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THE NATIVE TITLE ACT IN PRACTICE

*Pamela O'Neil**

Introduction

The *Native Title Act 1993* ("the Act") was designed to deal with the major legal and economic issues raised by common law recognition of native title. Opposition to the recognition of native title in Australia has manifested itself through criticism of the legislation. Among the criticisms were that the procedures provided for determination of native title and their implementation by the National Native Title Tribunal ("the Tribunal") established under the Act were too slow, leading to uncertainty and even hardship for pastoralists, miners and others with interests in the land over which claims to native title were made. These criticisms were loudest prior to the passage of amendments to the Act in September 1998. This article examines the factors contributing to the drawn out character of native title dealings by reference to the favourable determinations of native title that have been made since 1994. It concludes that while the number of determinations that native title exists will continue to grow slowly, there will be an increased use of agreements between native title claimants and other parties about the use and management of land.

The Act was passed following the 1992 decision of the High Court in *Mabo v State of Queensland*[1] that rights and interests in land under indigenous law are recognised under Australian common law. Those native title rights and interests exist today where an Aboriginal or Torres Strait Islander group has a continuing connection with the land in question and has rights and interests in that land under indigenous law and custom.[2] Native title is subject to existing valid laws. It has been extinguished by actions of the Crown since colonisation which indicated clear intention to do so and, once extinguished, cannot be revived.[3] But since the passage of the *Racial Discrimination Act 1975* (Cth) native title cannot be dealt with under State or Territory law in a way which would discriminate between indigenous and non-indigenous property holders.[4]

The Act provides a process by which native title rights can be established and compensation determined for loss or impairment of native title rights and interests. It provides for the validation of past acts which are invalid because of the existence of native title and also establishes a regime for determinations to be made as to whether future grants of interests can be made or acts done over native title land and waters. Certain future acts attract for the native title holders or claimants a 'right to negotiate' with both the government proposing to make the grant and the beneficiary of the proposed grant. Emphasis is placed in the Act on the use of negotiation, conciliation or mediation as the preferred methods of resolving native title claims and associated matters.

In 1996, the possibility of co-existence of native title with existing pastoral leases was recognised in *Wik Peoples v State of Queensland*.[5] This led, in part, to the amendment of the Act in September 1998.[6] It is now recognised that native title may exist over vacant crown land, some

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crown leases such as pastoral leases, national parks, public reserves, land held by government agencies, land held in trust for aboriginal communities, lakes, rivers, creeks, subterranean waters, beaches and foreshores, seas and reefs, and other places where extinguishment has not occurred.[7]

Impact of the Native Title Act

Over 700 native title claims have been placed on the Register of Native Title Claims established under the Act since its commencement on 1 January 1994. Many of the claims on the Register of Native Title Claims have been lodged in response to notices issued by State Governments announcing an intention to make grants of interests in land or to allow actions over native title land or land that could, in future, be subject to native title. These are known as 'future acts' They are sometimes acquisitions of land for the benefit of third parties, as is illustrated by the *Dunghutti* case which is discussed below,[8] but are more frequently the issue of mining or mineral exploration licences. The Act requires a government to issue a notice of its intention to do a 'future act'. Under the Act before it was amended, those who had become registered native title claimants within a certain period of the giving of the notice[9] acquired negotiation rights in relation to the proposed action. In practice some States did not issue 'future act' notices in relation to proposed actions on pastoral lease land, apparently on the assumption that pastoral leases extinguished native title. This assumption having been shown by the *Wik* judgment to be incorrect, provisions to validate those actions were included in the amendments to the Act. They are defined as 'intermediate period acts', the period being from the commencement of the Act on 1 January 1994 to the handing down of the High Court's *Wik* judgment on 23 December 1996.

When these mining related claims, mostly in Western Australia and usually over very small areas of land, are put to one side, the number of country claims is much smaller. For example, as at 30 September 1998 in Victoria there were 31 claims on the Register of Native Title Claims only 8 of which cover significant areas of land.[10]

Of the more than 700 claims lodged, in only four had native title been favourably determined at 30 September 1998 - Dunghutti in New South Wales, Hopevale[11] and Western Yalangi[12] in Queensland and Croker Island[13] in the Northern Territory. A further favourable determination, in the Miriuwung and Gajerrong case,[14] was made within two months of the amendments coming into effect. An examination of these quite different cases illustrates the application of many of the provisions of the Act, the work of the Tribunal as a mediator and the role of the Federal Court. It also provides some reasons for the apparently slow progress in finalising claims and demonstrates the desirability of reaching agreements that recognise the land management implications of a native title determination.

Native title mediation

The National Native Title Tribunal functions primarily as a mediation service, despite its name and structure, which included having a judge of the Federal Court as its first President and having other judicial appointees among its membership. These characteristics were recognised as leading to a misapprehension among many, particularly in the Tribunal's early days, that the Tribunal should be determining native title claims and making binding decisions. Although the Act did originally provide[15] for the Tribunal to make a determination of native title where parties reached agreement after mediation, the effect of the decision in *Brandy v Human Rights and Equal Opportunity Commission*[16] was that all native title

determinations must be made by the Federal Court, whether or not agreement has been reached. Amendments to reflect that reality came into effect on 30 September 1998. It is only in relation to 'future acts' that the Tribunal may exercise a determinative function. The Tribunal's 'future act' determinations are published and accessible on its website and are sometimes reported elsewhere.

An interesting element of the amendments allows the appointment by the President of the Tribunal of consultant mediators to work on native title claims. The role of the consultants will be almost indistinguishable from that of the members of the Tribunal when they mediate native title claims.[17] Members retain the statutory duty to undertake inquiries, either in relation to proposed future acts or otherwise,[18] but in the first years of the Tribunal's life conducting inquiries has not been the dominant role of Tribunal members. It will be interesting to see whether this change affects the way the Tribunal mediates claims in the future.

The amendments did not alter the Tribunal's objective in section 109(1) 'of carrying out its functions in a fair, just, economical, informal and prompt way.' This objective is similar to that of several Commonwealth administrative tribunals such as the Immigration Review Tribunal[19] and the Social Security Appeals Tribunal.[20] These are determinative Tribunals which consider individual claims for entitlements under legislation, and they finalise thousands of cases every year.[21] The use of similar language in the Native Title Act may reinforce the tendency for observers to have unrealistic expectations of speedy outcomes from the native title mediation process.

The Tribunal is required to identify and notify personally all those who have a proprietary interest in the claimed land. In practice the Tribunal notifies a wide range of interest holders including pastoral lessees, holders of mining tenements, fishing licences, bee-keepers' licences and those with rights to cut timber or use water. Only State Governments know the identity of proprietary interest holders in land. Even then this information is often not in any one register or place. In Victoria for example, it can take up to two years to get from the State Government tenure information to allow notifications of claims to proceed. The Wotjobaluk claim over 6,200 sq km in western Victoria was accepted by the Tribunal in October 1996 but notification could not commence until the middle of 1998. In that case some thousands of people have been notified, resulting in about 600 responses from people seeking to become parties to a mediation. In order to surmount this hurdle the Tribunal has entered into financial agreements with State Governments to provide the tenure information so that interest holders may be notified as required.

Mediation between hundreds of people is quite different from mediation in most other fields.[22] The Tribunal has had to deal with other factors, manifest to various degrees in different claims, such as pre-existing tensions between parties, power imbalances, lack of understanding and/or acceptance of the concept of native title, ignorance of the mediation process, and claims sometimes located in remote country where physical access is affected by seasonal conditions. The Tribunal developed an approach which it identified as 'interest based mediation'[23] and its mediation procedures, initially developed in 1994, were revised in 1996 following consultations with stakeholders.[24]

Native Title process: Case Studies

Case Study No.1 - Dunghutti

The claim of the Dunghutti people to 12.4 hectares of land near Crescent Head on the north coast of NSW was made in 1994[25] in the context of the planning and development of a subdivision to provide

additional residential land to the general community. The subdivision had been proposed prior to the commencement of the Act on 1 January 1994, but was only partly developed. A portion of the land proposed for subdivision remained crown land in the control of the NSW Government. Following the commencement of the Act, the NSW Government realised that it needed to deal with the possibility that native title existed on the land before it was relinquished for subdivision. The Government consequently lodged a non-claimant application with the Tribunal. A non-claimant application is made other than by persons claiming to hold native title (s.61). This form of application is usually made when a government, a mining company or other body wants to ascertain whether or not native title exists in an area. The application, having been lodged, was publicly notified as required by the Act and received a response. A claim for native title was made on behalf of the Dunghutti people of the Macleay Valley, with the help of the NSW Aboriginal Land Council's Native Title Unit. If no claim had been made within two months, the NSW Government would have been free to proceed with the alienation of the land, although compensation may have been payable if a subsequent claim of native title had been successful (s.24).

The claimant application, having been accepted by the Registrar (s.63), was also notified to all people with an interest in the land. Fortunately at Crescent Head there were fewer parties than in many other cases - the applicants, the NSW Aboriginal Land Council, the NSW State Government, the Shire Council and 23 residential land owners who shared a common boundary with the claimed land. The Tribunal was then responsible for mediating between the parties, but before this had advanced the Government turned to another provision of the Act to allow the sub-division to proceed more quickly. It lodged a notice of intention to do a future act to which the 'right to negotiate' applies (s.29). The proposed future act was acquisition by the Government of native title in the unsold allotments of land in the first part of the subdivision, covering about one third of the claimed area. This activated a different, more contained set of negotiations under the Act, in which only the native title claimants and the State Government could be parties.

The Dunghutti claimants were invited by the State to present evidence of their connection to the country they claimed and to estimate compensation which would be payable if the native title was acquired. Native title, usually thought of as a communal title, can be compulsorily acquired by a government, in which case compensation is payable. It can also be relinquished to government by agreement but it cannot otherwise be bought or sold. The documentation of the claimants' connection took six months to complete and included genealogies showing the claimants as the descendants of the original inhabitants of the Macleay Valley, together with anthropological, historical and linguistic evidence demonstrating their continuing connection over several generations. Legal issues were also addressed, for example whether an annual lease over part of the area granted between 1925 and 1928, or certain public works, had extinguished native title. At the end of this process, the State Government formed the view that the submission provided 'credible evidence' for the purpose of a settlement.

The terms of the settlement still took some time to work out and it covered both native title in the land to be acquired and in the remaining portion of the subdivision. Native title rights are property rights and, as with other forms of property right, financial compensation may be paid when those rights and interests are extinguished. Valuation of native title for the purposes of compensation is a difficult and relatively undeveloped field in Australia. The Tribunal has in two 'future

act' determinations expressed reservations about the use of the freehold value of the land as the basis of determining compensation for loss of native title.[26] In the Dunghutti claim compensation appears to have been awarded on the basis of market value plus an additional factor for special attachment.[27] A Deed of Agreement was signed recognising the Dunghutti people as the traditional owners of the land at Crescent Head, whilst guaranteeing future development. The Dunghutti were awarded compensation for the compulsory acquisition of native title in part of the land and they agreed to transfer their native title rights in the other part to the State in return for future compensation as the land is sold.[28] The money is to be held by a prescribed body corporate established in accordance with the requirements of Part 2, Division 6 of the Act.

This agreement, arising as it did from the future act compulsory acquisition proposal rather than directly from the earlier claim to native title, had been reached without the involvement of most of those who had become parties to the mediation of the claim. At each earlier stage of the process the Tribunal had conducted public education programs and held sometimes lively meetings with the residents to inform them about the nature of native title and the process of mediation. It became necessary at the final stage for those other parties to be informed of the agreement reached by the claimant and Government. Thus the Tribunal needed to conduct further discussions with the residential land owners who had been joined as parties to the original native title claim. In April 1997, a consent determination of native title was sought and granted in the Federal Court and a few hours later the Dunghutti people's native title rights and interests in the land were compulsorily acquired by the State with the consent of the native title holders.

Case Study No.2 - Hopevale

A claim to native title over 110,000 hectares of land and waters near Hopevale on the eastern Cape York Peninsula in Queensland was lodged by the Warra people in 1996. Like the Dunghutti claim, it involved coastal people and resulted in a consent determination. Otherwise it could not have been more different. The determination covered land which was the subject of a grant in 1986 by the Queensland Government to the Hopevale Aboriginal Council to be held in trust for the benefit of Aboriginal inhabitants.

Hopevale is the site of a mission established in 1887 for Aboriginal people and, as is common in such places, many of those who now live there are descendants not of the traditional owners but of people who were moved there and whose traditional country lies elsewhere. Such people are usually referred to as having an 'historical' as opposed to a 'traditional' connection with the country. The native title claim was made by thirteen clans with 'traditional' connection to the country. In pursuing their claim to hold native title over the Hopevale land, the claimants first negotiated with the other Aboriginal residents of Hopevale who have a 'historical' connection, but who were not claimants because they lacked the necessary 'traditional' connection. Negotiations with a range of other interest holders followed.

In granting the determination in December 1997, the Federal Court responded to a Deed of Agreement entered into between thirteen Aboriginal clans, the State of Queensland, the Hopevale Aboriginal Council, Cape Flattery Silica Mines Pty Ltd, Cook Shire Council, Far North Queensland Electricity Corporation, Telstra Corporation Ltd, Queensland Commercial Fishermen's Organisation, the Australian Maritime Safety Authority, the Cape York Land Council Aboriginal Corporation and one individual, Gordon

Charlie. The determination identifies the native title holders and their native title rights and interests as required by the Act, including the right of access to and use of the natural resources, the right to determine the access of others to the land, and to discharge cultural, spiritual, and customary rights, duties and obligations in relation to the land, for example through the preservation of sites of significance and the maintenance of beliefs through ceremony. The document further recognises the limitations on the exercise of those rights and interests imposed by valid State and Commonwealth laws generally and in particular by the lawful exercise of powers and rights conferred on the Hopevale Aboriginal Council, on public authorities responsible for infrastructure or public works on the native title land, on the holders of registered leases within the area, and by certain other agreements annexed to the Determination. It foreshadows the establishment of prescribed bodies corporate as required by the Act. It also recognises the rights of members of other Aboriginal clan groups and of Aboriginal historical residents of Hopevale to travel over, hunt, camp, fish, and gather in accordance with their traditional laws and customs.

