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ACROSS THE PUBLIC/PRIVATE DIVIDE: ACCOUNTABILITY AND ADMINISTRATIVE JUSTICE IN THE TELECOMMUNICATIONS INDUSTRY

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Introduction

Since the 1980s, a quiet revolution has taken place in the institutional design and ideological foundation of governance in Australia. Pressure for reform has led to significant change in the nature of public administration and the relationship between the public and private sectors. In the "post-modern" state, new administrative practices and institutional forms have emerged to facilitate the implementation of public policy and the delivery of public services. In constitutional terms, such novel instruments of governance challenge traditional conceptions of executive power, the public/private dichotomy and the relationship between citizen and government. Consequently, changes in the delivery of government services have also threatened the efficacy and legitimacy of administrative law. Administrative law is built on the notion that the values of accountability and administrative justice must be applied to exercises of public power. Yet the emergence of new forms of public administration has challenged the legal and conceptual boundaries of administrative law.

This essay examines the prospects for accountability and administrative justice in the post-modern state through an examination of one prominent area of governmental reform, the telecommunications industry. Section I provides an overview of the fundamental values of administrative law and the various ways in which the emergence of the post-modern state has challenged the legal and theoretical foundations of administrative law. This discussion demonstrates that, as new forms of executive activity develop, administrative lawyers must respond in a principled manner and rearticulate the values and legitimacy of administrative law. Ultimately, the province of administrative law must be redefined by a more flexible and sophisticated understanding of public power. Section II examines the legislative and regulatory framework of the telecommunications industry. Applying a substantive definition of "public power", this section asserts that the telecommunications industry remains within the legitimate province of administrative law. Section III evaluates the regulatory regime, from the perspective of the consumer of telecommunications services, against the values and standards of administrative law. This section critically assesses three aspects of the regime which impose mandatory service standards on service providers, and provide mechanisms for consumer protection. These are the customer service guarantee, the Telecommunications Industry Ombudsman scheme, and the industry code scheme. The rights and remedies generated by these mechanisms are tested against the standards of impartiality, fairness, accessibility, participation and transparency which have informed administrative law. This critical evaluation provides an insight into the prospects for accountability and administrative justice in a competitive, private sector industry engaged in the delivery of important public services.

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1 Principles of administrative law and the challenges of post-modern governance

> At a time when the very nature of the business of government - the function and purpose of public administration - is being questioned and redefined in so many areas, it is necessary to identify and to re-assert the core values which should be observed by government administrators . . . Incorruptibility, accountability and fairness may seem like high-sounding words. They are, however, basic values underlying public administration in any truly democratic community. They are in no way inconsistent with the processes of desirable change or the search for greater efficiency.
>
> - Governor-General Sir William Deane.[1]

The values of administrative law

The underlying values of administrative law are fundamental to the interests of the body politic and the nature of citizenship in the modern state. Administrative law mechanisms occupy an important position in the constitutional framework by safeguarding the democratic ideals of accountability and transparent, participatory and rational government.[2] The concept of accountability is central to notions of good governance and ethical public administration.[3] Accountability involves:

> a defined capacity by some person or institution to call [a public] authority into account, in the sense of having to answer for its conduct; a responsible authority or person with a duty to answer and explain such conduct; an agreed language and criteria for judgement; and upward, downward and outward reporting or answering processes.[4]

Traditionally, accountability has been generated through a network of relationships of political and financial accountability between the electorate, the parliament, the executive government, and the public service.[5] However, the basic mechanisms of ministerial and parliamentary responsibility cannot satisfactorily control executive power in a complex bureaucratic state.[6] As Sir Anthony Mason explained, "the blunt fact is that the scale and complexity of administrative decision-making is such that Parliament simply cannot maintain a comprehensive overview of particular decisions."[7] In providing the means to make public administrators directly accountable to individuals, administrative law has served the democratic needs of the community by ensuring the transparency and accountability of government.

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1 Address to the National Conference of the Institute of Public Administration, Melbourne, 20 November 1996, quoted in Administrative Review Council, *The Contracting Out of Government Services: Issues Paper*, February 1997, p 10.

2 Administrative Review Council, *The Contracting Out of Government Services: Issues Paper*, February 1997, p 13.

3 Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies*, Report No. 48, Melbourne, 24 January 1996, p 81.

4 G.Doern, *Political Accountability and Efficiency*, Ottawa Government and Competitiveness School of Policy Studies, Queens University, Discussion Paper Series 93-20, Ottawa, 1993, p 4.

5 *Accountability in the Commonwealth Public Sector*, Report of Management Advisory Board and Management Improvement Advisory Committee, June 1993, quoted in A.S.Blunn, "Accountability Processes and the Administration", in K.Cole (ed) *Administrative Law and Public Administration: Form v Substance*, Institute of Administrative Law, Canberra, 1996, p 61.

6 P.Bayne, "Administrative Law and the New Managerialism in Public Administration" (1988) 62 *Australian Law Journal* 1040, p 1041.

7 Sir Anthony Mason, "Administrative Review: The Experience of the First Twelve Years", (1989) 18 *Federal Law Review* 122, p 129.

In addition to reinforcing general notions of good governance, administrative law also has the fundamental goal of achieving administrative justice for individuals,[8] in the form of lawful, fair, impartial and rational treatment by the institutions of executive power.[9] Administrative law regulates relations between citizens and the state. The entitlement of individuals to administrative justice and the proper fulfilment of public duties has become an important aspect of citizenship in the modern welfare state.[10] As more individual interests, rights and entitlements under the welfare state are determined through exercises of administrative power, "administrative justice is now as important to the citizen as traditional justice at the hands of the orthodox court system."[11]

The existing administrative law package

At the Commonwealth level, the fundamental values of accountability and administrative justice have been interwoven into the body of statutes and rights making up the administrative law package.[12] The most prominent aspect of the package is the entitlement of individuals to challenge executive decisions by means of access to independent review bodies. Through judicial review, the legal boundaries of administrative decision making are judicially enforced. Through merits review, individuals may seek tribunal review of unfavourable decisions on a merits basis. An important corollary to judicial and merits review is the entitlement to written reasons for reviewable administrative decisions.[13] Another arm of the administrative law system is the power of the Commonwealth Ombudsman, under the *Ombudsman Act 1976* (Cth), to investigate government maladministration, either pursuant to public complaints or at the Ombudsman's own discretion. Under the *Freedom of Information Act 1982* (Cth) citizens are given rights of access to documents held by government agencies, thus giving effect to the basic principles of accountability, public participation and transparency in government.[14] The *Privacy Act 1988* (Cth) regulates the use and storage of personal information held by government agencies. Further regulation of the preservation of Commonwealth records and rights of access is provided by the *Archives Act 1983* (Cth).

Through this network of legislative controls and individual rights of redress, the administrative law package has given substance to the core values of accountability and administrative justice. However, in recent years, the capacity of the administrative law package to provide for the comprehensive control of executive action in all its disparate forms has been called into question. The administrative law package is premised on a traditional understanding of governance, involving direct decision making by government

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8 J.Mullins, "Handling Complaints Related to Government Services Delivered by Contractors", in K.Cole (ed) *Administrative Law and Public Administration: Form v Substance*, Institute of Administrative Law Forum 1995, Canberra, 1996, p 220.

9 M.Taggart, "The Province of Administrative Law Determined?", in M.Taggart (ed) *The Province of Administrative Law*, Oxford, 1997, p 3; M.Aronson, "A Public Lawyer's Response to Privatisation and Outsourcing" in M.Taggart (ed) *The Province of Administrative Law*, Oxford, 1997, p 43.

10 J.McMillan, "Introduction" to J.McMillan (ed) *Administrative Law: Does the Public Benefit?*, Australian Institute of Administrative Law Forum April 1992, Canberra, 1992, p xi.

11 Sir Anthony Mason, "Administrative Review: The Experience of the First Twelve Years", (1989) 18 *Federal Law Review* 122, p 130.

12 Administrative Review Council, *The Contracting Out of Government Services: Issues Paper*, February 1997, pp 11-12.

13 *Administrative Decisions (Judicial Review) Act 1977 (Cth) s 13*; *Administrative Appeals Tribunal Act 1975 (Cth) s 28*.

14 Administrative Review Council, *The Contracting Out of Government Services: Access to Information: Discussion Paper*, December 1997, p 4.

officers pursuant to legislation.[15] Such a model no longer accurately reflects the full spectrum of executive activity in the post-modern state. In recent times, the traditional model of government activity has been overtaken by new pressures and new expressions of public power.

The emergence of the post-modern state

Following vigorous debate throughout the 1980s concerning the nature of public administration and the need for microeconomic reform,[16] the core assumptions of public administration have been subject to challenge, and new forms of governance have emerged to complement and displace the old. The challenge to conventional public administration has been driven by faith in the effectiveness of private sector forms of corporate administration and the natural efficiency of competitive market forces. Significantly, faith in the maturity and efficiency of the private sector has been coupled with scepticism about the capacities of public sector institutions. The Hilmer Report of 1993, which criticised the anti-competitive distortions caused by public sector activity, confirmed the continuing prevalence of this ideology.[17] A more pragmatic factor in the ongoing debate surrounding administrative reform has been the desire for greater efficiency in government service delivery and a reduction in public sector spending.[18]

Pressure for reform and efficiency has challenged the very legitimacy of public power and its traditional constitutional forms. Critics have questioned the capacity of governments to govern effectively and efficiently while remaining directly involved in the minutiae of service delivery at all levels.[19] Governments have been forced to justify their involvement in certain activities, and to contemplate whether there are "better means of providing the services demanded of governments."[20]

The search for more efficient and innovative forms of executive activity has produced several distinct trends in public administration. Within the public service itself, pressure for reform has led to the introduction of imitative private sector practices and management forms, including corporatisation and the adoption of best practice performance indicators.[21] Other areas of executive responsibility have been entrusted to Government Business Enterprises ("GBEs"), distinct legal entities which follow private sector management practices and pursue commercial imperatives, while benefiting from greater operational independence.[22] At the same time, GBEs remain responsible for fulfilling policy objectives,[23] and remain identifiably public bodies, through the retention of government ownership and control. In other areas of government activity, the use of competitive tendering and contracting has put

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15 M.Roche, "Administrative Law in the Coming Decades: Towards the Future - A Period of Transition", in S.Argument (ed) *Administrative Law and Public Administration: Happily Married or Living Apart Under the Same Roof?*, Australian Administrative Law Forum 1993, Canberra, 1994, p 357.

16 J.Disney, "Access, Equity and the Dominant Paradigm", in J.McMillan (ed) *Administrative Law: Does the Public Benefit?*, Australian Institute of Administrative Law Forum 1992, Canberra, 1992, p 7.

17 Independent Committee of Inquiry, *National Competition Policy Report*, Canberra, August 1993.

18 C.Hood, "A Public Administration for All Seasons?" (1991) 69 *Public Administration* 3, p 3; R.W.Cole, "The Public Sector: The Conflict Between Accountability and Efficiency" (1988) 47(3) *Australian Journal of Public Administration* 223, p 224.

19 N.Lewis, "The Citizen's Charter and Next Steps: A New Way of Governing?" (1993) 64(3) *Political Quarterly* 316, p 317; D.Mullan, "Administrative Law at the Margins", in M.Taggart, *The Province of Administrative Law*, Oxford, 1997, p 136

20 Productivity Commission, *Stocktake of Progress in Microeconomic Reform*, Canberra, 1996, pp 160-1.

21 M.Aronson, "A Public Lawyer's Response to Privatisation and Outsourcing" in M.Taggart (ed) *The Province of Administrative Law*, Oxford, 1997, p 41.

22 M.Taggart, "Corporatisation, Privatisation and Public Law" (1991) 2 *Public Law Review* 77, p 77.

23 S.Bottomley, "Regulating Government-Owned Corporations: A Review of the Issues" (1994) 53(4) *Australian Journal of Public Administration* 521, p 525.

greater distance between the government and ultimate service delivery. The principal goal of outsourcing has been to harness the efficiency of competitive forces through the use of private sector agents in the delivery of policies formulated by the state.[24]

At the end of the conceptual spectrum of post-modern governance is privatisation. Privatisation involves the removal of government involvement in the form of ownership or direct control.[25] The process of privatisation therefore involves not only the direct sale of government assets into private ownership, but also the effective devolution of executive responsibility for certain activities from the public to the private sector.

Conceptual challenges to the legal instruments of administrative law

The new modes of public administration which have emerged from the introduction of various combinations of these practices challenge the conventional constitutional understanding of the state. Traditional relationships of accountability and control have been distorted by the introduction of new sources of public power and new operational imperatives. As governments distance themselves from direct executive responsibilities, and rely on means other than traditional methods of legislation and executive action to achieve their ends,[26] the relationship between public policy and ultimate service delivery has become more complex. The introduction into the constitutional framework of new private sector service providers through privatisation and contracting out has blurred conventional lines of responsibility and accountability.[27] As a consequence, "the relationship between the government and citizen is becoming increasingly diverse and complex."[28]

The capacity of the existing instruments of administrative law to safeguard the principles of accountability and administrative justice has been jeopardised by the restructuring of public administration. The administrative law package, in its current form, does not provide the same coverage in relation to power exercised by contracted service providers, GBEs and privatised industries as has been the case in relation to more traditional forms of executive activity.

In relation to contracting, the actions of contracted service providers do not generally fall within the scope of judicial review.[29] In the absence of specific legislation conferring jurisdiction, there is no merits review available of the actions of contracted service providers.[30] The actions of contracted service providers are also beyond the jurisdiction of the Ombudsman.[31] Likewise, the public's right of access to documents under the *Freedom of Information Act 1982* (Cth) does not encompass documents in the possession of contracted service providers.[32] This is despite the recommendations of the Administrative

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24 M.Aronson, "A Public Lawyer's Response to Privatisation and Outsourcing" in M.Taggart (ed) *The Province of Administrative Law*, Oxford, 1997, p 41.

25 National Commission of Audit, *Report to Commonwealth Government*, June 1996, q in M.Aronson, "A Public Lawyer's Response to Privatisation and Outsourcing" in M.Taggart (ed) *The Province of Administrative Law*, Oxford, 1997, p 42.

26 P.Cane, "Self-Regulation and Judicial Review" (1987) 6 *Civil Justice Quarterly* 324, p 346.

27 I.Harden, *The Contracting State*, Bristol, 1992, p 12.

28 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No. 38, 1995, p 18.

29 M.Hunt, "Constitutionalism and the Contractualisation of Government:" in M.Taggart (ed) *The Province of Administrative Law*, Oxford, 1997, p 35.

30 A.Marks, "Outsourcing and Administrative Law in the Commonwealth Public Sector", in K.Cole (ed) *Administrative Law and Public Administration: Form v Substance*, Institute of Administrative Law 1995, Canberra, 1996, p 215.

31 *Ombudsman Act 1976 (Cth) ss 3,5*.

32 *Freedom of Information Act 1982 (Cth) ss 4, 11*.

Review Council ("ARC").[33] The Information Privacy Principles in the *Privacy Act 1988* (Cth) currently have no direct application to private, contracted service providers.[34]

Similar limitations have become apparent in the applicability of the administrative law package to the activities of GBEs. Actions taken by a GBE under a general power to conduct business, or a capacity to enter contracts are beyond the jurisdiction of the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[35] Courts remain generally reluctant to judicially enforce Community Service Obligations imposed on GBEs.[36] While the extent of merits review of the actions of GBEs depends on the presence of specific legislative provisions, the ARC has noted that few decisions of GBEs are currently susceptible to merits review.[37] GBEs incorporated under the Corporations Law are not subject to the jurisdiction of the Commonwealth Ombudsman.[38] Nor, in general, do they fall within the scope of the *Freedom of Information Act 1982* (Cth).[39] The provisions of the *Privacy Act 1988* (Cth) also have no general application to incorporated GBEs.[40]

Political and ideological challenges to the values of administrative law

The principles of accountability and administrative justice have also been subject to challenge on a political and ideological level. Sustained political criticism has called into question the relevance and legitimacy of traditional mechanisms of accountability. Such criticism has in part been an incidental consequence of a shift towards measuring government performance in terms of economy, efficiency and output, rather than procedural standards of administrative fairness.[41] More significant is the perception that there is an irreconcilable conflict between accountability and the imperatives of efficiency and reform. The introduction of private sector models and market disciplines into public administration appears to have highlighted just such a conflict.[42] Advocates of reform in the 1980s emphasised the link between efficiency and the minimisation of public interference.[43] The development of GBEs, for example, reflected the view that efficient and effective administration required removal of the burdens of accountability and administrative justice.[44] Likewise, an important aspect of the privatisation debate has been the argument that the competitive forces of the market operate most efficiently in the absence of public accountability controls.

