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THE ADMINISTRATIVE DECISIONS TRIBUNAL - A LENGTHY GESTATION

*JW Shaw QC, MLC**

For the NSW Chapter of the Australian Institute of Administrative Law 1998 Seminar Series: Tribunals and their Relationship with Government, 28 July 1998.

Thank you for the opportunity to speak to you tonight on the topic of the Administrative Decisions Tribunal: A Lengthy Gestation.

It has indeed been a lengthy gestation and not without its fair share of obstacles along the way, however the Tribunal is about to come to term, with the legislation which conceived it (namely the *Administrative Decisions Tribunal Act 1997*) and give it form (namely the *Administrative Decisions Legislation Amendment Act 1997* and the *Administrative Decisions Tribunal Amendment Act 1998*) to be proclaimed to commence in stages starting on 6 October 1998 and its doors to open for business in a practical sense from that date. How have we got to this point in NSW?

I underestimated the weight of bureaucratic opposition which would be brought to bear against the proposal. I wrote (as a practising barrister) to then Attorney-General Terry Sheahan suggesting administrative law reform in 1987. I gather a discussion paper was generated as a result. But there was little evidence of subsequent activity. I should have then taken a lesson from the chronology of the (Commonwealth) *Administrative Decision (Judicial Review) Act 1977*. Mr Ellicott QC, the then Commonwealth Attorney-General, presented his second reading speech in April 1977. The Bill was assented to on 16 June 1977, but there was no proclamation for over 3 years, and the legislation did not commence until 1 October 1980.

There has been the will to bring to fruition a process which will provide for both rationalising the proliferation of tribunals in this State and extend existing rights for persons aggrieved by the decisions of government administrators as well as create new rights in this area.

The notion of good public administration requires acceptance of the following matters:

- lawfully made decisions;
- reasons to be given for decisions;
- available and accessible remedies and relief to correct wrong decisions; and
- a decision and review process which adheres to the principles of natural justice.

What can the ADT (Administrative Decisions Tribunal) do to assist in the achievement of this style of government? This evening I want to dwell on a specific feature of the Administrative Decisions Tribunal Act which I believe will propel the concepts of good government I have referred to from the theoretical into reality.

In considering the development of the Administrative Decisions Tribunal it is

* *JW Shaw QC, MLC is NSW Attorney-General, Minister for Industrial Relations and Minister for Fair Trading.*

interesting to consider differences between the ADT as established and some of the early proposals to establish a public administration tribunal. In particular it is apposite to note that the NSW Law Reform Commission, in its 1973 Report, *Appeals in Administration,* recommended against the introduction of a general statutory duty of administrators to give reasons because to do so "must so add to work loads and so interfere with the efficiency of public authorities that the disadvantages of adopting such a course of action must outweigh the advantages".[1]

Some of the early recommendations concerning administrative law reform have now been implemented, for example NSW has had an effective Ombudsman since 1975. Closer to home, the ADT will have a varied membership. It will be comprised not only of judicial officers and legally qualified persons but includes persons with expertise in particular areas of the ADT's jurisdiction.[2] However, in the case of merit review, it is notable that the attitudes towards decision-making in government have changed.

These changes are reflected in the *Administrative Decisions Tribunal Act 1997 (NSW),* which has also benefited from reviewing the experiences of the Commonwealth Administrative Appeals Tribunal, the Federal Court and the work of the Administrative Review Council.

For example, in the context of merit review, a key element of the ADT Act is the requirement for administrators to give reasons. These provisions overcome the common law in NSW as enunciated in *Public Service Board of New South Wales v Osmond* by then Chief Justice, Gibbs CJ, who stated that, contrary to the view of the NSW Court of Appeal and in particular the view of its then President, Kirby P:

> There is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests, or defeat the legitimate or reasonable expectations, of other persons.[3]

In particular, section 49 of the *Administrative Decisions Tribunal Act 1997* (NSW) provides that if an administrator makes a reviewable decision, an interested person may make a written request to the administrator for the reasons for the decision and that the administrator is obliged to provide the same within 28 days of receiving such a request.

If the administrator is of the view that the person (being a person who is entitled under an enactment to make an application to the Tribunal for an original decision or a review of a reviewable decision (as the case may be))[4] is not entitled to a statement of reasons either because they:

- were not entitled to it[5] or,
- did not make the request within 28 days of receiving written notice of the decision[6] or,
- in other cases, did not make the request within a reasonable time of being notified of the decision,[7]

then they must notify the applicant within 28 days of the request of their refusal to provide reasons and the reasons for the refusal.

A person who is refused a statement of reasons by an administrator pursuant to section 50(1)(a) or (c) may apply to the Administrative Decisions Tribunal for an order that the person was or was not entitled to make the request or that they did make the request within a reasonable time, as the case may be.[8]

If an administrator does not provide a statement of reasons within 28 days then the Tribunal may be applied to for an

order that the administrator do so within a set time frame.[9]

I anticipate that the Tribunal will be mindful of the federal case law concerning like provisions in the federal jurisdiction when asked to adjudicate on these provisions.

As you will have noticed, section 49 of the *Administrative Decisions Tribunal Act 1997* diverges from its federal counterpart[10] with respect to the contents of the statement of reasons. It provides that the statement of reasons must set out:

- the findings on material questions of fact, referring to the evidence or other material on which those findings were based,
- the administrator's understanding of the applicable law, and
- the reasoning processes that led the administrator to the conclusions the administrator made.[11]

Given the similarity of sections 28 and 37 of the Commonwealth *Administrative Appeals Tribunal Act 1975* and section 13 of the *Administrative Decisions (Judicial Review) Act 1977* with sections 49 and 58 of the *Administrative Decision Tribunal Act 1997*, I do not think it is unreasonable to examine the case law concerning the like Commonwealth provisions for some clues as to what might be expected from a statement of reasons under the NSW *Administrative Decisions Tribunal Act 1997.*

In this context I draw to your attention to *Re Palmer and the Minister for the Capital Territory.*[12] In that case, in interpreting sections 28 and 37 of the *Administrative Appeal Tribunal Act 1975,* three members of the Administrative Appeals Tribunal found that sections 28 and 37 of the Commonwealth Administrative Appeals Tribunal Act 1975 arise out of the Commonwealth Parliament's intention that the citizen be fully informed of a decision maker's reasons for making a decision which

> is a right consequent upon the decision being made which is capable of being reviewed, and the reasons, when properly given, ensure that the citizen is sufficiently informed to determine whether he wishes to take the matter further, and if so whether to make representations to the Minister, proceed in the appropriate court of law or to seek a review by this Tribunal.[13]

It follows that to achieve this end the reasons must, in the words of Megaw J

> be reasons which will not only be intelligible but which will deal with the substantial points that have been raised.[14]

This interpretation of the federal provisions requiring reasons to be given in exercises of administrative decision making was extended by Woodward J in the Federal Court of Australia in *Ansett Transport Industries (Operations) Pty Ltd and another v Wralth and Others,*[15] where he cites with approval the decision in *Re Palmer* and continues:

> ...s 13(1) of the Judicial Review Act (Cth)[16] requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say in effect: 'Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.' (and) This requires that the decision maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially) if those facts have been in dispute, and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation.[17]

These principles have most recently been developed in the context of the federal

judicial review legislation. In *Soldatow v Australia Council*[18] Justice Davies held:

> Section 13(1) requires proper and adequate reasons which are intelligible, which deal with the substantial issues raised for determination and which expose the reasoning process adopted. The reasons need not be lengthy unless the subject matter requires but they should be sufficient to enable it to be determined whether the decision was made for proper purpose, whether the decision involved an error of law, whether the decision-maker acted only on relevant considerations and whether the decision makers left any such consideration out of account.[19]

As you can see the NSW provision requiring reasons to be given has incorporated the decision in *Wraith* and developed in *Soldatow* and the cases cited therein.

Administrators may gain some solace from *Ansett Transport Industries (Operations) Ltd v Secretary, Department of Aviation*[20] (in the context of a statement of reasons pursuant to the Judicial Review Act), which provides that what amounts to a sufficient statement of the relevant law will depend on the circumstances, including the familiarity of the applicant with the legislative framework of the decision.

Like its federal counterpart, the *Administrative Decisions Tribunal Act 1997* also provides that, if an administrator gives an inadequate statement of reasons then the Tribunal may be applied to for an order that an adequate statement of reasons be given within a set time frame.[21] A statement of reasons is only adequate if it contains the matters set out in section 49(3) of the Act.[22]

Although it appears to be generally accepted that the quality of reasons statements required by the Commonwealth legislation has improved over the last 10 years, partly because of senior administrators becoming more aware of the legal context within which they make decisions,[23] I am concerned about the issue of motivating administrators to give reasons as required by section 49 of the *Administrative Decision Tribunal Act 1997* that will result in an interested person understanding how the decision was arrived at.

A further important element of the review jurisdiction of the Administrative Decisions Tribunal is that it expressly provides that the Administrative Decisions Tribunal is to give effect to government policy.

The experience in this area in the Commonwealth AAT demonstrates that there need not be any inherent conflict arising from an independent review body considering government policy.

It is accepted that the powers of the Commonwealth AAT extend not only to consideration of whether any government policy has been improperly applied but also to refusal to apply a policy in a particular case.

The Commonwealth AAT distinguishes between "core or political policies" and more general government policies and while it is required to make an independent assessment, it accepts the importance of consistency in administrative decision making, lending further weight to the application of an existing lawful policy.

This position was articulated by former Chief Justice Brennan when he was President of the AAT. In *Drake and the Minister for Immigration and Ethnic Affairs (no 2)*[24] he stated that generally the AAT should apply government policy.

He said:

> when the Tribunal is reviewing the exercise of a discretionary power and the minister has adopted a general policy to guide him in the exercise of the power, the tribunal will ordinarily apply the policy in reviewing the decision, unless the policy is unlawful or unless its application

> tends to produce an unjust decision in the circumstances of the particular case.[25]

However, he went on to say that to argue against the application of a policy in a particular case, "cogent reasons will have to be shown against its application, especially if the policy is shown to have been exposed to Parliamentary scrutiny".[26]

In preparing the Administrative Decisions Tribunal legislation the decision was made to specifically include a requirement for the Administrative Decisions Tribunal to have regard to government policy for two reasons.

First, for a decision-maker to rely upon the application of a policy to justify a decision it will be necessary that the policy is set down and available. Having the policies which inform decision making clearly identified and available will assist in ensuring the transparency of the decision-making process which is a key objective of the legislation.

Second, in the circumstances where a decision results from the application of a government policy it will in effect allow that policy to be tested in the Administrative Decisions Tribunal for its lawfulness and for the boundaries of its application so that its limits may be determined. A by-product of this is that decisions of the Administrative Decisions Tribunal will be taken into account when developing government policy and legislation. This will also work to improve the quality and consistency of government decision making.

