FORUM

Tribunals • Courts • Privacy • Parliament • Human Rights • Reasons • Decisions • Government • Review • Accountability • Investigation • Constitution • Public & Private Sectors • FOI

AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW INC.

NO 10

Editor: Kathryn Cole

The ***AIAL Forum*** is published by

Australian Institute of Administrative Law
PO Box 3149
BMDC ACT 2617
Ph: (06) 251 6060

This issue of the ***Forum*** should be cited as (1996) 10 AIAL Forum

The Institute is always pleased to receive papers from writers on administrative law who are interested in publication in the ***Forum.***

It is recommended that the style guide published by the ***Federal Law Review*** be used in preparing manuscripts.

Manuscripts should be sent to the Editor, ***AIAL Forum***, at the above address.

ISSN 1322-9869

TABLE OF CONTENTS

CHALLENGING TIMES FOR ADMINISTRATIVE LAW

*Denis O'Brien**

While they have certainly not marched to the beat of the same drum, public administration and administrative law have during the last quarter-century moved in parallel. The enhancement of administrative law remedies which took place in the early 1970s was a necessary response to the growth in government. As the capacity of government to affect individual interests increased, the organs of administrative law could be called upon to provide the individual with any necessary remedy.

It was inevitable within this milieu that a body such as the Australian Institute of Administrative Law would come into being to provide a forum for discussion of contemporary administrative law issues. For its part, the Administrative Review Council has done, and continues to do, valuable work in overseeing the institutions of administrative law and in giving the government of the day practical and independent advice about the operation of the system upon government administration. For the AIAL, however, the focus has been different. Its sole role has been to provide a clearing house for discussion of administrative law in public administration.

It is to be hoped that the AIAL will continue to do that. However, there is no doubt that public administration is undergoing watershed change and the challenge for administrative law will be to respond appropriately to the change. The process will make it necessary for us in the Institute to think beyond the past orthodoxy and to come to grips with a new definition of administrative law.

It is, therefore, an exciting time to become President of the Institute. I am looking forward to working with the other members of the Executive to ensure that the Institute remains at the forefront of change in administrative law.

What are some of the changes and challenges we are seeing in administrative law?

1. As a means of reducing the size of the public sector, governments are moving to competitive tendering and contracting both for the delivery of services to the government and the delivery of services to the community on behalf of the government. It will remain convenient for government to have services delivered in-house. But, in other cases, private sector suppliers will be contracted to deliver services to government and to deliver services on behalf of government. Immediately, this creates a problem for administrative law because the criterion of its operation has generally been the making of decisions under statutory authority or the undertaking of action by administrators. Delivery of service under contract has generally been beyond its ken.

   Administrative law will need to respond to this challenge by promoting the development of community service standards to go hand in hand with delivery of public services by private providers and, to

* *Denis O'Brien is the new President of AIAL.*

the extent that the Constitution permits, by ensuring the extension of the jurisdiction of administrative review mechanisms to provide a forum for redress of community complaints.

Administrative law should also be extended to ensure that the tendering process itself is fair and that disappointed tenderers have an equal appeal mechanism open to them.[1]

2. Public sector industrial relations arrangements will align themselves more closely with arrangements in the private sector. This will mean even less of an influence of administrative law on public sector employment decisions than is presently the case. In personnel matters, an uneasy tension has always existed in the public sector between administrative law remedies and employment law remedies. That tension will be resolved in favour of the latter but, paradoxically, in measuring appropriate employment behaviour, employment law will continue to draw on administrative law concepts of procedural fairness and due process. The new shape of the public service employment framework will emerge more clearly after the release by the government in October 1996 of its discussion paper on the public service.

3. The emphasis on traditional administrative law we have seen in the high volume decision making agencies will become less important. Those agencies will continue to recruit their own in-house lawyers but the emphasis will be more on contract preparation and oversight, privacy protection and human and civic rights issues. We are likely indeed to see greater use of in-house lawyers across the public service at the expense of both the Attorney-General's Department and private sector firms.

4. Privacy protection will be extended from the public sector to the private sector, giving individuals some measure of comfort that their personal privacy will be protected whether their dealings are with a government agency or a private sector corporation. The Attorney-General has recently released a discussion paper upon the extension of privacy protection to the private sector.

5. Establishment of the legislative instruments register will lead to greater opportunity for administrative lawyers to have an input to government rule-making. While in Australia our system of responsible ministerial government inevitably provides less opportunity than exists in the USA to lobby the executive branch in relation to proposed rule-making, one can expect some measure of growth in administrative law activity as the new system of Commonwealth rule-making kicks into action.

6. The commercial undertakings of government will continue to be required to measure up to competitive neutrality principles. The expressed aim of this exercise will be to ensure a level playing field between government enterprises and their private sector competitors. However, once the transformation in the public sector enterprise has been completed, governments will inevitably ask the question why they should own an enterprise whose products or services can equally as well be provided by the private sector. Further sales of such enterprises can be expected. Government activity will contract to policy work and regulatory activity at the expense of service provision.

7. FOI has the potential to gain greater potency if the Commonwealth legislature to give effect to the recent ALRC/ARC report on the FOI Act. In recent years, FOI activity has stuttered as a result of the imposition of fees and charges and lack of publicity and interest. However, if the proposals for an FOI Commissioner are implemented and if, as a result, the community becomes more aware of the Act's availability to allow community access to government policy making, FOI could again kick into life.

For all of us the changing face of public administration will throw up new challenges in the years ahead. The capacity of the Institute to adapt will be the test of its maturity as an organisation.

Endnotes

1 See the author's paper at the AIAL 1996 Administrative Law Forum, 'Administrative Law - Can it Come to Grips with Tendering and Contracting by Public Sector Agencies?'.

ADMINISTRATIVE LAW IN THE CHANGING PUBLIC SERVICE ENVIRONMENT

*Peter Shergold**

Edited text of an address to the Annual General Meeting of the Australian Institute of Administrative Law, Canberra, 29 August 1996.

Last month I was given the opportunity to participate in the 20th Anniversary of the AAT. Although the Convention arranged to mark the occasion did not shy away from critical analysis the mood was largely celebratory. The future was foreseen, in the words of Justice Michael Kirby, as "more of the same".[1]

The general tone of satisfaction is understandable. The 'ambitious new federal administrative law', whose innovative characteristics are still clearly visible two decades on, has provided the framework for a generation of decision-makers. It has proved a remarkable and lasting achievement. It has transformed the notion of public accountability for decision-making. It has, in a real sense, helped to keep the public service honest and government open.

It is true that public administrators, myself included, have on occasion been frustrated by the system. I talk for example, of:

- the apparent concern with form rather than substance, process rather than issue, the application of rules rather than managerial common-sense;
- insufficient weight being given to Government policy;
- the tendency for administrative tribunals, no matter how informal in intent, to become adversarial and legislative - and to persuade many public servants to legalise and judicialise their decisions;
- the difficulty of ensuring that a tribunal understands the range of material, much of it undocumented, which influences the primary decision; and
- the personal attitudes and inclinations of tribunal decision-makers, making reliance on 'precedence' unreliable and patterns of consistency difficult to discern.

Administrative review is, from the bureaucrats' desk, the law of hard knocks. And the bruises do not come cheap. As Lionel Woodward has pointed out, "administrative law processes have developed such that perhaps not enough attention is paid to the overall cost implications of these processes".[2]

Administrative review is also a significant part of the legislative constraint which buries public service managers in internal red-tape. Comparison of the public service employment framework with that in best practice private sector organisations quickly reveals the problems. Australian public servants operate within a complex array of outdated, rigid and cumbersome regulations; systemic barriers and a culture of prescription rather than trust.

* *Peter Shergold is the Public Service Commissioner.*

The Public Service Act, introduced in 1922 and amended more than a hundred times since, is riddled with unnecessary restrictions and arcane details. There are over 500 pages of legislation, guidelines and circulars specifying requirements for recruitment and selection; some agencies can take up to 29 steps when processing leave and entitlement applications; and the Act devotes 39 pages to prescribing the arrangements for dealing with misconduct. In 1996 permanent public servants are still employed to occupy a particular 'office' rather than doing a job of work.

The current APS framework is characterised by regulation through various statutes and associated delegated legislation; Service-wide and agency-specific industrial awards: and certified agreements, reached on both a Service-wide and agency basis. It, too, has produced a process-driven culture born of regulation and an entitlement mentality.

Little wonder, then, that the National Commission of Audit has recently argued for fundamental change:

> The public sector acts and regulations should be stripped back and simplified to promote improved performance. Any legislation covering the public sector should be limited to core fundamental principles under which the public sector should operate.[3]

In this environment, so inhibiting to a focus on results, the panoply of administrative law can often seem an additional burden of process. In 1994, the Public Service Commission reported the "often heard view that ... APS Managers still do not have the same capacity as their private sector colleagues to pursue efficiency and effectiveness ... The trend often appears to try to make APS people management more cumbersome by adding further levels of legally mandated process".[4]

At a time when public service leadership is being criticised as conservative and risk-averse, rather than creative and innovative, such views carry additional weight. Administrative law can be portrayed as a cost which does not have to be borne by private sector service deliverers. Even in the area of personnel services public servants routinely report that there "are too many avenues of appeal. There's a need to satisfy a variety of external sources as to the legality of both decisions and processes - people can (and do) pursue appeals through a number of channels, which include Reg. 83; the MPRA; the Ombudsman; HREOC; AAT".[5]

These are views worthy of consideration although I am sensitive to the fact that, from the other side of the fence, such concerns may be perceived as evidence of "growing pressure that due process and accountability as they have been enshrined in the administrative review principles are rather old-fashioned and a waste of time and money".[6]

But the fundamental challenge to our system of administrative law comes not from the gripes of those who are subject to it. Such criticisms, one might surmise, are simply manifestations of a creative tension between those who take decisions and those who scrutinise them - both driven by a concern for public interest.

The more profound challenge comes from the significant changes taking place in the nature of public service. These changes, I emphasise, bear no relation to party politics - they were driven by a Conservative government in the UK, a Labour government in New Zealand and a Democratic President in the USA. In the Commonwealth of Australia they are changes begun under Labor but now pursued with greater conviction by the Coalition.

Let me summarise:

- First, the role of Government, and the definition of a public good, is being

progressively narrowed. Government is withdrawing from public investment and the provision of infrastructure in areas such as utility supply, transportation, communications and banking. There will be less intervention in the operations of the market economy.

- Second, the distinction between the purchaser and provider of government services, between policy implementation and program delivery, is becoming manifest in administrative separation.

- Third, the delivery of government services is becoming competitive, with an increasing share of services being outsourced to the private or non-profit sector. Contract is emerging as "the most significant mechanism for the ordering of public resources and the delivery of services, both to the public and to the government itself".[7]

We are, in essence, moving to a 'contract state', in which the role of the core public service will be to contribute to policy development, administer legislation, regulate the market (to the extent required by government) and oversight contractual relationships that deliver government programs. Government services, traditionally provided by the Australian Public Service, will increasingly be purchased from the market.

In my view this poses fundamental challenges both for the nature of public service and for the discipline of administrative law.

The role of a public service until now has been clear although its articulation has been somewhat hidden by the rhetoric of contemporary managerialism. Because governments have found it impractical to undertake all the administrative tasks required to deliver their policies they have delegated substantial powers to an appointed public service. These powers have traditionally been exercised as a monopoly.

The public service serves the public interest. Its actions express the will of the state as set out in the Constitution, the judicial interpretation of that document, and the policies set by the government of the day and scrutinised by representative parliaments. In providing policy advice the public service does so on the basis of its understanding of the public interest. That is why it continues to set high store on strong, impartial and apolitical public service leadership.

It also delivers programs that have a public intent and are paid for out of the public purse. It has access to the coercive powers of government in implementing policy. For their efforts public servants are paid out of money levied from the people of Australia.