The determination and supporting documentation, including separate Deeds of Agreement between the native title parties and some other parties, have been compiled by the Tribunal into one document.[29] In the Foreword to the document, the then President of the Tribunal, Justice Robert French, wrote:

> The Hopevale Determination is Australia's third entry onto the National Native Title Register. It is the result of 16 months of intensive mediation involving the Aboriginal peoples of Hopevale themselves, and other non-indigenous interests including the State of Queensland, and Cape Flattery Silica Mines. The participants are to be congratulated for their constructive contributions during this time.
>
> The unity established within the claimant group was made possible through agreements signed in February 1996 and November 1996. These agreements established mechanisms for the management of issues between the area's traditional owners and indigenous people with historical affiliation with Hopevale. Agreements between the applicants and the non-indigenous interests then followed.
>
> The State of Queensland was a significant player in the final settlement of native title at Hopevale. The efforts of the State's negotiators and the genuine goodwill of other non-indigenous interests resulted in this determination of native title.
>
> The determination and associated agreements will stand as a guide and helpful precedent in other cases yet to be resolved. Their most important message is that co-existence of interests can be achieved.

Case Study No.3 - Yalangi

Hopevale was the first consent determination in Queensland, but within a year it was followed by another. The Western Yalangi claim, lodged in May 1995, covered 25,000 hectares north west of Cairns. Although it was referred to the Federal Court in October 1996 after many months of apparently unsuccessful mediation, negotiations were later resumed leading to an agreement which was submitted to the Federal Court, resulting in a consent determination of native title. Yalangi is notable for being the first inland claim to achieve entry on the National Native Title Register established under the Act. The earlier entries cover coastal areas or islands. The Western Yalangi determination illustrates the possibility of identifying the native title holders by descent group as opposed to the clan group method adopted in Hopevale. The identification of the holders of native title rights and interests is a live issue. In *Ward v Western Australia*[30] Lee J said that in all but exceptional cases, native title will be a communal title held by the community and not separate and

discrete vestings of native title in sub-groups such as 'estate groups'.

Case Study No.4 - Croker Island

Although the Meriam people whose native title rights and interests were recognised in the *Mabo* judgement live on the Murray Islands surrounded by sea, the extent to which native title may exist in offshore waters had not been judicially determined until the Croker Island case. Croker Island lies off the coast of the Northern Territory. Unlike Dunghutti and Hopevale, this was not a consent determination but was referred to the Federal Court by the Tribunal on the basis that mediation had not been successful. The Croker Island claim covered 3,257.83 sq km of waters. It was lodged at the end of 1994 and referred to the Court in May 1996. The island itself is identified as Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976 (C'th)* and it was not included in the application. In reality the case had always been seen, at least by the major parties, as a test case on the extent to which native title may exist in offshore waters, and as such not appropriate for mediation.

In *Yarmirr v Northern Territory*[31] the Federal Court had to consider native title in respect of the sea and sea-bed and sub-soil under the sea-bed and with respect to waters beyond the territorial limit of Australia. It took evidence from the claimants about their traditional laws and customs concerning the waters and also considered whether extinguishment of any rights had occurred through legislative or administrative acts which apply, or have applied in the past, to the subject area. The claim was resisted by the Commonwealth and Northern Territory Governments and others parties with fishing and pearling interests.

In its July 1998 decision, the Court found that members of five clans have native title rights and interests in relation to the seas and sea bed but not to the subsoil or resources. But their native title rights and interests must yield to, if inconsistent with, all rights and interests which exist pursuant to valid laws of the Commonwealth and the Northern Territory. The claimants' non-exclusive communal native title right allows free access to the waters for the purposes of travel, fishing, hunting and gathering for personal needs and in order to observe traditional laws and customs, to visit places of cultural and spiritual importance and to safeguard their spiritual and cultural knowledge.

Yarmirr v Northern Territory has been appealed. Depending on the outcome of that appeal, the case may provide guidance in the mediation a number of other claims which include off shore waters. Similarly, it had been hoped that the outcome of the long running *Yorta Yorta* case would clarify the position of native title rights and interests in respect of inland waters. That hope was not realised. The claim by the Yorta Yorta people to 1,130 sq km in Victoria and New South Wales in the region of the Barmah Forest straddled the States' borders and included portion of the Murray River and other waterways. The Yorta Yorta claim was referred to the Federal Court by the Tribunal in May 1995. In a judgment handed down on 18 December 1998 Justice Olney determined that native title does not exist in the land and waters claimed. He wrote of the claimants: 'The tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their customs'.[32] That judgment has been appealed.

Case Study No.5 – Miriuwung and Gajerrong

Ben Ward and Ors v the State of Western Australia and Ors took native title determination to a new plane. The claim covered 7,800 sq km in the Kimberley region of Western Australia, extending into the Northern Territory. It had been

lodged with the Tribunal on 6 April 1994 and was referred to the Federal Court on 7 February 1995 after a lack of progress in mediation. There were three groups of applicants and over 100 respondents as well as the State and Territory Governments and various other government parties.

In considering the claims, the Court examined the historical, linguistic, anthropological and genealogical evidence and the 'primary' evidence of the applicants concerning the observance of traditional laws, customs and practices which maintained connection with the land and with those who occupied the land before and after sovereignty. It looked at whether extinguishment of native title had since occurred over the land claimed by reference to the legislative basis on which other interests in the land had been granted and the character of the leases which had been issued.

On 24 November 1998, the Court determined that common law native title is held by the Miriuwung and Gajerrong people and also by the Balangarra peoples in respect of Boorroonoong (Lacrosse Island), off the Western Australian coast. Further, it determined that the Miriuwong and Gajerrong peoples hold native title over large areas including a national park (Keep River National Park), land flooded to create artificial lakes (Lake Argyle and Lake Kunnunurra), land covered by pastoral leases, mining leases (including the Argyle and Normandy diamond mining leases) and some other leases, and various reserves established for particular purposes such as conservation, recreation, irrigation and grazing, particularly where the land was used only partially or temporarily for its dedicated purpose. It confirmed that native title had been extinguished over places such as properly dedicated roads or streets and freehold grants. It further found that native title had been extinguished over that part of a pastoral lease on which a homestead had been built and where public works of a permanent nature such as a power station had been constructed.

As the exercise of native title rights to possess, occupy, use and enjoy the land by the common law native title holders is constrained by the vesting of concurrent rights in other parties in the same land or water, Lee J observed:

> How concurrent rights are to be exercised in a practical way in respect of the determination area must be resolved by negotiation between the parties concerned. It may be desirable that the parties be assisted in that endeavour by mediation, a course contemplated, perhaps, by ss.86B(5), 86A(1)(b)(iv) of the Act.[33]

An appeal had been lodged against the decision.

Agreements

Hopevale was the first claim to have been registered following negotiations leading to agreement as to the future management of land over which native title exists. As Justice French suggested, it was seen as a signpost to the future. A court can determine that native title exists, but its role does not extend to determining the arrangement whereby that land is to be managed subsequently. For example, issues which need to be worked out in relation to co-existing rights over pastoral lease land include arrangements for access, water use, site protection and liability for personal injury or damage.[34] For those closely involved with native title, it is the ongoing relationship between the exercise of native title rights and of other rights and interests which is seen as the central issue.

In two recent Federal Court cases, the Court has commented favourably on the use of negotiation for dealing with native title matters. As well as the comments of Justice Lee quoted above, there are also relevant comments by Justice Olney in the *Yorta Yorta* judgment. Although that case

produced a quite different outcome, Justice Olney nevertheless noted:

> The time and expense expended in the preparation and presentation of large parts of the evidence has proved to be unproductive, a circumstance which calls into question the suitability of the processes of adversary litigation for the purpose of determining matters relating to native title.[35]

The history in *Delgamuuk v British Columbia* demonstrates the desirability of agreement. That claim, over 58,000 square kilometres of the Canadian Province of British Columbia, progressed through a trial in the Supreme Court,[36] to the Court of Appeal of that Province[37] and thence to a full appeal in the Supreme Court of Canada. The process took 11 years, but resulted in a recognition under Canadian common law of a form of native title derived from occupation of the land prior to European settlement, and which is unalienable except by surrender to the Crown. The Supreme Court then remitted the matter, with a plea to the parties to negotiate, expressed by Lamer CJ as follows:

> Finally, this litigation has been long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed in litigation and to settle their dispute through the courts.....Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgements of this Court, that we will achieve the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.....[38]

Many agreements which allow negotiations to proceed and which may one day form the basis of a native title determination have been reached or are being discussed under the oversight of the Tribunal. An audit of agreements by the Tribunal indicated that at 10 September 1998 there had been over 1200 agreements[39] struck between native title parties and others, said to indicate a growing culture of mediation and negotiation. While the majority of the agreements were mining related, several hundred were agreements leading to native title. An important example is a framework agreement between the Spinifex people and the Western Australian Government. Their claim relates to 50,000 square kilometres of desert country abutting the South Australian border south east of Warburton. After two years of mediation by the Tribunal, the agreement signed by the Western Australian Premier anticipates further negotiations on a permanent and secure form of land tenure for the Aboriginal claimants and their involvement in environmental management and economic development.[40]

Other well known agreements involve local governments. The agreement between native title claimants in the Broome area in Western Australia and the Shire of Broome is one example, the Redland/Quandamooka Agreement between the Redland Shire Council in Queensland and the Quandamooka Land Council Aboriginal Corporation, covering North Stradbroke Island and the surrounding seas, is another. As land use and management is a major task of local governments throughout Australia, much work has been done by the Australian Local Government Association (AGLA) to provide guidance to their members in negotiating agreements with Aboriginal residents.[41]

The amended Act provides an improved capacity for parties to enter into Indigenous Land Use Agreements (ILUAs).[42] The original Act provided for agreements to be reached between native title holders and the Commonwealth or a State or Territory. While a worthy concept, it proved in practice to be of limited use. The amended Act expands the provisions into a new scheme for setting up binding ILUAs. There are now three types of such agreements possible under the Act, differentiated by whether there has been

an approved determination of native title over the whole of the area covered by the agreement, the identity of the parties to the agreement, the effect of the agreement and the registration requirements.[43] A Register of ILUAs is established and a registered ILUA has effect as if it were a contract among the parties. The Register is maintained by the National Native Title Registrar, but the function may be delegated to a State body or office holder.

The possibility that an ILUA Register might be maintained by a State authority is but one small example of the potentially larger role for the States and Territories under the amended Act. The original Act allowed the States to establish parallel regimes for the arbitration of future act matters. Only South Australia did so, placing the responsibility on its Environment and Resources Development Court.[44] From 30 September 1998 equivalent state bodies recognised by the amended Act may exercise wider powers.

Conclusion

Regardless of the manner in which a final outcome has been reached in those places now on the National Native Title Register, they had in common relatively well represented and cohesive applicant groups. Even so, the Dunghutti claim took over two years and Hopevale about one and a half years of intensive mediation. The Croker Island claim was with the Tribunal and then the Court for about three and a half years in all while Yalangi also took about three years. The Miriuwung and Gajerrong claim, with even more parties involved, took longer. The experience over twenty years in the Northern Territory under the *Aboriginal Land Rights (Northern Territory) Act 1976* demonstrates that an outcome in these matters cannot be achieved speedily, as does the history in Canada and in other countries grappling with native title.

There will often be complex anthropological, archaeological, historical and linguistic evidence and land tenure information to be gathered and assessed. Some State governments have recognised the need to provide claimants and others with an indication of the material, which, in the view of that State, will provide a basis on which mediation of a claim will progress. But many parties come to the negotiating table burdened by ignorance and antagonism.

Working against speedy finalisation of claims are factors such as large numbers of parties, multiple industry interests, on-going resistance to the reality of native title (especially among many farmers and pastoralists, some of their industry bodies and the towns and communities they influence), disputes between claimant groups leading to overlapping claims, and sometimes ineffectual representation of the parties.

The administration of the Act by the Tribunal, and thus its capacity to efficiently manage the claims, had also been impeded by the revealed inadequacy of some legislative provisions such as those relating to acceptance and registration. While the need to fix those practical problems has been widely accepted, amendments to achieve that end were caught up in the political process by being included in the same Bill as more contentious proposals. Bills to amend the Act have been before the Commonwealth Parliament since the Keating Government's Native Title Amendment Bill 1995 was introduced in November 1995, but only in the latter half of 1998 was an amending Act passed.

Implementing the extensive amendments to the Act, especially the complex new registration test, will further slow down the process in the short term. The Federal Court has a larger role to play in the new scheme and it may be that oversight of the mediation process by the Court will help parties focus on the need to be seen

to advance the negotiations. In the longer term, agreements will continue to be reached allowing the relationship between native title and other rights and interests to be managed effectively. The outcome of the mediations already conducted by the Tribunal will inevitably lead to the recognition of native title in more parts of Australia. There are now numbers of cases which are not far from finalisation.[45] If State Governments move successfully to establish 'equivalent bodies' as the new law allows we may see registration of native title by State as well as Commonwealth authorities. Whichever path is chosen and however long the process takes, native title remains a reality in Australian law.

Endnotes

1 *Mabo v State of Queensland [No.2]* (1992) 175 CLR 1
2 Justice RS French *'Wik and Beyond – An Overview of the Proposed Amendments to the Native Title Act 1993'* November 1997
3 *Jim Fejo and David Mills on behalf of the Larrakia people v Northern Territory of Australia and Oilnet (NT) Pty Ltd* (1998) 156 ALR 721
4 *Mabo v State of Queensland [No.1]* (1988) 166 CLR 186
5 *Wik Peoples v State of Queensland (1996)* 187 CLR 1
6 *Native Title Amendment Act 1998*
7 E Wensing *'Native Title: Can it be Regulated?'* Keeble Lecture, Royal Australian Planning Institute Queensland Division, August 1997
8 *Buck v The State of New South Wales*, (Federal Court of Australia, Lockhart J, 7 April 1997, unreported)
9 *Native Title Act* s30 (unamended)
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33 Federal Court of Australia, Lee J, 24 November 1998, unreported, 258.
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42 Native Title Act Subdivisions A,B & C of Part 2
43 DE Smith *'Indigenous land use agreements; the opportunities, challenges and policy implications of the amended Native Title Act'*

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44 The *Environment, Resources and Development Court (Native Title) Amendment Act 1994* No. 93 of 1994 (SA) came into effect on 17 June 1996

45 Consent agreements in two Torres Strait Island claims covering Moa and Sabai Islands were announced on 12 February 1999.

CROSS CULTURAL ISSUES IMPLICATIONS FOR PROCEDURAL FAIRNESS

*Lesley Hunt**

Paper presented to an AIAL seminar, Melbourne, 10 November 1998.

Introduction

This paper is shaped by my experiences in working with non-English speaking background communities, both as an advocate and community worker in various agencies in Brisbane, full-time Member of the Refugee Review Tribunal in Sydney (1993-97) and part-time Member of the Social Security Appeals Tribunal since late 1997. The approach taken combines a sociological and legal perspective.