The Administrative Decisions Tribunal will need access to all relevant documentation in order to reach the correct or preferable decision about the matter before it. Evidence of government policies may be provided by ministerial certificate. However the Act provides for the protection of the confidentiality of Cabinet documents and other exempt documents under the Freedom of Information Act and for the application of those parts of the evidence act which relate to privilege.

The interaction between the tribunal and the government can be expected to have a positive impact upon the way in which decisions are made in government. In this context it is worth bringing to your attention the objects of the Act as set out in section 3, and in particular 3(f) and (g) which provide that objects of the Act include

- fostering an atmosphere in which administrative review is viewed positively as a means of enhancing the delivery of services and programs and
- promoting and effecting compliance by administrators with legislation enacted by Parliament for the benefit of the citizens of NSW.

And, in the context of these objectives I believe it is worth considering Recommendations 71, 72 and 73 made in the 1994 Report (No 39) of the Administrative Review Council entitled *Better Decisions: review of Commonwealth Merits Review Tribunals* at Chapter 6, Improving Agency Decision Making. Primarily, this Chapter of the Report emphasises the importance of cultural acceptance of the benefits of merit review throughout an agency, as there is great potential for decisions of review tribunals to assist with better management and administration within agencies. The importance of the recommendations renders them worth repeating verbatim.

Firstly, Recommendation 71 says:

> All agencies should actively promote the potential beneficial effect of review tribunal decisions on the general quality of the agencies' decision making. As an important aspect of this, agencies should make a visible, formal and

real commitment to promoting that effect.

Recommendation 72 says:

> Agencies should ensure that their organisational structures are such as to maximise the potential beneficial effect of review tribunal decisions on the quality of agency decision making. Those structures should provide for:
>
> - appropriate levels of independence of legal policy and review staff;
> - effective communications systems; and
> - appropriate training for primary decision makers on the function and role of merits review in the decision-making process.

Recommendation 73 says:

> Agencies should be encouraged to respond to a review tribunal decision that has potential implications for future agency decision-making and where they consider the decision to be incorrect. They should:
>
> - amend their policy and guidelines, or seek to amend the law, to clarify the policy intention;
> - seek further review of the decision or appeal against it to a court; or
> - make a public statement of their position in relation to the review tribunal decision.

I understand that some administrators may resist the need for a improving their decision-making in the face of the pressures of economic rationalism and organisational change within their own agencies. To these concerns I can do no worse than reiterate the views expressed in *Better Decisions* that:

> the objective of more cost-effective decision making is seen by some as being incompatible with the objective of improved quality of decisions, and improved client focus. To foster appropriate cultural change, it is important for agencies and their officers to accept that the two objectives are not incompatible and that they must be reconciled.

That administrative decisions should become qualitatively better (in terms of fairness, objectivity and reasonableness) is after all the classic task of administrative law. The NSW reform is a step in that direction.

Endnotes

1 New South Wales Law Reform Commission Report No 16 *Appeals in Administration*, Rec. 176 at p 75, although it did anticipate a requirement to give reasons in special cases, such as a licence needed for livelihood purposes.
2 Ibid, recommendation 150. The *Administrative Decisions Tribunal Act 1997 (NSW)* partially implements the recommendation.
3 (1986) 159 CLR 656 at 662
4 section 4(1) *ADT Act 1997 (NSW)*
5 section 50(1)(a)
6 section 50(1)(b)
7 section 50(1)(c)
8 section 51(1)&(2)
9 section 52(1)
10 Section 28 of the *Administrative Appeals Tribunal Act 1975 (Cth)*
11 Section 49 (3)
12 (1978) 23 ALR 196
13 Ibid. Fisher J (President), A N Hall (Senior Member) and C A Woodley (Member) at 206
14 *Re Poyser & Mills' Arbitration* (1964) 2 QB 467 at 478,
15 (1983) 48 ALR 500 at 507
16 Section 13(1) of the *Administrative Decisions (Judicial Review) Act 1977* substantially mirrors the requirement on administrators to give reasons for decisions
17 underlining added for emphasis
18 (1991) 28 FCR 1
19 Ibid. at 1. Justice Davies cited the following as authorities Re Palmer (1978) 23 ALR 196, Ansett Transport Industries (Operations) Pty Ltd V Wraith (1983) 48 ALR 500; ARM Constructions Pty Ltd v Commissioner of Taxation (1986) 10 FCR 197; Ansett Transport

Industries (Operations) Pty Ltd V Taylor (19870 18 FCR 498; Hatfield v Health Insurance commission (1987) 15 FCR 487; Dornan v Riordan (1990) 24 FCR 564 are cited as authority.

20 (1987) 73 ALR 193
21 section 52(2)
22 section 52(3)
23 Bayne P, Reasons, evidence and internal review, (1991) ALJ 65 101
24 (1979) 2 ALD 634
25 Ibid. at 645
26 Ibid.

UNDERTAKINGS OF CONFIDENCE BY THE COMMONWEALTH - ARE THERE LIMITS?

*Tom Brennan**

Introduction

With the expansion of government outsourcing into major areas of information technology infrastructure and government service delivery much legal policy debate has focussed on the desirability or otherwise of the application of public law instruments to the entities to which the service delivery has been outsourced.[1]

Much of that policy discussion has focussed on questions of the accountability of government for its conduct in outsourcing and the accountability of government in the commercial environments created by outsourcing.

Some more recent analysis has focussed on the need for a reappraisal of the policy basis or the judicial interpretation of key exemption provisions in freedom of information legislation to ensure accountability of government in an outsourcing environment.[2]

These debates and analyses largely predate the High Court's decision in *Lange's* case.[3] This paper argues that the decision in that case will compel fundamental reconsideration of accountability and public law remedies in outsourcing contexts.

Lange's case takes its place within a series of High Court decisions on the constitutional consequences of implications of responsible and representative government.

From these cases it appears:

(a) there are constitutional implications in relation to responsible and representative government;

(b) those implications limit the legislative power of the Commonwealth;

(c) those limitations also limit the legislative powers of the states; and

(d) the common law of Australia is informed by and developed in accordance with those implications.

To date there has been scant attention paid to the consequences of the implications for the executive power of the Commonwealth or the States.

This paper explores some of those implications.

The paper concludes that:

(a) the Commonwealth's capacity to enter into binding obligations of confidence most likely is limited;

(b) if the Commonwealth's capacity is so limited, the limitation affects undertakings purportedly given by Ministers, departments of state, public servants, statutory authorities and corporations created by the Commonwealth (at least for so long

* *Tom Brennan is a Partner in the Canberra office of law firm Corrs Chambers Westgarth.*

as those corporations are owned by the Commonwealth);

(c) the basis upon which ministers, departments and other government instrumentalities relate to the Parliament in matters of outsourcing and general commercial activities of the Commonwealth requires reconsideration in light of these recent High Court cases on responsible and representative government; and

(d) parties dealing with the federal government or agencies cannot rely on maintenance of confidentiality of information provided to government instrumentalities except to the extent that it can be demonstrated that it would be contrary to the public interest for that confidentiality to be breached.

There are grounds for those dealing with state governments to be concerned about the legal capacity of those governments to maintain the confidentiality of those dealings. The paper concludes that on the current state of authority it is impossible to say how far the consequences of the implications might reach for the executive power of the states.

Constitutional implications apply to Executive Government

> Those provisions which prescribe the system of responsible government necessarily imply a limitation on legislative and *executive* power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal parliament. Moreover, the conduct of the executive branch is not confined to ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to the Minister who is responsible to the legislature.[4]

These references to limitations on executive power by the Court in *Lange* appear to have been unnecessary to reach the decision in that case. Nevertheless, this is a statement by a unanimous Court of seven Justices.

It is also consistent with the reasoning of the Court in earlier decisions.

In *Davis v Commonwealth*[5] there was a challenge to the establishment of the Australian Bicentennial Authority as a corporation by the Commonwealth, and to legislation which prohibited the use of certain terms connected with the Bicentennial except with the consent of the Bicentennial Authority.

In this case it was established that the executive power of the Commonwealth extends to the incorporation of a company (at least within a Territory) which has as its object the performance of a matter within the executive power. The case is also an example of the incidental legislative power being validly exercised in the support of the executive power of the Commonwealth.

The case held, however, that legislation which prohibited the use of certain terms, for example "200 years" without the consent of the Authority was invalid.

The leading judgment in the case (by Mason CJ, Deane and Gaudron JJ) proceeded on the basis that the effect of the legislation was "to give the Authority an extraordinary power to regulate the use of expressions in everyday use in this country.......In arming the Authority with this extraordinary power the Act provides for a regime of protection which is grossly disproportionate to the need to protect the commemoration" of the Bicentennial. Thus it was the impact on the freedom of expression with respect to terms in ordinary use in the community which took the legislation outside the scope of the incidental power.

Brennan J, as he then was, held:

> Freedom of speech may sometimes be a casualty of a law of the Commonwealth made under a specific head of power – for example, wartime censorship - or a law designed to protect the nation – for example, a law against seditious utterances - but freedom of speech can hardly be an incidental casualty of an activity undertaken by the Executive Government to advance a nation which boasts of its freedom.[6]

The Court was unanimous in holding that the invalidity of the legislation could not be saved by the conferral of a power on the Bicentennial Authority to approve the use of the expressions in question:

> Nor is freedom of speech restored by creating a discretionary authority to allow it.[7]

Nationwide News v Wills[8] was a case concerned with the validity of a provision of the then *Industrial Relations Act 1988* (Cth) which made it a criminal offence to utter words calculated to bring a member of the Industrial Relations Commission into disrepute in his or her capacity as a member of the Commission.

Thus the case is squarely one as to the adequacy of legislative power rather than executive power. The legislative power in question was the conciliation and arbitration power. The issue was whether protection of an instrument of the executive (the Industrial Relations Commission) as affected by the provision was a matter incidental to the subject matter of the conciliation and arbitration power.