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33 Administrative Review Council, *The Contracting Out of Government Services: Access to Information: Discussion Paper*, December 1997, p 6.

34 *Privacy Act 1988 (Cth) s 6*.

35 *ANU v Burns* (1982) 43 ALR 25; *Post Office Agents Association Ltd v Australian Postal Commission* (1988) 84 ALR 563; *General Newspapers v Telstra Corporation* (1993) 117 ALR 629.

36 *Yamirr and Ors v Australian Telecommunications Corporation* (1990) 96 ALR 739.

37 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No. 38, 1995, p 32.

38 Ibid. p 19; *Ombudsman Act 1976 (Cth) s 3(1)(a)*.

39 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No. 38, 1995, p 22; *Freedom of Information Act 1982 (Cth) s 4(1)*.

40 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No. 38, 1995, p 23; *Privacy Act 1988 (Cth) s 6(1)*.

41 C.Hood, "A Public Administration for All Seasons?" (1991) 69 *Public Administration* 3, p 11.

42 A.C.Aman Jr. "Administrative Law for a New Century", in M.Taggart (ed) *The Province of Administrative Law*, Oxford, 1997, p 96.

43 Rt Hon. Sir I.Richardson, "Changing Needs for Judicial Decision-Making" (1991) 1 *Journal of Judicial Administration* 61, p 63.

44 M.Aronson, "A Public Lawyer's Response to Privatisation and Outsourcing" in M.Taggart (ed) *The Province of Administrative Law*, Oxford, 1997, p 41; M.Taggart, "State-Owned Enterprises and Social Responsibility: A Contradiction in Terms?" (1993) *New Zealand Recent Law Review* 343, p 353; Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No. 38, 1995, pp 44-5.

Significantly, the microeconomic reform agenda has coincided and merged with another important body of thought in the debate about public administration, new managerialism. If the general impulse for efficiency has tended to marginalise the values of accountability and administrative justice,[45] the influence of new managerialism has been to make such marginalisation a deliberate focus of reform. New managerialists have characterised administrative law as cumbersome, legalistic, overly expensive and a serious burden on responsive and effective government.[46] To such critics, the existing administrative law regime has come to be associated with bureaucratic inefficiency, irrationality and timid and delayed decision making.[47] As evidenced in recent debates concerning privative clauses, impatience with the costs and distorted resource allocation of administrative law continues to be a motivating political force.[48] In the context of reform, new managerialists have argued for a reduction in accountability controls on the basis that administrative law values are antithetical to effective and fiscally efficient public administration.[49]

A crisis in administrative law?

With such political and ideological forces assembled against the values of administrative law, and with evidence that executive power in the post-modern state is beginning to escape the legal boundaries of the administrative law package, it is unsurprising to find that many have perceived a crisis in administrative law. The shift towards a market orientated state and a shrinking public sector has provoked profound uneasiness among public lawyers about the future standing of administrative law.[50] Some have predicted a diminishing role.[51] Others have taken up a more vigorous defence, warning that "administrative lawyers armed only with public law values have to fight it out in the ideological trenches with those with competing views and values."[52]

In relation to privatisation in particular, many administrative lawyers have recognised that the current debate will define the future role and legitimacy of administrative law. Privatisation brings with it the prospect of areas of traditionally public activity being relocated permanently beyond the province of administrative law. As Harlow warns, "unless [public lawyers] are content with the undignified role of doorkeeper to the empty stable after the private sector has long bolted, it is here that we must learn to fight for our principles."[53]

Clearly, administrative law must respond to change and adapt to new forms of public administration if it is to continue effectively to safeguard the principles it has been developed to protect.[54] The province of administrative law must be reconceived and extended to incorporate novel institutional forces and administrative arrangements.

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45 M.Freedland, "Government by Contract and Public Law" (1994) 86 *Public Law* 86, p 102.

46 P.Bayne, "Administrative Law and the New Managerialism in Public Administration" (1988) 62 *Australian Law Journal* 1040, p 1042.

47 R.W.Cole, "The Public Sector: The Conflict Between Accountability and Efficiency" (1988) 47(3) *Australian Journal of Public Administration* 223, pp 225, 227.

48 J.McMillan, "Administrative Law Under a Coalition Government - Key Issues", in J.McMillan (ed) *Administrative Law Under a Coalition Government*, National Administrative Law Forum 1997, Canberra, 1997, p 2.

49 G.Airo-Farulla, "'Public' and 'Private' in Australian Administrative Law" (1992) 3 *Public Law* 186, p 191.

50 M.Taggart, "The Impact of Corporatisation and Privatisation on Administrative Law" (1992) 51(3) *Australian Journal of Public Administration* 368, p 368.

51 M.Allars, "Administrative Law, Government Contracts and the Level Playing Field" (1989) 12(1) *University of New South Wales Law Journal* 114, p 117.

52 M.Taggart, "The Province of Administrative Law Determined?", in M.Taggart (ed) *The Province of Administrative Law*, Oxford, 1997, p 4.

53 C.Harlow, "Back to Basics: Reinventing Administrative Law" (1997) 8 *Public Law* 245, p 261.

54 M.Freedland, "Government by Contract and Public Law" (1994) 86 *Public Law*, 86, p 86.

However, for administrative law to make the necessary legal innovations to respond to the demands of accountability and administrative justice in the post-modern state, there are significant ideological and theoretical hurdles which must be overcome. These include the dichotomy between public and private which has defined administrative law, the inadequacy of traditional justifications of administrative law and the difficulty of identifying exercises of public power in the post-modern state. Ultimately, as the traditional indicia of executive power lose their relevance, a broader theoretical understanding of the nature of public power and the legitimacy of administrative law must be developed. The remainder of this section will be devoted to the consideration of these challenges.

Bridging the public/private divide

Traditionally, legal thought has been based on the notional existence of distinct spheres of public and private activity, governed by discrete systems of public and private law.[55] The public sector has been distinguished by the unique characteristics of the state and its relation to individuals.[56] The private sector has been quarantined from the strict requirements of public law, and governed primarily by market principles, self-interested relations between individuals, and the limited intervention of the private law.[57] In the tradition of Western liberal thought, the notion of the private sector carries with it significant psychological, ideological and legal implications. Legal and governmental incursions on the private sector have been strictly limited, and vigorously resisted.[58] The categorisation of activities and institutions as either public or private conditions expectations of the proper function of the law, the proper scope of individual liberties and the legitimacy of state action.[59] In terms of accountability and administrative justice, the designation of certain exercises of power as public or private is fundamental to the legitimation of administrative law controls.

Yet the post-modern state defies such clear-cut dichotomies. The integration of private sector agents into the constitutional networks of the state through contracting and the privatisation of public functions has blurred the distinction between the public and private sectors. New hybrid forms of governance in privatisation and outsourcing operate to manipulate private, market power to public ends without the direct involvement of identifiably "public" bodies.[60] Private sector bodies are becoming increasingly significant sources of institutional power,[61] fundamental to the execution of public policy.[62] At the same time, notionally public bodies are adopting private sector forms and imperatives, and being distanced from governmental interference.

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55 M.Taggart, "The Province of Administrative Law Determined?", in M.Taggart (ed) *The Province of Administrative Law*, Oxford, 1997, p 5.

56 A.Stuhmcke, "Administrative Law and the Privatisation of Government Business Enterprises: A Case Study of the Victorian Electricity Industry" (1997) 4 *Australian Journal of Administrative Law* 185, p 196.

57 Ibid. p 185.

58 Lord Wedderburn of Charlton, "The Social Responsibility of Companies" (1985) 15 *Melbourne University Law Review* 4, p 4; C.Sampford, "Law, Institutions and the Public/Private Divide" (1991) 20 *Federal Law Review* 185, p189.

59 M.Taggart, "Corporatisation, Privatisation and Public Law" (1991) 2 *Public Law Review* 77, p 94; S.Bottomley, "Regulating Government-Owned Corporations: A Review of the Issues" (1994) 53(4) *Australian Journal of Public Administration*, 521, p 530.

60 A.C.Aman, Jr. "Administrative Law for a New Century", in M.Taggart (ed) *The Province of Administrative Law*, Oxford, 1997, p 92.

61 C.Sampford, "Law, Institutions and the Public/Private Divide" (1991) 20 *Federal Law Review* 185, p 201.

62 N.Lewis, "The Citizen's Charter and Next Steps: A New Way of Governing?" (1993) 64(3) *Political Quarterly* 316, p 320.

In the face of such administrative innovation, it is evident that the ability of administrative law to respond to executive power in the post-modern state will depend in large part on the extent to which administrative law can overcome the theoretical limitations imposed by the public/private dichotomy. As governments increasingly transgress the boundary between public and private, so too administrative lawyers must develop the conceptual confidence to follow the extending state across the public/private divide. The public/private divide currently underpinning administrative law has produced an inhibited conceptual framework for the recognition and control of public power.[63] The development of administrative law will continue to be distorted while the instinct remains to divide institutions into starkly defined conceptual categories of public and private.[64] Therefore, if a sophisticated approach is to be developed for the recognition of public power within what is notionally the private sector, administrative lawyers must develop a more flexible approach to the very concepts of public and private.

Extending the legitimate province of administrative law

The need for a more sophisticated understanding of the public/private divide and public power coincides with another challenge in extending the province of administrative law, the need for a clear justification of the legitimacy of administrative law.

The very notion that administrative law is in crisis presupposes that the extended forms of public administration which have been created in the post-modern state fall within the legitimate scope of administrative law and should be subject to the standards of accountability and administrative justice. On closer analysis, however, justifying this normative position and identifying the essential factors that attract the need for administrative law remains an elusive proposition. Yet if the province of administrative law is to be extended, a clear and principled justification of such an extension is politically and legally essential. This is particularly the case if the province of administrative law is to extend beyond the public/private divide, to encompass the actions of the "private" sector.

Traditionally, administrative law has been characterised as protecting the individual against the incursions and actions of the state.[65] In this sense the province of administrative law has been defined by reference to the specific institutional manifestations of the state, as identified by formal indicia such as government control and ownership.[66] The state has been understood as the exclusive embodiment of the public sphere,[67] and the peculiar nature of the state as an entity has justified the need for administrative law controls to protect such standards as the rule of law and the separation of powers.[68] In the context of the post-modern state, the perpetuation of such an approach would severely restrict the scope of administrative law.

More recently, in an attempt to bring contracted service providers within the province of administrative law, an alternative justification has been proposed in the form of financial accountability. The Commonwealth Ombudsman has recommended, to the ARC's approval,[69] that her jurisdiction be extended to allow the investigation of service provision

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63 G.Airo-Farulla, "'Public' and 'Private' in Australian Administrative Law" (1992) 3 *Public Law*, 186, pp186-189.

64 C.Sampford, "Law, Institutions and the Public/Private Divide" (1991) 20 *Federal Law Review* 185, pp 186-7.

65 D.Mullan, "Administrative Law at the Margins", in M.Taggart, *The Province of Administrative Law*, Oxford, 1997, p 156.

66 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No. 38, 1995, p xi.

67 G.Airo-Farulla, "'Public' and 'Private' in Australian Administrative Law" (1992) 3 *Public Law* 186, p 189.

68 *R v Home Secretary; ex parte Fire Brigade Union* [1995] 2 WLR 464; *Church of Scientology v Woodward* (1982) 154 CLR 25.

69 Administrative Review Council, *Administrative Review and Funding Decisions (Case Study of Community Service Programs)* cited in J.Mullins, "Handling Complaints Related to Government Services Delivered by

wherever public money is being used to provide services to the public, irrespective of the status of the entity delivering the services and the source of their power.[70] Implicit in this approach is the realisation that the identity of the service provider can no longer be relied upon as an appropriate indicator of the proper boundaries of administrative law. Yet at the same time the "follow the dollars" approach perpetuates the need for a close nexus with the government in the form of direct funding arrangements. As such this approach does not contribute significantly to the flexibility of administrative law. Particularly in the context of privatisation, the "follow the dollars" approach does not provide a theoretical framework to distinguish exercises of power by privatised entities which no longer rely on public financing, but which may significantly affect public interests, involve the delivery of defined public policy objectives or dramatically impact upon the interests of citizens.

From the perspective of the citizen as the end-user of public services, the essence of accountability and administrative justice is not the distinctive character of the state, but the proper fulfilment of public duties, the delivery of services according to certain standards and the entitlement to fair and equitable treatment, protected by adequate avenues of redress.[71] Individual end-users do not attach significance to the nature of service delivery, the formal characteristics of the service deliverer, or the basis of financing arrangements.

From this perspective, "an effective system of accountability must apply to the exercise of official power and to the discharge of public functions either by or on behalf of government."[72] Even where private sector bodies are involved, the need for accountability mechanisms persists where "the private enterprise delivers what is regarded as an essential service or a service with a distinctive public interest component."[73] The theoretical difficulty for administrative law lies in recognising such essential services and public interest components, and developing the conceptual framework for designating certain exercises of power as "public" and amenable to the values of accountability and administrative justice, irrespective of the particular characteristics of the institution responsible for delivering the service.

As the nexus between administrative law and the formal indicia of the state diminishes in importance, the legitimacy of administrative law must be tied to a more substantive analysis of power. Formalistic criteria such as degrees of public ownership must give way to a more principled approach to the identification of public power.[74] The ability of administrative lawyers to grapple with these theoretical challenges, and adequately influence policy development and institutional design,[75] may well define the future province of administrative law.

Contractors", in K.Cole (ed) *Administrative Law and Public Administration: Form v Substance*, Institute of Administrative Law Forum 1995, Canberra, 1996, p 235.

70 Commonwealth Ombudsman *Annual Report 1995-6*, quoted in Administrative Review Council, *The Contracting Out of Government Services: Issues Paper*, February 1997, p 16.

71 A.Tang, "Contracting Out in Community Services" in L.Pearson (ed) *Administrative Law: Setting the Pace or Being Left Behind?*, Australian Institute of Administrative Law, Sydney, 1997, p 346; A.Stuhmcke, "Administrative Law and the Privatisation of Government Business Enterprises: A Case Study of the Victorian Electricity Industry" (1997) 4 *Australian Journal of Administrative Law* 185, p 198.

72 J.McMillan, "Administrative Law Under a Coalition Government - Key Issues", in J.McMillan (ed) *Administrative Law Under a Coalition Government*, National Administrative Law Forum 1997, Canberra, 1997, p 2.

73 H.Schoombee, "Privatisation and Contracting Out - Where Are We Going?" in J.McMillan (ed) *Administrative Law Under a Coalition Government*, National Administrative Law Forum 1997, Canberra, 1997, p 139.