It is for these reasons that the scrutiny to which the public service is subject is significantly greater than in the private sector. The disciplines which public servants face, and the ethical traditions to which they aspire, derive from the need to control governmental power, keeping it within proper bounds to protect the Australian citizen from abuse and excess. Public servants are part of the democratic process.

Public service decisions are expected to be transparent and open to question by parliamentary committees, the framework of administrative law, the investigation of Ombudsman and Auditor-General, and the application of freedom of information (FOI) legislation. The attitude toward risk management is far more restrictive than in a commercial environment: the Australian public may be 'share-holders' in the nation but the willingness to let risks be managed in the interests of efficiency and effectiveness is significantly constrained by the need to be accountable for public monies.

However, the framework of governance is now about the be transformed. It will no longer be accepted that a public good has to be delivered by a public service. Governments will purchase the services they require from a variety of providers on the basis of outcome payments with the public purpose set (and costed) as 'community service obligations'.

In the process the distinction between the public and private sector will become less clear. Public administration, and its service culture, will increasingly be subject both to the discipline of administrative law and of the market place - and just how an effective balance will be struck between the two is not yet clear.

In this environment, characterised by demarcation between steerer and rower, funder and deliverer, it will be necessary to rearticulate our vision of public accountability. To the extent that provision of Government services is contracted out of the public service it will need to be established what parts of the administrative law framework will continue to apply ... and to whom.

Will the private sector competitors be subject to the same administrative law framework as the public service? Or, alternatively, could the traditional values of public service be confined only to the 'core' public service? Is the discipline of the Administrative Appeals Tribunal, Ombudsman, FOI and Auditor-General to apply to the private sector 'provider' or only to the public sector 'purchaser'? Where government services are provided by an 'autonomous' delivery agency, a private company or a non-government organisation does ultimate responsibility for delivery lie with the Minister (because of government 'ownership'), with the departmental Secretary (on the basis of portfolio responsibility) or with the agency Chief Executive Officer (because the Minister and/or Secretary is responsible only for policy direction)?

To some critics it appears that administrative law will be pushed out of the public sphere by the re-labelling of public activities.[8] Others fear that the "traditional administrative law remedies are on the retreat as a result of the new managerialism".[9]

In my view there are a number of ways to preserve the public interest in those significant areas of government that are now being transformed from public administration to private delivery.

One is to depend upon market competition to ensure consumers of government services can exercise choice in choosing the best quality deliverer. However public choice is unlikely to be fully effective. The reality is that although the monopoly of the public service will be broken, in most regional areas the private supplier will operate in a monopolistic or oligopolistic environment.

An alternative is to ensure that community service obligations or other 'extraneous' matters of government policy are built into the procurement contract. The contract for delivery of government services could, for example, not only include provisions to promote equitable access by disadvantaged groups but also to ensure equal employment opportunities within the private company delivering the service. The justification would be to ensure that the government, as trustee, is seeking to make best use of the people's resources in the achievement of a variety of public goals.

This option could be strengthened through the government setting public standards for the delivery of its services. It is important to remember that the contract is between the government and the 'outsource' company not between the company and the public 'customer'. Consequently its effectiveness as a guarantee of quality is largely dependent on the commitment of government.

To this end the Commonwealth Government has recently announced that it intends to develop Government Service Charters to apply to public and private deliverers alike. "Consumers", the Minister for Small Business and Consumer Affairs has stated, are "entitled to a guarantee that appropriate service standards will still apply where existing public service functions are corporatised".[10]

The question remains whether the public service will be able to ensure the quality of service to end-users (the public) through the development and oversight of contract standards. Does the public interest still require that the public are able to seek remedy through the agencies of independent scrutiny such as the Auditor-General, the Ombudsman, even the Public Service Commissioner?

The development of market competition challenges the framework of public accountability. If adequate mechanisms are not in place to ensure protection for the public there is a danger that "considerations of public policy and public interest (will) be marginalised by commercial and competitive considerations".[11]

The contractual environment presents new challenges to administrative review. How, in this new world, will we ensure that government is "rendered truly accountable"? How will we ensure that agencies will "not contract out responsibility at the client's expense"?[12] And how are we to define that expense - in terms of reduced service quality, the closing off of government from public scrutiny or, perhaps the systemic corruption of the democratic process?

These are important issues. The Australian Institute of Administrative Law has a responsibility to address them. The new environment offers enormous opportunities to improve the cost, quality and effectiveness of government services. In order to compete the public service will have to develop a far more flexible framework.

But, in outsourcing service delivery from those interested in the public good to those motivated by commercial gain, there will need to be a means to ensure that public good does not become subverted by private interest. This, perhaps, is the key challenge which will face administrative law as we enter the next millennium.

Endnotes

1 The Hon Justice Michael Kirby AC, CMG, "AAT - Back to the Future", speech to the AAT - Twenty Years Forward conference, 2 July 1996, p 15.

2 Lionel Woodward, "Does Administrative Law Expect Too Much of the Administration?", in Stephen Argument, ed, *Administrative Law and Public Administration: Happily Married or Living Apart Under the Same Roof?*, 1994, p 36.

3 National Commission of Audit, *Report to the Commonwealth Government*, June 1996, p 84.

4 Public Service Commission, State of the Service Report No 3, *People Management and Administrative Law*, 1994, p 3.

5 MAB/MIAC Report No 18, *Achieving Cost Effective Personnel Services*, 1995, p 85.

6 Philippa Smith (Commonwealth Ombudsman), "Form vs. Substance", in Kathryn Cole, ed, *Administrative Law and Public Administration: Form vs Substance*, 1996, p 339.

7 Nicholas Seddon, *Commonwealth Contracts: Federal, State and Local*, 1995, p 31.

8 M Allars, "Private Law but Public Power: Removing Administrative Law Review from Government Business Enterprises", *Public Law Review*, Vol 6, 1995, p 44.

9 Seddon, op cit, p 19.

10 The Hon Geoff Prosser MP, Minister for Small Business and Consumer Affairs, Media Release, "Government Service Charters", 14 August 1996.

11 M Freeland, "Government by Contract and Public Law", *Public Law*, Vol 86, 1994, p 103.

12 Joanna Mullins, "Handling Complaints Related to Government Services Delivered by Contract", in Kathryn Cole, ed, *Administrative Law and Public Administration: Form vs Substance*, 1996, p 225.

THE ASC'S REGULATORY POWERS

*Murray Allen**

Paper presented to a seminar held by the Law Society of WA, "Challenging the ASC: the application of administrative law to the Australian Securities Commission", Perth, 3 October 1995.

The purpose of this paper is to provide an overview of the major regulatory powers that are available to the Australian Securities Commission (ASC) and the other decision-making entities established under the Australian Securities Commission Act (ASC Law) and the Corporations Law. The paper examines how these regulatory powers are exercised and the ways in which they may be challenged by aggrieved persons.

Because the paper is concerned with regulatory powers and decision-making (as opposed to investigative and enforcement powers) the majority of decisions and powers referred to will arise under the Corporations Law rather than the ASC Law.

Overview of administrative review under the former Commonwealth/ States Co-operative Scheme of corporation regulation

Prior to 1991, administrative review under the former Commonwealth/State companies co-operative scheme was governed by the Administrative Remedies Agreement between the Commonwealth and States dated 21 April 1982. Under that agreement the parties agreed that review of administrative decisions under state laws was a matter to be determined by state governments and state legislation. The principal feature of the administrative scheme put in place under the agreement was that the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) excluded from review decisions of the NCSC made in the performance of a function or the exercise of the power conferred upon it by any state Act or law of the Northern Territory and that decisions of members or delegates of the NCSC made pursuant to functions conferred by a state Act were not (for the purposes of section 9 of the ADJR Act) decisions of officers of the Commonwealth and, accordingly, not subject to review under the ADJR Act.

The main provision under which review of decisions made under the co-operative scheme could be reviewed was section 537 of the Companies Code. In summary, that section provided that a person aggrieved by the refusal of the NCSC to register or receive a document or by any other act, omission or decision of the NCSC could appeal to a state Supreme Court - which could confirm, reverse or modify the act or decision or remedy the omission.

Some examples of appeals under section 537 of the Companies Code include *Peters (WA) Limited -v- NCSC* (1986) 4 ACLC 507; *BHP -v- NCSC* (1986) 4 ACLC 265 (appeal against decision of delegate of the NCSC to register a Part A Statement); *Elders IXL Limited -v- NCSC* (1987) VR 1 (declaration by the NCSC that an acquisition of shares was unacceptable conduct).

* *Murray Allen is the Regional Commissioner, Western Australia, Australian Securities Commission.*

Other avenues of judicial review available were:

- by the High Court in the exercise of original jurisdiction where a prerogative writ or injunction was sought against a member of the NCSC or its staff as an officer of the Commonwealth or where the Commonwealth or a person being sued on behalf of the Commonwealth was a party.

- by the Federal Court in the exercise of original jurisdiction under section 39B of the *Judiciary Act 1903*.

Administrative Law review under the current corporations scheme

Section 35 of the *Corporations (name of State) Act* and section 45B of the *Corporations Act 1989* provide that the Commonwealth administrative laws (as defined) apply to the Corporations Law and the ASC Law of each State and Territory jurisdiction as if they were laws of the Commonwealth. The Commonwealth administrative law package comprises the *Administrative Appeals Tribunal Act 1975* (the AAT Act) the *Ombudsman Act 1976*, the ADJR Act, the *Freedom of Information Act 1982* (the FOI Act) and the *Privacy Act 1988*.

The explanatory memorandum to the *Corporations Legislation Amendment Bill 1990* noted that the application of the Commonwealth administrative law package was a "significant advancement on the co-operative scheme legislation which excluded the remedies provided by Commonwealth administrative law".

This paper will not address the FOI Act and will deal with issues relating to the Ombudsman Act only briefly. It does not consider the Privacy Act.

Ombudsman Act 1976

The Ombudsman's role is to investigate complaints concerning the administrative actions of Commonwealth government departments and prescribed authorities or agencies. The ASC is a prescribed authority as defined by the Ombudsman Act.

The purpose of an investigation by the Ombudsman is to determine whether an action or decision, or the process associated with the taking of an action or decision, is defective in some way. An "action" is something broader than a decision and includes in-action and omission by the agency. Most ASC decisions are reviewable by the Ombudsman. The Ombudsman is also authorised to enquire into the manner in which an agency has dealt with the FOI Act.

The Ombudsman can make preliminary enquiries of an agency under section 7A of the Ombudsman Act to gather information regarding a complaint and to ascertain whether the matter warrants investigation or is one that the Ombudsman is authorised to investigate. For example, the Ombudsman is not authorised to investigate action taken by a minister. In practice the Ombudsman resolves many complaints at this preliminary level.

If a matter cannot be resolved in this manner an investigation is carried out under subsection 8(3) of the Ombudsman Act. This section provides that the Ombudsman may obtain information from such persons and make such enquiries as the Ombudsman thinks fit. Prior to commencing an investigation the Ombudsman is required to advise the principal officer of the agency in question (in the case of the ASC, the Chairman). Accordingly, a letter from the Ombudsman's office to the Chairman is regarded as "notification".

The Ombudsman has the power to compel the provision of information and the production of documents and records. A person is not excused from furnishing any information, producing a document or

answering a question on the ground that furnishing of the information or answering the question would contravene the provisions of any other Act, such as the ASC Law. Should an agency fail to comply with a section 9 notice the Ombudsman may apply to the Federal Court for orders directing the agency to comply, after the Attorney General has been told of the reasons for the application.

The Ombudsman may also refer a question to the Administrative Appeals Tribunal (AAT) to obtain an advisory opinion in relation to the appropriateness of action taken, or the exercise of a power, by the agency. Alternatively, the Ombudsman can recommend that the agency obtain the opinion rather than the Ombudsman taking the action.

Where an issue, usually a dispute, arises between the agency and the Ombudsman with respect to the nature and extent of a function of the Ombudsman or the exercise or proposed exercise of the power by her, either the Ombudsman or the agency can apply to the Federal Court for a determination of the issue (but again only after the Attorney General has been told of the reasons for the application).

