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REFORM OF ADMINISTRATIVE LAW

The Hon David K Malcolm AC[*]

Address to the annual dinner of the AIAL (WA Chapter), Perth, 20 November 1998.

Introduction

I am very pleased to have been invited to speak to you this evening on the reform of administrative law. Despite recommendations by a number of law reform bodies since the 1970s, legislative change to judicial review of administrative decisions has been slow. Calls for reform have been made on at least three discernible bases. The first is the need to clarify and unify existing avenues of appeal. The second is the need to develop uniform and streamlined appeal procedures which will assist, rather than hinder, applicants for review. The third has been more recently identified as being an important aspect of reform and is, to an extent, an extension of the first two, namely, the need to assist in-person or unrepresented litigants in seeking administrative review.

Despite unified themes being discernible in the moves for reform, there are divergent opinions on the object of reform. Proposals for reform have advocated either an appellate body within the court system or an appeal body external to the existing structure. Much of the source of this divergence in opinion arises out of the conceptualisation of the separation of powers and the role of the courts in the review of administrative decisions on the merits. I would like to start this evening by developing these observations in calls for reform since the early 1980s.

WA Law Reform Commission's recommendations

It is now 16 years since the Western Australian Law Reform Commission produced its report entitled *Review of Administrative Decisions*.[1] The Commission's Working Paper[2] and Report examined the various methods of seeking review of administrative decisions and concluded that the inconsistencies in procedure between the various statutory schemes was the result of an *ad hoc* approach by the legislature.[3] The defects in the existing statutory arrangements created a system of review that was unco-ordinated, inconsistent and unsystematic. The Commission found that there were more than 43 appellate bodies. The Commission's report identified three main defects:

- Appeal arrangements did not, in many cases, provide for questions of law to be ultimately determined by the Supreme Court.

- The arrangements incorporated inconsistencies and an unjustifiable variation in the rights of appeal from the decisions of bodies with similar responsibilities.

- There was no unified code for the conduct of appeals.

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1 Western Australian Law Reform Commission, *Report on Review of Administrative Decisions - Part 1 - Appeals*, Report No. 60, (WALRC; Perth, 1982), (hereinafter WALRC Report I).

2 Western Australian Law Reform Commission, *Review of Administrative Decisions - Part 1 - Appeals - Working paper and Survey*, Paper No. 53, (WALRC; Perth, 1978) (hereinafter WALRC Report I).

3 *Working Paper*, ibid, para 4.1; WALRC Report I, id, para 2.19.

The Commission recommended the development of an appeals system which consisted of the Full Court of the Supreme Court, an Administrative Division of the Supreme Court, an Administrative Law division of the Local Court and the retention of a number of specialised appeal tribunals.[4] Under the proposed system, an appeal against an administrative decision would lie either to the Administrative Law Division of the Local Court, in the case of appeal jurisdictions conferred on the Local Court or Courts of Petty Sessions, or the Administrative Law Division of the Supreme Court in the case of appeal jurisdictions conferred on the Supreme Court and District Courts. An appeal of a point of law would lie to either body with provision for consideration by the Full Court.[5]

In addition, the Commission recommended that in the establishment of this regime, the following measures should be included:

(a) Provision be made for the appointment of lay members with particular qualifications to sit in the Administrative Law divisions where appropriate.
(b) The appellate body should have the power to affirm, vary or set aside the decision, substitute its own decision for that of the original decision-maker or remit the matter for reconsideration.
(c) The Supreme Court Administrative Law Division should have the power to remit a matter to the Local Court Administrative Law Division and *vice versa*.
(d) A unified code of procedure be adopted, including a requirement to furnish reasons for the making of an administrative decision, and that appellate bodies not be bound by the laws of evidence.[6]

It is implicit in the Commission's report that jurisdiction to review administrative decisions on the merits should be conferred on the courts, rather than an external review body. The question of the separation of the judiciary and the executive in administrative decision-making was not however directly dealt with, the Commission referring only to the appearance of independence which would be encouraged by the creation of appellate jurisdiction within the Court rather than by an extra-judicial tribunal.[7] What is clear, however, from the report is that the Commissioners considered that functions of an AAT-style tribunal could be incorporated within the existing court structure. The Commission dismissed concerns over expense and formality as not being reasons for the establishment of a separate body.[8] The Commission considered that the demonstrated flexibility of the courts meant that issues such as policy review, consistency, specialisation and the appointment of lay members could be incorporated into an administrative division of the existing court structure in accordance with its recommendations.[9]

By 1984, all of the recommendations of the Commission had been adopted by the attorney-general and cabinet of the day. My understanding was that in December 1984, while the drafting of legislation was deferred, cabinet decided that ministers should provide the attorney-general with information concerning existing rights of appeal.

Law Reform Commission's second report

The Law Reform Commission's original report was supplemented in 1986 with the publication of the *Report on Judicial Review of Administrative Decisions: Procedural Aspects*

4 WALRC Report I, id. Recommendation 1.
5 WALRC Report I, op cit. Recommendations 4 and 5.
6 WALRC Report I, op cit. Recommendation 12.
7 Id at para 4.20.
8 Id at paras 4.12 and 4.13.
9 Id at paras 4.14 to 4.21.

and the Right to Reasons.[10] This second report gave closer attention to difficulties in the procedures applicable to judicial review of administrative decisions. The Commission's report identified the following problems:

(a) An applicant was forced to choose between a number of remedies of uncertain scope which could not be joined together.
(b) The uncertain scope of existing remedies was exacerbated by different rules of standing to sue, and different time limits for those remedies.[11]
(c) A lack of interlocutory proceedings in an application for a prerogative writ could result in inadequate information being brought before the court.[12]
(d) A claim for damages could not be joined to proceedings for judicial review.[13]

In order to overcome these problems, the Commission recommended the introduction of a procedure which would allow for a person to apply for judicial review by an ordinary civil action which could be combined with an application for declaratory relief or an injunction or with an action for damages. For example, if an applicant sought one remedy, and the law allowed for another, the court would be entitled to award an appropriate remedy. A compulsory directions hearing was recommended in order to 'screen' applications and ensure an expeditious hearing.[14]

These recommendations were adopted by the attorney-general of the day in 1986. I was informed that cabinet had approved the drafting of a Bill to provide for judicial review of administrative action based upon the Commission's recommendations. I was told that ministers would be required to provide up to date information on appeal procedures in order to assist with the drafting of a comprehensive Bill. Not long afterwards, the Minister for Planning recommended that the Town Planning Appeal Tribunal which the Commission had previously suggested be included in the jurisdiction of the proposed Administrative Law Division of the Supreme Court and that specialist assessors be appointed to the Court on a full or part time basis. These recommendations were adopted by the government of the day in December 1986.

Supreme Court and Law Society responses

In the context of reform within the court, in June 1988, a Supreme Court Planning Committee, chaired by the Hon Justice Brinsden was established to consider the implementation of the Commission's recommendations. The Committee was established with the primary purpose of encouraging the government of the day to push on with the enactment of the proposed legislation. Despite adoption of the Commission's recommendations, and having expressed the intention to pursue their implementation, no further action was taken by government to implement the Commission's recommendations.

In 1992, I chaired the seminar conducted by the Law Society of Western Australia on *The Reform of Administrative Law in Western Australia*. At that seminar, it was clear that little or no action had been taken by government in the area. At that seminar there appeared to be a difference of opinion between the Law Society's Courts Committee and the Administrative Law Committee. The Administrative Law Committee favoured the creation of an external appeals body, similar to the Commonwealth Administrative Appeals Tribunal. My impression, however, from discussion with the chairmen of the respective committees was that the

10 Western Australian Law Reform Commission, *Report on Judicial Review of Administrative Decisions: Procedural Aspects and the Right to Reasons*. Rep No. 26 - Pt II. 1986 (hereinafter WALRC Report II).
11 WALRC Report II, ibid, para 3.2
12 WALRC Report II, id para 3.6.
13 WALRC Report II, id, para 3.8.
14 WALRC Report II, op cit, para 5.9.

differences were more apparent than real. I encouraged the two committees to meet. Subsequently, a joint submission was prepared and presented to me by the Law Society's Courts and Administrative Law Committees in mid-1992. The joint submission was adopted by the Law Society Council as outlining the preferred option for reform in Western Australia. The Society's submission raised the need for consideration to be given to unrepresented litigants seeking review. The Society's view at that time was that any new appellate body be established within the court structure, rather than external to it.[15]

In a media release at the time of the Law Society seminar, the attorney-general indicated that it was unlikely that legislation would be enacted at that time. The attorney-general identified the enormity of the task of rationalising appeal procedures under the various statutes as precluding enactment of the legislation in the short term.[16] It appeared that a major difficulty was also the unwillingness on the part of individual ministers to surrender the perceived power which they had in relation to administrative decisions to a single appellate structure. It also came to my attention that the draft legislation had become bogged down in the process of obtaining comments from individual departments.

Royal Commission comments on administrative law reform

In November 1992, the Royal Commission into the Commercial Activities of Government and Other Matters[17] reported to the Governor. Under the heading of "Accountability", the Commission recommended *inter alia* that the Law Reform Commission's 1982 and 1986 recommendations be enacted "forthwith".[18] The Royal Commission however recommended that administrative review should be conducted by a body distinct from the courts.[19]

More recently, the Commission on Government considered judicial review of administrative decisions as a specified matter. The Commission's report[20] reviews the public submissions received and highlights the repeated calls for independent, informal review of administrative decision making on the merits. In this respect, the Commission on Government report is not far removed from the Law Reform Commission's reports. The submissions received by the Commission on Government mirror the findings of the Law Reform Commission with regard to the inconsistency and lack of uniformity in appeal procedures as between the various legislative arrangements.

The Commission on Government's report did not however go beyond the recommendations of the earlier 'WA Inc' Royal Commission to consider the merits of the establishment of a separate review body as against a division of the existing court structure. Instead, it simply recommended the establishment of a separate Administrative Review Tribunal to conduct review on the merits. This was despite the question of the creation of a separate review body being directly raised in a submission by the then State Ombudsman, Mr Robert Eadie. Mr Eadie said in his submission:

> In essence, while I believe that a body such as the Commonwealth AAT may well be appropriate in the Federal sphere, and do not dispute the need for rationalisation (and some amalgamation) of the structure and functions of tribunals and the current system for review of administrative decision in Western Australia, I am not convinced that the establishment of an additional, possibly expensive and

15 Law Society of Western Australia (Courts Committee/Administrative Law Committee), *Submission*, (1992), p 3.
16 Media Statement. Attorney-General, 5 March 1992; Reproduced in Law Society of Western Australia. Seminar Papers, *The Reform of Administrative Law*, (1992).
17 Western Australian Royal Commission, *Report into the Commercial Activities of Government and Other Matters*, (1992).
18 Ibid at para 3.4.8.
19 Ibid at para 3.5.2.
20 Commission on Government, *Report No. 4*, (1996).

