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ADMINISTRATIVE LAW AND INVESTIGATIVE AGENCIES

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Paper presented to a seminar held by the NSW Chapter of AIAL, Sydney: The State of Administrative Law: Current Issues and Recent Developments, 4 November 1994

In my address to you today, I will discuss the application of administrative law to investigative agencies. What review is possible of decisions made and actions taken in investigations? What principles apply to that review?

Statutory powers of investigation are a means to an end, not an end in themselves. These powers are given to agencies as a means of assisting them to enforce other laws - in the case of the ASC, the Corporations Law, in the case of the TPC, the Trade Practices Act, in the case of the NCA, the criminal law generally (albeit within the field of organised crime).

Powers of investigation are administrative in nature. It has long been clear that these powers are administrative and not judicial or legislative in nature.[1]

The role of royal commissions

Perhaps the most notable repositories of special investigative powers have been, and still are, royal commissions.

Commissions of inquiry are a very long established part of the system of government inherited from the United Kingdom. The history of royal commissions extends back to the Domesday Book of 1086, which was the result of an inquiry appointed by William the Conqueror to establish the ownership of land holdings in England for taxation purposes[2] Royal commissions have been a regular feature of the UK system of government over the centuries.

Royal commissions are part of the executive arm of government. Their function is not judicial in nature.[3] This is so even where their powers include the power to conduct hearings, to summons and examine a witness on oath and to make decisions on refusal to answer questions or produce documents.[4] The basic functions of royal commissions are to inquire and report.

The Commonwealth and all states of Australia have enacted legislation regulating commissions of inquiry in one form or another.[5] These commissions are armed with statutory powers to require the attendance of witnesses and the production of documents.

In the past ten years, we have seen a number of royal commissions and commissions of inquiry established to inquire into a vast range of issues: possible illegal activities and associated police misconduct in Queensland (the "Fitzgerald Inquiry"), the business dealings of the WA Government (the "WA Inc Royal Commission"), the collapse of Tricontinental, corruption in the NSW Police Service, aboriginal deaths in custody, the

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State Bank of South Australia, and the building industry in New South Wales, just to name a few.

Historically royal commissions have a limited life and usually inquire into a specific subject matter. Calls to establish royal commissions usually arise when there is public concern about the capacity of existing bodies to deal with a matter.

Because royal commissions are executive in character their decisions and actions are amenable to judicial review. In fact there has been considerable judicial review of royal commissions over many years. (The cases cited in the endnotes to this paper are sufficient support for this proposition.)

Permanent inquisitive bodies

In recent years we have seen considerable development of standing investigative bodies with royal commission powers. Examples of such bodies in Australia are the National Crime Authority (1984), NSW's Crime Commission (1985), NSW's Independent Commission Against Corruption (1988) and Queensland's Criminal Justice Commission (1989). These permanent bodies have the functions of inquiring and reporting and they derive their authority and compulsive powers from statute. They may have other functions as well, for example the NCA has a statutory function to disseminate intelligence and information to law enforcement agencies.

These permanent investigative bodies differ from regulatory agencies in that their primary function is to investigate, not to regulate.

I will concentrate primarily on the Commonwealth and New South Wales investigative agencies as they are probably more relevant to my audience today; however, the general principles of administrative review applying to the other agencies will be the same.

Regulatory agencies

A number of regulatory agencies also have investigative powers granted to them in support of their regulatory role: in the Commonwealth sphere, the Australian Securities Commission and the Trade Practices Commission are two of the best known and influential of these agencies. Similar regulatory agencies exist at the state level.

Administrative Law generally

The Commonwealth system of review of administrative decisions has evolved through the establishing of the Administrative Appeals Tribunal,[6] and the office of the Ombudsman,[7] and the introduction of a codified judicial review system[8] and provision for access to administrative records.[9]

The development of the systems in the states has not kept pace with the Commonwealth: while all states have Ombudsman's offices and freedom of information legislation, only Victoria has established an Administrative Appeals Tribunal,[10] and only Victoria and Queensland have enacted judicial review legislation.[11]

On the other hand some of the Commonwealth administrative law enactments have not kept pace with more recent developments in the states. It is noteworthy that the Australian Law Reform Commission is conducting a review of the *Freedom of Information Act* 1982.

Common law review

In reviewing a decision under the common law (in an application for a declaration, an

injunction, or one of the prerogative writs of *mandamus*, *certiorari* and prohibition), a court is generally not able to examine the merits of the decision being reviewed. The court is limited to reviewing whether the decision was, or will be, made fairly, within the statutory power, and made according to law.

The Administrative Decisions (Judicial Review) Act

Decisions of an administrative nature made or proposed or required to be made under an enactment may be reviewed under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).[12] Other administrative acts which may be challenged are the making of reports and recommendations required by legislation and conduct engaged in for the purpose of making a reviewable decision.

Subsection 3(2) of the Act provides that a reference to making a decision includes:

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing.

A reference to a failure to make a decision is to be construed accordingly. Subsection 3(1) also provides that failure to make a decision includes a refusal to make the decision.

Decisions excluded from review

Decisions included in any classes of decisions set out in Schedule 1 of the AD(JR) Act are not reviewable under the Act. Some categories relevant to investigative agencies are decisions made under the *Telecommunications (Interception) Act* 1979 (Cth) and decisions regarding the assessment or calculation of tax.

Further, Schedule 2 sets out categories of decisions that, while still reviewable, are not ones for which the reasons for decision may be obtained under section 13 of the AD(JR) Act. These categories include (i) decisions relating to the administration of criminal justice, including decisions in connection with the investigation or prosecution of any person for any offences against a law of the Commonwealth or of a Territory, and (ii) decisions under a law of the Commonwealth or of a Territory requiring the production of documents, the giving of information or the summoning of persons as witnesses.

Further, individual Commonwealth statutes may contain provisions which attempt to oust the jurisdiction of the Act. One such provision is section 42 of the *Financial Transactions Reports Act* 1988 (Cth).[13] The *National Crime Authority Act* 1984 (Cth) does not exclude the operation of the AD(JR) Act, however, section 57 of the NCA Act varies the operation of the AD(JR) Act, most importantly by providing that an application for review must be made within five days of the applicant becoming aware of the matter to be reviewed.

The Administrative Appeals Tribunal

The Administrative Appeals Tribunal can only review decisions where review by the AAT is specifically provided for in the enactment establishing the decision maker or governing its procedure.[14]

Specific review mechanisms in empowering enactment

In addition to the general methods of review outlined above, there are often specific review mechanisms provided for in the enactment providing the powers of investigation.

One such review mechanism is contained in section 32 of the *National Crime Authority Act* 1984 (Cth). This section provides a right to apply to the Federal Court to seek a review of the Authority's decisions in certain circumstances. This provision provides for a review to ascertain whether there has been an error of law in reaching the decision, however other enactments may provide for a full merit review. The provision of a specific avenue of review does not usually exclude the possibility of review by way of application under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) or under the common law.

Grounds for review

Taking Into account an irrelevant consideration

An order for review may be sought on the ground that "an irrelevant consideration was taken into account in the making of the decision". It is well established at common law that a decision may be invalid where an irrelevant consideration has been taken into account.[15] Decisions made under a Commonwealth statute may also be reviewed on this ground under section 5(2)(a) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

Whether a matter is relevant or irrelevant is to be determined by construction of the legislation conferring the power.[16] A broad construction has been given to unconfined discretion, and therefore to the matters which may be taken into consideration in arriving at a decision.[17]

Failing to take into account a relevant consideration

This ground of review is available both under the AD(JR) Act[18] and the common law.[19] For a successful review on this ground, the applicant must show that the matter was relevant to the exercise of the power, and that the decision-maker was obliged to consider that matter before making a decision, that the decision-maker was, or ought to have been aware of the matter, and that the decision-maker failed to take the matter into account in making the decision

Bad faith and fraud

Bad faith and fraud are grounds for review under both the AD(JR) Act and the common law. Bad faith involves deliberate dishonesty, corruption or malice. A finding of bad faith or fraud completely vitiates the decision or ruling that it infected.[20]

Unauthorised purpose

An authority exercising a power conferred by a statute is bound to exercise the power for the purposes for which the power is conferred, and an exercise of the power for a different purpose is invalid.[21] The AD(JR) Act formulation of this principle is that an order for review may be sought in respect of "an exercise of a power for a purpose other than a purpose for which the power is conferred".

Unreasonableness

A decision may be reviewed under the AD(JR) Act and at common law for unreasonableness. To be reviewed on this ground, the exercise of power must be so unreasonable that no reasonable person could have so exercised the power.[22]

Error of law and want of jurisdiction

At common law, review is available for error of law on the face of the record, and for want of jurisdiction (whether the error in assuming jurisdiction was one of fact or law, or on the face of the record or not).

Under the AD(JR) Act, review is available for error of law, whether the error appears on the face of the record or not. Administrative action is reviewable under section 5(1)(c) of the AD(JR) Act for want of jurisdiction.

Breach of natural justice

Natural justice, also known as the duty of procedural fairness, arises where a body is exercising a power which may "destroy, defeat, or prejudice a person's rights, interests or legitimate expectations". The test is the nature of the power, not the character of the proceedings.[23]

Natural justice is a right to bring evidence before and to put submissions to the decision-maker on the decision to be made, and sometimes to cross examine other witnesses. There is no "absolute" content of natural justice, rather the content is dependent upon the type of decision being made and the circumstances of its making. In general, the more drastic the effect of the decision on a person's rights, the greater content of their right to natural justice.

Policy aspects of powers of investigation

There are a number of policy considerations underlying the grant and use of investigative powers, and views on how these considerations should be balanced often differ. The two major policy considerations are (i) the citizen's rights to privacy and confidentiality, and (ii) the legitimate needs of the government to ensure its laws are effectively enforced and to ensure that breaches of its laws are effectively investigated.

The report of the Commission of Inquiry Into Possible Illegal Activities and Associated Police Misconduct (better known as the "Fitzgerald Inquiry") described the tension between the two policy considerations:

> The problem is that law enforcement involves values and interests which often conflict.
>
> First, there is a desire to preserve and protect equality, privacy, reputation, freedom of thought, freedom of conscience, freedom of expression and religious and political freedom as well as the rights to personal security, liberty and fair trial which traditionally include the presumption of innocence, a right to remain silent and for serious offences, the right to trial by jury.
>
> Secondly, there is the right of the individual to protection by the State. There is a powerful public interest in opposing the spread of illegal drug trafficking, official corruption and other organised crime. The apparent conflict between these interests is accentuated by the manner in which the discussion on them is conducted. The debate over the

> formulation of policies and law relevant to crime tends to become emotional at the thought of crime on one hand and a loss of civil liberties on the other.[24]

The rights to privacy and confidentiality have received considerable attention over the past 20 years, and developments such as the appointment of a Commonwealth Privacy Commissioner attest to the importance that is placed on this area. The interests of privacy will tend towards having reasonable limits placed upon the use and scope of the powers of investigation.

However, privacy is not an absolute right, and other public policy elements tend towards giving investigative powers a wide scope and active role. Investigative powers are enacted in support of one or another area of law. The policy behind that other area of law also supports the grant and wide use of the investigative powers: for example, the powers of the Australian Taxation Office are supported by the requirement of the government to raise revenue.

Judicial attitudes to investigations

In a large number of cases, judges have acknowledged the reality of investigations: that they are, of their very nature, wide ranging; that they are investigations, not judicial determinations of disputed facts; that they must chase a number of leads, many of which will be fruitless; that they must investigate allegations that have not yet been proved and that may never be proved, or may be proved false.

One such acknowledgment was made in *Melbourne Home of Ford*:

> In the case of a matter that may constitute a contravention, the chairman may not know the constitutive facts of a contravention (if there has been one) and he may ultimately ascertain that there has been no contravention in the conduct or transaction which he is investigating. Because his attention has been drawn to a particular act or transaction which warrants investigation and because he has reason to believe that the person to whom the notice is given is capable of furnishing information relating to the matter under investigation he is engaged in a function of investigation, not in a task of proving an allegation. The power conferred by section 155(1) is in aid of that function and is a power which authorizes inquiries both wide in scope and indefinite in subject matter. It is an investigative power which is under consideration here and it is not possible to define a priori the limits of an investigation which might properly be made. The power should not be narrowly confined.[25]

And further:

> The investigative power may properly be exercised by inquiring into the existence of facts which do not themselves constitute a contravention or deny the possibility of a contravention. The power may properly be exercised to ascertain facts which may merely indicate a further line of enquiry, or which may tend to prove circumstances from which an inference can be drawn as to the existence of facts which have a more immediate and proximate relationship to the matter under investigation.[26]

As to the subject of the investigation being able to review every step of the investigation, it has been said:

> It is of the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry.[27]

In *Ross v Costigan*, Ellicot J stated[28]

> In determining what is relevant to a Royal Commission inquiry, regard must be had to its investigatory character. Where broad terms of reference are given to it, as in this case, the Commission is not determining issues between parties but conducting a thorough investigation into the subject matter. It may have to follow leads. It is not bound by rules of evidence. There is no set order in which evidence must be adduced before it. The links in a chain of evidence will usually be dealt with separately. Expecting to prove all the links in a suspected chain of events, the Commission or counsel assisting, may nevertheless fail to do so. But if the Commission bona fide seeks to establish a relevant connection between certain facts and the subject matter of the inquiry, it should not be regarded as outside its terms of reference in doing so.
>
> This flows from the very nature of the inquiry being undertaken.

Courts are however concerned with abuse of power. In *Clinch v Inland Revenue Commissioners* it was stated:

> One of the vital functions of the courts is to protect the individual from any abuse of power by the executive, a function which nowadays grows more and more important as governmental interference increases.[29]

However, even taking into account the need to control excesses of power:

> The court's jurisdiction is not to set the course of an investigation but to call a halt if it is shown that the investigation exceeds the powers conferred. Short of that point, the protection of the corporate citizen from harassment rests in the good sense of the repository of the power.[30]

The decision to investigate

The subject of an investigation does not have a right to present a case that he or she should not be subject to such an investigation by the investigating body *R v Coppell; Ex parte Viney Industries Pty Ltd* (1965) VR 630.

There is no right under the common law for a person under investigation to request disclosure of the reasons for the commencement of an investigation, the evidence to support those reasons or the name of the person making the accusation.[31]

Courts will, however, carefully scrutinise the source of the authority to investigate. In *Marriah v State Drug Crime Commission*[32]

it was held that the written notice that was the source of the power of the Commission to investigate a relevant drug activity did not by its own terms identify that activity by reference to the relevant allegations or circumstances or otherwise. The written notice upon which the Commission relied to found its power to conduct the investigation was not a notice authorised by section 25(1)(a) of the *State Drug Crime Commission Act* 1985 (NSW) and no relevant drug activity was referred to it for investigation by that document.[33] Thus the whole investigation was flawed for want of jurisdiction.

In *Ganin v New South Wales Crime Commission*[34] it was argued that the granting of the reference of the matter in question to the Commission was beyond power, tainting the whole investigation. It was held that the reference was not in fact beyond power. However, in arriving at that decision, the Court looked at the decision to grant the reference.

Kirby P observed:[35]

> The final attack on the jurisdiction of the Commission was that the Court on review, would conclude that the Management Committee had erred in being satisfied that "ordinary police methods of investigation into the matter are unlikely to be effective": See section 25(2).
>
> The question is not whether this Court is of such a view. By the statute, the decision is committed to the Commission. On review, the Supreme Court would only be authorised to intervene if the decision of the Commission in this regard was so unreasonable that no reasonable decision-maker could arrive at it, or involved the use of the power conferred on the Commission disproportional to the purposes of the power: cf *A-G (NSW) v Quin* (1990) 170 CLR 1 at 35; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41; cf *In the Application of Bryant* (unreported, Supreme Court, Qld, 6 January 1992), per Ryan J, at pp 20f, 42.