In his judgment Mason CJ referred to freedom of expression as a fundamental value traditionally protected by the common law. In a footnote he noted "the fundamental importance of the freedom of expression in modern democratic society"[9] had been recognised in his decision in *John Fairfax*[10] where he had said:

> It is unacceptable in a democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.[11]

Consistent with the lead judgment in the *Bicentennial Authority* case, Mason CJ decided *Nationwide News* on the basis that the legislation in question affected the "fundamental freedom of expression" so far that the legislation was disproportionate to the object it sought to serve. In so doing he referred to the need for:

> The Court [to] take account of and scrutinise with great anxiety the adverse impact, if any, of the impugned law on such fundamental freedom as freedom of expression, particularly when that impact impairs freedom of expression in relation to public affairs and freedom to criticise public institutions.[12]

Brennan J articulated the principle as follows:

> [T]he Constitution prohibits any legislative or executive infringement of the freedom to discuss governments and governmental institutions and political matters except to the extent necessary to protect other legitimate interests and, in any event, not to an extent which substantially impairs the capacity of, or opportunity for, the Australian people to form a political judgment required for the exercise of their constitutional functions.[13]

Deane and Toohey JJ similarly decided *Nationwide News* on the basis of constitutional implications derived from the doctrine of representative government. They held that:

> The Constitution's adoption of [the] doctrine of representative government was qualified in the areas of executive and judicial powers.[14]

With respect to executive powers they held:

> The combined effect of the nature of the British constitutional monarchy and of the development of the concept of the

> Crown as an Australian sovereign who acts, in relation to Commonwealth matters (including the appointment of a Governor-General), on the advice of Commonwealth Ministers who are dependent on the support of the Commonwealth Parliament is, however, that the limitations of the adoption of representative government in relation to the repository of executive power are now mainly of formal significance.[15]

Their Honours proceeded to find that the doctrine of representative government was the basis for the implication of freedom of expression as further developed in *Lange*.

Thus their Honours appear to have held that the substantive aspects of executive power are limited by constitutional implications of representative government, including freedom of expression.

On the same day as the decision in *Nationwide News* the Court decided the *Political Broadcasting Ban* case.[16]

Apart from the reasoning of McHugh J, the judgments in the case do not directly bear on the question of the application of implications to executive power. McHugh J, however, stated:

> If the institutions of representative and responsible government are to operate effectively and as the Constitution intended, the business of government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box. The electors must be able to ascertain and examine the performances of their elected representatives and the capabilities and policies of all candidates for election. Before they can cast an effective vote at election time, they must have access to the information, ideas and arguments which are necessary to make an informed judgment as to how they have been governed.[17]

His Honour's reasoning appears to apply to executive power as well as to legislative power.

In light of the unanimity of reasoning in *Lange* and that judgment's consistency with earlier decisions of the Court, it should be treated as settled law that executive power is limited by the implications of responsible and representative government just as legislative power is limited.

Levy's case[18] demonstrates why this must be so. There the Court considered the validity of Victorian regulations one of the effects of which was to prevent Mr Levy, a political activist opposed to duck shooting, conducting certain forms of protest in duck shooting areas on public lands in Victoria.

The Court held the regulations valid because they did not infringe the constitutional freedom of expression any more than was required to achieve the legitimate end of protecting life and personal safety. All members of the Court held that had the regulations not served that legitimate purpose they would have been invalid for infringing Mr Levy's freedom of expression on political matters.

Legislation with such an effect would be no more repugnant to the constitutionally protected principles of responsible government than would executive action with the effect of preventing protesters from entering duck shooting areas on public land. Indeed the executive action would be arguably more repugnant because of the lack of any of the aspects of public accountability inherent in the making of legislation.[19]

The content of the freedom of political communication

While the cases to date have been concerned with legislative power the following propositions appear to be established law.

1 The constitutionally protected freedom of communication operates vertically – in both directions between electors and elected and electors and

candidates for election; and horizontally – between electors.[20]

2 The freedom operates at all times and is not confined to election periods.[21]

3 The freedom operates with respect to "political or government matters".[22]

4 The freedom is not absolute but:

> Is limited to what is necessary for the effective operation of that system of responsible and representative government provided for by the Constitution.[23]

In the case of the exercise of legislative power this relative or limited freedom results in the application of a two stage test of constitutional validity of a law:

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect. Secondly, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[24]

It appears then that it is beyond the executive power of the Commonwealth for a constituent part of the executive government to obtain and seek to enforce obligations of confidentiality in relation to government or political matters unless the obligation serves a legitimate end. If that were not so, the executive through commercial conduct could achieve a result antithetical to the basic constitutional structures which create it and which the courts have held the legislature could not achieve.

Of perhaps greater practical importance, the Court's reasoning in *Lange* goes further. The executive or a constituent part of it cannot have the capacity to enter into undertakings of confidentiality to another party where the enforcement of those undertakings by the other party could deny free flow of information which is secured by the Constitution to either the parliament or electors.

This paper now deals with some of the circumstances in which these broadly stated propositions might apply and explores the legal mechanisms which might be used.

Accountability to the parliament

Secrecy provisions

The principle of responsible government is a "cardinal feature of our political system which [is] interwoven in its texture". Under this principle, "the Executive is directly responsible to.....the legislature."[25]

The full and complete accountability of the executive to the houses of parliament and their committees has generally been addressed as a matter of the law of parliamentary privilege.[26]

While the matter is not free from doubt, Lindell strongly argues that the parliament's power to require information from the executive is not, as a matter of law, limited by public interest immunity - but rather public interest immunity is a matter to be taken into account by the Parliament in determining whether to require the attendance of witnesses, the answering of questions or provision of documentation.

A related issue which has been addressed thus far as a matter of parliamentary privilege law is the operation of secrecy provisions (such as in the Income Tax Assessment Act) in the face of requirements of the parliament for officials to provide information otherwise affected by such statutory provisions. Odgers compendiously deals with certain disputes on this issue between the executive and its legal advisers on the one hand and the Senate and its Clerk on the other.[27] To summarise the position taken by the Senate:

(a) the privileges of the Senate would prevent prosecution of any person for providing any information to the Senate in conformance with the requirement of the Senate;

(b) there is therefore no room for the operation of secrecy provisions creating offences or other causes of action in relation to the disclosure of information; and

(c) such secrecy provisions do not limit the privileges of the House because those privileges can be limited only by express resolution or legislation.

The position of the executive has been more equivocal. Essentially the executive's position is that the question is to be resolved by interpretation of the particular secrecy provision in order to determine whether it necessarily requires the information not to be disclosed to the Parliament.

It should be noted, however, that the key opinion provided by the executive on the question is qualified at its commencement by "whatever may be the constitutional position".[28]

There is the argument that the operation of a secrecy provision to prevent the disclosure of information to the parliament cannot be inconsistent with notions of responsible government - because it is the parliament itself which has chosen to enact the secrecy provision in terms which have such effect.

That is not an argument that is likely to succeed. The implications drawn from responsible and representative government by the Court relate not only to upward vertical communications from electors or government instrumentalities to the Parliament but also to downward vertical communications from the Parliament to electors and to horizontal communications. A secrecy provision which infringes the notions of freedom of communication implied by responsible and representative government would have the effect of denying to members of the public access to information on political matters which the Constitution implies cannot be denied to them.

The result is that the disputes of the early 1990s between the Senate and the executive over the operation of secrecy provisions will need to be revisited. That revisitation will need to take into account the implications of the freedom of expression cases. The issues to be considered will be the constitutional validity of legislated secrecy provisions in the light of responsible and representative government.

In applying the two stage test set down in *Lange*, where a secrecy provision operates to prevent communication about government or political matters, the answer to the first question will be "Yes" - the law burdens freedom of communication about government.

In many cases the end sought to be achieved by secrecy provisions will without doubt be found to be legitimate. Secrecy provisions in taxation or social security legislation seek to enable citizens to deal with government agencies with security that their personal information will not be disclosed. However, to the extent that the provisions in such legislation have a wider effect, they must be at risk. To the extent that any such provision would operate to prevent a house of the parliament understanding and reviewing the conduct of a branch of the executive, there must be a very high risk that the provision would be found to be incompatible with the maintenance of the constitutionally prescribed system of responsible government, or not to be reasonably adapted to protection of the legitimate purpose it seeks to serve.

"Commercial-in-confidence"

The second consequence relates to a circumstance which arises much more regularly. This is the circumstance in which ministers or officials decline to provide information to the Parliament or its committees because that information is said to be "commercial in confidence". I understand the claim to mean that if the information were to be disclosed, the Commonwealth or the minister or official concerned would breach an obligation of confidence to some third party.

However, at least in the circumstance where the information concerned is material to the operation of government, it is inconsistent with the responsibility of the executive to the parliament for the executive to enter into enforceable obligations of confidence which would prevent such disclosures to the parliament. If this position is right, the executive does not have the power to enter into an obligation with such an effect.

In much government outsourcing, it is assumed by Australian governments and business that the resultant commercial transactions (whether they be tenders, contracts, due diligence documentation or otherwise) will be confidential.[29] In support of this understanding it is common practice for officials and ministers when asked in parliamentary committees or the parliament for details of such transactions to claim that the information cannot be provided because it is "commercial in confidence".

If this is a claim that the Commonwealth would breach an undertaking of confidence it had entered into if such a disclosure were made, it would appear to be on a constitutionally insecure foundation.

It is arguable that the maintenance or enhancement of business efficacy in the Commonwealth's dealings will be a legitimate end which will be weighed against the damaged freedom of communication that confidentiality provisions in government contracts would otherwise evoke. However, with possible exceptions in the most special circumstances, for such a provision to be entered into without parliamentary authority and with the effect that the provision of information to the Parliament was thereby precluded would not be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

Parliamentary privilege law would suggest that the executive could not refuse to comply with a requirement of either house that such information be provided. The implications of *Lange's* case go further. It flows from *Lange* that the executive needs to reconsider the basis upon which it chooses to decline to provide such information to the parliament in non-compulsory settings such as parliamentary questions and Senate estimates hearings.

A possible test would be whether, in the executive's judgment, the business efficacy of the Commonwealth's dealings would be enhanced by the executive choosing not to disclose the information which has been sought. However, that will be a significantly more complex and subtle judgment than those usually involved in determination that a matter is "commercial in confidence".

If that be so, tenderers to and contractors with the Commonwealth need to consider their position carefully. Undertakings by officers of the executive branch of government to maintain the confidentiality of commercial relationships are probably not legally sustainable within the parliamentary setting. The confidentiality of those relationships and their details might in fact depend predominantly on political judgments.

Undertakings of confidence in government contracts

In the *Hughes Aircraft* case[30], the Civil Aviation Authority had undertaken obligations of confidence with respect to a tender process. The Court considered whether two separate disclosures to ministers constituted breaches of those undertakings.

The first was by the chief executive officer of the Civil Aviation Authority in briefing the Minister for Transport on a tender process subject to obligations of confidence. The second was by an officer of the public service department in briefing her minister.