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

75 M.Taggart, "Corporatisation, Privatisation and Public Law" (1991) 2 *Public Law Review* 77, p 107.

Identifying public power

For radical theoreticians, the search for a more expansive definition of public power represents an opportunity to extend the province of administrative law to include large private corporations purely on the basis of the scale of their economic power. In this sense the debate concerning the province of administrative law has intersected with a broader ongoing debate concerning corporate accountability.[76] Advocates of corporate social responsibility have argued for an extension of administrative law values to the private sector to control exercises of power by powerful super-corporations where at present there is little scrutiny of the fairness of such exercises of power.[77] Such an extension is justified on the basis that the collective interests of the public and the individual interests of consumers may be severely and adversely affected by exercises of power by such institutions.[78] Central to this debate has been the idea that, despite the assumptions of the traditional public/private dichotomy,[79] private power may become "public" simply by virtue of its degree of concentration in particular institutions.

Particularly in the current political climate, however, it would seem that the legitimacy of administrative law must be tied to more specific criteria than the mere concentration of power. Therefore, while the degree of impact that exercises of power have on individual and communal interests may be acknowledged as one of the indicia of public power, it must be recognised as being merely one indication to be considered in combination with other factors.[80]

Many advocates of an expanded province for administrative law have sought to find distinctive public elements inherent in the nature of particular services, particularly in the context of the privatisation of utilities such as electricity, water and telecommunications. However, identifying particular services as inherently "essential", "public" or "governmental"[81] has proved a difficult proposition. To describe a particular area of service delivery as intrinsically public merely because of the traditional involvement of government, as some have done,[82] is intellectually troubling and politically unjustifiable. Furthermore, such attempts to identify public power through a traditional association with the institutions of the state merely perpetuate formalism in the analysis of public power.

More substantive attempts to identify the "public" nature of utility services have been attempted. Taggart points to the strategic, national importance of utility infrastructure and the fundamental importance of utility services to the individual as being factors indicating the

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76 J.Tolmie, "Corporate Social Responsibility" 15(1) *University of New South Wales Law Journal* 268, p 296.

77 Rt Hon. Sir H. Woolf, "Public Law - Private Law: Why the Divide? A Personal View" (1986) *Public Law* 220, pp 224-5, Sir G. Borrie, "The Regulation of Public and Private Power" (1989) *Public Law* 553, p 563.

78 M.Hunt, "Constitutionalism and the Contractualisation of Government:" in M.Taggart (ed) *The Province of Administrative Law*, Oxford, 1997, p 32.

79 Lord Wedderburn of Charlton, "The Social Responsibility of Companies" (1985) 15 *Melbourne University Law Review* 4, pp 6, 18.

80 M.Hunt, "Constitutionalism and the Contractualisation of Government:" in M.Taggart (ed) *The Province of Administrative Law*, Oxford, 1997, p 32.

81 M.Chen, "Judicial Review of State-Owned Enterprises at the Crossroads" (1994) 24(1) *Victoria University of Wellington Law Review* 51, p 52.

82 A.Tang, "Contracting Out in Community Services" in L.Pearson (ed) *Administrative Law: Setting the Pace or Being Left Behind?*, Australian Institute of Administrative Law, Sydney, 1997, p 337; D.Mullan, "Administrative Law at the Margins", in M.Taggart, *The Province of Administrative Law*, Oxford, 1997, p 153.

intrinsically public nature of utility services.[83] Allars has likewise singled out certain services involving "collectively consumed resources" as involving the exercise of public power. In the context of collectively consumed resources such as water, electricity, and telecommunications services, the processes involved in the organisation, management and delivery of such services are inherently public functions, which must be subject to the exceptional legal treatment of regulation through administrative law.[84]

Given the difficulty of designating certain functions and services as inherently public, it is preferable to seek more authoritative indications in the form of parliamentary intent.[85] Certain activities, bodies and services may be effectively characterised as public as a matter of legislative policy. In the area of privatised utilities, the distinctively public nature of the "processes of collective consumption" is indicated most clearly by the legislative designation of mandatory standards of service. Processes of collective consumption have been defined as those "whose organisation and management cannot be other than collective given the nature and size of the problem."[86] This is to be contrasted with commodity forms of commercially organised consumption which can be effectively organised by the disciplines of the market.[87] Rather than speculating as to the need for processes of collective consumption, the establishment of legislative, non-market criteria for the delivery of utility services provides unequivocal recognition of the need for such public processes. In this sense, public services may be defined as those which cannot be provided, to the satisfaction of certain public policy objectives, by the autonomous determination of market forces and the influence of consumer sovereignty. Rather the existence and content of the service must be defined and mandated through the authoritative public policy making processes of the Parliament, as influenced through political and electoral channels.[88]

The legislative imposition of mandatory standards and public service obligations on executive agents is therefore a significant indicator of public power. In the case of GBEs, the requirement that Community Service Obligations be satisfied represents a clear indication of the public nature of the power exercised by these institutions.[89] Such indicia of public power are also applicable in relation to services involving competitive, private agents. As will be explored in section II, the continuing public nature of telecommunications services has been signalled through a number of legislative measures imposing mandatory service standards and Universal Service Obligations (USOs) on the carriers and service providers involved in the industry.

New manifestations for an expanding administrative law

The fundamental basis of administrative law is that exercises of public power should be subject to the principles of accountability and administrative justice. As expressions of public power change, and the conceptual tools for recognising public power adapt in response, the issue becomes a strategic and legal question of how the values of accountability and administrative justice may be applied to such exercises of power. One option involves the

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83 M.Taggart, "Corporatisation, Privatisation and Public Law" (1991) 2 *Public Law Review* 77, pp 91, 99. See also N.Lewis, "Regulating Non-Government Bodies: Privatisation, Accountability and the Public-Private Divide", in J.Jowell and D.Oliver (eds) *The Changing Constitution*, Second Edition, Oxford, 1989, p 219.

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

85 P.Cane, "Self-Regulation and Judicial Review" (1987) 6 *Civil Justice Quarterly* 324, p 338.

86 Sociologist M.Castells, quoted in P.McAuslan, "Administrative Law, Collective Consumption and Judicial Policy" (1983) 46(1) *Modern Law Review* 1, p 2.

87 P.McAuslan, "Administrative Law, Collective Consumption and Judicial Policy" (1983) 46(1) *Modern Law Review* 1, pp 2-3.

88 I.Harden, *The Contracting State*, Bristol, 1992, pp 6-8.

89 M.Allars, "Public Law but Private Power: Removing Administrative Law Review from Government Business Enterprises" (1995) 6 *Public Law Review* 44, p 55.

extension of the existing administrative law package to incorporate new manifestations of public power. Increasingly, however, mechanisms other than the traditional administrative law package are being relied upon to give effect to the principles of accountability and administrative justice.

Particularly in the area of privatisation, the values of administrative law are increasingly protected through entirely novel institutional arrangements and legal instruments. The trend in regulatory policy has been towards self-regulation, the development of industry-specific complaints mechanisms, and reliance on industry specific regulatory institutions.[90] In an area such as telecommunications where the delivery of public services has been entrusted to a competitive industry involving private sector agents, the continuing protection of the values of accountability and administrative justice depends upon industry-specific regulation, self-regulatory codes, and industry-specific institutions. It is therefore essential that such arrangements be closely scrutinised by public lawyers and tested against the core standards and principles of administrative law. The pressing imperative for administrative lawyers must be to ensure that regulation in the post-modern state, in areas involving the exercise of public power, reflects the fundamental values of legality, openness, accessibility, fairness, participation, impartiality and rationality.[91]

2 Public services in the private sector: telecommunications reform and the new regime

History of telecommunications in Australia

In the period from 1975 to July 1997, a series of legislative and institutional reforms transformed the telecommunications industry from its original monopoly structure, through a stage of managed competitive duopoly, to the current regime of open competition.[92] Prior to 1975, all domestic telecommunications services were provided by the Postmaster-General's Department. The introduction of the *Telecommunications Act 1975* (Cth) removed telecommunications services from the ambit of the Postmaster-General's Department, and created the statutory agency of Telecom Australia for the specific purpose of delivering domestic telecommunications services.

Following sustained pressure for microeconomic reform, and criticism of the government monopoly model,[93] the Evans Statement of May 1988[94] signalled the comprehensive restructuring of the telecommunications industry. The statement highlighted the need for flexible and innovative service provision, and linked the need for efficiency in the information economy to the international competitiveness of Australian industry.[95] At the same time the statement reaffirmed the important social objectives of providing universally available and affordable telecommunications services to the Australian community.[96]

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90 Administrative Review Council, *The Contracting Out of Government Services: Issues Paper*, February 1997, p 3.

91 M.Taggart, "The Impact of Corporatisation and Privatisation on Administrative Law" (1992) 51(3) *Australian Journal of Public Administration* 368, p 371.

92 N.Tuckwell, "Managing the Transition to Competition", in S.Argument (ed) *Administrative Law: Are the States Overtaking the Commonwealth?*, National Administrative Law Forum 1994, Canberra 1996, pp 264-6.

93 Department of Communications and the Arts, *Liberalisation of the Telecommunications Sector: Australia's Experience*, August 1997, p 6.

94 Senator the Hon G.E.Evans QC, Minister for Transport and Communications, *Australian Telecommunications Services: A New Framework*, 25 May 1988, Canberra.

95 Ibid. p 8.

96 Ibid. p 190.

The Evans Statement heralded the introduction of a package of legislative and institutional reforms designed to marry these economic and social imperatives. The *Telecommunications Act 1989* (Cth) introduced limited competition in the provision of value added services, private networks, customer equipment and cable installation. Certain "reserved services", most importantly the provision of the basic telephone service, remained within the monopoly of Telecom. Under the *Australian Telecommunications Corporation Act 1989* (Cth), the Australian Telecommunications Corporation (as Telecom Australia was renamed) operated as a commercial entity, subject to defined Community Service Obligations to provide universal access to standard telephone services, payphones and emergency services.[97]

More significant changes followed in 1991, as the telecommunications industry progressed to a transitional phase of competitive duopoly. Under the *Telecommunications Act 1991* (Cth), the Australian Telecommunications Corporation's monopoly and the concept of "reserved services" were abolished, and allowance made for the issue of two general carrier licences for the provision of standard telephone services. The competitive duopoly in the provision of standard telephone services was set for a fixed period, to end on 1 July 1997.

Prior to the introduction of open competition on 1 July 1997, a further factor in the restructuring of the telecommunications sector was the partial privatisation of the government-owned carrier, Telstra Corporation (as it was renamed in April 1993). Following the *Telstra (Dilution of Public Ownership) Act 1996*, one third of the shares in Telstra were sold into private ownership, and government control of Telstra was limited to the position of the government as majority shareholder in the corporation.[98] Despite vigorous public debate concerning the privatisation of Telstra, however, the most significant reform has not been in the status of Telstra but in the reconception of the entire industry through the introduction of competition and a new regulatory regime.[99]

The post July 1997 regulatory regime

The transition to open competition on 1 July 1997 was achieved through a package of new Acts, the most significant being the *Telecommunications Act 1997* (Cth) ("the Act"). The fundamental features of the post July 1997 regime are the removal of restrictions to entry to the telecommunications services market, the creation of a new universal service regime, and the establishment of a framework for industry self-regulation.

The Act removes the barriers to competition in the provision of telecommunications services, with allowance made for an unlimited number of "carriers" and "carriage service providers". A carrier is an owner of "network units" (telecommunications facilities including line links, satellite based facilities and mobile base stations) used to supply carriage services (services for carrying communications) to the public.[100] Under the Act, any constitutional corporation may apply for a carrier licence to operate network units.[101] A carriage service provider is a person who supplies carriage services (for example telephony or Internet services) to the public using network units owned by a carrier.[102] Aside from compliance with service provider rules, outlined below, there is no restriction on eligibility to operate as a carriage service provider.

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97 *Australian Telecommunications Corporation Act 1989 (Cth) s 7*.

98 Senate Environment, Recreation, Communications and the Arts Reference Committee, Government Senator's Report, *Telstra: To Sell or Not to Sell? Consideration of the Telstra (Dilution of Public Ownership) Bill 1996*, September 1996, p 74.

99 Senate Environment, Recreation, Communications and the Arts Reference Committee, *Telstra: To Sell or Not to Sell? Consideration of the Telstra (Dilution of Public Ownership) Bill 1996*, p 4.

100 Department of Communications and the Arts, *Factsheet: Carriers and Service Providers*, 1997.

101 *Telecommunications Act 1997 (Cth) s 52*.

102 *Telecommunications Act 1997 (Cth) s 87*.

Public interest obligations in the current regime

While providing the conditions for open competition, the Act also reaffirms the continuing public interest in universality and equity in the provision of telecommunications services. The Act creates various mechanisms to ensure that telecommunications services are delivered according to public policy standards, rather than the purely autonomous operation of market forces.

The universal service regime imposed by Part 7 of the Act is the most prominent of these mechanisms. Section 149 establishes the basic universal service obligation, which is to ensure that standard telephone services, payphones, and certain other prescribed carriage services are reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business. The fulfilment of the universal service obligation is no longer linked directly to Telstra Corporation. Part 7 Division 3 of the Act provides for a competitive tendering process in the selection of universal service providers, with allowance made for the Minister to declare any specified carrier to be the national universal service provider,[103] or the regional universal service provider for a discrete service area.[104] Currently, Telstra is the declared national universal service provider.[105] The declared universal service provider for an area must take all reasonable steps to fulfil the universal service obligation, so far as the obligation relates to that area,[106] and must provide to the Minister a universal service plan outlining the provider's plans for progressively fulfilling the universal service obligation within their area of responsibility.[107] The cost of the universal service regime is borne directly by the carriers, through a universal service levy which is determined according to each carrier's proportionate share of the total eligible revenue in the relevant financial year.[108]

The Act imposes a number of other mechanisms for the protection of consumers and the maintenance of mandatory service standards. Carriage service providers must comply with a series of service provider rules,[109] which are enforced by the newly formed industry regulator, the Australian Communications Authority (the "ACA").[110] These include compliance with the Act, the provision of operator and directory assistance services, and the provision of itemised billing to customers to whom a standard telephone service is supplied. Part 8 of the Act requires that consumers continue to be given the option of untimed local calls in relation to the standard telephone service.

Three sections of the Act have particular significance to the protection of end-users and the safeguarding of service standards. Part 9 of the Act provides for the development of a customer service guarantee, in the form of mandatory performance standards which may be enforced by consumers against carriage service providers. Part 10 of the Act requires all carriers and carriage service providers involved in the supply of standard telephone services to join the Telecommunications Industry Ombudsman scheme.[111] Part 6 of the Act provides for the development of codes by the telecommunications industry, in a self-regulatory and co-regulatory setting.

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103 *Telecommunications Act 1997 (Cth) s 150(1)*.

104 *Telecommunications Act 1997 (Cth) s 150(2)*.

105 Australian Communications Authority, *Consumer Bulletin,* Issue 2 (March 1998), p 12.

106 *Telecommunications Act 1997 (Cth) s 151(5)*.

107 *Telecommunications Act 1997 (Cth) ss 157, 158*.

108 *Telecommunications Act 1997 (Cth)* Part 7 Division 6 Subdivision B; *Telecommunications Act (Universal Service Levy) Act 1997 (Cth)*.

109 *Telecommunications Act 1997 (Cth) Part 4 Division 5; ss 98, 101*.

110 *Telecommunications Act 1997 (Cth) ss 68, 69, 102, 105*.

111 *Telecommunications Act 1997 (Cth) s 246*.

Evaluating the post July 1997 regime: continuing public power in the delivery of telecommunications services

The most conspicuous achievement of the post July 1997 regime is the development of a fully competitive environment in which telecommunications services are shaped primarily by market forces rather than bureaucratic controls. As such, the move to open competition represents the culmination of the reform agenda of the 1980s and reflects the prevailing faith in the maturity and capacity of the private sector. The underlying policy objective of the Act is that the competitive behaviour of a multitude of service providers will increase the diversity and quality of services, encourage technological innovation, promote international competitiveness and efficiency, and reduce costs in the information economy.[112]

However, despite the shift towards reliance on market mechanisms and private sector service providers, the current regulatory regime is premised on the notion that there is a continuing need for public control to ensure the delivery of telecommunications services on an equitable basis and according to legislatively defined standards. The fundamental principle behind the universal service regime, and the other measures in the Act which operate to maintain publicly defined standards, is that competitive market forces cannot be relied upon as an adequate mechanism for the satisfaction of certain public policy objectives. These policy objectives include the delivery of basic communications services to the national community on an equitable, non-discriminatory basis irrespective of cost and location, the maintenance of strict standards of service quality, and the delivery of services of public importance, such as directory, operator and emergency services.