> bureaucratic structure to deal with administrative matters will necessarily [remedy] the deficiencies identified by the WA Law Reform Commission and the WA Inc Royal Commission in its Second Report.[21]

1996 Review of Tribunals

A more detailed review of proposals for the reform of judicial review in Western Australia has recently been completed by Commissioner Gotjamanos entitled the *Report of Tribunals Review*.[22] The Review was commissioned in 1994 by the incoming state coalition government. Starting from a similar point to that of the first Law Reform Commission report, the Review found that there were 56 different tribunals acting exclusively or almost exclusively as appellate bodies. The Review found that the review of administrative decisions remained plagued by the same problems which had been identified in successive reports, namely, inconsistency in procedure and diversity in purpose.[23] The Review's recommendations were thereby grounded in the first two bases I have identified. For the first time, the Review was also able to provide estimates with regard to the operation of diverse tribunals, thereby giving greater weight to arguments for rationalisation as a method of improving efficiency.[24]

The Review also supported its recommendations by reference to the *Access to Justice* Report published in 1994, sometimes referred to as the "Sackville Report".[25] That Report was principally concerned with the simplification and rationalisation of the justice system in order to improve access, particularly for unrepresented litigants. The Tribunals Review adopted the observations by Sackville that:

> [A]n administrative justice system fails if it does not provide:
>
> - a comprehensive, principled and accessible system of merits review;
> - a requirement that government decision makers inform persons affected by government decisions of their right to review;
> - a simplified judicial review procedure by comparison to judicial review under the common law;[26]

With regard to the needs of unrepresented litigants, the 1998 Australian Law Reform Commission terms of reference on the *Review of the Adversarial System of Litigation* has also placed some emphasis on the need to simplify appeal processes. The Commission's Issues Paper, entitled *Federal Tribunal Proceedings*,[27] deals exclusively with applicants for review of decisions of federal tribunals. The issues raised by the Commission are however of broader application. For example, the Commission identifies the following problems arising in review proceedings:

- Frequent non-appearance by applicants and requests for adjournments.
- Failure to specify the grounds on which the applicant relies for review of the tribunal's decision.
- Failure by the applicant to understand the nature of judicial review, in particular, attempting to obtain review on the facts.
- Consequent adverse costs orders against disadvantaged applicants who have pursued hopeless cases.[28]

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21 Eadie R, Submission to the Commission on Government, (1996) at p 4.
22 Commissioner Gotjamanos, *Report of the Tribunals Review to the Attorney General*, 1996.
23 Ibid at pp 83-85.
24 Id at pp 87-90.
25 Access to Justice Advisory Committee/Sackville R, *Access to Justice: An Action Plan*. (AGPS, Canberra, 1994).
26 Ibid at p 323; Review op cit at p 72.
27 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Federal Tribunal Proceedings*, Issues Paper No. 24, (AGPS; Canberra, 1998).
28 Ibid at para 13.43.

The Tribunals Review recommended the establishment of a separate review body rather than a division of the existing court structure. The Review revisits the arguments advanced, considered and dismissed by the Law Reform Commission.[29]

Where to from here?

In summary, it is clear that there is a broadly acknowledged need for reform. That need has traditionally been expressed with reference to two broad justifications, namely, the need to clarify and unify existing avenues of appeal and the need to develop uniform and streamlined appeal procedures which will assist, rather than hinder, applicants for review. Despite the acknowledgment by successive governments that there is a need for legislative reform, little has been actively achieved. More recently, the need for reform has been linked with the needs of unrepresented litigants and calls for access to justice generally. I will return to this final element shortly in the context of reform to procedure.

In the context of reform, there is a need to clarify and discuss the merits of establishing a review body which is separate from the courts, in particular, with regard to review on the merits. The reports which follow the original Law Reform Commission recommendations do not deal with the Commission's proposal that flexibility, informality and expertise are elements which can be incorporated into an Administrative Law Division of the Local and Supreme Courts opting instead for the Commonwealth and Victorian AAT models. In the last decade the courts have demonstrated a great capacity for reform and innovation as well as flexibility in relation to matters of procedure.

Leaving aside the question of how reform will be implemented, it would appear as though the process of legislative reform has again stalled. The present morass of administrative appeal structures remains. The position is largely unchanged since the Law Reform Commission published its report in 1982. The need for reform continues to increase, particularly in relation to access to review by unrepresented litigants. We need to actively consider all of the issues that I have outlined this evening and re-start the process of reform.

Proposed reform of court procedure

In the context of the reform of procedure, upon my appointment as Chief Justice, I established the Supreme Court Rules Review Committee to conduct a comprehensive review of the *Rules of the Supreme Court*. Draft Rules were subsequently prepared in 1995-1997 by a consultant to the Committee, Mr David Newnes. Since the latter part of 1997 the Supreme Court Rules Committee has been reviewing the Newnes Draft in detail to prepare a final draft with a view to harmonisation wherever possible with the rules of other Courts and the Federal Court in particular. It is expected that the final draft will be ready shortly. Two matters which have been addressed by the Committee are the reform of the present procedure relating to prerogative writs and the development of a single form of originating process.

With regard to the procedure which applies to prerogative writs, the consultant recommended no change be made to O.56, suggesting that legislative reform was required before substantial change could be made to the Order. The Committee have not accepted this recommendation and have identified a number of aspects of the present procedure which require reform. For example:

- It is unnecessary, in most cases, for the Full Court to deal with applications for prerogative relief at first instance.

29 Review, op cit at pp 41 et seq.

- The long-standing complaints concerning the unavailability of 'discovery' in applications for prerogative relief should be acknowledged. Although discovery may not be necessary where the application is based upon an assertion of an error of law on the face of the record, there may be some scope in the context of a jurisdictional error or failure of natural justice.

- The present rules do not allow for more than one type of relief to be claimed in the same application. A form of originating process which has more universal application would assist an applicant and the Court in fixing an appropriate remedy. For example, a universal form of application would avoid a situation in which an application is dismissed because an applicant has sought a writ of *mandamus* when the appropriate remedy is a writ of *certiorari*. Alternatively, it would allow for an application for both prerogative relief and some other remedy such as a declaration.

Amendments to O.56 are currently being given further consideration by the Committee to deal with these matters. In particular the Committee is considering the most appropriate form to be a single form of originating process. The present proposal which is currently being considered by the Committee is the adoption of a form of 'Application' similar to that in use in the Federal Court. The application will be in two forms, *inter partes* and *ex parte*. The application will contain either:

(a) an endorsement of claim sufficient to give, with reasonable particularity, notice of the grounds and nature of the claim and of the relief sought; or

(b) a statement of claim.

What is then proposed is a single form of procedure. The applicant would be required at the commencement of the proceedings to make an election whether to have the matter dealt with as if an action or on affidavit. The matter will then be referred to a Case Management Registrar who will assess the election made by the applicant and may direct that the matter proceed in the appropriate manner.

The key to this proposal is the adoption of a greater degree of flexibility within the present system. The distinction which is currently drawn between an action determined on oral evidence and a matter determined on affidavit evidence should no longer be so rigidly applied. For example, it may become apparent in a matter which has proceeded by way of affidavit that there are discrete areas of dispute between the parties. An order could then be made directing oral testimony in relation to those areas alone. The evidence which is presented may be a combination of affidavits, oral testimony and cross-examination. Prerogative relief still does not sit comfortably with the proposed amendments. The Committee is currently considering making all applications for prerogative writs to be by way of the same form of application and subject to a similar procedure but returnable first instance before a single judge.

The procedure which I have outlined remains in draft form and the subject of ongoing discussion and consideration by the Committee. It does not represent the 'final word' on amendments to the Rules. The proposal does however have considerable merit in implementing the recommendations of the 1986 Law Reform Commission report and simplifying the procedure which applies to prerogative writs.

THE BUMPY PLAYING FIELD: GOVERNMENTS, COMMERCIAL ACTIVITY AND THE TRADE PRACTICES LEGISLATION

Dr Nick Seddon[*]

Paper presented at the Annual Public Law Weekend, held by the Centre for International and Public Law, ANU, 6-7 November 1998.

Introduction

I must, at the outset, apologise for using the overworn playing field cliché, but I cannot think of another expression which attempts to capture the earnestly expressed desire on the part of government to be seen to be competing fairly in the market place. In Australia we have seen a very major effort, in the form of the Hilmer Report[1] and its implementation,[2] aimed at bringing about competitive neutrality, a process which is not yet finished. This effort has accompanied the headlong rush by government to commercialise, privatise, downsize and outsource just about everything. There has been, accordingly, a very significant rise in government commercial activities, the most prevalent of which has been outsourcing. It is true to say that many public servants (those that are left, that is) are now contract administrators.

In this paper I want to explore the aspiration of the so-called level playing field. On the face of it, it is an admirable aim: the government and government bodies should not be in a commercially advantageous position because of their government status over other players in the market. Nor should they be in any worse position — but this latter sentiment is rarely expressed. Level means level, whichever way you look at it.

The scope of the Hilmer reforms

The Hilmer inquiry was primarily focused on competition and the legislative implementation of its recommendations involved the way in which the *Trade Practices Act* 1974 (Cth) (TPA) Part IV (the competition provisions) would apply to government business activities. It is not clear why the inquiry was so narrowly focused because the first two items which the Committee was to have regard to in the terms of reference were:

(a) that no participant in the market should be able to engage in anti-competitive conduct against the public interest;

(b) as far as possible, universal and uniformly applied rules of market conduct should apply to all market participants regardless of the form of business ownership.

In this paper I want to concentrate on government procurement because this is by far the most significant government commercial activity. It includes not just the routine procurement of items and services for the government's own use but also the purchasing of services which are delivered directly to the public. So, contracting out is included in the concept of

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1 *National Competition Policy* (Report by the Independent Committee of Inquiry, chair Prof F Hilmer, 1993).

2 *Competition Policy Reform Act* 1995 (Cth) and a *Competition Policy Reform Act* in each State and Territory. Three inter-governmental agreements committed all governments to introduce various measures to ensure, so far as possible, competitive neutrality in relation to government business activities.

procurement. Items (a) and (b) above would appear to cover procurement (the government is a participant in the market) both in relation to possible anti-competitive conduct (Part IV of the TPA) and to other aspects of the TPA which impose standards of conduct (principally found in Part V). Even without the specific mention of "rules of market conduct" in item (b), legislatively imposed standards of conduct, such as the prohibition in trade or commerce on misleading or deceptive conduct found in section 52 of the TPA and its state and territory *Fair Trading Act* counterparts, are important components of competition policy because it is obviously unfair if such standards are binding on some market players and not others.

