of the Public Service Board.

Access to the document was refused initially on the ground that it was an internal working document and so was exempt under s.30 of the Act. When this began to look shaky, it was exempted on the ground that it was a Cabinet document. Just to make sure of the situation, the Secretary of the Department of Premier and Cabinet issued a conclusive certificate with respect to the document on the day prior to the hearing of the case before the County Court.

This case was fought all the way to the High Court and the document was finally released to Mr Wright. But, under the newly drafted Cabinet exemption it is unlikely that it would be today.

This is because either the relevant Minister could assert that it was a document prepared to brief him or her in relation to matters which may be discussed by Cabinet, or because the Minister or the Secretary could simply attach it to the relevant Cabinet submission and so put it beyond the Act's reach.

This could be done even though the document:

- was not prepared for the purpose of consideration by Cabinet;
- did not contain any record of the decisions or deliberations of the Cabinet and, as such, could in no way be regarded as a document which would undermine the unity of Cabinet since it revealed neither the views nor votes of Ministers in Cabinet.

This new exemption, then, clearly detracts from the public's right to know. It does not strengthen the Act. It weakens it significantly.

And it topples the Act from its position as Australia's most liberal by introducing an exemption for Cabinet documents considerably wider than its Commonwealth and inter-state counterparts, an exemption that will allow this and future governments to see out any problematic and potentially embarrassing requests.

Conclusion

We should, then, applaud the Act for the significant advances it makes particularly in bringing open government to Local Government. Nevertheless, as 'The Age' so cleverly put it, we should remain concerned that the Kennett Government while prising open one cabinet has chosen to lock up its own.

PARLIAMENTARY COMMITTEES AND PUBLIC ACCOUNTABILITY

*Stephen Argument**

Presented at a meeting of the joint NSW chapters of the AIAL and the Royal Australian Institute of Public Administration in Sydney, 22 September 1993 and first published in AIAL Newsletter No 16 1993.

In 1989, the Chief Justice of the High Court, Sir Anthony Mason, gave the inaugural Blackburn Memorial lecture[1]. His topic was 'Administrative review - the experience of the first twelve years' but, in the course of his lecture, his Honour also had some things to say about parliamentary review of Executive and administrative action. His Honour said that, as a result of 'the increasing complexity of social and economic life', a 'more sophisticated and flexible' form of regulation and control had been called for and that one of the end results of these new forms of control was that the material welfare of the individual had come to be more and more dependent on the Executive and its agencies. His Honour said that administrative action began to replace legislative enactment and judicial adjudication in creating legal rules and also in resolving disputes.

His Honour then went on to say:

> The standard response to this problem is that the electorate, through its elected representatives, controls the Executive and the actions of administrators. This is a gross overstatement. Although Parliament has the capacity to control the Executive and administrative action, that capacity is exercised to a limited extent only. Indeed, there are those who assert that the Executive controls Parliament. There is a very large measure of truth in that claim.[2]

His Honour went on to say:

> [T]he blunt fact is that the scale and complexity of administrative decision-making is such that Parliament simply cannot maintain a comprehensive overview of particular administrative decisions. Parliament's concentration on broad issues and political point-scoring leaves little scope for oversight of the vast field of administrative action.[3]

His Honour then went on to discuss what he perceived as the decline of the doctrine of ministerial responsibility. He said:

> The decay of the doctrine of ministerial responsibility appears to be a consequence of a perception that it is beyond the capacity of ministers to oversee all that is done by their departments or the statutory authorities for which they are responsible. What is beyond the capacity of the minister is certainly beyond the capacity of Parliament.[4]

In a paper that I wrote a couple of years ago, I had occasion to disagree (respectfully) with his Honour[5], principally because of my faith in the various accountability procedures that had been developed in the Senate and because of the opportunities that those procedures gave Senators to scrutinise the activities of Commonwealth departments and authorities. At the time, I concluded that the Parliament had the *capacity* to oversee and to scrutinise the operation of government departments and authorities; the big question was whether or not it had the *will*.

In the course of trying to think of something sensible to say today, I re-visited this conclusion. I was reminded of some things that former Senator Fred

Chaney said to a seminar that was held in 1991, to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills. Mr Chaney said:

> [M]y own view as to the extent to which we can improve the performance of Parliament is one which is tempered by the reality that once you get to the point that you are putting functions on senators and members of the House of Representatives which in fact is physically impossible for them to fulfil because of the volume of material, the volume of work and the multiplicity of tasks that you are performing, then you are holding out the promise of simply a new form of 'the new despotism'. You are simply offering another set of faceless, nameless bureaucrats, a decision making power over the people of Australia where there is no accountability.[6]

As one of those 'faceless, nameless bureaucrats', I found this sobering.