Post-war migration has significantly reshaped the socio-cultural, economic and political character of Australian society. Presently there are in excess of 100 different ethnic groups speaking over 80 different languages living in Australia and these figures do not include Australian Aboriginal and Torres Strait Islander communities or languages. Figures from the Australian Bureau of Statistics indicate that over 20% of Australians were born overseas and over half these came from non-English speaking countries. 14% of Australians do not speak English at home and 19% of Australians born in non-English speaking countries speak little or no English. In addition a significant number of Australians speak Aboriginal and Torres Strait Islander languages.

The question which this paper addresses is: how cognisant is the law and our legal and administrative structures of the cultural diversity of Australian society? In recent years numerous reports have documented the issues arising from the multicultural nature of our society. These reports have emphasised the particular disadvantages experienced by people from differing cultural and linguistic backgrounds in the context of our legal and administrative processes. The Administrative Review Council's 1991 *Report to the Attorney-General: Access to Administrative Review by Members of Australia's Ethnic Communities*; the 1991 Report from the Commonwealth Attorney-General's Department entitled *Access to Interpreters in the Australian Legal System*; the 1992 Report of the Australian Law Reform Commission entitled *Multiculturalism and the Law*; and the Commission's 1994 Report entitled *Equality Before the Law: Justice for Women* all serve as an indictment of the way in which our legal and administrative systems reflect and perpetuate the marginalisation of people of non-English speaking backgrounds.

Those who talk of a "level playing field" are not generally those who are members of marginalised groups in our society. We live in an inherently unequal society and the law cannot allocate equal rights in an unequal society. It can only protect the rights that society chooses to bestow. In fact our legal and administrative processes tend to mirror this inequality and are therefore often ineffective in ensuring equal rights and access to

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justice. The notion of treating people in a manner which will afford them equality before the law does not equate with treating everyone in the same manner irrespective of race, gender, ethnicity, socio-economic status and disability. It means actively taking into account their race, gender, ethnicity, socio-economic status and disability. Procedural fairness for members of disadvantaged population groups in our society must incorporate knowledge and understanding of their reality and include strategies to minimise the disadvantage they will experience in engaging with the legal system.

Ensuring fairness where relationships are fundamentally unequal

Sociology is essentially the study of society and the structures and relationships occurring within a society. Hence a central thrust of this paper is a critical, though by no means detailed, analysis of the structure of legal and administrative proceedings and the impact of this on the relationship between applicants and decision makers. The relationship between the tribunal member or judge and the applicant is a fundamentally unequal one. The decision being made is often a most significant life decision for an applicant whereas for the member or judge it is all in a day's work. The inequality is further reflected in the manner in which most hearings are conducted. Many strategies are employed to convey and reinforce this inequality. Having the applicant stand when the decision maker enters the room, the raised level at which the member or judge sits, the comparative height of the chair and so on, all convey the very high regard the dominant world of the judiciary and quasi-judiciary has for itself. In fact the purpose of these structures and behaviours is to remind applicants and witnesses of their relative powerlessness and it is often these very factors which can generate communication difficulties during the proceedings.

The physical setting of the tribunal or court have considerable impact on an applicant's ability to fully convey calmly and clearly the vital facts needing to be communicated to the decision maker who may be making one of the most critical decisions of the applicant's life. This is particularly so when they are combined with the disadvantages inherent in speaking a language and coming from a culture which is generally vastly different to that of the member or judge.

Judges and tribunal members often, though not always, share a very specific and privileged social sphere. As Canadian Professor Kathryn Mahoney states, our social sphere leads to our having a certain set of ideas to the extent that when we have to deal with other ideas we are not as able to perceive them accurately and without bias. Access to "justice" involves the notion that ones experience of life is going to be heard and understood. Access to justice in a diverse society therefore requires understanding of an extensive range of experiences, values, and beliefs relating to gender, race, ethnicity and class.

A fair and just legal system incorporates "natural justice" principles. The right to be heard and be treated equally before the law irrespective of one's race, gender, socio-economic status, age or ability are fundamental to the notion of "natural justice". "Irrespective" in this sense should not translate to "without regard to": rather due regard should be paid to an applicant's race, gender, ethnicity and socio-economic background to ensure barriers are removed and relevant issues are incorporated in the taking of evidence. That our prisons continue to hold disproportionate numbers of Aboriginal people; the quality of the representation afforded by self-representation as a result of cuts to legal aid; and the lived experiences of women in court as victims of sexual assault, all serve to belie the rhetoric of natural justice. Justice simply does not occur naturally, it requires

unrelenting struggle and vigilant scrutiny of our legal and administrative processes.

The requirements of natural justice depend on the circumstances of the case, the nature of the matter being heard, the rules under which the tribunal or court is acting, the subject matter being dealt with and so forth. Whilst there are no words of universal application which will ensure procedural fairness for every applicant in every situation, procedural fairness generally requires that the parties concerned be given information regarding their right of review, notice of the issues to be dealt with and adequate notice of the time and place of the hearing. It requires that witnesses be called and examined on oath, that the decision be based on the evidence presented at the hearing; that applicants be given the opportunity to respond to any adverse material relevant to their application; and that an applicant be given reasons for the decision made.

What are the implications for procedural fairness in these processes when an applicant speaks a language other than English and comes from a race or culture which is not Anglo-Saxon or Anglo-Celtic? Many, although by no means all, such applicants coming before tribunals are amongst the most disempowered people in our community, often having no or limited English, limited knowledge of our legal system, lack of familiarity with our Anglo-Australian cultural practices much less the written and unwritten rules of that sub-culture of the quasi-judiciary. In addition, they are in many instances unrepresented, or, as is the case with a significant number of applicants represented by migration agents who lack knowledge, skills and professional ethics, poorly represented.

So, whilst neither the law nor the tribunals can alter these facts, they underline the overriding obligation of ensuring procedural fairness: ensuring that applicants be given an adequate opportunity of presenting their case and that the member determining the application be unbiased. This is a difficult enough task in any legal setting much less one which is compounded by linguistic and cultural differences. Bias in decision making is very much a live issue today. I refer you to *Sun Zhan Qui v MIEA*,[1] where the Court found that actual bias was evident and called for concerns in this regard to be brought to its attention by other applicants.

Given the circumstances of many applicants of non-English speaking backgrounds it is imperative that linguistic and cultural factors be considered in determining what is procedurally fair, and explored in some depth throughout the reasoning of the decision maker.

Pre-hearing processes

In this climate of economic rationalism is it unashamedly utopian or is it the first step in ensuring procedural fairness to provide information in community languages regarding an applicant's right of review, leaflets explaining various tribunals and courts, the specific criteria to be met for an application to be successful?

What steps are taken to ensure an applicant is aware of the specific issues to be dealt with at a hearing? What steps are taken to ensure an applicant has understood the reasoning on which the primary decision was based? Where an applicant is asked to respond to adverse material in writing, is consideration given to language differences, access to translation services and the costs involved, particularly where an applicant is unrepresented and, as is the case for many refugee applicants, in receipt of a subsistence sum of money or with no income at all?

On this point I can recall one applicant who had not been interviewed by the Determination of Refugee Status officer, the primary decision maker, but had been posted a draft decision to respond to. This

practice was known at the time as the "natural justice process". However the applicant thought the draft decision he received was the decision on his refugee application. He was surprised when he received a second copy of it a few weeks later. How easy it would be for the tribunal member reviewing this application to make adverse assumptions about the seriousness with which the applicant took his application for protection in Australia as he had not responded to the draft primary decision in writing. How easy to assume the applicant was abusing the whole process to gain additional time in Australia, particularly given the negative media coverage of on-shore refugee applicants at the time. However it was language differences and the applicant's lack of access to translating services which were the issue. This example reinforces the necessity of going through with an applicant the whole process of the application as well as the claims it contains before proceeding further. Who filled out the initial application; was it read to him in a language he understood before signing; why did he not respond to the draft decision? These considerations are essential to providing an adequate opportunity for applicants to present their case, and to decision makers remaining unbiased.

When there are language and cultural differences, do Tribunals have a role to play in encouraging applicants, particularly unrepresented ones, to provide additional evidence, or to assist them in making a better or more focussed case?

Applicants' expectations of a hearing will be affected by their experiences of the legal system in their country of origin. The law, legal and administrative processes differ considerably in different countries.

At hearings, is consideration given to the fact that applicants from countries where there is state terrorism or significant political interference in judicial processes may be fearful and confused about the role of the hearing and the role and authority of the tribunal member or judge? While for some applicants before the Refugee Review Tribunal, a non-appearance may be indicative of a false claim, for others this will not be the case. It is not uncommon for an applicant to fear arrest following a decision being made on the spot. To arrive at a shared expectation of the hearing, it is vital that the purpose of the hearing, the independence of the tribunal or court, and the manner in which the hearing is to be conducted, is conveyed to the applicant prior to the hearing. This must be done in a manner which can be understood by the applicant to ensure that the chance of miscommunication is minimised and the applicant is provided with an adequate opportunity of presenting their case.

Where applicants are from non-English speaking backgrounds, consideration should also be given to the role of a pre-hearing conference in allaying an applicant's fears regarding the hearing, explaining the procedures, the specific criteria to be met and matters at issue. This procedure is particularly relevant to torture and trauma survivors.

For tribunals such as the RRT where the number of decisions made is directly linked to the funding level of the Tribunal, members and staff face significant pressure to produce quantities of decisions. However, decision making which is economical and quick should not occur at the expense of decision making which is procedurally fair, particularly where applicants are disadvantaged by language and cultural differences.

Language issues

An integral part of procedural fairness is the process of effective communication. There is still no statutory right to an interpreter under Australian law, yet the fundamental principle of equality before the law surely requires that people be provided with a means of communicating

in a language they can speak and understand. Where we speak different languages the obvious mechanism for overcoming these differences is through working with an interpreter. Currently it is the practice of most tribunals to provide an interpreter on request by the applicant; however, in many Australian courts, the provision of an interpreter is at the discretion of the sitting magistrate or judge, or by the police, none of whom is qualified to assess language skills. Consequently, many injustices occur.

Interpreting is a complex process. It seldom involves word for word translation but requires distilling the meaning of what is being said by the speaker; understanding the logical relationship between what is being said and the rest of the text, and from within the context; and recognising the various stylistic devices employed by the speaker. Interpreters are primarily concerned with the meaning and impact of utterances, rather than specific word translations.[2] Herein lies enormous scope for miscommunication and misunderstanding, and reasonable allowances must be made, particularly where a finding regarding a witness's credibility is at stake.

A simple illustration of this was given by Kirby J at a conference in Sydney in 1988, entitled "Interpreting and the Law". He recalled an interpreter translating the phrase "out of sight, out of mind" as "invisible idiot" in the witness's first language.

He went on to refer to a case where a defendant was committed to a psychiatric institution for observation, because when the magistrate had asked the defendant how he felt, he used an expression which when translated literally meant "I am the God of Gods". However this expression in his first language was a colloquialism for "I am on top of the world".

It is impossible to translate concepts in one language into "equivalent" concepts in another language, as "language is intimately connected to culture and thought, and without a knowledge of culture, it is impossible to understand fully the utterances of another person".[3] The view that what one has said can be restated exactly in another language is simply an ignorant one. In hearings where questions and answers are given through an interpreter, it is always possible that the applicant or witness will not receive the exact question that was asked, and that the decision maker will not receive the answer exactly as it was intended.

In this area, so crucial to the work of many tribunals, the provision of training has been insufficient. A 1991 report entitled *Cross Cultural Communication Issues and Solutions in the Delivery of Legal Services* commissioned by the Victorian Law Foundation and written by Michael D'Argaville indicates that although solicitors generally are aware of some communication problems, and of some strategies to overcome those problems, the practice of most did not reflect their perception. This gap between perception and practice was fairly consistent across solicitors with a wide variety of experience. D'Argaville concludes that practical experience was not sufficient to develop adequate communication skills, and that the need for training was evident.

Cultural bias

Language cannot be separated from its cultural context, and it is imperative that decision makers are aware of the pitfalls involved in having a limited knowledge of the cultures they may be confronting. D'Argaville's report indicates a significant frequency of broad, unqualified generalisations among statements by lawyers commenting on their perception of cross cultural barriers to communication. D'Argaville concludes that overgeneralisations of a perceived cultural difference may affect communication as adversely as not being aware that such differences may exist.

There is a tendency for all people to have a monocultural view of the world and the people who inhabit it. How then can decision makers ensure an unbiased interpretation of the evidence before them? The following example comes not from the area of administrative law but nonetheless it illustrates the point. The case involved a Filipino woman who was pressing charges of rape. However when she spoke of her ordeal she smiled, and even laughed. For her, this was a culturally appropriate behaviour necessary for overcoming embarrassment and for maintaining self-esteem and dignity. It was only when she was at home alone that her true feelings surfaced. For the police and the courts however it was interpreted as an indication of the diminished significance of the rape.

Another example is cited in the Australian Law Reform Commission Report regarding gender bias in the Australian legal system.[4] A Croatian woman seeking a domestic violence order was mistakenly provided with a Serbian interpreter. The woman refused to speak to the interpreter as she strongly believed this would compromise her in the eyes of her Croatian community. The magistrate responded by stating that "international conflicts should not be brought into the arena of the Australian courts". He suggested that if she could not use the services of an interpreter, then quite clearly this indicated that she was not in desperate need of an order.[5]

Another example cited by the Australian Law Reform Commission is that of a Muslim woman who had her case for a domestic violence intervention order dismissed because her complaint that she had been spat in the face was not considered serious. The magistrate, coming from an Anglo-Saxon cultural perspective, failed to recognise that to be spat on for this woman is considered a gross violation and extremely frightening in its suggestion of future violence.[6]

The task of achieving some sort of unbiased state is exceedingly difficult, yet it is integral to the notion of procedural fairness. Given that we are all biased, in that we all perceive the world and interpret our communication in that world from our own narrow experience of it, how do we ensure an unbiased approach to decision making? Every individual makes assumptions based on his or her history, class, gender, political leanings, cultural and religious values, and a lot of other factors. At the very least decision makers must be constantly alert to their own particular biases in order to minimise their impact on decision making. Whilst decision makers, like anyone else, can never be free of personal bias, they can develop a heightened awareness of personal biases, and an awareness that each claim must be assessed in accordance with the specifics of the applicant's localised cultural context, rather than that of the decision maker.

A difficulty with the problem of culturally-based assumptions, or cultural bias, is that decision makers are not generally required to alert the applicant to their process of reasoning. Without this, how can an applicant possibly respond, or alert the decision maker to cultural factors significant to the reasoning process? It is necessary for decision makers to have a great degree of self-awareness regarding their own cultural values and biases, and in some instances to engage the applicant in discussion around these matters in order to ensure an accurate and unbiased reasoning process. It is also useful for a decision maker to regularly check an applicant's understanding, as well as their own, of particular matters which have been stated and/or translated during a hearing to ensure the correct message has been conveyed and understood.