The Hilmer inquiry did not take such a broad view and, as already mentioned, concentrated almost exclusively on competition in its narrower sense of anti-competitive practices, such as misuse of market power, monopoly pricing behaviour and the effect on competition of the liability, or exemption from liability, to pay tax. A major concern was the position of government business enterprises, such as energy utilities, and other government business activity. The assumption underlying the Report appeared to be that governments engage in entrepreneurial activities in a major way. This may be so (though arguably less so as time goes on as governments privatise utilities and the like), but the very important activity of procurement was overlooked. Nor was the Report or its implementation concerned with aspects of the TPA other than Part IV. The consequence of these omissions is that in Australia we are now facing a very unlevel playing field in relation to government procurement activity. This will be discussed in detail further below. Before examining that, it is worth focusing on the more general question of whether the playing field is in fact level, quite apart from the narrow perspective of trade practices law.

Government commercial activity

The government is in a peculiar position when it engages in commercial activities. It may be subject to certain exemptions from the rules which apply to other market players (some, but not all, of which were the focus of the Hilmer reforms). These stem from crown immunity which still survives in some important areas. And yet government may be subject to greater burdens than apply to other market players. These come from various sources, including the possibility of public law remedies, not the least important of which is investigation by the Ombudsman,[3] duties to behave in accordance with higher standards of market behaviour than apply to private sector operators[4] and an overlay of legislative requirements found in finance legislation and the like.

The asymmetry of government contracts

Another source of disadvantage to the government is a very basic fact about governmental contracting. The principal remedy for breach of contract is damages and, to all intents and purposes, it is the only remedy in the types of contracts now under consideration, unless special measures are put in place to provide other remedies in the contract itself. The remedy of damages reflects contract's origins which grew out of the industrial revolution and the requirement of the law to respond to the needs of entrepreneurs in an increasingly sophisticated market place. For better or worse, the common law developed the remedy of

3 The extent to which government should be subject to public law remedies is a much-discussed and controversial topic which cannot be explored here. See N Seddon, *Government Contracts: Federal, State and Local* (1995) ch 7.

4 This is a complex topic but suffice it to illustrate here from the groundbreaking case of *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 in which Finn J held that a government body was obliged to behave as a "moral exemplar" and, specifically, was bound by a process contract when conducting a tendering process. So far, the imposition of contract on the tendering process has occurred only in public tenders. An attempt to argue for a similar contractual obligation in a private sector tender was unsuccessful in *Shivas v BTR Nylex Holdings NZ Ltd* [1997] 1 NZLR 318.

compensatory damages for failure to perform, rather than specific performance. The remedy of damages provided reasonable recompense to an entrepreneur whose expectations had been thwarted by a contract breaker. He or she could claim for lost profit or, if this was too difficult, for thrown away expenses. The key to claiming damages was that the victim of breach had to be able to prove in money terms what the breach had cost. If the plaintiff in a breach of contract action failed to prove this, then the court would award nominal damages.

If we turn to the use of contract by government, there is immediately a difficulty about damages. The same requirement — that loss must be proved — applies and this may be difficult or impossible in many types of government contracts. This is because the failure to perform cannot be measured in money terms. This may be a problem for the most mundane contract, such as delivery of furniture to the government. If it is delivered late, what loss to the government?[5] The same may apply to an item of defence equipment. When the government contracts to procure services to be delivered, not to itself but to its citizens, the problem becomes even more difficult. What loss to the government if a contractor provides a lousy service to job seekers?

The problem arises from the almost blind belief that contract is the answer to everything. Public administration experts, in my experience, do not know much about the law of contract and they blithely assume that, once the contract is in place, then all problems are solved. The fact is that the problems are only just beginning when the government decides to use the tool of contract for achieving public goals formerly performed directly by public servants. Contract, originally designed to serve the needs of entrepreneurs, has been commandeered to perform a task which it is not very well equipped to perform, at least in its basic form. There is immediately an asymmetry in the relationship between government and contractor, with the damages remedy being an adequate remedy for the contractor (who is out to make a profit in the normal entrepreneurial way) but sometimes a useless remedy for the government. This is another aspect of the uneven playing field that has received very little critical attention. It explains in part why stories are so often told of the government being a "soft touch" in the contractual relationship. If it is realised by contractors that the government has an ineffective remedy, then they will take advantage of that.

There are solutions to the problem. One of the notable features of contract is its adaptability. It is possible to draft anything into a contract (so long as it is not actually illegal) and the courts will attempt to give effect to the declared intention of the parties. Contract is an extremely flexible facilitator with few limits on what can be agreed to by the parties (unless, in areas such as consumer contracts of various kinds, legislation has intervened to limit the freedom of the parties). It is possible, therefore, to overcome the problem of lack of enforceability of government contracts by drafting into the contracts various devices for enhancing enforceability. The key to doing this effectively is to use "self-help" remedies, such as liquidated damages clauses, third party unconditional guarantees and the ability to withhold incremental payments in the event of failure to perform. All of this is possible but it requires a great deal of forethought and care. It therefore involves sometimes quite substantial transaction costs in the form of planning and tailor-making the contracts to fit the particular needs of government and then careful supervision by government personnel to ensure that the desired ends are achieved. In short, it involves the previously mentioned asymmetry costs. I suspect that these types of costs are not factored into the policy decision to contract out.

5 Some private sector contracts suffer from the same difficulty but the problem is much more prevalent in public sector contracts.

Hidden "costs" of government contracting

The shift from traditional public administration to contract has attracted a great deal of commentary and analysis. Here is not the place to investigate the many facets of government contracting and its consequences. It is, however, worth noting some features of government contracting which can broadly be described as "costs" in the overall assessment of whether it is sound policy to use contract as a tool of public administration. If all of these costs were properly taken into account, then it is at least arguable that the burden on the government party is so great that the decision to contract should be abandoned. They include the following:

- Because a contract can be made by a government using its executive power, contract is a form of *de facto* legislation without the same checks and balances that apply to laws passed by parliament.

- Contract may "lock in" both the present and future governments so that policy formulation and changes are fettered.[6]

- Contract, as a mechanism for carrying out government functions, is far less flexible than the traditional command and control model. Failure to perform precipitates delicate contract negotiations whereas under the traditional model the problem could be fixed by command.

- There are some serious "public" costs which are not acknowledged, such as the diminution of accountability to citizens who use contracted-out services and the blurring of the traditional lines of accountability to parliament and the people.

- The use of contract increases the risk of litigation.

- The use of contract increases the risk of loss of control over public expenditure because of informal contracting or because of variations to the original contract.

- Public servants have become contract administrators without adequate training or skills.

- The whole process is often hidden behind commercial-in-confidence claims.

This litany of pessimism is not to be taken as a statement that contracting out should not happen. In *some* circumstances in relation to *some* types of government objectives contracting out works well and saves taxpayers' money. The message is that it should be undertaken in a very discriminating way. In Australia this is not happening; instead we witness a Gadarene stampede driven by ideology and not by rationalism (despite the rhetoric).

I have strayed from the focus on the playing field, at least as it is traditionally discussed. I make no apology because the use of contract by government is not just about markets, efficiency and competition. It is, or should be, about a very large and complex cost-benefit equation taking into account such matters as public accountability and responsibility, transparency of government, citizen redress as well as the more usual factors of value for

6 The doctrine of executive necessity, which does allow governments to break contracts in limited circumstances, is in practical terms of very little help. It is often either politically or else reputationally unacceptable for the government to use this doctrine. By "reputationally" I refer to concern about international credit rating indicators.

money and efficiency. These larger factors are specifically recognised in one of the intergovernmental agreements which was part of the implementation of the Hilmer Report. The Competition Principles Agreement cl. 3(6) requires a cost-benefit analysis to be performed when deciding to what extent government business entities should have to comply with the various requirements designed to achieve competitive neutrality. The types of factors to be considered include "social welfare and equity considerations, including community service obligations" (cl. 1(3)(e)).

I return now to a more traditional area for inquiry in connection with the playing field and that relates to the way in which the trade practices legislation applies to governments in Australia.

Governments and the Trade Practices legislation

I include here the *Trade Practices Act* 1974 (Cth), the state and territory *Fair Trading Acts* which mirror important provisions of Part V of the TPA (including the all important section 52 which prohibits misleading or deceptive conduct in trade or commerce) and the state and territory *Competition Policy Reform Acts* which adopt the Competition Code[7] for each polity. It is here that a most extraordinarily bumpy surface is evident in so far as the application of this legislation to governments and government bodies is concerned.

"Carries on a business"

The difficulty stems from a provision in the legislation which attempts to deal with the problem of Crown immunity. In the TPA sections 2A[8] and 2B,[9] in each state and territory *Competition Policy Reform Act* section 13 and in the *Fair Trading Act* 1987 (NSW) section 3[10] the same formula is used, namely, that the legislation binds the crown in so far as it "carries on a business". The legislation itself provides some guide to what these words mean but mostly in negative terms.

The TPA section 4 defines "business" to include a business not carried on for profit and this definition is incorporated into the state and territory *Competition Policy Reform Acts* by subsection 3(2) of each Act which provides that a definition used in the *Trade Practices Act* applies in the state or territory *Competition Policy Reform Act*. The same definition of "business" is found in the *Fair Trading Act* 1987 (NSW) section 4(1).

In addition, the TPA sections 2C and 2D, mirrored in each state and territory *Competition Policy Reform Act* section 15, provide that carrying on a business does not include imposing or collecting taxes, levies or fees for licences, granting or revoking licences, agreements which are not contracts because they are between the same government legal entities and the acquisition of primary products by government bodies. The provisions also excludes from the concept of carrying on a business transactions involving the crown in right of the Commonwealth, state or territory and a "non-commercial authority", or transactions involving only "non-commercial authorities" of the Commonwealth, states or territories. A "non-commercial authority" is a single person who is not a trading or financial corporation.[11]

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7 The Competition Code is a slightly modified version of Part IV of the TPA found in Part XIA.

8 This section deals with the way in which the whole of the TPA binds the Commonwealth.

9 This section deals with the way in which Part IV (the competition provisions) binds the States and Territories. It is to be noted that Part V does *not* bind the States and Territories but they are bound by the mirror provisions of their own *Fair Trading Acts*.

10 The other State and Territory *Fair Trading Acts* apply to the Crown without the "carries on a business" qualification.

11 Trade Practices Act 1974 (Cth), s 2C(4).

These exclusions from what constitutes "carrying on a business" are not exhaustive and it is therefore possible to argue that other activities do not amount to carrying on a business.[12] A further exemption relates to the granting or refusing to grant licences by local government or transactions involving only persons who are acting for the same local government body.[13]

It is worth noting in passing that, as a result of the provisions just described, in-house bids for government work are not covered by the legislation. Perhaps some would consider that the inclusion of an in-house bid does not represent a fair competition because of this exemption alone (quite apart from the fact that no contract can eventuate if an in-house bid is successful).

A limited interpretation of "carries on a business"

The crucial words "carries on a business" in the trade practices legislation have not been the subject of very much judicial consideration,[14] certainly not in a way which provides any guidance as to how the words apply to what might be thought of as ordinary government "business", namely procurement. This gap in our understanding of the meaning of these words has now been partly filled by what was said by Emmett J in *JS McMillan Pty Ltd v Commonwealth*.[15] Before examining this case, it is worth pondering what these crucial words *could* possibly mean.