So, what is my message?

Well, for those State Parliaments that are inclined to embrace the Senate model, I think one clear message is that increased mechanisms for accountability bring with them an increase in work. I have enough experience of parliamentarians to know that an increase in workload is probably something that they neither need nor would welcome.

Another message is that increased obligations of this sort bring with them an increase in responsibility, including for the parliamentary bureaucracy. Speaking for myself, I have always regarded that the opportunity I have had over the past few years to work in Parliament and to participate (albeit in a small way) in the legislative process - which, as a lawyer, gives me a particular thrill - is a great privilege. However, it carries with it an onerous burden, as you must always be sure that you keep yourself out of it - that you act as a facilitator, rather than as an active participant - that it is the Committee's views that are promulgated and not your own. I assume that my Senate colleagues think the same way.

Re-reading Mr Chaney's words reminded me of this.

I feel that I should conclude by saying something a little more positive (and a little less self-indulgent).

For those who are interested in the accountability of the administration to the Parliament, surely one of the best 'reads' of recent years is the Pearce Report - a report by Professor Dennis Pearce on his inquiry into recent events involving the Commonwealth Department of Transport and Communications. In his report, Professor Pearce makes some significant comments about another aspect of increases in accountability and scrutiny. He said:

> The greater scrutiny of public servants' decisions nowadays by the Parliament, courts and tribunals, and the press, makes it impossible for departments to deal with the public on the basis of common practice. ... Working arrangements or understandings between departments and industry, while to be encouraged, cannot ignore legal requirements. Where substantial interests are at stake and there are avenues for review, someone will take up the legal issues - as has occurred in this case. The administrative culture must embrace the legal culture - or at least learn to understand it.[7]

Professor Pearce suggested that, as a result, it was desirable that training programs be introduced, to increase the awareness of officers of the significance of legislation and other legal requirements.

In Canberra, there is a certain amount of effort already being made in this regard. The Senate Procedure Office, for example, has for several years been running seminars on the legislative process. These seminars deal with how legislation is made by the Parliament, including the role of the various scrutiny committees. These seminars are primarily run for Commonwealth public servants but non-government attendees are also welcome.

It is important that they are open to non-government attendees because, in terms of understanding the legislative process, the average person who comes into contact with the process - including most lawyers - is not much better off than the bureaucrats criticised by Professor Pearce.

If I can concentrate on the lawyers for a moment, most of them that I come across have little or no idea about what really goes on in Parliament. They tend to have little or no understanding of the parliamentary process. Most seem to think that 'the law' is some thing that comes either out of casebooks or the mouths of judges. Occasionally, it is something that they look up in an expensive loose-leaf service or that they are forced to purchase (at an exorbitant price) from their local Australian Government Bookshop. An alarming number of them have only a superficial knowledge of how those laws get into the bookshops in the first place.

It almost goes without saying that most lawyers have no appreciation of the good work done (in all Australian parliaments) by the various different types of committees which scrutinise government activity. This is a great shame because, apart from any other reason, scrutiny committees can often be of great assistance to lawyers.

In my view, therefore, it is no good to just improve and develop accountability mechanisms. There also needs to be an effort made to educate people - and particularly the bureaucracy - about these mechanisms.

I would like to illustrate the need for this by recounting something that happened in my first year as Secretary to the Senate Scrutiny of Bills Committee.

The Committee had before it a Bill that emanated from the Finance portfolio. There was something about the Bill which did not seem right. The Committee was not sure what the Bill was all about. As often happens, the explanatory material on the Bill was of no help.

I have always advised the Committee that, in such situations, the best approach is to operate with an abundance of caution. The safest course is to draw the Senate's attention to the Bill and to seek from the relevant Minister some further details about that part of the Bill which it did not quite understand. It's always better to be safe than sorry.

The Committee took my advice and a letter went off to the office of the Minister for Finance.

A couple of day's later - it was late on a Friday afternoon, as I recall - I received a telephone call from a relatively senior officer of the Department of Finance. The officer was, to put it mildly, 'agitated'.

He wanted to know why the Committee had commented on the Bill.

I explained that the Committee wanted some more details about what the Bill was all about because, on its face, the Bill raised - for the Committee - some particular concerns. The officer told me that these concerns were 'nonsense'.