Of course, applicants are operating on culturally based assumptions also. For example, in an application for a protection visa or refugee status, a woman, perhaps a member of the principal applicant's

family unit, may well assume that the decision maker is aware of the kind of treatment she will face within the context of her family or her community if she breaches certain rules of behaviour, because for her such treatment is a culturally entrenched norm. Depending on her education or awareness of systems other than her own, she may assume that the same or similar rules apply here in Australia. Therefore she may not even mention specifically the nature of the treatment she can expect, or if it is referred to it may be downplayed as a common occurrence rather than as a breach of her fundamental human rights.

Linguistic and cultural differences also incorporate differences in thought processes, differences in how information is structured, differences in discourse or the ordering of a conversation, the level of background information provided, the repetition of statements, and the targeting of the sensitivities of the listener.

Linear thinking, where every cause has an effect, and every effect has a cause, is perhaps most common in Western settings. Eastern thought, for instance, is said to be more contextual and cyclical than the Western approach. How does this difference impact on communication in a hearing, particularly given that logic is the foundation of proof in our legal system?

A greater appreciation of the fact that discourse is culturally structured and conveyed may ease some of the frustration which often arises in hearings when an applicant does not state the information sought in the manner or order it is expected. It is not uncommon for judges and tribunal members to become impatient when a witness does not come straight to the point. The manner of questioning by the decision maker may also inadvertently give rise to frustration, if not offence, in many instances.

Sometimes both members and applicants will be tempted to alternate between using the interpreter and having the applicant speak in English. Certainly it is more difficult to attain a sense of the character of the person when working through an interpreter. The mood or emotional content may be lost, the meaning of intonation, the meaning or context of the non-verbal indicators, etc may be lost. However as Justice Gobbo stated at a conference in 1990 entitled "Law in a Multicultural Society", the practice of moving in and out of communicating via an interpreter can give rise to the view that the applicant is using the interpreter to evade, or gain time in which to think. To avoid this, it is preferable to be consistent in the use of the interpreter.

One of the problems which can arise through inconsistent use of a interpreter is illustrated by the following case of a Filipino woman who was assisted by South Brisbane Immigration and Community Legal Service to obtain permanent residence to press charges against her Australian resident fiance, relating to the sexual assault of their two year old daughter. The perpetrator was convicted in the District Court for indecently dealing with the two year old. However the conviction was subsequently quashed by the Court of Appeal on the grounds that the trial judge failed to make correct direction to the jury, and that the woman's evidence was of poor quality, characterised by prevarication and inconsistency.

Although an interpreter was used during the trial in the District Court, he was not used uniformly, neither was the interpreting at the required level three proficiency. On reading the court transcript it is apparent that this was the cause of the supposedly poor quality of the evidence provided by the woman. It was evident from her evidence in English that she was not completely fluent in English. The criticism made at the appeal regarding "prevarication" has been

described by those with a fuller appreciation of cross-cultural communication as being an Anglo-determined norm based on consistency requirements in English discourse which is not the normal practice for example for Tagalog speakers, or for some other language speakers such as Indian speakers of Hindi who are also not proficient in English.

The other more obvious area for misunderstanding is that of interpreting non-verbal language. This is mostly done subconsciously and so involves inherent dangers and non-verbal communication is also specific to cultural groups. Looking a person in the eye may indicate honesty and straightforwardness in one culture, but be seen as challenging and disrespectful in another. Similarly, shaking one's head from side to side can indicate understanding or agreement in one culture, but the complete opposite in another. The judging of a person's demeanour is thought by cross-cultural communication experts and many psychologists to be particularly unreliable in determining the value of a person's evidence. Again it is essential to be aware of cultural bias in assessing demeanour.[7]

Common practices generally born out of conditions of poverty, repression and fear, such as lying and bribery, must also be understood in their cultural context, rather than being judged from a misplaced notion of cultural or moral superiority. To say what others want to hear is internalised as a means of survival for many people, particularly people in powerless positions. It is not procedurally fair to jump to the conclusion that manipulative opportunism underlies the lie, or that one lie means that all statements have been lies. Experiences in an applicant's home country often lead to the applicant internalising lying as a means of survival and understandably this carries over to survival in Australia. This is not to suggest by any means that all applicants from developing countries lie or that all liars are misunderstood innocents; rather it is to suggest that decision makers have an obligation to view lies in a cultural and environmental context, rather than a moral one. The weight accorded such practices in assessing an applicant's credibility must be determined in the light of the socio-political conditions experienced by the applicant, rather than those experienced by decision makers. Knowledge and awareness of that context will enable decision makers to obtain accurate evidence and test the veracity of claims more effectively.

I am aware of two Immigration Review Tribunal (IRT) cases[8] which illustrate well these points. In both cases the issue in question was whether or not there existed a genuine marriage. The Department of Immigration and Multicultural Affairs had rejected the applications on the basis that the marriages were contrived to obtain residence in Australia. In one case, the IRT affirmed the decision not to grant the visa on the basis that the Tribunal members were unable to believe anything said by the applicant at the hearing as all statements made by the applicant were completely contradictory. However the marriage was indeed genuine. Both parties to the marriage returned to the applicant's home country where they lived together for three years before eventually returning together to live in Australia.

In the second case the Department had doubted the genuineness of the marriage and one of the central issues was that the marriage had not been consummated. The questions and answers in the hearing did not succeed in clarifying this issue to the satisfaction of the presiding member. After some time, as no progress was being made and the applicant was becoming distressed, the hearing was adjourned for a short break. When it was resumed the applicant was simply asked to tell the whole story from his perspective, uninterrupted by questions from the Tribunal. It turned out that the wedding had been arranged by the

applicant's parents in the traditional manner. It also became apparent that in the applicant's parent's household, where the applicant lived with his wife, the whole family slept in one bed - there was only one bed in the house - for this reason the marriage had not been consummated as the applicant had been too terrified to touch his wife, while in the same bed as his parents. This was not an uncommon situation in the applicant's home country. It highlights the need for decision makers to inform themselves with general background information before proceeding with hearings where applicants and witnesses are from a culture which is different to that of the decision maker.

These issues and illustrations are merely the tip of the iceberg in the myriad of complexities involved in cross-cultural communication. In summary, simply providing the same treatment for everyone does not ensure procedural fairness or "just' treatment. Allowances must be made to compensate for the disadvantages and barriers which go hand in hand with being a member of a linguistic and cultural minority proceeding through a predominantly ethnocentric system. Such allowances however should not be at the expense of human rights. Another problem in the legal area has been where judges have used so-called cultural traditions, or common cultural practices, to justify violence against women for example, or at last as a mitigating factor in sentencing. This is inappropriate use of cultural factors. Where there is a tension between cultural practices and human rights, the protection of an individual's human rights must surely be accorded greater weight.

Culturally determined features of communication merit wide exploration and great care if decision makers are to proceed with fairness. In short, there is a responsibility on tribunal members and judges to be cross-culturally competent.

Endnotes

1. (1997) 151 ALR 547
2. Ton-That Quynh-Du, "Legal Interpreting" in A Pauwels (ed) *Cross Cultural Communication in Legal Settings*, (1992), pp 58-61.
3. Bird, G, *The Process of Law in Australia: Intercultural Perspectives*, 1993, 216.
4. Australian Law Reform Commission, *Equality Before the Law: Women's Access to the Legal System*, 1994.
5. Ibid, 143.
6. Ibid, 35.
7. Australian Law Reform Commission, *Evidence Research Paper 8*, 1982, 61.
8. Thanks to Bruce Henry, former member of the Immigration Review Tribunal, for these two case examples.

RECENT DEVELOPMENTS IN FREEDOM OF INFORMATION IN VICTORIA

*Mick Batskos**

Paper presented to an AIAL seminar, Melbourne, 25 March 1999.

Introduction

As the title of my paper suggests, I propose to provide an outline of recent developments in freedom of information in Victoria. I will be focussing on four main aspects:

- the recent, highly publicised Frankston Hospital case;
- the review of the *Freedom of Information Act* 1982 (Victoria) ("FOI Act");
- whether concluded contracts can contain information acquired by an agency from a business, commercial or financial undertaking under section 34(1) of the FOI Act; and
- some other recent decisions of the Victorian Civil and Administrative Tribunal ("VCAT") under the FOI Act.

Frankston Hospital case

The Frankston Hospital case[1] was heard and decided by the VCAT on 23 November 1998. The case was extensively reported in the daily newspapers in January 1999. The case involved an attempt by a convicted triple murderer, Coulston, to obtain from the Frankston Hospital copies of nursing rosters for a particular ward of the Hospital. The reason he sought the documents was to assist in supporting his alibi that he was visiting his partner in the hospital in July 1992, around the date of the murder of three people. This would then be used in an attempt to reopen his case. The case involving his conviction had gone right up to the High Court where his appeal had been rejected.

According to a report in *The Age* newspaper[2], Coulston had contacted the Peninsula Health Care Network, which administers the Hospital, on 5 August 1997 requesting the names of the nurses on duty on the relevant date. His request was refused. This was followed by a request under the FOI Act to the Frankston Hospital and the Victoria Police on 13 October 1997 for access to this information. The request was denied by the Hospital. Internal review was sought and access refused on the basis of section 33 of the FOI Act, namely, that the disclosure of the documents sought would result in the unreasonable disclosure of information relating to the personal affairs of a person.

An application for review was lodged with the Administrative Appeals Tribunal and the matter came on for hearing before the VCAT on 23 November 1998. Mr Coulston appeared in person by video link from Barwon Prison. The Hospital was not legally represented; it was represented by a doctor. The Tribunal pointed out that the Hospital was required to put its case first. There was no evidence from the Hospital. No witness statements had been filed and served. The doctor representing the Hospital (or more correctly the Network) made the following statement:

> The network wishes to claim an exemption under the FOI Act under

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> section 33 because the disclosure of this information would be unreasonable disclosure in relation to peoples' personal affairs. We consider that although the rosters are not necessarily totally private documents the information relates to the personal affairs of these people and that no person needs to be publicly accountable for their whereabouts on any particular day and...we regard this information as being exempt because it is an unreasonable disclosure of their affairs.[3]

The Tribunal then clarified the documents in dispute and turned to consider written material which had been filed with the Tribunal by Mr Coulston. When it became apparent that the material had not been served on the Hospital, the doctor representing the Hospital was given an opportunity to read the material. After having seen Mr Coulston's documents, the doctor was asked whether he had anything further to add. He replied, "No, I don't have any further comments". When asked if he had any submissions on the law the doctor replied, "No".[4]

The Tribunal provided a decision and oral reasons on the spot. The Tribunal ordered the release of the documents. It found that the documents did not fall within section 33 of the FOI Act as they could not be characterised as relating to the personal affairs of any person. It came to this conclusion after considering two interstate decisions. The first was the decision of the New South Wales Court of Appeal in *Commissioner of Police v the District Court of New South Wales and Other*.[5] That case involved the release of the names of police officers and employees involved in the preparation of certain reports. The second was the decision of De Jersey J of the Queensland Supreme Court in *State of Queensland v Albeitz*.[6] That case involved the disclosure of names of departmental officers involved in investigations.

The Hospital released the documents shortly after the order was made by the VCAT. I do not, in this paper, propose to address the correctness or otherwise of the decision of the Tribunal. What I propose to do is deal with a number of practical issues that arise about handling freedom of information cases, particularly where s33 of the FOI Act is involved.

The chairman of the Mornington Peninsula Health Care Network which administers the Hospital was reported in *The Age* newspaper as having said that on its earlier legal advice, the Hospital had been supremely confident of winning the case and had not bothered to send a lawyer to the hearing. The Hospital was shattered when the Tribunal ruled against it and did not seek further legal advice before releasing the roster to Coulston.[7]

I must state at the outset that I am not aware of the exact nature of the advice provided to the Hospital, nor from whom it obtained the advice. However, this comment raises a number of questions and issues:

- Why was s33 the only exemption relied upon?
- Were any parts of s31 considered relevant?
- Did the legal advice address any other exemptions?
- Although the Hospital, relying upon its advice, was "supremely confident" of victory, did the advice justify non-legal representation of the Hospital by a person apparently unfamiliar with VCAT procedures in such sensitive circumstances as these? (Remember, no submissions whatsoever were made on the law other than to assert that s33 of the FOI Act applied to the documents and that their disclosure would be unreasonable.)

Then there is the issue of lack of involvement of the nurses. According to a series of newspaper articles in January 1999 the nurses were informed by memorandum sent only to a charge nurse at the Hospital. She apparently discovered the memorandum in her "In-tray" after returning from being on leave. In any event, apparently the memorandum

purported to inform the nurse about the release **after the event**. This raises some other issues including:

- Why were the nurses involved not consulted well before the hearing at the Tribunal in case they wished to raise objections to the release of their names?
- Why were the nurses informed only after the event, and even then, apparently only one charge nurse was supposedly informed by way of a memorandum left in her "In tray"?
- Why could the Hospital not have notified each nurse affected individually? One nurse was reported as saying:

  > We feel we have been denied any control about how our names will be used. We feel betrayed by the Hospital, and scared about what the future may hold.[8]

  The Australian Nursing Federation reportedly accused the Hospital of not properly protecting the privacy of its nurses by failing to send legal representation to the appeal, instead relying on a doctor.[9] By doing so, the Hospital in effect did not allow the nurses the opportunity to mount their own legal defence.[10]

  Where an agency makes a decision to release a document containing information relating to the personal affairs of an individual the agency is to advise the individual of that decision only if it is practicable to do so. The individual must also be informed of the right to appeal against such a decision: section 33(3) of the FOI Act. It is clear, however, that there is no legal requirement to inform individuals whose information is the subject of a request for access to documents where the agency decides to claim exemption under s33 of the FOI Act. Nevertheless, as a matter of prudence, it is generally advisable to seek the views of third party individuals about the release of information about them wherever practicable. This is regardless of whether the third parties are external or internal to an agency. This consultation process provides additional material upon which an FOI officer can determine whether disclosure of any information relating to the personal affairs of the individual would in all the circumstances be unreasonable. It should be noted that such consultation is mandatory under the Commonwealth FOI Act, where there is even provision to enable an agency to extend the period within which to make a decision about a request because it is consulting third parties.[11]

  Where the third parties are officers or employees of an agency, there is the additional reason of good staff management to consider in deciding whether to consult such third parties.

