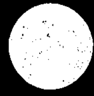

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TABLE OF CONTENTS

THE USE OF FEDERAL JUDGES TO DISCHARGE EXECUTIVE FUNCTIONS: THE JUSTICE MATHEWS CASE
Fiona Wheeler 1

KABLE v DPP: TAKING JUDICIAL PROTECTION TOO FAR?
Robert Orr 11

RECENT DEVELOPMENTS IN REFUGEE LAW IN AUSTRALIA
Refugee Review Tribunal 18

STANDING TO SUE FOR PUBLIC LAW REMEDIES
Alan Rose 25

COMPLAINTS, INVESTIGATIONS AND DISPUTES UNDER THE PROPOSED PRIVACY ACT EXTENSION TO THE PRIVATE SECTOR
Mick Batskos 34

AIAL ESSAY PRIZE 39

THE USE OF FEDERAL JUDGES TO DISCHARGE EXECUTIVE FUNCTIONS: THE JUSTICE MATHEWS CASE

*Fiona Wheeler**

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> The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.[1]

The appointment of a judge to conduct a Royal Commission or other governmental inquiry is a regular feature of Australian political life at both state and federal level. Members of the judiciary enjoy a reputation as "skilled and impartial" inquirers;[2] hence the many occasions on which Australian governments have asked judges temporarily to leave their courtrooms and discharge these non-judicial tasks.[3] The question whether judges should do so has long been a subject of debate. For example, in his 1974 Garran Oration entitled "The Ethics of Public Office", Sir John Kerr drew attention to the United States' Canons of Judicial Ethics, especially Canon Five - "[a] Judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties".[4] This Canon encompassed the specific rule that "[a] Judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice".[5] Having noted that general practice in Australia did not accord with this American precept, the Governor-General posed the question: "will practical experience and the weighing of fundamental values ultimately lead Australian judges to the position stated in Canon 5 ... "?[6] The issue was taken up just over three years later in 1978 at the forty-fourth Summer School of the Australian Institute of Political Science where Professor Gordon Reid described Sir John as having "anticipated some problems in this area".[7] Professor Reid observed that the practice of using judges to discharge a variety of executive functions was on the increase[8] and warned that to share the prestige of the judiciary in this way with the other branches of government "is fraught with dangers for a fearlessly independent Judiciary".[9] Subsequent discussion in the law journals throughout 1978 revealed a range of views among Australian judges as to the appropriate limits on their involvement in commissions of inquiry, administrative tribunals and the like.[10] The topic continues to provoke discussion and disagreement.[11]

While there exist strong views in the states on these issues,[12] the propriety of the assumption by federal judges (that is, judges of the High Court and the federal

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courts created by the Commonwealth Parliament) of non-judicial functions has always been a question, not just of the conventions or ethics of judicial office, but also of the demands of positive constitutional law. The High Court has held that the Commonwealth Constitution impliedly incorporates a doctrine of the separation of federal judicial power from legislative and executive power. This separation doctrine finds primary expression in two propositions of law which serve to promote both the rule of law and the impartial administration of justice:[13] first, that federal judicial power can only be exercised by the courts designated in s.71 of the Constitution (the High Court, federal courts created by the Commonwealth Parliament and state courts invested with federal jurisdiction)[14] and, secondly, that such courts cannot validly be invested by the Commonwealth Parliament with any other category of function - whether legislative or executive - unless incidental to the performance of their judicial functions.[15] It is this "fundamental principle of the separation of powers"[16] which lies at the heart of the recent decision of the High Court in *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs*[17] denying that Justice Jane Mathews of the Federal Court could validly be nominated under s.10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) to report on proposals to construct a bridge to Hindmarsh Island in South Australia. Although some of the themes in *Wilson* have since been further developed by the High Court in a different (albeit related) setting,[18] this commentary is specifically concerned with the *Wilson* case and its impact upon the capacity of federal judges to come to the aid of the executive in the conduct of official inquiries and other executive functions.

The Statutory Context and Background to the Case

The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) empowers the Minister for Aboriginal and Torres Strait Islander Affairs on the application of an Aboriginal or group of Aboriginals to make a declaration in relation to "a significant Aboriginal area" (s.10). Such a declaration operates to protect and preserve that area from "injury or desecration" (s.11). Under s.10(1)(c) of the Act, however, this power is conditioned upon receipt by the Minister of "a report under subsection (4) in relation to the area from a person nominated by him ...". Section 10(4) provides that such a report shall deal with the following matters:

(a) the particular significance of the area to Aboriginals;

(b) the nature and extent of the threat of injury to, or desecration of, the area;

(c) the extent of the area that should be protected;

(d) the prohibitions and restrictions to be made with respect to the area;

(e) the effects the making of a declaration may have on the proprietary or pecuniary interests of persons other than the [applicants] ...;

(f) the duration of any declaration;

(g) the extent to which the area is or may be protected by or under a law of a State or Territory, and the effectiveness of any remedies available under any such law;

(h) such other matters (if any) as are prescribed.

Justice Mathews was nominated by the Minister in January 1996 to act as a reporter in relation to what had become a highly politicized and controversial application for protection of Hindmarsh Island, it being claimed by a group of Aboriginals that proposals to construct a bridge to the Island were inimical to

Aboriginal tradition associated with the Island.[19] Justice Mathews agreed to perform this task. However, the plaintiffs (a second group of Aboriginals contesting the existence of the traditions invoked by the first group) argued that for Justice Mathews to discharge this particular non-judicial function was incompatible under the Commonwealth Constitution with her status as a Federal Court judge. The High Court (Kirby J. dissenting) agreed.

The Doctrine of Constitutional Incompatibility of Office

(a) The Pre-Wilson Legal Position

As pointed out above, the doctrine of the separation of powers prevents the conferral of executive functions on federal courts unless those functions are incidental or ancillary to the exercise of judicial power. Thus, the Commonwealth Parliament could not validly empower a federal court, or a judge of a federal court *acting as such*, to conduct a governmental inquiry. Nonetheless, the High Court has recognized a qualification to this principle of separation - that non-judicial functions can validly be conferred on federal judges in their capacity as *personae designatae*, that is, as individuals "detached from the court they constitute".[20] Clearly, this "designated person principle" could operate to undermine the doctrine of the separation of powers unless confined in some way.[21] Hence, the Court in its 1995 decision in *Grollo v. Palmer*[22] identified two conditions which must be satisfied if non-judicial functions are to be validly conferred on a federal judge in her or his individual capacity. First, a judge must consent to being used as a *persona designata*.[23] And secondly, the relevant non-judicial functions must not be incompatible with the holding by the designated person of judicial office. More specifically:

> no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power ...[24]

On the facts in *Grollo*, a majority of the High Court upheld the validity of provisions of the Telecommunications (Interception) Act 1979 (Cth) which conferred the non-judicial function of issuing telecommunication interception warrants on Federal Court judges who had consented so to act in an individual capacity. The designated person principle has also been held to support the appointment of a serving Federal Court judge as Deputy President of the Administrative Appeals Tribunal (a non-judicial body).[25]

In *Wilson* the High Court recognized that Justice Mathews had been appointed as a reporter under s.10 of the Act, not in her capacity as a Federal Court judge, but "as an individual", "persona designata".[26] Moreover, all members of the Court accepted the authority of *Grollo* and the twin conditions laid down in *Grollo* for the valid conferral of non-judicial functions on persons who are judges of federal courts. Where Kirby J. parted company with the majority was in his application of that test.

(b) The Approach of the Majority

Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. in their joint majority judgment in *Wilson*[27] emphasized the way in which the *Grollo* incompatibility condition protects "the independence of Ch III judges from the political branches of government",[28] thereby reconciling the designated person principle with the objectives underpinning the constitutional separation of federal judicial power. (This of course begs the question of why non-judicial functions cannot validly be conferred on a federal court or on a judge of a federal court acting as such, subject to a similar incompatibility condition. This, however, is a topic for another day.[29]) The High Court in *Grollo* had suggested a number of ways in which the doctrine of constitutional incompatibility of office might be infringed, including by the

conferral on a federal judge *persona designata* of "non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity is diminished".[30] This was the type of incompatibility relevant to Justice Mathews' nomination as a reporter[31] and, in a crucial paragraph of their judgment, Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. set out a three part test for determining whether the separation between the judicial and legislative and executive branches had in fact been breached in this way. Their Honours said that in any particular case:

> The statute or the measures taken pursuant to the statute [purporting to confer a non-judicial function on a judge of a federal court *persona designata*] must be examined in order to determine, ***first***, whether the function is an integral part of, or is closely connected with, the functions of the Legislature or the Executive Government. If the function is not closely connected with the Legislature or the Executive Government, no constitutional incompatibility appears. ***Next***, an answer must be given to the question whether the function is required to be performed independently of any instruction, advice or wish of the Legislature or the Executive Government, other than a law or an instrument made under a law ... If an affirmative answer does not appear, it is clear that the separation has been breached ... If the function is one which must be performed independently of any non-judicial instruction, advice or wish, ***a further question arises***: Is any discretion purportedly possessed by the Ch III judge to be exercised on political grounds - that is, on grounds that are not confined by factors expressly or impliedly prescribed by law?[32]

Justice Mathews' nomination as a reporter failed this test in several respects. In so concluding, Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. focussed upon the terms of the Aboriginal and Torres Strait Islander Heritage Protection Act which, in their view, effectively placed a reporter within the executive branch. In their Honours' words:

> The function of a reporter under s 10 is not performed by way of an independent review of an exercise of the minister's power. *It is performed as an integral part of the process of the minister's exercise of power.* The performance of such a function by a judge places the judge firmly in the echelons of administration, liable to removal by the minister before the report is made and shorn of the usual judicial protections, in a position equivalent to that of a ministerial advisor.[33]

The joint majority judgment had earlier noted that an obligation on the part of a *persona designata* to perform her or his non-judicial functions in accordance with the rules of natural justice would assist a finding of compatibility of office.[34] But the fact that a reporter was under such an obligation in this case was "not significant".[35] Instead, "the Act does not require the reporter to disregard ministerial instruction, advice or wish in preparing the report. The report may be prepared so as to accord with ministerial policy".[36] Moreover, the Act envisaged a reporter performing political functions such as addressing the competing interests of stakeholders in the area of land or water for which the Act's protection had been sought.[37] The final indicium of incompatibility was the requirement under s.10(4)(g) of the Act that a reporter deal with "the extent to which the area is or may be protected by or under a law of a State or Territory, and the effectiveness of any remedies available under any such law". This, said the joint majority judges, would amount to the rendering of an advisory opinion to the minister upon a question of law, advisory opinions being "alien to the exercise of the judicial power of the Commonwealth".[38]

It followed from these considerations that the function of a reporter under the Act could not, consistently with the Commonwealth Constitution and its entrenched doctrine of the separation of powers, be conferred by legislative or

executive action upon a person holding office as a judge of a federal court. Thus, s.10(1)(c) of the Act was read down so as to exclude such a person from the ranks of eligible reporters.

(c) The Dissent of Kirby J.

As noted above, Kirby J. accepted the authority of *Grollo v. Palmer*, but nonetheless concluded that performance of the reporting function under s.10 of the Act was not incompatible with Justice Mathews' commission as a Federal Court judge. Two factors in particular contributed to his Honour's finding. First, Kirby J. placed considerable emphasis upon historical practice, pointing out that the use of federal and state judges to conduct federal governmental inquiries - "some of them very controversial and partisan in their potential" - had been "a settled feature of Australian public life during the whole history of the Commonwealth".[39] Against this backdrop, the continued availability of federal judges to perform a variety of non-judicial tasks as *personae designatae* was "incontestably to the benefit of good government".[40] As his Honour put it:

> Australia's relatively small population, scarce governmental resources and limited numbers of trained personnel argue strongly against the imposition of a new and rigid constitutional rule which history, past practice and constitutional understandings to date would deny.[41]

To this argument of history and the practical demands of governance, Kirby J. added a conception of the reporting function under s.10 of the Act which differed from that of the majority. In his Honour's opinion, it was wrong to describe a reporter "as akin to a ministerial adviser": the minister had no power to interfere in the discharge of a reporter's function, the performance of which was subject to the rules of natural justice.[42] Thus, "[a]s a donee of statutory powers required to act with lawfulness, integrity and fairness, the reporter, upon accepting nomination, is obliged to act in a way that is wholly independent of the minister and completely conformable to the conduct normal to a judge".[43] As far as Kirby J. was concerned, if the secretive function of issuing telecommunication interception warrants could validly be conferred on persons who are judges of the Federal Court (*Grollo v. Palmer*), it followed that Justice Mathews' nomination under the Act was consistent with the Constitution.