With respect to the actions of the chief executive officer of the Civil Aviation Authority, Finn J held:

> The CAA, no less than the minister, operated in the constitutional environment of responsible government. This necessarily entails that it was accountable in some measure to the public.....
>
> One manifestation of that accountability was the CAA's subjection to audit by the Auditor-General under the *Audit Act 1901* (Cth). Another......was to Parliament and particularly its relevant committees......but central to the public accountability of statutory corporations so circumscribed under the legislation as was the CAA, was - and is - their accountability first to the Executive government through their respective minister, and then to Parliament via that minister. It is the minister to whom questions in Parliament are directed; it is the minister who, within the Government, is given portfolio responsibility for the corporation and its legislation; it is the minister who, in the CAA Act itself, is given both specific oversight powers and a general and specific direction powers. In such a setting - statutory and constitutional - the Minister should be taken as having a general right to obtain information from the CAA by virtue both of his relationship to parliament and to the authority, and its accountability to Government, the parliament and the public via the minister..........Parties who contract with government agencies must, in matters of confidentiality, be taken to have done so subject to such lawful rights of access to information in the agency's hands as our laws and systems of government confer on others.[31]

Nevertheless his Honour held that there was a breach of the obligation of confidence in the chief executive officer briefing the minister. That is because the chief executive officer volunteered the information. Had the minister required the information there would have been no breach.

In respect of the disclosures by the public servant, putting aside other issues, His Honour indicated that disclosures of material matters to the secretary of a department or to a minister will not constitute breaches of obligations of confidence by reason of the constitutional responsibilities of the minister and the position of the Secretary under subsection 25(2) of the Public Service Act.[32]

Hughes Aircraft Systems provides an example of what I suggest is compelled by the reasoning of the Court in *Lange*. That is the executive power of the Commonwealth does not extend to the entering into of enforceable obligations which in terms, operation or effect impede accountability of the executive branch of government to the parliament.

In the 1930s the courts were faced with resolution of the relationship between the legislature and the executive with regard to appropriation of moneys. The position arrived at was that the executive had power without parliamentary authority to enter into routine contracts. However no moneys could be paid over under any such contract except with parliamentary appropriation of such moneys. The courts would then imply into any government contract requiring the government to pay over moneys a term that such moneys would not be paid over in the absence of an appropriation to support them.[33]

An analogous approach is implicit in the reasoning of Finn J in *Hughes Aircraft Systems*. That is the implications of responsible and representative government limit the contractual capacity of the Commonwealth to enter into undertakings of confidentiality in government contracts. The way in which such a limitation will be effected by the Courts will be that:

> Parties who contract with government agencies must, in matters of confidentiality, be taken to have done so subject to such lawful rights of access to information in the agencies' hands as our laws and systems of government confer on others.[34]

By way of vertical communication, our systems of government confer rights of access to any information on the business of government to ministers and the parliament and through the parliament to the public.

Further our laws confer extensive rights of access to such information on the Auditor-General with obligations that the Auditor-General report any such material matter to the parliament subject to his exercise of judgment as to whether some matters might be kept confidential.[35]

Other laws impose substantial obligations on public officials, authorities and corporations to provide information to ministers to enable ministers to perform their constitutional roles.[36] A consequence of the enactment of such legislation is that the executive power of the Commonwealth is limited so that it cannot enter into any obligation of confidence inconsistent with the obligations in the particular legislation.[37]

A more difficult set of questions arises where the Commonwealth enters into an obligation of confidence which in terms, operation or effect restricts the free flow of information about government matters to electors (as most obligations of confidence entered into by the Commonwealth must do). Where that obligation is compatible with the maintenance of responsible and representative government, when will it be secure?

In the case of legislation the court has laid down a test of "reasonably and appropriately adapted to serve a legitimate end".[38]

In applying that test to legislation the Court has adopted differing approaches. In *Levy*[39] handed down some 3 weeks after *Lange*, Brennan CJ said:

> Under our Constitution the courts do not assume the power to determine that some more limited restriction than that imposed by the impugned law could suffice to achieve a legitimate purpose. The courts acknowledge the law maker's power to determine the sufficiency of the means of achieving the legitimate purpose.[40]

In the same case Toohey and Gummow JJ applied the test of whether the impugned laws imposed any greater curtailment than was "reasonably necessary to serve the public interest".[41] Gaudron J indicated that as the laws in question did no more than was necessary to protect public safety, on any test they were valid. McHugh J adapted a test along the lines applied by Brennan CJ while Kirby J appeared to indicate a preference for a test of "proportionality" of the public interest with the impact on freedom of communication.

Application of analogous tests to the exercise of executive power could result in a variety of approaches.

The reserve of Brennan CJ could be applied – so that executive undertakings of confidence will not be outside of power if they achieve a legitimate end and are reasonable and appropriate so to do.

On the other hand the reasoning of Brennan CJ is based upon a view of relationships between the judicial and

legislative arms of government. The same considerations might not apply to dealings by the executive.[42]

The greater willingness of Toohey and Gummow JJ to enter into judicial review might command broader support where the object of review is executive and not legislative action. If that were so, undertakings of confidence by the Commonwealth which limit the free flow of information to electors would be ineffective except to the extent that they were demonstrated to be necessary for the achievement of some "legitimate public purpose".

That in turn would take constitutional law to a point very close to that to which the Court appeared to be moving the law of equity in any event.

In the *John Fairfax* case[43] Mason J, as he was then, held that in an action by government, disclosure of confidential information will not be restrained except where it appears that it would be inimical to the public interest by reason of national security, relations with foreign countries or the ordinary business of government being prejudiced by the disclosure.

The *John Fairfax* case was one of the confidentiality being "owned" by the government. The decision was based on equity restricting the availability of the remedy when government sought equity's assistance.

In *Esso v Plowman*[44] Mason CJ with Dawson and McHugh JJ agreeing said:

> The courts have consistently viewed governmental secrets differently from personal and commercial secrets. As I stated in John Fairfax, the judiciary must view the disclosure of governmental information "through different spectacles". This involves a reversal of the onus of proof: the government must prove that the public interest demands non disclosure.....
>
> The approach outlined in John Fairfax should be adopted when the information relates to statutory authorities or public utilities because, as Professor Finn [as he then was] notes, in the public sector "the need is for compelled openness, not for burgeoning secrecy". The present case is a striking illustration of this principle.

However, *Esso v Plowman* was a case where the confidence was owned by a private party – Esso. The government parties were the respondents seeking to deny the existence of the duties of confidence. Thus the majority of the Court in *Esso v Plowman* greatly expanded the operation of the *John Fairfax* principle, from cases in which the government sought relief to cases which concerned the protection of information about government, statutory authorities or public utilities.

In all such cases it appears that the test will be whether it is proved that it would be contrary to the public interest for the disclosure to occur. If that is not done equity will not protect a confidence – whether for the benefit of the government or a private party.

Returning then to the constitutional issue, where an obligation of confidence would restrict the free flow of information to electors about a political or government matter, it will fall foul of the constitutionally protected freedoms unless it be established that it serves a legitimate end.

By analogy with *Lange* it will be open to the courts to develop the law as laid down in *Esso v Plowman* so that:

- no obligation of confidence with respect to government or political matter will be enforceable unless it is demonstrated that it would be contrary to the public interest for the information to be disclosed;
- legislative powers will be limited so that laws cannot provide for the enforcement of obligations of confidence in respect of government or political matter where it is not

demonstrated that it would be contrary to the public interest.

Information management within government agencies

The constitutional implications cannot lead to an outcome that government employees will be free of any obligation of confidence with respect to information in their possession provided the individual employee concludes that it would not be contrary to the public interest to disclose the information.

On the other hand, the *John Fairfax* case was about attempts by the government to protect confidential information which had been disclosed, it seemed, by such a government employee. The government failed in that endeavour because the Court was not satisfied that it would be contrary to the public interest for the information to be disclosed.

The limits of the effect of the constitutionally protected freedom of communication on internal management of government agencies will depend largely on resolution of the difference within the Court on the extent to which the courts ought engage in judicial review of government action, by reason of its limitation on the free flow of information on political or governmental matters.

It will be recalled that in *Levy*[45] Brennan CJ articulated a most restrained test. Provided there was a legitimate end to the exercise of power impugned and provided the mechanism chosen was reasonable and appropriate to achievement of that end, it was not for a court to consider whether a lesser limitation on freedom of expression might have achieved the same end.[46]

On the other hand, Toohey and Gummow JJ in *Levy* appeared to apply a test of whether the exercise of power impugned was the minimum necessary infringement upon the freedom of political communication to achieve the legitimate end.

In this context there can be little doubt that ensuring the effective functioning and accountability of governmental agencies will be a legitimate end.

It might well be that the Australian jurisprudence will come to be informed by American jurisprudence on this issue. In the US, the Supreme Court has found in a series of cases a legitimate public interest which operates to limit the freedom of expression in the effective conduct and management of the public sector. On the other hand the cases seem also to indicate that the use or exploitation of the proprietary interests of government will not of themselves provide a countervailing interest to the freedom of communication.[47]

There are three sources of obligation on officers of the Commonwealth not to disclose information obtained by the officer by virtue of being a Commonwealth officer:

(a) the *Crimes Act 1914* (Cth) section 70;

(b) Public Service Regulation 7;

(c) specific legislation relating to particular agencies or functions.

The Crimes Act, section 70, creates an offence of disclosure of certain information. An element of that offence is that it is the duty of the officer concerned not to disclose the information.

Where the freedom of communication of such information is constitutionally protected, it will not be the duty of an officer not to communicate that information.

Public Service Regulation 7(13) provides that:

> An APS employee must not, except in the course of his or her duties as an APS

employee or with the agency head's express authority, give or disclose, directly or indirectly, any information about public business or anything of which the employee has official knowledge.

Under the test articulated by Brennan CJ in *Levy*, Public Service Regulation 7(13) is probably constitutionally valid. That is because there is a legitimate end to be served in the maintenance of the efficacy and integrity of Commonwealth administration. The regulation prescribes a regime for the achievement of that legitimate end and the regulation is appropriate or adapted to the achievement of that end.

That is not to say that the effect of the regulation would be to excuse an agency from implementing formal processes for consideration by the agency head or senior management of the question of whether or not particular information should be disclosed. Indeed the subregulation would appear to be sufficient to provide to an APS employee in possession of such information (or any other person affected by a view that the information could not be disclosed because of that regulation) standing to seek a declaration of right that such information might be lawfully disclosed.[48]

On such an application if it were demonstrated that senior management had not adequately considered the balance of competing public interests, it would follow that the actions of the executive branch pursuant to the regulation were inconsistent with the constitutionally protected freedom of communication.

On the test postulated by Toohey and Gummow JJ there is a real issue as to the constitutional validity of Public Service Regulation 7(13). The minimum steps necessary to protect the public interest in the efficacy and integrity of public administration would limit the duty of APS employees not to disclose information to those circumstances in which a legislated process for the balancing of the competing public interests was in place. It would no doubt be arguable on such a test that that legislative process would require some form of independent merits review of the public interest balancing to be undertaken.

The minimalist consequence of the freedom of political communication cases would appear to be that public sector agencies need to review their internal information management practices - in order to be able to demonstrate adequate and structured balancing of the competing public interests whenever a question of disclosure of information arises.