The use of compulsory process

In *Ross v Costigan*[36] the court held that the summonsing of witnesses to appear before a royal commission was a "decision" under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and was reviewable under the Act. In *Lloyd v Costigan*[37] it was further held that Lloyd had not established grounds for review of a summons to appear. To succeed, Lloyd would have to show that there was no possible question the royal commissioner could ask Lloyd which was relevant to his terms of reference or which bore upon a line of enquiry being pursued by him in good faith.

The recipient of a notice requiring the production of books has a genuine interest in seeking to avoid the obligations placed on him or her by the notice and is a person aggrieved by the decision to issue the notice.[38] Where a person is subject to an investigation, either as a target or as a person capable of assisting in an investigation, it is probable that the person would be aggrieved by a relevant decision.[39]

In *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)*[40] the Full Federal Court considered in detail the power of the TPC to issue a summons and the validity of such a summons.

> Ordinarily, when a question arises as to the validity of a s. 155 notice issued under the first limb, three

> questions fall for consideration: (1) whether there is a "matter that constitutes, or may constitute a contravention"; (2) whether the Commission, the chairman or the deputy chairman (as the case may be) has reason to believe that the person to whom the notice is given "is capable of furnishing information, producing documents or giving evidence relating to" that matter; and (3) whether the information required to be produced or the evidence required to be given (as the case may be) relates to that matter.
>
> The first two of these questions are material to the existence of the power to issue a notice, the last to the manner of its exercise.[41]
>
> ...
>
> Provided the necessary relationship exists between the matter and the information or documents required, the notice is not open to objection on the grounds that it is burdensome to furnish the information or produce the documents.[42]
>
> ...
>
> Notices are to be reasonably, not preciously, construed and the terms used in notices will ordinarily take their meaning from the commercial circumstances in which the notices are given.[43]

The onus of showing that a notice (and any other use of powers) complies with the empowering enactment lies on the investigating agency.[44]

It should also be noted that the exercise of the powers depends upon the statute granting the power. It is to this statute that one should first turn when seeking to attack or justify a use of the power. Each statute is couched in different terms - for example the *National Crime Authority Act* 1984 (Cth) subsection 28(7) restricts the powers granted by the section to being exercised only for the "purposes of a special investigation". This brings into play a different test to that associated with section 155 of the *Trade Practices Act* 1977 (Cth), which requires reason to believe that a person is able to furnish information or produce documents relating to a matter that constitutes or may constitute a contravention of the Act.

Natural justice

A party is entitled to natural justice in the conduct of a hearing and what is required by natural justice depends *inter alia* on the nature of the inquiry, the subject matter and the rules under which the authority in question is acting.[45]

A witness before an investigative body is not entitled to be informed in advance of the questions to be asked, or of the use to which his or her answers or documents may be put, or of the relevance of his or her answers or documents.[46] Further, there is no requirement that the investigator supply all information to a person in possible jeopardy of an adverse finding before he or she is asked to contribute to the investigation.[47]

It has been held that there is no common law right for proceedings which might adversely affect a person's reputation to be held in private and there was no miscarriage of the discretion to hold the hearing in public. In arriving at this decision, NSW Chief Justice Gleeson stated:

> There is a fallacy in passing from the premise that the danger of harm to reputation requires the observance of procedural fairness to the conclusion that fairness requires that proceedings be conducted in all respects in such a way as to minimise damage to reputation ... our ideas of fairness in judicial procedure do not encompass a requirement to protect people from adverse publicity.[48]

Natural justice does not require that the suspected person or persons be allowed to be present throughout the whole of the hearing process in order to cross-examine witnesses, give evidence in reply or make submissions before any findings are made.[49]

Good faith

Investigative powers must be used in good faith and for the purpose of the investigation of the matter referred to the body, which cannot go off on a frolic of its own.[50]

Challenging relevance of questions or documents required to be produced

If the documents sought are not relevant to the investigation, it is not sufficient for the investigating agency to be acting *bona fide*. However, the criterion of relevance is to be applied in accordance with the (very wide) concept of investigation explained in *Melbourne Home of Ford v Trade Practices Commission*[51] and *Lloyd v Costigan*.[52]

The relevance of documents sought by way of notice is to be determined by an objective examination and not by the person served with the notice.[53]

An investigative agency does not take part in the accusatory process and does not determine the rights of parties in the way that a court does. Relevance of questions put to a witness or documents sought to be produced in relation to the investigation cannot be tested against defined pleadings and relevance may not strictly be an appropriate term.[54]

Severance of invalid portion of notice to produce

Where a document or other thing required to be produced by written notice is not relevant to an investigation, the requirement to produce that document or thing is invalid. However, provided that requirement is severable, the remainder of the notice remains valid. Where the requirements contained in the notice are divided into numbered paragraphs each dealing with different matters, there is no reason why an invalid paragraph should invalidate the other paragraphs.[55]

Review of listening devices and telephone intercepts

Two of the most intrusive powers available to certain law enforcement agencies are the power to listen into the private conversations of persons through the use of listening devices and the interception of telecommunications. The intrusiveness of these powers requires that they are only used in circumstances where the infringement of civil liberties is justified. Further, the nature of the powers requires that they be subject to close scrutiny, before and after the grant of the warrants authorising the listening device or the interception of telecommunications.

In New South Wales, the use of listening devices is governed by the *Listening Devices Act* 1984 (NSW). Section 5 of this Act prohibits the use of listening devices to listen to or record private conversations.[56]

This prohibition is lifted where a person has obtained a warrant from the Supreme Court to use a listening device. To obtain a warrant, the applicant must first believe or suspect that an indictable offence has been, is about to be, or is likely to be committed, and that the use of a listening device is necessary for the investigation of the offence or for the gathering of evidence. Before granting the warrant, *the Court* is to consider the following:

- the nature of the offence
- the effect of the use of the listening device on the privacy of any person
- the alternative means of obtaining evidence and the effectiveness of those means
- the evidentiary value of the expected product of the listening device
- any previous warrants sought or granted.[57]

The Attorney-General of New South Wales or a prescribed officer (in effect, this function is performed by the Solicitor-General) must be served with details of any warrant being sought, and the Court is not to grant the warrant unless it is satisfied that the Attorney-General has been so served, and that the Attorney-General has had an opportunity to be heard in relation to the granting of the warrant.[58] This provision has the effect of allowing the Attorney-General to review all warrants before they are granted and to represent the public interest in the hearing of the application for the warrant.

After the warrant has been executed, the person to whom the warrant was issued must report in writing to both the Court and the Attorney-General.[59] If, after receiving that report, the Court is satisfied that the use of the listening device was not justified and was an unnecessary interference with the privacy of any person, the Court may direct the person authorised to use the listening device to supply to the subject of a recording such information regarding the warrant and the use of the listening device as the Court specifies.[60]

The interception of telecommunications is governed by the *Telecommunications (Interception) Act* 1979 (Cth). This Act prohibits the interception of a communication passing over a telecommunications system, and then provides an exception for (amongst other things) interception pursuant to a warrant.[61]

The application for a telephone interception warrant must be accompanied by an affidavit setting out the facts and grounds the application is based on, and details of previous applications and warrants in relation to the person and service and the result of those applications and warrants.[62]

Telephone interception warrants can be obtained for class one offences which are defined as:

- murder, or an equivalent offence
- kidnapping, or an equivalent offence
- a narcotics offence
- an ancillary offence in relation to murder, kidnapping or narcotics
- an offence into which the NCA is conducting a special investigation.

Warrants can also be obtained for class two offences which are defined as:

- offences punishable by life imprisonment or imprisonment for a maximum of at least 7 years, and involving:
  - loss of life or serious risk thereof;
  - serious personal injury or serious risk thereof;
  - serious damage to property in circumstances endangering the safety of a person;
  - trafficking in prescribed substances;
  - serious fraud; or
  - serious loss to the revenue of the Commonwealth or of a state or the ACT
- offences against Part VIA of the *Crimes Act* 1914 (computer crimes)
- an ancillary offence in respect of the above.

Before granting a warrant in relation to a class one offence, the judge must be satisfied that there are reasonable grounds for suspecting that a particular person is using or is likely to use the service, that the material to be intercepted would be likely to assist in connection with the investigation of a class one offence in which the person is involved, and that some or all of the information could not be appropriately obtained by using other methods of investigation.[63]

Before granting a warrant in relation to a class two offence, the judge must be satisfied that there are reasonable grounds for suspecting that a particular person is using or is likely to use the service and that the material to be intercepted would be likely to assist in connection with the investigation of a class two offence in which the person is involved, and further, must consider the following factors:

- the potential invasion of the privacy of any person
- the gravity of the conduct being investigated
- the value to the investigation of the material likely to result from the intercept
- the alternative investigative methods available, and their previous use in the investigation
- how much the use of alternative investigative methods is likely to assist the investigation
- how much the use of alternative investigative methods is likely to prejudice the investigation.[64]

Review of records by Ombudsman

Each agency is to keep a register of all telecommunications interception warrants granted to its officers. The Ombudsman is required to inspect the records of the Commonwealth agencies, at least twice a year, to ensure that the agency has complied with the record keeping and destruction requirements of the Act. The Ombudsman must report on this inspection to the Attorney-General. The Ombudsman may also report to the Attorney-General any other contraventions of the Act that he or she discovers.

Reports to Commonwealth Attorney-General

A Commonwealth agency obtaining an interception warrant must give a copy of the warrant (and a copy of any revocation of a warrant) to the Commonwealth Attorney-General. In addition, within three months of the ceasing of the warrant, the agency must report to the Attorney-General on the use made of the information obtained from the interception, and of the communication of that information to any person outside the agency.

Both state and Commonwealth agencies must make an annual report to the Commonwealth Attorney-General on all interceptions.

The decision to prosecute

The Federal Court is reluctant to interfere in the criminal process by exercising review pursuant to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), reflecting the common law concept of justiciability.

In *Smiles v Commissioner of Taxation (Cth)*[65] Davies J held that the court will not interfere by way of judicial review in the ordinary process of a prosecution unless exceptional cause for doing so is shown. Section 5 of the AD(JR) Act is not an appropriate vehicle for the control of abuse of process in the court of a state as that is a matter for the courts of the state.

This decision was applied in *Jarrett v Seymour*, the court also stating:[66]

> Moreover, this case is concerned with a particular area of the criminal process, that is, the discretion to institute criminal proceedings, where collateral intervention, as was sought here, should be allowed only in very special situations. There are cogent, and obvious, policy considerations underlying the reluctance of civil courts to interfere collaterally with the initiation of a criminal prosecution: see for example, *Barton v The Queen* [(1980) 147 CLR 75].

It is always open to the applicants to challenge, after the institution of criminal proceedings against them, the validity and propriety of those proceedings in the courts exercising criminal jurisdiction once charges have been formulated and filed and the issues in those proceedings have been defined.

> Courts exercising criminal jurisdiction have for many years had power to examine whether the processes of the criminal law have been commenced or exercised in bad faith or as an abuse of process.[67]

There is no doubt that there can indeed be injustice or unfairness to an accused in being charged and put on trial without reasonable grounds and that an action for damages for malicious prosecution does not necessarily remove the injustice or unfairness.[68]

Nevertheless intervention is relatively rare. As the Federal Court has stated:

> Time and again judges of the High Court and this Court have made it clear that the Court will not interrupt or interfere with criminal proceedings except in special circumstances.[69]

In *Yates v Wilson*[70] Mason C.J. delivering the judgment of the High Court said:

> It would require an exceptional case to warrant the grant of special leave to appeal in relation to a review by the Federal Court of a magistrate's decision to commit a person for trial. The undesirability of fragmenting the criminal process is so powerful a consideration that it requires no elaboration by us. It is a factor which should inhibit the Federal Court from exercising jurisdiction under the Administrative Decisions (Judicial Review) Act 1977 (Cth) and as well inhibit this Court from granting special leave to appeal.

The use of coercive powers once proceedings have commenced

Early decisions of the High Court held that the use of compulsory powers while a matter was within the cognisance of a court was *ultra vires* the grant of the powers and constituted a contempt of court.[71] These decisions were made on the basis that once the matter was before the courts, the act of fact finding was an exercise of judicial power, and was no longer an administrative function. In *Melbourne Steamship Co Ltd* Griffith CJ went so far as to say:

> In my opinion, when the Attorney-General has formally instituted a prosecution in this Court in respect of an alleged offence, the power as well as the purpose of sec. 15B is exhausted so far as regards the persons whom the Attorney-General alleges to have committed the offence for which he prosecutes, whether they are made parties to the suit or not.[72]

This position held sway until recently,[73] to the extent that in *Pioneer Concrete*,[74] at first instance it was held that the service of a notice to produce on a respondent in proceedings brought under the *Trade Practices Act* 1977 (Cth) by a private litigant was beyond the power vested in the Trade Practices Commission and was a contempt of court.

When *Pioneer Concrete*[75] reached the High Court, that Court held that there was no evidence that the notices were issued as an aid to or for the purposes of the proceedings, or that there was any intention to interfere with the course of justice, or that there was any real risk the notices would do so.

The Court held that the use of notices was not an exercise of judicial power and was within the power granted by section 155 of the *Trade Practices Act* 1977. Gibbs CJ and Brennan J held that an inquiry into facts which are the subject of pending proceedings is not necessarily an exercise of judicial power, and that under section 155 the Commission cannot determine the facts, or apply law to them, in any way that is binding. Mason J stated: "And I do not accept the suggestion made by Barton J in *Melbourne Steamship* (at p 346) that once the subject matter has passed into the hands of the courts it is immune from legislative and executive action".[76]

The High Court examined the issue again in *Environmental Protection Authority v Caltex Refining Co Pty Ltd*,[77] where the Court was divided over the validity of the issue to defendants in current proceedings of notices to produce documents for the purpose of those proceedings.

Mason CJ and Toohey, Brennan and McHugh JJ held that the notices were valid. Deane, Dawson and Gaudron JJ held them invalid on the ground that the relevant section did not "empower an authorised officer to require the production of documents for the purpose of furnishing

evidence in existing proceedings" as that is governed by the procedures of the court in which the prosecution is commenced.[78]

In arriving at the decision that the notices were valid, Mason CJ and Toohey J stated: "As the court's own process can be used to compel production, resort to the statutory power for the same purpose cannot amount to an abuse of process".[79] Later they said:

> It would be artificial to say that it is permissible to issue a notice requiring production of documentary material with a view to ascertaining whether a breach of the statute or a condition of a licence has taken place but it is impermissible to issue a notice with a view to providing evidence of such a breach. And, if it be permissible to issue such a notice for that purpose before the commencement of proceedings, as we think it is, it must be permissible to do so after proceedings have commenced.[80]

Brennan J observed:

> There is no abuse of a court's process in a party taking advantage of a legitimate means of obtaining evidence to be used in a pending litigation. If the documents to be produced pursuant to the notice had been seized under a search warrant, it could not be suggested that the use of the search warrant was an abuse of process. Nor can the service of the notice under s29(2)(a) be so described.[81]

Similarly, McHugh J noted:

> Obtaining evidence under a statutory power for the purpose of assisting a party in pending litigation does not necessarily constitute an interference with the procedure of the courts. The evidence gathering procedures of a party are not limited to the use of court procedures. No interference with the processes of the courts or the course of justice occurs merely because a party avails itself of a statutory power to obtain evidence during the course of pending litigation. the mere use of such a power during the pendency of litigation is not a contempt of court even where the sole purpose of the exercise of the power is to assist a party to obtain evidence for use in that litigation. To constitute a contempt, the party must exercise the power in such a way that it interferes with the course of justice. Thus, there might be contempt if the exercise of the statutory power 'would give such a party advantages which the rules of procedure would otherwise deny him'.