Such policy objectives reflect the underlying view that there is a distinctive character to telecommunications services. Telecommunications services have been identified as a "basic human need."[113] The universal availability of telecommunications services has been recognised as an essential precondition to national cohesion, fundamental to the effective participation of citizens in the social, cultural and economic life of the community.[114] The "tyranny of distance" in Australia has made the delivery of universal and affordable communications services a particularly sensitive area of governmental responsibility.[115] Particularly for groups on the social and geographical fringes, such as the disabled and inhabitants of rural communities and remote aboriginal communities, rights of access to affordable telecommunications services of a satisfactory standard are intimately connected to notions of citizenship and national community.[116]

What is most significant in terms of identifying public power in an administrative law sense is not the inherent or traditionally public nature of telecommunications, but the fact that the current regulatory regime provides clear legislative recognition of the continuing public nature of telecommunications services. While responsibility for the delivery of telecommunications service has shifted outside the public sector and into the arena of the market and private agents, service providers in the telecommunications industry have assumed the responsibility for discharging significant public obligations. As in other areas of administrative reform, the regime defies traditional notions of public administration. The

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112 M.Armstrong, M.Hudson and T.Jordan, *The Communications Environment: Australia 1998*, Media and Telecommunications Policy Group, RMIT, Melbourne, 1998, p 1.

113 Senate Environment, Recreation, Communications and the Arts Reference Committee, *Telstra: To Sell or Not to Sell? Consideration of the Telstra (Dilution of Public Ownership) Bill 1996*, p 132.

114 Standard Telephone Service Review Group, AUSTEL, *Report of the Standard Telephone Service Review Group*, December 1996, p 32.

115 M.Armstrong, M.Hudson and T.Jordan, *The Communications Environment: Australia 1998*, Media and Telecommunications Policy Group RMIT, Melbourne, p 3.

116 J.Given, "Reviewing Australia's Standard Telephone Service", Unpublished paper presented at Kowloon Shangri-la Hotel, Hong Kong, 26-27 February 1997, Unnumbered.

execution of public policy in telecommunications does not rest upon the activities of a government owned or controlled body, nor upon the expenditure of "public" money. Yet there remains a strong residual element of public power being exercised. As legislative standards of conduct and service are superimposed on the activities of the competitive telecommunications market, the private agents of the industry are effectively used as instruments for the fulfilment of public policy. As such, and according to the definition of public power proposed in section I, the telecommunications industry remains within the legitimate province of administrative law.

3 Consumer safeguards in the new regime: a critical evaluation

The previous section identified the residual presence of public power in the new telecommunications regime. The principles underlying administrative law suggest that, from a normative and theoretical perspective, the standards of accountability and administrative justice must therefore be applied to the actions of telecommunications service providers. This section critically evaluates three novel legal instruments which have been introduced in the telecommunications regime to give effect to public law principles. It must be noted that a core level of legal protection in the new regime will be provided by private law mechanisms, including tort, contract and consumer protection legislation. However, the fundamental principle behind administrative law is that, over and above private law, exercises of public power must be subject to the specific, exceptional disciplines of public law.

This section concentrates on such public law disciplines through an assessment of three mechanisms in the Act which operate to control the actions of service providers. These are the customer service guarantee, the Telecommunications Industry Ombudsman scheme, and the industry code scheme. The effectiveness of these mechanisms in giving substance to the values of accountability and administrative justice, and ensuring the fair and equitable treatment of consumers, depends on the precise nature of the legal rights which they establish and the institutions which they depend upon.

Customer service guarantee

Part 9 of the Act establishes a framework for the development of a customer service guarantee, in the form of a set of minimum customer service standards relating to the supply of standard telephone services.[117] The customer service guarantee creates a legally enforceable entitlement to compensation for customers in the event of the contravention of a performance standard by a carriage service provider.[118] The ACA, under ministerial direction, is responsible for the development of performance standards and scales of compensation for the customer service guarantee.[119] The current standard for the customer service guarantee, the *Telecommunications (Customer Service Guarantee) Standard 1997* (the "CSG Standard") establishes a set of performance standards in the form of maximum time periods for the connection of standard telephone services[120] and the repair of faults and service difficulties.[121] The CSG Standard also requires carriage service providers to attend appointments with customers.[122] Carriage service providers are liable for damages equal to the monthly rental for the standard telephone service for each working day of delay

117 Australian Communications Authority, *Factsheet: Customer Service Guarantee*, June 1998.

118 *Telecommunications Act 1997 (Cth) s 235*.

119 *Telecommunications Act 1997 (Cth) ss 234, 236, 242*.

120 *Telecommunications (Customer Service Guarantee) Standard 1997 (Cth) s 7*.

121 *Telecommunications (Customer Service Guarantee) Standard 1997 s 8*.

122 *Telecommunications (Customer Service Guarantee) Standard 1997 (Cth) ss 12(1), 12(3)*.

beyond the guaranteed maximum periods set in the CSG Standard for connection and fault rectification, and for each missed appointment.[123]

The liability of service providers to pay the stipulated damages for contravention of a performance standard may be enforced by customers through legal action in a court of competent jurisdiction.[124] Section 237 confers jurisdiction on the Telecommunications Industry Ombudsman ("TIO") to investigate alleged contraventions of a performance standard, and, following determination of the matter, issue an evidentiary certificate which will operate in subsequent legal proceedings as prima facie evidence of the contravention of a performance standard and the entitlement of the customer to compensation.[125] In an attempt to encourage voluntary compliance as the principal means of enforcement,[126] and in keeping with the general philosophy of the TIO, customers with a complaint about a breach of the customer service guarantee are required to seek resolution of the matter with their carriage service provider before the TIO will investigate.[127] The possible ramifications of this precondition will be considered below.

Critical assessment of the customer service guarantee

It is important to measure the scheme against the fundamental values of administrative law, as identified in section I. The customer service guarantee introduces a blend of elements from public law and private law into the area of telecommunications services. The scheme relies on the public law framework of conferring on the consumer the legal capacity to enforce statutory standards without the need for a contractual nexus.[128] The creation of individual rights to enforce performance standards against private sector agents and encourage the just treatment of individuals represents a significant development from an administrative law viewpoint. This development is particularly significant when considered in light of the problems relating to privity of contract which have been encountered in the area of public sector contracting.[129] Furthermore, the customer service guarantee may provide an innovative mechanism for end-user enforcement of universal service obligations. The current policy of the ACA is to incorporate aspects of the universal service plan relating to connection periods into the customer service guarantee.[130] Given the traditional limitation which has arisen from the fact that universal service obligations do not create enforceable legal rights for end-users of services,[131] this represents a notable advance.

At the same time, the scheme relies on private law avenues of enforcement through civil litigation in ordinary courts, and allows for redress only in monetary terms. The reliance on formal litigation represents a significant limitation, given that accessibility is one of the essential precepts of an effective system of administrative justice. Critics have suggested that the scheme should be extended to allow for enforcement in an informal, non-judicial

123 In the case of Telstra, for example, this amounts to $11.65 for residential customers, and $20.00 for business customers; Australian Communications Authority, *Factsheet: Customer Service Guarantee*, June 1998.

124 *Telecommunications Act 1997 (Cth) s 235(4)*.

125 *Telecommunications Act 1997 (Cth) s 237*; Australian Communications Authority, *Customer Service Guarantee Review: Discussion Paper*, 29 June 1998, p 8.

126 Australian Communications Authority, *Factsheet: Customer Service Guarantee*, June 1998.

127 Ibid.

128 H.Schoombee, "Privatisation and Contracting Out - Where are we Going?", in J.McMillan (ed) *Administrative Law Under a Coalition Government*, National Administrative Law Forum 1997, Canberra, 1997, p 144.

129 I.Harden, *The Contracting State*, Bristol, 1992, p 60.

130 Australian Communications Authority, *Connections: The Australian Communications Authority Bulletin*, Issue 3 (June 1998), p 11.

131 *Yamirr v Australian Telecommunications Corporation* (1990) ALR 739.

body, such as an independent tribunal.[132] While the scheme does incorporate the ostensibly public law institution of the TIO into the equation, thus offering a degree of informality and accessibility, the TIO does not have direct enforcement powers. Criticism has also been levelled at the limited nature of monetary compensation. The lack of more flexible remedies, such as the direct ordering of corrective action, has the consequence that the scheme does not address the substantive effects of contravention of performance standards on particular individuals.[133] Nevertheless, the enforceable right to monetary compensation does provide a significant sanction to encourage the equitable treatment of customers,[134] and creates a hard-edged form of accountability in a language which is easily understood by private sector bodies.[135]

There is one outstanding area of potential weakness in the customer service guarantee scheme. Pursuant to the Act, the ACA has made provision for the rights created under the customer service guarantee to be waived by customers in their individual dealings with service providers, by specific agreement in writing.[136] According to the ACA, "this has been made possible to ensure that customers are not restricted in the choices they make", by facilitating more flexible commercial negotiations by service providers.[137]

If there is an underlying tension throughout the Act between free market competition and social equity principles, the allowance for the waiving of rights represents one point at which this tension is clearly apparent on the face of the Act. In this instance, the interests of the market have prevailed, and the principles of administrative law have been undermined. In the interests of flexibility, the Act leaves open the possibility of commercial exploitation and the widespread evasion of the rights and performance standards mandated under the Act. The very concept of bargaining away statutory entitlements to fair treatment and mandatory standards is entirely antithetical to the principles of administrative law, and the role of administrative law in controlling public power.

The Telecommunications Industry Ombudsman Scheme

Under Part 10 of the Act, each carrier and each carriage service provider involved in the supply of mobile telephone services, Internet access, or standard telephone services to small business or residential customers must enter into, and comply with,[138] the industry based Telecommunications Industry Ombudsman scheme.[139]

The constitution of the scheme confers on the TIO extensive jurisdiction in relation to supervision of the telecommunications industry, and the investigation and determination of consumer complaints relating to the supply of carriage services. The TIO's jurisdiction encompasses complaints about basic telephone, data and mobile services, operator and directory assistance, fault reporting and rectification, privacy matters, land access, billing and

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132 H.Schoombee, "Privatisation and Contracting Out - Where are we Going?", in J.McMillan (ed) *Administrative Law Under a Coalition Government*, National Administrative Law Forum 1997, Canberra, 1997, p 144.

133 Ibid.

134 N.Seddon, "Commentary: Privatisation and Contracting Out - Where are we Going?", in J.McMillan (ed) *Administrative Law Under a Coalition Government*, National Administrative Law Forum 1997, Canberra, 1997, p 147.

135 I.Harden, *The Contracting State*, Bristol, 1992, p 60.

136 *Telecommunications (Waiver of Customer Service Guarantee) Instrument 1997*; *Telecommunications Act 1997 (Cth) s 238*.

137 Australian Communications Authority, *Customer Information: Frequently Asked Questions: Customer Service Guarantee for Phone Users*, p 3.

138 *Telecommunications Act 1997 (Cth) s 250*.

139 *Telecommunications Act 1997 (Cth) ss 245, 246*.

payphones.[140] As noted above, the TIO also has a role in the determination of complaints relating to the customer service guarantee. The TIO has also become the principal institution for the enforcement of industry codes and standards, as discussed below.

The remedial powers available to the TIO in making determinations are extensive. Following an investigation, the TIO may direct a service provider to pay compensation, remove, amend or impose a charge, provide or withdraw a service, supply or remove a good, undertake corrective work, correct its records, include or remove an entry in a directory. Orders involving a cost of up to $10,000 are binding on members, with allowance for non-binding recommendations of up to $50,000 and "findings of fact" for matters involving a remedial value of over $50,000.[141]

In addition to exercising a reactive review function, the TIO is also a proactive institution, with a responsibility to monitor the behaviour of service providers, inform the public about important telecommunications issues, and provide public data on complaints and their outcomes.[142] Along with the ACA, the TIO has become an important source of public information, ensuring a significant level of transparency and accountability in the industry. As such the TIO is in a position to influence the development of policy and general administrative standards in the same manner as the government Ombudsman.[143]

Critical assessment of the TIO scheme

With the TIO exercising such important functions in the current regime, it is necessary to examine the structure and operations of the TIO scheme against the ideals of administrative law. The TIO serves an important role in providing a free, informal, speedy and notionally independent source of review of the actions of service providers.[144] The TIO is indeed the sole source of independent review for telecommunications consumers, aside from private law litigation. The breadth of the TIO's jurisdiction and the extent of the TIO's remedial powers make the scheme a valuable source of protection for public law values. In particular, the fact that the TIO may make binding decisions is a significant advance on the powers of the government Ombudsman.[145]

However, as with other industry based ombudsman schemes,[146] the critical issue with the TIO is its independence. Independence and impartiality have long been recognised as being fundamental to the effectiveness and legitimacy of systems of administrative review.[147] The credibility and accessibility of the TIO scheme depends to a large extent on the actual and perceived impartiality of the TIO. The concept of independence in this sense encompasses

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140 Bureau of Transport and Economics, *Telecommunications in Australia*, Report 87, 1997, p 41; Telecommunications Industry Ombudsman, *Information: Introducing the Telecommunications Industry Ombudsman Scheme*, December, 1997, p 4.

141 Telecommunications Industry Ombudsman, *Information: Introducing the Telecommunications Industry Ombudsman Scheme*, December, 1997, p 12.

142 Ibid. p 15.

143 Administrative Review Council, *The Contracting Out of Government Services: Issues Paper*, February 1997, p 35.

144 Telecommunications Industry Ombudsman, *Information: Introducing the Telecommunications Industry Ombudsman Scheme*, December, 1997, p 1.

145 M.Armstrong, M.Hudson and T.Jordan, *The Communications Environment: Australia 1998*, Media and Telecommunications Policy Group RMIT, Melbourne, p 11.

146 D.Everett, "Australian Banking Industry Ombudsman" (1990) 5(10) *Banking Law Bulletin* 213, p 213; A.Stuhmcke, "Administrative Law and the Privatisation of Government Business Enterprises: A Case Study of the Victorian Electricity Industry" (1997) 4 *Australian Journal of Administrative Law* 185, p 189.

147 M.Taggart, "Corporatisation, Privatisation and Public Law" (1991) 2 *Public Law Review* 77, p 89.

both operational independence, in day to day activities, and independence in long term agenda setting, membership and control.[148]

The TIO scheme operates as a private company limited by guarantee, with a membership of carriers and carriage service providers. The scheme is governed by a Board of Directors, which is responsible for funding issues and the appointment of the TIO, and a Council, which has responsibility for general policy issues and the overall operation of the scheme. The Board is appointed by the members of the scheme. The Council has seven members; including three appointed by members, three selected from consumer and community groups, and an independent Chairperson.[149] While the institutional structure does have the advantage of encouraging industry self-regulation, and ensuring expert industry-based participation,[150] it fails to provide the appropriate guarantees of impartiality and independence. The fact that the Board, which appoints the TIO, is composed entirely of industry members directly undermines the credibility and integrity of the office. The mixed composition of the Council is intended to operate as a guarantee of the scheme's independence from industry.[151] Such a view, however, places excessive faith in the ability of the independent Chairperson and the non-governmental public interest representatives to counterbalance the interests of the member appointees. Given the capacity of the Council to shape the policies, practices and philosophy of the scheme,[152] the direct involvement of industry representatives further compromises the actual and perceived impartiality of the TIO. Aside from the managerial structure of the scheme, the independence of the TIO is further undermined by its complete reliance on industry funding. The scheme is funded by its members, with the costs of the scheme divided according to the number and proportion of complaints received against individual members.[153]

The effectiveness of the TIO as an administrative review body is also compromised by the fact that the scheme requires consumers to attempt to resolve any complaints with their provider before seeking the intervention of the TIO. The jurisdiction of the TIO is only triggered after the relevant service provider is given a "reasonable opportunity to address the complaint."[154] This legal requirement is also reflected in the philosophy of the scheme, which is that "the TIO is an office of last resort - to be involved once all other avenues for dispute resolution have been explored."[155] While the TIO is accessible in terms of its informality and affordability,[156] the precondition that complainants first approach their service provider may inhibit consumers from exercising their rights of review. Consequently, the accessibility of the TIO as an independent source of review and protection is seriously undermined.[157]

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148 J.Barnes, "Is Administrative Law the Corporate Future?" (1993) 21 *Australian Business Law Review* 66, p 69.