- Why did the Hospital not seek written reasons for the decision as it is entitled to do under section 117(2) of the *Victorian Civil and Administrative Tribunal Act* 1998 ("VCAT Act"). Where oral reasons are provided by the Tribunal, a party has 14 days within which to request written reasons.
- If the Hospital was "shattered" by the VCAT decision, why did it not seek legal advice about its options? Instead of seeking further legal advice, the Hospital merely released the documents sought without even informing the nurses before doing so. With the benefit of hindsight, one can see from the reaction of the nurses and the Nursing Federation that if they had been involved in the matter, and an adverse decision was made, they may have sought to appeal the decision to the Supreme Court.

The circumstances surrounding the Frankston Hospital case serve to highlight, in my view, that proper thought and care must be put into dealing with every

request for access to documents and every case which may ultimately go before the Tribunal. More than just the legal niceties which may be involved in a particular case must be considered; as well, the context in which the request is made and what impact it may have on the agency as a whole must be considered. There needs to be an understanding of the possible overall consequences of release.

Review of the FOI Act

Once the Frankston Hospital matter came to light in early January, there was a scathing response from the Victorian Premier, Mr Kennett. According to reports in the press[12], Mr Kennett immediately ordered the Attorney-General to conduct a review of the FOI Act and its administration. He is reported as having expressed horror and vowed to rewrite Victoria's freedom of information laws. The way the FOI Act was being used and interpreted by the courts had, he was reported as saying, "gone beyond the pale of decency". He was also reported as saying that the State Government would not hesitate to scrap the FOI Act if this was the best way to provide absolute security for public servants and if the life of one citizen was put at risk.

After the heat of the initial reaction died down, Mr Kennett was reported as confirming that there was no program in place to get rid of the FOI Act, but the Government did not want to see a repeat of the Frankston Hospital case. *The Age* newspaper reported Mr Kennett as stating:

> So my responsibility as head of government is to make sure that freedom of information works for the right reasons and that it doesn't in the process put anyone at risk...And unless I can develop the Act in that way, then that gives cause for the next jump, which is whether we need an FOI Act at all. We believe that we'll be able to fix the Act without getting rid of it.[13]

It was also reported in January that the review by the Government would be concluded in a matter of weeks and that any resulting amendments would be introduced in the autumn session of Parliament to ensure that there would never be a repeat of the Frankston Hospital case.

The newspapers have speculated as to the nature of any changes that may be made. They suggest that the Government, after a careful comparison with freedom of information legislation of other States and the Commonwealth, is expected to consider replacing public hearings before the Tribunal with an FOI Ombudsman. Such a structure would be similar to the Queensland and Western Australian models, where an Information Commissioner exists.

I understand that the "review" of the FOI Act is currently with the Department of Justice. I have been unable to ascertain the precise extent of the review, but I suspect that it will not result in a comprehensive overhaul of the FOI Act, despite suggestions to the contrary by members of the Opposition. My guess is that the review will be quite limited in scope, probably confined to a consideration of s33 and how it is applied by agencies receiving requests for access to documents containing information of a personal nature.

This view is based on the comments of the Premier and a News Release from the Attorney General[14] confirming that she is seeking legal advice and is looking at the FOI Act in relation only to issues raised in the Frankston Hospital case. If the review is limited to the scope and operation of s33 of the FOI Act, I believe that there are changes that could be made to maximise the possibility that the Frankston Hospital situation does not occur again.

First, the controversy and difficulty in determining whether the names of employees or officers of agencies contained in a document comprises information "relating to the personal affairs" of a person could be eliminated by adopting a more expansive approach similar to that adopted in the Commonwealth FOI Act. Section 41 of

that Act was amended in 1991 so that a document is an exempt document if its disclosure under the FOI Act would involve the unreasonable disclosure of personal information about any person (including a deceased person). The term "personal information" is defined in identical terms to the definition in the Commonwealth *Privacy Act 1988*, namely:

> information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

A similar approach might be adopted in Victoria if the draft Data Protection Bill is enacted in its current form and the FOI Act is amended to ensure consistency between the FOI Act and any *Data Protection Act*. It is important to note that the Data Protection Bill currently proposed by the Government includes a definition of personal information which is similar to that contained in the Commonwealth Privacy and FOI Acts. The draft Bill states that "personal information" means:

> information (whether fact, opinion or evaluative material) about an identifiable individual that is recorded in any form but does not include information contained in a generally available publication.

If the Victorian FOI Act was amended to incorporate such a definition of "personal information", and s33 was amended to exempt the unreasonable disclosure of such personal information, it would mean that if the Frankston Hospital case circumstances arose again, the names of the Hospital staff would clearly be "personal information". The sole issue would then be whether release of the document was unreasonable. That alone would not guarantee non-disclosure.

The second change that may occur would be in relation to assisting a decision-maker to determine whether disclosure would be "unreasonable" in all the circumstances. This would involve requesting consultation with persons who are the subject of the personal information. Such an approach is similar to section 27A of the Commonwealth FOI Act. That section applies where an agency receives a request for a document which contains personal information about a person and it appears to the decision-maker[15] that the person concerned might reasonably wish to contend that the document is an exempt document under s41 (the equivalent to Victoria's s33). In that situation, the decision-maker is in effect obliged, where it is reasonably practicable in all the circumstances to do so, to give the person a reasonable opportunity to make a submission about the release of the document.

If a decision is then made to release the document, the person consulted must be informed of that decision and of his or her right to seek review of that decision by the Administrative Appeals Tribunal ("AAT"). The applicant is also required to be informed of the decision to release and that the third party the subject of the information has review rights which might be exercised. If such consultation takes place, the agency is given power to extend by up to thirty days the time within which to make a decision about a request in order to enable this reasonable consultation to occur.

Accordingly, this mechanism ensures that the individual the subject of the personal information has the opportunity to raise any concerns and they may be taken into account by the decision-maker when considering whether to release the document. Even if the decision-maker decides to refuse access, it is nevertheless open to the person the subject of the personal information to seek to be a party to any review of the decision by the AAT. I believe there is merit in a similar approach being introduced in Victoria.

If an approach similar to that I have suggested is adopted, it will still not guarantee non-disclosure of documents such as those in the Frankston Hospital case, but it will maximise the possibility that all persons affected by the matter have the opportunity to be heard.

Concluded contracts and section 34(1)(a)

There exists an unresolved issue as to whether a concluded contract between a government agency and a third party business can be said to contain (or would result in the disclosure of) information of a business, commercial or financial nature acquired by the agency from the third party business. This unresolved question has resulted in conflicting decisions before the VCAT. There is a very recent decision of the VCAT that is the subject of a current appeal to the Supreme Court of Victoria in relation to that precise issue. That decision was made by Senior Member Megay in the case *Re Thwaites and the Department of Human Services.*[16]

In that case, Mr Thwaites sought access to various documents associated with the decision of the Government to have a private consortium build, own and operate the Latrobe Regional Hospital. By the time the matter came before the VCAT, there were seven documents, part or all of which were claimed to be exempt under, among other things, s34(1)(a) of the FOI Act. That was on the basis that the documents, if disclosed, would disclose information of a business, commercial or financial nature acquired by an agency from a business, commercial or financial undertaking.

The seven documents in dispute comprised various contractual documents including some between the Minister and various companies. They included agreements in relation to the provision of maintenance services, transitional health services (as the old Hospital closed) and the arrangement of finance.

After considering some of the conflicting authorities on this issue, the Tribunal adopted the view that the concluded contracts did not contain information acquired by the Department. The documents claimed to be exempt under section 34(1)(a) were, according to the Tribunal:

> nothing more than a record of concluded negotiations between the parties. I concur with the reasoning of Ms Preuss and Mr Levine in the *Thwaites and MAS* case – that is, at the time the consortium was negotiating the agreement it disclosed terms upon which individual members would do business, **but the information changed its character when the negotiated terms became embodied in legally enforceable documentation.**[17] (emphasis added)

Accordingly, each of the seven documents was found not to be exempt. Senior Member Preuss also adopted this approach three days later in another case involving the same parties. It related to documents about the tendering and contracting and sale of the Bairnsdale Regional Health Service.[18] This same approach had also been applied in a number of earlier cases.[19]

The alternative approach, which was dismissed by the Tribunal in the Thwaites case, was that espoused by Deputy President Macnamara of the Administrative Appeals Tribunal in *Re Holbrook and Department of Natural Resources and Environment.*[20] In that case Deputy President Macnamara disagreed with the general proposition that records of transactions entered into by government cannot by their very nature be the subject of a section 34(1)(a) exemption. He stated:

> To make out the exemption it is not necessary to show that the text of the relevant document is information acquired by the government agency from a business undertaking – only that the revelation of that piece of text would reveal information acquired by the agency from a business undertaking. Where an agreement records the price payable as between a government agency and a business undertaking for a good, service, concession or other right, revelation of the figure may reveal the price at which the business undertaking is prepared to do business.[21]

In the Thwaites case, the Tribunal reasoned that to suggest that the formal contracts represent information acquired by the agency is tantamount to saying that all government contracts relating to matters of a business, commercial or

financial nature (and that would cover most commercial contracts) will be exempt. Ms Megay went on to say:

> That of course flies in the face of the purpose of the legislation which is underpinned by a predisposition towards disclosure. A different view might of course be taken in the instance of a contract to manufacture some product which, for instance, required the exposition of some chemical formula. To my mind, that is the type of information Mr Macnamara had in mind in the *Holbrook* case.[22]

Justice Wood has espoused a similar view to that of Mr Macnamara in two recent decisions. The first is the case of *Hulls v Department of Treasury and Finance*[23]. In that case, Wood J referred to two earlier cases (which were later relied upon by Ms Megay in the Thwaites case) and stated:

> Both of these cases concern the agency as party to the concluded contract and hence, presumably, some of the information contained in the contract would not have been 'acquired' by the agency but rather would have been its own information. The exemption is attracted in respect of 'information acquired by an agency...from a business, commercial or financial undertaking and relates to...matters of a business, commercial or financial nature'. In my view, **the fact that the document constitutes a concluded contract does not disqualify it from exemption under s.34(1). To do so would be to read down the sub-section considerably because the information of a business nature is capable of including a term of a concluded contract.**[24] (emphasis added)

In that particular case, there was no evidence as to the source or sources of the information contained in the document in question.

Ms Megay, in considering the decision of Woods J, also seemed to place some emphasis on the fact that in that case, the respondent agency was not a party to the agreement in question. This appears to have been in the context of seeking to distinguish that case from the case before her.

Interestingly, it seems that neither the Tribunal nor any of the parties was aware of the subsequent second decision of Wood J which clearly involved the situation where the respondent Department (or at least one of the Ministers responsible for that Department) was a party to the agreements to which access was sought. In *Bracks and Department of State Development* Judge Wood considered two agreements. The first was an agreement between the Minister for Regional Development and an abattoir under which the Minister made various grants on various conditions to be met by the abattoir. The second was a deed of guarantee between the Minister and the abattoir and an associated company. In finding that the documents were exempt under s34(1)(a) of the FOI Act, Justice Wood stated:

> It is irrelevant that the information acquired is later reproduced in a concluded contract between the parties. The test is simply whether the information was provided by the third party to the respondent. I discussed this question in Hulls v Department of Treasury and Finance...[25]

With respect, I believe that the views of Wood J and Mr Macnamara are correct. Provided the evidence is sufficient to support a conclusion that disclosure of the document would reveal information of the relevant kind acquired by the agency from a business, commercial or financial undertaking, the fact that the information is reproduced in a concluded contract or that the text of the concluded contract would reveal that information is irrelevant.

The decisions of Ms Megay and Ms Preuss are the subject of current applications for leave to appeal to the Supreme Court. So, it is a question of "watch this space".

Other recent cases

I turn now to 3 other recent cases which raise or remind us of some interesting legal and procedural issues.

The first is the decision of the VCAT in July 1998 in *Re Kosky v Department of Human Services*.[26] In that case the Tribunal provided a timely reminder about a point which is often forgotten by agencies in relation to who is an "officer" under section 30 of the FOI Act. Provided certain other features are present in documents, that section exempts from access documents which would disclose matter in the nature of opinion, advice or recommendation prepared by an officer, or consultation or deliberation that has taken place between officers of an agency or between an officer and a Minister.

"Officer" of an agency is defined in s5 of the FOI Act to include a member of the agency, a member of staff of the agency, and any person employed by or for the agency.[27]

The Tribunal confirmed that for the purposes of section 30 an "officer" can include an external consultant. Justice Wood referred to the decision of *O'Connor v State Superannuation Board of Victoria*[28] which was expressly approved of by the Full Court of the Supreme Court in *Ryder v Booth*[29] In the O'Connor case, the County Court stated that the expression "a member of staff of the agency" in the definition of "officer";

> covers all persons who are employed by the agency under a contract of service with the agency or by the government for the agency. The remaining words are wide enough to cover consultants employed by the agency...and indeed would seem to have as their main area of application, consultants and other independent contractors.[30]

The second case I wish to mention is *Re Garbutt and Department of Natural Resources and Environment*.[31] This case addressed two important procedural points in the context of processing FOI matters. First, it reiterated that where an applicant is of the view that the respondent agency has not dealt with each document it had in its possession relevant to a request, that was a matter for the Ombudsman. The Tribunal may not investigate the matter further.

Secondly, the VCAT concluded that if an exempt document is inadvertently released to the applicant by the respondent, the document loses its exempt status. As the Tribunal stated:

> It would be a ridiculous situation, if, if the applicant so desired, he could legally copy such document and distribute it to every household in Victoria on the one hand and it remained an exempt and confidential document on the other. The law must realise the reality of the situation...

The Tribunal distinguished this from the situation where, for example, a Cabinet document is known to exist and may contain matters that are in the public knowledge, however that comes about. In that situation, the document is not deprived of its exempt status as a Cabinet document. Public knowledge of the existence of the document also does not exclude it from exemption.

The third case I would like to mention is the VCAT decision in *Re Hulls and Parks Victoria*.[32] It has to do with how documents which may be irrelevant to a request are treated by the VCAT if inadvertently included within the exempt documents properly before the Tribunal.

In that case, the applicant sought access to various documents. The respondent identified six documents that it thought might fall within the request. It made a decision to grant access to two documents and refused access to four documents. The original decision was confirmed on internal review and so the applicant applied to the VCAT for review in respect of the four remaining documents.

The respondent's legal adviser formed the view that the remaining documents fell outside the scope of the request.[33] Accordingly, an application was made by the respondent to have the proceeding dismissed for want of jurisdiction. The Tribunal has jurisdiction under section 50(2)(a) of the FOI Act to review "a decision refusing to grant access to a document **in accordance with a request.**" (emphasis added) The

respondent submitted that the Tribunal could only review refusals to grant access to documents that actually fell within the scope of the request by reason of the operation of the words, "in accordance with a request". Since the documents did not fall within the terms of the request, there was no decision to refuse access to documents in accordance with a request.