The other justices in the majority similarly expressed the sentiment that the exercise of a power may constitute a contempt of court if that exercise interfered with the course of justice. From this, we can see that not every use of an investigative power after proceedings have commenced will be invalid, but rather one must examine how the use of the power relates to the proceedings and whether they interfere with those proceedings. For example, using a statutory power to require a party to disclose its defence would almost certainly constitute an interference with the course of justice and be beyond power.

These principles leave a large degree of uncertainty and investigative agencies

should act carefully in using compulsory powers where matters are before the xourt.

Reportings of findings and dissemination of information

Until recently the law was that, in an investigation, a body is not bound, before it makes a report or charges a person, to give the person an opportunity of answering or explaining matters which if unanswered or unexplained might give rise to adverse findings.[82]

However, in *Annetts and Anor v McCann and Ors*,[83] the High Court virtually overruled *Testro Brothers v Tait*, saying:[84] "It is beyond argument that the view of the majority in that case would not prevail today".

Natural justice only requires that submissions may be made in respect of any potential adverse finding against the person making the submission and not in the whole of the subject matter of the investigation.[85]

A report affecting the commercial or business reputation of a person (being legal rights or interests of the person) gives rise to the obligation to accord the person procedural fairness by appraising him or her of the allegations and providing the opportunity to rebut them.[86]

Where a person has given evidence in private before an investigative body, the transcript of that evidence should not be given to a third party without the witness being given an opportunity to be heard, if the release would be contrary to that person's interests. That opportunity need not be provided, however, where the purpose of providing the transcript (for example to a law enforcement agency for the potential laying of charges) would be frustrated by the witness being aware of the transcript being provided.[87]

Regulatory and investigative agencies (eg NCA) are given significant powers to investigate activity within their purview. Due to the nature of investigations, the agencies must be free to exercise them in a wide range of circumstances. However, the checks and balances of administrative review of these powers, and close scrutiny by the courts of their exercise endeavours to ensure that they are not abused.

I would like to thank Andrew Throssell (Proceeds of Crime Officer, NCA) for his considerable assistance in preparing this paper.

Endnotes

1 *Shell Co of Australia Ltd v FCT* (1931) 44 CLR 530, *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, *Melbourne Home of Ford Pty Ltd v TPC* (1979) ATPR 40-107.

2 L E Hallet *Royal Commissions and Boards of Inquiry* (1982), p 17.

3 *Lockwood v Commonwealth* (1954) 90 CLR 177 at p 181.

4 *Mannah v State Drug Crime Commission* (1987) 13 NSWLR 28, at p 38.

5 *Royal Commissions Act* 1902 (Cth); *Evidence Act* 1910 (Tas); *Royal Commissions Act* 1917 (SA); *Royal Commissions Act* 1923 (NSW); *Commissions of Inquiry Act* 1950 (Qld); *Evidence Act* 1958 (Vic); and the *Royal Commissions Act* 1968 (WA).

6 *Administrative Appeals Tribunal Act* 1975 (Cth).

7 *Ombudsman Act* 1976 (Cth).

8 *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

9 *Freedom of Information Act* 1982 (Cth).

10 *Administrative Appeals Tribunal Act* 1984 (Vic).

11 *Administrative Law Act* 1978 (Vic); *Judicial Review Act* 1991 (Qld).

12 Section 3(1).

13 This section reads:

> 42 The *Administrative Decisions (Judicial Review) Act 1977* does not apply to decisions under this Act, other than a decision by the Director under subsection 19(2) or (3).

14 *Administrative Appeals Tribunal Act* 1975 (Cth) section 25(1).

15 *R v Trebilco: Ex p FS Falkiner & Sons Ltd* (1936) 56 CLR 20, Latham CJ at 27, Dixon J at 32, Evatt and McTiernan JJ at 33; *R v War Pensions Entitlement Appeal Tribunal: Ex p Bott* (1933) 50 CLR 228, Rich, Dixon and McTiernan JJ at 242-243; *Parramatta City Council v Pestell* (1972) 128 CLR 305, Menzies J at 323, Gibbs J at 327, Stephen J at 332.

16 *R v Trebilco: Ex p FS Falkiner & Sons Ltd* (1936) 56 CLR 20, Latham CJ at 27, Dixon J at 32, Evatt and McTiernan JJ at 33; *R v War Pensions Entitlement Appeal Tribunal: Ex p Bott* (1933) 50 CLR 228, Rich, Dixon and McTiernan JJ at 242-243; *Parramatta City Council v Pestell* (1972) 128 CLR 305, Menzies J at 323, Gibbs J at 327, Stephen J at 332.

17 See for example, *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1; *R v Australian Broadcasting Tribunal: Ex p 2HD Pty Ltd* (1979) 144 CLR 45.

18 *Administrative Decisions (Judicial Review) Act* 1977 (Cth) section 5(2)(b).

19 *R v Australian Broadcasting Tribunal: Ex p Hardiman* (1980) 144 CLR 13; 54 ALJR 314; 29 ALR 289; *Mutton v Kuring-gai Municipal Council* [1973] 1 NSWLR 233 (CA) per Jacobs P at p 241.

20 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208.

21 *Brownells Ltd v Ironmonger's Wages Board* (1950) 81 CLR 108, *Arthur Yates & Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37.

22 See *Administrative Decisions (Judicial Review) Act* 1977 (Cth) s5(2)(g) and *Parramatta City Council v Pestell* (1972) 128 CLR 305.

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

24 Fitzgerald Report 1989, p 172.

25 *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)* (1980) 47 FLR 163 per Brennan, Keely and Fisher JJ at p 173; see also *MF1, MF2 & MES v National Crime Authority* (1991) 105 ALR 1; 33 FCR 449.

26 *Melbourne Home of Ford Pty Ltd v Trade Practices Commission* (1980) 47 FLR 163 at p 174; see also *MF1, MF2 & MES v National Crime Authority* (1991) 105 ALR 1; 33 FCR 449.

27 *National Companies and Securities Commission v News Corp Ltd* (1984) 156 CLR 296 per Mason, Wilson and Dawson JJ, at pp 323-324.

28 (1982) 41 ALR 319 at p 334.

29 *Clinch v Inland Revenue Commissioners* [1974] 1 QB 76 per Ackner J at p 92.

30 *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)* (1980) 47 FLR 163 per Brennan, Keely and Fisher JJ at p 174.

31 *Maxwell v The Department of Trade and Industry* (1974) 1 QB 523 at 534 per Lord Denning MR; *Parry-Jones v Law Society* (1969) 1 Ch 1 at 8 per Lord Denning MR; *Wiseman v Borneman* (1971) AC 297; *Re: Standhill Development and Finance Limited* (1965) VR 415 at 415 per Starke J.

32 (1987) 13 NSWLR 43.

33 Hope JA at 49.

34 (1993) 70 A Crim R 417.

35 At p 437.

36 (1982) 49 FLR 184.

37 (1983) 48 ALR 241.

38 *Salter v National Companies and Securities Commission* (1989) WAR 296.

39 *Ricegrowers Co-operative Mills Ltd v Bannerman* (1981) 56 FLR 443 at pp 447-448.

40 (1980) 47 FLR 163.

41 *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)* (1980) 47 FLR 163 per Brennan, Keely and Fisher JJ at p 172.

42 *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)* (1980) 47 FLR 163 per Brennan, Keely and Fisher JJ at p 173.

43 *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)* (1980) 47 FLR 163 per Brennan, Keely and Fisher JJ at pp 175-176.

44 *Re ABM Pastoral Company Pty Ltd* (1978) 3 ACLR 239.

45 *BHP Co Ltd v NCSC (No 3), Elders IXL Ltd v NCSC (No 2)* 10 ACLR 597.

46 *Mannah v State Drug Crime Commission* (1987) 13 NSWLR 28.

47 *Independent Commission Against Corruption v Aristodemou* (unreported) Supreme Court of NSW, 14 December 1989.

48 *ICAC v Chaffey* (1993) 30 NSWLR 21 at 28 and 29.

49 *NCSC v News Corporation Ltd* (1984) 156 CLR 296, see also *Connell v NCSC* (1989) 7 ACLC 748, *Connell v NCSC* (No 2) (1989) ACLC 755, *Sim v NCSC* (1988) VR 961; 6 ACLC 516.

50 *Riley McKay Pty Ltd v Bannerman* (1977) 31 FLR 129 at p 134; *Mannah v State Drug Crime Commission* at pp 39, 42; *Ross v Costigan (No 1)* (1982) 41 ALR 319 at pp 334-335; *Ross v Costigan (No 2)* (1982) 41 ALR 337 at p 351; *MF1, MF2 & MES v National Crime Authority* (1991) 105 ALR 1.

51 (1980) 47 FLR 163. See also *MF1, MF2 & MES v National Crime Authority* (1991) 105 ALR 1.

52 (1983) 48 ALR 241.

53 *MF1, MF2 & MES v National Crime Authority* (1991) 105 ALR 1 per Ryan J.

54 *McGuiness v Attorney-General (Vic)* (1940) 63 CLR 73 at p 86; *Mannah v State Drug Crime Commission* (1987) 13 NSWLR 28 at pp 37-41; *Ross v Costigan (No 1)* (1982) 41 ALR 319 at pp 334-335; *Ross v Costigan (No 2)* (1982) 41 ALR 337; *Lloyd v Costigan* (1983) 48 ALR 241 at p 244; *Melbourne Home of Ford v Trade Practices Commission* (1980) 47 FLR 163.

55 *Smorgon v ANZ Banking Group Limited* (1976) 134 CLR 475; *Re: Lindsay Toole and Co. (Wool) Pty Ltd* (1966) 84 WN (Part 1) (NSW) 318 per Street J at pp 320-321; *Re ABM Pastoral Company Pty Ltd* (1978) 3 ACLR 239.

56 The *Australian Federal Police Act* 1979 and the *Customs Act* 1901 allow AFP and NCA officers to apply to a judge to obtain listening device warrants for Commonwealth offences. There are similar safeguards and reporting requirements as in the NSW Act.

57 *Listening Devices Act* 1984 (NSW) section 16.

58 *Listening Devices Act* 1984 (NSW) section 17.

59 *Listening Devices Act* 1984 (NSW) section 19.

60 *Listening Devices Act* 1984 (NSW) section 20.

61 *Telecommunications (Interception) Act* 1979 (Cth) section 7.

62 *Telecommunications (Interception) Act* 1979 (Cth) section 42.

63 *Telecommunications (Interception) Act* 1979 (Cth) section 45.

64 *Telecommunications (Interception) Act* 1979 (Cth) section 46.

65 (1992) 35 FCR 405 at p 410.

66 (1993) 46 FLR 557 at 568.

67 *Jarrett v Seymour* (1993) 46 FLR 557 per Lockhart and Beaumont JJ at p 564.

68 *Barton v The Queen* (1980) 147 CLR 75 per Gibbs ACJ and Mason J at 96-97.

69 *Jarrett v Seymour* (1993) 46 FLR 557 per Sheppard J at p 573.

70 (1989) 168 CLR 338 at p 339.

71 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330; *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333.

72 At p 341.

73 See *Brambles Holdings Ltd v Trade Practices Commission* (1980) 44 FLR 182 and *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1980) 44 FLR 197.

74 (1980) 44 FLR 197.

75 *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460; 43 ALR 449; 57 ALJR 1.

76 57 ALJR 1 at p 7.

77 (1993) 68 ALJR 127.

78 At p 156.

79 At p 139.

80 At p 140.

81 At p 145.

82 *Testro Brothers v Tait* (1963) 109 CLR 353 at 364 per McTiernan, Taylor and Owen JJ; at 370-371 per Kitto J (by implication); and at 373-374 per Menzies J; *Footscray Football Club Ltd v Commissioner of Payroll Tax* (1983) 1 VR 505 at 511 per Lush J; *Re: Standhill Development and Finance Limited* (1965) VR 415 at 416 per Starke J; *Re: Pergamon Press Ltd* (1971) Ch 388 at 399 per Lord Denning MR.

83 (1991) 170 CLR 596, 97 ALR 177.

84 (1991) 170 CLR 596 at p 600.

85 See for example *Annetts and Anor v McCann and Ors* (1991) 170 CLR 596.

86 *Ainsworth V Criminal Justice Commission* (1992) 106 ALR 11.

87 *Johns v ASC* 116 ALR 567, particularly per Brennan J at 580.

ADMINISTRATIVE LAW AND THE INDEPENDENT COMMISSION AGAINST CORRUPTION

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Introduction

The creation of the Independent Commission Against Corruption (ICAC) was the result of a general community perception that government had not been functioning satisfactorily and that radical measures were required. This was reflected in the second reading speech of Premier Greiner when he said:

> In recent years, in New South Wales we have seen: a Minister of the Crown gaoled for bribery; an inquiry into a second, and indeed a third, former Minister for alleged corruption; the former Chief Stipendiary Magistrate gaoled forperverting the course of justice; a former Commissioner of Police in the courts on a criminal charge; the former Deputy Commissioner of Police charged with bribery; a series of investigations and court cases involving judicial figures including a High Court Judge; and a disturbing number of dismissals, retirements and convictions of senior police officers for offences involving corrupt conduct.
>
> No government can maintain its claim to legitimacy while there remains the cloud of suspicion and doubt that has hung over government in New South Wales. I am determined that my Government will be free of that doubt and suspicion; that from this time forward the people of this State will be confident in the integrity of their Government, and that they will have an institution where they can go to complain of corruption, feeling confident that their grievances will be investigated fearlessly and honestly.[2]

The determination to remove doubt and suspicion was significant. Perhaps more important was the objective to ensure integrity of government. However, integrity is an imprecise word and not amenable to legal definition or objective determination. It embraces all the activities of government, extending far beyond the problems identified in Premier Greiner's speech. Integrity involves the political and personal dealings of the government and its members requiring compliance with acceptable levels of morality and ethics, in addition to compliance with the law. If the ICAC was required to determine whether the appropriate level of integrity has been maintained there would inevitably be

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arguments and debate. Premier Greiner did not offer a definition of integrity but later stated in that same speech that.[3]

> The independent commission is not intended to be a tribunal of morals. It is intended to enforce only those standards established or recognised by law. Accordingly, its jurisdiction extends to corrupt conduct which may constitute a criminal offence, a disciplinary offence or grounds for dismissal. The commission's jurisdiction will cover all public officials. The term public official has been very widely defined to include members of Parliament, the Governor, judges, Ministers, all holders of public offices, and all employees of departments and authorities. Local government members and employees are also included. In short the definition in the legislation has been framed to include everyone who is conceivably in a position of public trust. There are no exceptions and there are no exemptions.