The evident purpose of the words is to ensure that any residual crown immunity is removed and so a wide interpretation of the words "carries on a business" would be warranted. Thus "business" means the business of government.[16] This would cover any commercial activity of government, including the most important of all in terms of dollar value, procurement and contracting out by government for ordinary governmental purposes. A wide interpretation was adopted by the House of Lords in *Town Investments Ltd v Department of the Environment*[17] when it had to consider the expression "for the purposes of a business carried on by [a tenant]" in connection with the leasing of premises by government for the use of public servants. "Business" was defined to include "a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate ..." Taking a purposive approach to the legislation (which was aimed at controlling commercial rents as an anti-inflation measure), it was held that the use of premises by public servants was a "business tenancy" and therefore covered by the legislation.

A difficulty arises with this wider interpretation because the phrase in the trade practices legislation includes the indefinite article — "carries on *a* business" — and so it might be argued that the section only applies to a discrete business rather than to business generally. The same form of words arose in the *Town Investments* case but caused no problem. As Lord Diplock put it:

> My Lords, it has been said that Roger Casement was hanged by a comma and ... that John Keats's mind was "snuffed out by an article". I think that in exercising the functions of government the civil

12 Ibid s 2C(2).

13 Ibid s 2D.

14 See N Seddon *Government Contracts: Federal, State and Local* (1995) para [5.10].

15 (1997) 147 ALR 419.

16 *See Re Australian Industrial Relations Commission; ex parte Australian Transport Officers Federation* (1990) 171 CLR 216 at 226 in which the High Court said that it was appropriate to talk of "the business of government".

17 [1978] AC 359.

> servants of the Crown are all engaged in carrying on a single business on behalf of the Crown ... I do not see why the presence of an indefinite article affects the matter ...[18]

Opposed to this wide interpretation, the words "carries on a business" could be given a narrower, and perhaps more natural or common sense, meaning. It is somewhat awkward to describe ordinary government commercial activity carried out for achieving governmental purposes as carrying on a business. Further, if it was parliament's aim to remove Crown immunity it could have done so without any qualifying words (as has occurred in all the State and Territory *Fair Trading Acts* except that of New South Wales). The narrower interpretation recommended itself to Emmett J in the *McMillan* case.

The case involved selling by tender the assets of the Australian Government Publishing Service (AGPS). McMillan represented a consortium of bidders. It was informed that it had not been placed on the short list because its bid was non-conforming. McMillan considered that the Commonwealth had been misleading (contrary to TPA section 52) in the way it had conducted the tender process and immediately sought an injunction (under TPA section 80) to stop the process. It then sought a reinstatement order from the Federal Court.[19] Emmett J held that the Commonwealth had engaged in misleading conduct in the way that it dealt with McMillan's bid but he went on to hold that the Commonwealth was not liable because it was not carrying on a business when selling AGPS assets.[20] What Emmett J had to say in the course of his consideration of the crucial words also applied to government procurement.[21] He made the point that a government agency, when purchasing services or goods for ordinary day-to-day purposes, could not be said to be carrying on a business. He conceded that there are some activities of government entities or units which could be said to be carrying on a business and he instanced the former AGPS itself which was a business publishing and printing unit within the now disbanded Department of Administrative Services. It is important to note that, according to Emmett J, both ordinary procurement and sales of government assets did come within the words "trade or commerce" which are found in section 52 itself. The expression "trade or commerce" has been given a very liberal meaning in section 52 cases and there is no doubt that negotiations for, and entry into, a contract is "in trade or commerce". As the legislation stands at present, it is necessary in an action against the government that the activity or conduct complained of should be both in trade or commerce (a relatively easy hurdle to clear) and in the course of carrying on a business (a less easy hurdle to clear).

The implications of the *McMillan* case

If the narrow meaning of the words "carries on a business" persists in later cases, the implications are startling.

Misleading conduct

The *McMillan* case itself shows that the Commonwealth is not bound by the TPA (specifically section 52 in that case) in respect of most of its commercial activities, that is, procurement of goods and services for governmental purposes and sales of government assets. Similarly, the New South Wales government is not bound by its own *Fair Trading Act* in the same way.

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18 Ibid at 385.

19 The action was based on the TPA s 52. Under s 87 a court has very wide remedy powers and Emmett J would have ordered that McMillan be placed back on the short list had he not found that the Commonwealth was not bound by the Act.

20 (1997) 147 ALR 419 at 438.

21 Ibid at 437.

This means that a contractor to either government is bound by the all-important misleading conduct provision but that the government party is not.[22]

Competition law

The *McMillan* case also has implications for competition law, that is the law found in the TPA Part IV and the Competition Code. As already mentioned, all the competition provisions, whether applying to the Commonwealth under the TPA,[23] the states and territories under the TPA[24] or each state and territory under its own *Competition Policy Reform Act* bind the crown in right of the various polities only in so far as each carries on a business. It might be thought that it is in the nature of competition law that it could only apply to business activities and so the qualifying words do not provide any significant exemption to governments. In other words, the circumstances in which competition law would be most likely to apply would be to entrepreneurial activities and not to ordinary procurement. This certainly appeared to be the assumption behind the Hilmer recommendations, though nothing explicit was said on this score. If anti-competitive conduct could occur in ordinary procurement and sales of government assets, then the Hilmer reforms are seriously flawed if the *McMillan* interpretation of "carries on a business" is adhered to.

It is not difficult to imagine circumstances where conduct which would be in breach of Part IV of the TPA occurs in the course of ordinary government procurement or sales. In the lead-up to the 1998 Queensland election, then Premier Borbidge announced that government contracts would be awarded to Queenslanders in preference to outsiders. If this policy had been followed through then a legal challenge to the award of a particular Queensland government contract would run into difficulties because it could be argued that the award of a contract for ordinary government procurement was not in the course of carrying on a business and so the government would be exempt from the operation of Part IV of the TPA or its own *Competition Policy Reform Act*.

Exempt parties

The *McMillan* interpretation means that there is a significant area of exemption in relation to the applicability of the trade practices legislation to governments and some government bodies. The exemption extends to all those entities which can claim the shield of the crown. This exemption extends to the nine Australian polities[25] and those statutory corporations which can claim to be the Crown for immunity purposes.[26]

There is also the bizarre possibility that the exemption could be claimed by *private* sector bodies to which government tasks have been contracted out. This follows from two sources. First the TPA itself in section 2A, the crucial section which deals with the extent to which the Act binds the Commonwealth, covers not just the Commonwealth but also Commonwealth authorities which are defined in section 4 to include a company in which the Commonwealth

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22 There is a further anomaly in Queensland because the *Fair Trading Act* remedies for misleading conduct are confined to "consumers" as defined. This means that, although the Queensland Crown is bound by the *Fair Trading Act* 1989 (Qld), it is in effect not bound by the misleading conduct section (s 38) in respect of procurement because the supplier to the government is not a "consumer". Only when the Queensland government is *selling* and the purchaser is a "consumer" as defined will the government be bound — a narrow compass for the application of the legislation.

23 *Trade Practices Act* 1974 (Cth) s 2A which applies the whole of the TPA to the Commonwealth.

24 *Trade Practices Act* 1974 (Cth) s 2B.

25 There are in fact ten: the Commonwealth, the States, the two Territories and Norfolk Island.

26 The law on which statutory corporations can, and cannot, claim Crown immunity is complex and contradictory: see N Seddon *Government Contracts: Federal, State and Local* (1995) paras [4.6]-[4.8].

has a controlling interest. Secondly, a case which is currently[27] before the High Court, *Woodlands v Permanent Trustee Co Ltd*[28] has extended Crown immunity to companies contracted to the New South Wales government for the implementation of the ill-fated HomeFund scheme, a supposedly low-interest loan scheme for low income borrowers. Borrowers who had fallen foul of the scheme alleged that the government and the companies had engaged in misleading conduct in breach of the TPA section 52 in promoting and implementing the scheme. The New South Wales government is not bound by Part V of the TPA (where section 52 appears). The companies argued that they were also immune from the operation of section 52. The Full Federal Court agreed.

In order to understand this decision it is necessary to go back to a case which was one of the principal reasons for the Hilmer inquiry. In *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd*[29] it was alleged that the Queensland Commissioner for Railways and private sector companies had made contracts in breach of Part IV of the TPA. It was held that the Queensland Commissioner for Railways, a statutory corporation enjoying crown immunity, was exempt from the operation of the TPA.[30] It was also held that any company contracting with the Commissioner was also exempt because it would be impossible to apply the legislation to the company without it applying equally to the immune Commissioner. This argument, which provided "derivative" immunity to private sector companies, depended on the impossibility of applying the legislation to one party to a contract without it affecting the other party. This argument is particularly applicable to contracts in which there are alleged infringements of competition law.

In *Woodlands* what was termed the "second leg" of *Bradken* was re-examined to see whether it extended to the circumstances of the companies contracted to the New South Wales government. The key to the argument was whether *Bradken* was limited to those circumstances where it was impossible to apply legislation to one party without it, at the same time, affecting the other party or whether *Bradken* stood for some wider principle. When the allegation concerns misleading conduct by a party contracted to the government it is possible to apply the law to that party without it affecting the government. The Full Federal Court nevertheless decided that the companies should enjoy "derivative" immunity. This was in the nature of an agency argument: if the company is in effect the government's agent then it has derivative immunity. But this is *not* agency in the ordinary private law sense where the government is the principal and the company is the agent acting for and on behalf of the principal. Instead, the precept is that the company is in effect an "arm" of the government for the purpose of implementing the government-initiated scheme. The Court acknowledged that if a company engaged in misleading conduct as part of an independent initiative, then the company would not be able to claim derivative immunity.

The implications of this decision, if not reversed by the High Court, are extraordinary. One would have thought that the concept of crown immunity was withering away but the effect of this decision is to enlarge crown immunity in an era when all sorts of private entities are carrying out contracts for governments. If the *Woodlands* view persists, a vast number of companies and individuals will be brought within the shield of the crown.

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27 This paper was written in August 1998 because I had to write it before going overseas. It may be that the following discussion has become redundant by the time this paper is delivered. I certainly hope so.

28 (1996) 139 ALR 127.

29 (1979) 145 CLR 107.

30 This was because s 2A only deals with how the Act binds the Commonwealth. The High Court concluded that s 2A does not extend to the States and Territories simply as a matter of interpretation. This is still the case.

Solutions

We go back to the problem of the effective partial exemption of Crown bodies from the operation of the trade practices legislation. What can be done about it? One way of dealing with this would be to change the legislation. We have an admirable precedent to follow in the form of the New Zealand *Fair Trading Act* 1986 which provides in section 4(1) that "this Act shall bind the Crown in so far as the Crown engages in trade" and section 5(1) provides "This Act applies to every body corporate that is an instrument of the Crown in respect of the Government of New Zealand engaged in trade". "Trade" is defined in section 2 to mean

> any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land.