The Impact of *Wilson* on the Use of Federal Judges to Conduct Governmental Inquiries and Other Non-Judicial Functions

Wilson is the first case in which the performance of non-judicial functions by a person who is a judge of a federal court has been held to contravene the Constitution. As such, the principles elaborated in *Wilson* - against which any future use of federal judges to discharge executive functions must be tested - deserve close attention. But what precisely is their impact? Do they provide sufficient guidance for future cases? When closely examined, it is submitted that the three part test embraced by Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. in *Wilson* is unclear in a number of respects.[44] The question whether a particular non-judicial function conferred by or under statute on a person who is a federal judge "is closely connected with"[45] the functions of Parliament or the executive begs the question of what degree of connection is "close". But accepting that in most controverted cases such a connection will exist, it is the final limb of the three part test which excites most difficulty: what do the joint majority judges mean when they deny that a federal judge *persona designata* can validly exercise a "political" discretion?[46] Their Honours described such a discretion as exercisable "on grounds that are not confined by factors expressly or impliedly prescribed by law".[47] But how "confined" or "structured" must a discretion be to escape

classification as a political discretion?[48] As indicated above, the need for a reporter to make "political decisions"[49] was one reason which Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. gave for their decision on the facts of the case. These "political decisions" (they were in fact recommendations - the minister was bound only to consider a report) flowed from the terms of s.10(4) of the Act - specifically, the requirement that a reporter address "the extent of the area that should be protected" (s.10(4)(c)), "the prohibitions and restrictions to be made with respect to the area" (s.10(4)(d)), "the effects the making of a declaration may have on the proprietary or pecuniary interests of persons other than the [applicants]" (s.10(4)(e)) and "the duration of any declaration" (s.10(4)(f)). As a reporter's conclusion in relation to each of these matters would surely take colour from the purposes of the Aboriginal and Torres Strait Islander Heritage Protection Act which were declared in s.4 of the Act to be "the preservation and protection from injury or desecration of areas and objects in Australia ... that are of particular significance to Aboriginals in accordance with Aboriginal tradition", it would seem to follow that the notion of a political discretion under the *Wilson* tripartite test will capture a relatively wide range of decisions. But whatever its ultimate scope proves to be, the use of the term "political" in this context is to be regretted; not only is it vague, but it also conveys undertones of discredited distinctions between law and policy.

The joint majority judges in *Wilson* did comment specifically on the impact of their decision on the use of federal judges to conduct Royal Commissions, observing that:

> A judge who conducts a Royal Commission may have a close working connection with the Executive Government yet will be required to act judicially in finding facts and applying the law and will deliver a report according to the judge's own conscience without regard to the wishes or advice of the Executive Government except where those wishes or advice are given by way of submission for the judge's independent evaluation. The terms of reference of the particular Royal Commission and of any enabling legislation will be significant.[50]

While this passage suggests that the duties of a Royal Commissioner may be compatible with judicial functions, it does not imply compatibility of office in all circumstances. Each case will turn on its own facts. It is clear, however, that the prospect of a finding of compatibility between a Royal Commissioner's judicial and non-judicial duties will be enhanced by the existence of enabling legislation expressly insulating the Commissioner from any governmental instruction, advice or wish (other than as formally submitted to the Commission for its independent evaluation) and obliging the Commissioner to act in accordance with the rules of natural justice. Whether the making of a series of recommendations bearing upon the subject of her or his report could ever amount to the exercise by a Royal Commissioner of a "political" discretion remains to be seen. Any function in the nature of the giving of an advisory opinion on a question of law in the sense referred to in *Wilson* would also have to be avoided.[51]

The other specific extra-judicial activity to which the joint majority judges directed their attention was the appointment of a person who is a federal judge as a presidential member of the Administrative Appeals Tribunal. Although Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. did not unequivocally endorse the 1979 finding of the Full Federal Court in *Drake v. Minister for Immigration and Ethnic Affairs*[52] that such appointments are consistent with the separation of federal judicial power, they went out of their way to stress that the Administrative Appeals Tribunal is required to act independently of the executive government.[53] In *Grollo v. Palmer*, McHugh J. (party to the *Wilson* joint

judgment) had expressed the view that although the functions performed as a presidential member of the Administrative Appeals Tribunal by a person who is a federal judge are non-judicial, "those functions do not fall beyond the limits of the persona designata exception".[54] It would seem to follow then that service on the Administrative Appeals Tribunal by members of the Federal Court does not fall foul of the doctrine of constitutional incompatibility of office.

But whereas the Administrative Appeals Tribunal may be unaffected by *Wilson*, the decision will have a significant impact upon the availability of federal judges to discharge other executive functions. In the penultimate paragraph of their judgment, the joint majority judges proffered the view that "the criteria of incompatibility above expressed have not always been observed in practice",[55] a comment which casts doubt on the constitutionality of certain historical instances of the use of federal judges in executive positions. The wartime appointments of Latham C.J. and Dixon J. (as designated persons, but whilst serving judges of the High Court) to diplomatic posts in Japan and the United States respectively, might well be such examples.[56] It would also seem highly unlikely that a member of the federal judiciary could validly be appointed to head a body like A.S.I.O. or the National Crime Authority.[57] Whether a federal judge could now be appointed to a Law Reform Commission is unclear.[58]

Given that *Wilson* fails to provide clear guidance in distinguishing those non-judicial functions which are constitutionally consistent with office as a judge of a federal court from those which are not, members of the federal judiciary may choose to err on the side of caution in doubtful cases and decline nomination as a designated person. In these situations, and those of undoubted incompatibility of office, to whom do the federal legislature and executive turn for the conduct of official inquiries and other executive functions which demand (at least in the eyes of the executive) judicial expertise and impartiality for their effective discharge? In the past, judges of State courts have served on federal inquiries,[59] but another recent decision of the High Court alluded to above suggests (without deciding) that such judges - even as designated persons - may also be constrained by the Commonwealth Constitution in terms of the non-judicial functions they can validly undertake.[60] Thus, to a significant extent, senior counsel and retired judges look like filling the breach.

Ultimately, *Wilson* limits the extent to which the judicial reputation for independence and impartiality may be borrowed by the legislative and executive branches in the name of upholding that reputation.[61] As McHugh J. said in his dissenting judgment in *Grollo*:

> One of the usual reasons for investing executive power in a judge as persona designata is that it gives the exercise of executive power the appearance of independence and impartiality that is always associated with the exercise of judicial power. That independence and impartiality is only possible, however, because of the institutional separation between executive and judicial functions.[62]

The High Court is clearly moving in the direction of strengthening the institutional separation referred to by McHugh J. As to whether its decision on the facts in *Wilson* is a necessary consequence of the separation of federal judicial power, or adopts too precious a view of potential threats to judicial independence, takes one back to the debates referred to at the outset of this commentary. *Wilson* does not spell an end to those debates - on the contrary, it will doubtless inaugurate another round of discussion by lawyers and political scientists as to the appropriate role of judges in society. The difference this time is that the High Court has signalled that it will enforce

entrenched limitations on the use of federal judges in the performance of non-judicial functions.

Endnotes

1 *Mistretta v. United States* (1989) 488 U.S. 361, 407 (quoted with approval by Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. in *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 A.L.R. 220, 225).
2 M. McInerney, "The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities" (1978) 52 Australian Law Journal 540, 548.
3 Many examples of the use of judges to perform non-judicial functions in the federal sphere may be found in A.J. Brown, "The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge" (1992) 21 Federal Law Review 48. A list of Royal Commissions conducted by judges for the various colonial and state governments, as well as the Commonwealth government, may be found in M. McInerney, G.J. Moloney and D.G. McGregor, *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals* (1986) 70-87.
4 Quoted in Sir John Kerr, "The Ethics of Public Office" (Robert Garran Memorial Oration, delivered to the Australian Regional Groups, Royal Institute of Public Administration, Canberra, 11 November, 1974) 6.
5 Quoted in *ibid* 7.
6 *Ibid* 9.
7 G.S. Reid, "The Changing Political Framework" in T. van Dugteren (ed), *The Political Process: Can It Cope?* (1978) 91.
8 *Ibid* 90-91.
9 *Ibid* 92.
10 Justice Connor, "The Use of Judges in Non-Judicial Roles" (1978) 52 Australian Law Journal 482 (describing Professor Reid's warning as "timely and well worthy of consideration by Australian lawyers and others" (*ibid* 484 (footnote omitted)), but confining his comments to situations where serving judges are "seconded to executive positions in which they have a hand in determining and implementing government policy" (*id*)); M. McInerney, "The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities" (1978) 52 Australian Law Journal 540 (a judge of the Supreme Court of Victoria arguing against serving judges accepting appointment on commissions of inquiry); Justice F.G. Brennan, "Limits on the Use of Judges" (1978) 9 Federal Law Review 1 (arguing that judicial skills have an important contribution to make to the work of Law Reform Commissions, Royal Commissions, Committees of Inquiry "and Tribunals and Commissions of differing kinds". Thus, "[j]udicial skills should not be denied to them unless their jurisdiction or procedure require the judge to depart so substantially from the traditional judicial function that the departure carries an unacceptable risk of loss of confidence" (*ibid* 11)).
11 See, for example, M. McInerney, G.J. Moloney and D.G. McGregor, *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals* (1986) and G. Winterton, "Judges as Royal Commissioners" (1987) 10 University of New South Wales Law Journal 108. And for an earlier example see J.D. Holmes, "Royal Commissions" (1955) 29 Australian Law Journal 253 and accompanying commentaries.
12 Notably in Victoria where the judges of the Supreme Court have generally declined to act as Royal Commissioners. This is to be contrasted with the greater willingness of New South Wales judges to conduct commissions of inquiry (see generally the account of Professor Winterton, "Judges as Royal Commissioners" (1987) 10 University of New South Wales Law Journal 108).
13 L. Zines, *The High Court and the Constitution* (3rd ed) (1992) 179-180; *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 A.L.R. 220, 226 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.: "The separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges." In relation to Ch.III judges, see below n.28.
14 Authoritatively established in *New South Wales v. Commonwealth* (the *Inter-State Commission* case) (1915) 20 C.L.R. 54 and *Waterside Workers' Federation of Australia v. J.W. Alexander Ltd* (1918) 25 C.L.R. 434.
15 *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254 affirmed on appeal to the Privy Council in *Attorney-General (Cth) v. The Queen* (1957) 95 C.L.R. 529.
16 *New South Wales v. Commonwealth* (the *Inter-State Commission* case) (1915) 20 C.L.R. 54, 88 per Isaacs J.
17 (1996) 138 A.L.R. 220.

18 *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 138 A.L.R. 577 (judgment in which was delivered six days after judgment in *Wilson*). In *Kable*, a majority of the High Court held invalid the Community Protection Act 1994 (N.S.W.) as contrary to Ch.III of the Commonwealth Constitution (Ch.III of the Constitution being headed "The Judicature" and commencing with s.71). Specifically, the Community Protection Act purported to empower the Supreme Court of New South Wales to make a preventive detention order in relation to a single, named individual - Mr Gregory Wayne Kable (being "the person of that name who was convicted in New South Wales on 1 August 1990 of the manslaughter of his wife, Hilary Kable" (s.3(4) of the Act)) - and no one else. This function was held to be incompatible under Ch.III of the Constitution with the exercise by the Supreme Court of its invested federal jurisdiction ((1996) 138 A.L.R. 577, 612, 615 per Gaudron J.; 622, 624, 627-629 per McHugh J. and 630-632, 644 per Gummow J.) or at least to require the Supreme Court to exercise federal jurisdiction in the case at hand (the case falling within federal jurisdiction both at first instance and on appeal) in a manner contrary to traditional judicial process (*ibid* 608 per Toohey J.).

19 For a useful chronology of the events which constitute the "Hindmarsh Island Bridge Affair" see B. Lane and A. Ramsey, "Hindmarsh ruling places Herron in bridge row spotlight", The Australian, 7 September 1996 and for a more detailed account J. Clarke, "Chronology of the Kumarangk/Hindmarsh Island Affair" (1996) 84 Aboriginal Law Bulletin 22.