It is difficult to reconcile these two statements. As a consequence when these concepts were incorporated in the legislation, an inevitable and fundamental tension was created. It was made more difficult by a failure to identify the function of the Commission and its place in the legal and administrative structure. The ICAC was always intended to be more than a mere law enforcement agency. Indeed many people would be surprised that the language of law enforcement was used by the Premier and would argue that if this was relevant at all, it was but a minor part of the Commission's functions. Was it to be a body similar to the ombudsman with powers of determination or was it to be merely investigatory? Was it intended to identify appropriate standards of integrity and require that conduct meet those standards? These questions were not answered. It is now apparent that this muddling of concepts has created difficulties for the functioning of the ICAC and has brought antipathy from the courts.[4] This paper seeks to explain some of the problems and attempts to identify the complex considerations necessary before the Commission can be provided with a satisfactory structure. Depending on the powers which it is given, the rules of procedural fairness which apply to it may require redefinition. But the primary question is if the Commission is to have a role in ensuring integrity of government, beyond criminal conduct, what powers should it have to perform the task.

It is essential now that the opportunity is available to the Parliament to review the ICAC Act, that care be taken to identify the intended role of the Commission and the limits of the legitimate use of subjective judgment. Essentially, this will involve defining its capacity to make adverse findings about the conduct of individuals and identifying the legal basis for such findings. If the Commission is to have a role in supporting the integrity of government, the statute must provide that corruption is not limited to the breach of an existing law. Integrity of government is as much about the quality of decisions which relate to rights, dispose of resources or grant statutory permission, as it is about complying with a statute.

The ICAC Act requires integrity of government - a new control on administrative actions

The Commission was given a variety of functions in the 1988 Act. In exercising its functions the Commission was to regard the protection of the public interest and the prevention of breaches of public trust as its

paramount concerns.[5] The tension referred to previously is immediately apparent. The public interest is a variable concept capable of articulation in respect of particular issues but not amenable to the application of objective legal standards. Furthermore, on any issue there may be competing public interests requiring the Commission to balance and make choices. Although a breach of public trust may be easily identified in many cases, this may not be so in others where the perspective of the decision-maker may be relevant. There is, not yet, and I suspect there never will be, a legislated description of the concept.[6] It is relevant to ask why the legislature provided this fundamental object for the Commission when to implement it was likely to embroil the Commission in controversy. The reality may be that the Commission was always intended to exercise subjective judgments.

Section 13 - the catalogue of the Commission's principal functions - includes the advisory and educative roles which are consistent with an effective anti-corruption body not limited merely to investigation. The Commission was also empowered to investigate corrupt conduct but only if it was acting pursuant to a reference from Parliament could it determine whether corrupt conduct had occurred.[7] This limitation on its powers did not conform to any conventional model of an administrative body or tribunal.[8]

It is important that this power to make determinations was limited. It created difficulties in defining the true role of the Commission and its relationship to conventional administrative law doctrines. Although the Commission was to be required to investigate conduct - often conduct which was not "criminal" in nature - no guidelines were given as to its capacity to determine the character of the conduct. Unless the limited outcome derived from prosecution or disciplinary proceedings occurred the Commission's task did not lead to any formal act beyond reporting to Parliament.

It should also be remembered that the Ombudsman has power to determine the character of conduct which that office investigates and to bring in findings. Perhaps, because of the jurisdiction of the office we do not hear of problems of the type confronted by the ICAC.[9] It is appropriate to ask whether the ICAC should be different or whether in its area of jurisdiction it should be able to make determinations. The question should have been addressed in the original Act.

The legislative intention that the Commission would have concerns beyond corruption which involved criminal conduct is to be found in sections 8 and 9 of the Act, the sections which define its jurisdiction. Corrupt conduct is defined in section 8 to include conventional criminal activity including bribery, fraud and blackmail. Many other offences are included. So much was to be expected. But more was included - and it is of considerable significance. Conduct is also corrupt if it is a dishonest or partial exercise of an official function, constitutes or involves a breach of public trust or a misuse of confidential information. It is possible that many, including politicians, failed to appreciate that these matters had been included in the definition. The actions of Premier Greiner and Minister Moore were found by Commissioner Temby to be corrupt within section 8 being both partial and breach of public trust - findings which were supported by the Court of Appeal. If the Act was to make good the promise of bringing integrity to government this wide definition was essential, even if it intrudes into conventional administrative law doctrine and requires subjective judgments by the Commission.

There is no difficulty with dishonesty. But partial conduct and breach of public trust are concepts which have not been judicially defined. Both involve consideration of standards of behaviour which may be ascertained after appropriate enquiry. Only when a standard has been identified by reference to competing opinions (which may themselves be subjective) can an objective standard be applied. There is legitimacy in the idea that the Commission should be required to identify these standards (who else could do it) but there was a failure to make this clear in the legislation. There was a further problem. Although by 1988 it was reasonable to believe that the ordinary person would think such conduct was wrong, many would not have described it as corrupt.

There is a second limb to the definition of corrupt conduct. Conduct must not only come within section 8 but must not be excluded by section 9. This has been described as the "seriousness test". The concepts of criminal and disciplinary offences are readily understood. But what of "reasonable grounds for dismissing a public official"? That concept proved difficult when applied to ministers of the Crown and was made more so by the difficulties in the concepts of partial conduct and breach of public trust in section 8.

I have written elsewhere[10] that it is apparent that those who drafted the legislation were concerned that standards of public administration were under threat from activities which were not criminal. In a state which has no administrative appeals tribunal and where, in some areas, at least, there has been a demonstrated reluctance of the courts to intervene to circumscribe administrative action,[11] it is logical that the Commission should be concerned with gross abuses of the decision making power. There is a tendency for government decisions to be motivated by a political rather than a policy outcome. Integrity of government requires principled decisions, not those which serve a party's political objective or the interests of an individual.

The power to make findings of corruption - a limited capacity

The definition of corrupt conduct in the 1988 Act was primarily intended to provide the jurisdiction of the Commission. As I have indicated, only when Parliament required it was the Commission to attempt to determine whether corrupt conduct had actually occurred, and publish a finding to that effect. This structure was inherently unsatisfactory if the Commission was to function as a conventional administrative tribunal where a decision making function would be anticipated. If the intention was to address partial conduct and breaches of public trust by public officials including parliamentarians and ministers as well as criminal activity, the lack of a determinative capacity may limit its effectiveness.

Many complaints to the Commission and many investigations do not involve criminal conduct or that alone. Many reflect a decision making process which has been infected by an inappropriate concern for the benefits of the decision to persons or groups not legitimately part of the process. It has been said, and was central to the actions of Premier Greiner, that all decisions by politicians are partial "the political process is partial". If this is intended to suggest that party interests prevail over appropriate policy it reveals a significant malaise. This is not to suggest that the "political" position of the party in government may not be reflected in administrative action. Provided that position is reflected as a legitimate consideration in the decision, there is no difficulty even if the decision is thereby described as partial. But when the political position is irrelevant, the decision is flawed. It is clear that the ICAC Act *prima*

facie made all such decisions corrupt and depending upon the seriousness of the departure from an acceptable standard, defined them as corrupt conduct. However, when no standard existed by which to test the conduct a serious jurisdictional deficiency was revealed.

The first public investigation conducted by the Commission revealed part of the problem. It was concerned with the relationship between a developer, Balog, and Stait, the engineer and planner for Waverley Council. The decision and the response to it operated to mask the real difficulties confronting the Commission. There were likely to be few problems requiring the courts to intervene if the Commission was limited to investigating corruption, educating, and encouraging proper behaviour. But a body which determines the character of any conduct would inevitably confront powerful and significant interests, even if the determination has no legally binding effect.

The debate in *Balog v ICAC*[12] centred upon the capacity of the Commission to make findings of criminality or corrupt conduct in relation to an individual and publish them in a report to the Parliament. The trial judge and the Court of Appeal both said the Commission could make findings of corrupt conduct. Samuels JA said:

> I do not see how the [ICAC] could communicate the results of its investigations without stating whether it had accepted or rejected the allegations of corrupt conduct which it had been investigating.[13]

Clarke JA said:

> It seems to me that the power to investigate must include the power to evaluate the information gathered in the investigation and to reach appropriate conclusions. If it were otherwise the Commission would effectively be denied any useful function in those cases in which the investigation has revealed serious corrupt conduct.[14]

The High Court reached a different conclusion. In a joint judgment it said:

> the Commission is primarily an investigative body whose investigations are intended to facilitate the actions of others in combating corrupt conduct. It is not a law enforcement agency and it exercises no judicial or quasi-judicial function. Its investigative powers carry with them no implication, having regard to the manner in which it is required to carry out its functions, that it should be able to make findings against individuals of corrupt or criminal behaviour.[15]

Elsewhere in the judgment the High Court cautioned against vesting a power to make findings that a person may have committed corrupt conduct in a body which has coercive powers which may "be exercised in disregard of basic protections otherwise afforded by the common law".[16]

The Act is amended to allow findings of corruption in every case

This caution was not persuasive to the NSW Parliament. No doubt as a reflection of the continuing concerns about corrupt conduct but more importantly because of a concern that without a capacity to determine the character of the conduct the role of the Commission would be inhibited, the Act was amended. This occurred notwithstanding the public debate in which the Attorney-General had indicated that the High Court's decision reflected the original intention as to

the operation of the Act.[17] His view did not prevail and the Act was amended to provide that the Commission could determine whether conduct was corrupt in all cases.[18]

The amendments represented a significant step in the effective identification of the role of the Commission. However, it is now obvious that the full implications were not appreciated. As I have indicated, the Commission was previously limited primarily to investigation of corrupt conduct (except in the circumstance of a parliamentary reference) but was now expressly given the function of determining the character, which may include the legal character, of the conduct under investigation. That conduct may involve a criminal act, in which event the Commission must rule whether in its view that act has occurred. It may involve a finding as to one of the extended elements of the definition of corruption. Although a Commission decision carries no legal sanction inevitably it could have serious and lasting consequences. Consistent with the expectations reflected in the amendment it has been usual for the Commission's terms of reference for an investigation to require a determination as to whether corrupt conduct has occurred.

It is interesting to contemplate the extent of judicial review which may have occurred if the Act had not been amended. If sections 8 and 9 had been limited to defining jurisdiction there may have been less intervention by the courts. Interestingly no challenge to jurisdiction has been brought before a report was published. But with the capacity to make determinations, the lawful exercise of the functions would inevitably be closely scrutinised by the courts. This has occurred in relation to ministers[19] and a senior public servant.[20] The Commission has also been subjected to intense scrutiny with respect to the application of the rules of procedural fairness.

Greiner's case - no findings with respect to ministers unless criminal conduct - subjective view of the commission is irrelevant

By vesting the Commission with the capacity to make findings of corrupt conduct, the Parliament required the Commission to define, at least for its purposes, conduct which was partial and the nature of a breach of public trust. In so far as these concepts involve value judgments, and to differing degrees they both do, the Commission was being required to identify the limits of appropriate conduct for public officials. There is no difficulty in this provided the function is recognised as administrative and not judicial. The function was to be performed in the expectation that it would not only apply to appointed officials but also to elected officials including ministers. Indeed it is likely that the public expectation was that in so far as breaches of public trust were involved, it was primarily the activities of ministers which were sought to be examined.

In *Greiner v ICAC* the Court of Appeal[21] was comprised of Gleeson CJ, Mahoney JA and Priestley JA. Mahoney JA was also a member of the Court which heard *Balog's case*. It is arguable that there is a different perspective of the majority in *Greiner* to the view of the Court in *Balog*. Mahoney JA's views are consistent.

In *Greiner*, Gleeson CJ emphasises the fact that the Commission is not a court "but an administrative body that performs investigative functions and, in certain circumstances, makes reports".[22] But this is not all. He acknowledges that its determinations are fundamental to its task following the legislative amendment after *Balog's case*. However, primarily because of the absence of an appeal process, Gleeson CJ imposes strict rules on that determinative function. Unlike many

administrative decisions which legitimately reflect subjective views, Gleeson CJ finds that "Parliament has intended that adverse determinations should be made by reference to objective and reasonably clearly defined criteria".[23] If such criteria do not already exist, they cannot be created by the Commission, and no finding can be made.

It must be remembered that Greiner and Moore sought Metherall's appointment to the Environment Protection Authority to obtain a political advantage. Commissioner Temby found the conduct was both partial and a breach of public trust within section 8. Having found the facts as he did some might say this was not surprising. Gleeson CJ himself says:

> The Commission's findings of fact, in my view, were such that it was well open to him to conclude that the case came within the section.[24]

It is at least arguable that this finding reflects the subjective views of the Commission. There are no ascertainable legal criteria for the judgment made. Notwithstanding this finding in relation to section 8, Gleeson CJ held that because no ascertainable legal criteria for dismissal existed the requirements of s 9(1)(c) had not been fulfilled. He said:

> On the true construction of s.9, the test of what constitutes reasonable grounds for dismissal is objective. It does not turn on the purely personal and subjective opinion of the Commissioner.
>
> The context of s.9(1)(c) supports such construction. The immediate context is that of a section which deals with a number of matters, most of which are clearly capable of determination according to objective, ascertainable criteria: criminal offences, disciplinary offences and grounds for dispensing with or terminating services. That is the setting in which there is reference to grounds for dismissal. The wider context is that of legislation which exposes citizens to the possibility of being declared to have engaged in corrupt conduct; it should not be construed so as to make that outcome turn upon the possibly individualistic opinions of an administrator whose conclusions are not subject to appeal or review on the merits. Furthermore, the legislative history of the statute shows that it was Parliament's intention that the test be objective and that determinations should be made by reference to standards established and recognised by law.

The rationale for this approach has been discussed by Associate Professor Allars.[25] The author challenges many of the assumptions in the judgment. Many of her criticisms address the difficulties of analysing the decision by reference to accepted administrative law principles. The position may be that ultimately Gleeson CJ found the decision of Commissioner Temby unreasonable in the *Wednesbury* sense.[26] Indeed, it is unlikely that this is the correct analysis. If it is not, it may be difficult to appreciate some of the detailed criticisms made of the Commissioner's reasoning process - a process undertaken by an administrative body.[27]

With some differences and without canvassing the same matters, the judgment of Priestley JA is to similar effect. He ultimately found that because the test of "reasonable grounds" required the application of objective standards, and none existed in relation to dismissal of ministers,

the findings made were not open to the Commission. Priestley JA would not allow the Commission to define reasonable standards for itself.[28]

Mahoney JA adopted a different view. He accepted that the question was whether it would be reasonable for the Governor to dismiss the minister in the circumstances which the investigation revealed. Provided the answer given was open to the Commission, no error was revealed. His analysis is of some significance even when his conclusion was a minority view:[29]

> The reason for the difference was suggested by Mr Greiner in what he said to Parliament on 28 April 1992 ... The Commissioner, in his report confronted what was there said. He concluded that the standard of conduct in public life there adopted was not acceptable: at least, the view could reasonably be taken that it was not. The conclusion of the Commission was, in my opinion, one to which reasonably it could come. I am not able to say that, in coming to that conclusion, the Commission acted beyond the limits of what was reasonable.[30]

Greiner has been followed by Grove J in *Woodham v ICAC*.[31]

I have indicated that the *Greiner* decision has attracted some critical academic attention. For clear and substantial policy reasons the Commission did not appeal to the High Court. It would seem likely that special leave would have been granted and it may be suggested that the Court would have assessed the competing arguments with a greater concern as to the nature of the error if any committed by the Commission. It is perhaps regrettable that the "political realities" did not allow the High Court to consider the matter.

Central to the Commission's reasoning in not taking an appeal was the expectation that there would be legislative amendments at an early date to deal with these problems. Premier Greiner having resigned, there was little reason to pursue an argument which in practical terms was sterile. It was decided that the matter should be left to the legislature. The Commission could not have anticipated that the government would prove unable to put forward any legislative remedies until more than two years after the problem was identified.