If after conducting an investigation the Ombudsman is of the opinion that the action in question:

- appears to have been contrary to law, unreasonable, unjust or improperly discriminatory; or
- was in accordance with a rule of law but that the rule or practice may be unreasonable or unjust; or
- was based either wholly or partly on a mistake of law or fact; or
- was subject to irrelevant consideration; or
- failed to take relevant considerations into account; or
- was otherwise in all the circumstances wrong; or
- did not furnish, but should have furnished, the complainant with particulars of the reasons for deciding to exercise the power in that matter or to refuse to exercise the power;

a report will be prepared in which the reasons for the opinions are set out.

If the report is critical of the agency a draft of the report will be given to the agency for comment and the final report will take any comments into account. In the report the Ombudsman can request the agency to advise what action it proposes to take in relation to the recommendations. If the Ombudsman believes an agency has not taken adequate or appropriate action the Ombudsman may inform the Prime Minister and thereafter give the report to the President of the Senate and Speaker of the House of Representatives for presentation to both houses of Parliament.

The ASC and the Ombudsman are able frequently to resolve matters at a preliminary stage by way of oral advice. If that is not possible then the ASC requires the Ombudsman to commence an investigation.

The most common type of matter raised with the ASC by the Ombudsman concerns ASC decisions not to investigate alleged contraventions of the Corporations Law. In such matters the ASC is usually urged to pursue a course of action or re-open an investigation previously concluded.

Where the complaint to the Ombudsman concerns information confidential to a third party (ie a person other than the person who complained to the Ombudsman) or which might affect such a third party's reputation, the ASC must consider what procedural fairness to accord the third party. ASC Law (s127) and the Ombudsman Act (s8) permit the

ASC to release confidential information to the Ombudsman - but not at the expense of procedural fairness to affected persons.

The ASC has adopted the view that its procedural fairness obligations in this context will be satisfied if it:

- notifies the Ombudsman that the information is confidential, and stating why;
- obtains a representation that the information is reasonably needed by the Ombudsman to conduct a specified investigation; and
- obtains an undertaking that before the Ombudsman releases any of the information in a report or for any other reason the Ombudsman will afford anyone affected by the release the same sort of hearing and consideration as the ASC would have had to give in the same circumstances.

Since 1 July 1993 the ASC has dealt with 33 matters raised by the Ombudsman - 13 in the year to June 1994, 19 in the year to June 1995 and one since then.

Jurisdiction of the Administrative Appeals Tribunal

Under section 25 of the AAT Act the AAT is authorised to review decisions only where an enactment has specifically conferred jurisdiction so to do. Since January 1991 the AAT has had the authority, by virtue of section 1317B of the Corporations Law, to review the decisions of the Minister, the ASC and the Companies Auditors and Liquidators Disciplinary Board (CALDB) and any delegates thereof subject to a number of exceptions set out in section 1317C.

Unlike other enabling legislation, the conferral of jurisdiction on the AAT under the Corporations Law is made by way of general grant with only a limited number of exceptions. Accordingly, the power conferred on the AAT to review ASC decisions is extremely wide. Significant difficulties have emerged for the ASC, the AAT and ASC clients in determining the precise scope of AAT jurisdiction. This point is returned to below.

Unlike the Corporations Law, the ASC Law does not confer jurisdiction upon the AAT by way of a general grant. Rather, section 244(2) of the ASC Law gives the AAT jurisdiction to review decisions of the ASC only in relation to decisions made under Division 8 of Part 3 of the ASC Law (ie decisions in relation to orders that can be made by the Commission in relation to securities and futures contracts).

A person whose interests have been affected by a decision is entitled to seek review. The term "person whose interests are affected" extends to those who are beneficially and adversely effected. The AAT has consistently indicated that it will take an expansive interpretation in relation to a person's right to apply for a review.

At the hearing the AAT "stands in the shoes of the decision-maker" - but it is not bound to take account only of that evidence and information that was before the decision-maker at the time the decision was made. It may take fresh evidence in order to undertake a merits review rather than looking to the "legality" of the decision or the decision-making process. The AAT's purpose is to reach the correct and preferable decision in the circumstances of the particular case. In so doing it looks to the facts and circumstances and the law at the time that it makes its decision. The AAT is not bound by the rules of evidence and may inform itself as it considers appropriate.

In the year to June 1994 there were 18 appeals to the AAT from ASC decisions, 20 in the year to June 1995 and 9 since then.

Review under ADJR Act

The ADJR Act provides for review by the Federal Court of decisions of an administrative character, made, proposed to made, required to made (whether in the exercise of a discretion or not) under an enactment. A person who is aggrieved by such a decision is entitled to seek judicial review. The ADJR Act exempts from its operation certain categories of decisions - however decisions of the ASC are not exempted from the operation of the ADJR Act (but as noted above, the Act did not apply to decisions of members of the NCSC or of delegates of the NCSC made pursuant to functions conferred by a State Act).

The Federal Court considers the matter at the time the decision was made. It is empowered to make a variety of orders including setting aside a decision and remitting a matter back to the decision-maker in accordance with the Law.

Section 5 of the ADJR Act sets out the grounds upon which an application for an order of review in respect of a decision to which the Act applies may be made. These grounds broadly correspond to the common law grounds of review, although there may be slight differences.

What is a decision?

Both the ADJR Act and the AAT Act provide that a reference to "decision" includes among other things:

(a) the making, suspending, revoking or refusing to make an order for 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 an article; or

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

The leading case in relation to what is a decision in this context is the High Court decision in *Australian Broadcasting Tribunal -v- Bond* (1990) 94 ALR 11 (the Bond Case) where it was held that:

> A reviewable decision is one for which provision is made by or under a statute. That will generally, but not always, entail a decision which is final or operative or determinative, at least in a practical sense, of the issue of fact falling for consideration.

Another essential quality of a reviewable decision is that it be a substantive determination.

As commentators have frequently noted, the Corporations Law is now an extremely large piece of legislation involving some 1,400 sections, a very high proportion of which involve the ASC doing something, making some decision or acting in some fashion, all of which might at first sight appear to fall within the ambit of the AAT Act and/or the ADJR Act. However, it seems clear that there are many acts or decisions which do not involve the exercise of a discretion, or are a mandatory activity for the ASC, or they are preliminary or procedural decisions where it is at least arguable that there is not a decision within the Bond test and/or the decision relates to matters of administration and form. An example of the former category (ie no discretion) might be the obligation of the ASC to allot each corporation a registration number (subsection 129(2)) and of the latter category the ability of the ASC to give written comments on documents lodged in relation to related party transactions (subsection 243W(1)).

What is the source of power?

As has been seen above, the AAT has jurisdiction over all matters under the Corporations Law (with the exception of the matters set out in section 1317C) but has only jurisdiction in relation to a very narrow range of matters under the ASC Law. It follows that if the source of the power to be exercised by the ASC is properly found in the ASC Law rather than the Corporations Law then the AAT will have no jurisdiction - although the Federal Court under the ADJR Act would have jurisdiction in either case.

The difficulties inherent in distinguishing between those powers arising under the Corporations Law and those arising under the ASC Law is well demonstrated by the difficulties that have arisen in connection with review of the ASC's decision to authorise persons under section 597 of the Corporations Law to make an application to the Court to examine officers of companies.

Occupational licensing

A significant proportion of ASC resources are applied to decision-making under the Corporations Law involving the regulation of persons who wish to carry on certain occupations and businesses. The main of these are:

- registered company auditors (CL Part 9.2)
- liquidators (CL Part 9.2)
- official liquidators (CL Part 9.2)
- securities dealers (CL Part 7.3)
- investment advisers (CL Part 7.3)
- futures brokers (CL Part 8.3)

  futures dealers (CL Part 8.3)
- trustees or representative of an approved prescribed interest trust deed (CL Part 7.12)

(a) Auditors and liquidators

In relation to the registration of auditors and liquidators (but not official liquidators) the statutory regime set out in Part 9.2 of the Corporations Law is that, on receipt of an application, the ASC "shall" register the applicant as an auditor or liquidator if the applicant has the formal qualifications specified and satisfies the ASC as to experience and capacity and that he/she is "otherwise a fit and proper person" (see sections 1280 and 1282 of the Corporations Law). Otherwise the ASC "shall" refuse the application.

By virtue of subsections 1280(8) and 1282(10) of the Corporations Law the ASC may not refuse to register a person as an auditor or a liquidator unless the person is given an opportunity to appear at a hearing and to make submissions and give evidence about the matter.

The procedures followed by the ASC in dealing with these types of applications are set out in the ASC Procedures Manual (published by the Centre for Professional Development and available to the public). In fact ASC staff would first interview an applicant whose application seemed deficient. This would be an opportunity for the applicant to fill any gaps in the application - having been advised where the application was perceived to be deficient.

If after this interview the application still appeared to be deficient the applicant would be so advised and offered the opportunity to appear at a hearing. The hearing would be convened by a senior officer of the ASC acting as a delegate of the Commission. This officer would not have been involved in the processing of the application to that date.

The hearing would be held in accordance with guidelines set out in the ASC Hearings Manual (also published by the Centre for Professional Development and also available to the public).

If, after the hearing, the delegate decides to refuse the application, the applicant must, within 14 days of the decision, be given a statement of the decision and the reasons for it (see subsections 1280(9) and 1282(11) of the Corporations Law). Note that section 109V of the Corporations Law would also require such a statement to set out the findings on material questions of fact and refer to the evidence or other material on which these findings are based.

The regime in the Corporations Law for dealing with auditors and liquidators whose conduct or ability is thought to have fallen short of the required standard is set out in section 1292 and following of the Corporations Law. On the application of the ASC the CALDB may, if satisfied as to the necessary grounds, cancel or suspend the registration of an auditor or liquidator, admonish, reprimand, require undertakings and deal with any failure to comply with undertakings.

Section 1294 of the Corporations Law requires the CALDB not to exercise its powers under section 1292 unless it gives the person concerned, and the ASC, the opportunity to appear at a hearing and make submissions to, and adduce evidence before it.

Any exercise of power by the CALDB is reviewable under the AAT Act and the ADJR Act.

The conduct of CALDB proceedings is largely set out in Part 11 Division 2 of the ASC Law. Section 218 specifically provides that the CALDB must observe the rules of natural justice "at and in connection with a hearing." Some issues which go to the content of natural justice in this context can be identified:

- There is a right to an oral hearing, but the auditor/liquidator can elect to make only oral submissions (ASC Law subsection 216(9) and Corporations Law section 1294).

- There is a right to representation by a barrister or solicitor. The ASC has a right to be represented by an employee or other person authorised by the ASC - but the auditor/liquidator may only be represented by an employee approved by the CALDB (ASC Law subsection 218(3)).

- Hearings must be in private unless the auditor/liquidator requests a public hearing (ASC Law subsections 216(2) and (3)).

- The rules of evidence do not apply (ASC Law paragraph 218(i)) - but this should not be taken to mean that some of those rules may not be appropriate in particular circumstances. For example, the tribunal should not rely on an issue and material not made known to the person concerned. The CALDB will frequently have to make decisions about what evidence to receive or not receive - and the weight to be given to it - and those decisions could form the basis of appeals to the AAT or the Federal Court. It is, perhaps, understandable that the CALDB may choose to follow, more or less, the rules of evidence.

- There is no statutory right of cross-examination - but consistent with the common law right to cross-examine where oral testimony is presented, the CALDB does permit cross-examination.

- The practice adopted by the CALDB is to require the ASC to establish its "case" before requiring the auditor/liquidator to present any "defence." The more serious the allegations made the higher the standard of proof required of the ASC will be.

In practice, the ASC initiates a matter in the CALDB by submitting a statement of "facts and contentions." This document sets out all the allegations made against the auditor or liquidator and the facts that

would support them. All supporting documentary material is subsequently made available to the auditor/liquidator before the hearing.