20 *Grollo v. Palmer* (1995) 184 C.L.R. 348, 363 per Brennan C.J., Deane, Dawson and Toohey JJ.

21 *Hilton v. Wells* (1985) 157 C.L.R. 57, 81-82 per Mason and Deane JJ.

22 (1995) 184 C.L.R. 348.

23 *Ibid* 364-365 per Brennan C.J., Deane, Dawson and Toohey JJ.

24 *Ibid* 365 per Brennan C.J., Deane, Dawson and Toohey JJ.

25 *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577 (Full Court of the Federal Court).

26 (1996) 138 A.L.R. 220, 223-224 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.

27 Gaudron J. wrote a separate concurring judgment.

28 (1996) 138 A.L.R. 220, 229. Their Honours used the term "Ch III judge" (referring to Chapter III of the Commonwealth Constitution headed "The Judicature") to signify a judge of the High Court or of a court created by the Commonwealth Parliament under Ch.III of the Constitution (*ibid* 224, n.6).

29 But see, for example, Sir Anthony Mason, "A New Perspective on Separation of Powers" (1996) 82 Canberra Bulletin of Public Administration 1, 5-6.

30 (1995) 184 C.L.R. 348, 365 per Brennan C.J., Deane, Dawson and Toohey JJ.

31 *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 A.L.R. 220, 230 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.; 235 per Gaudron J.

32 *Ibid* 230-231 (italics and bold script added, footnote omitted).

33 *Ibid* 232 (emphasis added and footnotes omitted). See also *ibid* 238 per Gaudron J.: "The function of reporting under s 10 of the Act is one which, if performed by a judge in his or her individual capacity, gives the appearance that the judge is acting, not in any independent way, but as the servant or agent of the minister. Thus, it is not a function that parliament may confer on a judge of a court exercising the judicial power of the Commonwealth." In Gaudron J.'s opinion, the reporting function was not such as to undermine public confidence in the ability of Justice Mathews to discharge her judicial functions with integrity. Instead, Gaudron J. found that for a federal judge to act as a reporter *persona designata* would undermine public confidence in the integrity of the judiciary as an institution (*ibid* 236).

34 *Ibid* 231.

35 *Ibid* 232.

36 *Id* (their Honours adding that this circumstance could not be remedied by a judge choosing to erect a "*cordon sanitaire*" between her or himself and the Parliament or executive (*ibid* 233)).

37 *Ibid* 232.

38 *Ibid* 233 (footnote omitted).

39 *Ibid* 244.

40 *Ibid* 250.

41 *Ibid* 251.

42 *Ibid* 247.

43 *Id.*

44 In considering this three part test, it should be borne in mind that it does not exhaust the possible categories of constitutional incompatibility of office. Resort should always be had to the basic *Grollo* incompatibility condition of which the *Wilson* three part test is but one refinement. For example, *Grollo* indicated that incompatibility of office might

also arise from "so permanent and complete a commitment to the performance of non-judicial functions by a judge that the further performance of substantial judicial functions by that judge is not practicable" (*Grollo v. Palmer* (1995) 184 C.L.R. 348, 365 per Brennan C.J., Deane, Dawson and Toohey JJ.).

45 (1996) 138 A.L.R. 220, 230 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.

46 *Ibid* 231 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.

47 *Id.*

48 See M. Allars, *Introduction to Australian Administrative Law* (1990) 11. Compare the view of Kirby J. in *Wilson*: "It is not necessarily incompatible with the judicial office for a judge to be involved in highly controversial matters and even matters which concern partisan or political questions" ((1996) 138 A.L.R. 220, 253).

49 *Ibid* 232 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.

50 *Ibid* 231 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.

51 Gaudron J., in her separate majority judgment in *Wilson*, referred only indirectly to the conduct of Royal Commissions by persons who are serving judges (*ibid* 237).

52 (1979) 24 A.L.R. 577.

53 *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 A.L.R. 220, 231-232 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. Gaudron J. did not specifically mention the appointment of federal judges *persona designata* to the Administrative Appeals Tribunal. However, her Honour's statement that "[i]n general terms, a function which is carried out in public ... which is and which is manifestly free of outside influence and which results in a report or other outcome which can be assessed according to its own terms, will not be one that gives the appearance of an unacceptable relationship between the judiciary and the other branches of government" might be taken as apposite to the performance of functions by the Administrative Appeals Tribunal (*ibid* 237).

54 (1995) 184 C.L.R. 348, 383. Note also the point made by Professor Winterton that this aspect of the decision in *Drake* was approved by the High Court in *Hilton v. Wells* (1985) 157 C.L.R. 57 (G. Winterton, "Judges As Royal Commissioners" (1987) 10 University of New South Wales Law Journal 108, 122 n.79.

55 (1996) 138 A.L.R. 220, 233.

56 These wartime appointments are discussed in A.J. Brown, "The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge" (1992) 21 Federal Law Review 48, 51-52. In later years, Sir Owen Dixon was not sure that he had been right to accept appointment to this and other executive positions in wartime (he also chaired the Central Wool Committee, the Australian Coastal Shipping Control Board and the Marine War Risks Insurance Board (see *ibid* 51, n.15)). In Dixon's words: "I do not wish it to be thought that, looking in retrospect, I altogether approve of what I myself did" (J. D. Holmes, "Royal Commissions" (1955) 29 Australian Law Journal 253, 272 (commentary by Sir Owen Dixon).

57 In relation to the appointment by the Fraser government of Woodward J., a federal judge, as Director-General of A.S.I.O., see A.J. Brown, "The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge" (1992) 21 Federal Law Review 48, 60. On the appointment of persons who are judges to the Chair of the National Crime Authority, see *ibid* 62-64.

58 See Law Reform Commission Act 1973 (Cth). But see also Canon Four of the United States' Canons of Judicial Ethics quoted by Sir John Kerr in his Garran Oration: "A judge may engage in activities to improve the law, the legal system, and the administration of justice" (Sir John Kerr, "The Ethics of Public Office", Robert Garran Memorial Oration, delivered to the Australian Regional Groups, Royal Institute of Public Administration, Canberra, 11 November, 1974, 6, 9-10).

59 See the list in M. McInerney, G.J. Moloney and D.G. McGregor, *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals* (1986) 83-87.

60 See *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 138 A.L.R. 577 (referred to above n.18). *Kable* is unclear as to the future direction of the High Court on this point. Of the majority judges see, for example, *ibid* 623-624 per McHugh J., but compare *ibid* 612 per Gaudron J.

61 See *Mistretta v. United States* (1989) 488 U.S. 361, 407 referred to above n.1.

62 *Grollo v. Palmer* (1995) 184 C.L.R. 348, 377 per McHugh J.

KABLE v DPP: TAKING JUDICIAL PROTECTION TOO FAR?

*Robert Orr**

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The recent decision of the High Court in *Kable v The Director of Public Prosecutions for New South Wales*[1] is a significant development of the concept of judicial power in the Australian Constitution, and is evidence of the ongoing tussle between the executive, the Parliament and the judiciary in our constitutional system. I would like to reflect briefly on an aspect of the history of this tussle, outline the New South Wales Community Protection Act 1994 (the law before the High Court in *Kable*), summarise what the High Court said about that Act and the concept of judicial power, and then, in a slightly provocative way, raise some issues which I think flow from the decision, and from another recent decision of the High Court on judicial power, *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs.*[2]

A touch of history

In 1688 James II republished the Declaration of Indulgence which sought to suspend penal ecclesiastical laws. On one view this was a great blow for freedom of religion, although James II clearly had other motives. But these laws had been made by the Parliament. In addition to suspending the laws. King James made an order in council directing that the Declaration be read in all churches. Seven Bishops petitioned the King objecting to the order. For this, they were sent to the Tower and tried before the King's Bench for seditious libel. The King's Bench consisted of judges appointed at the pleasure of the King, and some had recently been dismissed. The judges appointed to the King's Bench were generally supporters of the King. Not surprisingly, when confronted with this case, they avoided the constitutional issues, such as whether the King even had power to suspend the penal ecclesiastical laws and whether there was a right to petition the King, and left the matter to the jury, who acquitted the Bishops. This marked the beginning of the Great and Glorious Revolution of 1688.[3]

The Bill of Rights of 1688 stated in Article 1 that the suspension of laws without consent of Parliament was illegal. It stated in Article 5 that it was the right of the subject to petition the King. Whilst by some oversight the independence of the judiciary was not dealt with in the Bill of Rights, the Act of Settlement of 1701 provided that judges' commissions were not at the pleasure of the King, though judges were to be subject to removal upon address of both Houses of Parliament. The trial of the seven Bishops was a pivotal moment in the constitutional history of England, a moment in the struggle between the executive and the legislature and the judiciary. While less dramatic, the decisions in *Kable* and *Wilson* illustrate that such tensions continue today.

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The Community Protection Act 1994 (NSW)

The *Kable* decision concerned the Community Protection Act 1994 *(NSW)*. The Act provided that on application by the New South Wales Director of Public Prosecutions, the Supreme Court could order the detention in prison of a person, if it was satisfied on reasonable grounds that:

- the person was more likely than not to commit a serious act of violence; and

- that it was appropriate for the protection of a particular person or persons or the community that the person be held in custody.

The maximum possible period of detention was 6 months, but further orders could be made.

Section 17 provided that the Court was bound by the rules of evidence, but there were specific provisions about obtaining reports which led members of the High Court to suggest that in significant respects the accepted rules of evidence did not in fact apply.

The Act stated that proceedings were civil proceedings (s. 14), and were to be determined on the balance of probabilities (s. 15). Section 3 stated that in construing the Act, the need to protect the community was to be given paramount consideration. Section 3(3) stated that the Act authorised the making of a detention order against Gregory Wayne Kable, and not any other person. The Bill for the Act had originally been introduced into Parliament as a general measure, but section 3(3) and related provisions were added during passage.

Gregory Wayne Kable had stabbed to death his estranged wife in the house in which she lived with the two children of their marriage. Prior to the stabbing, Mr Kable had behaved violently towards his wife, and he was the subject of an apprehended violence order. He pleaded guilty to a charge of manslaughter upon the basis of diminished responsibility, and was imprisoned for over five years. While he was in prison he wrote threatening letters to various members of his wife's family, some of whom had custody of the children. He was charged with relevant offences, but at the time of his impending release, these charges had not been heard.

In proceedings under the Act against Mr Kable brought by the Director of Public Prosecutions, Justice Levine of the Supreme Court of New South Wales made a detention order. That detention order was the subject of an appeal to the Court of Appeal of New South Wales, which upheld the order,[4] and then to the High Court. While the appeal proceedings were progressing, Justice Grove of the Supreme Court of New South Wales refused to make a further detention order in relation to Mr Kable. On 21 August 1995, Mr Kable was released.

The High Court's decision

The High Court, by a majority of four to two (Toohey, Gaudron, McHugh and Gummow JJ, Brennan CJ and Dawson J dissenting) allowed the appeal and held that the Act was invalid. There were a number of grounds upon which it was argued before the Court that the Act was invalid. It was suggested that the Act was an improper exercise of judicial power by the Parliament of New South Wales, on the one hand, and that it was an improper conferral of legislative power on the Supreme Court of New South Wales, on the other. The basis of the High Court's decision was that the Act was invalid because it infringed Chapter III of the Australian Constitution which, the Court held, prohibited the conferral on the Supreme Court of New South Wales of such non-judicial powers as those contained in the Act.

Each of the four Justices who comprised the majority wrote a separate judgment, but time does not permit me to outline the reasoning of each. In some areas there are significant differences. But in summary, the reasoning of the majority was as follows.