The expansive view would suggest that government needs to fundamentally reconsider the legislative and administrative regimes under which information management in the public sector occurs.

Freedom of Information legislation

Freedom of information legislation anticipated the logic of the freedom of political communication cases.[49]

Thus fundamental to the logic of freedom of information legislation is that it underpins our representative and responsible government by providing to electors legally enforceable rights of access to government information.

The legislation provides such rights subject to various exemption provisions.

The first exemption provision to consider is that relating to breach of confidence.[50] This exemption as most recently amended is not made out unless it be established that disclosure of the information in question would constitute an actionable breach of confidence.

The consequence is that the exemption will not be made out where the free flow of

information in question is protected by the constitutional implications.

The second exemption to consider in an outsourcing context is the business affairs exemption. While each of the freedom of information Acts varies to some extent I will concentrate on the Commonwealth exemption which exempts from disclosure[51]:

> (a) trade secrets;
>
> (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or
>
> (c) information (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking being information:
>
> (i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs;
>
> ......

Working back through this exemption the freedom of communication cases provide a base for an argument that paragraph (c) does not exempt from disclosure information about political or government matters except where nondisclosure achieves some other legitimate end and the other elements set out above are satisfied.

That argument will proceed on the basis that "unreasonably" in paragraph (c) is to be understood by reference to the constitutional implications. Where information is about the business of government, it is a public interest which must be demonstrated to render a disclosure unreasonable. Thus significant adverse effects on private business or professional affairs may well be "not unreasonable" viewed in the constitutional context of responsible and representative government. This approach is consistent with that already taken by the Full Federal Court. In *Searle Australia Pty Ltd v Public Interest Advocacy Centre* the Court held:

> If it be in the public interest that certain information be disclosed, that would be a factor to be taken into account in deciding whether a person would be unreasonably affected by the disclosure; the effect, though great, may be reasonable under the circumstances.[52]

Paragraphs (a) and (b) of the Commonwealth exemption in subsection 43(1) do not expressly permit any consideration of public interest matters. However, by necessity the Act applies only in respect of information in the possession of public officials. If it be right (see above) that those public officials cannot be lawfully constrained from disclosure of information within their possession, except where such disclosure is determined to be contrary to the public interest, it will be arguable that no information in the possession of government officials can be a trade secret or otherwise have commercial value unless it be properly determined that disclosure of the information would be contrary to the public interest.

If the arguments outlined above were to find favour with the courts the practical operation of the Commonwealth Freedom of Information Act in cases relating to outsourcing of government services would move very close to that of the Victorian Freedom of Information Act.

The Victorian Act differs from all other Australian freedom of information Acts in providing that the Administrative Appeals Tribunal (AAT) has power to order disclosure even though a document falls within an exemption provision. This power can be exercised where, in the opinion of

the AAT, the public interest requires disclosure.

In a series of decisions relating to outsourcing and government competitive tendering processes, the Victorian AAT has ordered disclosure of tender documentation, due diligence documentation, full outsourcing contracts and information relating to monitoring of contractual performance.[53]

If an equivalent test as applied by the Victorian AAT were applied in the Commonwealth context there would be a dramatic change to the practices and expectations of parties dealing with the Commonwealth.

Yet that would appear to be the minimum impact of the *Lange* and *Levy* decisions. The Victorian test applies only where the Tribunal positively concludes that the public interest requires disclosure. Where such a conclusion is reached, it is difficult to conceptualise any test under which it might be concluded that an officer of the Commonwealth could be constitutionally required not to disclose the information. If the officer in whose possession the information is placed could not be required to keep the information confidential, it is difficult to conclude that the information retains the status of a trade secret or otherwise has a commercial value.

To put the matter another way, if the officers of the Commonwealth with the information could lawfully choose to disclose it voluntarily, there would be little room for operation of exemption provisions which depend on their terms on the capacity of the "owner" of the information to control access to that information.

Extent of the constitutional implications

It follows that the issues outlined in this paper are issues not merely for departments of state but for statutory authorities and for corporations established by government.

The reasoning of the Court in *Lange* indicates that the constitutional implications apply not merely to ministers and departments of state but also to statutory authorities and government owned corporations.

That reasoning is consistent with the reasoning of the majority[54] and of Brennan J in *Esso v Plowman*.[55] In *Esso v Plowman* the majority referred to the public interest test in respect of information relating to the business of government applying to information relating to the business of statutory authorities and public utilities.

The reasoning is also consistent with that of the majority in the *Bicentennial Authority* case.[56] That case proceeded on the basis that the Bicentennial Authority, a company limited by guarantee and incorporated under the ACT Corporations Law, could not have any greater capacity than that enjoyed by the executive government of the Commonwealth.

Lange and *Levy* further demonstrate that at least in some circumstances, the constitutional implications operate to restrict not merely Commonwealth but also state legislative powers. The conclusion would seem to follow that the implications will operate to limit not merely Commonwealth but also state executive powers.

Thus the issues raised in this paper are issues not merely for Commonwealth administration but also for that of States and potentially local government as a creature of the states.

As *Levy* demonstrates, the extent of the impact on State governments cannot be reliably assessed on the current state of authority.

Endnotes

1. Australian Law Reform Commission: *Open Government: A Review of the Freedom of Information Act 1982* (ALRC 1995)
   Tongue S: 'Protection of Information Rights' *Canberra Bulletin of Public Administration* (87) February 1998, 66-67
   Waterford J: 'Protection of Information Rights' - Commentary; *Canberra Bulletin of Public Administration* (87) February 1998, 77-9
   Allars M: Private Law But Public Power: Removing Administrative Law from Government Business Enterprises; *Public Law Review* (1995) 6, 44-76
2. Finn, C: "Getting the Good Oil: Freedom of Information and Contracting Out" (1998) 5 *AJAL* 113
3. *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96
4. per the Court in *Lange* at 107
5. The *Bicentennial Authority* case (1988) 166 CLR 79
6. at 116
7. per Brennan J at 116
8. (1992) 177 CLR 1
9. per Mason CJ at 31
10. (1980) 147 CLR 39
11. p. 52 Mason CJ further quoted the *Attorney-General v Times Newspaper* 1974 AC 273, *Smith v Daily Mail Publishing Company* 1979 443 US 97
12. per Mason CJ at 34
13. per Brennan J at 51
14. p.70
15. p.71
16. *Australian Capital Television Pty Ltd v Commonwealth* (1992) 172 CLR 106
17. per McHugh J at 231
18. *Levy v Victoria* (1997) 146 ALR 24
19. Note, however, that McHugh J appears to contemplate that it would be permissible for the Crown to achieve this result through exercise of its proprietary rights to land. See *Levy* at 276.
20. *Lange* at 106
21. *Lange* at 107
22. *Lange* at 107
23. *Lange* at 108
24. *Lange* at 112
25. *Engineers* case 28 CLR 129 at 146-147
26. For a comprehensive discussion of which see Geoffrey Lindell, "Parliamentary Enquiries and Government Witnesses" in *AIAL Forum* No 8 page 1
27. See Odgers *Australian Senate Practice* (7th Edition) pages 43-47
28. See Odgers page 44
29. In the Commonwealth context it is expected that the price paid by the Commonwealth will be advertised in the electronic successor to the Government Gazette but that other information will be kept confidential.
30. *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1
31. 146 ALR at 88-89
32. 146 ALR at 97
33. *NSW v Bardolph* 1934 52 CLR 455
34. 146 ALR 1 at 89
35. *Auditor-General Act 1997* (C'th) see especially ss 37, 38, 48
36. See for example the *Financial Management and Accountability Act 1997* (C'th) and the *Commonwealth Authorities and Companies Act 1997* (C'th)
37. *Brown v West* (1990) 169 CLR 195, see also Brennan J in *Esso v Plowman* (1994) 128 ALR 391 at 407 "It is the duty of the SECV to furnish the Minister with the information...and that duty cannot be defeated by any contractual duty"
38. *Lange* at 112
39. *Levy* (1997) 146 ALR 248
40. *Levy* at 254-255
41. *Levy* at 267-268
42. In other contexts parliamentary scrutiny of executive policy or action has been a key determinant of the degree of constraint found on judicial review. See eg, *Drake v Minister for Immigration* 24 ALR 577
43. *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39
44. (1995) 128 ALR 391 at 402-403
45. *Levy v Victoria* (1997) 146 ALR 248
46. 146 ALR 254-255
47. *Perry Education Association v Perry Local Educators Association* 460 US 37; *Cornelius v NAACP Legal Defense and Education Fund, Inc.* 473 US 788
48. See for example *Telstra Corporation Limited v Australian Telecommunications Authority and Optus Networks Pty Limited* 1995 133 ALR 417
49. As noted by Bayne P: "Recurring Themes and The Interpretation of the Commonwealth Freedom of Information Act" 1996 24 *FLR* 287 at 288
50. See for example section 45 *Freedom of Information Act 1992* (C'th)
51. See subsection 43(1) *Freedom of Information Act 1992* (C'th)
52. *Searle Australia Pty Ltd v Public Interest Advocacy Centre* 1992 108 ALR 163 at 178
53. For a full discussion of these cases see Finn, C: "Getting the Good Oil: Freedom of Information and Contracting Out" 1998 5 *AJAL* 113 at 116-118
54. Mason CJ Dawson and McHugh JJ
55. *Esso v Plowman* (1994) 128 ALR 391
56. (1988) 166 CLR 79

RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW - THE LAW RELATING TO BIAS

*Justice Susan Kenny**

Paper presented to AIAL seminar, Canberra, 13 May 1998.#

The Institute has asked me to discuss recent developments in the law relating to bias. Of course, the principles relating to bias are, in general, well established. But from time to time, it seems to me, certain aspects of them give rise to difficulties.

I want to examine three particular questions -

1 Is it enough that a relevant observer might form the view that a decision-maker might be biased? Or must he form the view that a decision-maker would, or would probably, be biased?

2 Is the relevant observer to have knowledge of the facts and law, just the facts, or just some of the facts?

3 Is there a new category of bias, called unintended actual bias?

Question 1

Is it enough that a relevant observer might form the view that a decision-maker might be biased? Or must he form the view that a decision maker would, or would probably, be biased?

The question arises in relation to cases of apparent (apprehended or ostensible) bias. Australian jurisdictions have differed from time to time as to the precise formulation of the legal principle to be applied in cases of this kind. Is it enough that a possibility of bias is shown? Or must there be a probability? Of course, strictly speaking, there are four possible formulations, based on the distinction between possibility and probability.

These are:

(1) & (2) Whether or not a hypothetical reasonable observer might form the view that a decision-maker (1) might be biased or (2) would, or would probably, be biased.

(3) & (4) Whether or not a hypothetical reasonable observer would form the view that a decision-maker (3) might be biased or (4) would, or would probably, be biased.