In fact, in virtually all cases the ASC makes available the facts and contentions and relevant documents to the auditor/liquidator prior to submission of the matter to the CALDB and will take into account any submissions made.

Following the reasoning in *Gallivan Investments Ltd -v- ASC* (9 ACLC 1324) it has been suggested that a decision of the ASC to apply to the CALDB is not a reviewable decision. The decision for the ASC is only whether the circumstances may exist which would entitle the CALDB to exercise its powers ie it is not an ultimate or operative decision. In the light of the reasoning of the Full Federal Court in *Mercantile Mutual -v- ASC* (1993) 10 ACSR 140 in relation to decisions to authorise a person to apply to the Court for a section 587 examination, it now seems likely that the Gallivan reasoning cannot be sustained.

(b) Official liquidators

The manner in which official liquidators (ie those persons who may be appointed by a court to conduct the winding up of a company) can be appointed and removed is somewhat different.

Section 1283 of the Corporations Law empowers the ASC to register as official liquidators "as many" natural persons who are already registered as liquidators "as it thinks fit."

Apart from the need for the applicant to be a registered liquidator, no other qualifications or criteria for appointment as an official liquidator are specified and there is no requirement that an applicant be given the opportunity of a hearing before the application is refused.

The ASC has published a Policy Statement (PS24) regarding its policy on the registration of official liquidators and the ASC Procedures Manual provides that an applicant should be offered an interview to address identified areas of weakness in the application and would also be provided with a statement of reasons for a refusal.

Consistent with the dominant role played by the ASC in the registration of official liquidators, section 1291 of the Corporations Law empowers the ASC "at any time," to cancel or suspend for a specified period the registration of an official liquidator. There is no statutory right to a hearing but subsection 1291(3) requires the ASC to give a notice setting out the decision and the reasons for it within 14 days of the decision.

Again, the ASC would not attempt to remove the registration of an official liquidator without notifying him/her of the grounds upon which that course of action was being contemplated and providing him/her with an opportunity to appear, give evidence and make written or oral submissions. The matter would be dealt with in much the same way as the ASC deals with the removal of licenses from persons involved in the securities industry - which is considered below.

In any event, a decision of the ASC to refuse or cancel registration as an official liquidator would be reviewable under both the AAT Act and the ADJR Act.

It follows that, with the Commonwealth's administrative law package now applicable to decision-making of this type, comments such as those of O'Loughlin J in *Pipkin -v- Corporate Affairs Commission* [(1987) 5 ACLC 179] have much less force today. His Honour said (at p 183):-

> the deliberate and separate treatment of official liquidators in the legislation - particularly the arbitrary power to cancel or suspend the registration of an official liquidator ... reinforces my view that the legislation has seen fit to repose in the Commission the absolute control over the registration of official liquidators and

the cancellation or suspension of their registration.

(c) Securities and Futures Industry participants

The procedures adopted by the ASC in processing applications for persons wanting to be licensed under Parts 7.3 and 8.3 of the Corporation Law are similar to those adopted in relation to the registration of auditors and liquidators.

Applications (under section 782 or 1144 of the Corporations Law) are considered in accordance with the requirements of the Corporations Law and relevant ASC Policy Statements. Perceived deficiencies are brought to the attention of the applicant, who is invited to address them. Likewise the standard (and any non-standard) conditions intended to be imposed on the licensee due to the nature of the business to be carried on and the circumstances of the applicant will be "offered" to the applicant. If the ASC is minded to refuse the application or to impose a condition on the license that is unacceptable to the applicant the applicant is offered the opportunity of a hearing before the final decision is made (see sections 837 and 1200 of the Corporations Law).

Unlike the case of auditors and liquidators, where the ASC considers that a licensed person in the securities or futures industry requires some form of disciplinary action (such as revocation or suspension of the license or the imposition of a condition on a license) or to ban a person from acting as a representative of a licensee, the ASC itself has the power to make such decision disciplinary decisions. There is no equivalent of the CALDB for these industry participants.

In such cases the ASC must provide the person with an opportunity for a hearing of a similar nature to that required in the original licensing situation (ie under section 837 or 1200) of the Corporations Law.

Such a hearing is, obviously, in response to some form of provisional or tentative finding of fact and/or law reached by an ASC officer to the effect that the elements of a relevant section of the Corporations Law are made out which would justify the contemplated disciplinary action. Examples of such sections are sections 020, 020, 029, 1191, 1192, 1192A but that list is by no means exhaustive.

The notice of hearing given to the person concerned must give the person sufficient particulars of the provisional findings and conclusions of the ASC which are relevant to the elements of the particular licensing section and sufficient time to prepare a case, obtain representation and appear at the hearing.

In practice the notice of hearing will contain all the allegations, facts and contentions the ASC believes the person should answer and all supporting documentary material (including statements made by potential witnesses) will be provided to the person well before the hearing.

Prospectus Stop Orders

Section 1033 of the Corporations Law empowers the ASC, where it appears that the requirements of the section are satisfied in relation to a prospectus, to issue an interim stop order, without a hearing, or a final stop order after holding a hearing. Such orders have the effect of preventing securities from being allotted, issued or sold.

For a final stop order, the obligation on the ASC is to not make the order unless it has "held a hearing and given a reasonable opportunity to any interested persons to make oral or written submissions ... on the question whether an order should be made." The interim stop order can be made if the ASC considers any delay in making an order pending the holding of a hearing would

be prejudicial to the public interest (see subsections 1033(3) and (4)).

Time will normally be of the essence when the ASC is considering whether a stop order should be made in relation to a prospectus and, consequently, the opportunity to provide a form of procedural fairness to persons affected by a stop order may be limited. Nevertheless, the ASC will normally inform the issuers of a prospectus of its concerns which may lead to the making of an interim stop order and provide a period of time (sometimes limited, but usually at least 24 hours) to respond.

Likewise, if the ASC believes that the grounds may exist for a final stop order, but an interim stop order does not appear necessary, the ASC would normally, before announcing the holding of a section 1033 hearing, give the issuer a reasonable opportunity to respond to the ASC's concerns, withdraw the prospectus or issue a supplementary prospectus.

The obligation on the ASC is to give any "interested persons" a reasonable opportunity to make submissions at a hearing. An interested person is one whose interests would be affected by the making of the stop order. Any person with a direct financial interest in the prospectus or any person who might be exposed to civil liability under Part 7.11 of the Corporations Law would meet the "interested person" test. The corporation issuing the securities, its directors, the author of any statements under scrutiny and the underwriters might all be expected to have a sufficient interest to satisfy the test.

Disqualification of directors under section 600

Section 600 of the Corporations Law is seen by the ASC as a particularly important tool in the range of measures that can be taken to protect investors and creditors from having to deal with unscrupulous or particularly inept company directors. My remarks will be limited to some issues of process.

When the ASC believes that the requirements of section 600 are made out it can issue a Notice to Show Cause to the relevant person. This notice provides sufficient detail to inform the person of the basis on which a decision may be made - including the names of the corporations involved, the periods of directorships, dates of winding up etc. The notice will be accompanied by a Statement of Areas of Concern - which clearly particularises the areas of conduct of the person of concern to the ASC and which would appear to justify a disqualification order. The person will also, at the same time, be given copies of all the documents the ASC would rely on at the hearing. If the matter involves allegations of possible criminal behaviour the person will also be given a document setting out his/her rights under section 68 of the ASC Law.

Before the final hearing is held a preliminary conference will be held with the person and his/her representative to ensure the issues are clarified, that all relevant documents have been made available, to estimate the time needed for the final hearing, whether the person wishes to have summons issued to any witnesses etc.

The ASC believes that the procedural arrangements that it has put in place provide a high level of procedural fairness to persons who may be subject to a disqualification order.

Exemption and modification decisions

In a number of areas in the Corporations Law the ASC is given power to exempt a person from complying with a provision of the Corporations Law or to modify the operation of a provision in its application to a person or a class of persons. Examples include sections 111AT, 313, 728, 730, 1069 and 1084. Judging by the number of applications received by the

ASC for various forms of relief and the proportion of ASC resources devoted to dealing with such matters, it would seem to be no exaggeration to say that the Corporations Law could not operate satisfactorily without the regular use by the ASC of these powers.

Neither the Corporations Law nor the ASC Law specify how the ASC should carry out its functions under these various empowering sections. As has been noted, prior to 1991 the Commonwealth's administrative law package was not applicable to decision-making of this type and the number of decisions of the NCSC and its delegates challenged under section 537 of the Companies Code was small. Accordingly, the ASC and its staff and, one suspects, the AAT and perhaps the Federal Court, have been on a quite steep learning curve over the past four and a half years. Certainly, for ASC staff the steps that now need to be taken to make certain types of decisions, the time that is required to undertake them and the new issues and principles to be grappled with to ensure all concerned are accorded procedural fairness have introduced an entirely new dimension to their work.

The ASC has published a number of Policy Statements, Practice Notes and other material that attempts to set out how the ASC meets its obligations to accord procedural fairness - both when exercising exemption and modification powers and generally. In particular readers are referred to Policy Statements 35, 51, 78 and 92, Practice Note 57 and the Legal Commentary at 1993 ASC Digest LC21. This paper can provide no more than a brief overview in relation to two issues:

- the obligation to give procedural fairness to third parties where the ASC proposes to make a decision which may adversely affect a person's rights, interests or legitimate expectations in a direct and immediate way (see *Kioa -v- West* (1985) 159 CLR 550 at 582 and *Ainsworth -v- Criminal Justice Commission* (1992) 106 ALR 11 at 19).

- the obligation to notify persons who are affected by a decision of the ASC of their right to appeal to the AAT as required by section 244A of the ASC Law and section 1317D of the Corporations Law.

(a) Procedural fairness to third parties

As is noted in Policy Statement 92, in assessing its procedural fairness obligations to third parties in a particular case, the ASC considers -

- whether any third party might be directly, materially and adversely affected by the decision - if not there is no obligation to consult any party and the application can be determined.

- whether the applicant has given sufficient reason for the ASC to expedite the application and/or treat it as confidential. If the judgement is that the detrimental effect on the applicant clearly outweighs the potential adverse effect on third parties the ASC will not consult the third parties. If the material adverse effect on third parties is not clearly outweighed by detriment to the applicant then the ASC will not determine the application until the third parties have been consulted. If the applicant refuses to permit the ASC to provide the third parties with sufficient information the ASC will refuse the application.

If the ASC determines that third parties must be given procedural fairness it must consider -

- who are the third parties who will be directly, materially and adversely affected;
- which of those parties should be notified;
- what information must be given to those third parties; and

- how much time needs to be given to them.

Inevitably, the ASC is required to balance confidentiality versus disclosure and a quick decision versus delays due to consultation.

The ASC will not necessarily have to consult every person who may be affected by the proposed decision and who would be entitled to be notified of the decision after it was made - although the two categories will often be the same. Normally, the directors of a company and the trustee of a prescribed interest scheme would be taken to represent the shareholders or prescribed interest holders. See *Hawker de Havilland Ltd -v- ASC* (1991) ACSR 579 and *Magellan Petroleum Australia Ltd -v- ASC* (1993) 30 ALD 214.

Where the information that would need to be provided to the third parties is confidential the applicant will need either to waive the confidentiality or negotiate confidentiality arrangements with the third parties. The third party must be prepared to receive the information in confidence and for the purpose only of making submissions to the ASC. If the third party will not agree to such confidentiality the ASC will regard its obligations as having been fulfilled.

The time allowed third parties will obviously vary according to the circumstances. For takeover applications two business days is usually granted.

Decision-making in the context of disputed takeovers is, not surprisingly, the area that causes the ASC greatest difficulty from the point of view of consulting third parties. Time is almost always of the essence and intending offerors are almost always concerned about market impacts should news of an intending takeover get out. Equally, target companies are zealous to ensure that nothing happens that might in any way give an offeror a real or imaginary advantage. All concerned are usually very happy to take advantage of any and all rights of review/appeal if that is seen as having some tactical advantage in the context of the commercial dynamics of the takeover - irrespective of what the parties really think about the merits of the ASC decision or the process by which the decision was made. It is fair to say that the ASC has found itself involved in hard-fought AAT and Federal Court proceedings over some decision made where none of the other parties have particular concerns about the merits of the decision.