Procedural fairness

The ability to make findings of corrupt conduct gave significant power to the ICAC. Obviously, with that power came the requirement that the Commission afford procedural fairness in its investigation. One inquiry, *The Report on Investigation into North Coast Land Development*, provoked considerable controversy. It also led to a number of prosecutions.[32]

In *Glynn & Ors v ICAC*[33] a challenge was brought to the Commission before it had published its report alleging, *inter alia*, that the plaintiffs had been denied procedural fairness. Problems had occurred during the course of the public hearings which meant that the representation for the company Ocean Blue Club Resorts Pty Ltd and various of its executives changed. An experienced solicitor advocate took up the cause of Ocean Blue. He asserted that he found great difficulty in presenting his client's case to Assistant Commissioner Roden.

The difficulties are reflected in the transcript of the hearing, of which relevant sections are produced in the judgment. It was said

that these difficulties were so great that Ocean Blue was denied a fair hearing. In his judgment, Wood J said:

> In substance it was submitted that the Commissioner behaved in a manner which was so intemperate, abrupt, condescending and sarcastic and involved so many interruptions in the submissions, as to leave a reasonable observer with the apprehension that he had preconceived views, was biased against OBCR, and did not permit Mr White a fair opportunity to press his case. This is a serious submission to advance, and it requires reference to some portions of the transcript.[34]

He then discussed the principles to be applied to the complaint made. Recognising the value of the oral argument,[35] the court said that "where a party is deprived of a proper opportunity to pursue his case, intervention may be necessary to ensure that natural justice is done".[36]

The transcript was examined and Wood J concluded:

> While these passages do reveal unfortunate and undignified expressions of irritation and, on occasions, sarcasm, which to some extent were understandable at the end of a long and wearing inquiry in which many technical and legalistic points were taken, they also reveal in a telling way that the Commissioner was carefully listening to and trying to follow the submissions which were being put. When they seemed irrelevant or incorrect, they were stopped and tested. It is clear that the learned Commissioner was doing his utmost to keep the inquiry to relevant matters and to understand what was being put. Others may well have behaved with more patience, politeness, and awareness of the possible risks attached to ill temper and sarcasm, but when read in their context and in the light of the foreshadowed issues, I do not believe that the Commissioner passed over the line between robust control of the inquiry and unfair and uneven-handed treatment.[37]

The case is of interest not so much for the debate reflected in the judgment but because of the assumptions underlying the proceedings. If the Commission was limited to performing an investigative function without a capacity to determine the character of particular conduct would the complaint have arisen? What if any rules are provided in relation to a mere investigation?[38]

The litigation brought by Detective Chaffey[39] is of greater significance. Although Chaffey failed, the decision is a reminder that the rules of procedural fairness are not confined. The courts will modify them to meet the circumstances of a particular tribunal depending upon that tribunal's function and the matter under consideration.

The facts are well known but may be briefly described. Chaffey and others were police who were to be adversely named by Smith, a notorious criminal, in evidence which the Commission knew would be given during the course of the investigation into the NSW Police Service. Smith had indicated, before giving his evidence, that although he would subject himself to cross-examination, he would not answer all questions. Specifically, he would not answer questions which implicated non-police in criminal activity.

Before the Commission had finally decided how to deal with the problem, proceedings were commenced. Cole J made two declarations finding that the Commission had acted contrary to the principles of natural justice by permitting counsel assisting to disclose the allegations during his opening address and by allowing Smith to give evidence when it was known he would not answer all material questions to be put to him.

The finding by Cole J surprised many including Gleeson CJ.[40] Accepting that the Commission was bound to observe the rules of procedural fairness, Gleeson CJ observed that this did not mean its actions had necessarily to be perceived as fair to all. Observing that fairness in judicial procedure does not encompass a requirement to protect people from adverse publicity, Gleeson CJ determined that the rules of procedural fairness did not require the Commission to investigate the matter in private. Provided, when it decided whether to sit in public, the Commission acted fairly and its decision was reasonably open to it, the Court could not intervene.

Mahoney JA (agreeing with Gleeson CJ) recognised the Commission's function as quasi-judicial.[41] He concluded that in deciding whether to hear evidence in private procedural fairness must be afforded. However, agreeing with Gleeson CJ, he did not suggest that procedural fairness required a private hearing - the matter was one for the discretion of the Commissioner.

Kirby P took a different approach. He reasoned that the Commission was not a court from which it followed that the principles of open hearings which applied to courts may not apply to the Commission. He held that procedural fairness included a right to protection of a person's reputation. Unless Kirby P is suggesting the common law includes such a right (which may be the situation), his decision is perhaps another application of the *Wednesbury rule.*[42]

It is apparent that the judgments of Gleeson CJ and Mahoney JA reflect the conventional view of the limits of procedural fairness. Kirby P would significantly expand them. It is appropriate to recognise that if the ICAC is to be viewed as a special form of administrative body with extraordinary powers of investigation and determination, it may be legitimate to require it to observe different rules of procedural fairness. This is the fundamental position adopted by the judgments of both Cole J and Kirby P and it has considerable force. However, it could only be accepted if there is an agreed position as to the nature and role of the Commission.

Future directions

It should now be apparent that despite the good intentions of Premier Greiner's speech, the legislation which created the Commission contained a fundamental problem. There was a failure to adequately identify and provide for its capacity to make decisions about the conduct of individuals. This came largely from the fact that the true nature of the body had not been defined. Was it a standing royal commission as some have suggested, was it an administrative tribunal with a special jurisdiction in relation to public corruption, or was it a lesser body limited to collecting evidence to be deliberated on by others? If its jurisdiction had been limited to conduct involving a crime there may not have been great difficulty. But it extended to actions and decisions which although not criminal involved partiality and breach of public trust.

Even when the problem emerged following *Balog's case*, the legislative amendments were not made after consideration of the appropriate role for the Commission. The

failure to do this has significantly contributed to the problems which the Commission has faced. For the reason that it has enormous power, it may investigate the Governor, judges and ministers of the Crown and require them to answer publicly to any allegation which may have been made, it could never appropriately be classified as an ordinary administrative body. Because it can make such potentially damaging findings after collecting evidence by means not available to courts, it is apparent that great care was required when defining the legal principles which should be applied to its tasks. These difficulties are the source of the divergent judgments in both *Greiner* and *Chaffey*. It can be confidently stated that unless this analysis is undertaken and effective endorsement of a revised legislative arrangement is made the Commission will continue to be subject to ill-informed and strident criticism and the courts will have difficulty formulating the rules which should control its functions. If this is the case, its work will be impaired.

The *Greiner* judgment was handed down in August 1992 - more than two years ago. There has been considerable public discussion about the outcome and it was decided that the Committee on the Independent Commission Against Corruption (the Parliamentary Joint Committee) should review the situation. It did this and published a report in May 1993. To date, nothing has been done. It is impossible not be critical of the delays. Perhaps it can be explained by the difficulties which are involved, some of which I have discussed. However, it is more likely that there is a lack of will to achieve an effective outcome.

The Parliamentary Committee report discussed ten issues. All are important. Eight issues were resolved to their satisfaction - two were not. These were the capacity of the Commission to make findings about individuals and the related question of whether an appeal mechanism should be established with a capacity to review findings of fact.

With respect to the problem of members of Parliament, the Committee's recommendation, adopting the submission of the Commission was that section 9 should be repealed. This would mean that all conduct, including partial conduct or a breach of public trust committed by a member of Parliament or minister could be investigated by the Commission leaving it to the Commission to identify conduct which was sufficiently serious to justify the application of its resources. This was an appropriate direction for amendment but was criticised by some, including some involved with the original legislation. The argument was raised that politics is about partiality and this amendment would conflict with the political process. Given the original Act was intended to restore integrity to government and accordingly was designed to extend to decisions which, although not criminal were infected by dishonest or partial considerations, this response is surprising. It suggests that the promised integrity may have proven troublesome in reality. Even if section 9 is amended it is to be hoped that the Parliament will not resile from the expectations raised by the Premier's speech in 1988.

The Committee found itself unable to resolve the question of whether the Commission should be able to make findings of corrupt conduct. One view was that the Commission should be limited to finding the primary facts. The contrary view - and the view advanced by the Commission - was that this would be too limiting. The different views are set forward and discussed in the Committee's report. The Hon. A. Moffitt Q.C. has provided a suggested definition of primary facts which

is complex and likely to provoke litigation - at least initially.[43]

I have previously expressed the view that if the Commission is to make findings of corrupt conduct difficulties will inevitably arise.[44] Later events have demonstrated this to be correct. It is interesting to contemplate the political outcome in *Greiner's* case if a finding of corrupt conduct had not been made. The conduct would nevertheless have been described as partial and a breach of public trust and within section 8 of the Act. Although Premier Greiner and Minister Moore may not have been found to be corrupt, it is inconceivable that significant political ramifications would not have occurred. As it happened, the nature and consequences of the factual findings made by Commissioner Temby were completely overshadowed by the debate about his capacity to make a finding of corruption. It is arguable that although the finding of corrupt conduct was important to the immediate political process, it was the conduct itself which was more significant and required the response of the Parliament. Would that response have been any different without the formal finding?

In the ultimate, the difficulty which the ICAC has faced is that it has been required to investigate and adjudicate upon matters which are the responsibility of the conventional investigation and court processes. In my opinion, the object of the legislation is adequately provided if the Commission is able to investigate and report the facts which it has found which must include conclusions as to the motivations of persons and the outcome they intended. It must be able to determine the truth of the situation. By this means utilising its special powers to obtain information, the Commission should be able to expose corrupt activities and will be likely, as has already occurred to significantly improve the quality of public administration.

The legislation should avoid the necessity for the Commission to reach ultimate conclusions about conduct described by reference to defined legal concepts. If it exercises such a function there is little to distinguish it from a court. Full appeal rights would be irresistible and the Commission would be in reality a parallel "criminal justice" system. Perhaps there is a need to examine the effective workings of the criminal justice system when dealing with public corruption but it should not be modified by accident. This should only occur after an informed community is aware of the nature of the proposed changes. Whether the ultimate powers of the Commission require the development of the rules of procedural fairness will depend upon the changes which are made. There may be significant reasons to conclude that special rules should be created.

Endnotes

1 It is appropriate to disclose that I have appeared in a number of the matters referred to in this paper and have been for two years an Assistant Commissioner of the ICAC.

2 Hansard, 26 May 1988, p 673.

3 Hansard, 26 May 1988, p 676.

4 See the discussion in Allars: "In Search of Legal Objective Standards: The Meaning of *Greiner v ICAC*", *Current Issues in Criminal Justice*, Vol 6 No 1, p 107.

5 *Independent Commission Against Corruption Act 1988*, s 12.

6 See the discussion in Margaret Allars "A New Morality in Administrative Law", in *Administrative Law & Public Administration: Happily married or living apart under the same roof?*, edited by Stephen Argument, at p 250.

7 *Balog v ICAC*, (1990) 169 CLR 625.

8 These provisions were later changed following *Balog v ICAC* - see discussion below.

9 *Ombudsman Act*, 1976 (Cth) s 15(1); *Ombudsman Act*, 1974 (NSW) s 26

10 "Elements of Corruption in Local Government", by PD McClellan, March 1994.

11 See the chapter by Wilcox J "Retrospect and Prospect", in *Environmental Protection and Legal Change*, edited by Tim Bonyhady, 1992, at p 217.

12 *Balog v ICAC* (1989) 13 NSWLR 356; (1990) 169 CLR 625.

13 *Balog v ICAC* (1989), supra, p 361.

14 *Balog v ICAC* (1989), supra, p 380. It is interesting to review the statement having regard to the later correspondence between Clarke JA and the Parliamentary Joint Committee included in the Committee Report on the Review of the ICAC Act - May 1993.

15 *Balog v ICAC* (1990) 169 CLR 625 at 636.

16 *Balog v ICAC* (1990), supra, p 635.

17 *The Australian*, 29 June 1990.

18 *Independent Commission Against Corruption Act 1988*, ss 13(2) and (5).

19 Premier Greiner and Minister Moore: *Greiner v ICAC* (1992) 28 NSWLR 125.

20 *Woodham v ICAC*, unreported, Supreme Court of New South Wales, Grove J. 16 June 1993.

21 *Greiner v ICAC* (1992), supra, p 125.

22 *Greiner v ICAC* (1992), supra, p 129.

23 *Greiner v ICAC* (1992), supra, p 130.

24 *Greiner v ICAC* (1992), supra, p 144.

25 *Faimess and Objectivity in the Independent Commission Against Corruption: A Tribunal in Need of Judicial Discipline*, paper presented to a seminar held by the NSW Chapter of AIAL and the NSW Bar, 9 June 1993.

26 *Wednesbury Corporation v Ministry of Housing and Local Government* (1965) 1 All ER 186.

27 *Public Service Board of NSW v Osmond* (1985-86) 159 CLR 656.

28 *Greiner v ICAC* (1992), supra, pp 192-3.

29 *Greiner v ICAC* (1992), supra, pp 175-6.

30 *Greiner v ICAC* (1992), supra, p 176.

31 *Woodham v ICAC*, unreported, NSW Supreme Court, Grove J, June 1993.

32 One of the prosecutions *R v Glynn* (1994) 33 NSWLR 139 is of particular interest, relating to political donations.

33 *Glynn & Ors v ICAC*, unreported, Wood J, 22 March 1990.

34 *Glynn & Ors v ICAC*, supra, p 43.

35 *Vakuata v Kelly* (1989) 63 ALJR 610; (1989) 167 CLR 568; *Escpbar v Speidelberi* (1956) 7 NSWLR 51.

36 *Stead v State Government Insurance Commission* (1986) 67 ALR 21.

37 *Glynn & Ors v ICAC*, supra, pp 55 and 56.

38 The recent investigations by Carmel Niland in relation to the conduct of Mr Griffiths raises this point for consideration.

39 *ICAC v Chaffey* (1993) 30 NSWLR 21.

40 *ICAC v Chaffey* (1993), supra, p 27.

41 *ICAC v Chaffey* (1993), supra, pp 60 and 61.

42 See the comment by Allars, "Faimess and Objectivity in the Independent Commission Against Corruption: A Tribunal in Need of Judicial Discipline", supra.

43 "Primary facts shall include the fact of the occurrence of any event, including any conversation or the existence of any state of mind, including the intention of any person, whether such fact is established by direct evidence or is inferred from other evidence and a finding of primary fact shall include a finding that any fact did not exist, but shall not include any finding or opinion concerning the quality of the conduct, conversation, state of mind or intention of any person".

44 The Independent Commission Against Corruption - Lessons from the First Twelve Months, 1990.

WHITHER ADMINISTRATIVE LAW?

Roger Wilkins[*]

Paper presented to a seminar held by the NSW Chapter of AIAL, Sydney, The State of Administrative Law: Current Issues and Recent Developments, 4 November 1994

Let me say a little about socio-economic context, and then I want to do a *tour d'horizon* of some of the more prominent issues that fall under the general rubric of "administrative law". In deciding what to focus on my judgement is inevitably influenced by the fact that I am a senior bureaucrat. But I should make it equally clear that my views are not necessarily those of the bureaucracy or of the NSW Government.

When the Kerr Committee reported two decades or more ago, the economic and administrative milieu in this country was importantly different from the situation today. Kerr and Wilenski recommended a systematic overhaul of the system of "administrative justice" in the Commonwealth and in NSW respectively. Although it may be an oversimplification of the issues involved, it will suffice for me to observe in this context, that the 1960s and 1970s saw an agenda for reform of administrative justice based on a premise that the state was expanding its influence and power over ordinary citizens; and that the traditional modes of accountability through the courts and Parliament were inadequate.