149 Telecommunications Industry Ombudsman, *Information: Introducing the Telecommunications Industry Ombudsman Scheme*, December, 1997, p 15.

150 J.Barnes, "Is Administrative Law the Corporate Future?" (1993) 21 *Australian Business Law Review* 66, p 69; D.Everett, "Australian Banking Industry Ombudsman" (1990) 5(10) *Banking Law Bulletin* 213, p 217.

151 Bureau of Transport and Economics, *Telecommunications in Australia*, Report 87, 1997, p 41.

152 For similar criticisms in relation to the Banking Industry Ombudsman, see D.Everett, "Australian Banking Industry Ombudsman" (1990) 5(10) *Banking Law Bulletin*, 213, p 216.

153 Telecommunications Industry Ombudsman, *Information: Introducing the Telecommunications Industry Ombudsman Scheme*, December, 1997, p 14.

154 Ibid. p 4.

155 Ibid. p i.

156 J.Barnes, "Is Administrative Law the Corporate Future?" (1993) 21 *Australian Business Law Review* 66, p 69; D.Everett, "Australian Banking Industry Ombudsman" (1990) 5(10) *Banking Law Bulletin* 213, p 213.

157 A.Tang, "Contracting Out in Community Services", in L.Pearson (ed), *Administrative Law: Setting the Pace or Being Left Behind?*, Australian Institute of Administrative Law, Sydney, 1997, p 342.

Even where the TIO accepts jurisdiction over a complaint, the emphasis remains on informal, internal resolution of the complaint by the service provider and a minimal role for the TIO. Initial complaints progress through three distinct stages; consultation, formal complaint and dispute. At each stage, the TIO attempts to encourage voluntary resolution of the matter, through conciliation, mediation and negotiation. It is only at the dispute stage that the TIO operates as a formal review body, exercising powers to require documentation from the service provider in the process of determining the dispute.[158] It is clear from the procedures and philosophy of the scheme that the TIO does not provide accessible, independent review of the merits of a complaint. The scheme does not provide for the open, transparent, public determination of disputes in a manner equivalent to traditional tribunals.[159] Rather the TIO operates primarily as a facilitator for the private resolution of disputes, with the determinative powers of the TIO reserved for extreme cases.

Self-regulation in the post July 1997 regime

An essential pillar of the new regime is reliance on self-regulation by the telecommunications industry. The underlying regulatory policy of the Act is to promote "the greatest practicable use of industry self-regulation."[160] To facilitate self-regulation, Part 6 of the Act establishes a framework for the initiation, development and implementation of codes of practice by the industry and its representative bodies.

The introduction of self-regulation in telecommunications is in keeping with a widespread trend in contemporary regulatory theory.[161] The involvement of regulated bodies in the development and implementation of regulatory rules is intended to produce more flexible and tailored rule making, greater responsiveness from the regulated parties,[162] and generally more effective regulation than traditional command and control models of regulation.[163] Most importantly, in terms of the microeconomic reform agenda outlined in section I, the use of self-regulation in the telecommunications industry is intended to produce efficient regulation, by minimising the direct regulatory responsibilities of government[164] and the compliance burdens imposed on the industry.[165]

The incorporation of self-regulation in the Act is intended to synthesise the efficient self-ordering of the market with the maintenance of consumer safeguards, public policy objectives and performance standards. Self-regulation is thus part of the wider reform in public administration. As such, it represents another manifestation of change with which administrative law principles must be reconciled. A closer examination of the legislative and institutional framework for industry self-regulation in telecommunications, however, reveals that industry codes are not a reliable, standardised source of protection for the universal values of accountability and administrative justice.

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158 Telecommunications Industry Ombudsman, *Information: Introducing the Telecommunications Industry Ombudsman Scheme*, December, 1997, pp 8-10.

159 A.Stuhmcke, "Administrative Law and the Privatisation of Government Business Enterprises: A Case Study of the Victorian Electricity Industry" (1997) 4 *Australian Journal of Administrative Law* 185, p 189.

160 *Telecommunications Act 1997 (Cth) s 4*.

161 R.Creyke, "Sunset of Administrative Law? Reflections on Developments Under a Coalition Government" in J.McMillan (ed) *Administrative Law Under the Coalition Government*, Australian Institute of Administrative Law Forum May 1997, Canberra, 1998, p 57.

162 P.Cane, "Self-Regulation and Judicial Review" (1987) 6 *Civil Justice Quarterly* 324, p 330.

163 Ibid. p 328; Sir G.Borrie, "The Regulation of Public and Private Power" (1989) *Public Law* 552, pp 565-6.

164 Esther Alter, ACA Member, quoted in Australian Communications Authority, *ACA Release Guide to Industry Code Registration*, Media Release, No. 34, 7 August 1998.

165 *Telecommunications Act 1997 (Cth) s 4*.

The legislative framework for industry self-regulation

Under Part 6 of the Act, bodies which represent the telecommunications industry may develop industry codes to govern the activities of industry participants. The peak industry body, the Australian Communications Industry Forum (ACIF), has assumed the responsibility for code development.[166] ACIF is a private, industry funded association, with membership encompassing carriers, service providers, equipment vendors, user organisations and consumer groups.[167]

The Act allows for codes to be developed in relation to any matter related to the delivery of telecommunications goods and services.[168] ACIF's Consumer Codes Reference Panel is currently engaged in the development of codes relating to privacy, marketing of telecommunications services, credit management, charging and billing, customer and network fault management, and consumer complaint handling.[169]

The Act provides that industry codes may be registered with the ACA, in which case they will be made available on a public register.[170] Compliance with industry codes is voluntary, although the ACA has a reserve power to direct a particular industry member to comply with a registered code.[171] ACIF anticipates that industry participants will agree to be bound by code provisions, including enforcement sanctions, by becoming signatories to the codes, and to general codes governing code administration and compliance.[172]

Where the ACA considers that a code is required in relation to a particular matter, it has the power to request the industry to develop such a code.[173] Where the industry fails to develop a satisfactory code the ACA has the reserve power to itself develop an industry standard.[174] Compliance with industry standards is mandatory.[175] Notwithstanding this reserve power, the clear intention of the Act, the ACA and ACIF is that the role of the ACA in the code regime will remain minimal. According to its own corporate plan, the role of the ACA is one of partnering industry in fostering "the conditions that will bring about an efficient, competitive and increasingly self-regulated communications sector."[176] The powers of the ACA are seen merely as "default or safety net powers, within the objectives set by Parliament, of fostering industry competition and ensuring adequate consumer safeguards."[177]

The Act thus entrusts to the regime of self-regulation matters which are fundamental to the rights of consumers. The entitlement of the individual consumer to fair treatment, public protection and administrative justice depends to a large extent on the nature of industry codes. The development, content and ultimate enforceability of codes will therefore have a

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166 Australian Communications Industry Forum, *Guideline: Development of Telecommunications Industry Consumer Codes*, January 1998, p 2.

167 Australian Communications Industry Forum, *ACIF Alert! The Communications Industry's Self-Regulation Newsletter*, Issue 1 (Summer 1998), p 1.

168 *Telecommunications Act 1997 (Cth) ss 109, 112*.

169 Australian Communications Industry Forum, *ACIF Alert! The Communications Industry's Self-Regulation Newsletter*, Issue 2 (Autumn 1998), p 6.

170 *Telecommunications Act 1997 (Cth) ss 117, 136*.

171 *Telecommunications Act 1997 (Cth) ss 121, 122*.

172 Australian Communications Industry Forum, *ACIF Alert! The Communications Industry's Self-Regulation Newsletter*, Issue 2 (Autumn 1998), p 14.

173 *Telecommunications Act 1997 (Cth) s 118*.

174 *Telecommunications Act 1997 (Cth) ss 123, 125*.

175 *Telecommunications Act 1997 (Cth) s 128*.

176 Australian Communications Authority, *Corporate Plan 1997-2000*, October 1997, p 1.

177 Australian Communications Authority, *Connections: The Australian Communications Authority Bulletin*, Issue 1 (December 1997), p 1.

significant bearing on the fate of the individual in the de-regulated telecommunications environment.

Critical assessment of the industry code scheme: the processes of code development

Given the significance of industry codes, the processes involved in the development of codes are of great importance. From a constitutional perspective, Parliament has effectively delegated wide ranging quasi-legislative responsibilities to non-governmental agencies. Through ACIF, the industry itself has become the primary policy making force.[178] Therefore, as the Act does not provide for minimum standards in regulating the content of codes, and does not provide the ACA with a general jurisdiction to review the content of codes, the maintenance of adequate policy standards depends to a large extent on procedural standards adopted in code development.

Rather than establishing the conditions for independent policy formation, the Act relies on a pluralistic model, through the integration of competing interest groups in the code development process. The regime of code development places great pressure on private, non-governmental representatives of the public interest. Consumer and user groups are represented on the ACIF Board and Advisory Assembly,[179] as well as on the numerous Reference Panels and Working Committees involved in the development of codes.[180] In addition, the ACA, ACCC, TIO and Privacy Commissioner have observer status on all ACIF reference panels.[181]

As a matter of policy, ACIF has expressed its commitment to balanced, co-operative and inclusive code making to incorporate the legitimate interests of consumer representatives.[182] ACIF has also committed itself to "comprehensive public consultation" in code development.[183] There remains the need, however, for more secure standardising mechanisms to ensure the accountability, transparency and openness of the processes involved in the development of codes. The legitimacy of the process depends upon the capacity of private representatives of the public interest to exert genuine influence and secure the adequate protection of consumer interests. In the absence of safeguards to ensure balance in the code development process, the code system rests on the dubious notion that such representatives can compete effectively in terms of commercial and political bargaining with experienced industry agents.[184]

In terms of scrutiny of the content and development of codes, the only safeguards established under the Act are related to the process of registration of codes with the ACA. The Act mandates a set of criteria which must be satisfied in order for the ACA to agree to the registration of an industry code. Where a code is presented for registration, the ACA is empowered to evaluate the content of the code, for example to determine whether

178 Australian Communications Industry Forum, *Guideline: Development of Telecommunications Industry Consumer Codes*, January 1998, p 7.

179 Australian Communications Industry Forum, *ACIF Alert! The Communications Industry's Self-Regulation Newsletter*, Issue 1 (Summer 1998), p 3.

180 Australian Communications Industry Forum, *ACIF Alert! The Communications Industry's Self-Regulation Newsletter*, Issue 2 (Autumn 1998), p 6.

181 Australian Communications Authority, *Consumer Bulletin*, Issue 1 (October 1997), p 3.

182 Australian Communications Industry Forum, *Guideline: Development of Telecommunications Industry Consumer Codes*, January 1998, p 5.

183 Ibid. p 8.

184 A.Stuhmcke, "Administrative Law and the Privatisation of Government Business Enterprises: A Case Study of the Victorian Electricity Industry" (1997) 4 *Australian Journal of Administrative Law* 185, p 193.

appropriate community safeguards are provided for.[185] The ACA also scrutinises the processes involved in the development of the proposed code. The ACA must be satisfied that, prior to submission, the draft code was distributed to industry members and members of the public, adequate allowance was made for the receipt of submissions, and submissions on the code were given consideration.[186] The ACA must also be satisfied that the ACCC, the TIO and at least one body that represents the interests of consumers have been consulted about the development of the code.[187] Where the code deals with a matter relating to privacy, the ACA must be satisfied that the Privacy Commissioner has been consulted about the development of the code.[188]

While these stipulations provide a framework for standardising the processes of code development, they operate only in the context of registration. Under the Act, registration of industry codes is voluntary. The ACA has no authority to review codes unless they are presented by the industry for registration. While the ACA has declared as a matter of policy that codes should be registered,[189] and has sought to persuade the industry of the benefits of registration,[190] the standard practice of the industry in relation to code registration remains to be seen. In any case, the lack of a legislative requirement of registration severely restricts the capacity of the ACA to guarantee universal standards in policy making and code content.

Even in situations where the ACA is involved in the review of proposed codes, the willingness of the ACA to enforce procedural and substantive standards may well be inhibited by the ethos of self-regulation and minimal interference underlying the Act. The actions of the ACA are subject to what has been labelled the "public interest balance test."[191] The Act requires that, in evaluating codes proposed for registration, the ACA must act in a manner that "enables public interest considerations to be addressed in a way that does not impose undue financial and administrative burdens" on industry participants.[192] The Act therefore ensures that the theoretical and political tension between efficiency and accountability, the tension between public and private, will be played out in the context of code registration. As such, the public interest balance test mandates deference to the autonomy of the industry, and militates against the ACA insisting upon strict standards of public protection.

Critical assessment of the industry code scheme: enforceability of code provisions

Critics of code-based regulatory schemes have recognised that the capacity of industry codes to provide protections comparable to those provided by administrative law ultimately depends upon the introduction of "hard edged" performance standards, enforcement

185 *Telecommunications Act 1997 (Cth) s 117(1)(d)(i)*.

186 *Telecommunications Act 1997 (Cth) ss 117(1)(e), 117(1)(f)*; Australian Communications Authority, *Registering Telecommunications Industry Codes - A Guide*, July 1998, p 9.

187 *Telecommunications Act 1997 (Cth) ss 117(1)(g), 117(1)(h), 117(1)(i)*; Australian Communications Authority, *Registering Telecommunications Industry Codes - A Guide*, July 1998, p 10.

188 *Telecommunications Act 1997 (Cth) s 117(1)(j)*.

189 Australian Communications Authority, *Registering Telecommunications Industry Codes - A Guide*, July 1998, p 8.

190 Australian Communications Authority, *ACA Release Guide to Industry Code Registration*, Media Release, No. 34, 7 August 1998.

191 Australian Communications Authority, *Registering Telecommunications Industry Codes - A Guide*, July 1998, p 3.

192 *Telecommunications Act 1997 (Cth) s 112*.

mechanisms and sanctions.[193] Of particular importance is the ability of individuals to enforce codes of conduct against service providers. In the new telecommunications regime, the matter of code enforcement by consumers against service providers is not provided for in the Act, but is dealt with in the codes themselves. It has emerged that the standard mechanism for the enforcement of code provisions will be the TIO scheme.[194]

Certainly, the incorporation of the TIO into the code scheme does have the significant advantage of integrating an external enforcement mechanism, giving substance to code-based rights and ensuring the proper separation of rule making and enforcing responsibilities.[195] However, the reliance on the TIO as the sole means of enforcement of codes of practice introduces the same complications, as outlined above, relating to the credibility, impartiality and accessibility of the TIO. In keeping with the other dispute resolution functions of the TIO, consumers will be required to complain initially to their service provider regarding a breach of a code provision, prior to lodging a complaint with the TIO.[196] Such factors, in contributing to the inaccessibility of the TIO, may well have the effect of dulling the hard edge of rights created by industry codes.