The ASC will at times make decisions which, on the merits, might look difficult to justify and will make decisions about who and when to consult that will be found, in the light of more information and more leisurely reflection, to be incorrect. Given the competing views from applicants and other parties, the commercial pressures to determine matters quickly, the apparent impracticality of consulting all who might be affected, confidentiality restrictions on who it might contact to discover who would be affected and a general lack of information, that should come as no surprise.

(b) Notification of appeal rights

Since July 1994 the ASC has been obliged by ASC Law section 244A and Corporations Law section 1317D to notify persons who are affected by a decision of their right to appeal to the AAT. If the notification would be excessively onerous to the ASC, in light of the cost of giving notice and the way in which the persons' interests are affected, then the ASC is relieved of the obligation.

Identification by the ASC of the potentially affected parties is, of course, the most difficult aspect of this obligation. Generally speaking, where an application is refused by the ASC the only person affected will be the applicant. Where the application is granted the persons affected will vary according to the

circumstances. ASC Practice Note 57 sets out the approach of the ASC in relation to some commonly exercised powers. For example, where a company is granted relief under section 313 of the Corporations Law from complying with an accounting standard, it will be a condition of the relief that the company's accounts include a statement of review rights available.

Other ways in which the ASC attempts to identify affected persons and to notify them of their appeal rights include: -

- requiring the applicant to identify persons who might be affected, and

- publication of a standard notice in the Government Gazette in which ASC instruments are published and in the Instruments and Class Order sections of the ASC Digest.

Generally, ASC officers use either Pro Forma 89 or an ASC Information Sheet (see ASC Digest at PF997 or at INFO227) as the basis of advice to affected persons.

Although not required by law, the ASC includes in its notification information about FOI entitlements and the right to apply to the Ombudsman to review the ASC's decision-making processes.

ASC ADMINISTRATIVE LAW CHALLENGES

	Year ended June 94	Year ended June 95	Quarter ended Sep 95
FOI	73	53	12
OMBUDSMAN	13	19	1
AAT	18	20	9
ADJR	10	3	2
Applications (all types)	4 774	6 540	1 472
Securities and Futures Licensing	230	232	0
Auditors/Liquidators	211	191	57
Prospectuses received	1 226	749	137
Takeover documents	140	120	40

NATIONAL ELECTIONS: CARETAKER CONVENTIONS AND ARRANGEMENTS FOR TRANSITION

*Mike Codd**

Edited version of an address to AIAL seminar, Caretaker conventions and arrangements for transition, Canberra, 6 February 1996.

We are here to talk about behaviour at both political and public service level in the caretaker period, and what happens in the transitional phase in welcoming and preparing for an incoming government. The behaviour in a caretaker period is governed by conventions, not by law. There is no legal impediment to the government that is in place right now, giving a direction, introducing a policy, spending money. They could, for example, make an appointment to the governorship of the Reserve Bank for another seven years and do so right now, legally. The fact that they do not generally do that kind of thing in a caretaker period, as I said, is entirely based on convention. The convention goes back quite a long time. I think the record shows, for example, Menzies writing to his ministers in 1951 just ahead of the election, asking that they take care not to take decisions in the period ahead without reference to him. You can track through other correspondence in elections after that, where gradually this set of conventions was refined, life became a little more complicated, and the conventions were eventually set down in writing. The most extensive text on the subject coming from government, at least that I am aware of, is in the Prime Minister and Cabinet Annual Report for 1986-87 in a special article which gave a little bit of the history and explained what the conventions are, and I will be referring to some of that as I go on.

There are occasionally circumstances in which the force of the conventions might be supplemented in one way or another by some undertaking. Two examples have been used in the past. In the United Kingdom, Churchill, just after the Second World War, when the coalition government during the war time ended and there was a period before the election, gave undertakings to the Palace about actions that he would take while he was in caretaker mode ahead of those elections. Secondly, in Australia in November 1975 when the Governor-General invited Malcolm Fraser to form a government, he did so seeking first his undertaking to abide by certain conditions. Those conditions were not to take decisions or make appointments or take action that would commit an incoming government in the period that he was in caretaker mode. Where undertakings of that kind have been given, the force of the convention might be argued to be supplemented to some degree. But in the end, it is a matter of public response, public debate, public pressure if you like, above anything else, that ensures that the conventions are generally followed. That is to say, if they are not, people jump up and down, there is controversy about it, and generally politicians are sensitive to

* *Mike Codd was Secretary to the Department of Prime Minister and Cabinet 1986 - 1992.*

that and will therefore acknowledge the conventions and seek to give effect to them.

Having given that brief introduction, what is the caretaker period? According to the literature, it dates from the dissolution of the House of Representatives, and goes through until the result is clear, or the new government is sworn in. If the result is clear and there is no change of government, then normal business starts again. If there is a change of government, then the period ends when the new government is appointed.

The literature also says, however, "it is also accepted that some care should be exercised in the period between announcement of the election and the dissolution". I will come back to that a little later on with some illustrations on that point.

The conventions as described are that first of all, decisions are not taken in this period which would bind an incoming government and limit its freedom of action. That means that caretaker governments are not supposed to enter major contracts or undertakings. Also, they are not meant to make long term appointments of significance. The practice has built up in the appointments area that if there is a vacancy coming up in a critical area, either the government makes an acting appointment if it can; or it makes a short term appointment, say for three months, that gets it over the period into the period of the incoming government; or it seeks the agreement of the Opposition, the relevant shadow minister, or opposition leader to proceed with a longer term appointment, and proceeds on that basis.

Next, it is said that the caretaker government should avoid implementing major policy initiatives. Now, as always with the wording of these sorts of conventions, it is not altogether clear what that means in practice. If you take, for example, a government that has legislated for taxation cuts and they are to come in a phased fashion, and it decides to call an election and one of the refund points happens to be in the middle of the election campaign with dollops of money coming out to everybody, this is a policy that they not only declared some three years before, but the legislation has been through and the timing is all set, and this part of the implementation happens to fall during an election period. According to the language of the convention, this would be legitimate, but it would probably be a matter of some controversy nevertheless. So I think you will find with anything like this that the scope for debate about what is right or wrong is endless.

The next convention is that a caretaker government should avoid involving departmental officers in election activities. I will come back to that again because the precise meaning of that is not necessarily all that clear.

Next, the literature says government resources should not be directed to supporting a particular political party. One of the illustrations of that is advertising. I think you probably noticed the controversy in the New South Wales election period some time back about government advertising that went on in the lead up to the campaign itself, and perhaps during it. One illustration of that issue nationally was in the 1987 election when there were recruitment advertisements for the Department of Defence which featured Bob Hawke and Kim Beazley as the Prime Minister and Defence Minister at the time, and there were concerns raised about the profile that would give them during a campaign period, and the decision was taken to stop those advertisements during that period. Because of that and other examples, there now seems to be general acceptance of the view that profiling ministers, even if the advertisement is down to earth, just telling you about your social security benefits, is inappropriate during an election period if taxpayer

funded. Then the literature says about departmental operations that it is accepted practice for departments to decline requests for material or administrative assistance for purposes clearly related to the election, rather than the ongoing business of government. That relates back to the other stated convention that I mentioned: to avoid involving departmental officers in election activities. The thinking behind that is clear enough, but it is also accepted practice that during a caretaker period caretaker ministers who request factual material are entitled to get it. Whilst it is understood widely that public servants should not take factual material and convert it into a political speech for the caretaker minister, the requirement to provide factual material is understood and generally accepted. That can be quite an issue in some circumstances. For example, if there is a demand on the public service to provide reams of material on the impact of certain programs by electorate, that is clearly going to be used in the minister's office for election purposes. Some people in the public service who are asked to do that in a caretaker period would feel very uncomfortable about it. Again, it is a question of judgement about what is right and appropriate in the circumstances of the particular case. There is also the issue of costings of opposition policies, and the work that goes on on that front, but I will return to that subject later.

In the present literature there is no general principle stated from which these various conventions have been derived. But I suggest that if you look through the stated conventions, you can self-select two fundamental principles which must underlie them. One is the fostering and maintenance of a bipartisan, professional, career public service. The second is that in a robust democracy the incumbent should not be advantaged in an election period by access to taxpayer funded resources. This second might be characterised as giving each party to an election a "fair go". If these are indeed the two main principles underlying the conventions, how far should they be taken? This is a matter for legitimate debate. Let me give you an illustration from the Fraser government period. The Prime Minister, some of you may recall, wanted to put out a monthly glossy called "The Government Record" and it was to be a collection of major policy statements by the government, in Parliament, outside of Parliament, a record of the government's achievement. There was a mailing list of some thousands of opinion leaders right around the country, all the media of course, business leaders and so on. The first draft of this document contained, as well as factual information and statements of the government's policy position, a good deal of rhetoric criticising the Opposition, explaining how the then Opposition had gotten the country into such a mess. It turned this into, in effect, a political document. The issue was raised with Mr Fraser - was it appropriate for taxpayers' money to be used to produce a document of that character and distributed that widely. The decision was taken by the Fraser government that that was not appropriate and an official had to edit this document each month, taking out all the polemics.

This is an interesting example, partly because it occurred not in a caretaker period but in the normal course of government. Thus it illustrates that the boundary that some people draw around "what is the caretaker period, when does it start" is capable of considerable extension. It may therefore be argued that the fundamental principles that the caretaker conventions are trying to address apply much more widely than in the caretaker period.

The second illustration I want to give about how far these principles should go is on costing - costing of opposition policies. As far as I know, the practice that the Public Service develops official versions of the costs of opposition policies began in 1972 in the McMahon/Whitlam

election period. In that election there were some rather sweeping policy pronouncements by Mr Whitlam and the intention was get some official costs out which would frighten the electorate and would be 'believed because they came from the Treasury (as it then was). Well that exercise was done, Mr McMahon used those figures, and in the end they probably didn't have much impact on the result. Subsequently, and from both sides of the political fence, it has become standard practice to get the Public Service to do costings as a matter of course. In fact, it is not just during the election period, now. Whenever the Opposition puts out a policy, whether or not it is something as major as Fightback, well ahead of an election period, the official estimates are done and out they come and are used as something of a political football. In practice, these days there are so many other estimates around that the electorate is probably thoroughly confused, bemused, unimpressed by all of this, so in practice it probably does not matter. In principle, I think it is open to question whether the resources, during a caretaker period particularly, of the Public Service should be used for that kind of exercise. I saw it happening in the McMahon/Whitlam election period and felt uncomfortable, and I still feel uncomfortable about this practice.

So these and some of the other examples I referred to earlier, like legislated tax cuts; what sort of advertisements it is appropriate to keep running at taxpayer expense during an election period - these are areas of fine judgement. In the end the judgement needs to be made by the political leadership, and if necessary debated publicly. The role of the public service, however, is to be conscious of these conventions and of the underlying rationale for them, and to bring them to notice whenever they feel there is an issue of sensitivity or judgement, and make sure that the judgement is made in the knowledge of the implications, in terms of past standards and likely public reaction.

Moving on to the issue of arrangements for transition, in most departments, and certainly in Prime Minister and Cabinet in this caretaker period, it is both a busy period and a fascinating period. As most of you would know, the preparations for an incoming government are extensive. In the case of the Prime Minister's Department, you have books on what happens immediately after the election, the procedures that need to be followed for swearing in of ministers, when Parliament has to be recalled, cabinet arrangements, machinery of government issues. There is a book that gets prepared on just those issues for both sides. Then there is a book on policy that is the first set of advice to the incoming government about what needs to be done to implement the policy that they have announced, any issues or difficulties that are seen with it, advice on how to take the necessary steps to get it advanced, and so on. And then there is a volume which is an information volume, that tells them what the latest budget deficit is, what other information they may need to know about the situation in Sri Lanka and so on. So, there are these huge volumes prepared and ready to hand over on the Sunday after the election, if the result is clear, to whoever it is. And the ones that are not lucky and do not win the election, those volumes do not get trashed, they get put on a file somewhere, but they do not ever see the light of day.