If they had difficulties with the Bill, why hadn't they simply rung him up?

I pointed out that, apart from anything else, the time constraints imposed by the way the Committee was forced to operate

precluded the Secretariat - let alone the Committee - from doing much in the way of research on these sorts of matters. I did not dare mention that, trying to get hold of the relevant public servant in these circumstances was difficult enough in itself, let alone the further difficulty of finding one who was familiar enough with the work of the Committee - and who trusted you enough - to actually help.

The officer, nevertheless, went off his brain about the trouble that he had been caused over 'nothing'. He ranted and raved, on and on.

One thing he said has stuck in my mind. At the end of his harangue he said:

'Who do these Senators think they are?'

Frankly, I was too stunned to give him the obvious answer - that they think they are one of the three arms of 'the Federal Parliament' which, under the Constitution, is entrusted with the legislative power of the Commonwealth. Equally, I was too flabbergasted to point out that it was the legislative power of the Commonwealth that was the source of authority for most of what he, his Department and his colleagues in the Australian Public Service did from day to day.

Of course, I would not suggest - and I do not believe - that all public servants are like this person. Far from it. He's really just the worst example that I have come across in my three years with the Scrutiny Committee. However, the Pearce Report leads me to believe that he's not the Lone Ranger. That being the case, it is - in my view - equally important that parliamentary committees work to ensure that the bureaucracy knows what they are doing and - more importantly - where they fit into the grand scheme of things[8]. If they do, it can only help.

Endnotes

1 Reproduced in (1989) 18 *Federal Law Review* 122

2 *Ibid*, 128

3 *Ibid*, 129

4 *Ibid*

5 S Argument 'Annual reporting by Commonwealth departments and statutory authorities - the cornerstone of executive accountability to the Parliament', 1991 1 *Legislative Studies* 16, at 23

6 Senate Standing Committee for the Scrutiny of Bills, *Ten years of Scrutiny* (1992), 29

7 Department of Transport and Communications, *Inquiry into Certain Aspects of the MDS Tendering Process 1992-93 Volume 1 - Report by Professor Dennis Pearce* (May 1993), 9

8 For more on this point, see Argument, S, 'Quasi legislation: Greasy pig, Trojan Horse or unruly child?', paper delivered to Fourth Australasian Conference on Delegated Legislation and First Australasian and Pacific Conference on the Scrutiny of Bills, 29 July 1993, pp 22-5.

WA INC. ROYAL COMMISSION RECOMMENDATIONS: OVERVIEW AND IMPLICATIONS FOR COMMERCIAL DEALINGS OF GOVERNMENT

*Michael Barker**

Presented at a seminar run by the Western Australian Chapter of the AIAL in Perth, 2 December 1992, and first published in AIAL Newsletter No 16, 1993.

Introduction

In Part I of the report of the Royal Commission into the Commercial Activities of Government and other matters, the Commission concluded that:

- The system of government in Western Australia had been placed at risk during the period into which it had inquired;
- Some ministers had elevated personal or party advantage over their constitutional obligation to act in the public interest;
- Personal associations and the manner in which electoral contributions were obtained could only create the public perception that favour could be bought, that favour would be done;
- Members of statutory authorities with very significant funds subject to their control seemed to be unaware of, or else indifferent to, their legal and public duties;
- Persons appointed to statutory authorities had not always been possessed of appropriate experience and qualifications;
- In many instances, the capacity of statutory authorities to act appropriately in the discharge of their obligations was severely constrained by the presence on their boards of public servants who represented government;
- The appointment of ministerial advisers and favoured appointees to the public service had resulted in the public service being denied an effective advisory role;
- Processes of decision making were often shrouded in secrecy. The reasons for decision in many instances were not documented. The proper role and function of Cabinet was either poorly understood or deliberately abused by the Premier and certain senior Ministers;
- Accurate records provide the first defence against concealment and deception. The absence of an effective public record hindered the Commission in its enquiries. On some occasions, a deliberate process of interference with official records appeared to have taken place;
- A marked change in the Government's approach to business relationships was observed by the Commission, especially in relation to the Burke years - it was more entrepreneurial and risk taking. In the case of the provision of a $150,000,000 indemnity to National Australia Bank to assist the rescue of Rothwells in

* *Barrister; Counsel Assisting the WA Royal Commission into the Commercial Activities of Government.*

> October 1987, Parliament was not consulted. In the case of the Government's decision to involve itself, through WA Government Holdings Ltd, with Bond Corporation in the Kwinana Petrochemical Project, the Government acted completely outside the purview of public scrutiny. The value of that project was enhanced at least ten times its proper value to a figure of $4,000,000,000 by obligations undertaken by the Government including the giving of a Treasurer's guarantee.