First of all, the Court (in particular Gaudron, McHugh and Gummow JJ) held that there is an integrated system in Australia for the exercise of federal judicial power. Section 71 of the Australian Constitution provides that the judicial power of the Commonwealth is vested in the High Court, in such other federal courts as the Parliament creates, and in such other courts as Parliament invests with federal jurisdiction. These other courts (which are State courts and have jurisdictions pursuant to s. 77 of the Constitution) are not less worthy courts, or subordinate in any sense. Rather, in this integrated system, these other courts play an equal role. The Justices drew on s. 73 of the Constitution, which provides for the appellate jurisdiction of the High Court, to reinforce this view of an integrated judicial system with the High Court at its apex. The Justices also drew on s. 118 (full faith and credit for judicial proceedings), s.51(xxiv) (service and execution of process and judgments) and s.51(xxv) (the recognition of the judicial proceedings of a State). Justices McHugh and Gummow suggested that there is a unified system of common law in Australia. Justice Gummow stated that 'there is but one stream of authority in Australia and it flows from this Court throughout the nation'.[5]

Secondly, the Court noted that for the purpose of vesting federal judicial power, the Commonwealth has to take the State courts as it finds them. But the majority held that this proposition had been overstated. They said this proposition relates only to appointments to the courts, their administration and their State jurisdiction. Otherwise those courts are subject to the limitations imposed by Chapter III of the Australian Constitution.

Thirdly, the Court articulated the limitations which Chapter III imposes on State courts.

- There must be State courts which can exercise federal judicial power. Several of the Justices specifically rejected the contention that a State could, in essence, abolish their Supreme Courts, and have no courts able to exercise federal judicial power.
- A State could not prevent a right of appeal from its Supreme Court to the High Court. Justice McHugh said the Constitution had withdrawn any such power from each State.
- Most importantly, a State could not invest in a Supreme Court functions that are repugnant to, or inconsistent with, offensive to, or incompatible with federal judicial power. A State could invest its Supreme Court with non-judicial functions only if such functions were not incompatible with judicial functions.

The Court drew this incompatibility doctrine from *Grollo v Palmer*[6] and *Wilson*. Those decisions do not deal directly with the exercise of federal judicial power. Rather they are concerned with the *persona designata* doctrine, that is the performance of non-judicial functions by persons who are judges. The Court held in *Grollo* that judges could not exercise *persona designata* functions incompatible with their judicial role. In *Kable*, the Court in a sense borrowed this incompatibility doctrine, and imposed it as a restriction on the functions that State Parliaments are able to confer on State Courts which exercise federal jurisdiction.

In addition, various American authorities were relied on, in particular the decision in *Mistretta v United States*,[7] which was

referred to in *Wilson*, and also in *Grollo*. *Mistretta* concerned the establishment of the United States Sentencing Commission. That Commission was an independent body, but was said to be part of the judicial branch. The Commission made guidelines, in effect binding rules, in relation to sentencing by federal courts. Some of the members of this Commission were judges. The US Supreme Court held that the Commission was validly established. But in doing so, the Court articulated an incompatibility doctrine for federal judges.

As to the rationale for the principle in this context, Gaudron J held that there is a necessity to ensure the integrity of the judicial process. Public confidence in that judicial process must be maintained and the courts must be, and must be seen to be, independent. Justice McHugh said that a State Parliament could not confer functions on the courts that might lead an ordinary member of the public to conclude that the courts were not independent of the executive, or were biased in favour of the executive.

So, applying this incompatibility principle to the New South Wales Act, the Court held that the Act exhibited a number of features which fell foul of this limitation upon the exercise by the Supreme Court of federal judicial power. A number of these can be mentioned.

First of all there was imprisonment involved. Mr Kable was detained by order of the Court. The High Court had considered issues concerning compulsory detention in *Polyukovich v The Commonwealth*[8] and *Chu Kheng Lim v Minister for Immigration*.[9] In a sense this decision is a further development of the Court's judgments in those cases. The Court in effect stated that it is inconsistent with the exercise of judicial power for a court to be empowered to imprison persons except for traditional reasons and by a traditional judicial process.

Secondly, the Act provided for imprisonment without a crime - imprisonment on the basis of what a person might do, rather than what he had done. An order under the Act was a preventive order. The NSW Court of Appeal had not seen this as a problem. Mahoney JA had stated that 'the ordinary citizens would, I suspect, see it as more important that harm be prevented than that it be punished' (at 377).

Thirdly, the Court suggested that the Act failed to set up a proper judicial process. Rather, an essentially non-judicial process had been dressed up with judicial trappings. Justice Gaudron stated that it was a 'mockery of the judicial process'.[10]

Fourthly, the Act focussed upon one person. It was not a law of general application. Justice Gaudron in particular commented that laws applied by the judiciary must be laws of general application. There was some discussion of the fact that the legislature has made a range of laws which are addressed to one person or one situation. But this factor added to the Act's bundle of inappropriate attributes.

Fifthly, the process set out in the Act was not otherwise known to law. It was novel. There was one example, a Victorian law, which came close, but that law had been much criticised.

These characteristics, and others, in combination suggested that the Act conferred an incompatible function on a court which exercised federal judicial power. There are some suggestions in the judgments that if some of these attributes had not been present then the Court might not have found the Act invalid. Justice Toohey, in particular, suggests it was a combination of these factors which led him to this conclusion. But, of course it is difficult to say which of the factors if left out would have resulted in validity. In summary, the Court held that the Act made the NSW Supreme Court an

instrument of the legislature and the executive government. The authority and standing of the judiciary was being borrowed by the executive and the legislature. The functions conferred by the Act upon the NSW Supreme Court were incompatible with federal judicial power and therefore the Act breached Chapter III of the Australian Constitution.

Comment

I would like to make a number of brief comments about the decision.

First of all, the Court's reasoning is interesting. The basis of the decision is an implication drawn from the structure and terms of Chapter III of the Constitution. The minority Justices were unwilling to draw this implication. Chief Justice Brennan said that there is no textual or structural foundation for this implication. He noted that there are no earlier relevant cases nor any relevant debate in the Conventions. He concluded that the concept of incompatibility based on *Grollo* was simply irrelevant to this situation. But, as noted above, the majority was prepared to draw the implication. Justice McHugh stated that there is an assumption in the Constitution that there will be State courts, that they will be courts capable of exercising federal judicial power, and that there will be functions which the State cannot confer on those courts because they are incompatible with the exercise of federal judicial power. The substance of the principle is drawn by analogy from the distinct but related test developed by the Court with regard to the *persona designata* doctrine.

Secondly, this case marks a major development in the High Court's thinking about judicial power. It now appears that State Courts which exercise federal jurisdiction are subject to an aspect of the separation of powers doctrine in the Australian Constitution in relation to their functions under State laws.

Thirdly, there is not a great deal of talk about human rights in the decision. Justice Gaudron does say that one central purpose of the judicial process is to protect the individual from arbitrary punishment.[11] I briefly noted above her comments about the need for general rules and equal justice. But the other Justices are more concerned with the reputation of the courts than the liberty of subjects. However, the effect of the decision may be to limit the powers of governments to imprison their subjects.

Fourthly, the test for incompatibility interestingly rests squarely on what reasonable ordinary members of the public are assumed to think. I think it is interesting that in a constitutional context we have a test which is based on the opinion of ordinary reasonable members of the public. It would be possible to obtain evidence of what ordinary members of the public think, although the High Court had no such evidence before it. But, we have sophisticated electoral and parliamentary systems which are meant to reflect what the people of New South Wales and Australia think. The Parliament of New South Wales had, after significant debate, passed the Act the subject of the *Kable* decision. The appointment of Justice Mathews (considered by the High Court in *Wilson*) was publicly made by the Minister for Aboriginal and Torres Strait Islander Affairs, and he was accountable to the Commonwealth Parliament for that decision. In a sense the Court is disregarding that evidence about "what the people think" and relying, in essence, on what it thinks is appropriate or inappropriate.

Fifthly, we now have in effect two judicial power tests, judicial power test A and judicial power test power B. Judicial power test A applies to functions which can be conferred by the Commonwealth Parliament on the High Court, on other federal courts created by the Commonwealth Parliament and on State

Courts. It is difficult enough to apply. Judicial power test B applies to judges of the High Court and federal courts when they are exercising *persona designata* functions, and also applies to State Courts which exercise federal jurisdiction in relation to their State functions. This is also a difficult test to apply, resting, as I have noted, on what reasonable ordinary members of the public think, but not on what their elected representatives think. It requires an assessment as to whether the function is repugnant to, or inconsistent with, or incompatible with, or offensive to, Chapter III of the Constitution. This makes it difficult to advise governments on what they can and what they cannot do in implementing their policy objectives.

Sixthly, the case highlights that the principle of judicial power is a conservative force. Judicial functions are to a large extent functions the courts have traditionally exercised, in the way they have traditionally exercised them, and non-judicial functions are functions which the courts have not traditionally exercised. In *Brandy v The Human Rights and Equal Opportunity Commission*,[12] the Court stated that in the end, judicial power is power exercised by the courts and is defined by what the courts do and the way in which they do it.[13] This is a circular definition. In a sense that ties the hands of the Commonwealth - and now, after *Kable*, the hands of the States. It means that in developing new policies, processes and systems to deal with issues troubling the Australian community, governments are bound to a significant extent to what courts have traditionally done and the ways they have traditionally done them. Further, in the *Kable* decision, Justice McHugh looked to what judges have traditionally done, and he noted that Justices of State Supreme Courts often acted as Governor of States. Governors of States are heads of, and represent the executive of the State. Nevertheless, the High Court found that this did not compromise the independence of the courts from the executive. The concept of a judge acting as head of the executive is acceptable because judges have traditionally done so. In any event, the doctrine is a conservative one; courts and judges can only be asked to do what they have traditionally done, and even some of these functions may need to be reassessed. There is a somewhat different emphasis in some of the American cases. In *Mistretta* the US Supreme Court said that the constitutional principle of separated powers was not violated by mere anomaly or innovation.

The seventh point takes us back to James II, the House of Commons and the King's Bench. What does *Kable* say about the current relationship between the executive, the legislature and the judiciary? I have to disclose my interests as an adviser of the executive, and whilst I do not want to make comments which show I am oversensitive, I do want to provoke some discussion. On one view we have moved away from a separation of powers doctrine, to a judicial protectionism doctrine. The separation of powers doctrine is based on checks and balances between the three arms of government. It seeks to protect the role of each. It should lead to a concern about issues such as the delegation of legislative power, which the *Mistretta* decision discusses. It should include a concern with interference in the executive power by other arms of government. Rather than considering these broader issues, the Australian courts seem to be particularly concerned with protecting judicial power and reputation. And there is a certain amount of antagonism to the executive and to the legislature. Notwithstanding that we are now well removed from the 17th century, the Court seems to see the judiciary as still under threat.

The Court stated in *Kable* that the Act under consideration might lead people to think the Supreme Court was simply an instrument of the executive government. There was concern that the judicial reputation should not be borrowed, and

therefore sullied, by other arms of government. But I think we could equally say that it may be useful for the Australian community if judicial skill and reputation were available to assist society to deal with significant issues. *Kable* and *Wilson* concern such issues. In the Act under consideration in *Kable*, the New South Wales Parliament was grappling with the issue of apprehended violence. In the actions under consideration in *Wilson*, the executive was seeking to deal with an Aboriginal heritage issue which had become a matter of great controversy. Notwithstanding the importance of these issues, the judiciary has sought to distance itself from them, and leave the other arms of government to do their best. It seems that the skill and reputation of judges are not to be available to deal with these issues.

In *Mistretta* there is discussion of the concept of reciprocity amongst the branches of government. There, the Court noted that in order to facilitate workable government, some conversing may take place between the co-ordinate branches on matters of vital interest. Perhaps the co-mingling in *Kable* and *Wilson* was too extreme, but facilitation of workable government on matters of vital interest is clearly something which we should expect from our constitutional system. Arguably, these decisions of the High Court have done little to further this objective.

Endnotes

1 (1990) 138 ALR 577.
2 (1996) 138 ALR 220.
3 See generally Theodore Plucknett, *Taswell Laymead's English Constitutional History* (11th ed 1960).
4 *Kable v Director of Public Prosectuions* (1995) 36 NSWLR 374.
5 (1996) 138 ALR 577.
6 (1995) 184 CLR 348.
7 (1989) 488 US 361.
8 (1991) 172 CLR 501.
9 (1992) 176 CLR 1.
10 (1996) 138 ALR 517.
11 *Id.*
12 (1995) 127 ALR 1.
13 *Ibid* 17.