In practice, however, courts in this country have limited the debate to the first two possibilities. It is convenient to begin discussion of the modern debate with a case decided a over a decade ago, *Livesey v. The New South Wales Bar Association* (1983) 151 C.L.R. 288. In that case, the High Court preferred the first of these formulations. The facts in *Livesey* were straightforward enough. In 1981 the Bar Association had applied to the Court of Appeal of the Supreme Court of New South Wales for a number of declarations against Peter Livesey, including a

* *Justice Kenny was a Justice of the Court of Appeal, Supreme Court of Victoria. She is now a Justice of the Federal Court of Australia.*

I would like to acknowledge the work of my Associate, Dr Steven Tudor, on this paper. The good ideas are his, the not so good, mine.

declaration that he was not a fit and proper person to be a member of the Bar, and for an order striking his name from the roll of counsel. The Bar Association's complaint concerned the lodging of a $10,000 cash surety to secure bail for one of Livesey's clients. In a previous proceeding in which Livesey had been neither a party nor a witness, two judges of the Court, Moffitt, P. and Reynolds, J.A. had expressed the view that Livesey had actively and knowingly participated in a corrupt scheme in connection with the provision of the surety. The matter came on for hearing before the Court constituted by Moffitt, P., Hope, J.A. and Reynolds, J.A. Before the hearing of the case began, Moffitt, P. had stated from the Bench that senior counsel for Livesey had spoken to him in his chambers that morning in the presence of senior counsel from the Bar Association and that he had raised the question whether the President and Reynolds, J.A. should sit because of the views which they had previously expressed. The President said that the Court had considered the matter and could find "no valid reason why the Court as constituted should not sit". The Court found against Livesey. On appeal, the sole issue was whether, in all the circumstances, the due administration of justice required that the President and Reynolds, J.A. should not sit. It was not, of course, said that the judges were motivated by any impropriety. The argument was that, because of the views expressed by them in earlier proceedings, a fair-minded observer might reasonably doubt that the proceedings could be dealt with by their Honours without bias by reason of pre-judgment. The question was, in *Livesey*, determined by reference to the following principle:

> A judge should not sit to hear a case if in all the circumstances the parties or the public *might* entertain a reasonable apprehension that he *might* not bring an impartial and unprejudiced mind to the resolution of the questions involved in it.

Applying that principle the Court allowed the appeal. In stating the principle in this way, the Court relied upon *R. v. Watson; ex parte Armstrong* (1976) 136 C.L.R. 248 at 258-263. That case in turn had relied upon *R. v. Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group* (1969) 122 C.L.R. 546.

The *Livesey* formulation entails two "occasions of possibility", one "nesting" inside the other, i.e., whether the observer (however described) might reasonably form the view that the decision-maker might be biased. In *Gascor v. Elliot & Ors.* [1997] 1 V.R. 332, a decision of the Victorian Court of Appeal, Ormiston, J.A. referred to this as an "apparently attenuated test of possibility upon possibility" (at p.350).

A decade after *Livesey*, the two "occasions of possibility" test was approved and applied again by the High Court in *Webb v. R.* (1994) 181 C.L.R. 41, at 47 by Mason, C.J., McHugh, J. and at 67 by Deane, J. This was the case of the juror who, in the course of a murder trial, had brought a bunch of flowers to Court, requesting that they be given to the deceased's mother. In that case, Mason, C.J., Toohey and McHugh, JJ. held that, in the circumstances, a fair-minded observer would not have had an apprehension of lack of impartiality on the part of the juror, and the judge had properly directed the trial should proceed. Brennan and Deane, JJ. dissented on the point.

The *Livesey* formulation contrasts with narrower formulations. For example, one that requires the observer to come to a reasonable view that there be a "real likelihood" of bias. Of course, the narrower formulation is not a stricter one for the decision-maker. The broader possibility net will be the wider and so the tougher one for decision-makers.

The question whether *Livesey's* two occasions of possibility represented the

current state of the law has arisen in the Courts of Appeal in Victoria and New South Wales relatively recently. The leading case in Victoria is *Gascor v. Elliott* which in turn followed upon *Rozenes & Anor. v. Kelly & Ors.* [1996] 1 V.R. 320. *Gascor v. Elliott* concerned an arbitration in 1995 between Gascor as the sellers of off-shore natural gas and Esso Resources Ltd. and B.H.P. Petroleum (North West Shelf) Pty. Ltd. as the buyers. The buyers advanced three grounds for apprehending bias on the arbitrator's part. First, it was said that the arbitrator, who was the Honourable R.J. Ellicott Q.C., had acted as leading counsel for the producers in an arbitration about the price of on-shore natural gas in 1985-1987. Secondly, it was said that in 1987-1990, Ellicott had been one of a number of arbitrators in another arbitration concerning off-shore natural gas production which had been determined in favour of the sellers (who were different parties to those in the Gascor arbitration). Finally, it was said that the arbitrator was disqualified for failing to disclose appropriate information concerning his participation in earlier arbitrations to the buyer before undertaking the arbitration. The arbitrator declined to disqualify himself as required by the buyers. A judge refused to order his removal and the Court of Appeal also dismissed the buyers' appeal. Tadgell, J.A., at 340-3, and Ormiston, J.A., at 350, specifically applied the two occasions of possibility test.

The New South Wales Court of Appeal, in *Australian National Industries Ltd. v. Spedley Securities Ltd. (In liq) & Ors.* (1992) 26 N.S.W.L.R. 411, also came to apply the two occasions of possibility test, although with some misgivings. See pp.427 per Samuels, J.A. and 439-40 per Mahoney, J.A. Samuels, J.A. referred to the possibility that certain of the observations of Mason, J. in *Re JRL; ex parte CJL* (1986) 161 C.L.R. 342 at 352 indicated that there had been a shift away from the two occasions of possibility test formulated in *Livesey*. In *Re JRL*, Mason, J. had said:

> The ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party.

The position has been different in the Federal Court. In *Khadem v. Barbour* (1995) 38 A.L.D. 299, a decision of Hill J., and in the Full Court decision of *Kaycliff Pty. Ltd. & Ors v. Australian Broadcasting Tribunal & Anor.* (1989) 90 A.L.R. 310, the Federal Court lent towards the "likelihood" version of the principle, i.e., that a hypothetical reasonable observer might form the view that a decision-maker would be biased. In *Khadem*, Hill, J. said, at 308, that he was bound by the Full Court's decision in *Kaycliff* in which the Full Court had said "Parties such as the appellants must raise quite a substantial case in order to succeed" (at 317). After saying that, the Full Court had cited a passage from the joint judgment of Dixon, C.J., Williams, Webb and Fullagar, JJ. in *R. v. Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co. Pty. Ltd.* (1953) 88 C.L.R. 100, at 116. In that passage, the majority had said:

> Bias must be 'real'. The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons.

It will be seen that this is roughly equivalent to version 4 referred to earlier, i.e., whether a hypothetical reasonable observer would form the view that a decision-maker would be biased.

With all this in mind, Hill, J. in *Khadem*, at 307, cited the discussion in *Spedley* as showing there was some variety (or wavering) in opinion on the issue and said, at 308:

> To the extent that the full court in *Kaycliff* was adopting a test of probability of bias rather than possibility of bias, it would seem that there is a conflict between the views of the full court of this court and the views of the New South Wales Court of Appeal.

In passing, I note that the Victorian Court of Appeal has not construed the comments of Mason, J. in *Re JRL* as supportive of anything other than the two occasions of possibility test. In *Gascor*, at 342, Tadgell, J.A. said that Mason, J. was simply:

> concerned to ... point out that the reasonable apprehension that matters is of a partial or prejudiced decision and not of a decision adverse to the party harbouring the apprehension.

His Honour went on to say "the court is to be satisfied that the criterion is met, not that it might be". This accords with the possibility approach if it is understood that the criterion in question is that a reasonable observer might view the decision-maker as possibly biased, where "a reasonable observer" allows for the possibility that some observers might, reasonably, not view things in this way. The possibility approach does not say that the only reasonable view is the one which views things as containing a possibility of bias. To hold that would be to adopt a narrower test, although sometimes the cases are not perfectly clear on this point.

In any event, it seems that the Full Court of the Federal Court has, without saying so, decided not to follow *Kaycliff* and has re-aligned itself with the two occasions of possibility approach. In *Gaisford v. Hunt* (1996) 71 F.C.R. 187, the Court, constituted by Beaumont, O'Loughlin and Lehane, JJ., returned to the possibility approach, ignoring *Kaycliff* and *Khadem*. It is presumably to be understood, without being explicit, that the Full Court has rejected the likelihood approach in favour of the possibility approach.

The concerns which occupied the High Court in *Melbourne Stevedores* and later the Full Federal Court in *Kaycliff* are not to be dismissed as trifling. Perhaps concerns about "substance" can more usefully be articulated in terms of the reasonableness of the observer's view, instead of the likelihood of bias. That is to say, the apprehension must be reasonable and not fanciful; significant and not trifling. This would fit better with the concern about "substantial distrust" mentioned in *Melbourne Stevedores*. For example, substantial distrust would not be reasonably engendered where it is reasonable to hold there is a high probability that a decision-maker has a trivial dislike (or bias) against the mauve trousers worn by counsel.

This sort of approach, at least in relation to reasonableness, can be seen in Tadgell, J.A.'s comment in *Gascor* (at 342) that:

> It is a reasonable and not a fanciful or fantastic apprehension that is to be established; and the apprehension is to be attributed to an observer who is 'fair minded' - which means 'reasonable.

The exclusion of trivial or insubstantial bias is implied in Ormiston, J.A.'s comment in *Gascor*, at p.350, that "the test must be applied to a variety of situations and in circumstances where the practicalities of the matter make its most stringent application impracticable", if "practicality" means, not that it can be applied but that it is sensible or more productive of justice on balance not to apply it.

In the context of apprehended bias, the observations of Merkel, J. in *Aussie Airlines Pty. Ltd. v. Australian Airlines Pty. Ltd.* (1996) 65 F.C.R. 215 may be of particular assistance. In that case, the applicant had issued proceedings seeking relief against the respondents who conducted the business of Qantas Airways. The relief was founded on alleged breaches of the *Trade Practices Act 1974* (Cth.). In the course of the case senior counsel for the applicant had made

application that his Honour not sit on the case, on the ground that a reasonable apprehension of bias might arise by reason of his association with senior counsel for the respondent. The judge ultimately held that, sitting as a trial judge, the parties or the public might entertain a reasonable apprehension that he would not bring an impartial and unprejudiced mind to the resolution of the issue. His Honour's comments about the nature of the association between himself and counsel are relevant to the question of substance. His Honour acknowledged that there was "the requirement for a cogent and rational link between the association and its capacity to influence the decision to be made in the particular case". It is, he said, "the capacity of the association to influence the decision rather than the association as such that is disqualifying" (at 226). Earlier his Honour had said (at 222):

> There must be something in the nature or the extent of the association which leads [the] bystander to conclude, whether for friendship, love, money, fear, favour or otherwise, that the adjudicator might be influenced by it. Where the association in question is trivial, remote or indirect the courts might conclude that it is not a disqualifying one.