The Tribunal rejected that argument and agreed with the applicant's submissions that the jurisdiction of the Tribunal is to review a decision refusing access to documents where the request for access complied with s17 of the FOI Act.[34] The jurisdiction was enlivened by the decision to refuse access, not the request. The words "in accordance with a request" merely limited the class of decisions that may be the subject of an application for review to those decisions made in response to a valid request. The applicant had also argued that it was not part of the Tribunal's function to enter into an inquiry as to whether the original decision to the effect that the documents fell within the scope of the request was the correct one, but rather simply to review the decision to refuse access.

The Tribunal considered that it had jurisdiction to hear the application for review, notwithstanding the formulation of a view by the respondent, after the application for review was lodged, that the documents in fact fell outside the scope of the request and had been mistakenly taken into account in the two refusals to grant access.

The effect of the Tribunal's decision is that it is absolutely imperative for FOI officers and internal review officers (usually the CEO of an agency) and their legal advisers to be sure that there is no ambiguity in a request and that they are satisfied that they understand fully the scope of the request. They must be satisfied that only documents relevant to a request are the subject of any decision about access. If access to irrelevant documents which have been inadvertently included is refused , those documents may nevertheless be the subject of review by the VCAT if the applicant appeals, even though they do not fall within the scope of the original request.

Endnotes

1 The proper name of the case is *Re Coulston and Mornington & Peninsula District Hospital*, VCAT, Senior Member Megay, 22 November 1998, unreported.
2 "Names released after long battle", *The Age*, 15 January 1999, page 2.
3 Transcript of proceedings, 23 November 1998, page 1.
4 Transcript of proceedings, 23 November 1998, page 3.
5 (1993) 31 NSWLR 606.
6 [1996] 1 Qd R 21.
7 "FoI nurses blast hospital", *The Age*, 15 January 1999, page 1.
8 Id.
9 Id.
10 "Names released after long battle", *The Age*, 15 January 1999, page 2
11 Section 27A, *Freedom of Information Act 1982* (Cth).
12 "FoI nurses blast hospital", *The Age*, 15 January 1999, page 1; "Names released after long battle", *The Age*, 15 January 1999, page 2; "Kennett threat to scrap FoI after row", *The Age*, 16 January 1999, page 3; "FOI under threat", *The Age*, 16 January 1999, page 9; "New FoI loss for the Government", *The Age*, 20 January 1999, page 5; "Convicted murderer reassures Premier", *The Age*, 21 January 1999, page 5; "Act contains disclosure protection: institute", *The Age*, 23 January 1999, page 2; "FoI a safeguard, says press council", *The Age*, 26 January 1999, page 4.
13 "Convicted murderer reassures Premier", *The Age*, 21 January 1999, page 5.
14 14 January 1999.
15 Whether the original-decision maker or the internal review officer.
16 VCAT, Senior Member Megay, 12 January 1999, unreported.
17 Ibid, 24.
18 *Re Thwaites and Department of Human Services*, VCAT, Senior Member Preuss, 15 January 1999, unreported page 25.
19 *Re Ventura Motors and Metropolitan Transit Authority* (1988) 2 VAR 277; *Re Thwaites and Metropolitan Ambulance Service* (1996) 9 VAR 427; *Re Thwaites and Metropolitan Ambulance Service*, AAT, Ms Preuss and Mr Levine, 13 June 1997, unreported; *Gillespie v Melbourne Parks and Waterways*, AAT, Mr Davis, 27 March 1998, unreported.
20 (1998) 13 VAR 1.
21 Ibid, 8.
22 Ibid, 24.
23 AAT, Wood J, 30 June 1998, unreported.
24 Ibid, 26-7.
25 Ibid 15.

26 VCAT, Wood, J, 30 July 1998, unreported.

27 Whether or not the provisions of the *Public Sector Management Employment Act* 1998 apply to that person.

28 County Court, Dixon J, 27 August 1984, unreported.

29 [1985] VR 869.

30 *O'Connor v State Superannuation Board of Victoria,* County Court, Dixon J, 27 August 1984, unreported, 16. It should be noted that subsequent cases have found that a corporation can also be an officer: *Re Thwaites and Department of Health & Community Services,* AAT, Ball DP, 9 May 1994, unreported; *Re Mildenhall and Vic Roads* (1996) 9 VAR 362, 370.

31 VCAT, Mr Davis, 14 December 1998, unreported.

32 VCAT, Ms Davis, 10 February 1999, unreported.

33 The Tribunal ruled that the documents did, in fact, fall within the terms of the request. The matter is continuing before the VCAT.

34 Which sets out the formal requirements to be met before there is a valid request.

SEPARATION OF POWERS AND THE STATUS OF ADMINISTRATIVE REVIEW

*Bruce Topperwien**

Introduction

As Else-Mitchell recognised in 1961, the framers of the Constitution did not have in mind the modern administrative state when they adopted a separation of powers structure. After commenting on the appropriateness of the rigid separation of powers found by the High Court in the circumstances of the *Boilermakers Case*,[1] he said:

> the wisdom of separation of powers in the field of industrial relations has little relevance to one problem which the Founding Fathers hardly considered. namely the scope of administrative action and for the integration of administrative and judicial power.[2]

Similar comments doubting the relevance of a formalist[3] approach to the separation of powers in a modern administrative state have been expressed in America. Fallon has said:

> A second objection to article III literalism arises from policy concerns of the modern administrative state. The role of federal government has expanded far beyond that contemplated by the framers. At the time of the Constitution's adoption, government enforced the system of private rights defined by the common law but otherwise had limited functions. As government has created more entitlements and assumed responsibility for enforcing a broader range of legal rights, functional concerns have supported the assignment of adjudicative responsibilities to non-article III decision-makers.[4]

Can a practical theory of governmental structures be developed that recognises the intrinsic values of the constitutional text and separation of powers, and better accommodates existing structures in a way that supports and enhances independent administrative review, while promoting fundamental constitutional values, but without overturning too much existing authority?

This article proposes a new approach to separation of powers under the Australian Constitution. It has not received acceptance by the High Court,[5] but it is an approach that I consider could validly be taken, and if it were taken, would significantly strengthen and support the validity of the current system of administrative review, without radically changing accepted notions of separation of powers.

A new functionalist approach

Applying a more functionalist approach to separation of powers issues, I suggest that Parliament could give powers and functions to Chapter III courts provided that those powers are not inconsistent with:

- the values inherent in "separation of powers"; and
- the traditional role of courts.

Equally, Parliament could decide to give those same powers and functions to a non-Chapter III institution provided:

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- implied constitutional values are not breached; and
- it is not a power or function that has traditionally, and exclusively, been exercised by courts in the Anglo-Australian tradition.

A fourth arm of government

The idea that government is divided into three distinct and separate functional parts has never been applied in practice in any country. This is so even in the United States of America where the notion of separation of three types of powers is often assumed to be an essential element in the fabric of government. In Australia, considerable overlap has always been permitted in the exercise of executive and legislative powers. But it is in the area of judicial power that the High Court has been concerned to make distinctions and invalidate legislation and legislative schemes, far more so than the Supreme Court has done in America. It is the approach to judicial power, and its impact on administrative review, with which this article is primarily concerned, and in which I suggest a new paradigm for the assessment of separation of powers issues.

Because the Commonwealth is a creature of statute (the *Commonwealth of Australia Constitution Act 1900*), all its powers are statutory.[6] As the Constitution divides those powers into three, and only three, categories, every power that is exercised by a Commonwealth agency must be an exercise of one or more of those categories of powers.

While the Constitution appears to divide government into three arms associated with the three powers, I suggest that Parliament and the executive can create, and effectively have created, a fourth arm of government, independent of, but subject to oversight by, Parliament, the executive, and the judiciary. This fourth arm, which exercises all three types of powers (executive, legislative and judicial), comprises those independent agencies of government that are not subject to direct Ministerial (ie, executive) or Parliamentary control—including administrative tribunals, the Ombudsman, Auditor-General, and numerous other similarly independent governmental instrumentalities and statutory office holders. Because not all of its members have the tenure of Chapter III judges, by definition, these agencies of government must exercise either, or both of, the "executive power of the Commonwealth" or the "legislative power of the Commonwealth", but not the "judicial power of the Commonwealth".

Defining the "judicial power of the Commonwealth"

The "judicial power of the Commonwealth" is not *any* judicial power exercised in respect of, or under, a Commonwealth law (including the Constitution), but should be taken to be a technical term,[7] limited by:

- The text of the Constitution—that is, the jurisdiction given to Federal courts by Chapter III of the Constitution or by laws of the Parliament made for the purposes of Chapter III;
- Historical judicial traditions—that is, the kinds of matters traditionally dealt with, and functions traditionally exercised by, Anglo-Australian courts; and
- Implied values—that is, the values inherent in the idea of separation of powers implied from the structure of the Constitution.

Taking this approach, one does not have to employ the fiction, which the High Court has employed, of calling a judicial power "administrative", "executive", "arbitral", or "legislative". It has been said that "the Court looks considerably sillier when it stoutly maintains that a fish is a tree than when it explains that, under appropriate

constitutional theory, it simply does not matter whether the item is a fish or a tree."[8]

This suggested approach gives broad and flexible policy control regarding the structure and nature of governmental institutions to the executive and Parliament, and protection of fundamental constitutional values to the judiciary. It has some judicial support. Murphy J said:

> Whether adjudication is treated as part of the judicial power or not is often in practice the decision of the legislature. If it places the function with a court (within Ch. III) then in general the adjudicative power is treated by this Court as part of the judicial power of the Commonwealth. If not, it is treated as administrative adjudication. ... Other functions, even with a minimal adjudicative aspect, because traditionally they have been dealt with by courts, can be regarded as part of judicial power if the legislature cares to place them with the courts.[9]

If the executive creates an institution using its prerogative power, that institution can only exercise the "executive power of the Commonwealth".

If the Parliament creates an institution, it can delegate to that institution part of the "legislative power of the Commonwealth", or give it part of the "judicial power of the Commonwealth", or give it part of the "executive power of the Commonwealth". If Parliament creates a Chapter III court, it must give it only "judicial power of the Commonwealth", but if it creates a non-Chapter III institution, it can give it "executive power of the Commonwealth" and/or delegate to it "legislative power of the Commonwealth".

Within each of the three "powers of the Commonwealth" there may reside elements of executive, legislative, and judicial power that can, and sometimes must, be used in order to exercise, effectively and lawfully, the relevant power of the Commonwealth by the particular institution to perform its statutory functions.

The Chapter III courts must remain separate from the other arms of government because it is the judiciary that oversees and establishes the rule of law. It is the conscience of government and final arbiter of disputes. The fundamental purpose of the notion of the separation of powers is, by institutionalising separateness, to ensure that tyrannical power cannot accrete to any single institution. Chapter III courts are given the role of invalidating action taken by any other institution of government that is inconsistent with this constitutional value. To ensure that those courts cannot themselves be corrupted by power, executive powers that are not directly related to the judicial function are deemed to those courts, and the legislature can override any legislative decisions of the courts except those that relate to the continued existence of the most fundamental human rights (that is, human rights inherent in the Constitution itself that cannot be removed by legislation).[10]

Finally, it is the trust and confidence of the people in the institutions of government that give them their validity and continued role. Whatever the constitutional structure and institutional functions, the institutions of government retain their legitimacy through the continued acceptance by the people and by those institutions of the judgments of the courts and the rule of law.

Text of the Constitution

The "judicial power of the Commonwealth" can only ever be exercised if there is an "appeal" from a State Court or the Inter-State Commission[11] (s.73); or a "matter" (ss. 73, 75, 76, 77, or 78) to be determined. By limiting the jurisdiction of Chapter III courts in this manner, the Constitution limits the nature of the "judicial power of the Commonwealth" to the power used in determining particular sorts of controversies in particular sorts of cases. The "judicial power of the

Commonwealth" includes certain executive and legislative powers (which can, and should, be described as such), but which are executive (or administrative) and legislative[12] powers within the "judicial power of the Commonwealth," not within the "executive power of the Commonwealth" spoken of in section 61 or within the "legislative power of the Commonwealth" spoken of in section 1 of the Constitution. Any other functions that might be said to be "judicial" in nature or character do not involve an exercise of the "judicial power of the Commonwealth," but must be characterised as an exercise of judicial powers within the executive or legislative power of the Commonwealth.

The "judicial power of the Commonwealth" is not co-extensive with judicial power exercised in the execution of, or in making, Commonwealth laws, because to the extent that such exercise does not fall within sections 73 and 75 to 78 of the Constitution, it is either part of the "executive power of the Commonwealth" or the "legislative power of the Commonwealth".

Effectively, the judicial power of the Commonwealth relates only to the exercise of a power in deciding "matters", ie, controversies concerning "some right or privilege or protection given by law, or the prevention, redress or punishment of some act inhibited by law", involving "adjudication ... in proceedings *inter partes* or *ex parte*", but it does not involve determining abstract questions without the right or duty of any body or person being involved.[13]

Section 75 confers original jurisdiction on the High Court in certain enumerated types of matters. Sections 76 and 77 permit Parliament to confer and limit the jurisdiction of Chapter III courts in other types of matters, but these sections do not expressly state that these other types of matters can only be given to Chapter III courts. On one interpretation of these sections, it is only if the Parliament confers jurisdiction that the adjudication of such a matter becomes an exercise of the judicial power of the Commonwealth. Unless Parliament confers such jurisdiction on a Chapter III court, it cannot be an exercise of the "judicial power of the Commonwealth". If Parliament confers it on some other body, it must be an exercise by a non-Chapter III institution (which might even be called a court) of a judicial power within the executive power or the legislative power of the Commonwealth.

Therefore, applying this approach, the terms of the Constitution and the legislation enacted under or in support of Chapter III are the primary factors limiting and defining the scope of the "judicial power of the Commonwealth".