RECENT DEVELOPMENTS IN REFUGEE LAW IN AUSTRALIA

*Refugee Review Tribunal**

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Introduction

The United Nations *Convention relating to the Status of Refugees* ("the Convention") was drafted between 1948 and 1951. The majority of states which drafted the Convention sought to create a regime to cope with the large numbers of people who had been displaced by the Second World War. The original definition of "refugee" only permitted a person to be declared a refugee as a result of events occurring before 1 January 1951. The Convention was supplemented by the 1967 *Protocol relating to the Status of Refugees* ("the Protocol"). The main effect of the Protocol was to remove the time line in the Convention's definition of a refugee. Hence, the Convention now extends to all persons who are refugees because of events occurring at any time. Australia ratified the Convention and acceded to the Protocol in 1973.

The Convention itself consists of 46 articles. However, administrative decision makers, lawyers and judges usually only need to consider article 1 of the Convention, which contains the definition of a refugee, and in particular article 1A(2).

Article 1A(2) of the Convention, as amended by the Protocol, defines a refugee as a person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

The definition of a refugee in article 1 of the Convention ("the Convention definition") has been effectively incorporated into Australian domestic law in the Migration Act 1958 and the Migration Regulations.

Since 1 September 1994, a person seeking recognition as a refugee in Australia must apply to the Department of Immigration and Multicultural Affairs for a protection visa. The prescribed criteria for the grant of a protection visa are set out in the Migration Act and the Migration Regulations.[1] In broad terms, the main criterion for a protection visa is that the decision-maker must be satisfied that the applicant is a refugee under the Convention.[2] Although problems may arise by splitting the definition of "refugee" into separate parts, for convenience it may be said that there are five basic elements which an applicant for a protection visa must satisfy, and those elements have become a source of rapidly developing area of law in Australia.

These five elements are:

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- the person must be outside his or her country of nationality or former habitual residence;
- the person must hold a 'well-founded fear';
- the treatment the person fears must amount to 'persecution';
- the persecution feared must be for a reason specified in the Convention;
- the person must be unable or unwilling because of his or her fear to take advantage of the protection of his or her country. This element is commonly referred to as a 'failure of state protection'.

This paper focuses on the recent developments in the areas of 'well-founded fear', the meaning of the term 'persecution' and the meaning of the phrase 'particular social group'.

The meaning of "well-founded fear": the "real chance" test

The first substantive element of the Convention definition is "well-founded fear". The meaning of this phrase was considered by the High Court in *Chan v MIEA*.[3] The only subsequent High Court case to examine this issue was *MIEA v Wu Shan Liang & Ors*,[4] handed down in May this year, where the Court very succinctly set out what *Chan* had decided about the meaning of 'well founded fear':

> *Chan* established two propositions as to the steps by which refugee status was to be 'determined'... First, the definition of refugee involved a mixed subjective and objective test. Second, the definition would be satisfied if an applicant could show genuine fear founded upon a 'real chance' of persecution for a Convention stipulated reason.[5]

What has been of particular interest in recent case law is the "real chance" test. It is well-established that "real chance" means a chance that is not "remote or insubstantial" or "a far-fetched possibility", and may be as low as 10%.[6]

The application of the "real chance" test was relatively uncomplicated until fairly recently. However, a line of authority starting with *MILGEA & Anor v Mok*,[7] has introduced some complexity into this area. In *Mok*, the decision-maker had considered conflicting evidence about conditions in the applicant's country, and had given greater weight to some evidence than to other evidence. The Federal Court said that use of the term "I give greater weight to..." indicated that the decision maker had applied a 'balance of probabilities test' rather than a 'real chance test'. The Court found it difficult to accommodate the use of the expression 'I gave greater weight to...' to the assessment of a real chance that a person may be persecuted on return to another country.[8] *Mok* was applied by the Full Federal Court in *Wu v MIEA* (Vic).[9] In that case, the Court again held that the decision-maker had made an error of law by weighing the evidence. The Court said that language such as "give greater weight to" indicated that the decision-maker had approached the inquiry in terms of establishing whether a state of affairs was more probable than not - which is not the same as a "real chance".[10] In the subsequent case of *Guo Wei Rong v MIEA*,[11] the Full Federal Court took this line further by indicating that the real chance test should be applied to the determination of past facts as well as to future possibilities.

That line of authority was recently rejected by the High Court in *Wu Shan Liang*.[12] *Guo's* case also raised other issues and is currently before the High Court.

The difficulty which was raised by the *Mok* line of cases was not so much what the real chance test means, but rather how it should be applied, and also, the extent to which the language used in a decision indicates a misapplication of the correct test.

In *Wu Shan Liang,* the High Court found that weighing evidence is not necessarily indicative of an incorrect application of the *Chan* test.[13] The Court did not accept that the term 'give greater weight to' was a renunciation of the *Chan* test and an adoption of a 'balance of probabilities' or 'more likely than not' test. For one thing, as Brennan CJ, and Toohey, McHugh and Gummow JJ pointed out in their joint judgment, *Chan's* case actually requires the attribution of weight to material going towards a determination of refugee status.[14] Similarly, Kirby J said that "there is no suggestion in *Chan* that this Court intended that the evaluation of past facts (as distinct from the speculation on future possibilities) would be based otherwise than on likelihood".[15]

The Court found that the decision-makers in these cases had embarked upon a process whereby the different material before them was evaluated and some material was given a greater weight. The decision-makers had concluded that there was not a real chance that the applicants for protection visas would be persecuted if returned to their country. The Court stated:

> The delegates should be taken to mean what they have said and a proper construction of the reasons does not disclose any surreptitious adoption of a balance of probabilities test.[16]

Kirby J agreed that the decision-maker's reasons disclosed no error of law. His Honour provided some guidance as to how to assess whether there is a real chance of persecution:

> The process of determination involves the [decision maker] making findings as to the primary facts, identifying the inferences which may properly be drawn from the primary facts as so found, and then applying those facts and inferences to an assessment of the real chance affecting the treatment of the applicant if he or she were returned to [his or her country of origin].[17]

Also at issue in *Wu's* case was the use of the term "speculative" in the context of applying the real chance test. The decision-makers in *Wu* had rejected certain claims because they were "speculative". The Full Federal Court held that they had erred in eschewing speculation: the Court said it was impossible to answer the question of whether there was a real chance of persecution without engaging in speculation; therefore the suggestion that speculation ought not to be engaged in was incorrect.[18] The High Court rejected this aspect of the Full Court's decision as well. Although the Court agreed that the real chance test necessitates speculation in the sense of prediction,[19] it did not agree that use of the word "speculative" in its context demonstrated that the delegates had abandoned the process of looking into the future. It noted that the word might equally have been used to refer to the probative force of the material before the delegate.[20]

In sum, the *Mok* line of cases created such difficulties for decision-makers applying the real chance test that Lindgren J described the situation as akin to "tiptoeing through a minefield".[21] However, the High Court in *Wu* has removed most of the mines, so that the real chance test now appears to be more-or-less as it was understood to be before *Mok*.

The role of motivation in defining persecution

The "real chance" that a refugee faces is a real chance that he or she will be persecuted for one of the reasons set out in the Convention definition. Examples of harm which have been said to be persecutory in the particular circumstances are denial of access to employment, liability to arrest and detention, and restriction on a right to practise a religion.[22] There are a number of factors involved in the concept of persecution. Persecution is "serious" harm;[23] it is also "selective",[24] and part of a course of systematic conduct" directed for a Convention reason against a person or a group.[25]

The focus in recent cases has been the element of intention, attitude, or motivation of the persecutor, which is said to be implicit in the very idea of "persecution". This aspect, already implicit in *Chan*,[26] was clearly articulated by the Full Federal Court in *Ram v MIEA & Anor*.[27] In that case the Court emphasised that the motive of the persecutor is a critical element in a finding that an applicant is being persecuted for a Convention reason. That case concerned a Sikh man who was born in the Punjab and left in India in 1977 to work as a contract labourer in Saudi Arabia. He returned home after ten years with savings and was seen in his village as a wealthy man. Mr Ram claimed that extremist groups were rife in the Punjab and that the police themselves were apt to adopt the role of extremists. Mr Ram said that extortion by violence or threats of violence was a common occurrence in the Punjab and that particular targets were villagers who had gone abroad and returned with money, as he had done, or "wealthy Sikhs". He argued that his fear of persecution arose because he was a member of a 'particular social group'. He argued that his particular social group was broadly defined as those who have returned to their villages in the Punjab from a foreign country with money or as rich Sikhs.

In considering Mr Ram's claims about membership of a particular social group, Burchett J had regard to the whole of the definition of a refugee, and in particular, the link between the concept of persecution and the Convention ground. His Honour said:

> In my opinion there is a unity of concept about the whole definition of a refugee contained in the Convention, so far as it relates to membership of a particular social group...That concept flows through the separate elements of the definition. The well-founded fear of which it speaks is a fear of being persecuted. "Persecution" involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them by their persecutors. ... Consistently with the use of the word "persecuted", the motivation envisaged by the definition (apart from race, religion, nationality and political opinion) is "membership of a particular social group".
>
> ...
>
> The link between the key word "persecuted" and the phrase descriptive of the position of the refugee, "membership of a particular social group" is provided by the words "for reasons of" - the membership of the social group must provide the reason. There is thus this common thread which links the expressions "persecuted", "for reasons of" and "membership of a particular social group". That common thread is a motivation which is implicit in the very idea of persecution, is expressed in the phrase "for reasons of", and fastens upon the victim's membership of a particular social group. He is persecuted because he belongs to that group.[28]
>
> It is the whole of the Convention conception of a refugee which must be applied in an individual case. A lawyer naturally analyses the language into its constituent parts. But the whole is not merely the sum of those parts.[29]

The motivational aspect of persecution was again picked up by the Federal Court in *Amanyar & Anor v MIEA*.[30] The Court concluded that the adverse treatment must be directed at a person due to some perceived characteristic or conduct of the person being subject to the treatment - the persecutor must act out of ill-will towards the person.

This theme - the link between the persecution feared and the Convention reason - has been picked up in other recent cases - particularly in cases dealing with membership of a particular social group.

Membership of a particular social group

The motion of "membership of a particular social group has been the most problematic of the Convention reasons, and there has been considerable recent

judicial deliberation about it. The courts have made it clear that there are two issues to be considered. The first one is whether a relevant 'particular social group' exists and the second is whether the persecution feared is for the reason of membership of that group.

Morato v MILGEA[31] established the basic principle that a particular social group must be sufficiently recognisable in a society to have something that may be sensibly identified as membership.[32] In *Ram's* case, it was held that membership of a particular social group may be defined through the eye of the persecutor. That is, a person could come within the Convention if he or she is perceived by the persecutor to be a member of a particular social group even if in truth this is not the case. Burchett J gave the example of Hitler's views about race leading to the classification as Jewish of people who had regarded themselves as German. In that instance it was the perception of the authorities which identified the particular social group and in reality determined the fate of the members of the group.[33]

Over the last two years the Federal Court has considered, and in most cases rejected, a number of different groups put forward as particular social groups.

- *"Russian seamen"* on a particular vessel, carrying out a particular trade with the Russian mafia did not constitute a particular social group (*Kashayev v MIEA & RRT*).[34] However, the Court acknowledged that in appropriate circumstances, people engaged in a particular trade, profession or calling could be members of a particular social group within the meaning of the Convention;[35]

- *"Rich Sikhs" or "victims of extortion"* did not constitute a particular social group (*Ram's*);[36]

- *"Hepatitis B carriers"* did not constitute a particular social group (*Lo v MIEA*);[37]

- *"evil organisers"* [of illegal departure from the People's Republic of China] did not constitute a particular social group (*Su Qun De v MIEA & RRT*[38] and *Fu Hai Yuan v MIEA & RRT*).[39]

In *MIEA v Respondent A & Ors*,[40] the Refugee Review Tribunal and the Federal Court accepted that "people with one child who wish to have another child ... [and] are susceptible to forcible sterilisation" constituted a particular social group in China. The Full Federal Court disagreed, and the matter is currently before the High Court. That case involved a claim by a Chinese woman who feared forcible sterilisation as a result of the implementation of China's family planning policies which in general terms limit families to one child. Rejecting the claim that a particular social group existed through the operation of the family planning law, the Full Federal Court said:

> ... To apply the reasoning of *Morato*, such a law would be dealing with what people did, not with what they are. The only difference is that such a law would be one operating on individuals to prevent future acts (conception and birth) rather than to punish past acts. Such a law would not create or define a particular social group constituted by those who are affected by it, any more than would laws imposing tax or prescribing punishment for tax evaders...the respondents are not facing persecution by reason of membership of any social group having a recognisable existence separate from the persecutory acts complained of.[41]

Perhaps the most interesting of the recent Federal Court cases dealing with membership of a particular social group is *Jahazi v MIEA*[42] because in that case the crucial question was not the existence of a relevant group, but the link between the group and the harm feared. The applicant feared excessive punishment in Iran for drug offences committed while serving on an Iranian shipping line. It was accepted that his fear was well-founded. French J accepted that the employees of that shipping line constituted a particular social group attracting Convention protection.