This definition would clearly cover ordinary government procurement or disposition of surplus assets.

However, the problem in Australia is that to bring about this change ten pieces of legislation would have to be amended, that is the TPA, the state and territory *Competition Policy Reform Acts* and the New South Wales *Fair Trading Act* 1987. It seems unlikely that this is going to happen. The solution then lies with the judiciary who, it is to be hoped, will follow neither the *McMillan* case nor the *Woodlands* case.

Conclusion

This paper has ranged widely and, it might be thought, has strayed from the central them which was to investigate the notion of the level playing field in connection with government commercial activities. The most important of these activities in terms of dollar value and in terms of the effect on citizens and, dare I say, democracy, is government procurement which includes contracting out. I conclude that it is never possible for government to operate on a level playing field with the private sector and that is as it should be because government has peculiar responsibilities. The idea of the level playing field embraces not just the advantages that government enjoys but also the extra burdens under which it must operate. The extra burdens tend to be ignored in the cost/benefit exercise which ought to be undertaken when making a decision whether or not to contract out a particular function. There may well be a case for not contracting out once the full equation is assessed.

This is not to say that the aspiration of the level playing field should not be pursued: it is appropriate in relation to those activities which are close to the kinds of activities engaged in by the private sector. It is also appropriate to ensure that the government does not have an unfair advantage by being exempt from legislatively imposed standards of market conduct. The Hilmer reforms have gone some way in smoothing out the playing field. The task is by no means finished and what remains to be done is by no means easily accomplished.

JUDICIAL REVIEW – A PROCESS IN SEARCH OF A PRINCIPLE

*B M Selway**

Paper presented to an AIAL seminar, Adelaide, 28 October, 1998.

Marbury v Madison 5 US 137 (1803) is a pivotal case in US jurisprudence. In that case the US Supreme Court identified judicial review as an essential aspect of the judicial function, notwithstanding the principle of separation of powers. It was by no means self evident that this was a proper function of the courts. Under the United States constitution where there are separate and co-equal branches of government there was a real question as to whether one branch, the judiciary, had the authority to determine the validity of the acts of another branch.

The principle of separation of powers operates quite differently within the Australian constitutional framework. For example, at the state level there is no principle of separation of powers.[1] Even under the Commonwealth constitution the principle of separation of powers operates differently than it does under the US constitution. In the Australian constitutional framework, the judiciary are appointed by the crown to dispense justice in accordance with the law, and the executive are appointed by the crown to execute and administer the laws. The relationship between the executive and the courts was largely determined in the 17th century. In particular, the courts then determined, and the crown accepted, that the executive could not exercise judicial power without express statutory authority.[2] It was also established that the executive was subject to the law as interpreted by the judges and that the executive crown had no power to dispense with the law.[3]

Consequently, judicial review has a different, or at least, a more obvious constitutional basis in Australia than it has in the United States. The parliament of the federated Commonwealth established in 1901 was a subsidiary legislature, as were the parliaments of the pre-existing colonies. The courts of the colonies and of Australia clearly had the power to declare that purported laws of that subsidiary legislature were beyond power and invalid.[4] Covering clause 5 of the Commonwealth constitution was merely declaratory of the common law that the Commonwealth constitution was binding upon the courts and judges of the new states. The principle of separation of powers could not limit judicial review where the legislature was a subsidiary legislature. Furthermore, since at least the 17th century the executive had always been subject to the supremacy of the parliament. Its prerogative powers had always been limited. There was no doubt that the executive (or at least, its officers) could act unlawfully and that the courts could determine that they had done so. Consequently, there was and is simply no reason to rely upon the reasoning in *Marbury v Madison* in order to justify the power of Australian courts to review invalid laws and executive acts.[5] In particular,

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1 *Kable v DPP (NSW)* (1996) 138 ALR 577, 583-584, 587-594, 602-604, 612, 622-624. It is possible that a "manner and form" provision of a state constitution could entrench the principle of separation of powers in that constitution. On one view this may have occurred, at least to an extent, in Victoria: see *BHP v Dagi* [1996] 2 VR 117, 153-157, 191-192, 207.

2 *Prohibitions det Roi* (1607) 77 ER 1342; *Baslog v ICAC* (1990) 169 CLR 625, 636; *Herald & Weekly Times v Woodward* [1995] 1 VR 156, 158.

3 *Case of Monopolies* (1602) 77 CR 1260; *Case of Proclamations* (1612) 77 ER 1352.

4 See eg *R v Burrah* (1878) 3 App Cas 889, 904-905; *Engineers* Case (1920) 2B CLR 129, 149.

5 See Lindell in Zines (ed) *Commentaries on the Australian Constitution* (1977) at 160-186; Lane *The Australian Federal System* (2nd Ed, 1979) at 1143-1144; Lindell in Lee & Winterton (eds) *Australian*

in Australia there has been no suggestion that the functions of the judiciary are limited because the executive has a proper role and responsibility in interpreting the law.[6]

Historically, the constitutional basis for the supervisory jurisdiction of the superior courts was the prevention of *ultra vires* acts, that is, acts which had no legal effect because they were nullities. This constitutional basis was clear enough when judicial review was largely limited to what might be called illegality, for example, to issues such as exercising powers of compulsion without any power to do so. However, from the late 19th century the courts accepted that they could also review the exercise of statutory powers by reason of the failure to comply with natural justice. The justification for this approach was the presumption[7] of statutory interpretation that there was implied into the statutory grant of the relevant power a statutory requirement so to comply. On this basis the requirement to comply with the rules concerning natural justice could still be justified on the basis of *ultra vires*, that is, the failure to comply with the implied statutory requirement.

However, starting in 1967 in England the rules of natural justice have been applied to the exercise of prerogative powers.[8] This development was confirmed by the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service*[9] and is clearly now the accepted law in England. In England the question whether a person exercising a power is required to comply with natural justice does not depend upon the source of the power but upon the nature of that power.[10] I should say that this development has received almost universal academic support, almost to the level of barracking.

This same development has subsequently been recognised and followed in Australia[11] although some judges, particularly Brennan CJ, have not welcomed it.

Of course, once judicial review is not founded upon statutory interpretation or upon some traditional limitation upon prerogative powers then it can only be founded upon some autonomous development of the common law. The cases do not identify any such development. Instead the courts seem to have been content to develop specific rules to be complied with by those subject to administrative law, without bothering with the basic principles to explain those rules.[12]

In the absence of any such basic principles, there is no constitutional or jurisprudential theory which justifies the current processes of judicial review. Whatever may be said of this as a matter of jurisprudence, on a practical level I have previously made the point that:

Constitutional perspectives (1992) at 218-219; contrast Galligan, "Judicial Review in the Federal System: Its Origin and Function" (1979) 10 FL Rev 367 who seems to view the US reasoning as directly applicable (see at 368).

6 Indeed, the very opposite may be true. The history of the development of the Westminster system, and the different role of the various arms of government under that system, may suggest that there should be a greater role for judicial review in Australia than has even yet occurred. See Brennan, "Courts, Democracy and the Law" (1991) 65 ALJ 32.

7 Which was limited initially only to those persons required to act "judicially", but subsequently extended to all persons required to exercise statutory functions giving rise to a "legitimate expectation".

8 See *R v Criminal Injuries Board ex p Lain* [1967] 2 QB 864.

9 [1985] AC 374.

10 Ibid at 407.

11 See Bayne, "The common law basis of judicial review" (1993) 67 ALJ 781 and Aronson & Dyer, *Judicial Review of Administrative Action* (1996) at 115-116, 202-221.

12 Indeed, some judges have welcomed the opportunity to develop those rules: see Toohey, "A Government of Laws, and not Men" (1993) 4 PLR 158 and see Brennan, "Courts, Democracy and the Law" (1991) 65 ALJ 32 at 39-40.

> The nature and scope of the jurisdiction of the superior courts to grant judicial review can only be defined by reference to the courts' own perceptions of what standards of public decision making they need to impose and on whom they need to impose them. This is based, in part, upon an increased judicial scepticism about the role of the executive vis-a-vis parliament and the increased readiness to use public law remedies to redress the balance. The jurisdiction continues to expand.[13]

It follows that there can be no certainty that the legal principles applicable to judicial review today, will necessarily be those that are applicable tomorrow. Developments of the law in this area may proceed at differing speeds in different jurisdictions. Changes in the personnel of different courts may affect such developments.

One result of this lack of any identifiable principle justifying judicial review is the current confusion about the consequences of a breach of administrative law. This confusion is highlighted by the question of whether the consequence of a breach of administrative law is that the relevant act is void or merely voidable and by the related issue of whether the relevant act can be challenged in "collateral" proceedings.[14] Historically, the accepted position seems to have been that an administrative decision that was "illegal" was void *ab initio* and could be challenged in collateral proceedings, at least so long as the vitiating defect was patent.[15] However, acts and decisions that were in breach of administrative law by reason of irrationality or procedural impropriety were not void *ab initio*, but were merely voidable. They continued to be effective until set aside by a superior court in judicial review proceedings.[16] Although there are still some judgements which seem to support that approach,[17] it no longer enjoys general acceptance.[18] Although there have been some other attempts to develop completely new approaches to the issues,[19] it would seem that currently there are two approaches which have relatively broad acceptance. The first is that the question is one of statutory interpretation,[20] the second is that all acts and decisions in breach of administrative law are invalid *ab initio* at least in the absence of a legislative direction to the contrary.[21] Both of these tests have some difficulties in both justification and in application.

The fact that judicial review now extends to the prerogative means that any explanation of the consequences of a breach of administrative law which relies upon some principle of parliamentary sovereignty must be an incomplete explanation. The lack of any over-riding principle to explain the current processes of judicial review means that issues such as collateral challenge, the void/voidable distinction and, indeed, the proper role for the exercise of discretion in judicial review proceedings will continue to present logical difficulties.

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13 Selway, *The Constitution of South Australia* (1997) at 235.

14 I have considered this matter in some greater depth in Selway, "The Rule of Law, Invalidity and the Executive" (1998) 9 PLR 196, 201-203.

15 *Posner v Collector for Interstate Destitute Persons (Vic)* (1946) 74 CLR 461, 483; *Murphy v R* (1989) 167 CLR 94, 106.

16 See eg *Calvin v Carr* [1980] AC 574; *Ainsworth v CJC* (1992) 175 CLR 564; 579ff, 594ff.

17 *Ousley v R* (1997) 148 ALR 510, 514-515 (Toohey J), 520-521 (Gaudron J).

18 It could not still apply in the UK because of the rejection in that country of the distinction between jurisdictional and other errors: see *Boddington v British Transport Police* [1998] 2 WLR 639, 645-646, 650. Of course, that distinction is still recognised in Australian law: see *Craig v South Australia* (1995) 184 CLR 163, 178-179.