I would call that the routine practice that goes on during this period. There is also not-so-routine practice, at least in my experience, and I imagine that it applies in other departments as well. This is an opportunity for public servants with ideas that they harbour - how to improve government in one way or another - to produce those ideas to an incoming government and say "well, you didn't announce this but here is an idea - what do you think about this?". The politicians

are away electioneering, so you have the luxury of a little bit of time to sit down and think these things through. One illustration of that is the birth of what is now called COAG, the Council of Australian Governments. The reform program proceeding under that umbrella is something that was put forward in 1987 to Mr Hawke after the election. There was a paper that analysed the history of inter governmental arrangements in Australia, and what were seen to be some of the problems in the arrangements as they then stood, micro-reform issues and so on, and what sort of steps might be taken, what process followed to try to advance reform in that area. That was examined by Mr Hawke and his office and indeed by two other ministers at the time at his request, and there was some interest in it as an idea, but it was finally decided that the time was not right to advance such an agenda. Three years later, in 1990 after the election, the idea was put forward again and was accepted on that occasion.

The final point I want to make in relation to transition is its immediacy, especially when there is a change of government. A well-known example is what John Menadue did on 11 November 1975 when he learned that a commission had been given to Malcolm Fraser. He had to switch immediately and go across and start providing professional advice to the Prime Minister of the day. The whole Department who had been engaged until that morning, assiduously working on Whitlam government policy and programs, suddenly switched and started working for the caretaker government.

NATIONAL ELECTIONS: CARETAKER CONVENTIONS AND ARRANGEMENTS FOR TRANSITION

*Tony Blunn**

Edited version of an address to AIAL seminar, Caretaker conventions and arrangements for transition, Canberra, 6 February 1996.

There are two topics in a sense that we were asked to talk about. One was the caretaker period, and very, very closely related is the question of the preparation for the incoming government. As Mike Codd said, one of the uses of the caretaker period is that of important preparation for an incoming government. It is the one time when a public servant can genuinely anticipate a change of government. Indeed, the whole focus of a lot of our activity during this period is just that - anticipating, in the very literal meaning of that word, a change of government. So the relationship between the two things is very close. Usually, when we talk about the caretaker period, the first thing that comes to mind is the caretaker conventions. Now I would like to touch on a couple of things about the caretaker conventions fairly quickly.

Mike referred to the 1986-87 Department of Prime Minister and Cabinet (PM&C) Annual Report, and I guess that it is the bible for most of us in terms of the convention period and, to rephrase it, the conventions. It is called, in fact, the caretaker conventions, and interestingly other pre-election practices - I think that is a titillating sort of description of it - but from my point of view it is very much the other pre-election practices that are interesting, because basically the conventions themselves, what are known as the basic conventions, are pretty well understood, I think. We run into problems from time to time, as Mike said, about advertising, but that has been largely clarified. The good thing about this, of course, is that being conventions, they are growing, they are developing, they are changing. A recent change, I think, has been that one about advertising, where it has become much more clear, what the ground rules for that are. But the basic conventions were, in fact, in the form of guidelines for the handling of government business, incorporated in the Senate Hansard of 5 June 1987, p 3668. But they do cover the major policy decisions likely to commit an incoming government, that includes appointments of significance, entering into major undertakings or contracts and, I stress very clearly, those words "major significance" - "major". They are not the small things, they are the big things that are caught by the conventions. But, again as Mike has made very clear, that is a matter of judgement, and I guess that is where we come in, and the other processes come in and I will mention those in a moment.

The advertising campaigns I mentioned, consultations with officials by the Opposition, gets a very long mention in those guidelines. Interestingly, in respect of those in the guidelines themselves, there is a definition of the pre-election period, and this is described as being from three months prior to the expiry of

* *Tony Blunn is Secretary to the Department of Social Security.*

the House of Representatives, or the date of the announcement of the House of Representatives election, whichever is first. So there is automatic time running in terms of that one convention. I have been unable to find that that question of three months before applies as a matter of established practice to any other of the conventions.

As I said, it is major and significant things that we are talking about. However, the tabled conventions are not the end of the story. There are described in that PM&C history and description of it, "the other established practices". They are usually regarded as part of the conventions, but certainly they are not to be found or referred to in that summary of guidelines which was tabled in the Senate.

To quote from the PM&C Annual Report again, "they are mainly directed at ensuring that Departments avoid any partisanship in the special circumstances of an election campaign, and that government resources are not directed to supporting a particular political party". Now, depending on your minister at the time, they love it. Like hell they love it! It is a real question of interface there, and it is quite a difficult situation for public servants, and I think genuinely for ministers, who are not used to coming up against those sorts of conventions. To paraphrase them, if I may, I suppose you would say that basically during the convention period as public servants we do not provide policy advice, we do not develop new policies, we can, of course, provide advice on the impacts of existing policies, and indeed may have to on occasions because things may be going wrong. It is still the government - let me emphasise that very strongly - the government is still the government and we are still public servants working for that government. I will come back to that in a moment because I think it is a very important point.

We seek to ensure that no use is made of official facilities to promote the political party. We seek to ensure that as far as possible, in terms of our involvement anyhow, there is no electoral advantage to be gained from what we do. But we do, on the more positive side, continue to provide factual information and material. Mike referred to that and some of the problems that arise from it. I guess from my point of view the first test for me in that situation is, would I provide it to the Opposition, if I would then I have no problems at all. If I would not, then you go further into it, and I will come back to the mechanics of that in a moment.

There are, of course and I think it is worth mentioning, some legislative requirements that may impinge on the use of official facilities, and indeed even the provision of factual information and material. Mike mentioned the case of providing material which has been long published and may be in bulk in the department and is required by the minister's office. Now most ministers' offices are clever enough not to tell us what they want it for, and I guess we are clever enough, if it is within the bounds of reason, not to ask too much about what it is wanted for. So there is a bit of give and take in that, and I think that is sensible, and it has been the case in every election that I have been involved in. Certainly, if it was excessive, then I think the issue would arise. But there are legislated things which may impact on that. I have in mind, particularly, the Electoral Act and perhaps the Broadcasting Act. But there are probably many other pieces of legislation which do or may have impact. I say "may" because in some areas I think we are moving into new ground. Some of you would know my Department has been heavily involved in developing a thing called the Community Information Network which is a computer-based network which we provide to the community at large and which has access to the Internet and is also a means of communication between people. I am unclear - and I have not asked my colleagues in the Attorney-General's Department yet to tell me the answer - of

my responsibilities if that started to be used for material which might be described as political material. There are a number of issues there, and again I make the point that conventions develop, and I guess that we are going to have to develop some conventional approaches to those sorts of things. It may be that we will develop hard law approaches to that, I do not know. It is probably the subject of a separate and different discussion.

In the spirit of the conventions and recognising a reduced government load, that is, that basically ministers do not deal with a lot of the correspondence, a lot of the detailed day to day work that they would normally deal with during the parliamentary term, they hand that over in a sense to us, or to the Parliamentary Secretary as the case may be, and we get much more involved in dealing with parliamentary inquiries, the day to day sort of run of the mill stuff, which normally would go to the minister's office or through the minister's office to the minister and would be dealt with there. Because that load drops off, and also because the day to day running of government diminishes, and for other reasons, not just because of the self-denying conventions that we have talked about, we draw back from ministers' offices. Our departmental staff that may be there to assist ministers do not withdraw entirely, because we still recognise that there is a load of work to be carried, but significantly, we draw back resources to the minimum that is sensible in terms of that ongoing government commitment.

Now Mike made the point and I would emphasise it very strongly, that all of those things that I tried to describe and all the things that Mike described, are at the discretion of the government, and they are subject to the overriding demands of continuing effective government. So if at any stage a situation arose where it was necessary to provide policy advice, even new policy advice, because of the exigencies of the situation, there would be no doubt that it would be our role to provide that advice and to perform that advice at the request of the government.

I think it is a very healthy thing that despite the general nature of these conventions, and as we both tried to describe they are very general in their formulation and their application, they have been observed and have been relatively free from any significant controversy. I mean, the advertising one certainly created some issues, but the conventions were able to meet that and by and large I think that the spirit of the conventions is adhered to - which I think has something to do with the fact that the House of Representatives is no longer available to review the decisions of government during this period. I think that is also an influence on the way in which they have developed. You will be glad to know that all of those decisions that we have to make are not solely on my shoulders, I can turn to the Prime Minister's Department for help, because as I said earlier, they are in fact the custodians of the conventions in a very real sense and they do provide guidance and assistance to the Parliament in the difficult issues that do arise.

I think that one of the problems that we have, and why we need the Prime Minister's Department (apart from their general wisdom) is because these practices are not uniform across departments. Different departments will adopt differing attitudes in terms of the way in which they interpret and apply the conventions. In my own case, I sat down with my minister's staff and my minister when it became fairly obvious that the election was imminent, and we discussed my views on the conventions, and reached fairly quick approval from the minister about how we should apply them. I think that would be generally the case for most of my colleagues, some of whom are in this room, that they would sit down and reach agreement about how they apply the conventions. That is fine, until suddenly the minister finds that what he

has agreed with you is not necessarily what is being done by somebody else. Let me give you an example. Because Social Security is a large Department with some 300 regional and area outlets, we are in a constant process of opening offices. They are pretty high visibility things, they are in local electorates, they are usually in high demand by local representatives wanting to be the officiator of the opening. The Opposition likes to be there if it can be. We get a lot of publicity out of those sorts of openings, which is very good for our purpose, but notwithstanding the advantage to us, because of the spirit of the conventions, we do not open any offices during the formal convention period - we just stop opening offices. It does not mean they do not operate, but we do not have that formal public opening. That is a decision we take. Other departments take a different view. That creates some tensions when it becomes known. Local members say "if I can do it with department X why can't I do it with department Y, and I really need those extra few votes that I might get from that" or whatever they say. We have pursued the line of no openings and it is a line which I personally believe is entirely appropriate and proper and I am glad to say that my minister has shown no real signs of changing his view on the propriety of that either.

There are those sorts of tensions, and indeed I think it is true to say that not only are there different approaches between departments, in a lot of departments there are different approaches within the department, depending sometimes on the particular views of the officer responsible. But because you can over-emphasise these conventions, you can be over zealous about appearing to be pure, let me give you another illustration. When the election was formally announced we, in consultation with PM&C, went through our advertising program and cut those things which were clearly out of the bag. But much to my surprise my staff came with the very firm recommendation that we should stop telling people about their right to maternity allowance because the government was, in fact, making an announcement about maternity allowance. We did, actually, change the wording so that we did not give too much credit in any one direction but the obligation on us to advise our customers of their entitlements does not change during the period. There is a real issue about departments getting too carried away with the purity and zealousness of their role. I think that is something we have to watch too.

I mentioned the role of PM&C and that has been very helpful. We do have pretty constant reference to Bill Blick and his people, we do not always agree with them, sometimes we do not think they understand the program significance of what is happening or the reality of the situation we are in, and we of course always have a resort higher up the line, either to Mike Keating or eventually to the Prime Minister if it is a real issue - and it is the Prime Minister at the end of the day, acting on advice, who makes the decision.

Just so you do not get carried away with Mike's description of that relaxed period that we are all having at this time, let me make it quite clear that these conventions and their applications are a pain in the neck. They really do create a very significant workload.