Merkel, J. reiterated this approach in *Velasco v. Carpenter* (unreported, 24 June 1997) in which the question of apprehended bias arose in a quite different context, relating to the determination of charges of misconduct against a public servant. The applicant alleged apparent bias, on the ground that the officer appointed to inquire was answerable to an area manager who had made decisions against the applicant in the past.

It seems to me that Merkel, J.'s observations could readily be applied *mutatis mutandis* in many situations said to give rise to bias, including comments made at trial.

Question 2

Is the relevant observer to have knowledge of the facts and law, just the facts, or just some of the facts?

As now formulated, the principle against apprehended bias gives rise to a further difficulty, namely, what is the nature and extent of the knowledge to be attributed to the observer which, it is said, can give rise to a reasonable apprehension of bias? The need to examine the question necessarily arises from the assertion that "it is the court's view of the public's view, not the court's own view, which is determinative", a proposition accepted by Mason, C.J. and McHugh, J. in *Webb* (at 52).

Some such notion as "the public's view" or "the hypothetical lay observer" is needed to distinguish cases of "actual bias" from cases of "apprehended bias". If the court were to investigate simply how things appeared to it (i.e. to make its own findings), then that would be a case of "actual bias", not "apprehended bias". The distinction is really between the appearance to the Court and the appearance to a reasonable lay observer, not between appearance and actuality. This is because the court has no more "direct access" to the inner mind of the decision-maker than the lay observer, although speaking in terms of actual versus apparent bias can sometimes, if unintentionally, convey the contrary sense. Both courts and lay observers make inferences about possible states of mind from appearances, or external evidence, in the form of words, actions and the result of actions. A court simply has different, and presumably better, knowledge of the law and evidence before it in making its factual judgment.

Returning to the question of what knowledge is to be imputed to the public observer, Tadgell, J.A. said in *Gascor* that (at 342-343):

> ... it is for the court to determine what knowledge the fair-minded or reasonable

> lay observer is to apply to an appraisal of the situation. No exhaustive criteria for such determination appear to have been authoritatively laid down - perhaps it is not feasible to do so or useful to try ... [T]he observer whose view the court is to seek is in my opinion to be fastened with sufficient knowledge to enable a rational and reasonable view - not just a perfunctory or superficial view - to be formed. Of course that is really to say no more than there must be attributed to the fair-minded observer knowledge which would afford an opportunity to consider all the relevant circumstances of the case.

If this is the correct approach, one may, I think, reasonably ask: is the observer to be imputed with all the knowledge, legal and factual, that might be possessed by a court in an actual bias case? If so, then there is no real difference between the court and the observer: they are the same. If not, then, is the observer to be imputed with knowledge of the facts only (and not with knowledge of the law)? In the latter case, then the notion of "relevant circumstances" is to be limited in some way by the ignorance fairly to be expected of a non-lawyer.

Indeed, in *Webb*, Deane, J. appeared to be of the latter view. His Honour said, at 73:

> The knowledge to be attributed to him or her is a broad knowledge of the material objective facts as ascertained by the appellate court, ... as distinct from a detailed knowledge of the law or knowledge of the character or ability of the members of the relevant court.

A different approach was taken by Mahoney, J.A. in *Spedley* where his Honour seems to have been sympathetic to the view that not too much is fairly to be expected of the lay observer. Mahoney, J.A. went so far as to say, at p.438, that apprehended pre-judgment "is to be judged, not according to what the court and the parties know, but according to the impressions of a lay person who does not know the facts". *Spedley* concerned the position of a judge of the commercial division of the New South Wales Supreme Court who had heard a series of cases dealing with the same or similar issues. The judge had made adverse findings on the credit of certain witnesses and the conduct of the parties. The Court of Appeal held that, on the ground of apprehended bias, the trial judge should have disqualified himself from hearing related matters in which the same issues arose. In this context Mahoney, J.A., had said, at 441:

> This matter is to be judged often, if not ordinarily, according to the view of one who is mistaken. The fact will ordinarily be that the court will be impartial in the relevant sense but the judge will step aside because, though he will be impartial, the appearance of what he does to a person who does not know, for example, the integrity of the court, the capacity of a judge, or the full facts of the case will raise the reasonable apprehension that he might not be so.

In *Cascor*, Tadgell, J.A. said, at 343, that:

> If his Honour meant that the observer is not to be treated as having a sufficient knowledge of the facts giving rise to the case, and of the basis on which the bias is alleged, I am respectfully unable to agree with him.

It seems to me that Merkel, J. in *Aussie Airlines* has offered a way out of the problem. After comparing the dissenting and majority view in *S. & M. Motor Repairs Pty. Ltd. v. Caltex Oil (Aust.) Pty. Ltd.* (1988) 12 N.S.W.L.R. 358 and *Laws v. Australian Broadcasting Tribunal* (1990) 170 C.L.R. 70, Merkel, J. concluded that the differences of view:

> demonstrate the difficulties in imputing knowledge of the processes of the law to the hypothetical observer. ... [H]owever, the differences ... relate more to the extent of the knowledge to be imputed than any underlying difference as to the principles to be applied (at 230).

Merkel J. proceeded by attributing to the observer a certain amount of knowledge about the role of the barrister and concluded his observation, at 230, by saying:

> The issue is whether that observer upon being informed of [these] kind of matters ... concludes, not whether it would be better for another judge to hear the matter, but whether the judge sitting to hear the matter might not bring an impartial and unprejudiced mind to the resolution of the ... question ... for decision.

Another way of putting the same thing may be to say that what the judge may do may be a matter for regret, but he must not act so as to give rise to a justified resentment on the part of the observer (or the parties).

Question 3

Is there a new category of bias, called unintended actual bias?

The last matter I raise for your consideration today is whether there is a new category of bias, called unintended actual bias. The Full Court of the Federal Court, constituted by Wilcox, Burchett and North JJ, has recently raised this question in a case called in *Sun Zhan Qui v. Minister for Immigration and Ethnic Affairs* (unreported, 23 December 1997). It was said in that case that actual bias had infected the decision of the Refugee Review Tribunal. Wilcox, J. left the issue of actual bias open, but both Burchett and North, JJ. took the view that a case of actual bias had been made out and that actual bias was not to be confined to an intentional state of mind. Burchett, J. said, at p.49, that:

> Bias may be subconscious, provided it is real.

His Honour went on, at p.49, to say:

> A notable feature of the Tribunal's reasons is the repeated drawing of extremely adverse conclusions ... on what, upon examination, turn out to be the flimsiest grounds.

That led him to conclude, at p.54, that:

> I accept that, just as the Tribunal member should not lightly have drawn the conclusion that the appellant had fabricated the account which had been accepted as true by another Tribunal member with the advantage of actually hearing it, so also the Court should not lightly make a finding of actual bias. But the ground of bias has been made available by Parliament as a protection for individuals, and it would be no protection if the Court shrank from giving effect to it in a proper case. When the accumulated matters I have discussed are taken into account, this must be seen as a proper case. It is more than a matter of Wednesbury unreasonableness, which is not in itself an available ground. Errors occur, but to err so many times and in such ways, and each time against the appellant, argues overwhelmingly for the conclusion that the Tribunal member proceeded to consider the case from a pre-conceived opinion and a fixed position so adverse to him that he could not obtain a fair hearing. In my opinion, that situation fell within the provision of s.476(1)(f) [of the *Migration Act 1958*]: the decision was affected by actual bias.

North, J. also made a finding of actual bias against the tribunal as his chief ground for judgment. His Honour said, at p.56:

> A decision-maker may not be open to persuasion and, at the same time, not recognise that limitation. Indeed, a characteristic of prejudice is the lack of recognition by the holder. Some judges, including myself, who have in recent years attended gender and race awareness programmes, have been struck by the unrecognised nature of the baggage which we carry on such issues. Decisions made upon assumptions or pre-judgments concerning race or gender have been made by many well-meaning judges, unaware of the assumptions or pre-conceptions which, in fact, governed their decision-making. Thus, actual bias may exist even if the decision-maker did not intend or did not know of their prejudice, or even where the decision-maker believes, and says, that they have not pre-judged a case.

North, J. went on to say that:

> Once it is appreciated that actual bias may exist, even if unintended, any special reticence in pursuing such a case should be diminished.

Why did his Honour consider that reticence should be the less if there were a category of actual, though unintended, bias? It may be that bias of this kind is easier to establish in an evidentiary sense. In one sense, however, all cases of bias involve the court in making a judgment about what is probably the case rather than what is possibly the case, because the latter can be left to the lay observer. Hence, it may be more useful to distinguish between publicly apparent bias and "judicially apparent" bias with the higher standards required in the latter case. All empirical findings, whether by courts or lay observers, are provisional or probabilistic in some way or other so that "high probability bias" rather than "actual bias" might be a more accurate term and better contrasted with "possible" bias rather than "apparent" bias. Perhaps the real advantage which his Honour saw in the notion of unintended actual bias is that it is easier on the decision-maker insofar as it does not attribute any ill will to him or her. But it seems to me that the finding of actual although unintended bias may entail a deeper and even harsher criticism of the decision-maker. Not only is it said that there is bias "in there somewhere", it is implicit that there has been a radical lack of self-understanding on the decision-maker's part.

A question may arise as to whether the concept of unintended actual bias has very much application beyond the context of paragraph 476(1)(f) of the *Migration Act 1958* which constrains a person seeking to challenge a decision of the Refugee Review Tribunal to bring this challenge within one of the grounds nominated by the Act (here "actual bias").

I shall be very interested to see whether, and in what way, courts choose to develop the concept, or having raised it, give it burial.

In this context, the need for 'quite a substantial case' was mentioned in *Satwinder Singh v. MIEA* (1997) 44 A.L.D. 55, at 558 and in a brief discussion in *Sarbit Singh v. MIEA* (unreported, 18 October 1996), two decisions of the Federal Court concerned with actual bias. In *Sarbit Singh*, it was said of a member of the Refugee Review Tribunal that he had pre-judged the matter before the conclusion of the hearing. As Lockhart, J. said, it was not:

> sufficient to show that a decision-maker has displayed irritation or impatience or even sarcasm during a hearing; regrettable though these manifestations may be, whether the relevant states of mind approach the level required to support a finding of actual bias remains a question of fact in each case.