In the 1990s we need to come to grips with issues of administrative justice in a different milieu:

- a milieu in which the emphasis is on fiscal restraint and greater productivity;
- where governments are expected to provide greater value for the same money;
- where bureaucrats are required to increase productivity and guarantee citizens a reasonable quality of service;
- where risk-taking in terms of process is generally seen to be worthwhile and necessary to meet the required outcomes and produce the required results;
- a milieu in which contracting out, privatisation or at least market testing of "government" services is part of mainstream policy;
- a milieu in which government is seriously questioning the need for its participation in a whole range of activities;
- a world in which traditional "command and control" methods of regulation are being challenged and voluntary and market-based mechanisms are being examined as more efficient methods of control.

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Importantly it is a milieu in which the relationships and interdependencies of people and associations and institutions are more varied and complex. Society tends to be richer, more pluralistic, more variegated. At the same time there is less homogeneity and consensus about values and interests.

The divide between public and private has become blurred, perhaps fictitious. For example, is the College of Surgeons a private or public body? Does it have private or public functions?

Also, perhaps the boundaries between the public sector and the private sector are becoming increasingly less significant, so that the distinction between private and public law no longer makes good sense.

On the other hand it is also a milieu in which greater accountability and transparency of government administration is required. For example:

- courts have an expanded role and a greater preparedness to intervene;
- conduct and decision-making is subject to review by the Ombudsman and far more robust scrutiny by the Auditor-General;
- a variety of tribunals have the charter to review decisions;
- there are more liberal laws of standing;
- there is scrutiny by parliamentary committees;
- in NSW there is also the Independent Commission Against Corruption;
- there is freedom of information legislation and annual reports legislation.

This is not to mention the panoply of internal checks and balances and scrutiny by Treasury, Office of Public Management, Cabinet Office, Industrial Authority, etc.

Now, I am not going to make one of those speeches where a senior public servant complains about the unreasonableness and the enormous costs associated with these accountability mechanisms. Rather, what I want to suggest to you is that these mechanisms may be becoming irrelevant to where the main game is taking place.

I actually believe that the main difficulty confronting bureaucrats in relation to all this accountability has less to do with the machinery and more to do with the fact that there is a profound intolerance to risk-taking in public administration on the part of the public and the media. It is normally no answer to something that goes wrong to say - "Well we took a risk, a calculated risk, and it didn't come off". More effort is, therefore, demanded on avoiding making mistakes, than actually trying to achieve results.

In contrast, a private company might behave quite differently. Sure, there may be some very cautious shareholders. But there is equally a greater understanding that risk taking is acceptable. The normal canons of decision theory and rational calculation are more readily accepted. I do not have a ready explanation for the collective psychology of this phenomenon. Perhaps it is a function of the fact that individual instances that go wrong are more readily pictorialised and understood than a vast quantity of unproblematic cases.

In themselves the Ombudsman and Auditors-General are not problems. The

problem is that they locate problems and mistakes (that is their job), and the public thinks that public administration should make no mistakes.

There are however some more systematic problems with the existing systems.

1 I would say that there is an obsession with "process" in the current systems of review and not a focus on results.

2 There is a focus on "trouble cases", problem cases and not overall performance. By and large these are looked at as isolated and discrete cases not as part of a system.

3 There is a focus on "natural justice" and "due process".

In the introduction to her very thoughtful study of administrative procedures, Gabrielle Ganz[1] has written:

> The greatest disservice that administrative lawyers can render administrative law is to mould the administrative process in their own image. The rules of natural justice have a great deal to answer for in this respect. They are modelled on the gladiatorial combat between two parties before an impartial judge ...

Now maybe it is perfectly understandable that there is a focus on process. After all, we would soon be complaining even louder if review by the courts involved a review of the justice of the product rather than the process. So it is understandable that the courts and other review bodies, with the notable exception of the Ombudsman, have tended to focus on whether proper processes have been followed and the requirements of the law have been complied with. They tend to concentrate on whether decisions are lawful, fair and rational.

For example, Lord Diplock in *Council of Civil Service Unions and Minister for Civil Service*[2] said:

> Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of proportionality which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well established heads that I have mentioned will suffice.
>
> By "illegality" as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (*Associated Provincial Picture Houses Ltd and Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it ...
>
> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the administrative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

You can see that the courts are in a bind. Either they review process and make canons to guide process or there is little left for them to say unless they are prepared to embark upon review on the merits. That means of course that merit review is sometimes simply disguised as process review. A court might say that a decision-maker failed to take relevant matters into account or took irrelevant matters into account. That is getting pretty close to review on the merits. If you were also to introduce the doctrine of proportionality you would have a much more formidable tool for reviewing the merits.

All this has tended to drive bureaucrats off into a further pursuit of integrity of process. In some areas there is an absolute obsession with process. The great problem with this is that it becomes an end in itself. People worry more about the process than the products of their decisions. And they tend to build processes that are judicially water-tight. All this is very counter-productive stuff.

The other thing that is worth putting into this equation is that the character of a lot of important "public disputes" is not bilateral, it is not adversarial in that simple sense. It tends to be multilateral or "polycentric" to use Lon Fuller's terminology. These are typical of planning disputes and disputes about the environment and natural resources. To attempt to reduce such disputes to adversarial disputes with a defined *lis inter partes* is to misdescribe and misrepresent what people are disputing.

It seems to me that one of the most critical issues confronting legal policy in the area of administrative law is whether we should attempt to draw a boundary between the territory where administrative law should work and where private law should work. Of course if you decide to do that then the next issue is where or how to draw the line.

The English courts have been engaged in an attempt of sorts to do that. They have special public law procedures available under Order 53 of the High Court. This special procedure is to apply to "public bodies". Some commentators like Sir Harry Woolf[3] see it as important to make out this distinction. His view is that it is necessary to treat public law disputes as importantly different from private law disputes. Here he sees some analogy with the sharp divide found in continental legal systems such as the French *droit administratif*. Other commentators such as Sir William Wade

find the distinction to be one that needs to be got rid of.

Now I have no definitive answer to this question. But let me throw a few of the relevant considerations around.

What is attractive about Woolf's view is that on the face of it bodies that are carrying out actions in the wider public interest or the interest of a large segment of the public do seem to require some different and more expeditious treatment than private and relatively discrete disputes.

On the other hand, in terms of the real world, it is not easy to know where to draw the line. To begin with, as I have already noted, more and more functions are being "contracted out" or "privatised" - to the extent that this type of distinction becomes vague and uncertain. Second, the idea that some bodies are performing "private" functions and some "public" is just wrong - it is more a spectrum of "shades" than a clear dichotomy.

The English Court of Appeal decision in *R and Panel on Takeovers and Mergers, ex parte Datafin PLC and Anor*[4] rather illustrates the difficulty. In that case the Court held that the decisions of the self-regulatory City Take-Over Panel were subject to review by the Court, and that its decisions could be quashed on the conventional grounds of irrationality or unfairness. The essence of the decision was that in the view of Court the Panel performed a "public duty".

It would be odd or inequitable if we got the result that where you go to a public hospital rather than a private one or travel on a public bus rather than a private one, or go to a state owned bank rather than a private one - then you have a different range of remedies and legal rules applying to you, compared to the person who went private.

It could be argued that a better and more productive route is in fact to ensure the adequacy of private law remedies for persons aggrieved. Citizens should be assured of remedies based on contract/consumer protection where "privatised" or "corporatised" bodies deliver services.

The traditional approach to public services in English law has been, more or less, to eschew contract as a remedy. This can be traced back to a decision in 1778[5] in which the court decided that the Postmaster-General did not enter into any contract for the delivery of post. In subsequent decisions the courts tended to look at whether there was an action in tort for breach of statutory duty. So, individuals could sue only if the statute imposing the duty had been intended to create private rights for their benefit.

Ian Harden[6] sums up the position by saying:

> ... the law of contract often does not apply when the provider of a public service is carrying out a public legal duty. This is so even in the circumstances - which superficially look highly contractual - of a consumer paying for a marketed public service. Exceptions to this principle are of uncertain scope. Furthermore, the legal framework which does govern the legal entitlements of individuals to public services is a patchwork, composed of accidents of history and legislation and of discretionary judicial decision-making about the sort of breach of statutory duty.

A robust application of the law of contract and of ordinary private law remedies is what some would contend for. Certainly, in NSW

where we have corporatised entities (eg the Water Board) we have been at pains to make the contractual relationships as real as we can and to ensure maximum exposure to consumer/contractual remedies. There is certainly some artificiality about the artifice of a "deemed contract" published by the Government to users. Perhaps we could go further and allow people to negotiate individual arrangements with the Water Board.

But the reality probably is that unless you have a contestable market, with alternative suppliers, there will always be a need for government to safeguard the position of the consumer.

The other thing is (and maybe this is a partial explanation for the old common law position on public services) that perhaps there are some commodities or services that are just so essential for people that some different obligation or some different form of remedy needs to operate. Can you really just cut off someone's water or electricity indefinitely? Perhaps there are basic things like health care, education, water and electricity where freedom of contract cannot be allowed full sway. Michael Taggart[7] has reminded us of the old common law doctrines that placed special obligations and rules on innkeepers and carriage drivers. And governments will need to consider this in privatising and contracting out basic public services.

Certainly there seems to be scope for requiring a definition of entitlements from utilities to citizens and the provision of a credible and efficient grievance handling system. Whenever government contracts out the business of providing services to citizens it really is critical to agree clearly:

1 what the price and quality is going to be;

2 that there will be an accessible and independent means of redress.

Now it may be that this should simply be the Ombudsman. Certainly there is a need for that function and the government in NSW has insisted on this.

I have to say, too, that this is not simply a matter of providing citizens with redress. It is also fundamentally a question of governments being assured that those they franchise or contract with are carrying out their part of the bargain. So it is prudent commercial practice as well as providing a safeguard to consumers.

More generally, you will be aware of the "Citizen's Charter" or "Guarantee of Service" which is being introduced in various jurisdictions. This is a significant development and it is important for administrative lawyers to understand that this trend is deadly serious and not just "flim flam".

The interesting thing to consider here is whether the clear definition of entitlements - "guarantees" of service - may come to ground some right of action in administrative law based on "legitimate expectation". The concept of "legitimate expectation" in administrative law is potentially a powerful juridical concept. It can be taken a long way. And if you think about it - it has some analogy with the development of estoppel in contract law and equity. So maybe you can get some sort of convergence here between private law remedies based on contract/estoppel and public notions of legitimate expectation. I don't know, but convergence is an interesting alternative to Woolf's view, and maybe that's what needs to happen.

Let me outline a little of the dynamics of this policy development. This move toward requiring a better definition of citizen's

entitlements on expectations from government service providers got going for a few different reasons.

1 Politicians were concerned that the drive for greater efficiency that came out of the 1980s was not being translated into terms that the ordinary voter could understand. It was necessary to reduce this to simple guarantees about services to individuals.

2 Treasuries and central policy agencies were concerned to give greater autonomy to service delivery agencies and even in some cases to "contract out" these functions - but there needed to be robust outcome measures of value for money. There needed to be some way of saying "there is the money, this is what you are expected to produce - get on with it and we will measure your performance by your ability to achieve these results". The guarantee of service is defining those outcomes or results.

3 There is a third force behind this which is more profound. In a way it is the recognition that increasingly it is unrealistic to expect governments, cabinets to manage the affairs of government. The idea that the ballot box will present you with a group of people who have the background and experience to run a business the size of multi-nationals with enormously diverse businesses, is not really on. But that is only to say that politicians and cabinets should be concentrating on strategic policy. That is, on goals, aims and outcomes and not on ways and means.

That, as you will appreciate, brings with it a potentially radical re-orientation of the traditional Westminster system. The minister under this model is no longer the "manager" of the service provider - rather he or she is the representative of the citizen/consumer. And his or her job is to ensure that the systems are in place to deliver services at a certain price and quality.

It is, I think, important for administrative lawyers to understand that a lot of what you may take as a "fad" is not so. It is actually part of a more profound shift.

One last observation about this public/private split. I said earlier that there is not likely to be a dichotomy but a rich variety or spectrum of possibilities. That is something that is worth reinforcing from another angle - there is an increasing recognition of the "public duties or responsibilities" of private institutions and private capital. Just to give one recent example. Hilmer[8] recommends that governments introduce a regime to allow third parties to force access to essential facilities. That is not a regime that will be restricted to publicly owned facilities. It will also include privately owned facilities, and the number of those is likely to increase.

Other obvious examples are professions and financial institutions. It is interesting to note that in these cases institutions run as Ombudsmen have been either imposed by governments or have been self-imposed.

I do not know that I would subscribe to Harry Woolf's rather imperialistic view of administrative law - the sort of view that comes out of the *Datafin case*. One reason is that it seems to me that it provides the judiciary with too wide and ill-defined a brief to go roving. It therefore promotes greater uncertainty in the law. The other reason is that the traditional paradigms of administrative justice based on "natural justice" are not necessarily well adapted to

providing paradigms for all decision making processes, as Ganz claimed.

My preference would be to see a greater role for private law remedies in relation to consumer/citizen grievances and for administrative law to remain within the relatively traditional confines of core public sector activities.

One of the major issues that strikes me grows out of some of the remarks above. There is a prevailing view that representative democracy is moribund and that what is needed is greater participatory democracy.

In concrete terms what does that mean for administrative lawyers? It means that there should be greater access and opportunity for decisions to be made by the community, or at the very least greater accountability and opportunity for citizens to challenge government decisions and have them reviewed.

I have some reservations about this shift, although I also want to acknowledge that there is a legitimate basis for concern. My reservations, you may find quite predictable coming from a senior public servant. I actually think that governments should govern and that accountability needs to be systemic and not *ad hoc*. I think there is a great danger that participatory democracy actually means government by vociferous interest groups and not by the people. I also think that the authority to make decisions that compel or coerce needs to be clearly based on the authority of Parliament. It may be old-fashioned but it seems to me undesirable to entrust unelected bodies with the power to make decisions which are in the nature of value judgements, that affect sizeable sections of the public.

Having said that, I do acknowledge that there is a need to ensure transparency and openness. I happen to agree with the President of the Court of Appeal that there should mostly be a duty to give reasons for decisions where one is clearly acting as a minister or public servant affecting the rights or interests of a public citizen.

I also think that participatory democracy makes good sense if it means providing people with the opportunity to make known their interests and concerns. In many ways it is exemplified in public inquiry processes and consultation processes. I also think that it makes good sense for government to encourage communities, associations or groups of people to take on and solve problems for themselves - not to rely all the time on governments to fix things. Voluntary solutions of this sort are to be encouraged. I do, however, have concerns about the use of third party rights or the *actio popularis*.

The rationale for third party rights is not without respectable foundation. After all, the common law has longstanding recognition of the right of any citizen to enforce the criminal law, presumably because committing a crime was viewed as doing a wrong to society or the community as a whole.

In other cases the common law relied on the Attorney-General or some person authorised by the Attorney-General to look after the more diffuse and community wide interests. The credibility of that mechanism has to be questioned. The Attorney-General is a member of the government and is presumably going to think twice about granting someone permission to attack or embarrass the government.

However to provide "open slather" has the difficulty of creating a climate of uncertainty and there is no doubt that the potential for delay and uncertainty has caused some businesses not to locate in NSW and Australia. You may say that may be a good

thing if they were afraid of the impact of the operations under planning and environment legislation.