However, he identified the real question as one of connection between membership of that group and the feared persecution. Following *Morato*, he noted that the membership of the group must provide the reason for the persecution. His Honour accepted that there was a causal connection between the apprehended harm in Iran and Mr Jahazi's former employment by the Iranian shipping line; however, a bare causal connection was not enough.[43]

The Court found that the feared harm was not in any relevant sense attributable to membership of the group of "employees of the Iranian Shipping Line". If Mr Jahazi was persecuted upon his return to Iran it would be because he had been convicted of an offence which had a connection with an Iranian government organisation which in this case happened to be the Iranian Shipping Line. There was no suggestion that the Iranian government had any policy or practice of persecuting the employees of its own shipping line. *Jahazi's* case is a clear application of the principle enunciated in *Ram's* case - that the Convention link involves an element of motivation.

In summary, the recent developments in refugee law in Australia have been most marked in the application of the "real chance" test, the importance of motivation in the concept of persecution, and the correct interpretation and application of the Convention ground of "particular social group". Further guidance in each of these areas is anticipated when the High Court delivers its judgments in the matters of *Guo*, and *Respondent A & Ors*.

Endnotes

1 The prescribed criteria for the grant of a protection visa are set out in s.36(2) of the Migration Act and Part 866 of Schedule 2 to the Migration Regulations. If an applicant satisfies the prescribed criteria, the Minister is to grant the visa; if not, the Minister is to refuse to grant the visa: see s.65(1) of the Migration Act.

2 Migration Act, s.36(2), Migration Regulations, Schedule 2, cl 866.221. There are other criteria such as taking a health test and public interest criteria.

3 (1989) 169 CLR 379.

4 (1996) 185 CLR 260.

5 *Ibid* 263 per Brennan CJ, Toohey, McHugh & Gummow JJ.

6 *Chan v MIEA* (1989) 169 CLR 379 at 389 per Mason CJ, 407 per Toohey J, 429 per McHugh J.

7 (1995) 127 ALR 223.

8 *Ibid* 252 per Sheppard J.

9 (1995) 130 ALR 367.

10 *Ibid* 378, 383.

11 (1996) 185 CLR 259.

12 *Ibid* 280 per Brennan CJ, Toohey, McHugh and Gummow JJ.

13 *Id.*

14 *Ibid* 280 per Brennan CJ, Toohey, McHugh and Gummow JJ, referring to *Chan v MIEA* (1989) 169 CLR 379 at 413 per Gaudron J.

15 *Ibid* 294 per Kirby J.

16 *Ibid* 281 per Brennan CJ, Toohey, McHugh and Gummow JJ.

17 *Ibid* 294 per Kirby J.

18 (1995) 130 ALR 367, 378, 383.

19 (1996) 185 CLR 259, 277 per Brennan CJ, Toohey, McHugh and Gummow JJ.

20 *Id.*

21 *Mataka v MIEA & Anor* (Federal Court of Australia, 24 May 1996, unreported decision of Lindgren J).

22 *Chen Ru Mei v MIEA & Anor* (1995) 130 ALR 405; *Yesus v MIEA* (Federal Court of Australia, 9 July 1996, unreported decision of Madgwick J); *MILGEA & Anor v Mok* (1995) 127 ALR 223.

23 *Chan v MIEA* (1989) 169 CLR 389, 388 per Mason J. See also 430, McHugh J.

24 *Id.* See also 430, per McHugh J.

25 *Ibid* 430 per McHugh J, referring to *Periannan Murugasu v MIEA* (Federal Court of Australia, 28 July 1987, unreported judgment of Wilcox J).

26 *Ibid* 388 per Mason CJ. See also 430 per McHugh J.

27 (1995) 130 ALR 314.

28 *Ibid* 317 per Burchett J.

29 *Ibid* 318 per Burchett J.

30 Federal Court of Australia, 22 December 1995, unreported judgment of Jenkinson J.

31 (1992) 39 FCR 401.

32 *Ibid* 405 per Black CJ.

33 (1995) 130 ALR 314, 318 per Burchett J (O'Loughlin and Nicholson JJ agreeing):

> I have referred to the way in which a group is seen by others. In this area, perception is important. A social group may be identified, in a particular case, by the perceptions of its persecutors rather than by the reality. The words "persecuted for reasons of" look to

> their motives and attitudes, and a victim may be persecuted for reasons of race or social group, to which they think he belongs, even if in truth they are mistaken.

34 (1994) 50 FCR 226.

35 *Ibid* 234.

36 *Ram v MIEA & Anor* (1995) 130 ALR 314, 319 per Burchett J:

> The applicant does not fear persecution for reasons of membership of a Particular Social Group, but extortion based on a perception of his personal wealth and aimed at him individually.

37 (1996) 134 ALR 73.

38 Federal Court of Australia, 24 April 1996. unreported judgment of Carr J. Carr J stated at 6-7:

> I propose, for the purposes of these reasons, to assume that if Mr Su were returned to China that he would be treated as an "evil organiser" and that any punishment meted out to him would be serious enough to amount to "persecution". That leaves the question whether an "evil organiser" is a "member of a particular social group" for the purposes of the definition of "refugee" in the Convention. In my view the applicant's submission is not made out. These Chinese laws regulate the conduct of individuals. They are laws which deal with what people do, not with what they are ...

39 Federal Court of Australia, 24 April 1996, unreported judgment of Carr J.

40 (1995) 130 ALR 48.

41 *Ibid* 61-2.

42 (1995) 133 ALR 435.

43 *Ibid* 443:

> The question whether a particular causal connection between persecution and membership of a group attracts Convention protection will be resolved not merely by the logic of causality but as a matter of evaluation which has regard to the policy of the Convention. While it is not necessary that the fear of persecution be solely attributable to membership of a relevant social group, a decision-maker can have regard to the extent to which membership of the relevant group is a factor in the risk of persecution.

STANDING TO SUE FOR PUBLIC LAW REMEDIES

*Alan Rose AO**

Edited text of an address to a seminar held by the Australian Institute of Administrative Law, Canberra, 12 November 1996.

I speak with you this evening about standing to sue for public remedies, the subject of the Australian Law Reform Commission Report No 78 entitled *Beyond the door-keeper - standing to sue for public remedies.*

Background

This work on standing was part of the Australian Law Reform Commission's on-going concern with reform of the federal judicial dispute system. Recently we reported on the costs shifting rules (ALRC Report No 75) and earlier on Evidence (ALRC Report No 26 and ALRC Report No 38). We are presently working on a major reference on the adversarial litigation system.

The ALRC was asked on 17 May 1995 to re-open its standing reference (ALRC Report No 27, 1985) by the former Attorney-General, Mr Michael Lavarch. (A copy of the Terms of Reference relating to the Attorney-General's request appears at Appendix A). Essentially, the former Attorney-General and the Australian Government were interested in knowing whether the ALRC would confirm its 1985 recommendation for an 'open standing' test in public interest litigation. All of this reconsideration was set in the context of the Government's desire to achieve fair, efficient, effective and accessible justice (see the Prime Minister's Justice Statement of 18 May 1995).

In the decade since our initial "open standing" recommendation was made there have been changes in the law relating to standing both as a result of judicial decisions and through legislation in specific areas. These changes are discussed in Chapter 3 of ALRC Report No 78 and in summary amount to a continuation of a general trend of broadening the base of capacity to sue in public interest matters. In its report, the Access to Justice Advisory Committee recommended that the 'open standing proposal' of ALRC Report No 27 should be considered for implementation by the Commonwealth, and the States and Territories should be encouraged to introduce similar reforms in their jurisdictions. Furthermore, the ALRC itself in its Report No 69 (*Equality before the law: Women's equality*) had reiterated that the proposals with respect to interveners and friends of the court in ALRC Report No 27 should be implemented.

In addition, during the decade 1985-1995, a number of judicial decisions, including decisions of the High Court, stimulated a renewed debate on who should be able to file material or otherwise intervene in public interest matters.

The legal and constitutional foundations of Australia's system of representative democracy was also the subject of heightened judicial consideration and

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professional debate during this period, most recently in *McGinty v Western Australia*[1] with respect to the freedom of political speech.

ALRC Report No 78

Against this background and after targeted consultation on Discussion Paper 61, the Commission endorsed its earlier belief that legislation enshrining an "open standing" approach should be enacted at the federal level.

In essence, we recommended that any person should have standing to commence proceedings that have a *public element* subject to only two limitations:

- the provisions of any relevant legislation which provides otherwise; and
- where such litigation would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it as he or she wishes, this broad standing should be restricted.

Appendix B provides a detailed list of all the recommendations made in ALRC Report No 78.

In general terms, under the current law, people must possess a private right or have a special interest in a matter which is more than a mere intellectual or emotional concern before they can claim to have standing to sue for a public remedy. Apart from this standing test, there are a multitude of particular standing requirements contained in particular legislation, such as the Administrative Decisions (Judicial Review) Act 1977 (person aggrieved), and others in environmental legislation.

The essential reason that the Commission on two separate occasions has recommended the replacement of the current requirements for standing is that they do not, in practice, act as a filter against vexatious, frivolous or meddlesome claims, but simply add to costs and delays. They are an unpredictable and technical hurdle.

The Commission was further strengthened in its resolve to recommend a single simple test because:

- most inquiries in comparable overseas jurisdictions have supported such a test for standing;
- since 1985, the desirability of such a test has been implicitly recognised by the Courts;
- the overwhelming majority of submissions lodged in response to our Discussion Paper 61 supported the introduction of a single open test for standing;
- where there is legitimate reason for restricting standing in particular circumstances, Parliament can enact appropriate legislation; and
- the Commission on the material available to it and from looking at the experience of the Land & Environment Court in NSW and proceedings under federal legislation such as the Trade Practices Act 1974 (Cth) was unable to find any support for one of the principal justifications for special interest tests, ie, that it kept the "floodgates" closed.

The Commission's recommendation with respect to open standing applies only to proceedings that have a public element. The Commission specifically considered that it was appropriate to define civil proceedings having a public element in terms of the recognised public law remedies. This approach provides a simple and relatively certain mechanism for identifying proceedings in which standing may be an issue. In broad terms this approach covers all judicial review proceedings and almost all proceedings

for an injunction or declaration based on a statutory cause of action or that could be brought by the Attorney-General in his or her own name to enforce public rights. It does not cover damages claims or actions involving purely private rights.

The Commission also found that the wide range of statutory remedies and statutory standing criteria meant that no single criterion would be sufficient to indicate precisely which statutory remedies should be subject to the new open standing test. Our view was therefore that in determining whether a remedy was one where the reformed test of standing would be applicable was a matter of judgment having regard to:

- the extent to which the remedy resembles in form any one or more of the general law remedies in the 'public law' area;
- the extent to which it supersedes such remedies;
- whether the persons entitled to invoke the remedy are expressly identified;
- if so, whether they are entitled to invoke the remedy by virtue of being individuals, or members of a class, who are alone entitled to enforce the rights to which the remedy relates;
- alternatively, whether the basis on which they are entitled to invoke the remedy is that they fall within a description similar to that found in general law rules of standing (for example, "persons interested" or "persons aggrieved");
- whether the remedy is in substance an appeal which can only be brought by a party to the earlier proceedings from which the appeal stems;
- the nature and extent of any "public element" in proceedings where the remedy is sought: for example:
  - that the conduct of a public official is being reviewed; or
  - that the remedy acts in aid of the criminal law; or
  - that the remedy exists as a means of enforcing a statute enacted for the benefit and protection of the public; or
  - that the constitutional validity of a law is at issue.