Conclusion

As a result of the changing nature of post-modern governance, administrative law is facing profound challenges. Administrative reform has exposed the shortcomings of the administrative law package and, on a deeper level, administrative law theory. In responding to such challenges, a significant level of theoretical, legal and political acumen is required on the part of administrative lawyers if the values of accountability and administrative justice are to continue to apply to public power in all its forms. The theoretical and political obstacle of the public/private dichotomy must be overcome. The legitimacy of administrative law must be better articulated. Ultimately, the province of administrative law must be extended and reconceived, according to a more sophisticated, coherent and principled understanding of public power.

Furthermore, as the above examination of the telecommunications industry has demonstrated, administrative lawyers face further challenges in developing satisfactory legal instruments to give effect to administrative law values across the public/private divide. It is imperative that administrative lawyers critically assess the capacity of new legal instruments to guarantee accountability and administrative justice by examining them against the standards of fairness, accessibility and impartiality. While the customer service guarantee, the TIO scheme and the industry code scheme do introduce the values of accountability and administrative justice into the telecommunications industry, a close examination of each mechanism reveals serious flaws. The institutions and rights created by these mechanisms do not compare favourably with the high standards of the administrative law package. As administrative lawyers search for a strategic legal response to the changing nature of public power, the distinctive qualities of administrative law rights and protections must be more faithfully replicated.

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193 R.Creyke, "Sunset of Administrative Law? Reflections on Developments Under a Coalition Government" in J.McMillan (ed) *Administrative Law Under the Coalition Government*, Australian Institute of Administrative Law Forum May 1997, Canberra, 1998, p 60; H.Schoombee, "Privatisation and Contracting Out - Where are we Going?", in J.McMillan (ed) *Administrative Law Under a Coalition Government*, National Administrative Law Forum 1997, Canberra, 1997, p 142.

194 Australian Communications Industry Forum, *Guideline: Development of Telecommunications Industry Consumer Codes*, January 1998, p 12; ACA, *Registering Telecommunications Codes - A Guide*, p 7.

195 P.Cane, "Self-Regulation and Judicial Review" (1987) 6 *Civil Justice Quarterly* 324, p 328.

196 Australian Communications Industry Forum, *Guideline: Development of Telecommunications Industry Consumer Codes*, January 1998, p 12.

THE IMPORTANCE OF BEING LEGISLATIVE

Dennis Pearce[*]

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Introduction

Dixon J in *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee*[1] said:

> I do not think that in English law such a question [improper purpose as a ground of invalidity] will be found ever to be solved by ascertaining whether, upon a correct juristic analysis, the power should or should not be described as legislative.

This notion that the effect of particular activities should not turn on an arid and debateable classification of the nature of the activity as legislative, executive or judicial is one that is often asserted in public law. However, the differentiation keeps returning and this is nowhere more apparent than in relation to delegated legislation. The classification of an instrument as "legislative" has significant consequences in relation to the making, parliamentary oversight, and judicial review, of the instrument. Perhaps surprisingly, this position is not changing. If anything the classification issue is becoming more important.

Delegated legislation creates problem for bureaucrats, parliaments and courts. The first problem to which delegated legislation gives rise is to identify what it is. The very general definition that I offered in the first edition of *Delegated Legislation* (1977), pp1-2 "instruments that lay down general rules of conduct affecting the community at large which have been made by a body expressly authorised so to act by an Act of parliament" attracted approval by courts from time to time.[2] One of its attractions was probably that it was so unspecific that it could be made to fit many situations.

The Administrative Review Council in its report *Rule Making by Commonwealth Agencies*[3] thought that it was unwise to attempt a more specific statement. However, the various versions of the ill-fated Commonwealth Legislative Instruments Bill eschewed this approach. It provided that a legislative instrument had to be of a legislative character. An instrument was to be taken to be of a legislative character if:

(a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and

(b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

This definition was then fleshed out with specific examples of instruments that were to be taken to be legislative.

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1 (1945) 72 CLR 37 at 80.

2 See most recently, *Latitude Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 110 ALR 209 at 228-9.

3 Report No 35,1992.

The problem lies of course in the fact that instruments that look like legislation can deal with particular issues and persons, while instruments that appear to be non-legislative can lay down general rules.

But does it matter? The answer is yes it does because:

- procedures for making instruments, including permitting public input, are different for legislative and executive instruments;

- parliaments are becoming more aware of their function of oversighting non-parliamentary legislation; and

- courts are continuing to differentiate between legislative and executive action in their application of review principles.

The Making of Instruments

It is clear that many public servants do not recognise that different sorts of public instruments should attract different attention. In the course of a review of actions of a Department I once found the ministerial instruments which formed the legal basis of significant and sensitive government action spiked on the files together with all the general correspondence, drafts of action papers, etc, that form the substance of bureaucratic daily fare. This makes one think that general definitions are not wise. It is probably better to put in place detailed descriptions and identifiers such as were included in the Legislative Instruments Bill. It is not fair to require public servants to differentiate between instruments on the basis of their effect rather than their form.

The form becomes important not because of any inherent quality but because of what flows from it. For many years the regulation was the traditional form of delegated legislation and its making, publication and parliamentary oversight were controlled. In an age that produced little legislation in either Act or delegated form this was manageable for executives, parliaments and courts. The executive was the first branch of government to find this too constraining and there was a steady adoption of other types of instruments that involved fewer constraints on making procedures, publication and parliamentary oversight. Bureaucratic convenience overrode the need for the public to know the law and for the parliament to review it. We are now going through a period of reaction to this.

Beginning in New South Wales and Victoria, requirements have been adopted for impact statements or other forms of explanatory memoranda to be produced relating to delegated legislation. Further, in some jurisdictions, consultation procedures must be followed before certain forms of delegated legislation are made. Legislative instruments additional to the traditional regulations or statutory instruments must be made available to the public. A staged repeal process is followed whereby there is a time limit after which legislation expires. These changes have been adopted in differing forms in most States but notably have foundered at the Commonwealth level.[4]

Apart from those public servants who deny the accuracy of those terms as descriptive of their function, and the inevitable bean counters, these changes have been accepted with very little fuss by either bureaucrats or members of the public. They seem to have become a part of the delegated legislation regime in those jurisdictions where they apply. They have

4 For a description of the position in the various Australian jurisdictions, see Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, (2nd ed, 1999) chs 2-11.

not led to the collapse of the public service but they have raised the understanding of both public and bureaucracy of the significance of delegated legislation.

The Commonwealth is functioning with a delegated legislation regime that is now not representative of the thinking applying elsewhere in Australia and which is simply outmoded. The fault for this lies most curiously in the parliamentary chamber that for decades led the way in enlightened management of delegated legislation. The Senate's insistence on amendments to the Legislative Instruments Bill has resulted in a triumph for those trogloditic areas of the public service that deny public involvement in government. The Australian public has been condemned to being ruled by instruments into which they have no input and about the existence of which they may have no knowledge.

To summarise the issue, in a number of States various instruments are designated as being of such importance to the public that there is public consultation before their making, they are made publicly available and their continuance in force is monitored. In contrast, the range of instruments thus dealt with in a number of other jurisdictions, notably the Commonwealth and the ACT, is left for the public service to determine on a case by case basis. This has the effect of excluding the public from participation in the legislative process and also leads to the making of what can properly be described as secret law.

While the Commonwealth is lagging behind the States in empowering citizens in the legislative process, it led the way in enabling members of the public to understand non-legislative instruments. If a person is affected by a decision of an administrative character, that person can usually obtain a statement of the reasons for the making of the decision. This bold innovation, reversing the common law position, was adopted through the operation of the *Administrative Decisions (Judicial Review) Act 1977*. It has been followed in Queensland and the ACT and in more limited scope in some other States.

This change in the law has led to a number of decisions classifying government decisions as legislative or administrative. The relevant cases are set out in Butterworths *Administrative Law Service* at para [312B]. Those cases indicate that the form of the instrument and the extent to which it affects members of the public generally will be significant indicators of its classification. Parliamentary involvement in the procedures relating to the instrument such as tabling or disallowance requirements will also point to the instrument being legislative. Factors pointing against an instrument being legislative have been that a minister has had the power to amend the instrument and that the content of the instrument was closely constrained by the empowering Act. It will always be a question of judgment whether an instrument can properly be designated as "legislative" and some instruments are going to fall close to the line.

The position thus exists that if a decision is classified as legislative in some jurisdictions, a procedure for public input into the content of the legislation is attracted. There are also detailed provisions relating to publication of the legislation. In others this is not the case. In contrast, the Commonwealth and some other jurisdictions require the revelation of the reasoning that underlay an administrative decision. Others still apply the common law approach rejecting the legal need for such advice. It can be seen that the legislative/administrative classification becomes all-important to the procedures that must be followed in relation to the instrument in question.

Parliaments and Delegated Legislation

The last 20 years have seen a remarkable change in the attitude of parliaments to delegated legislation. Up to the 1970s the Senate led the way in providing a means whereby parliamentarians might require the content of regulations to recognise or not override certain

fundamental rights. Now all jurisdictions have committees that examine certain legislative instruments against stated criteria and which press governments to accept those standards in drafting the legislation. The relative success of these committees varies but there is no question that the "being there" effect has a significant result on the content of delegated legislation.[5]

However, what most committees, with the notable exceptions of those in the Senate and the ACT, fail to provide is an oversight of the increasingly broad range of legislative instruments that are made by the executive. The jurisdiction of all the parliaments is to review delegated legislation that is tabled in that parliament. The definition of these instruments becomes crucial to the scope of the work of the committee charged by the parliament to examine the legislation. In most States the instruments tabled are limited to the traditional forms of regulations, rules,etc. These then are all that a committee gets to see. But executives are making an increasing number of legislative instruments in forms other than the traditional. If this is done, parliamentary scrutiny is avoided.

It is necessary therefore for parliaments to turn to the generic description of legislative instrument as their touchstone for jurisdiction. This was proposed for the Commonwealth in the Legislative Instruments Bill. The Senate has had experience of the significance of non-regulation instruments through the increasing use of the "disallowable instrument" category of legislation provided for by section 46A of the *Acts Interpretation Act 1901*. The operation of this section requires a case by case consideration of the question whether an instrument has such legislative characteristics that it should be subject to parliamentary review. It is to the credit of Commonwealth legislators that there has been a generous attitude taken to the desirability of prescribing instruments as falling within this description. The result has been that the Senate now reviews more non-regulation instruments than those that fall within the traditional categories.[6] The position would very likely be the same in the States if the range of reviewable instruments was similarly designated.

The adoption of a generic description of reviewable instruments would bring within the purview of parliaments the full range of instruments that their public role of oversighting delegated legislation demands. So in the case of parliaments, the significant issue is not so much the definition of legislative but the range of instruments that fall within the description. Limiting the range of instruments leaves it open for the executive to include inappropriate material within a legislative instrument but avoid parliamentary scrutiny.

The Courts and Delegated Legislation

There remain some significant differences in the approach that the courts take to the validity of delegated legislation compared with executive decisions. These have stemmed from the courts' perception of their role in relation to questioning decisions of legislation-makers even though the same persons may immediately after making legislation carry out a function of executive decision-making. The nature of the instrument will produce a different result. Consider the following illustrations.

Application of the rules of natural justice

The starting point to any consideration of the issue whether procedural fairness must be afforded a person affected by legislation is that "The legislature is not likely to intend that a statutory power of a strictly legislative nature be conditioned on the observance of the principles of natural justice, for the interests of all members of the public are affected in the same way by the exercise of such a power": per Brennan J in *Kioa v Minister for Immigration*

5 Ibid.

6 Ibid, para 1.14.

and Ethnic Affairs.[7] There has been some breach in the inflexibility of this principle, see *Bread Manufacturers of NSW v Evans*[8] where it was suggested that if an instrument otherwise legislative in form applied only to an individual's rights, then that person could claim the right to a hearing. However, I have found only one Australian case where this approach had been followed: *Lyster v Camberwell CC*[9] where the exercise by the Governor of the power under the Local Government Act to repeal a Council by-law was said to be so particularised that the Council was entitled to a hearing. (For a Canadian example, see *Development Co Ltd v Village of Wyoming*.[10])

Compare the approach to administrative decisions. There is a right to a hearing if a person can show that they are affected by a decision: *Haoucher v Minister for Immigration and Ethnic Affairs*.[11] However, if no person is singled out as being particularly affected by the decision, the right to a hearing is lost: *Botany Bay CC v Minister for Transport and Regional Development*.[12] Alternatively, the nature of the hearing may be curtailed. The end result may not be very different from that where a decision is classified as legislative but the presumption is effectively reversed.

If a decision is described as legislative it will be assumed that procedural fairness has no application unless it is possible to attract the *Bread Manufacturers* test. The likelihood of this occurring is demonstrated by the paucity of examples. If the decision is administrative, procedural fairness applies unless it is possible to show that the person seeking to assert the principle is not more affected than others.

Mind of the decision-maker

One of the most frequently used grounds for challenge to an administrative decision is that of relevancy: the decision-maker failed to take account of a relevant factor or took into account an irrelevant factor. I know of no case involving a legislative instrument where this has been a basis for challenge. Perhaps this is because challenges to legislation are based on arguments of *ultra vires*: that the empowering provision does not support the legislation purporting to be made under it. But if this be so, why does the same argument not apply to administrative decisions? There too the issue turns on the interpretation of the power that supports the decision.

Perhaps the reason for this difference in approach lies in a reluctance on the part of the courts to investigate the reasons why a legislator reached a particular conclusion. There is no doubt that few Acts would survive a challenge based on relevancy grounds! Much early delegated legislation was also the product of the collective minds of the makers in the form of local government rules. But this is not the position in the case of the bulk of delegated legislation now made. It has its origin with the same persons who make administrative decisions. Even the limitation that the decisions of the Crown's representative were unchallengeable which could have been thought to constrain review of the higher levels of delegated legislation has now gone: *R v Toohey; Ex parte Northern Land Council*.[13] More significantly, the courts have contemplated that a legislative decision can be challenged on the basis of improper purpose.

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7 (1985) 62 ALR 321 at 373.

8 (1981) 38 ALR 93.

9 (1989) 69 LGRA 250.

10 (1980) 116 DLR (3rd) 1. See further *Delegated Legislation in Australia*, above, paras 13.2-13.4.

11 (1990) 169 CLR 648 particularly per Deane J at 653.

12 (1996) 41 ALD 84.

13 (1981) 151 CLR 170.

Toohey's case involved the validity of regulations made by the Administrator of the Northern Territory. Local government legislation was held invalid on motive grounds in *Kwiksnax Mobile Industrial & General Caterers Pty Ltd v Logan CC*[14] and in *Bailey v Connole*.[15] The cases acknowledge the difficulties of proof of motive, particularly in the case of a multi-member elected body: see particularly *In re the Mayor of the City of Hawthorn; Ex parte The Co-operative Brick Company Limited*.[16] There used to be a difference in approach in the determination of motive in the case of legislation of local government bodies between administrative and legislative decisions. It seemed easier to establish impropriety in the case of the former than the latter. However, the *Kwiksnax* case and *Haines v Annwrack Pty Ltd*[17] (a decision of the NSW Court of Appeal) seem to have equated the two types of activity.

In summary, a different approach is taken in relation to relevance between legislative and administrative instruments. However, this distinction is not so apparent in relation to impropriety as a ground of review. Why there should be this difference in approach is not immediately apparent.

Pseudo-merits review: unreasonableness/ proportionality

Whether there is a difference between unreasonableness and proportionality as grounds of review has been the subject of disagreement. *Minister for Resources v Dover Fisheries*[18] says that they should be considered separately and I shall do so here.