19 See eg *Bugg v DPP* [1993] QB 473, 491-500; *Leung v Minister for Immigration & Multicultural Affairs* (1997) 150 ALR 76, 86-90.

20 *R v Wicks* [1998] AC 92, 117; *Blue Sky v Australian Broadcasting Authority* (1998) 153 ALR 490, 512-518; *Ousley v R* (1997) 148 ALR 510, 552; *Darling Casino Ltd v NSW Casino Control Authority*(1997) 143 ALR 55, 72-76.

21 *Ousley v R* (1997) 148 ALR 510, 531-534; *Boddington v British Transport Police* [1998] 2 WLR 639, 649-650; 655, 656, 664-666.

My own view is that the courts were wrong in extending judicial review to acts done pursuant to the prerogative in the absence of some constitutional justification for doing so. Some justification must now be found. Constitutionally, such a justification cannot be an enhanced role for the courts in supervising the executive. Such an enhanced role would be inconsistent with the principles of separation of powers and the independence of the judiciary. If a justification is to be found it must be found in the substantive law. This does not preclude a lateral approach. After all, the justification for requiring that those exercising statutory powers should comply with the principles of procedural fairness rested in a presumption of statutory interpretation which, at least when first identified, must have been very difficult to justify. In respect of prerogative powers the justification could be a development of the common law so as to limit some of the common law prerogatives of the crown, for example, that such prerogatives must be exercised fairly and impartially. Whether such a development of the common law is consistent with the usual principles for such development by the courts raises further interesting questions which will need to be dealt with on another occasion.

NORMATIVE AUTONOMY AND THE JUDICIALISATION OF TRIBUNALS

*Jeremy Webber**

Address to the Annual General Meeting of the NSW Chapter of the AIAL, 23 September 1998[1]

Introduction

When Justice Beazley approached me about giving this talk, I have to say that I felt some hesitation. I am not an administrative lawyer, but rather very much a constitutional lawyer. Moreover, one of the consequences of being Dean is that one has no time whatever for research. That means that it is very difficult to develop the breadth of knowledge in Australian practices that I would like to have before speaking to an Australian topic, particularly because I did not come to Australia to act as a Canadian expatriate.

Nevertheless, there has been one topic in the administrative field that has intrigued me since my arrival in February, and it is that topic that I would like to address this evening. I hope you will forgive my lack of depth in contemporary Australian administrative law. In partial compensation, I will draw upon an earlier dimension of my own scholarship that did cross the Australian/Canadian divide: my work on the specialised administrative regimes established to govern industrial relations at the turn of the century – arbitration in Australia, conciliation in Canada.[2] That example speaks in important ways, I believe, to important challenges facing Australian administrative tribunals today.

I understand that this year, your seminar series has tended to focus on tribunals, and especially the extent to which they may be coming under increased pressure from governments of the day. My concern is with one common response to such pressures – a response that tries to insulate tribunals from political pressures by attempting to wrap them in the cloak of judicial independence. I am concerned, in other words, with the increasing judicialisation of administrative tribunals.

Factors encouraging judicialisation of tribunals

There are, of course, a number of factors driving this process. One is the factor to which I have just referred: the attempt to buttress tribunals' independence by emphasising the extent to which they act like courts. Another is the attempt to harness the authority – the symbolic weight - of courts to tribunals, by for example the obvious expedient of appointing judges as their members. And of course, there is no doubt a measure of institutional self-interest at work among tribunal members. The prestige and flattery of judicial trappings doubtless exercise their own attraction.

There are also a number of structural factors that tend towards judicialisation (without being themselves determinative). One is, I believe, the constitutional requirement of the separation of the judicial and executive powers. Now this may seem paradoxical, for ostensibly that separation forces tribunals **not** to be judicial. But of course, one of the principal ways in

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1 My thanks to Eric Ghosh for his research assistance, and to Associate Professor Margaret Allars and Mr Brian Opeskin for their helpful comments.

2 See especially Webber, "Compelling Compromise: Canada chooses Conciliation over Arbitration 1900-1907" (1991) 28 Labour/Le Travail 15.

which the separation of powers is respected is by dividing different stages of regulation between the tribunals and the courts, often in a manner that permits the courts to revisit matters that tribunals address in first instance. When this occurs, tribunals will inevitably perform their role in a manner that keeps one eye firmly fixed on the courts; inevitably, they will be pulled towards a court's view of the world.

The tendency to create general appellate or review tribunals, like the AAT or the ADT, also must create a bias in favour of judicialisation. I know that expedients have been found to preserve elements of specialisation and expertise in the make-up of panels. But nevertheless, the very fact of having a general review tribunal that is not, in principle, subject-specific, must push the process towards greater generality of standards, less responsiveness to particular domains, and more straight-line adjudication.

I suspect, however, that the strongest tendency towards judicialisation operates on a more theoretical level – that it is driven by a genuine concern that tribunals *should* act like courts, that really the only viable administrative justice consistent with the rule of law and democratic control is one in which tribunals apply, as faithfully as possible, express rules pre-established by an open and democratic process. This means having real law applied by institutions that look (as far as possible) like real courts. This view is influential in a great many jurisdictions, although I wonder whether it might be especially pronounced in Australia, where there tends to be a vibrant distrust for authority, and especially for authority that operates by discretion or presumes to found its decisions on anything but the most explicit norms.

It is this position against which I most want to argue. I wish to argue that there is a significant cost to judicialisation, a cost that may very well undermine many of the purposes for which tribunals were initially created. I am thinking particularly of tribunals' ability to deal with disputes in ways profoundly different from courts, ways that in turn relate to a very different idea of legal normativity. In trying to make our tribunals look and act like courts, we may be surrendering their primary advantage. It is to that cost that these remarks are directed.

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Why autonomous tribunals?

Why do we create autonomous administrative tribunals?

The decision-making autonomy of tribunals has been justified on a variety of grounds. Most tend to focus upon procedural advantages. Tribunals can decide matters more quickly and less expensively. They can blend a range of dispute settlement strategies: adversarial adjudication, inquisitorial adjudication, fact-finding, mediation. They are arguably more accessible and comprehensible to ordinary citizens for they can avoid the technicality and expectations about parties' autonomy typical of adjudication before courts. And the procedural advantages do not accrue solely to individuals: governments themselves benefit from agencies that can administer mass programs quickly and inexpensively.

Other justifications focus on the substance of tribunals' decision-making. Generally, these emphasise the expertise that tribunals can enjoy in particular domains. Thus, an industrial commission knows the employment context, has some grasp of the web of legal regulation that bears upon that milieu, and can craft appropriate solutions more efficiently than a non-specialist court. Specialisation is valuable, in other words, essentially because the tribunal begins the proceeding with a comprehensive grasp of the law, and has the factual background necessary to a sound appreciation of the evidence.

These justifications are (in many instances) compelling and I do not want to understate their importance. I believe, however, that there is another advantage to tribunals that is often

neglected, precisely because it demands a different understanding of what law is all about. Sometimes tribunals are valuable not just because they apply the law more efficiently or more accurately, but because they are capable of applying a very different kind of law. They are valuable because of the very different conception of legal normativity that they embody.

Normative dimensions of tribunals' activities may vary with the field

Now, I want to make clear that what I am about to say may not be true of all tribunals. My sense is that in this area, differences in the normative dimension of tribunals' activities vary with the field. In some, there may be little claim to a conception of law different from that of courts. And even where there is such a claim, the internal operation of that normative order may be very different depending upon whether one is dealing with, for example, labour negotiations, a securities market, or telecommunication regulation.

One way of conceiving of this different approach is found in the work of the administrative law theorist Harry Arthurs. He emphasises that one of the great merits of administrative tribunals is that they can be responsive to the norms that are generated out of the patterns of social interaction in particular contexts - the "indigenous" norms of the workplace, or those of securities markets, for example. Administrative tribunals should be understood, then, not simply to be applying a law pre-determined by the legislature, but rather to be responding to and elaborating the norms particular to specific domains of regulation. Arthurs himself draws an analogy to Lord Mansfield's use of special juries in the development of the commercial law, in which those actually engaged in trade were actively involved in determining the norms applicable. [3]

This approach therefore places a high premium on the autonomy of robust and independent administrative tribunals, working in a manner almost entirely exempt from judicial oversight, precisely because the tribunals themselves are best placed to understand the specific context in issue and the norms appropriate to it. On this view, the emphasis on administrative tribunals' expertise takes on a whole different – and indeed normative - dimension, because the expertise relates not just to the legal rules, but to the capacity to grasp and articulate the norms emergent in the parties' own interaction.

This kind of picture has been influential in a number of domains (although not without some commentators expressing significant concerns about the "capture" of regulators by the interests they are supposed to be regulating). It has been particularly important in labour relations, but it has also been invoked in such fields as telecommunication regulation or the self-regulation of the professions. I do not wish to claim that it is equally significant, or that it should work in the same way, in all domains. There may be some circumstances in which it is entirely unreal to speak of normative standards emerging from the parties' own interaction. Decision-making in immigration or refugee matters, where there is no substantial interaction, would be a clear example of this. There may also be situations in which one emphatically does not want to defer to the autonomous ordering of the domain itself, but rather wants to impose outcomes in the interest of society as a whole. Nevertheless, in many contexts there is a great deal to be said for a more responsive form of decision-making. And even where one does not want to defer to the parties' own methods of social ordering, one may be wise to intervene in a way that takes full account of those forms of ordering, if only to maximise the chances of regulatory success.

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3 See H.W. Arthurs, '*Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985) at 54-56. See also: H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) *17 Osgoode Hall L.J.* 1; H.W. Arthurs, "Understanding Labour Law: The Debate over 'Industrial Pluralism'" [1985] *Current Legal Problems* 83.

There is a further concern with Arthurs' postulate of a spontaneous normative order that emerges in the workplace or in other contexts: it tends to emphasise commonality within those domains and neglect the extent to which standards of justice in those domains may be highly contested. This contestation needs to be taken into account, but I don't think that it entirely undermines the force of the legal pluralist justification for administrative tribunals. Adjudication inevitably involves the interpretation of norms in specific contexts. In highly contested situations, that elaboration can often benefit from an awareness of the different perspectives of the individuals involved. Otherwise, legal interpretation can slip into contentious and skewed interpretations, often through the simple fact that the decision-maker is oblivious to the interests in cause. In other words, even in situations of contestation, a tribunal may well want to see the dispute from the perspectives of those actually involved, in order to interpret the law in a manner that at least considers and reflects upon the principal concerns of the protagonists.[4]

This brings me to my example of this evening, which I hope will give substance to the fairly abstract position for which I have been arguing.