This was the same approach as adopted in Schedule 1 of the draft Bill at Appendix A of ALRC Report No 27. An updated sample of the application of the standing test to the statutory remedies is set out in Appendix C to ALRC Report No 78.

In considering whether or not to recommend the open standing test, the Commission considered whether there was any constitutional requirement for a plaintiff to have a personal stake in the litigation. Under Chapter III of the Constitution, a court cannot exercise federal jurisdiction unless it has a "matter" to consider. There is an argument that there might not be a matter sufficient to guarantee the constitutionality of the proceeding if a person were allowed to start proceedings where he or she does not posses a right or special interest. The Commission rejected this argument of unconstitutionality in ALRC Report No 27 on the basis that such a plaintiff would still be contending that the defendant had broken or was threatening to break some law or omitting to carry out some duty, if the defendant exceeded or misconceived some jurisdiction or was likely to do so. In other words, there was a genuine rather than hypothetical disagreement, and hence, there would be a "matter" at issue. The Commission believes that the open standing test it has recommended would meet the tests of constitutionality laid down by the High Court in *South Australia v Victoria*[2] and *Re Judiciary and Navigation Acts*.[3] The analysis of

Gummow J in *ICI v the TPC*[4] in dealing with the "any person test" in the Trade Practices Act 1974 (Cth) provides, the Commission believes, further support for its views of the constitutionality of open standing and also illustrates the likely approach that would be taken by the High Court to the notion of open standing should it be challenged.

The Commission similarly considered arguments put to it that an open standing test may result in some courts declining to hear a particular case on the basis that it was not justiciable.

In ALRC Report No 27, the Commission noted that although the test for justiciability is a very general one, the underlying principle is that matters are not properly for decision by a court if there are no available legal standards or if they are matters of a political nature which should be resolved by the executive or the legislature rather than the courts. The Commission believes that justiciability is a different issue from standing although in some cases the two may be intertwined. It is possible for an issue to be justiciable but the plaintiff may not have standing and *vice versa*. The requirement for justiciability remains irrespective of any changes to the law of standing.

The Commission recommended (ALRC Report No 78, Appendix C) that its new test for open standing should also apply to an application for reasons for a decision made pursuant to s 13 of the Administrative Decisions (Judicial Review) Act 1977 (Cth). The Administrative Law Committee of the General Practice Section of the Law Council of Australia has pointed out that officials may have difficulty in applying the second proposed limitation on the open standing test, ie, that contemplated (public element) litigation would unreasonably interfere with a private litigant's interest in having a matter dealt with as he or she would wish given that there is no requirement for litigation to be actually in contemplation at the time reasons are sought. It does seem that this is an issue that will need additional work at the time of settling the drafting of the proposed new Standing Act. The Commission concludes, however, that the same test of standing should apply to both ADJR review and requests for reasons. The outcome with respect to reasons, we believe, would be that unless an applicant for reasons indicated some desire to litigate, the second restriction on the proposed test of standing would, in the majority of cases, not be effectively applicable to any request on which an official was called upon to make a decision. The Commission of course has no desire to reduce the current ability of an individual to obtain a statement of reasons and particularly in circumstances where that individual had no present intention to litigate but simply wished to fully understand the decision which had been made by the official. In many of these circumstances at present the giving of reasons in fact forestalls any possibility of litigation and the Commission would want to see this potential maintained.

Intervention and *friends of the court*

The Commission confirmed its conclusions in ALRC Report No 27 that, in general terms, in a representative democracy in which the Constitution is founded on the sovereignty of the people, participation in proceedings with a public element by persons other than the original parties should be encouraged. Harnessing private support for compliance with public duties is consistent with modern public policy developments. But the Commission now considers that having separate categories of interveners and friends of the court (*amicus curiae*) is not the most effective way to promote participation by private parties. Such a dichotomy limits the court's ability to accommodate the range of levels of participation that is useful.

Therefore, in ALRC Report No 78, the Commission recommended that these two categories should be replaced by a statutory framework giving courts a general power to allow intervention of an infinitely variable kind on specific terms and conditions in individual cases.

The features of the statutory framework the Commission recommended to complement existing statutory provisions are:

- at any stage of public law proceedings a court may, on its own motion or on the application of a person (an intervener), give leave to the intervener to participate in the proceedings subject to such terms and conditions and with such rights, privileges and liabilities (including liability for costs), as the court determines;

- when deciding whether to grant leave the court should have regard to whether the intervener's contribution will be useful and different from those of the parties to the proceedings and whether the intervention will unreasonably interfere with the abilities of the parties having a private interest in the matter to deal with it differently;

- leave should not be refused solely because the applicant does not have a personal or "special" interest in the litigation. However, the existence of such an interest may be relevant to the level and nature of participation. For example, a person with a personal interest is more likely to be given the same rights, duties and obligations as a party than a person with no such personal interest;

- when granting leave, the court should specify the role and manner of participation of the intervener, including the matters he or she may raise; whether his or her submissions are to be oral, written or both; the length of the submissions and the evidence (if any) he or she may adduce;

- unless the court orders otherwise, the role of a person who intervenes with the leave of the court will be confined to assisting the court in its task of resolving the issues raised by the parties and will not include filing pleadings, leading evidence or examining witnesses. In these circumstances, an intervener will not be liable for costs;

- the court must give reasons for its decision to grant or refuse a person's application to intervene. This will assist in developing judicial guidelines as to how the discretion should be exercised;

- neither the parties nor a person seeking to intervene should have a right of appeal against an order granting or refusing the intervention or setting the terms and conditions it will be subject to. It would be counterproductive if intervention was allowed to become a substantive issue in dispute, adding to the complexity and total costs of the litigation rather than assisting in its resolution. An appeal against intervention orders may, however, be made with the leave of the appellate court. Leave to appeal should only be given if it can be shown that the discretion as to intervention miscarried at first instance either by reason of some manifest error or by consideration of irrelevant matters; and

- the court should have the power to direct that notice of public law proceedings be given to third parties (including the Attorney-General) whom it specifies.

Implementation

In conclusion, the Commission in ALRC Report No 78 addressed itself to how its recommendations should be implemented while noting the draft Bill attached to

ALRC Report No 27 recommended a more pragmatic approach to settling the terms of the proposed new federal Standing Act. In addition, ALRC Report No 78 recommended that the federal government should, through the Standing Committee of Attorneys-General, encourage the uniform adoption of the open standing rule and new framework for intervention in public interest litigation in all Australian jurisdictions.

The ALRC's recommendations give rise to a number of practical issues that need to be considered before implementing legislation is drafted. The Commission has recommended that the federal Attorney-General should arrange for members of the judiciary, lawyers and other interested individuals to examine how the new rules for standing will work in practice. The Attorney-General should also ask the Australian Institute of Judicial Administration to coordinate this examination and, in light of the outcome, coordinate the development of rules, guidelines and practice notes for the better implementation of the new Standing Act.

The objective of this examination and the statute by statute review of special standing requirements referred in Appendix C of ALRC Report No 78 is to provide an opportunity for a full review area by area of whether or not the present limitations, in the way of full participation by personal litigants to the enforcement of public duties, should be removed.

Endnotes

1 (1995-96) 134 ALR 289.
2 (1911) 12 CLR 667.
3 (1921) 29 CLR 257.
4 (1992) 110 ALR 47, 65.

APPENDIX A

TERMS OF REFERENCE

STANDING

I, MICHAEL LAVARCH, Attorney-General of Australia, HAVING REGARD TO:

- the need for a fair, efficient and effective legal system;
- the Law Reform Commission's Report No. 27 *Standing in Public Interest Litigation*;
- changes in the law relating to standing since 1985 both as a result of judicial decisions and legislation in specific areas;
- Action 2.7 in the Report of the Access to Justice Advisory Committee; and
- Recommendations 7.1 and 7.2 in the Laws Reform Commission's Report No 69 Part 2 *Equality before the law: women's equality*.

REFER to the Australian Law Reform Commission for inquiry and report under the *Law Reform Commission Act 1973*, the following matters:

(a) what changes, if any, should be made to the recommendations and draft legislation contained in the ALRC 1985 Report on *Standing in Public Interest Litigation* in the light of subsequent developments in law and practice and recent and proposed reforms to court and tribunal rules and procedures;
(b) whether, in the light of developments since 1985, any further general changes are now required to present law and practice in relation to the capacity and right of persons to be heard in courts and tribunals exercising federal jurisdiction; and
(c) any related matters.

The Commission shall consider, among other matters:

(i) the need to avoid Australia becoming an unduly litigious society by giving consideration to other methods available outside the litigation process to achieve resolution of disputes;
(ii) participation in proceedings by intervention or as an *amicus curiae* or expert adviser or by any other method;
(iii) the relationship between standing rules and other relevant aspects of litigation including the volume and cost of litigation; and
(iv) developments in public interest litigation in Australia and the impact of present and proposed standing rules on public interest litigation.

IN PERFORMING its functions in relation to this reference the Commission shall

(i) conduct such consultations as are necessary among the Australian community and with relevant bodies;
(ii) in recognition of work already undertaken, have regard to relevant reports, and any steps taken by governments to implement their recommendations, including:
- the Report of the Access to Justice Advisory Committee, and
- relevant reports of the Law Reform Commission; and
(iii) consider and report, as appropriate, on relevant developments in standing rules in other countries.

IN MAKING ITS REPORT the Commission will also have regard to its function in accordance with s6(1)(d) of the Law Reform Commission Act to consider the present proposals for uniformity between the laws of the Territories and laws of the States.

THE COMMISSION IS REQUIRED to make a final report not later than 29 February 1996.

Dated 17th May 1995

Michael Lavarch
Attorney-General

APPENDIX B

LIST OF RECOMMENDATIONS

Recommendation 1 - standing reforms to apply to public law proceedings

Reforms to the law of standing should apply to

- proceedings to obtain a remedy under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)
- proceedings for an injunction or declaration where
  - the Attorney-General could have commenced the proceedings in his or her own name or
  - rights, duties or powers created by or under an enactment are in dispute
- proceedings for prerogative relief (such as certiorari, prohibition, mandamus, habeas corpus or quo warranto)
- proceedings to obtain a statutory remedy which is similar in function to any of the foregoing remedies

where the proceedings relate to a matter arising under the Constitution (or involving its interpretation) or federal legislation or are against the Commonwealth or a person acting on its behalf.

Recommendation 2 - any person should be able to commence public law proceedings

Any person should be able to commence and maintain public law proceedings unless

- the relevant legislation clearly indicates an intention that the decision or conduct sought to be litigated should not be the subject of challenge by a person such as the applicant; or
- in all the circumstances it would not be in the public interest to proceed because to do so would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it differently or not at all.

Recommendation 3 - standing to be determined as a preliminary issue

As a general rule, any issue as to standing should be resolved as a preliminary or interlocutory matter.

6 Intervention in public law proceedings

Recommendation 4 - intervention at the court's discretion

A court may, at any stage of proceedings, on its own motion or upon the application of a person, give leave to that person to participate in public law proceedings subject to such terms and conditions, and with such rights, privileges and liabilities (including liability for costs), as the court determines.

When deciding whether to grant leave the court should have regard to whether the intervenor's contribution will be useful and different from those of the parties to the proceedings and whether the intervention will unreasonably interfere with the abilities of the parties having a private interest in the matter to deal with it differently.

Recommendation 5 - special interest not needed for intervention

Leave to intervene should not be refused solely because the applicant does not have a personal or 'special' interest in the litigation.

Recommendation 6 - court must give reasons

The court must give reasons for its decision to grant or refuse a person's application to intervene.

Recommendation 7 - appeals against an intervention order

A party to proceedings or a person seeking to intervene in those proceedings may, with the leave of the appellate court, appeal against an order granting or refusing the intervention or an order setting the terms and conditions for the intervention. Leave to appeal should be given only if it can be shown that the court's discretion to allow intervention miscarried at first instance either by reason of some manifest error or by consideration of irrelevant matters.

Recommendation 8 - court may give notice of proceedings

The court should have the power to direct that notice of public law proceedings be given to third parties (including the Attorney-General) whom it specifies.

Recommendation 9 - discretionary intervenor may seek leave to appeal

A person who intervenes in public law proceedings pursuant to the statutory framework may appeal against the judgment of the court with the leave of the appellate court.

When considering whether or not to grant leave to appeal the appellate court should take into account the basis on which leave to intervene was granted.