Of these various matters, the Royal Commission very directly observed in Part II of its report, that:

> Individually, the matters upon which we have reported reveal serious weaknesses and deficiencies in our system of Government. Together, they disclose fundamental weaknesses in the present capacity of our institutions of Government, including the Parliament, to exact that degree of openness, accountability and integrity necessary to ensure that the Executive fulfils its basic responsibility to serve the public interest. This is not to deny the essential strengths of the concepts of representative democracy and responsible government which Western Australia has inherited. What is now necessary, however, is a systematic reappraisal of our institutions of government. In carrying out this task, individual recommendations for change to our system of government must be formulated with proper regard to the operation of the system as a whole. The inter-relationship between the institutions of government demands a comprehensive approach. Recommendations for change, both specific and directional, must also respect the principles which underlie our system of government.

The Commission in Part II of its report then proceeded to lay out these fundamental principles. First, it stated what it called 'the democratic principle', namely, that it is for the people of the State to determine by whom they are to be represented in government. Secondly, it made reference to the 'trust principle', namely, that the institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public. The Commission observed that both principles, and the commitment which they assume to the rule of law and to respect for the rights and freedoms of individuals, need to be translated into practical goals if they are to provide the basis for government in Western Australia. The Commission then identified three goals as necessary to safeguard the credibility of democracy and to provide an acceptable foundation for public trust and confidence in our system of government:

(a) government must be conducted openly;

(b) public officials and agencies must be made accountable for their actions; and

(c) there must be integrity both in the processes of government and in the conduct to be expected of public officials.

Central Recommendations

Having regard to these principles, the Commission made some forty recommendations and a number of ancillary observations. Each recommendation was designed to facilitate open and accountable government and integrity in government.

Central to the direction adopted by the Commission was the role and function of the Parliament. Once this is understood, the approach taken in Part II of the report to the commercial undertakings of

government, as other matters, can be better appreciated.

The Commission unequivocally affirmed 'the constitutional idea of responsible government, namely, that those who participate in the government of this State are responsible and accountable through the Parliament to the public they serve.'

Thus, particular attention was given by the Commission to the responsibility Parliament has for the scrutiny and review of governments. In turn, this resulted in the Commission recommending that the Legislative Council be acknowledged as the House of Review, with particular responsibility for scrutiny of the public sector as a whole. This led to consequential recommendations concerning the electoral system of both the Legislative Council and the Legislative Assembly.

The Commission recognised, however, that a reformed Parliament left to the traditional - or current - devices of Parliament, would be unlikely effectually to discharge the primary responsibilities assigned to it: secret and unaccountable government might be replicated unless the Parliament were better informed than it now is, concerning matters affecting the public sector.

To this end, the Commission recommended the designation of certain agencies, and two proposed agencies, as Independent Parliamentary Agencies. The existing agencies are the offices of the Auditor General, the Ombudsman and the Electoral Commissioner. The two new agencies proposed are the Commissioner for Public Sector Standards and the Commissioner for the Investigation of Corrupt and Improper Conduct.

These independent parliamentary agencies would serve the public at large. The public, through the Parliament, would oversee their operations. And, most importantly, the public, through the parliament and its committees, would maintain a monitoring and investigatory eye on government and executive behaviour.

Other recommendations of the Commission complete or complement these essential recommendations.

Open Government

The Commission recommended:

- FOI legislation largely in accordance with a Bill currently before the Parliament;
- An Administrative Decisions (Reasons) Act in accordance with a 1986 WA Law Reform Commission proposal;
- A review of secrecy laws;
- The limitation of confidentiality agreements in commercial dealings;
- Greater control over the giving by government of guarantees and indemnities;
- The investigation of the role of press secretaries and The Government Media Office.

Accountability

The Commissioner further proposed:

- The establishment of an Administrative Appeals Tribunal;
- Increased powers for the Auditor General;
- That all companies owned or acquired by the government or a statutory authority by subject to a State-owned Companies Act.
- That a public servant should not be appointed to the board of a statutory

authority or a State-owned company while retaining a position in the public service in a department within any portfolio of the minister responsible for that body.

- That members of boards of authorities and State-owned Companies conform to the same standards of probity and integrity as is expected of persons occupying positions of trust; and where the authority or company is responsible for a business activity, a member should exercise reasonable care and diligence in the exercise of powers.