Case study – industrial tribunals

In the industrial field, tribunals have long been structured in a tripartite manner: they have frequently consisted of members nominated, in equal numbers, by representatives of employees and employers, with the chair of the tribunal (or a cluster of "neutral" members) appointed in a manner designed to achieve impartiality (eg they are appointed in the same manner as superior court judges, appointed by the Chief Justice of the jurisdiction, or appointed on agreement of the employee and employer nominees). Now, if these tribunals are expected to exercise their functions in the manner we commonly associate with courts - essentially applying pre-determined rules to the facts in issue - then their structure appears to be seriously defective. The representatives of labour and capital appear to be, almost by definition, biased. And indeed such criticisms have been current since at least the turn of the century. They remain with us today, and indeed one index of the judicialisation of tribunals has been the extent to which the parties' nominees have been replaced by members all of whom have been appointed by a method designed to ensure "neutrality".

In fact, there was a recent example of precisely this at the University of Sydney, where the Academic Board has just acted to remove the staff member's nominee from committees hearing appeals in promotions applications, replacing that nominee with a member appointed by Academic Board. Why? Precisely because the staff member's nominee was biased in favour of the employee. Now I have little doubt that, prior to the change, the staff member's nominee did have a special affinity for the complainant. But is the change justified? Is the conception of adjudication on which it is premised appropriate, or is it rather the misapplication of a conventional court-centred model onto tribunals that should march by a very different drummer?

In 1891, the NSW Royal Commission on strikes delivered a report that played a key role in the long history of experimentation with conciliation and arbitration in Australian industrial relations. This remarkable Commission grew out of the great Maritime Strike of 1890. Its recommendations were translated (with important qualifications) into the 1892 Trade Disputes Conciliation and Arbitration Act of NSW. This particular law was not terribly

4 For an example of this in practice, see Webber, "The Mediation of Ideology: How Conciliation Boards, Through the Mediation of Particular Disputes, Fashioned a Vision of Labour's Place within Canadian Society" (1989) 7(2) Law in Context 1. See also, Webber, "Living Wage and Living Profit: Wage Determination by Conciliation Boards under the Industrial Disputes Investigation Act, 1907-1925" in W. Wesley Pue and Barry Wright, *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) at 207.

effective, in large measure because it departed in crucial ways from the Commission's recommendations. But it was the first of the measures that evolved into the arbitration regime that has dominated Australian industrial law for so long.

In one of the most insightful discussions of conciliation and arbitration in the literature, the 1891 Commission specifically addressed the question of impartiality. The terms it used are worth quoting. The Commission first noted the issue with refreshing honesty:

> [The representatives of the parties on a conciliation board] will inevitably have the bias of their class, and will feel some responsibility towards their associates for upholding their class interests, and therefore at the Board will act in the mixed capacity of advocates and judges.[5]

The Commission noted, however, that it was important that the result have some degree of acceptance among all parties. It continued:

> It follows that the Arbitration Court cannot consist exclusively of independent judges, but must consist predominantly of persons chosen to represent class interest, the purely judicial function being performed only by the umpire [the chair], who would decide when the votes were equal. It is true that the members of the Court would be chosen on account of their high character, and would be expected to be fair and impartial: still their special function is to see that their class is not wronged.[6]

Note the argument here. The Commission recognises that, by conventional judicial standards, this structure would be defective. But it also notes the need to have workers' views represented in the deliberations of the tribunal. Doesn't this make good sense? Even if one does want to have these tribunals operate as tribunals of justice, rather than mere negotiating committees, doesn't it remain important that they be cognisant of workers' conceptions of what justice demands, not simply the opinions of employers (or of judges who often came from a background that tended to dispose them more towards the employers' view of the world)? When adjudication inevitably involves a measure of adjustment and interpretation to the specific context, doesn't it serve justice, rather than detract from it, if the perspectives of those immediately affected are represented in the deliberations of the tribunal?[7]

In fact, these tribunals' effectiveness tended to depend upon the tension between nominees' two roles: representation of the parties' interests on the one hand, combined with an aspiration to impartiality and justice on the other. Note the combination of both in the passage just quoted: nominees will feel some responsibility for upholding class interests, but they will also be expected to be "fair and impartial". There is a fascinating set of letters between the drafter and administrator of a comparable Canadian regime – William Lyon Mackenzie King, who later became prime minister of Canada - and the chairs of conciliation boards, in which King manifests a remarkable ambivalence, exhorting board members towards a measure of impartiality and detachment, but at the same time recognising how crucial it is to have all interests integrally represented in the process.[8] That kind of interplay is, it seems to me, important in the operation of such tribunals not just for pragmatic reasons, but because the quality of justice they are likely to produce will be different. Those tribunals lose something important – sensitivity to the perspective of employees – if they are restructured to achieve a perfect "neutrality". This inevitably affects the quality of their law.

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5 *Report of the Royal Commission on Strikes* (Sydney, 1891) at 29.

6 Ibid.

7 See, for example, "The Mediation of Ideology", supra, note 4.

8 Charles W. Gordon to W.L.M. King, 25 June 1909, and King to Gordon, 2 July 1909, King papers, National Archives of Canada, MG 26, J 1, vol. 11, 10508-10513.

This may be a specific case, unique to the labour context. But it does point towards one of the hidden costs of the judicialisation of our tribunals, by which I mean their restructuring on the basis of models of process derived uncritically from the judicial paradigm. The law applied by tribunals may well be different law, deriving from very different sources. And it may be all the better for it.

THE IMPACT OF NATIVE TITLE ON DOMESTIC LAW

*John Basten QC**

Paper presented to an AIAL seminar, Sydney, 24 June 1998.

The primary focus of administrative law is the interrelationship between the state and the citizen. Systematic study of this relationship is, however, a relatively modern phenomenon in our legal system. There was very little legal analysis as to the legal relationship between the crown and its new indigenous Australian subjects in 1788 and the decades that followed. My brief historical researches suggest that this Institute was not flourishing in 1800.

The first principle which is relevant to this period is that the courts of this country will neither consider as justiciable arguments concerning the legality of the acquisition of sovereignty over Australia by various acts of the British crown (those being "acts of state") nor will it enforce any undertakings or promises made by the crown as part of the acquisition of sovereignty. (This latter point has arisen in a number of cases concerning the Indian subcontinent, but not in relation to Australia.)

As an aside, it is interesting to note that the colony of South Australia was established, not by an act of crown prerogative but pursuant to a statutory power. One of the interesting (and legally curious) aspects of the settlement of South Australia was a proviso to the Letters Patent establishing the state recognising the prior rights of the native inhabitants and providing that the establishment of the state was not intended to interfere with those rights. The effect of that proviso, together with other instruments relating to the foundation of South Australia, is something which the High Court has been asked to consider in the matter of *Fejo v Northern Territory* in which judgment was reserved on 23 June 1998.[1]

The second aspect of the colonisation of Australia concerns the extent to which the British common law introduced into this country at the time of the acquisition of British sovereignty, recognised and made enforceable the law and custom of the native inhabitants. As we now know, the correct legal understanding of what happened in those days is that the radical title in all the land was acquired by the British crown but it was burdened by native title, which was recognised and enforceable at common law. Native title was not extinguished by the acquisition of sovereignty, a concept which we have now lived with for six years since the decision of the High Court in *Mabo v Queensland [No. 2]* (192) 175 CLR 1. That conclusion immediately gives rise to a question of state power to abrogate native title, either expressly or by way of inconsistent grants of interests in the same land. The question of express abrogation may be briefly dealt with: although it was suggested that native title was extinguished for all time upon the acquisition of the colony of Western Australia by the crown, that argument was rejected by the High Court in *WA v Commonwealth (Native Title Act* case*)* (1994-5) 183 CLR 373. Further, the attempt by the WA Government in 1993 at express abrogation and replacement of native title with a scheme of statutory rights was found to be inconsistent with the Native Title Act. In 1985, a similar attempt by Queensland to extinguish native title in the Torres Strait Islands and other places was found to be invalid because of inconsistency with the Racial Discrimination Act: *Mabo v Queensland* (1988).

Accordingly, the real issue which has needed to be considered is whether the crown had power to grant interests in land inconsistent with native title rights and, what the effect of such grants may have been where they occurred.

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1 Editor's note: This decision has been handed down. See 156 ALR 721.

The general principle accepted in *Mabo [No. 2]* was that native title was peculiarly susceptible to extinguishment by inconsistent grant. Whereas the crown can not make a grant inconsistent with an earlier grant, it could validly make a grant inconsistent with native title. However, the significance of this general proposition of law is doubtful in that there was little alienation of land in Australia which did not take place pursuant to a statutory scheme. Once the various Waste Lands Acts came to be passed, whether by the imperial parliament or the colonial legislatures, they effectively abrogated the power of the crown to alienate land pursuant to its prerogative. The relevant question is then whether statutory powers to grant estates and interests in land were intended to provide for grants which would be burdened by native title, or which would override native title to the extent of any inconsistency. It has been recognised by the High Court in each of the cases dealing with native title that a legislative or executive power to extinguish native title would not be implied in the absence of a plain and clear statutory intention to that effect.

Throughout Australia, statutes providing for land grants were passed at a time when there were two contending views of the circumstances pertaining in the colonies. One view was that the native inhabitants had undoubted prior rights of a proprietary kind in relation to the land. The alternative view was that Australia was uninhabited; either literally or inhabited by people with a sufficiently sophisticated culture to reflect the enjoyment of proprietary rights in any sense recognisable by the common law. With the possible exception of South Australia, which may have resolved the tension in favour of the view now accepted by the High Court, the legal issue remained unresolved and the practical effects were the parcel by parcel dispossession of the native title holders.

This process was legally constrained by two later events, of which the latter was more important than the former. The first was the imposition on the Commonwealth of a requirement that acquisition of rights in land only occurs where just terms compensation was provided, in accordance with section 51(31) of the constitution. That restraint was largely inconsequential for present purposes as the High Court has held that it only applies to land in a state, where Commonwealth land acquisitions have been relatively minor. The second and highly significant event was the commencement on 31 October 1975 of the Racial Discrimination Act. Section 10 of that Act clothed native title holders with similar protection in relation to their rights as the protections enjoyed by those who held title under statutory grants. The parcel by parcel dispossession now cannot occur without a compulsory acquisition of outstanding interests by the crown.

Once common law recognition of native title was established as part of the law of Australia in June 1922, it became necessary to consider the validity of grants made in possible contravention of either the constitutional protection or the Racial Discrimination Act protection. It also became necessary to establish a statutory scheme which would allow for the formal recognition of native title where it continued to exist. That statutory scheme is to be found in the Native Title Act. That Act also provides a code in relation to the protection and possible extinguishment of native title and provides a level of protection for possible native title in circumstances where the existence or otherwise of that title has not been judicially determined or accepted by government.

The Native Title Act itself, much criticised when first enacted under the Keating government, has now been accorded a level of respect for the relative simplicity with which it dealt with a myriad of complex land tenure issues across the country. However, it is not without its flaws and the present calls for amendments to the legislation are to some extent irresistible.