Can I just echo again some of Mike's comments about the preparation for an incoming government. Can I go back to that relationship issue. It is really a question of gaining and maintaining trust in a very large way. We do not know who is going to be in government. We have to maintain the trust we have, or hope we have, with the existing government, but we have also got to be in a position through our actions to gain the trust and the confidence of the potential government. A lot of the caretaker period conventions, of course, are designed to achieve that. There is a significant policy development role going in the sense that

we are watching very carefully what the Opposition is saying, and indeed what the Government is saying, because from here on in we do not have too much notice of what some of the government's new policies might be - in fact some of them have already caught us a little bit by surprise - and so we are looking pretty constantly at the way the Government and the Opposition are developing their policies in order to prepare those tomes which Mike described. From our point of view, we prepare basically three. We prepare one in the event that the Government gets back and we get the same minister and that is a bit of a snap. Well, it is except for what Mike said - this is the opportunity to advance some new ideas. To say "we did all that, but there is a new opportunity so let's see if we can't take it". So there is a policy development role going on all the time, trying to build on what has been achieved. Then of course there is the Government returned with a different minister. Well you start the guessing game right about now - "if he/she goes there, where will he/she go, and if he/she goes there who will I get" - so you try and start matching up against the sorts of people that you think you might get, but basically that is not too bad. Then, of course, there is the ultimate issue of a new Government coming in, and of course it is constant reference to what Mr Howard or Mr Costello is saying at any given moment. Those policy issues cover the portfolio-specific issues, the sorts of policies we want. They certainly cover cross-portfolio issues. We are desperately interested in what they are saying about DPIE or HARD or DEET or whoever, in order to catch the nuances of the way policy might develop, and of course that relates to, and is directly affected by, the machinery of government changes that might be suggested or intimated during the process. So it is time for preparing those sorts of documents, but in summarising this slightly, it is a terrific time to focus your staff, to focus the people in the department towards the next round, towards the next set of objectives to be achieved, and towards how we might go about achieving those objectives.

AMBIT OF AAT REVIEW REVISITED - SAWMILLERS EXPORTS DECISION

*Pat Brazil**

Deputy President B J McMahon's ultimate decision in *Sawmillers Exports Pty Ltd and Minister for* Resources (17 May 1996) was to affirm the decision of the Minister under review because the relevant Regulations, the Export Control Hardwood Woodchips Regulations, imposed a national ceiling on woodchips exports which prevented him from increasing the volume of woodchips to be exported by the applicant. At the same time, however, he reviewed the merits and made a "conclusion" that "the preferable decision" would have been to grant the increase sought (at p 16).[1]

It has been held that the Administrative Appeals Tribunal (AAT) may discontinue a hearing when the application to review is merely "a sterile exercise": *Re Gowing and Civil Aviation* Authority (1990) 11 AAR 411. In the *Sawmillers Exports case*, a preliminary submission was made that this was such a case, but the Deputy President rejected it and entered upon an examination of the merits, and of the associated submissions made by the applicant that the provisions in the Regulations as to the national ceiling on woodchips exports were invalid.

The course followed by the Deputy President is not expressly authorised by the provisions of the *Administrative Appeals Tribunal Act 1975* (AAT Act). Under subsection 43(1) of the Act, the only types of decision referred to are:

- affirming the decision under review;
- varying the decision under review; and
- setting aside the decision under review and either making a decision in substitution or remitting the matter for reconsideration in accordance with the "directions or recommendations" of the AAT.

At the same time, subsection 43(1) does not rule out what the Deputy President did. The reason why he was unable to give effect to his finding was that under the Regulations in question, the Minister had already granted licences for export volumes for 1996 that in the aggregate used up the whole of the ceiling. This type of problem is, if not a familiar one, nevertheless one that has been identified and dealt with in writings on administrative review. It has been dignified with the description of "polycentric" decision-making. Thus the *17th Annual Report of the Administrative Review Council 1992-1993*, at 76, refers to decisions that relate to the allocation of a finite fund or resource, against which all potential claims for a share of that fund or resource could not be met. The report goes on to suggest that such decisions are "generally considered inappropriate for merits review". The reason given is that this is because a decision to make an allocation affects the amount granted to other claimants and that if that decision is altered then so is the basis of all other decisions. Whether consciously or not, this wisdom was obviously not taken into

* *Pat Brazil is a consultant to Allen Allen & Hemsley. He was Secretary to the Commonwealth Attorney-General's Department 1983 - 1989.*

account in drawing up the Regulations considered by the Deputy President, which specifically gave a right of review on the merits in relation to the grant of licences, without any express exclusion of the volume of exports from the scope of the review. The comment may also be made that the finite nature of the ceiling on exports only made it more important that the individual allocations of resource be fair and just, and, if at all possible, subject to review.

Also, under subsection 43(2) of the AAT Act, the AAT is required to give reasons for its decisions. The AAT should be able, in giving its reasons, to say that it has only affirmed the decision under review not because it considers it to be the right one but only because no effective decision can be made to redress what is perceived to be an erroneous outcome. It is pertinent to note in this regard that in the *Sawmillers Exports case* the findings raised substantial matters of administrative fairness and justice. The Deputy President found that the decision under review depended upon advice that was wrong, it failed to take into account representations made by the exporter to the Minister, and finally that the nature of the process leading to the fixing of the quantum of the national ceiling was completely unexplained, either in the Regulations themselves or in the submissions that were put to the AAT (at p 16).

The submissions put on behalf of the exporter that the Regulations in relation to the ceiling were invalid were, first of all, that they gave preference to one state or part of a state over another state, contrary to section 99 of the Constitution, by making a distinction between exports sourced from the relevant region in New South Wales specified in the Schedule to the Regulations and other parts of Australia. It was also submitted that the Minister's decision was intended to transfer, or had the effect of transferring, export allocation from an exporter in one state region to other states and other parts of Australia on the basis of false assumptions of a factual character and that this produced constitutional invalidity.

The Deputy President ruled that it was not appropriate for the AAT to rule on the constitutional validity of Regulations, saying that this was a matter that should be determined by a court of competent jurisdiction and this was a policy that had always been followed by the AAT. He cited *Re McKie and Minister for Immigration (1988)* 8 AAR 90, at 96. The comments to the same effect by the present Chief Justice of the High Court (Brennan CJ) when President of the AAT in *Re Adams and Tax Agents Board* (1976) 12 ALR 239, at 241, could also have been cited. Some findings of fact were made by the Deputy President in relation to the constitutional issues, but only in so far as they might turn out to be relevant (at p 18).

A different approach was taken however to the other submission that the Regulations establishing the national ceiling were in any case beyond the regulation-making power contained in section 7 of the *Export Control Act 1982*. The Deputy President made it clear during argument that questions of validity of this kind could be dealt with by the AAT, and he proceeded to consider them. He concluded that the Regulations relating to the ceiling were a valid exercise of the regulation-making power, but his willingness to rule on the question was, with respect, soundly based.

Thus, in *Re Jonsson and the Marine Council* (1990) 12 AAR 323, the AAT ruled that the regulation on which the decision under review was based was ultra vires the regulation-making power, and it set aside the decision on that basis. The ruling on invalidity was made, not as an authoritative legal ruling such as only a court can make, but rather on the basis that the AAT has the competence to form an opinion of the invalidity of regulations (on non-constitutional grounds) merely as a means which the AAT as an

administrative review body may adopt so that "it may appropriately mould its conduct" in reviewing the decision to accord with the law. This language derives ultimately from a passage in the decision of Brennan CJ in *Re Adams and Tax Agents Board* (1976) 12 ALR 239, at 242.

The AAT, in *Re Jonsson and the Marine Council* (at pp 341-2), said that it took the course it did because in the circumstances of that case the grounds for doing so were "compelling". In the *Sawmillers Exports case* no such reservation was entered, and a general competence to deal with such issues of invalidity was assumed by Deputy President McMahon. Despite the reserved approach which was ably expounded in *Re Jonsson and the Marine Council*, Deputy President McMahon's approach is probably the better one. To use language used by Bowen CJ in *Collector of Customs v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307, at p 316, it is difficult to distinguish degrees of nullity or invalidity. Suffice it that the AAT can, on its own motion or at the request of a party, refer the question of invalidity to the Federal Court if it wishes to do so (AAT Act, section 45).

Lawlor's case is an appropriate point on which to end this case note. The approach taken and the reasons given by Deputy President McMahon in the *Sawmillers Exports case* are in line with the object and purpose of the AAT Act, as described by Bowen CJ in *Lawlor's case* (at p 313), namely to provide a simpler and more broadly based system of appeals from administrative decisions. The approach is in accord with the majority's view in *Lawlor's case* that the AAT could decide a matter on the ground that the decision under review was "in excess of authority". Bowen CJ observed that a more restrictive view of the ambit of AAT review would mean that, whenever it appeared there was an error of law by reason of which the decision was legally ineffective and that the applicant certainly needed relief, the AAT would be obliged to refuse on the ground it had no jurisdiction. The word "decision" in section 25 of the AAT Act is to be taken as referring to a decision in fact made, in purported exercise of powers conferred by an enactment, regardless of whether it is legally effective. Finally, there are no degrees of nullity.

Endnotes

1 Page references in this case note are to the "Decision and Reasons" as published by the AAT.

SOME NOTES UPON COMMISSIONS OF INQUIRY

*Cedric Hampson AO, QC**

These notes formed the basis of an AIAL seminar, Brisbane, 16 April 1996.

Any person may appoint another to discover facts for him and even to make recommendations on the basis of those facts. The Domesday Book can be regarded as the report of Commissioners sent about to establish the assets of the kingdom. Only if information will not be given voluntarily to the enquirer does it become necessary to arm him with some special powers of compulsion.

Two famous commissions were those set up by Thomas Cromwell in 1535. The first enquired into monastic habits and morals and Cromwell's ruffians were guilty of dishonest lying in the scandalous state of affairs they reported. The second commission was into the monastic revenues. The two commissions were an early recognition of the political use of commissions; use them to establish first there is a problem; secondly, how to solve the problem at profit to the Crown.

Dixon J in *McGuinness v* AG (Vic) (1940) 63 CLR 73 at 94 deals with the history of commissions of inquiry. The warrant or letters patent "commission" ("commission") was issued under the Royal prerogative; think of the commissions of assize of oyer and terminer, of gaol delivery, of nisi prius and of the peace which sent the King's Justices on assizes.

In Australia a practice was followed for some time of passing a special Act of Parliament to constitute a Commission of Inquiry or Royal Commission. There is now Commonwealth legislation and legislation in each State which empowers persons appointed by Order in Council to conduct such inquiries. The legislation has advanced to a stage where most questions about the powers of a Commission of Inquiry will obtain answers from a construction of the legislation eg. what are the rights and obligations of a witness?

Originally, inquiries were investigatory with or without a request for recommendations. The task was to assemble information. More recently we have become accustomed to inquisitional inquiries where the answer to a specific question is sought. Coercive powers may be desirable in the case of investigatory inquiries but will be essential in the case of inquisitional ones.

There were questions raised whether a commission could be in contempt of court by inquiring into matters of which a Court was seized and in particular whether an inquiry could be made as to whether a crime had been committed and who had committed it: a clear contempt of the criminal courts, it was argued. These arguments were rejected over time: *Clough v Leahy* (1904) 2 CLR 139, *McGuiness v AG (Vict)* (1940) 63 CLR 73 and *Victoria v Australian Building Constructions Employees' and Builders Labourers' Federation* (1982) 56 ALJR 506.

These are cases where the very existence of the Inquiry was claimed to be in contempt. Cases have arisen where the

* *Cedric Hampson is a member of the Queensland Bar.*

course the inquiry takes may impinge upon ordinary litigation. In *Johns & Waygood Ltd v Utah Australia* (1963) VR 70 it was argued before Scholl J that an inquiry into why part of the King Street bridge had collapsed would interfere with pending civil litigation arising from the collapse. He thought relief could be given if there was a "real and substantial present danger of interference with the course of justice" but held that, in the circumstances, there was not. On the other hand the proximity of the trial of Hammond who had been charged with an offence arising from alleged export meat substitution justified an injunction to restrain Woodward J, a Federal Judge, who had been appointed Royal Commissioner by the Commonwealth and Victoria to inquire into allegations of unlawful substitution of meat for export: *Hammond v The Commonwealth* (1982) 152 CLR 188.