Unreasonableness has always held some place in the panoply of grounds for reviewing delegated legislation even though Dixon J's statement in *Williams v Melbourne Corporation*[19] that unreasonableness is not a separate ground of review but merely an indicator of *ultra vires* has carried great weight. The likelihood of success on this ground had been minimal - up until 1992 there had been only one successful case this century and even it was overruled in a later case: *Ingwersen v Borough of Ringwood*,[20] overruled by *Brunswick Corporation v Stewart*.[21] However, there now seems to be a greater willingness to consider the possibility of delegated legislation being unreasonable and there were two successful actions in 1992: *Austral Fisheries Pty Ltd v Minister for Primary Industries and Energy*[22] and *La Macchia v Minister for Primary Industries and Energy*.[23] Both cases concerned a fishery management plan. While this can properly be classified as a legislative instrument it sits very close to the border with an executive decision and it may be that this was influential in the decision reached.

It is clear that the courts continue to be reluctant to find delegated legislation invalid on unreasonableness grounds. An apparently harsh effect on a person is not sufficient: *Octet Nominees Pty Ltd v Grimes*;[24] *Zhang Fu Qiu v Minister for Immigration and Ethnic Affairs*;[25] *De Silva v Minister for Immigration and Ethnic Affairs*.[26] The legislation will be interpreted in

14 [1994] 1 Qd R 291.
15 (1931) 34 WALR 18.
16 [1909] VLR 27; see also Mason J in *Tooheys* case, above, at 226.
17 (1980) 39 LGRA 404.
18 (1993) 116 ALR 54.
19 (1933) 49 CLR 142.
20 [1926] VLR 551.
21 (1941) 65 CLR 88.
22 (1992) 27 ALD 633, affd on appeal 112 ALR 21.
23 (1992) 110 ALR 201.
24 (1986) 68 ALR 571.
25 (1994) 37 ALD 443.
26 (1998) 51 ALD 537.

such a way as to avoid an unreasonable outcome if more than one interpretation is available: *Minister for Resources v Dover Fisheries Pty Ltd*;[27] *Melbourne Pathology Pty Ltd v Minister for Human Services and Health*.[28] And perhaps more questionably, it will be assumed in the case of local government legislation that it will be reasonably administered to avoid unreasonable consequences: *South Australia v Tanner*;[29] *Southorn v Jovanovic*.[30]

While courts have always been cautious about overturning administrative decisions on the basis of unreasonableness, it has seen something of a revival in recent years and there has not been the reluctance to press it in aid that is apparent in relation to delegated legislation: see, for example, *Park v Minister for Immigration and Ethnic Affairs*.[31]

Proportionality as a test of invalidity of delegated legislation was sanctioned by the High Court in *South Australia v Tanner*:[32]

> ...the test of validity is whether the regulation is capable of being considered to be reasonably proportionate to the end to be achieved...It is not enough that the court itself thinks the regulation inexpedient or misguided. It must be so lacking in reasonable proportionality as not to be a real exercise of the power.

The influence of Dixon J's statement in *Williams's* case referred to above is very apparent.

There have been some successful applications to challenge delegated legislation on the lack of proportionality ground: *Re Gold Coast City By-laws*;[33] *Paradise Projects Ltd v Gold Coast CC*;[34] *Re Gold Coast City (Touting and Distribution of Printed Matter) Law 1994*[35] (all of which concerned a succession of by-laws dealing with the same subject-matter); *House v Forestry Tasmania*.[36]

And some unsuccessful: *SA v Tanner*, above; *Dover Fisheries*, above; *State Bank of SA v Hellaby*;[37] *Zhang Fiu Qiu*, above; *Bienke v Minister for Primary Industries and Energy*.[38]

Interestingly in regard to the successful cases, unreasonableness was also argued as a basis of invalidity but without success. Apparently proportionality involves a lower degree of "wrongness".

The test of proportionality for validity of delegated legislation was derived from the constitutional sphere. There is some suggestion that its value there is being questioned: see *Victoria v Commonwealth*;[39] *Leask v Commonwealth*.[40] Where it will go in relation to delegated legislation is unclear. My guess is that it will revert to a variation of the *Williams* test inquiry, ie as an indicator of *ultra vires*.

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27 (1993) 116 ALR 54.
28 (1996) 40 ALD 565.
29 (1989) 83 ALR 631.
30 (1987) 63 LGRA 277.
31 (1996) 41 ALD 487.
32 (1989) 83 ALR 631 at 636.
33 [1994] 1 Qd R 130.
34 [1994] 1 Qd R 314.
35 (1995) 86 LGERA 288.
36 (1995) 5 Tas SR 169.
37 (1992) 59 SASR 304.
38 (1996) 135 ALR 128.
39 (1996) 138 ALR 129 at 147.
40 (1996) 140 ALR 1 at 18.

In the present context the interest in the test lies in the fact that it seems to have attracted greater attention in relation to the validity of legislation than in regard to administrative decisions: see the discussion by John McMillan, "Recent Themes in Judicial Review of Federal Executive Action".[41]

Compliance with making requirements

An issue to which the courts have paid considerable attention in determining the validity of delegated legislation is that of compliance with prescribed procedures relating to the making of legislation. Such procedures can be divided into four categories:

- making the legislation
- publishing the legislation
- laying the legislation before the parliament
- making copies of the legislation available to the public.

The attitude of the courts has been to require strict compliance with the specified procedure relating to the first two categories only. Whether it is appropriate to permit non-compliance with requirements relating to the third and fourth categories is questionable. The procedures have been stated with a particular public interest in mind. The problem with the third category has been overcome in some jurisdictions by the legislation being amended to make the position clear that non-compliance with tabling requirements spells invalidity but in NSW, Victoria and South Australia the common law position still prevails.[42]

In regard to making legislation available to the public, only Barwick CJ in *Watson v Lee*[43] has ever suggested that the inability of a person to be able to obtain a copy of legislation goes to the enforceability of the legislation. However, section 20 of the Victorian *Subordinate Legislation Act 1994* provides that a person cannot be convicted or prejudicially affected under the terms of a statutory instrument if it is shown that at the relevant time a copy of the instrument could neither be purchased nor inspected. This is most relevant in relation to many lower level legislative instruments the availablity or indeed the existence of which is often unknown to the public.

It is my impression that the approach adopted by the courts to these formal aspects relating to the making of delegated legislation is generally to impose a stricter burden of compliance than is done in the case of administrative instruments. The consequences of a failure to comply with a designated procedure has become the key to whether compliance will be required or not.[44] It seems reasonable for the courts to take the attitude that the consequences flowing from a failure to comply with the procedures relating to the making of delegated legislation are likely to have an adverse effect on the public and therefore strict compliance should be required.

Conclusion

It is sometimes fashionable to assert that a clear distinction between legislative and executive instruments cannot be made. Certainly it is difficult to do so. However, as has

41 (1996) 24 Fed L Rev 347 at 354.

42 For details, see *Delegated Legislation*, chs 2-11.

43 (1979) 26 ALR 461.

44 Pearce and Geddes, *Statutory Interpretation in Australia* (4th ed, 1996) Paras 11.14-11.27.

been demonstrated, consequences do flow from the categorisation for requirements as to making, parliamentary oversight and judicial review of the two types of instruments. It therefore seems that the classification of functions doctrine will be around to test us for some time yet.

APPLES AND ORANGES: COMPARISON OF THE WORK OF THE VARIOUS AUSTRALIAN DELEGATED LEGISLATION COMMITTEES

Stephen Argument[*]

This paper was originally prepared for presentation to the Seventh Australasian and Pacific Conference on Delegated Legislation and Fourth Australasian and Pacific Conference on the Scrutiny of Bills, held in Sydney on 21-3 July 1999. The author is grateful to the Regulation Review Committee of the NSW Parliament for allowing him to publish the paper separately to the proceedings of the Conference. Any views expressed in the paper are those of the author.

Introduction

A quick search through the papers and proceedings of the Delegated Legislation Conferences held over the past 14 years reveals that, to date, no-one has attempted to do a comparative assessment of the work of the various delegated legislation committees. While there have been at least 2 attempts to assess the performance of committees - the most recent being Bill Wood's "performance indicators" paper delivered at the Adelaide conference[1] - there has been no attempt to assess the performance of the various committees against each other. Why is this so? The most obvious reason, of course, is that it is a dangerous task for anyone to undertake because, out of necessity, it would end up as a competitive exercise, destined to make the assessor unpopular with most of the committees. Another reason, however, is that it is difficult to envisage *how* to make a comparison because the various committees operate very differently and under very different conditions. In many ways, it would be like comparing apples and oranges.

Having said that, the comparison that I would like to present is a "scorecard" that focuses on what I regard as some of the more important features of the work of the various committees. To a large extent, this scorecard focuses on differences between the work of the committees, rather than similarities. I should also say that many of the features that I have selected are very much the product of my own prejudices, as someone interested in following the work of the committees. In particular, they relate to the accessibility of information about the committees and their work.

"Parliamentary" Factors

The first set of features that I would like to touch on are features about whose value I am unsure. They relate to what I would call the *parliamentary* environment in which the committees operate. Three committees - those in the ACT,[2] the Northern Territory[3] and Queensland[4] - operate in unicameral legislatures. Of the remaining committees, all but the Senate Regulations and Ordinances Committee operate as joint committees of the upper and lower houses. In all but the ACT and Tasmanian jurisdictions, the chair of the committee

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1 Wood, B, "Scrutiny: What a performance! Scrutiny Committees and performance indicators", reproduced in Parliament of South Australia, *Proceedings of the Sixth Australasian and Pacific Conference on Delegated Legislation and Third Australasian and Pacific Conference on the Scrutiny of Bills* (July 1997).

2 The Standing Committee on Justice and Community Safety.

3 The Subordinate Legislation and Publications Committee.

4 The Scrutiny of Legislation Committee.

is a member of the government party. In the Commonwealth, NSW, the Northern Territory, South Australia and Victoria, the government party has "the numbers" on the committee, either absolutely or because the chair has a casting vote.

Before I go any further, I should state clearly that I am well aware that a feature of the operation of these committees is said to be the extent to which their operation is bipartisan and apolitical. I do think, however, that these parliamentary factors are an interesting point of comparison, particularly because there is no obvious correlation between the features that I have identified.

Jurisdictions with a Scrutiny of Bills Committee

While my identifying the existence of a scrutiny of bills function as being a factor for comparing the work of committees almost certainly reflects a prejudice developed by virtue of having been the secretary to such a committee, I do feel that it is relevant. Scrutiny of bills committees have a significant role by virtue of their opportunity to scrutinise the primary legislation under which the power to make delegated legislation is given. One of the roles of scrutiny of bills committees is to ensure that bills do not inappropriately delegate legislative power and do not result in the exercise of legislative power being insufficiently subject to parliamentary scrutiny. As such, they operate as a “bulwark” against proliferation of the kinds of quasi-legislative instruments that I have written about elsewhere.[5]

The scrutiny of bills function has been established in the ACT, the Commonwealth, Queensland and Victoria (and recommended in Western Australia). How is this significant in a comparative sense? I would argue that it is important because of the capacity mentioned above to ensure that legislative power is not delegated inappropriately and also that delegated legislation properly attracts the mechanisms that ensure notification, publication and parliamentary review. In that sense, they can operate to maintain a flow of work to delegated legislation committees. The flaw in this argument is, of course, that the jurisdiction that has had a scrutiny of bills function for the longest time - ie the Commonwealth - has (in my view) been relatively unsuccessful in its “bulwark” function.[6] This may be one of the reasons why jurisdictions such as NSW have (at previous conferences) pointedly and consistently eschewed the scrutiny of bills function. Whatever the reasons - and despite the reservations that I have expressed above - I remain firmly of the view that a scrutiny of bills function is an advantage, if only because legislation needs all the scrutiny it can get and legislative scrutineers need all the help that they can get. Those jurisdictions that have *not* established a scrutiny of bills function should not, however, be regarded (simply on that basis) as being the poor cousins of those that have. Any analysis needs to be made on the basis of an assessment of the overall effectiveness of whatever review mechanisms are available in keeping under control the kinds of problems that (at least in my mind) a scrutiny of bills committee might address.

Jurisdictions with Committees Performing the Dual Function

The discussion above leads into a consideration of the significance of committees performing the dual function of scrutinising both delegated legislation *and* bills. As delegates to this conference are well aware, this dual function was first bestowed upon the committee established in the ACT but it was subsequently embraced by Victoria and Queensland. I am not at all sure about the significance of the dual function as a factor of comparison, though I should admit that my initial doubts about whether the dual function would work effectively have been allayed by the fact that it appears to have worked without problem in each of the

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5 See Argument, S, “Parliamentary scrutiny of quasi-legislation” 15 *Papers on Parliament* (May 1992), pp 43-6).

6 See, further, Pearce and Argument (Note 2), at p 91.

3 relevant jurisdictions. I should also say that the way that the Victorian committee has organised its operations - with the scrutiny of delegated legislation function being undertaken by a subcommittee of the "main" committee - has some practical attractions (principally in relation to the division of work and subsequent concentration of effort).

The Role of the Independent Legal Adviser

Currently, the ACT, Commonwealth and Queensland committees are assisted in their work by an independent legal adviser. In the first edition of *Delegated Legislation in Australia*,[7] there were comments about the relevance of the existence of an independent legal adviser in the effectiveness of the work of the various committees. At that time, it was suggested that certain committees may have suffered from their lack of an independent legal adviser. This comment was particularly directed at the (then) NSW committee,[8] which was adjudged to have suffered from the lack of an independent legal adviser. While the value of "independent" legal advice is not to be underestimated, current indications are that the existence or not of an independent legal adviser is of no particular relevance in judging the work of committees. The fact is that the NSW and Victorian committees, in particular, apparently do very good work without recourse to independent legal advice. They do so, however, because they have established a high quality source of advice within their own secretariats.[9] The same can be said of other jurisdictions. It is trite (but nevertheless important) to observe that the quality of advice available to such committees depends largely on the particular adviser and that "independence" is not necessarily the issue, particularly at a time when parliamentary bureaucracies are themselves assertive of their independence from the mainstream bureaucracy.[10]

Regulatory Impact Statements

One of the most significant developments in delegated legislation over the past 20 years has been the growth of "regulatory impact" as a criterion for scrutiny and the capacity for public input into the content of delegated legislation. There are presently statutory requirements that regulatory impact statements be prepared for delegated legislation in NSW, Queensland, Tasmania and Victoria. I have (eventually) come to the view that the extent to which these mechanisms produce "better" delegated legislation cannot be under-stated. There is no doubt that input from affected persons or bodies (including through avenues provided by parliamentary review committees) can only lead to an end product that is better than what might ordinarily be produced by government departments and agencies left to their own devices. In that sense, this is a criterion for comparison that I am reasonably comfortable in identifying as a "plus" for those jurisdictions that actually have it.

I cannot leave this topic without making some reference to the position in the Commonwealth. In *Delegated Legislation in Australia*, I commented on the fact that the Commonwealth had been singularly unsuccessful in introducing regulatory impact requirements, by virtue of the unhappy history of the various versions of the Legislative Instruments Bill.[11] It led me to make the following comments:

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7 Pearce, DC, *Delegated Legislation in Australia and New Zealand* (1977, Butterworths, Sydney).

8 The Regulation Review Committee.

9 In this context, the advisers to the Victorian committee would also point out that they are employed on a contract basis, for an agreed term, which may also be relevant to their "independence". I should point out, however, that it is the *outside* nature of the resource that I was meaning to focus on, as much as its *independence* from the committee.