Historical judicial traditions

The importance of implications from historical traditions as an essential element in determining whether a particular type of decision *must* be made by a Chapter III court is seen when regard is paid to the fact that the only expressly essential elements of a Chapter III "court" are the tenure of its members and the non-diminution of remuneration. Consider the following example:

> The *Swift and Sure Decision-making Act 1999* is passed establishing the Pensions Court as a statutory corporation, which is then 100% privatised—the Commonwealth purchases the services of this Court, not on a case-by-case basis but on a pre-arranged annual fee (the contract bases the fee on a formula reflecting the Court's previous year's claim finalisation and rejection rates). Its "justices" are appointed by the Governor-General, are given tenure until age 70, and are guaranteed salary of not less than $25,000 per annum. All that these judges do is finally decide the facts and law in each case and determine pension claims. No hearings are held, and the claims are determined on the material on files submitted to it by Centrelink. The legislation precludes appeals to the High Court under section 73 of the Constitution or to any Chapter III court

under any other Commonwealth legislation (thus negating any jurisdiction under section 76 of the Constitution). The legislation deems the decisions of these justices to be decisions of the Court. The High Court has no jurisdiction under section 75 (v) because there is no "Commonwealth officer" who makes a relevant decision, merely a corporation.[14] The Commonwealth cannot be sued in relation to any particular matter before the Court under s. 75 (iii) because the Court is a 100% privately owned corporation, and the legislation declares that the only party to any matter before the Court is the claimant and the Commonwealth shall not be a party to proceedings. Further, the legislation provides that failure of a judge to accord due weight to Ministerial guidelines constitutes misbehaviour for the purposes of section 72 of the Constitution.

On a *literal* reading of Chapter III of the Constitution (and for the moment disregarding the general ineffectiveness of ouster clauses), there is no reason why this scheme would not successfully remove jurisdiction for all pension decisions from any of the current Chapter III courts, including the High Court—and save the Commonwealth lots of money.

What this extreme example shows is that there must be more to a "court" than tenure and remuneration. No one would regard the way in which this "court" does its business as being court-like. No hearing is given, the funding arrangements and threat of impeachment would influence decision-making, it is not a public institution, its judges need not be legally qualified, and they are remunerated at a rate that would not attract experienced governmental decision-makers, thus promoting poor quality, unreviewable, decision-making. The cry would be, "where is the justice?"—and there wouldn't be any! But, on a strict literal reading, it is "constitutional".

The fact that there is no "justice" in this type of arrangement must be an indication that it could not be a "court" exercising the "judicial power of the Commonwealth."

One must look to the history of Anglo-Australian courts to see what must have been intended to be the fundamental matters that could not be taken away from a court exercising the judicial power of the Commonwealth. It is from that history that we get our sense of what are the essential things that courts do, and must continue to do, and which must be implied into Chapter III of the Constitution.

Bruff has said "separation of powers principles suggest that some 'inherent' or 'core' functions may not be taken from the constitutional courts."[15] In *Leeth v. The Commonwealth*, Mason CJ, Dawson and McHugh JJ said:

> It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power, but the rules of natural justice are essentially functional or procedural and, as the Privy Council observed in the *Boilermakers' Case*, a fundamental principle which lies behind the concept of natural justice is not remote from the principle which inspires the theory of separation of powers.[16]

When the Constitution came into operation, the judiciary was given (by implication) a new power not previously held by English or Australian courts, that of judicial review of legislation for want of validity.[17] Other than matters giving rise to such issues, the types of matters expressly given to the judiciary by the Constitution were those traditionally dealt with by Anglo-Australian courts. While the Parliament can confer additional jurisdiction on Chapter III courts, there is nothing in the Constitution to suggest that the judiciary was to have any different role or function from that which it ever had. Causes of action were not enlarged (other than in relation to validity of legislation) and the types of matters referred to in Chapter III reflected traditional fields of judicial activity. Thus, after 1 January 1901 one could not go to a Chapter III court to obtain any new remedies or

pursue new causes of action unless the Constitution or the Parliament provided that such should be the case.

If the Parliament provided for a new remedy or new cause of action, it would be up to the Parliament to decide whether this would have to be pursued in a Chapter III court (and so Parliament could enlarge the judicial power of the Commonwealth) or in a non-Chapter III institution (by which Parliament could enlarge the executive power of the Commonwealth or delegate legislative power of the Commonwealth[18]). If a non-Chapter III institution were given authority to administer such new remedies or causes of action it could be required to act judicially, but would not be exercising any of the "judicial power of the Commonwealth".

The types of matters that have been regarded as being essential to be heard by courts are fairly limited. They concern matters relating to:

- imposition of criminal penalties;
- loss of liberty;
- forfeiture of property; and
- imposition of civil penalties.

But even in some of these matters, it has only ever been essential that courts have had supervision and ultimate control over their administration. For example, a person can lawfully be arrested by a police officer and thus lose his or her liberty, and a customs official can confiscate a person's property, without any order of a court. It is only if the person challenges the exercise of those powers that a court need get involved. In either case an aggrieved person might opt to pursue a further administrative avenue rather than take the matter directly to a court (for example complain to a more senior officer or apply for review to an administrative tribunal). The decision of that senior officer or tribunal might satisfy the person. But if not, ultimately, the matter must be brought before a court, which has the legal authority to determine finally the rights and liabilities of the person. It is that finality and authority that makes a court a court.

If a person chooses to waive the right to have such a matter determined by a Chapter III court, then there is nothing wrong with the final decision, in that particular case, being made by a non-Chapter III person or institution. The notion of waiver has arisen in a number of American cases concerning separation of powers issues.[19] It was also an element in the *BIO Cases*,[20] where it was held that provided there was an alternative avenue of appeal to a Chapter III court, it was not inconsistent with the doctrine of separation of powers for the adjudication of taxation matters to be decided by an administrative tribunal, and complainants could not complain that their matter had been dealt with by an administrative tribunal rather than a court when they had chosen to take that course themselves. An important issue then, becomes what is the nature of the alternative review undertaken by a Chapter III court in those circumstances—does it have to be a *de novo* review or merely a review on legal issues concerning the original administrative decision?

It has been said that in taxation matters, because of the nature of tax—"a compulsory exaction of money by a public authority for public purposes, enforceable by law, and ... not a payment for services rendered"[21]—fundamental rights are involved that require the highest adjudicatory standards. Certainly, the Constitution treats taxation laws differently to other legislation, and so one might infer that such matters require a higher standard of "justice" to be applied. In *MacCormick v. Federal Commissioner of Taxation,* Brennan J said that where Parliament:

> imposes a tax by reference to prescribed criteria, it is for the courts and not for the executive to determine whether each of those criteria exists in a particular case ... an opportunity to obtain a judicial determination as to the existence of the fact may be validly limited (as it is under the Income Tax Assessment Act) to judicial proceedings on appeal from disallowance of an objection to an assessment, but it cannot be wholly excluded.[22]

Perhaps the doubts that Gummow J raised[23] concerning the validity of the *Administrative Appeals Tribunal Act 1975* are groundless given the alternative avenue in taxation matters, which is an area of public law that is *sui generis*. No other areas of public law traditionally were subject to *de novo* hearings by courts, and so it is not necessary that Chapter III courts have that jurisdiction today.

The roles and functions of courts have varied depending on the nature of the dispute. In public law matters, courts traditionally have interfered only when there has been legal error, including issues relating to procedural fairness. It is only in special public law areas, such as taxation, that courts have demanded, and traditionally been given, a greater role.

While there is no reason that the Parliament cannot give courts a greater role in areas of public law, there is no historical reason to suggest that they need have any greater role. Any other role could be given to a non-Chapter III institution, which could be called a court or tribunal and which could be required to act judicially, being, in appropriate circumstances bound by the rules of evidence, and acting, for all intents and purposes as a court would normally act. But, because its decisions would be subject to the supervision of a Chapter III court, and would not have the finality of those of a Chapter III court—at least in relation to questions of law—it would not be exercising the "judicial power of the Commonwealth".

While it is not possible to find any "original intention" support for a fourth arm of government, there is some support in early constitutional text books for the idea that public law matters could be decided by non-Chapter III institutions utilising judicial-type powers. Allan Hall has also suggested that there is a historical difference between private and public rights, liabilities and privileges and the exercise of judicial power, and that, as a consequence, there is no essential requirement that they be decided by Chapter III courts.[24]

At the time of framing the Australian Constitution, it was settled law in America that "public rights" could be decided outside constitutional courts. This doctrine originated in *Murray's Lessee v. Hoboken Land & Improvement Co.*[25] After stating that Congress could not withdraw from the courts any "matter which, from its nature" is judicial, the US Supreme Court noted that:

> At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.[26]

Harrison Moore recognised this and applied it to the Australian Constitution, saying:

> The question then is—what is 'the judicial power of the Commonwealth' within the terms of sec. 71? Even in those Constitutions in which the separation of powers has been accepted as fundamental, by no means every function which is in its nature judicial is exclusively assigned, or permitted, to the judicial organ. Therefore, although neither history nor usage nor practical convenience can determine the nature of 'judicial power', logical consistency may have to yield something to history and familiar and established practice in determining what is the judicial power of the Commonwealth committed to the Courts by sec. 71.[27]

Quick and Garran, in 1900, also noted that executive officials would have to undertake some judicial functions and act judicially. They said:

> The distinction between judicial and executive functions is not always easy to draw. 'Doubtless the non-coercive part of executive business has no affinity with judicial business. ... The same may be said, for the most part, of such coercive work of the executive as consists in carrying out decisions of judges; e.g., the imprisonment or execution of a convict. But there are other indispensable kinds of coercive interference which have to be performed before or apart from any decisions arrived at by the judicial organ; and in this region the distinction between executive and judicial functions is liable to be evanescent or ambiguous, since executive officials have to "interpret the law" in the first instance, and they ought to interpret it with as much judicial impartiality as possible.' (Sidgwick, Elements of Politics, p. 358).[28]

Implied values

Separation of powers has a prophylactic function. Adherence to its principles in structuring governmental institutions prevents abuse of power through limiting undue accretion of power in any one organ of government.[29] Some of the values that flow from the concept include:

- independence of decision-making;
- countermajoritarian check on majoritarian institutions;
- rule of law; and
- prohibition of the exercise of arbitrary power.[30]

Independence of decision-making

Chapter III courts under this fourth-arm-of-government model would remain independent of the executive and Parliament. It is fundamentally important that they be so, and the judicial independence is the purpose of the tenure and guaranteed remuneration clauses of the Constitution. It is also that independence that the lower level "independent" decision-makers in the fourth arm of government can rely upon to validate their own actions, and assert and maintain their own independence from the executive and Parliament.

Where an agency has statutory duties or functions to carry out, the High Court insists upon the proper fulfilling of those duties and functions in accordance with, and not in excess of, the powers given to that agency. While the Court will permit discretion to be applied within the scope of the powers and nature of the function of the agency, there are common law rights and administrative law standards that the Court will insist are not encroached upon. Thus, the influence of the executive on such agencies is minimised, notwithstanding that the executive might have power to dismiss the office holders. In the end, the Chapter III courts set the standard of proper functioning of such agencies.

A new principle that would be important to introduce into fourth-arm-of-government jurisprudence is a notion of "structural" procedural fairness. In *Canadian Pacific Ltd v. Matsqui Indian Band*,[31] Lamer CJ of the Canadian Supreme Court held that the very structure of a tribunal could constitute a reasonable apprehension of bias at common law, and thus invalidate its decisions. In his view, the level of structural independence that is required of a tribunal depends on the nature of the tribunal, the interests at stake, and whatever other indicia of independence are available, such as oaths of office. In this matter, Lamer CJ held that the Bands' Appeal Tribunal did not meet the requisite standard of independence for three reasons: the by-laws creating the tribunal made no provision for financial security for the tribunal members; security of tenure for tribunal members was either absent or was ambiguous; and the Indian bands both appoint the tribunal members and are a party to the dispute. He held that it

was all three factors in combination that led him to his conclusion. He stated:

> [I]t is a principle of natural justice that a party should receive a hearing before a tribunal which is not only independent, but also appears independent. Where a party has a reasonable apprehension of bias, it should not be required to submit to the tribunal giving rise to this apprehension. Moreover, the principles for judicial independence outlined in *Valente*[32] are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties. However, I recognize that a strict application of these principles is not always warranted.[33]

By advancing such principles, the High Court could influence the structure and independence of institutions within the fourth arm of government, ensuring that proper standards were adopted, both procedurally and structurally, thereby ensuring that the exercise of judicial power within the executive or legislative power of the Commonwealth was appropriate to the nature of the matters dealt with by the relevant agencies.

Countermajoritarian check on majoritarian institutions

While a fundamental value contained in the Constitution is the democratic nature of government—the representation of the people in Parliament and the sovereignty of the people—an essential value of separation of powers is the avoidance of the "tyranny of the majority" by having the judiciary independent of popular will. The judiciary is a countermajoritarian institution, which protects individual and minority rights. Sir Gerard Brennan said recently:

> Responsibility for the state of the law and its implementation must rest with the branches of government that are politically accountable to the people. The people can bring influence to bear on the legislature and the executive to procure compliance with the popular will. But a clamour for a popular decision must fall on deaf judicial ears. The Judiciary are not politically accountable. The Courts cannot temper the true application of the law to satisfy popular sentiment. The Courts are bound to a correct application of the law, whether or not that leads to a popular decision in a particular case and whether or not the decision accords with executive policy. ...
>
> [I]f the Courts were to seek popular acclaim, they could not be faithful to the rule of law. Confidence is based on faithful adherence to the law by the Courts which are charged with its declaration and application. Our Constitution, rooted in the common law, does not need to express the proposition that the nation is under the rule of law and that the Courts are the organ of government responsible ultimately for the enforcing of the rule of law. That is the Constitution's fundamental postulate, inherent in its text, especially in Ch III. As Dixon J said in the *Communist Party Case*, the Constitution 'is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.'[34]

The same values can, and should, be seen in the fourth arm of government. The function of independent tribunals is closely related to the operation of the rule of law. The legislation under which they operate generally provides that their decisions are deemed to be the decisions of the primary decision-maker. This has the automatic legal effect of imposing on the executive agency the decision of the tribunal that has been made independently of that executive agency and in accordance with the law as interpreted by the tribunal. The only way in which that decision, lawfully, need not be implemented is by an appeal to the judiciary. Thus the fourth arm of government is also countermajoritarian in nature, but subject to the laws of the democratically elected Parliament.

Rule of law

The notion of rule of law is closely linked to the separation of powers, and flows

from the fact that no arm of government has total power to do as it might wish. Each is subject to, and submits to, some control by another arm, and it is the courts that authoritatively state the rules and apply them to the agencies of government. Sir Gerard Brennan said:

> The courts do not seek to assert some personal supremacy over the other branches of government; they simply discharge their duty of applying the law to them as they apply it to themselves. Precedent, analogy and logic as well as experience confine judicial decision-making in cases of political significance as in cases concerning purely individual rights and liabilities.
>
> The rule of law is the cement of the Westminster system in our federal Constitution.[35]

Thus, a fundamental consideration in the structure of government is whether the proposed scheme promotes or detracts from the rule of law. The notion of a fourth arm of government promotes and enhances rule of law ideals.