The remedies which may be obtained against those conducting an inquiry could be declarations and injunctions and, formerly prerogative writs, but judicial review has now taken over from the prerogative writs as the appropriate remedy: *Lloyd v Costigan No. 2* (1983) 53 ALR 402 (Federal Full Court). The decision to be reviewed will have to be something other than the ultimate report or recommendations which is not a decision: *Ross v Costigan* (1982) 41 ALR 319.

It is a moot question whether an incorrect finding of fact could ever have been rectified by certiorari but there is no doubt that a Royal Commission must afford natural justice and will have an order it makes without according natural justice overturned: *Mahon v Air New Zealand* (the Mt Erebus tragedy) (1983) NZLR 633.

What a Commissioner is investigating must be able to be objectively identified. In *Mannah v State Drug Crime Commission* (1988) 13 NSW LR 43 a challenge was made to subpoenas. The Commission had had referred to it by notice under the Act which constituted it a "relevant drug activity". It was held by the Court of Appeal that it was impossible objectively to identify the subject matter of the inquiry and the subpoenas were bad.

There will always be difficulty in restraining a Commission from seeking certain evidence on the ground that the evidence sought falls outside the terms of reference. *Lloyd v Costigan No. 2* (1983) 53 ALR 402; *Ross v Costigan No.2* (1982) 41 ALR 337. Even where a Commissioner is charged with recommending prosecution only on the basis there is a prime facie case, it seems he cannot be prevented from relying on inadmissible evidence to reach his conclusion: *Jackson v Slattery* (1984) 1 NSW LR 599.

The Acts to which I have referred protect Commissioner, counsel and witnesses against liability for defamation.

There was a privilege against answering a question which would incriminate the witness: *Sorby v Commonwealth* (1983) 152 CLR 281. Nowadays however section 6A of the Commonwealth Act and section 14(1A) of the Queensland Act require a witness to answer but the evidence given by him under compulsion cannot be used against him except for prosecution for an offence (eg perjury) against the Act. This view is supported by *R v McDonnell* (1978) 78 ALR 393. However the evidence given by a willing witness will be admissible against him: *Reg v S* (1953) SR(NSW) 460. A witness under the Commonwealth Act has a wider protection because of the form of section 6DD: *Giannarelli v The Queen* (1983) 154 CLR 212. There has been some alteration of the legislation from time to time and care should be taken in using authorities. The objection to answer voluntarily cannot be taken in a "blanket" fashion: *C v National Crime Authority* (1987) 78 ALR 338.

Legal professional privilege is a good reason for refusing to answer questions or to produce information *Baker v Campbell* (1983) 153 CLR 52.

Dr Hallett of Victoria wrote a doctoral thesis *Royal Commissions and Boards of Inquiry* (published in 1982 by the Law Book Company). This is a very useful book as it sets out such things as the procedural rulings which have been given by Commissioners over the years. Two matters that arise are obtaining leave to appear and the order of proceedings.

Usually, to obtain leave to appear generally it is necessary to show a special interest in the inquiry over and above that which every member of the public has. General leave really makes the person represented a party to the inquiry. Limited rights of representation can be given, eg for a person summoned as a witness for the time he is giving evidence. These days the Commissioner most usually adopts the procedure announced by Gibbs J in the *National Hotel Inquiry* (1964) QWN 65. He said:

> I intend to follow the practice that has been followed in many, although not all, Royal Commissions in Australia of requiring that all witnesses should be called and examined in the first instance by counsel assisting the Commission.
>
> If a witness is represented by counsel, he may next be examined by his own counsel, and he may then be cross-examined by other counsel in the order of their appearances, although it is hardly necessary to say that I expect counsel to avoid duplication or repetition in their cross-examinations.
>
> If any counsel who has been granted leave to appear desires that any person be called as a witness, he should request Mr. Byth, as counsel assisting the Commission, accordingly, and should furnish him with a statement of the evidence that the proposed witness is expected to give.
>
> If Mr. Byth declines to call the witness when so requested, counsel who desires him called may make application to me at the hearing, supported by an affidavit annexing a copy of such statement.

Commissions have statutory powers to prohibit publication of evidence received by them. They are not obliged to conduct their proceedings in public although the better view is that they should do so unless there is a good reason to the contrary. The case for public hearings is well made in the Commission chaired by Lord Justice Salmon, *Report of the Royal Commission into Tribunals of Inquiry*, 1966 UK.

> As we have already indicated it is, in our view, of the greatest importance that hearings before a Tribunal of Inquiry should be held in public. It is only when the public is present that the public will have a complete confidence that everything possible has been done for the purpose of arriving at the truth.
>
> When there is a crisis of public confidence about the alleged misconduct of persons in high places, the public naturally distrusts any investigation carried out behind closed doors. Investigations so conducted will always tend to promote the suspicion, however unjustified, that they are not being conducted sufficiently vigorously and thoroughly or that something is being hushed up. Publicity enables the public to see for itself how the investigation is being carried out and accordingly dispels suspicion. Unless these inquiries are held in public they are unlikely to achieve their main purpose, namely, that of restoring the confidence of the public in the integrity of our public life. And without this confidence no democracy can long survive.

Recent years have seen the establishment of bodies which have most of the characteristics of a Royal Commission and might be described as standing Commissions. Their role is to assist police in more sophisticated areas of crime for which purpose they are given wide powers of coercion and of investigation generally. Additionally they have a particular mandate to detect corruption. These roles are entirely investigatory and usually the bodies will wish to keep secret the information they

have assembled until a prosecution brief emerges. The courts have recognised the propriety of keeping information secret even to the extent of allowing the person conducting the inquiry to refuse to allow the same legal practitioner to appear for witnesses for the prosecution and for the defence: *Re: Whiting* (1944) 1 Qd R 561. Another example is *National Crime Authority v A* (1988) 78 ALR 707. There are useful comments by Lockhart J in *ASC v Bell* (1991) 104 ALR 125 upon the obligations of a legal practitioner when conflicts of interest may arise because of representing a particular person.

The two bodies of the kind I have been discussing which will be of importance to Queensland practitioners are the Criminal Justice Commission and the National Crime Authority. They and their powers are creatures of their particular constituting Acts which must be studied by any person proposing to appear before them. It should be noted in particular that rights to claim privilege are seriously circumscribed

AIAL ESSAY PRIZE

The Australian Institute of Administrative Law was established in 1989. The Objects of the Institute include:

> "(a) to promote knowledge of and interest in administrative law;"
>
> and
>
> "(d) to publish and encourage the publication of papers, articles and commentaries about administrative law;".

To further these objects, the Institute has decided to conduct an annual competition for the AIAL Essay Prize in Administrative Law.

A prize of $A2,000 will be awarded to the author of an essay displaying original thinking on a topic of the author's choice relating to administrative law.

The competition is open to any interested persons.

COMPETITION RULES

1. Entries must be unpublished essays which are the original work of the author. They may be on any topic relating to administrative law.

2. The winning entry is likely to exhibit original ideas on issues of importance in the practice of administrative law or administrative law theory.

3. Entries should be about 10,000 words in length.

4. All entries should be on A4 paper and typed well spaced. The original and two copies together with a disk of each essay should be submitted. The name of the author and a short biography should be included on a detachable page. The author's name should not appear on the essay or copies.

5. Entries should be addressed to Secretary, AIAL, PO Box 3149, BMDC, ACT, 2617, Australia, and must be received by 1 March 1997.

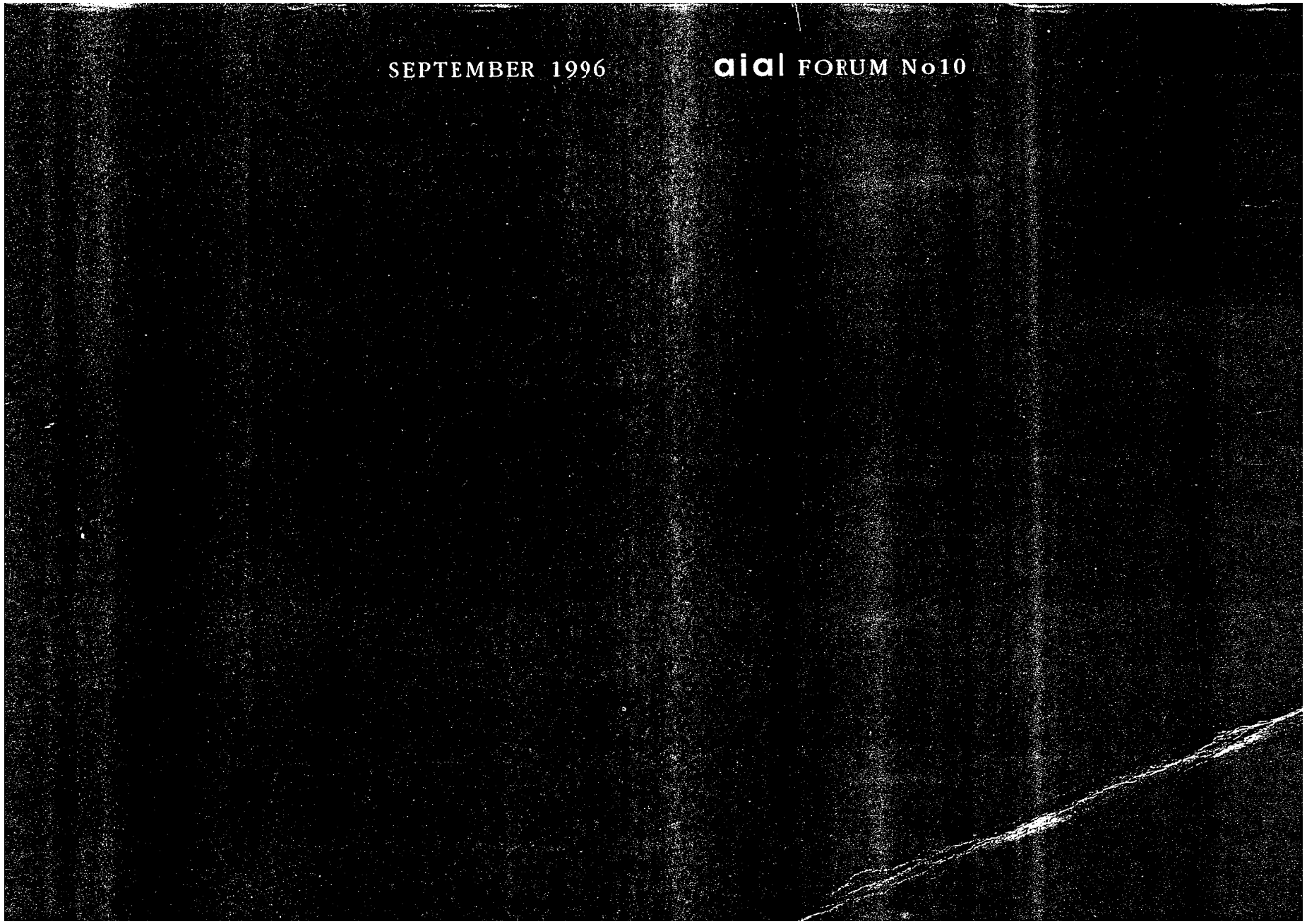
6. The winning entry will be determined by the Executive of the Institute acting on the recommendation of a committee of the Executive. The award of the prize shall be in the absolute discretion of the Executive. The Executive may determine not to award the prize in any year.

7. The prize will be $A2,000.

8. The prize is expected to be awarded at the Annual Forum of the Institute.

9. The winning essay will normally be published by the Institute. It is a condition of entry to the competition that the winning essay will not be published elsewhere without the prior approval of the AIAL.

Further information relating to the competition may be directed to Emeritus Professor Dennis Pearce, Centre for International and Public Law, Faculty of Law, Australian National University, Canberra ACT 0200.


SEPTEMBER 1996
aial FORUM No10