Integrity

Here the Commission proposed:

- The establishment of an independent Archives Authority;
- The formulation of standards of conduct in codes of conduct;
- The establishment of whistleblowing procedures;
- Registration of pecuniary in other interests of members of Parliament and senior public sector employees;
- The enactment of a comprehensive law governing political donations and political expenditure; and an inquiry into other aspects of political finance.

Other recommendations made in Part II of the report deal with the Parliament and the establishment of the two independent parliamentary agencies earlier referred to. The Commission proposed the separate appropriation of funds to ensure the independence of Parliament.

Commission on Government

Where it was felt appropriate, the Commission made explicit recommendations for immediate implementation. In a number of areas, however, the Commission expressly acknowledged the need for further community debate on issues of immense public importance. To this end, the Commission proposed the establishment of a Commission on Government (COG) to facilitate extensive public consultation on these issues. The Commission stated in its report that it was the public's 'right' to be consulted in relation to these matters; consultation should not occur as a matter of mere courtesy.

Commercial Dealings of Government

It will already have become apparent that a number of the recommendations touch on the question of the commercial dealings of government.

The Commission at the outset expressed the view that 'it is impossible to contend that Government should be prohibited from engaging in any commercial activity', because whatever the political philosophy of the Government, government involvement to some degree in commercial activities is inevitable.

In a State such as Western Australia, the government has found it appropriate, with public support, to create conditions conducive to economic development over many years. On some occasions it has engaged directly in business enterprises. This is not a phenomenon unique to Western Australia, or Australia; it is common indeed in many western democracies and developing countries. The Commission suggested that to prohibit some forms of commercial activity would, in fact, offend the democratic principle identified at the outset of the report.

The vital issue, therefore, became not whether government should engage in commercial activities, but the conditions under which government may engage in these activities. The public, the Commission said, is entitled to insist that government be conducted openly, and that it be and be seen to be, accountable

for its actions. This is especially so where the actions of government would put public funds and resources at risk.

This Commission made a number of recommendations consistent with these objectives which touch upon commercial dealings.

Commercial Secrecy

The Commission maintained that claims to commercial secrecy by government in its commercial dealings should be minimised. We are not here speaking of rights to confidentiality of third parties who have supplied information to government in confidence, or of the proprietary information belonging to the government itself, but claims to commercial secrecy in respect of government activities where the claim is made to prevent the public from being informed of the details of those activities. The Commission ultimately observed that commercial information should be protected from public disclosure only where such public disclosure would reveal information that has a commercial value, and disclosure could reasonably by expected to diminish or destroy that commercial value. That is the same test that is used under the proposed WA FOI legislation. However, certain pre-conditions to this rule were stated by the Commission, namely:

- Parliamentary review of these activities should still be possible;
- The Auditor General should retain the power to investigate those activities;
- Commercial activities should be set by law or known policy of government;
- A State-owned Company or Statutory Authority should be obliged to file a statement of corporate intent with Parliament in respect of its proposed activities;
- The responsible Minister should have a right of access to all commercial information, including that for which secrecy is claimed;
- An annual report should be filed with Parliament by the entity carrying on this activity;
- There should be no complete FOI exemptions for entities carrying on such activities, except for compelling reasons.

In other words, if government wishes to engage in commercial dealings, it must be as open with the public, especially through the Parliament, as is possible. If confidential arrangements exist, they should be known to exist. After all, it is the public's funds which are being put at risk.

To this end, Section 58C of the Financial Administration and Audit Act (FAAA) should, said the Commission, be amended to ensure that no confidentiality arrangements are entered into which would prevent Parliament being informed about the matter, and requiring the Minister to advise Parliament and the Auditor General of what is being done, and why.

The Royal Commission in the light of these matters recommended that the State Trading Concerns Act, which currently prevents government entering into certain commercial undertakings without parliamentary approval, be repealed.

Guarantees and Indemnities

Some of these may be given under statutory authority. In the case of the rescue of Rothwells, Swan Building Society and the Teacher's Credit Society, matters inquired into by the Commission, guarantees and indemnities were given by the Government without statutory authority. There are currently no clear procedures governing the giving of such

commitments. Yet, government can effectively bind the Parliament to appropriate the funds necessary to meet these contingent liabilities should they fall due because, as the Under Treasurer of the State put it in evidence to the Commission, politically speaking no parliament is our system of government is likely to renege on an undertaking given by government. To do so would jeopardise the State's credit rating.