Recommendation 10 - intervention by the Attorney-General

Legislation should confer on the Attorney-General an unfettered right of intervention in public law proceedings in order to protect Crown prerogatives or to argue issues of public importance as a party to the proceedings.

Recommendation 11 - statutory intervenor to be a party

Where the Attorney-General, a Minister, a government body or a private person intervenes in public law proceedings pursuant to a specific statute, he or she shall do so as a party to the proceedings unless the statute provides otherwise.

Recommendation 12 - costs and statutory intervenors

The Attorney-General and any person who intervenes in public law proceedings pursuant to a specific statute may seek or be subject to orders for costs unless the statute specifies otherwise.

Recommendation 13 - costs and discretionary intervenors

A person who intervenes with the leave of the court should not recover or be liable for costs other than pursuant to a disciplinary or case management costs order unless the court, when setting the terms and conditions of the intervention, orders otherwise.

Where a court allows an intervenor to play a greater part in the proceedings than was originally specified the court should also address at that time the question of whether and to what extent the intervenor should pay any costs incurred by the parties as a result of the intervenor's greater involvement.

7 Implementation

Recommendation 14 - a Commonwealth standing statute

The rules for standing and intervention in federal public law proceedings recommenced by the Commission in this report should be implemented by the enactment of a Commonwealth standing statute.

Recommendation 15 - uniform standing rules

The rules for standing and intervention in federal public law proceedings recommended by the Commission should proceed irrespective of whether the State and Territory governments take steps to implement the recommendations.

Recommendation 16 - Standing Committee of Attorneys-General

The federal Government should, through the Standing Committee of Attorneys-General, encourage the uniform adoption of reforms to the rules for standing and intervention in public law proceedings in all Australian jurisdictions.

Recommendation 17 - assessing the impact of new rules for standing and intervention prior to implementation

Before the standing rules recommended by the Commission are implemented, the federal Attorney-General should arrange for members of the judiciary, lawyers and other interested individuals and organisations to examine the way in which the rules will probably work in practice. The Attorney-General should ask the Australian Institute of Judicial Administration to coordinate the development of rules, guidelines and practice notes for implementation of the new rules.

Recommendation 18 - reforms to the litigation process and the rules for standing and intervention

The rules for standing and intervention recommended by the Commission should be adopted as part of a package of reforms that will

make the litigation process cheaper and more effective.

Recommendation 19 - review of the operation of the new rules

The federal Attorney-General should arrange for the operation of the rules for standing and intervention in public law proceedings to be monitored and assessed by a body such as the Australian Institute of Judicial Administration to ensure that they are achieving the desired outcomes without unnecessary expense to the court, tribunal, parties or community.

COMPLAINTS, INVESTIGATIONS AND DISPUTES UNDER THE PROPOSED PRIVACY ACT EXTENSION TO THE PRIVATE SECTOR

*Mick Batskos**

In September this year, the Federal Attorney-General published a discussion paper entitled *Privacy Protection in the Private Sector*. The discussion paper proposes that the Privacy Act 1988 (Cth) should be extended to organisations and individuals in the private sector so far as it is within the Commonwealth's constitutional power to do so. The paper also proposes a "co-regulatory approach" to privacy in the private sector, based on provision for Codes of Practice to be developed in relation to specified information, activities, organisations, industries or professions.

This article briefly outlines the following matters relating to complaints, investigations and disputes contained in the discussion paper:

(a) when an individual can complain to the Privacy Commissioner;

(b) what is an interference with privacy;

(c) how complaints can be made;

(d) when the Privacy Commissioner should have power to investigate the activities of an organisation[1];

(e) how investigations are conducted;

(f) how complaints can be resolved;

(g) when organisations may be taken to court; and

(h) what types of remedies are available for an interference with privacy.

Complaints

The discussion paper proposes that an individual would be able to make a complaint to the Privacy Commissioner about an act or practice of an organisation that:

(a) *might* be an interference with privacy; or

(b) *might* otherwise adversely affect the privacy of an individual and is inconsistent with guidelines issued by the Privacy Commissioner (eg as is proposed in the telemarketing and optical surveillance areas). This article focuses on interferences with privacy.

There are three types of acts or practices of organisations which might give rise to an "interference with privacy". First, where one or more of the Information Privacy Principles ("**IPPs**") or a Code of Practice is breached in relation to the personal information of an individual. Secondly, where the organisation concerned makes a decision about fees. Thirdly, where the organisation makes a decision about extending time limits within which a decision about access must be made. The last category will be an interference with privacy only if, in addition, the Privacy

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Commissioner believes that there was no proper basis for the decision to extend the time limits.

Another interesting feature of the discussion paper is the proposal for representative complaints. This is could lead to a "class" type of complaint made by an individual on behalf of a group or class of individuals. Currently, s.6(1) of the Privacy Act defines the term "representative complaint" as:

> a complaint where the persons on whose behalf the complaint was made include persons other than the complainant, but does not include a complaint that the Commissioner has determined should no longer be continued as a representative complaint.

At present, s.38 of the Privacy Act permits a representative complaint to be made if:-

(a) the class members have complaints against the same person; and

(b) all the complaints are in respect of, or arise out of, the same, similar or related circumstances; and

(c) all the complaints give rise to a substantial common issue of law or fact.

A representative complaint must:

(a) describe or otherwise identify the class members and

(b) specify the nature of the complaints made on behalf of the class members; and

(c) specify the nature of the relief sought; and

(d) specify the questions or law or fact that are common to the complaints of the class members.

In describing or otherwise identifying the members of the class, it is not necessary to name them or specify how many there are. A representative complaint may be lodged without the consent of class members.

A complaint must be in writing. The staff in the office of the Privacy Commissioner will provide assistance to a person wishing to make a complaint.

Investigations: when are they to be conducted?

Apart from certain exceptions, the discussion paper suggests that the Privacy Commissioner would be required to investigate acts or practices which could give rise to an interference with privacy (or which could otherwise affect the privacy of an individual because it was inconsistent with one of the Privacy Commissioner's guidelines) either upon receiving a complaint, or upon his or her own motion, if he or she considered it desirable.

Thus, if the Commissioner does not consider it desirable to investigate an interference with privacy by a private sector organisation, the Commission will have a discretion not to investigate. This differs markedly from the current provisions in the Privacy Act which state that the Privacy Commissioner **shall** investigate an act or practice if the act or practice may be an interference with the privacy of an individual and a complaint about the act or practice has been made. The Privacy Commissioner **may** also investigate an act or practice which may be an interference with privacy if it is thought desirable to do so. Under the current provisions, the need to determine whether or not the investigation is desirable only arises where the Privacy Commissioner (without receiving a complaint from another person) considers an act or practice may be an interference with privacy.[2]

The Privacy Commissioner would be able to decide not to investigate or further

investigate an act or practice if satisfied that:

(a) there was no interference with privacy (or privacy was not adversely affected);

(b) no person aggrieved wanted the investigation;

(c) the complainant had not first complained to the organisation about the act or practice;

(d) the organisation had dealt or was dealing adequately with the complaint or had not had an opportunity to do so;

(e) the complaint was made more than 12 months after the matter came to the complainant's attention;

(f) the complaint was frivolous, vexatious, misconceived or lacking in substance;

(g) the complaint was being dealt with under other Commonwealth legislation;

(h) another remedy had been or was being sought which had disposed or was adequately disposing of the complaint;

(i) if the complaint related to a Code of Practice which set out a complaints procedure, that procedure was not fully pursued where it would have been reasonable to do so;

(j) another more appropriate remedy was reasonably available.

Again, these provisions are similar to existing provisions in the Privacy Act.[3] What they suggest is that it is in the interests of organisations wishing to maximise their chances of avoiding investigations by the Privacy Commissioner to introduce appropriate internal procedures for handling complaints about privacy. These procedures should be well documented and actually applied in practice; they should not just be a token gesture

Investigations: how are they to be conducted?

The discussion paper states that the investigation procedures are intended to be flexible and informal[4]. Although informality and flexibility may arise in practice, this is not necessarily reflected in the types of powers the Privacy Commissioner will have even though the investigation procedures proposed are very similar to those which currently exist in the Privacy Act.[5]

Before an investigation is commenced, the Privacy Commissioner will be required to inform the organisation concerned of the impending investigation. Investigations would be conducted in private as the Commissioner thinks fit. The Commissioner will be able to obtain such information and make such inquiries as thought fit. Ordinarily, that would be by informal and personal inquiry and by discussions or correspondence with relevant persons.

However, there would also be substantial powers of compulsion including the power to:

- give persons notice to provide relevant information, answer questions or produce relevant documents;
- require persons to attend in order to provide information or answer questions on oath;
- direct persons to attend a compulsory conference (to try and settle a complaint) where a failure to attend without reasonable excuse would be an offence;

- conduct compulsory conferences in private to try and settle complaints. Neither the complainant nor the organisation would be able to be legally represented; however, an organisation can be represented by an employee, member or officer. This gives organisations a potential advantage where they have in-house lawyers who can attend on their behalf;

- transfer complaints to the Human Rights and Equal Opportunity Commission where a complaint would be more appropriately dealt with by that body.

Settlement, court proceedings and civil penalties

If the Privacy Commissioner considers that a complaint is substantiated, he would be required to use his best endeavours to secure a settlement between the parties. The Attorney-General envisages that as part of this process the Privacy Commissioner would make constructive suggestions with a view to resolving complaints.[6] The settlement process might involve obtaining assurances that the act or practice which lead to the investigation, or a similar act or practice, would not re-occur.

The Privacy Commissioner would be able to issue an assessment of the organisation's compliance with the IPPs (or the relevant Code of Practice) and issue an assessment of any appropriate remedy, including compensation.

A complainant alleging an interference with privacy would be able to commence Federal Court proceedings to consider the whole matter afresh. This would not be by way of a review of the Privacy Commissioner's assessment nor would such proceedings be able to be commenced to enforce any settlement agreement. Federal Court proceedings will be able to be commenced in three circumstances. They are where the Privacy Commissioner:

(a) was unable to secure a settlement; or

(b) considers that the matter was not suitable for settlement; or

(c) considers that the matter raised public interest concerns.

The Federal Court would be able to order organisations to pay compensation, refrain from acts or practices which would constitute an interference with privacy and to undertake actions necessary to avoid an interference with privacy.

In addition, the Privacy Commissioner would have the power to seek an order for civil penalties from the Federal Court for:

(a) unauthorised disclosure of personal information for profit; and

(b) obtaining personal information by false pretences.

In hearing these types of cases the Federal Court would apply the rules of evidence and procedures which usually apply to civil matters.

By contrast, where a matter would involve an adverse effect on the privacy of an individual (eg. in telemarketing and optical surveillance), the Privacy Commissioner would only have power to make recommendations as to consistency with guidelines and as to an appropriate remedy. No Federal Court proceedings could be commenced.

The discussion paper is silent on whether or not injunctions will be available to stop an interference with privacy. There is no equivalent proposed (it would seem) to s.98 of the Privacy Act. That section enables an injunction to be sought where a person has engaged, is engaging or is proposing to engage in any conduct that constituted or would constitute a

contravention of the Act. It can be sought by the Privacy Commissioner or *any person*. The applicant need not have any special interest to have standing. Accordingly, interest groups are able to seek injunctions without the need to establish an interest greater than any member of the public. Further, where an injunction is sought to stop a breach of the Act, no undertaking as to damages need be given: s.98(7).

As representative complaints will be possible, I presume that the Privacy Act provisions will be extended in relation to identification of the class to be affected by any determination about a representative complaint, and the manner in which members of the class may participate in or benefit from any such determination.

Endnotes

1 For "organisation" read "organisation or individual". To avoid confusion when referring to individuals, this article refers to organisations only.
2 See Section 40 of the Privacy Act 1988.
3 See Section 41 of the Privacy Act 1988.
4 See also text of address by Attorney-General to Insurance Council of Australia, 12 September 1996, para 51.
5 See Sections 43-48 Privacy Act 1988.
6 See text of address by Attorney-General to Insurance Council of Australia, 12 September 1996, para 53.

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 to be called 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 in administrative law theory.

3. Entries should be about 8,000 to 10,000 words in length.

4. All entries should be on A4 paper and typed single spaced. The original and two copies 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.

DECEMBER 1996 aial FORUM No 11