No one is suggesting that people should not be subject to proper controls and obligations. But if you consider third party rights you will see that anyone at all can bring an action. There is really no way that someone can negotiate or mediate a settlement. Because there is always the chance that having settled with A, B then comes through the door and commences a challenge. Moreover a plaintiff may have no concrete interest at all in the proceedings - there may be no stake in the dispute, nothing that the person has to trade or bargain about. It is quite unlike an ordinary civil action.

It seems to me that another argument against them is the fact that they sometimes are seen as the answer to government accountability. In a sense it is like creating "private attorneys-general". I have heard people say - "let's just have third party rights and then there will be no need for the government to worry about having to do anything - we can just say that it is up to the interest groups". This is what I mean by the need for systemic accountability.

There are positive ways around the need to set up an *actio popularis*. Harry Woolf has suggested something like a DPP or Ombudsman who can bring or screen actions.

Let me conclude on a more positive note by mentioning two initiatives in tandem, which seem to me to offer the single best hope for an accessible and responsive administrative justice, the Ombudsman and the process of mediation.

Despite the political gamesmanship that currently characterises the NSW Parliament as it heads toward a general election, there is a small but important and uncontroversial amendment to the Ombudsman Act currently going through. What the amendment does is give to the Ombudsman a clear remit to engage in mediation of disputes between citizens and government agencies. It is arguable that the Ombudsman already has this power. You may, in fact, be surprised to hear that there is any doubt that he does not already engage in mediation. But there is a doubt, and this amendment does two things - it lays to rest the uncertainty and it sends a clear signal to agencies that mediation is something to be pursued.

The amendment has the enthusiastic support of the Ombudsman and the Government. It should also gain the enthusiastic support of the public if it is given currency and taken seriously. For it is my contention that mediation is the best hope we have for responsive and affordable redress of legitimate grievances that the public have about public administration.

There are, however, some pitfalls that need to be understood and guarded against. And I will elaborate on some of those. First, let me develop a little more fully my thesis that mediation of disputes is the best hope we have for responsive and affordable administrative justice.

This is not an isolated piece of law, an isolated development. There is a general trend emerging for alternatives to the courts in the area of administrative justice. Let me give you some examples.

- Mediation has been introduced into the proceedings of the Land and Environment Court.
- Mediation has been built into the new Disabilities and Community Services regimen.

- Mediation is now annexed as a means of solving disputes in the Supreme Court.

- Mediation is a method of dispute resolution that corporations and whole sectors, including utilities are taking seriously (eg the Banking Ombudsman).

There is not, to my knowledge, a comprehensive audit of the success of various mediation approaches. But there are certain features that recommend it as the way to go.

1 It tends to be cheaper and less time consuming.

2 It is much more flexible - the parties can "customise" their solutions and are not tied into rigid remedies.

3 It frees up the courts to deal with the really intractable disputes.

Let me mention some down sides, or, as I said earlier, some pitfalls:

1 In the area of public law it may be said that the dispute is not a private one susceptible to "compromise". There are important issues of right and public duty and responsibility that should not simply be "traded away".

Indeed it may even be said that this encourages a "quasi-corruption" akin to buying rights and entitlements for public money.

2 In many areas of public law dispute, what you have are plaintiffs who represent "sections of the public" or the public interest. As I have mentioned before, we are increasingly seeing the notion of "third party rights" being mooted. Predominantly you find this in environmental and planning challenges. Suppose you "mediate" this - what comfort do you have that someone else is not going to "come through the door". Indeed, you will not even have a *res judicata*. Hence, public disputes show themselves to be problematic once again at being assimilated to "agreement" or "compromises".

3 Despite the idea that public servants may be tempted to "throw money" at vexatious claimants to get them to go away, I suspect the truth is quite the opposite. There are powerful forces pulling the typical public servant away from mediation and negotiation and into the courts. To begin with, he or she will be held accountable by a variety of mechanisms (eg Auditor-General) for the proper use of public funds. It is much easier to pay by coercion than to make a judgement that it is "a reasonable thing to do all things considered". It is much easier to point to a court order. Of course politics is often seen as a reason for keeping things out of the courts - perhaps sending them off to be "laundered" through the mediation or arbitration process. But it also often figures as a reason to send things to court rather than make a politically embarrassing or problematic compromise.

It seems to me that there are also obvious problems that the Ombudsman would need to guard against in these circumstances. After all, if mediation fails, he or she may be required to investigate

or rule on the complaint. So there needs to be a careful and credible differentiation and isolation of functions within the Ombudsman's office.

The fact that the Ombudsman will presumably be able to exercise discretion in selecting those matters suitable to mediation is also an important safeguard. It should give the public and Parliament some confidence that matters of grave public interest are not being disposed of secretively or inappropriately. It should also provide public servants with some greater confidence that cases chosen for mediation will not be seen as inappropriate for compromise and settlement.

Endnotes

1 *Administrative Procedures*, Sweet and Maxwell, London, 1974, p 1.

2 1985 1 AC 374, p 410.

3 Hamlyn Trust Lectures, Stevens and Sons, London, 1990

4 [1987] 1QB 815.

5 *Whitfield and Lord le Despencer* 1778 2 comp 754.

6 *The Contracting State*, Open University Press, Philadelphia, 1992, p 41.

7 "State Owned Enterprises and Social Responsibility", [1993] *NZ Recent Law Review* 343.

8 *National Competition Policy*, Report by the Independent Committee of Inquiry, chaired by Professor Hilmer, 1993.

A COMMUNITY LEGAL CENTRE PERSPECTIVE ON ACCESS TO JUSTICE AS IT AFFECTS ADMINISTRATIVE LAW

*Mary Perkins and Simon Cleary**

Paper presented to a seminar held by the NSW Chapter of AIAL, Sydney: The State of Administrative Law: Current Issues and Recent Developments, 4 November 1994

Introduction

Mary and I have been invited to speak at this forum so as to describe broadly the areas in which community legal centre clients and the disadvantaged of our society most often come face to face with administrative law, to raise the issues which are of most concern to them, and to offer our perspective on a few improvements to the administrative law process.

The primary motivation for the formation of the legal centre movement 20 years ago was the commitment to building a just and equitable society within the context of a broader social justice agenda. Community Legal Centres (CLCs) now exist in every state and territory, are locally based and provide advice, assistance and advocacy to disadvantaged members of our society. We also conduct legal education and law reform campaigns. Because of the nature of our work CLCs have developed expertise in areas of the law not often practiced by the private profession. CLCs operate both as generalist centres, and as centres that specialist in particular areas such as welfare rights, consumer credit or the rights of the intellectually disabled. CLCs often have a profound effect on the lives of disadvantaged people and communities.

As a generalist centre, Redfern Legal Centre provides assistance to people who are disadvantaged in a wide range of areas. Our clients are commonly disadvantaged because of economic, cultural, linguistic, ethnic, educational or intellectual reasons. Consequently, our clients regularly have dealings with government departments and public sector agencies whether it be in relation to social security payments, immigration status, public housing applications, wage contributions for bankrupts or compensation for victims of crime.

Many of the public sector agencies and tribunals with which our clients come into contact are under federal aegis such as the Departments of Social Security and Immigration. We understand that the focus of the morning's plenary session is on NSW administrative law, and we will attempt to keep this focus, however many of the comments are drawn from the procedures of federal departments and tribunals and equally apply at the state level.

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Scope of "Administrative Law"

"Administrative Law", as it is known, should not be seen in isolation from the range of issues relating more broadly to "civil law". Many of the obstacles an individual faces in seeking justice are common to a number of areas of civil law. Some of these obstacles, which we will outline later, should be seen in this context.

More specifically, the boundaries around the field of law known as administrative law should not be too restrictively drawn. The fragmented nature of administrative law in this country, with its federal and state tiers, large number of government departments and agencies, proliferation of tribunals and their differing procedures and mechanisms for decision-making and review, require that administrative law be widely considered.

Such a broad approach to decision-making and review becomes even more important as we enter a social environment dominated by competition policy. As government moves further to privatise services traditionally provided by the state the issue of protective mechanisms to ensure that individuals receive fair and just determinations from service-providers becomes more acute.

Administrative law has always been concerned with fettering the power of officials entrusted with the task of public administration. When government entrusts the private sector with areas traditionally the responsibility of the state, it must only do so if it retains responsibility for ensuring that systems of review of these decisions be implemented. If for example, the Insolvency and Trustee Service of Australia was privatised, we are faced with the question of what review mechanisms of ITSA determinations should then be put in place. Currently, decisions of the Official Receiver as to the amount of a bankrupt's contribution during the bankruptcy are reviewable by appeals to the AAT.

Whereas at present administrative review is seen as a protection for the individual against, among other things, unjust government determinations, we may need to look in the future to a system of administrative review that is activated not by the nature of the agency (i.e. governmental) but by the nature of the service provided. This is a debate that will gain in importance, one that is not without difficulty, but one which we should keep in mind.[1]

Rights affected initially by the government department

An individual's rights first become affected at the point of initial contact with a particular department or agency. That agency has the power to critically alter that individual's standard of living through its determination. It is crucial that at this level, perhaps more so than the review level, any obstacles lying in the way of an individual's path to a fair and just determination be removed. Irrespective of the financial benefits this may have for government, it importantly engenders in society a confidence in the ability of government agencies to make correct decisions.

Issues of access - factors relating to individual disadvantage

Many of the concerns facing the disadvantaged stem directly from the obstacles they face in accessing justice. Many of these concerns are commonly shared by courts, tribunals and public sector agencies with the power to determine individual rights. Many of our clients are commonly disadvantaged because of:

- the fact that they are from a non English speaking background;
- lack of education;
- cultural differences;

- the fact that they are from low-income groups;
- geographical isolation; and
- intellectual disability.

By way of example, think of a person recently arrived in the country from a state without a welfare system to speak of, and without an effective administrative arm of government. This person not only has language barriers to overcome, but has no real understanding of his or her rights as they relate to a government service. For example, the existence of a right to compensation for victims of violent crime is a right with which people from some cultural backgrounds are unfamiliar.

Others with low educational and literacy levels are similarly disadvantaged in that they may be unaware of their rights not only in relation to the review of certain administrative decisions, but also of the very existence of government services to which they may be entitled.

Commonly, individuals with an unsophisticated understanding of the role of government and the existence of available procedures are disadvantaged in preparing an application for review of a decision, or in writing a letter of complaint to the Ombudsman's office. Though they may have good grounds for a favourable review, or for a comprehensive investigation of their complaint, they may frame their concern in terms of a procedural injustice. Such applications by individuals commonly are not investigated as fully as they should be.

Furthermore, access to justice issues are frequently only approached from a perspective of disputes between parties who are assumed to be relatively equal. This is often not the case. In tribunals which have adversarial-style proceedings, or in situations where the review mechanism has been framed to achieve a particular result, there is commonly a power imbalance between either applicant and respondent, or applicant and the review body itself.

All people have a fundamental right to equality before the law. The right to an effective remedy should not be dependent on access to wealth and social advantage.

Recognition of and response to individuals' disadvantages by departments, tribunals and public sector agencies

The system of administrative law must be sympathetic to individuals who are disadvantaged in these and other ways, and must be capable of compensating for these disadvantages. This can be done in a number of ways.

Communication between courts and tribunals and their users needs to be reviewed.

Simplification of forms and procedures

Forms and procedures need to be simplified. Many forms are not comprehensible to an inexperienced lawyer let alone the public. Documents which fail to communicate either their subject matter or their importance can result in a denial of rights and loss of court or tribunal time. Significantly they also result in a reliance by the general public on the services of lawyers.

Documents and forms should be well designed and in plain English. Process needs to be uncomplicated. This seems self-evident, but the results of a procedure that is, either deliberately or inadvertently, complicated and ambiguous can be disastrous. The Federal Court, in its decision of *Hamilton and McMurray v Minister for Immigration and Ethnic Affairs*,[2] commented, in relation to the Department of Immigration, on "serious deficiencies in the Department's administration, as regards the application of ordinary fairness".

I hesitate to comment in any detail on administrative procedures within the Department of Immigration. It is an area that many of you will be far more familiar with than I. Nevertheless, a number of the facts of this case highlight broader problems in other administrative systems. In this case the applicant needed to make an application for immigration on particular grounds in a very limited time-frame. Among other things the court commented upon:

- the applicant's handicap in having difficulty in receiving legal advice in such a short period while in custody;
- the failure of the detention centre to have copies of the Migration Act and its regulations; and
- the failure of the Department's officers to provide the applicant with:
  - the relevant forms;
  - the full set of corrected documents; and
  - correct advice as to her options.

Justice Burchett commented that:

> People's fundamental liberties should not depend on hazards, or be obliterated by the lack of an appropriate form, or by inability to obtain advice within a bare few days, especially while in custody. And to the extent that strict rules are applied, there should be equal strictness to ensure that the Department provides the necessary information and the means of immediate compliance by those affected.

Role of registries

The registries in the various tribunals should play a significant role in improving community access. At present far too many people expect that, when seeking information from a court or tribunal, they will be treated as a bothersome individual. Lawyers and court and tribunal staff need to have a general awareness of how frightened many people are of legal processes.

Courts and tribunals should adopt a service orientation. Court and tribunal officers could provide a comprehensive service to help the public. This would include, registrars, community assistance officers and interpreters who believe it is their job to assist people to use that court or tribunal. Staff should be trained to recognise and meet the needs of people with disabilities, people from non-English speaking backgrounds and Aborigines.

In local courts, small claims courts and some tribunals many people choose, or are forced, to represent themselves. They are often unaware of the issues and processes they need to consider in deciding how to run their case. They could be assisted by access to advice services, access to court based advisers, and through processes designed to clarify issues for litigants before the hearing.

Operating hours of courts and tribunals

Court facilities and court opening hours should be reviewed with the needs of court users foremost. Services should be provided out of "normal" working hours, facilities for people with disabilities, child care and other identified needs should be provided eg provision of a separate waiting room in the court for women seeking apprehended violence orders.

Interpreters and translators

Interpreters and translators should be provided for all who require them. This seems a statement of the obvious - if English speakers have difficulty with legal English and concepts, then those who don't speak English particularly well are disadvantaged. So, too, are people who

come from countries with very different systems of government and law unless provided with translators and interpreters free of charge.

Access in remote areas

Access to courts, tribunals and government agencies for people living in remote areas could be enhanced by greater use of circuits and technology. Greater use could be made of the telephone, especially in pre-hearing matters. Some tribunals, including the Social Security Appeals Tribunal, currently conduct telephone hearings in suitable matters. Wider use of such technology should be accompanied by work on appropriate procedures to ensure that litigants' rights are not compromised. Research is currently being conducted by the Darwin Community Legal Centre on the experience of litigants of the Social Security Appeals Tribunal whose hearings were conducted by telephone.

Formality

The formality of buildings and interiors assists in making the courts and some tribunals intimidating and inaccessible to many "ordinary" people, as does the formality of dress. Design specifications should be developed with access and user friendliness as a major priority.

Review Processes

In NSW the operation of administrative law is severely fragmented, and seriously inadequate. There is no "judicial review" of administrative decisions other than in the administrative law division of the Supreme Court, nor is there an equivalent to the federal Administrative Decisions (Judicial Review) Act for state bodies. The types of review processes that do exist, both external and internal, are so many, and differ so widely in their procedural mechanisms that it is difficult to comment on them broadly. Almost all public sector tribunals and review processes, however, should have a number of minimum characteristics.

Independence

Of fundamental importance to review mechanisms is an element of independence. For internal review processes, the reviewer should at least be someone other than the person who made the initial decision.