The weaknesses of the Act have been highlighted by two circumstances, each of which was predictable but difficult to avoid. First, whilst the Act establishes a set of principles with a remarkable level of clarity, those principles have to be applied to complex and differing schemes of land management and ownership across the country. Difficulties of application

are, accordingly, inevitable. Secondly, the Act provides, and was intended to provide, a major constraint on development of land where native title might still exist. Accordingly, enforcement of the Act has put native title claimants into conflict with large and powerful sectors of the Australian economy. Loopholes and weaknesses have inevitably been exposed and exploited.

One of the great strengths of the Act was the establishment of an administrative tribunal as a mechanism for the initial consideration and mediation of claims, with a view to settlement outside the judicial process. As to that role, there is little I need to say for present purposes. More significantly for my purposes, the fact of registration of a claim with the registrar gives the registered native title claimant a status and valuable right to have a say in relation to developments on claimed land, in certain circumstances. The two categories of case which became the subject of the right to negotiate provisions were the grant of mining leases and the compulsory acquisition of land for purposes involving the conferral of interests on non-government parties. The importance of those provisions was recognised by the High Court in *North Ganalanja Corporation v Queensland (the Waanyi case)* (1995-6) 185 CLR 595. The right to negotiate provisions were found by the Court to impose a constraint on state and territory power to deal with land inconsistently with the scheme of the Act. The importance of those constraints were such that the Court found it inappropriate to determine whether native title might have been extinguished as a matter of fact in circumstances where it held that a claim should properly have been registered.

The purpose of the Act seems to have been that a registered claim precluded a state or territory government from determining whether or not the claim was good. A procedure, by way of unopposed non-claimant application, could be invoked, but, if after notice of a non-claimant application, claimants lodged and obtained acceptance of their own application, the power to act on the basis that there was no native title in relation to the land appeared to be removed. Nevertheless, *Fejo* is a case in which the Northern Territory government sought to make grants of interests in land in circumstances where there was an accepted native title claim. Whether the government has power to do so, in apparent contravention of the scheme of the Act, is a matter which is presently reserved before the High Court.

The importance of the administrative nature of the scheme needs to be emphasised. It appears from the *Waanyi* case that the status acquired by a registered native title claimant is sufficient to entitle the claimant to obtain an injunction to stop the grant of a mining lease or a compulsory acquisition in circumstances where the right to negotiate procedures are not being followed. The basis for a grant of relief would not be the existence or otherwise of native title but rather the existence of a registered claim. The issue before the High Court at the present time is whether a government can avoid that result simply by making a grant without purporting to acquire native title, which may not exist. If it can so act, then the registered claimant would have to establish an arguable case of native title and not merely the fact of a registered claim. On the other hand, in relation to a mining lease, it would be sufficient to rely upon a registered claim. This would, in my view, be a curious result and probably not one intended by the drafters of the Act.

This issue, however, highlights a weakness of the Act (one of the few) which has been exploited by native title claimants. The weakness is that there is no real constraint upon the right of a person to register a claim and thereby obtain the statutory protections. It is, I think, common ground between responsible parties from industry, government and Aboriginal organisations that an appropriate threshold test needs to be imposed to avoid overlapping claims and claims which have no real prospect of success. On the other hand, the need to have an administrative process which will protect land from inappropriate development pending determination of native title claims is one of the few major benefits given by the Native Title Act to indigenous people and should be maintained as a right of universal application across the country.

In this paper, I have done little more than identify the areas of conflict between native title and state grants of interest in land. It may be that I have covered nothing that you do not already know, nevertheless, the fact that so many of these issues remain controversial and lie outside the scope of current judicial determinations, suggests that they will remain important topics for consideration for some little time to come.

For example, there are a number of unresolved issues in relation to the role of the Registrar and the registration of claims. Is the Registrar *functus officio* once details are entered on the register pursuant to section 190 or section 66 of the Act, or can details be removed? Is there any obligation on a native title claimant to advise the Registrar if a belief that native title has not been extinguished, sworn to in an affidavit required to accompany the affidavit, is changed because of information later acquired? Where an application contains details, some only of which the Registrar thinks it appropriate to put on the register, can the details be so restricted or can the Registrar request amendment of the application? These and other questions remain unresolved, although proposed amendments to the Act may assist in some cases.

BOOK REVIEW

Reviewed by David Creed[*]

Delegated Legislation in Australia, 2nd edn, by Dennis Pearce and Stephen Argument, Butterworths, rrp $95.00

There has always been discussion about the most appropriate role for the Senate, Australia's house of review and states' house. This discussion has continued after the 3 October 1998 general elections, which, like other elections in recent years, gave one political group a handy majority in the House of Representatives but did not deliver a similar result in the Senate. This led Senator Helen Coonan and others to put forward proposals which would increase the likelihood of a workable Senate majority for one or other of the two major political groups. There has also been debate about electoral mandates, the nature of parliamentary consideration of bills implementing the government's electoral platform and of the appropriate relationship in a representative democracy between the executive and an upper house. This debate is characteristic of a healthy body politic, but it would be a pity if it did not include recognition of an important parliamentary function, which is to review and scrutinise delegated legislation made by the executive and the judiciary. This excellent new edition of *Delegated Legislation* by Professor Dennis Pearce and Mr Stephen Argument is therefore particularly welcome.

There is a relatively small number of books which are basic reading for all those interested in public affairs in Australia and this is one of them. First published in 1977 and with no new edition until now, this may not be what Hamlet had in mind when he railed against the law's delay, but the book is certainly a pleasure postponed. Nevertheless it is no less welcome and valuable on that account.

The book is divided into two basic parts. The first, written by Stephen Argument, a former Senate officer, gives a general introduction to delegated legislation and deals with making, publication, commencement and parliamentary review. The second and far larger part, written by Professor Pearce, addresses judicial review of delegated legislation.

The best part of Mr Argument's contribution is the Introduction, which in 19 pages sets out all of the main concepts and issues affecting delegated legislation. This is a concise but flowing summary which should be required reading not only for law students but also for students of political science and public administration. It should also be a compulsory element in all continuing education courses for legal practitioners.

The bulk of Mr Argument's work is nine chapters, one for each of the commonwealth, states and territories, each chapter having the same title and discussing the procedural and parliamentary aspects of delegated legislation, particularly the operation of legislative scrutiny committees. This is a valuable reference for each of those jurisdictions, but of necessity involves considerable subdivision. For instance, the chapters on South Australia and Tasmania are each seven pages long with 19 headings and subheadings, while that on the ACT is six pages long with 19 headings. This means that many of the headings are dealt with by only a few lines. One wag commented that these chapters have more classifications than the Karma Sutra. It may have been preferable to arrange these chapters on a thematic basis rather than on political borders, but this is a quibble. Also, these chapters are drawn together by a chapter of concluding comments.

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Mr Argument's chapters on state and territory parliamentary review of delegated legislation are, however, especially useful as a salutary reminder to those of us based in the national capital that vigorous parliamentary activity exists outside Canberra and that ordinary Australians may be affected more directly by state regulations than by Commonwealth. The Chairs and members of the state and territory committees have also tended to be colourful characters, in the best meaning of that expression, who often have close contact with users of delegated legislation. This direct contact is denied the Senate committees, due to geographic factors and the national effect of Commonwealth delegated legislation. This has resulted in somewhat different cultures in the Senate committees on the one hand and the state and territories on the other, which is not to say that one is more or less effective, but simply that they may operate differently. All the Committees, however, share a common core commitment to active scrutiny of executive actions. The work of the delegated legislation scrutiny committees refutes any suggestion that parliaments in Australia are mere rubber stamps for the actions of the executive. It should be emphasised that such scrutiny is not limited to the upper houses of parliaments, although parliamentary review in unicameral legislatures presents particular challenges. Queensland, the third largest state, is unicameral yet a succession of Chairs of its scrutiny committee from both sides of politics has actively reviewed and questioned executive law making.

One criticism of Mr Argument's work is that he appears to be under the impression that Commonwealth delegated legislation is not accompanied by Regulation Impact Statements, which he regards as a bad thing. In fact, there are quite detailed RIS requirements for legislation affecting business. This legislation includes bills, delegated legislation, treaties and quasi-legislation. These requirements, imposed by administrative means, have been in place for some years and were tightened in 1997. Although limited to legislation affecting business, in practice this includes most important delegated legislation. The Senate Regulations and Ordinances Committee scrutinises these in the usual way and has found many instances of matters in RIS about which it has written to ministers. Also, in relation to staged repeal Mr Argument appears to be unaware of the Legislative Review Program for all legislation restricting competition or affecting business, which has as one of its objects the repeal of unnecessary legislation. The Commonwealth RIS requirements and the LRP are both supervised by the Office of Regulation Review of the Productivity Commission, which recently presented its first annual report on regulation review. Following this Report the Committee arranged to meet with the Chairman of the Productivity Commission to discuss matters of common interest. In the last paragraph of his concluding chapter Mr Argument singles out RIS and staged repeal as areas where the Commonwealth is "very much behind" several other jurisdictions. This conclusion, however, is not correct. There is more than one way to skin the RIS and staged repeal cats and at the Commonwealth level this has been done by administrative direction rather than by Act.

Little need be said about Professor Pearce's analysis of judicial review of delegated legislation, which takes up the great bulk of the book. These chapters are a comprehensive survey of all aspects of the topic, written with clarity and authority. They are free of jargon and unnecessary technical expressions and as such will interest not only lawyers but also parliamentarians and administrators. The facts of the cases cited also present a fascinating panorama of Australian public life.

Of course there is room for discussion about which individual cases should be included. For instance, Professor Pearce cites but gives no details of *Thomas Borthwick and Sons (Pacific) Ltd v. Kerin* (1989) 87 ALR 527, where the Minister, relying on a most restrictive interpretation of parliamentary power, argued that disallowance by the Senate of three Orders was invalid. The Federal Court, however, preferred a more expansive interpretation, of which the Senate has subsequently taken full advantage. Also, the book does not refer to comments by Mason C.J. in *Australian Capital Television Pty. Ltd v. The Commonwealth*

(1992) 177 CLR 106 at 147, which would be endorsed by every legislative scrutiny committee. The Chief Justice, who wrote the Foreword to the first edition of this book, said:

> In my view, it is impossible to justify the validity of a regime which restricts freedom of communication in relation to the electoral process when the operation of the regime depends upon the making of regulations at the discretion of the Executive government according to unspecified criteria.

Again, however, these are mere quibbles.

The book is a splendid tribute to the authors on a subject which should be better known. In some ways delegated legislation reflects the story of Australia. Professor Pearce reminds us that Governor Phillip read out delegated legislation when proclaiming the establishment of the first colony on our shores. On a more contemporary note, this review is being written amid the national catastrophe of the second cricket test in Kingston, the television broadcast of which was provided for by delegated legislation made by the Minister on 25 February 1999. Unfortunately, however, the drafting style of the 1999 instrument is in sad contrast to the regal elegance of Governor Phillip's proclamation.