Actual bias was not found to be established in that case, though the tribunal had, it was said, conducted the hearing "somewhat robustly". In *Satwinder Singh* it was said that remarks made by a member of the Refugee Tribunal in an "exasperated and mocking tone" were not sufficient to make out a case of actual bias (558).

THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL - THE FIRST DAYS

*Justice Murray Kellam**

Paper presented to the Annual General Meeting of the Victorian Chapter of the AIAL, Melbourne, 15 September 1998.

The first tribunals

I am here tonight at the request of your Committee to speak on the Victorian Civil and Administrative Tribunal (VCAT), the first days. The Committee did not define for me precisely the first days about which it wished me to speak. It can be said that there are a number of events which can be established in the broad sense as being the first days of the Tribunal. The very first tribunal of course, was a raised semi-circular or square platform in the Roman Basilica at which the magistrates were placed, the word "tribunal" coming from the Latin "Magistratus Tribus" or "Magistrate of a Tribe". One definition of the word "tribunal" in the Shorter Oxford Dictionary is "a raised throne or chair of state". So clearly, many distinctions can be drawn between VCAT and the first tribunal. First, I do not believe that any of our members can be said to be representatives of a tribe. Secondly, I believe that we do not have to have raised thrones from which to adjudicate, although it may well be said that at least some of the hearing rooms from which VCAT operates are even less comfortable than the picture I have in mind of the semi-circular stone steps in the Roman Basilica at which hearings were conducted. Another clear difference is that leave must be sought to appear before VCAT. No such leave was required for an advocate in the ancient tribunal. Indeed, as is the case in some circumstances at VCAT, the advocate could be an inexperienced layman. Scipio when *Praetor* offered a man an advocate in the shape of the man's own landlord who was a rich oaf said, "let him act for my opponent my Lord, I'll defend myself".

The first tribunal attracted famous advocates - Cicero, Hortensius and Crassus. In their early lives each of these advocates spent considerable time debating topics which sprang from logic rather than real life, such as the famous crocodile problem.

A crocodile seized a woman's son, "I'll give him back", it promised her, "if you'll tell me the truth about his fate". The woman answered, "You won't give him back" as she looked the crocodile straight in the face. This means the crocodile would either return the child to its mother in which case she would keep the child, or it would not return the child in which case the mother was correct and would be entitled to be given back the child in any event. This showed a brilliant grasp of logic but a profound ignorance of crocodiles. VCAT members will be required not merely to be logical but from time to time may

* *Justice Kellam is President of the Victorian Civil and Administrative Tribunal.*

need to have a knowledge of crocodiles.

However, many of the cases before the early tribunal dealt with the completely practical matters that VCAT also deals with in everyday life. It has been said that only the Bible had more influence in civilising the western world that Roman law has had. The digest of Roman Law compiled long after Cicero lived and died, set out many problems which had been debated in the tribunals of Rome and provided the answers given by learned jurists. I pose two of them in question and answer form as they appeared in the Roman Digest.

Question: A pregnant woman gives birth to a child during a voyage. Is the ship's captain entitled to charge an extra fare for the child?

Answer: No, the child takes up very little room and uses none of the facilities available to the other passengers.

I commend that to members of the Civil Claims List of VCAT.

Question: It is well known that if you buy a slave and then discover that he has a hidden bodily defect, you can return him and claim your money back. Does this apply if you find he wets his bed?

Answer: It depends why he does it. If he wets his bed when he's fast asleep or dead drunk or because he's simply too lazy to get up during the night, you cannot return him. But if he has a weak bladder, which is a bodily defect, you may do so.

I commend that to the members of the Anti-Discrimination List of VCAT. It appears to me that many of the day to day practicalities of the early tribunal have some similarity to the problems we face on a day to day basis. Like VCAT, the conduct of a hearing, and case management, were problems for the first Tribunal. From Cicero's time, water clocks were used regularly. Pompey who brought a handsome water clock back from Egypt decreed that prosecuting counsel should address the Court for six hours and defence counsel for nine. From that time on clocks were kept in Court. Advocates who ran out of time had sometimes to bring their speeches to an abrupt close which could be something of a mercy after so many hours. We might all wish for an hour glass or a water clock from time to time.

To a degree, tribunals have not found favour in the world in which we are experienced until the last quarter of a century. As we know in Victoria and indeed throughout Australia, tribunals have been set up to deal with a variety of different issues. Throughout the post-war era tribunals in Victoria and other parts of the Commonwealth grew dramatically to the point where they came to be considered as an integral part of the justice system. In general they were established as specialist bodies to deal with a variety of issues as particular needs arose often on a relatively *ad hoc* basis.

It has always been the intention of governments that by comparison with courts, tribunals should be informal, speedy and inexpensive. Recent decisions of the Court of Appeal in Victoria underline the inquisitional role of a tribunal, at least in the review jurisdiction.

VCAT - early days

The next period which might be identified as the first days of VCAT was the period of some months following the release of a discussion paper by the Department of Justice in

late 1996 headed "Tribunals and the Department of Justice - A Principled Approach". There can be no doubt that this discussion paper and the responses to it can be identified as the conception of VCAT. That discussion paper identified a number of perceived deficiencies in the structure and operation of Department of Justice tribunals including the exponential growth in the number of tribunals resulting in the creation of a perplexing mosaic of tribunal jurisdictions, and lack of independence of tribunal members from the executive government, in particular. The proposed logical structure for Victoria's tribunals set out in the discussion paper, although substantially different from what finally evolved, is clearly the genesis of the VCAT Act.

I turn now to the first 10 weeks of operation since 1 July 1998. Most people in this room are familiar with the structure of VCAT. but for those who are not, it is appropriate to describe its structure in a brief form. VCAT is split into two divisions - a Civil Division and an Administrative Division. Basically, the Administrative Division has a review jurisdiction. It incorporates much of the review jurisdiction of the former Victorian AAT but in addition, assumes the licensing appeals functions and the inquiry and disciplinary functions of the previous Motor Car Traders Licensing Authority, Prostitution Control Board, Travel Agents Licensing Authority and Estate Agents Disciplinary Tribunal. The Civil Division has what might be described as an inter-parties jurisdiction. Decisions under the Guardianship and Administration Act, although not strictly speaking, inter-parties matters, are also dealt with under this Division. Each of the two Divisions has a Vice-President as its head who in each case is a County Court Judge. Each of the 13 Lists has a Deputy President as its head although in a number of cases Deputy Presidents have responsibility for more than one List. VCAT has 3 judicial members, 9 deputy presidents, 11 senior members, one of whom is part-time, and 23 full-time members, 3 permanent part-time members and 102 sessional members, that is, a total of 149 members. In the lead up to the commencement of VCAT, there was some considerable anxiety amongst members of the legal, planning and other professions associated with tribunals as well as consumer and like groups of various types. Some of these concerns were agitated by reason of copies of draft bills which came into existence for discussion purposes and which suffered substantial change in the course of the consultation process. Other concerns were that there would be sudden and dramatic change to procedures. There were concerns about rights to representation. There were concerns that suddenly members of guardianship would be hearing planning cases and vice versa. Accordingly, it was necessary to assure the various prospective professional groups and others associated with VCAT that there would be no sudden and substantial change without consultation. That has been the case and generally most procedures adopted by Lists are comparable with previous procedures of their precursor tribunals. However, there have been a number of changes which have taken place or are in the process of taking place. It is hoped that these changes will result in improved service to the community and better conditions and more work satisfaction for members of the tribunals.

First, some members of the VCAT have had the opportunity to sit in jurisdictions other than and in addition to those to which they were previously assigned. Although some care needs

to be taken in this regard, taking into account the fact that a tribunal has as one of its advantages over a court, specialised knowledge on the part of its members, there are, in my view, many advantages to a continuing practice of having members who are able to sit across the boundaries of various Lists. As has already been observed, and I might say from comments made to me by users of VCAT observed most favourably, there is a cultural and organisational benefit in skilled members of VCAT bringing their skills in the hearing of cases and in administration of case management to share with other Lists. Furthermore, it is now possible to use the skills of a particular person in one List for a particular case in another List. By way of example, the Occupational and Business Regulation List heard an appeal from the Medical Board with a panel member who was a psychiatrist transferred from the previous Guardianship Board. There are a wide variety of skills within VCAT. Engineers, surveyors, specialist physicians, planners and the like can no doubt lend their skills to Lists other than those in which they normally sit. That of course will be of benefit to the litigant and in my view it will also have a professional benefit for such members.

There is underway a business process re-engineering project. This is the modern tag for what I think used to be called systems analysis. We are hopeful that this very substantial project which will take some six months to complete will result in real benefits both for users of VCAT and for the registry staff and membership of VCAT.

The Attorney-General's Department has engaged consultants who are examining the present basis of remuneration of members of VCAT and they have had extensive consultation with each of the Deputy Presidents of VCAT and others. Although obviously there will be very real difficulty in obtaining any increase in budget in the near future, I expect that the report of this consultancy will provide a fresh look at the relevant remuneration considerations for members of VCAT.

Many of you were present at the Tribunal Conference associated with the Australian Institute of Judicial Administration Annual Conference a week or two ago. The fact that 82 of the 160 registrants at that conference were from VCAT is a clear demonstration of the interest of the members of VCAT in further professional development. The VCAT Act places an obligation upon those responsible for the administration of VCAT to ensure that professional development and training is undertaken. Deputy President Cremean has undertaken the task of directing this aspect and has made substantial progress with a view to implementing formal training and professional development programs. There are numerous other initiatives on foot in the separate Lists. The Planning List, by way of example, is considering the operation of a pilot mediation scheme and a pilot commercial list arrangement. Most Lists have set up user groups which will enable direct input from the professions and other users.

Conclusion

The first days of VCAT have been exciting ones. None of the dire concerns which were expressed before the commencement of VCAT seem to have taken place. Indeed, the feedback which I and others have received from attending a variety of professional meetings and conferences has been positive indeed. I believe that the morale of members

is good at present and should only improve. The fact that there is now a more substantial basis for saying that tribunal members are more independent from executive government than in the past, in my view, can only enhance morale. A transparent appointment process is, I believe, capable of being achieved and as far as I can ascertain, there is considerable goodwill on the part of the Office of the Attorney-General to the establishment of such a process. Over a period of time all members of VCAT will have five year terms. That process is already substantially underway.

I believe that with the goodwill of its members and staff, VCAT can demonstrate conclusively to Government that the tribunal system is a major force in an independent judiciary. This has been recognised already by having VCAT invited to be represented on the Courts Consultative Committee, a committee previously composed of the Attorney-General, the Chief Justice, the President of the Court of Appeal, the Chief Judge of the County Court and the Chief Magistrate and their respective chief executive officers. The more VCAT demonstrates its capacity to play a major part as an independent part of the judiciary, the more independence its members will achieve.

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