Applying the values of separation of powers to adjudication by non-Chapter III institutions should require that such jurisdiction will be validly given to such an institution only if its decisions are subject to review by a Chapter III court.[36] This was the principle applied by Hughes CJ of the US Supreme Court in *Crowell v. Benson,*[37] where he held that Congress may give adjudicatory power to administrative agencies if, and only if, the Article III courts are given adequate power to control the legality of those agencies' exercise of these powers through judicial review of all questions of law, including the sufficiency of evidence upon which facts are found, and that the essence of federal judicial power lies in the control that the court ultimately exercises in reviewing whether the law was correctly applied and whether the findings of fact had reasonable support in the evidence.[38] Thus, if Parliament gave judicial power to a non-Chapter III institution without also giving an appeal right to a Chapter III court on legal and procedural issues, it would breach this important constitutional value, and render the grant of power to that institution invalid.

Prohibition of the exercise of arbitrary power

Barendt has said:

> the separation of powers is not in essence concerned with the allocation of functions as such. Its primary purpose ... is the prevention of arbitrary government, or tyranny, which may arise from the concentration of power. The allocation of functions between three, or perhaps more, branches of government is only a means to achieve that end. It does not matter, therefore, whether powers are always allocated precisely to the most appropriate institution.[39]

If the division of powers and functions between three arms of government works to prevent the exercise of arbitrary power, where the division between the executive and the legislature is not distinct (such as in Australia), the introduction of a further semi-autonomous arm of government can be seen to enhance this constitutional value. In relation to the American system, where the separation between the executive and legislature is clearer than in Australia. Peter Strauss has suggested that government agencies comprise a fourth arm of government:

> An agency is neither Congress nor President nor Court, but an inferior part of government. Each agency is subject to control relationships with some or all of the three constitutionally named branches, and those relationships give an assurance—functionally similar to that provided by the separation-of-powers notion for the constitutionally named bodies—that they will not pass out of control. Powerful and potentially arbitrary as they may be, the Secretary of Agriculture and the Chairman of the SEC for this reason do not present the threat that led the framers to insist on a splitting of the authority of government at the very top. What we have, then, are three named repositories of authorizing power and control, and an infinity of institutions to which parts of the authority of each

> may be lent. The three must share the reins of control; means must be found of assuring that no one of them becomes dominant. But it is not terribly important to number or allocate the horses that pull the carriage of government.[40]

The types of control exercised by the executive, legislature, and judiciary on the fourth arm of government are very different in nature and extent. The executive can set policy objectives, but once a statutory power has been granted to an agency, that agency has authority to exercise those statutory powers to their full extent and in accordance with its own discretion. In *Re Drake*, Brennan J said:

> There are powerful considerations in favour of a Minister adopting a guiding policy ... Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is the better assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process.
>
> Of course, a policy must be consistent with the statute.[41]

In earlier proceedings before the Full Federal Court, Bowen CJ and Deane J said:

> It is not desirable to attempt to frame any general statement of the precise part which government policy should ordinarily play in the determinations of the Tribunal. That is a matter for the Tribunal itself to determine in the context of the particular case and in the light of the need for compromise, in the interests of good government, between, on the one hand, the desirability of consistency in the treatment of citizens under the law and, on the other hand, the ideal of justice in the individual case. ... Such a decision, even though it involves the application of government policy to the relevant facts, is the outcome of the independent assessment by the Tribunal of all the circumstances of the particular matter. It is to be contrasted with the uncritical application of government policy to the facts of the particular matter which represents an abdication by the Tribunal of its functions.[42]

Here we can see the role of the judiciary in its oversight of the fourth arm of government in its decision-making. The Courts will not interfere in the application by the agency of the executive's policy unless it appears to it that the agency has abdicated its statutory function (ie, the function given to it by the Parliament) to the executive's will.

Conclusion

The story has been told of former President Harry Truman, on hearing the news that General Eisenhower had been elected President, said, "Ike will be very disappointed in office. He will say, 'Do this, do that' and, unlike in the Army, it won't happen." This clearly, is the Australian executive's experience of the fourth arm of government. It is not directly under the executive as some government departments might be. The executive has very limited control over it. Once statutory powers are granted to independent agencies of government, the courts will ensure that they are exercised independently of undue executive influence.

The rumours that have circulated, and some of the issues made public by the Government, concerning matters under consideration by the Inter-Departmental Committee on Commonwealth Merits Review Tribunals are clear indications that the executive has recognised it does not have control over the fourth arm of government, and is seeking ways to bring its tribunals under greater executive influence. Some of the means that have been suggested by which this might be achieved are arguably contrary to separation of powers notions. Thus, it might (and should) be the case that the judiciary would promote the continued existence of a fourth arm of government by adopting separation of powers values

to invalidate certain changes that would tend to compromise the independence of tribunals.

While the fourth-arm-of-government notion has not gained formal acknowledgment by the courts in the United States, in *Mistretta v. United States*, the Supreme Court indicated the way in which it keeps agencies independent of the branch of government in which they are said to reside:

> In adopting [a] flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch.[43]

If a similar approach were to be adopted by the High Court, the effective result would be a recognition that there is a fourth arm of government—the independent tribunals and similar agencies of government—that needs the protection of a separation-of-powers doctrine to maintain its checking and balancing role within government. The fourth arm of government is under the rule of law because of its supervision for legal error and adherence to constitutional values by the judiciary.[44] It operates under rules made by the legislature, and pays regard, but not slavish adherence, to executive policy.

Adopting this fourth-arm-of-government approach there should be no doubt concerning the validity of the administrative law package of legislation and its institutions. Agencies within it can exercise all three types of powers, but are always subject to forms of supervision and oversight of the three branches of government named in the Constitution, which do not unduly compromise its independence.

Endnotes

1 *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, affirmed on appeal by the Privy Council, *Attorney-General of the Commonwealth of Australia v. The Queen* (1957) 95 CLR 529.

2 Else-Mitchell, R, Introduction to *Essays on the Australian Constitution*, Else-Mitchell, R (Ed), Law Book Company, 1961, p. xxxi.

3 The terms "formalist" and "functionalist" have been applied by American theorists to different separation of powers theories. A formalist theory is one that seeks to apply a rigid separation of both powers and functions between the three arms of government. A functionalist theory retains a basic separation of the functions of government, but does not require a strict divide between the three types of powers of government—it permits the one agency of government to exercise all three powers in the exercise of its functions, but the oversight and control of the use of each type of power ultimately resides with the relevant constitutionally vested arm of government.

4 Fallon, R H, Jr, "Of legislative courts, administrative agencies, and Article III", (1988) 101 *Harvard Law Review* 915, at p. 920.

5 Nevertheless, it is an approach that has been mentioned by Finn J as having possible application in Australia: *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1, 21.

6 While this view is not universally accepted, I submit that even the prerogative and other implied executive powers can be seen to be statutory powers because they are included by implication within the power vested in the Executive by section 61 of the Constitution. George Winterton has said, "It is arguable that the implied incorporation of the prerogative powers of the Crown in s. 61 has converted those powers into 'statutory' powers": Winterton, G, *Parliament, the Executive and the Governor-General*, 1983, 134. This appears to have been recognised by Brennan J in *Davis v. Commonwealth* (1988) 166 CLR 79, 108-111.

7 Similarly, "executive power of the Commonwealth" and "legislative power of the Commonwealth" are technical terms.

8 Redish, M H, *The Constitution as Political Structure*, Oxford University Press, New York, 1995, p. 102.

9 *R. v. Hegarty; ex parte City of Salisbury* (1981) 147 CLR 617, 632.

10 Toohey, J has said "[W]here the people of Australia, in adopting a Constitution, conferred power upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties." "A

government of laws and not of men", (1993) 4 *Public Law Review* 158, 170.

11 A body rendered effectively defunct because of a restrictive view of the separation of powers doctrine.

12 An example of legislative power is the power of the High Court to declare the common law. Legal realism as developed by judges and academics such as Oliver Wendell Holmes Jr held that all law is, in reality, judge-made, and thus the courts are the ultimate legislature. In *Southern Pacific Co v. Jensen* (1917) 244 US 205. 221. Holmes J said, "judges do and must legislate".

13 (*In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 266-267).

14 This was part of the ratio of Tamberlin J's judgment in *VVAA(NSW) v. Cohen* (1996) 70 FCR 419 as to why the Federal Court did not have jurisdiction under section 39B of the *Judiciary Act 1903* in an action seeking prerogative relief against the members of the Specialist Medical Review Council and the Repatriation Medical Authority.

15 Bruff, H H, "Specialized courts in administrative law", (1991) 43 *Administrative Law Review* 329 at p. 353.

16 *Leeth v. The Commonwealth* (1992) 174 CLR 455 at p. 470.

17 Legislation can be ruled invalid on the ground that it is either in excess of the powers of the Parliament (an implied judicial power) or it is a State law that is inconsistent with a valid Commonwealth law (while this is expressly provided for in s 109, the Constitution appears to be self-executing, and it would be open to argue that the executive or legislature could declare State law to be invalid just as effectively as the judiciary). While the rule in *Marbury v. Madison* (1803) 1 Cranch 137 is not expressly provided for in the Constitution and runs counter to the English doctrine of the supremacy of Parliament, it was accepted by the framers of the Constitution that it would apply in Australia. However, the idea of courts invalidating legislation was not entirely unknown to English law. The inclusion of s 109 of the Constitution permitting a court to invalidate State law that is inconsistent with Commonwealth law is analogous to the jurisdiction of Anglo-Australian courts to rule colonial laws to be invalid if they were inconsistent with Imperial legislation.

18 An example of this is the Specialist Medical Review Council, set up as a review body under the *Veterans' Entitlements Act 1986* to review the legislative decisions of the Repatriation Medical Authority. The legislation provides that a relevant person may seek review of the contents of a legislative instrument determined by the Repatriation Medical Authority. The Council must then review the contents of the legislative instrument, and may require the Authority to amend the instrument in accordance with its findings. The Federal Court, in *VVAA(NSW) v. Cohen* (1996) 70 FCR 419, 46 ALD 290, held that, in performing this review function, the Council exercises legislative power. Yet, in performing its task, the Council acts judicially, and its task possibly could have been given to a Chapter III court instead.

19 For example, *Commodity Future Trading Commission v. Schor* (1986) 478 US 833.

20 *British Imperial Oil v. Federal Commissioner of Taxation* (1925) 35 CLR 422; *Federal Commissioner of Taxation v. Munro*; *British Imperial Oil v. Federal Commissioner of Taxation* (1926) 38 CLR 153 affirmed on appeal by the Privy Council in *Shell Co of Australia v. Federal Commissioner of Taxation* (1930) 44 CLR 530.

21 *Matthews v. Chicory Marketing Board* (1938) 60 CLR 263, 276 per Latham CJ.

22 (1984) 158 CLR 622 at p. 658.

23 In *TNT Skypak International (Aust) Pty Ltd v. Federal Commissioner of Taxation* (1988) 82 ALR 175, Gummow J suggested that s 44 of the *Administrative Appeals Tribunal Act 1975*, which provides for a right of appeal to the Federal Court only on a question of law, might be invalid on this ground.

24 Hall, A N, "Judicial power, the duality of functions and the Administrative Appeals Tribunal" (1994) 22 *Federal Law Review* 13.

25 (1856) 59 US (18 How) 272.

26 Quoted in Bruff, H H, "Specialized courts in administrative law", (1991) 43 *Administrative Law Review* 329 at p. 354.

27 Moore, W Harrison, *The Constitution of the Commonwealth of Australia*, 1910 edition, reprinted 1991, Legal Books, Sydney, 315-316.

28 Quick, J, and Garran, R R, *The Annotated Constitution of the Australian Commonwealth*, 1901 edition, reprinted 1976, Legal Books, Sydney, 720.

29 Redish, M H, *The Constitution as Political Structure*, Oxford University Press, New York, 1995, 114.

30 Barendt, E, "Separation of powers and constitutional government", [1995] *Public Law* 599, 602.

31 [1995] 1 SCR 3.

32 *Valente v. R.* [1985] 2 SCR 673.

33 *Canadian Pacific Ltd v. Matsqui Indian Band* [1995] 1 SCR 3, 49.

34 Brennan, Sir Gerard, "The Parliament, the Executive and the Courts: roles and immunities", speech given at the School of Law, Bond University, 21 February 1998, <http://www.hcourt.gov.au/bond2.htm> (11/09/98).

35 Brennan, Sir Gerard, "The Parliament, the Executive and the Courts: roles and immunities", speech given at the School of Law, Bond University, 21 February 1998,

<http://www.hcourt.gov.au/bond2.htm> (11/09/98).

36 Under the AD(JR) Act, extensions to the Judiciary Act, and review by statutory right (e.g. s.44 AAT Act), the right to Chapter III review is guaranteed for most administrative decisions, and decisions of non-Chapter III tribunals and institutions. The Australian system is unlike that which exists in the United States, where Article III courts give deference to the decisions on questions of law of lower courts or tribunals by only requiring that the interpretation be reasonable, rather than the correct or preferable interpretation. Thus the notion of appellate review as an element of separation of powers theory has more likelihood of success in Australia than in America. Australian courts already exercise complete control over the interpretation of legal questions by administrative tribunals, and it cannot be said that any authoritative discretion has been given to those tribunals on legal questions if they are subject to complete review and no deference given by the reviewing court, on such matters. As Fallon notes, "There is some risk to judicial integrity insofar as courts give their imprimatur of validity to judgments that, but for the agency's decision, they would not have reached.": Fallon, R H, Jr, "Of legislative courts, administrative agencies, and Article III", (1988) 101 *Harvard Law Review* 915, 985-986.

37 (1932) 285 US 22.

38 Discussed in Bator, P M, "The Constitution as architecture: legislative and administrative courts under Article III", (1990) 65 *Indiana Law Journal* 233, 267.

39 Barendt, E, "Separation of powers and constitutional government", [1995] *Public Law* 599, 606.

40 Strauss, P L, "The place of agencies in government: separation of powers and the fourth branch", (1984) 84 *Columbia Law Review* 573, 579-580.

41 *Re Drake and the Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634, 640.

42 *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 590-591.

43 (1989) 488 US 361, 381.

44 Fallon, R H, Jr, "Of legislative courts, administrative agencies, and Article III", (1988) 101 *Harvard Law Review* 915, 947, said: "Appellate review can provide an effective check against politically influenced adjudication, arbitrary and self-interested decision-making, and other evils that the separation of powers was designed to prevent. It can help ensure fairness to litigants and can be sufficiently searching to preserve judicial integrity."

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