The Commission considered that the Treasurer and the Department of Treasury must be centrally involved in the giving of guarantees and indemnities, and that in the case of significant matters, Cabinet approval should be required to the commitment. Further, consistently with other recommendations concerning confidential dealings, Parliament and the Auditor General should be notified as soon as practicable of the nature, full extent and purpose of any guarantee or indemnity given.

The Commission refrained from recommending that government should not be able to issue guarantees and indemnities unless with parliamentary approval, principally because it considered that to do so might unreasonably constrain upfront action in the public interest. However, the Commission emphasised that early notification to Parliament and the Auditor General of it's dealings was essential.

It should be noted here what by now will have become obvious, that the role of the Auditor General in relation to these various matters is of considerable significance.

Regulation of Statutory Authorities in State-owned Companies

Again, the Commission did not seek to prevent commercial activity by government through such entities. Government must, however, operate in the full light of day if it wishes to utilise such entities for commercial purposes.

Where a company is created or acquired by government or a statutory authority, the responsible Minister, said the Commission, should notify Parliament of the full details. A central register of all such companies must be kept by the Auditor General and the proposed State-owned Companies Act should apply to the entity.

Under the State-owned Companies Act, all such bodies would be similarly regulated to ensure consistency of memorandum and articles of association, to prevent the entity from exceeding the power of the statutory authority which may have acquired it to require a statement of cooperate intent, to define the control of the Minister over the body, to affirm the responsibilities of directors and officers to, ensure that the FAAA applies to the body, to lay down the reporting obligations to Parliament and to ensure the jurisdiction of the FOI legislation, the Ombudsman and the proposed Commissioner for the Investigation of Corrupt and Improper Conduct in respect of the body.

Members of Statutory Authorities and State-owned Companies

Attention was drawn earlier to the recommendation of the Commission designed to prevent public servants sitting on boards of bodies to which their Minister is the responsible Minister.

Level of Competence and Liabilities of Members of Statutory Authorities and State-owned Companies

The responsibilities of members of such boards was highlighted earlier in that they should be under the same probity obligations as a person holding a position of trust and must exercise reasonable care and diligence in relation to the conduct of business activities.

Independence from Ministerial Control

The Commission also recommended that if some level of independence of ministerial control is to be conferred on a board, it must be done so explicitly. Otherwise, it is to be assumed that such control exists.

Auditor General

Earlier the significance of the office of the Auditor General was foreshadowed. It already has wide powers under the FAAA. The Commission recommended a strengthening of those powers.

The Auditor General has the function not only to conduct financial audits under current law but also to investigate more generally the performance of the public sector. The Commission emphasised the importance of this office. Whilst the Auditor General's office does not carry with it the function to question government policy, it does have the power to examine, and report to Parliament on, the effectiveness with which policy is implemented. The Commission recommended that all public sector bodies, programs and activities involving any use of public resources be the subject of audit by the Auditor General.

Conclusion

It will be appreciated in the light of these detailed recommendations, how important the central recommendations of the Commission are. The detailed recommendations are likely to count for nought if there does not exist a reformed Upper House in Western Australia which has as its primary responsibility the review and scrutiny of the management and operations of the public sector.

The functions of the proposed Commissioner for the Investigation of Corrupt and Improper Conduct and Public Sectors Standards Commission, together with the Auditor General and Ombudsman, are crucial to ensuring that the public of this State, through its elected representatives, know exactly what government is doing in its name.

I should also take this opportunity to make brief observations on the assessment made by certain academic commentators which have appeared in '*The West Australian*' newspaper in recent days, including, for example, the comment that Part II of the report is 'fatally flawed', and that 'the Bill on COG not only has to be opposed by all right-thinking people, but replaced by a Bill instituting a Constitutional Convention of the People charged with bringing WA into the 21st century with a codified Constitution which sets out the responsibilities of people in government that ... gives Western Australia a new system of limited government by, as well as for, the people'.

Clearly, the principles expressed in Part II of the report of the Royal Commission do not satisfy adherents of radical, US-style constitutional change. I believe, however, the views of such persons represent an unwise and an unwarranted solution to the governmental problems identified by the Royal Commission. This is a case where truly discretion is the better part of valour.

There should be a natural reluctance to throw out the bath water of our existing constitutional arrangements in dealing with these most serious of issues. The proposals in Part II of the report set forth a serious and important reform agenda for constitutional change, without recommending a break with our traditions and experience which may have unpredictable, deleterious consequences. I earnestly trust wise heads prevail in urging the early establishment of COG so that the reform process may begin.