For external review processes there must be independence from the agency that made the decision. The recent Discussion Paper by the Administrative Review Council (ARC) on Commonwealth Merits Review Tribunals notes that:

> [I]ndependence from the agency whose decisions are being reviewed is necessary to ensure credibility in the eyes of people who seek to have agency decisions reviewed.[3]

The ARC went on to say that this independence not only meant that the decision-makers involved in the review are not subjected to undue influence, but that there also be no perception of undue influence. It is critical that the reviewers not be unduly influenced by the government agency, by other reviewers or by tribunal staff.

The criteria of independence should apply to all tribunals. The Residential Tenancies Tribunal (RTT) in NSW is one such tribunal that is commonly perceived to lack this element of independence. The RTT is located in premises shared with the Department of Housing and is accountable to the Minister for Housing. At the same time it is empowered to hear disputes between public housing tenants and the Department of Housing itself. The RTT is not seen to be independent.

In other tribunals, where there are lax or poorly organised procedures for tribunal or

registry staff to follow, the tribunals open themselves to criticisms that communications between registry staff, applicants and decision-makers in some cases leads to unfair decisions.

Representation

The question of representation in tribunals is problematic. Different tribunals take very different positions on the adversarial-inquisitorial spectrum. This is commonly affected by the nature of the tribunal, ie whether it is a review tribunal in the nature of the Social Security Appeals Tribunal, or whether it hears applications on a matter at first instance, like the RTT. Generally, the more adversarial is the approach taken by the tribunal, the more important it is that representation be allowed. It is in adversarial-type proceedings that an individual is more likely to be disadvantaged.

The NSW RRT serves as a good example. It does not generally permit representation. The rationale is that legal representation is expensive and if severely restricted, costs will be minimised and access increased. It is argued that neither party is disadvantaged by this rule because they are treated the same.

The reality is different. Landlords may be represented by the real estate agent who regularly manages their property and the Department of Housing is represented by a departmental officer who is a professional (non-legal) advocate for the Department. While these people are not lawyers they will be more familiar with the law and the tribunal's workings than most lawyers. Tenants appearing before this tribunal must argue their case on a very unequal basis.

Greater use could also be made of lay advocates. Courts and tribunals should allow representation by paralegals such as financial counsellors, and social workers who can establish that their appearance will benefit their client.

Consistency of review bodies' decisions

Crucial to the question of whether individuals have confidence in a tribunal is the ability and willingness of the tribunal to maintain consistency in its decisions. In NSW the Victims' Compensation Tribunal (VCT) has been criticised for failing to maintain consistency in its decisions. In a number of instances appeals from the VCT to the District Court have successfully increased the award for damages for people who have been sexually abused as children. The decisions of the District Court, however, have no precedential value, so that the VCT continues to decide subsequent applications without any reference to the comments of District Court judges.

The means of ensuring consistency in decisions is not always easy. In some instances it will mean that the tribunal itself takes responsibility for ensuring that all members are made aware of tribunal decisions. In other cases it may mean that a set of guidelines, upon which a decision is made, is relied upon and readily available to applicants. The experience of the VCT, however, highlights some of the difficulties associated with attempting to achieve this consistency. The VCT does not have a permanent staff, and its members are made up of a large number of magistrates who from time to time hear applications. The magistrates often bring with them to the VCT their Local Court experience and a background in adversarial processes. This, it has been argued, stands in the way of the "beneficial" intentions of the legislation which set up what was intended to be a non-adversarial user-friendly scheme. This example highlights the importance of proper training for tribunal members and staff.

Speed with which a decision is made

Tribunals have different time-frames within which they attempt to make decisions. Long delays in gathering material, hearing an

application and making a decision often mean that applicants are left in a state of "limbo". As a tribunal decision often has a significant effect on an applicant's future, it is important that tribunals are capable of streamlining their processes to ensure that a decision is made as efficiently as possible.

This need for quick and efficient procedures should stem from the desire to prevent injustice to the applicant through delay. On the other hand, however, in certain situations a procedure which operates too quickly denies the applicant reasonable time to prepare his or her application, and consequently amounts to a procedural inequity. The NSW Tenancies Tribunal makes fast decisions, in some cases giving applicants only 14 days notice of a hearing date. This is an example not of a "streamlined" process, but of a "steamrolling" one. The touchstone must be one of fairness.

Best practice models

The development of best practice models for tribunals could be a way of addressing a great number of the problems arising.

Such models could identify, first when tribunals are an appropriate response to the need to provide a forum to assert rights and resolve disputes and second, the best procedures to be used in various circumstances.

Role of Legal Aid

The provision of grants of aid to disadvantaged individuals seeking to pursue administrative claims is a crucial element in ensuring that all individuals who wish to have a tribunal or court review a determination that has affected them can do so, irrespective of their financial position. The Legal Aid Commission of NSW provides grants of aid in administrative matters, but only in a limited number of cases. The Administrative Law Division of the Commission is limited to providing aid in matters relating to federal administrative law. Even then the list of areas in which aid will be given is not comprehensive. Aid is still not generally available for matters involving the *Student Assistance Act 1973*, the *Citizenship Act 1948*, the *Freedom of Information Act 1982*, and in relation to Comcare matters.

For matters relating to state administrative law, aid is provided under the Commission's civil law policies for "consumers" who are adversely affected by a decision of a government instrumentality. On one hand this reflects the fragmented nature of state administrative law. It also means that each application for aid must be sought on a piecemeal basis. Without clear guidelines as to what matters at state level are aidable, the very process of applying for and receiving aid becomes fraught with unnecessary difficulties.

The Legal Aid Commission, in addition to providing aid in administrative matters, is itself a public sector agency. A decision by the Commission to refuse a grant of aid is a decision with tremendous impact on an applicant's chances of success in a dispute. In many ways just as significant, although not as widely understood, is the existence of the Commission's determinations pursuant to section 46 of the *Legal Aid Commission Act (NSW)*. The Commission is required to make a determination, after the completion of every matter in which a grant of aid has been provided, as to whether the recipient of the aid is able to repay the amount of the grant or is able to make a lesser contribution. It is a term of each grant of aid that the Commission may seek to recover from the applicant the costs and expenses of the legal services provided under the grant, and cannot, due to section 46, decide the amount payable until the end of the case.

Grants of aid from the Legal Aid Commission are not so much grants as loans which the Commission may choose not to call up. Recipients of aid to whom this

is not clearly communicated are under the misapprehension that they are being provided with a free service. It is crucial that all applicants for a grant of aid understand the true nature of the grant to which they are agreeing, before the grant is provided. The failure to do so is a serious obstacle to a fair and just legal system.

Access to Justice Advisory Committee Report

As a final point we believe it is worth keeping at the forefront of this debate a number of recommendations of the Access to Justice Advisory Committee (AJAC).[4]

The AJAC Report released in May 1994 noted that a comprehensive system of review of Commonwealth government decisions has been in place since the 1970s but that state systems fail to provide minimum standards. The Committee took the view that:

> [A]n administrative justice system fails if it does not provide:
>
> - a comprehensive, principled and accessible system of merits review;
> - a requirement that government decision-makers inform persons affected by government decisions of their rights of review;
> - a simplified judicial review procedure by comparison to judicial review under the common law;
> - a right for persons who are affected by decisions to obtain reasons for those decisions;
> - broad rights of access to information held by governments; and
> - an adequately resourced ombudsman or commissioner of complaints with a general power to review government action.[5]

The Committee acknowledged that in NSW there is recourse to the provisions of the *Freedom of Information Act 1989 (NSW)* and the *Ombudsman Act 1974 (NSW)*. However it also noted that there is:

- no general approach to merits review;
- no general obligation on decision makers to inform persons affected by decisions of their rights of review; and
- no general right to obtain reasons for administrative decisions.

AJAC recommended that each state consider the comprehensive work of the Electoral and Administrative Review Commission of Queensland on the reform of Queensland's administrative review system and in particular consider:

- the establishment of a general merits review tribunal;
- the provision of a simplified codified judicial review procedure; and
- the imposition of a duty on administrators to provide reasons for their decisions when affected persons request reasons.[6]

The types of decisions that fall under the jurisdiction of administrative law can have a profound effect on a person's life. Very often, the people most affected are those from the poorest and least advantaged sections of the community, in particular

those reliant on state-provided services and benefits for their existence.

From a CLC perspective it is very important that administrative decision making be open, fair, impartial and rational and that it be subject to external review. We have long advocated the establishment of a merits review process. We would like to see similar avenues for redress developed in NSW as exist at the Commonwealth level. While we acknowledge the merits of a number of specialist tribunals, we particularly recommend the establishment of an administrative review tribunal as a matter of urgency. Such a body is essential in order to enhance the "ordinary" person's access to justice.

Endnotes

1 See also Chris Shanahan of Murdoch University, "Revisiting the Three 'Rs', Administrative Review - Crossing the Public-Private Divide", presented at the National Association of Community Legal Centres Conference, August 1994.

2 *Jacqueline Hamilton and Olive Mary McMurray v Minister for Immigration & Ethnic Affairs*, Federal Court of Australia before Davies, Sheppard & Burchett JJ, handed down 26 October 1994 (unreported).

3 "Review of Commonwealth Merits Review Tribunals", Discussion Paper, Administrative Review Council, September 1994, p 61.

4 *An Action Plan*, Access to Justice Advisory Committee, 1994.

5 Ibid, p 323.

6 Ibid, p 333.

PERFORMANCE APPRAISAL - THE FOCUS

*David Landa**

[Editorial note: This article was published originally in AIAL Forum No 2. It was incorrectly attributed to Alan Cameron, Chairperson of the Australian Securities Commission. It is now republished with the correct attribution. The Institute apologises to Mr Landa and Mr Cameron for any embarrassment or confusion.]

Now that the public sector is becoming familiar with performance measures and appraisal, it is perhaps time to reflect on the measures whereby performance is appraised. Can we rely on set standards or must we always continually re-appraise those standards to examine outcomes, I will explain

In September 1993, I was invited to be a key note speaker at a conference in Singapore. My topic was *'Complaint Handling in the Public Sector'* a current and recurring theme in my Office for the last two years. I prepared my paper and equipped myself with overheads to demonstrate amongst other points the point that it was profitable for organisations even in the public sector to identify complaints and handle them, rather than to allow them to blow out. I usually demonstrate this point with charts from the private sector and research from the United States indicating for example, that for every person that vocalises a complaint, seven nurture a grievance silently and simply take their business elsewhere, and that each unsatisfied customer will speak to 10 people about their dissatisfaction. If one accepts these statistics as being near the mark, clearly the message gets through that it is important to identify grievances and to handle them before they blow out.

I arrived at Singapore Airport at 10.00pm after 8½ hours journey from Sydney, tired and ready for a shower and sleep. I entered the customs hall at the airport to find that another plane had landed, and that the two planes emptying, however, were being filtered through two customs points for non-Malaysians, one custom point for aircrew and another for Malaysians. The crew customs point emptied quickly as did the Malaysian entry point. The visitors from elsewhere waited in a queue, hand luggage in hand, for in my case in excess of 1 hour and 10 minutes, in a temperature that can only be described as tropical steamy. I found the custom officers surly, I was annoyed that the queue was handled badly and that adequate resources had not been invoked for what was a simple problem, that is, dealing with two planes landing at once. It happens all the time in Sydney and you never see queues that last an hour and ten minutes. I wondered why there were no announcements. I protested to a tour guide that I thought that was very poor, he said it happens all the time. Next morning when I read the Singapore Times an article said that business travel magazines voted

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Singapore the best airport in the world. I revolted. I decided that I would conduct my own survey because I was not going to let this matter go unnoticed. I was clearly very angry still, and affronted that they should claim for themselves something which truly I could vouch for was a lie.

By the time I had arrived to deliver my paper to a group of senior executives from Singapore, Malaysia, Thailand, Hong Kong, I had kept tally of the people I had told this story to. I found that I had already spoken to 17 people. I had also learned that Singapore is a population of 3 million. It achieves a great deal of its prosperity from the inflow of 6 million visitors through its airport per annum.

Clearly, the airport is an important part of the economy. Equally clearly was the fact that my grievance had reached more than 10 ears because by the time I had finished speaking at the conference I had reached 70 ears, and I have used this example on a number of occasions and have now lost count of how far my grievance has carried. I don't know if it has any effect on others but each time I tell the story I feel a sense of satisfaction, a sense of making up for the discomfort that I was caused, and in the retelling I certainly have determined never to go to Singapore, except for the utmost pressing reason.

What has this got to do with performance appraisal? I will explain, I had the recollection of visiting Singapore a number of times in the past and indeed I had thought the airport and its services to be outstanding. Why then could this incident occur, an incident that tour guide operators say that it is a common occurrence? Gradually the truth began to dawn on me.

1 Why was the air conditioning inadequate? Had somebody turned the air conditioning down, so as to save expenditure to meet budgets?

2. Why were there inadequate crews manning the customs point? Had management of that shift or that section of the airport determined to meet performance standards or increase efficiency on a budgetary basis by reducing crews? If so, this would not only account for the discomfort of the passengers, but perhaps the surliness of the customs people who themselves felt pressured in performing a task that overburdened them. Also of course, they were affected by the humid conditions. Their surliness was surely the lasting memory that they gave to each and every passenger. Yet would not the person responsible for management in that area perhaps have achieved praise rather than condemnation? Praise for having lived within budgets or below budget.

Performance appraisal in economic terms can, as this example demonstrates, be indeed a dangerous practice. How far down the track have we gone in assessing performance purely in economic terms? How much attention has been paid by organisations, public and private for appraising customer satisfaction as an ingredient to be added into the equation for measurement? Indeed, how is customer satisfaction information ever gained? To my knowledge, very few if any, performance appraisals call for such information. If my suppositions in

the Singapore airport case are correct, clearly indicators that are positive do not disclose very costly mistakes, the cost of which cannot be measured. The cost may not be great but it certainly carries a cost that arguably may exceed any savings for which performance is assessed positively and praised.

One crucial performance measure in the public sector which I hope will be incorporated into reporting requirements is the measure of how agencies resolve their own grievances. Examination of reasons for failure will produce meaningful performance indicators.

The Ombudsman's Office has for more than two years been changing its direction from an organisation reacting to complaints to one that is actively promoting change through education. The object is to send back grievances for resolution by the agencies from which the complaint originated. In principle public agencies as in private enterprise should be aware of the needs of its customers and be able to identify grievances and have in place the means to resolve conflict. This has led my Office into a field of training and accreditation of public sector personnel in alternative dispute resolution methods, particularly mediation and negotiation. A continual battle is being fought to make conciliation a focus of police complaint handling and this has been ongoing for over five years and through two Parliamentary Inquiries. Complaint identification and complaint handling, therefore, have been raised in profile and brought forward as important issues to be understood and managed in the public sector no less than in the private sector.

Discussions are presently taking place that will, I hope, culminate in the formation of a Public Sector ADR association. The function will be to provide training, accreditation, information and even manage mediator panels for use within the public sector. My Office so far this year has already been involved in the training and accreditation of 120 public sector mediators.

Currently the Ombudsman's office is trialing customer satisfaction counselling in selected agencies. This involves the assessment of the agency's performance through analysis of the complaints its customers make to my office. The outcome we are seeking to achieve is the containment of customer management within the agencies - ie to have complaints treated as management issues wherever possible.

I do not think the move to proactive counselling will result in the elimination of an Ombudsman. Rather it will free up the office to use resources more effectively in helping administration uncover and rectify poor practices.