10 See Pearce and Argument (Note 2), p 92.

11 Ibid, pp 12-4.

> [T]he Commonwealth is no longer leading the way for the other jurisdictions. Particularly as a result of the failure of the Commonwealth government(s) to secure the passage of the Legislative Instruments Bill, the Commonwealth can no longer be said to be leading the way on scrutiny of delegated legislation, as it was 20 years ago.
>
> The fact is that the Commonwealth is now very much behind several other jurisdictions, particularly in relation to regulatory impact assessment and staged repeal of delegated legislation.[12]

These comments have attracted further comments, most notably in a review by David Creed.[13] Mr Creed suggested that I was unaware of the requirements of the Legislative Review Program, which applies to all Commonwealth legislation (including bills, delegated legislation, treaties and quasi-legislation) restricting competition or affecting business, and the role of both the Office of Regulation Review (a part of the Productivity Commission) and the Senate Standing Committee on Regulations and Ordinances in supervising and scrutinising the preparation of regulatory impact statements in relation to that legislation. In fact, I am aware of those requirements but (at the risk of attracting the ire of the Office of Regulation Review) regard them as a poor substitute for the requirements that the later versions of the Legislative Instruments Bill would introduce. The fact is that (as Mr Creed states) these are *administrative* requirements and, as such, can only be enforced administratively. The fact is that the Commonwealth *needs* the Legislative Instruments Bill, which I understand the Government is hoping to be able to introduce in the coming sittings of the Parliament. It will be the *fourth* version of the Bill.

In a similar context, I should avoid speculation that I am apparently unaware of other things by briefly mentioning the recent *Report of the Public Management Service of the OECD on Regulatory Impact Assessment in New South Wales*.[14] That report contains a comprehensive assessment of how regulatory impact assessment operates in NSW, with some comparative references to other jurisdictions. I hesitate to mention that, at one point, the report suggests that Victoria appears (in some ways) to undertake regulatory impact assessment to "a higher standard" than NSW!![15]

Staged Repeal of Delegated Legislation

Another feature of the Legislative Instruments Bill that already operates in other jurisdictions is the staged repeal or “sunsetting” of delegated legislation after a set number of years on the statute book. Those jurisdictions in which this currently applies, together with the relevant repeal period, are as follows:

New South Wales	5 years
Queensland	10 years
South Australia	10 years
Tasmania	10 years
Victoria	10 years

It is generally accepted that there is too much legislation currently operative and that much of it is (in its present form) neither relevant *nor* useful. What automatic repeal or revocation forces upon those responsible for administering delegated legislation is an assessment of

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12 Ibid, p 95.

13 See (1998) 19 *AIAL Forum* 32. The other review, by Robin Creyke, is to appear in a to-be-published edition of the *Canberra Bulletin of Public Administration*.

14 The Regulation Review Committee of the NSW Parliament has published this report as Report No 18/51 (January 1999).

15 Ibid, at para 256. Unfortunately, this Report was published after the manuscript to *Delegated Legislation in Australia* had gone to the printers.

whether or not it is needed and whether or not it does what it is intended to do. That being so, it is difficult to argue against staged repeal as a useful tool in managing the volume and effectiveness of delegated legislation, particularly when you consider that, in NSW, for example, the total number of rules "on the books" has fallen from 976 (as at May 1990) to 531 (as at May 1998), a reduction of 45.59%. I am sure that the other jurisdictions can report similar reductions. Again, I am reasonably comfortable in identifying staged repeal as a "plus" for those jurisdictions that have it.[16]

Other Features

There are some other features that present themselves as being useful in comparing the work of the committees but that are so unique that I offer them as no more than as possible "best practice" or as a "wish list" of what an ideal delegated legislation committee might have available to it. I do not pretend that the list is exhaustive (or that it represents any more than a list of mechanisms that I think are useful).

Scrutiny of explanatory material

The ACT and Queensland committees have a formal, statutory role in relation to scrutinising the explanatory material accompanying delegated legislation that comes before them. While other committees have, informally taken on a similar role, in an ideal world, all committees would have a formal responsibility in this regard, as it puts the bureaucracy very clearly on notice that explanatory material is important.

The capacity to amend delegated legislation

It is fair to say that, in most jurisdictions, the principal weapon in the committee's armoury - moving that a piece of delegated legislation be disallowed - is one that it uses sparingly, because it is very much a blunt instrument. That being so, the capacity to *amend* delegated legislation - which is available only in the ACT and Western Australia - is a desirable feature of any review framework, with the (more prevalent) capacity for partial disallowance as a second-best option.

The capacity to take action out of session

While I have no direct evidence of it actually being a problem, the fact that delegated legislation invariably operates until such time as it is disallowed means that regulations etc, promulgated immediately prior to a parliamentary recess can operate for a considerable period of time, despite there being obvious problems with them. That being so, a mechanism such as that which exists in Tasmania, under which the Tasmanian committee[17] can cause regulations to be amended, rescinded or suspended during periods of parliamentary adjournment or recess, is desirable. Again, a second-best option is something similar to the capacity of the Western Australian committee[18] to report its concerns on a regulation to the department or agency that made it, despite the fact that the parliament is not sitting.[19]

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16 The Victorian Office of Regulation Review have kindly provided statistics that indicate that, between 1992 and 1998, in relation to regulations that impact on business, there has been a 38.8% reduction in the number of regulations in force and a 51.4% reduction in the number of new regulations made. Figures for other jurisdictions were not available to the author.

17 The Standing Committee on Subordinate Legislation.

18 The Joint Standing Committee on Delegated Legislation.

19 In NSW, the Regulation Review Committee has the power to "sit and transact business despite any prorogation of the Houses of Parliament or any adjournment of either House of Parliament" (*Regulation Review Act 1987*, subsection 8(8)).

An effective bulwark against avoiding legislative scrutiny?

My final point in this wish list relates to my particular concerns with quasi-legislation and the possibility of the bureaucracy avoiding parliamentary scrutiny of their delegated legislation by the simple mechanism of ensuring that it is *called* something other than "subordinate legislation", a "regulation", a "statutory rule", or whatever the term is that attracts the jurisdiction of the relevant scrutiny committee. My preferred mechanism is that proposed by the later versions of the Commonwealth's Legislative Instruments Bill, which would apply to "instruments of a legislative character", with that term being defined. Such a mechanism would ensure that parliamentary scrutiny would attach to what an instrument does and not to what name that the bureaucracy gave it, thereby avoiding a lot of the problems that currently exist.

This is, very clearly, a selective wish list.

Workload of the Committees

I now turn to more problematic issues. When I started this exercise, I had in mind to do some sort of comparison based on numbers of regulations, etc scrutinised, number of reports issued, numbers of regulations disallowed, etc. I started to devise some tables that set out this information but ran into problems, largely because I found it difficult to get the statistics for *all* the committees for the most recent financial year (ie 1998-99). The bigger problem, however, is that measuring the work of committees by numbers of reports is a dubious exercise in any event. There are significant factors beyond the raw figures that need to be taken into account. Again, these factors highlight the differences between the work of the committees.

First, if we are to take the figures as being an indicator of the respective workloads of the committees, it also needs to be remembered that the ACT, Queensland and Victorian committees carry the dual function and that the ACT committee (in its new configuration) has, in addition, a function in relation to scrutinising policy issues in the subject area of justice and community safety. Similarly, the Northern Territory committee has a scrutiny function in relation to annual reports and “miscellaneous instruments and documents”.[20] These committees have an additional workload.

The second factor to consider is what level of assistance the respective committees have in performing their work. It needs to be remembered that the ACT, Commonwealth and Queensland committees have the advantage of being able to rely on advice from an independent legal adviser. As discussed above, this does not mean to suggest that access to an independent legal adviser necessarily makes the performance of one committee better than that of a committee that does not have such access, the fact is that the value of that dedicated resource needs to be taken into account. Similarly, the level of staffing available to committees is a key factor. In making any comparison between the work of committees, it is surely relevant to take into account that the NSW and Victorian committees, on the one hand, each have a secretariat of 5, while the Northern Territory and Tasmanian committees each have a secretariat of one.[21] It is useful, therefore, when comparing the statistics relating to the numbers of regulations, etc examined by the respective committees, to compare also the number of staff available to assist the committee in examining those regulations.

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20 In 1998-99, the Northern Territory committee scrutinised 78 annual reports and 48 miscellaneous instruments and documents, in addition to 88 regulations.

21 It is also relevant to note that the Secretary to the NT committee is, in addition, the secretary to the Legislative Assembly’s Public Accounts Committee.

For similar reasons, I have not even attempted to compare the committees on the basis of disallowance motions moved and passed. For those who are interested, however, there are some details included in the various chapters of *Delegated Legislation in Australia* as to the number of disallowance motions moved and passed in the various jurisdictions in recent years.

Accessibility of Information

I now want to make some comments about accessibility of information of the work and procedures of the various committees. In my view, just as it is important that legislation be accessible, so too should information about the work of delegated legislation committees be accessible. If it is not, there is a likelihood that not only does the valuable work of the committees go unnoticed but also that an invaluable educative opportunity is lost.

Reports of committees

If there is a to be a comparison of the work of the committees, the most important tool (for an outsider) is the availability of regular reports on the committees' work. This is, of course, another instance of the prejudice of the writer in making the comparison. Obviously, it is easier for someone to complete the sort of exercise that I undertook for *Delegated Legislation in Australia* if reports of the committees' work are readily available. In that sense, one measure of comparing the committees' work might be to compare the number of reports tabled by each of the committees in the most recent financial year. Again, this proved to be a difficult exercise because of the difficulty in getting figures for *all* the committees in relation to the same period. In the end, I abandoned the exercise because, again, I think that these figures are, for several reasons, of limited value as a performance measure (though, again, recent figures are included in the various chapters of *Delegated Legislation in Australia*).

First, the Northern Territory and Tasmanian committees both have a practice of reporting to their respective parliaments as required, rather than on a regular basis. This is analogous to the practice of the Senate's Regulations and Ordinances Committee and of the NSW, Queensland, South Australian and Western Australian committees, except that, unlike those committees, the Northern Territory and Tasmanian committees do not produce formal reports, as such. This practice is also similar to that of the Regulations and Ordinances Committee in that much of the valuable information about that Committee's work is disseminated by way of statements to the Senate, rather than formal reports.

The second problem with using the number of reports as a performance measure is that the figures for the ACT committee are inflated by the fact that the committee's reports include reporting in relation to its scrutiny of bills function. This is different to the 2 other committees with the dual scrutiny of bills and scrutiny of delegated legislation function, namely Queensland and Victoria, in that reporting in relation to the scrutiny of delegated legislation function can easily be identified. The distinction is enhanced in the case of the Victorian committee,[22] in that the delegated legislation function is handled by a subcommittee that reports to the parliament as a "separate" exercise.

Assuming that committees only report as is necessary, what does it *really* mean if a committee reports more rather than less? A committee that does not report very often might be regarded as "inactive" or as not performing its legislative scrutiny function as diligently as it might. Equally, however, this might be an indication that, given the resources available to it, the committee is flat-out performing the scrutiny function and that it simply has neither the time nor the resources to produce reports on its work.

22 The Scrutiny of Acts and Regulations Committee.

On a slightly more positive note, the absence of reports might be an indication that delegated legislation in the relevant jurisdiction does not contain material about which the committee needs to be concerned. This could, in turn, be a reflection of the fact that lawmakers in the jurisdiction are so skilled in their work or so frightened of attracting the attention of the committee that their delegated legislation is perfect. While this is unlikely, the fact is that it is possible. I have said before that it is my experience, as a person who now has to get legislation "through" legislative scrutiny committees, that (in the Commonwealth jurisdiction) the Office of the Parliamentary Counsel and the Office of Legislative Drafting operate as *de facto* assistants of the legislative scrutiny committees. They do this by telling people like me "If you put a provision like that in the legislation, Scrutiny of Bills/Regulations and Ordinances will make an adverse comment". This fact has been alluded to by Professor Margaret Allars.[23] I suspect that the same happens in other jurisdictions. If this is the case, a lack of reports might be an indication that a committee is doing (or, rather, in the past *has done*) a terrific job, rather than that it is doing nothing.

Annual reports

Of similar relevance (and with similar caveats) is the availability of annual reports on the work of committees. The Commonwealth, Queensland, South Australian[24] and Victorian committees have adopted a practice of tabling reports of their activities on a financial year basis. These reports are a veritable goldmine of useful information about the work of the committees. For other committees, this sort of information is only available either through the annual reports of parliamentary departments (in which case, it is much less detailed and discursive) or by direct approach to the committee secretariats. Again, however, the capacity of a committee to produce annual reports is presumably limited by the resources available to it. I speak from experience when I say that, when resources are limited, this sort of work is something that tends to be given a fairly low priority.

Availability of material on the Internet

The final point that I would make about accessibility of information is, again, both based on a personal prejudice and is something that is presumably limited by resources. It relates to the availability of committee material through the Internet. I have found it extremely valuable that the committees in all jurisdictions except South Australia were in some way accessible through material on the Internet. In the case of the Commonwealth, NSW, Queensland, Victoria and Western Australia, reports and other written material on the committees are available through the Internet.[25] As the Internet increases in its importance as a research and information dissemination tool, it is useful that committees ensure that their material is available through it. Again, however, I acknowledge that resources are an issue for committees and that, in some jurisdictions, it is simply a case of them not being able to stretch as far as providing Internet access.

Conclusion

I mentioned at the outset that there had been 2 prior attempts at assessing the work of committees, with the most recent being set out in a paper given to the last delegated legislation conference. The other attempt was made in 1989, by Professor Dennis Pearce, in a paper to the Second Conference of Australian Delegated Legislation Committees.[26] Since

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23 See Allars, M, *Introduction to Australian administrative law* (1990, Butterworths, Sydney), p 341.

24 The Legislative Review Committee.

25 I also acknowledge that 1 report of the ACT committee is available through the ACT Legislative Assembly web-site.

26 Pearce, DC, "Legislative quality control by scrutiny committees - Does it make administration better?", reproduced in *Second Conference of Australian Delegated Legislation Committees - 26-28 April 1989* -

it was Professor Pearce who dobbed me in for this exercise, I would like to point out that, apart from initially answering "Of course" to the question as to whether legislative scrutiny committees make for better administration, I do not believe he got any closer to addressing what lies at the nub of this exercise than I have.
I would re-iterate that this is probably in large part a reflection of the fact that the committees operate so differently and, therefore, it is difficult to make any sensible, qualitative comparison. To make a final point, I will, however, repeat an observation that I made in *Delegated Legislation in Australia*.[27] My final point is about progress and development. In probably all jurisdictions except the Northern Territory, the role of parliamentary review committees is very different to what it was 20 years ago. More controversially, however, what can also be said is that the Commonwealth is no longer leading the way for the other jurisdictions. This is largely the result of the failure of the Commonwealth government(s) to secure the passage of the Legislative Instruments Bill.

The fact is that the Commonwealth is now very much behind several other jurisdictions, particularly in relation to regulatory impact assessment and staged repeal of delegated legislation. Experience with the Legislative Instruments Bill does not promote optimism that this slide will be arrested in the near future. This is not to suggest that the quality of the work of the 2 Senate committees has fallen away. Rather, it is a reflection of the fact that, at present, the Commonwealth jurisdiction probably has more to learn from some of its state counterparts than they have to learn from it. It also means that, until such time as the Commonwealth passes the kinds of amendments contained in the Legislative Instruments Bill, the state and territory jurisdictions will be setting the example that had previously been set by the Commonwealth.

My concluding message is more positive. Despite my glib comments about Professor Pearce's 1989 paper, I have to agree with Professor Pearce that the obvious answer to the question as to whether legislative scrutiny committees make administration better is "Of course". The challenge, however, is to ensure that people appreciate the good work of committees and, in so doing, to build on that good work. While I have said that I appreciate the constraints that limited staffing and resources place on committees' ability to do so, I must stress that, in my view, regular reporting on committee activities is the key to this. It is all very well for us to demand that legislation be (in every way) accessible but, unless our demands are publicised to the wider community (including the bureaucracy), we are wasting our breath. It is all very well for your committees to do great work with limited resources but, unless this work is known about and recognised, you are, to a significant degree, wasting your time. You are also wasting an excellent opportunity to get your message across and, in so doing, (hopefully) to make your lives easier.

Report and transcript of proceedings and conference papers 1989, Senate Procedure Office, Canberra), at p 345.

27 See Pearce and Argument (Note 2), at p 95.