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THE SOCIAL CONTRACT RENEGOTIATED: PROTECTING PUBLIC LAW VALUES IN THE AGE OF CONTRACTING

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This paper was awarded the 2001 AIAL Essay Prize in Administrative Law.

Introduction : Religion and the Public Square

> Thus the conflict between religion and those natural economic ambitions which the thought of an earlier age regarded with suspicion, is suspended by a truce which divides the life of mankind between them. The former takes as its province the individual soul, the latter the intercourse between man and his fellows in the activities of business, and the affairs of society. Provided that each keeps to his own territory, peace is assured. They cannot collide, for they can never meet.
>
> RH Tawney, Religion and the Rise of Capitalism[1]

Recent public policy developments in Australia and elsewhere have highlighted the fact that the conditions of Tawney's truce between religion and "the affairs of society" are increasingly hard to sustain. In the United States, where the strict separation of church and state has been a sacred constitutional dogma, the Bush administration has established the Office of Faith-based and Community Initiatives, looking to extend the involvement of religious organisations in the delivery of government-funded social welfare programmes. In the United Kingdom, a Christian socialist Prime Minister has actively promoted "social enterprise" partnerships between government, the private sector and the non-profit sector, especially churches, as "the third way" to improve social outcomes. In Australia, churches have been awarded Job Network contracts following the dismantling of the Commonwealth Employment Service.

But as the private sphere of religion and the public sphere of the secular state have engaged one another in new ways, the tensions in the relationship are evident. Last year there was open antagonism between the Human Rights and Equal Opportunity Commission (HREOC) and the Minister for Employment Services over the right of church-based Job Network Contractors to exercise religious discrimination in employment. New Commonwealth school funding legislation has reinvigorated the state aid debate and caused constitutional issues about the establishment of religion to be revisited. And the Commonwealth Government's Inquiry into the Definition of Charitable and Related Organisations has asked how much government support can a charity receive before it loses its charitable status, in other words, before it becomes a *de facto* public body?

These tensions are part of a re-negotiation of the social contract between the state, the market, civil society and the individual citizen. They are taking place against, and to an extent are explained by, a wider change in the political climate: the citizenry of developed Western capitalist democracies appear to be reacting against the economic libertarianism and glorification of the market that has delivered greater inequality and social *anomie*. There are increasing calls for a new appreciation of the values of community and the institutions of civil society that provide a framework for meaningful and purposeful living beyond mere acquisitiveness.[2]

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1 RH Tawney, *Religion and the Rise of Capitalism*, New York: Harcourt, Brace and World, 1926, Mentor Books edition, 1947, p.229.

2 Simon Longstaff, "The Young and the Damned", *The Australian*, 1 March 2001.

The Australian government has responded to this disengagement by evoking notions of "mutual obligation" and using the power of the state to compel re-engagement with the market economy, exemplifying the situation where "the individual today is often suffocated between the two poles represented by the state and the marketplace. At times it seems that he exists only as a producer and consumer of goods or as an object of state administration".[3]

The renegotiation of the social contract must transcend this dichotomy between commercialisation and politicisation, the market and the state:

> There is a growing recognition that human beings do not flourish if the conditions under which we work and raise our families are entirely subject either to the play of market forces or to the will of distant bureaucrats. The search is on for practical alternatives to hardhearted laissez-faire on the one hand and ham-fisted top-down regulation on the other.[4]

Avery Dulles has suggested that the first step in this search "is to acknowledge that in addition to the political and the economic orders there is a third, more fundamental than either. The moral-cultural system is…the presupposition of both the political and the economic systems."[5]

The legal system, as the regulator of both the private power of the marketplace through contract law and the public power of the state through administrative law, is a particular expression of the moral-cultural order. However, as public policy increasingly experiments with mechanisms of social service delivery that cross the boundary between private and public activity, the legal system is struggling to evolve new frameworks that satisfactorily address the need to respect both public and private purposes and values.

This essay, therefore, presents an argument that the law needs to be reshaped according to the contours of the new terrain being mapped out by the interpenetration of "the private" and "the public". The traditional distinction between public administrative law and private contract law needs to evolve, to be transformed in order to be a more effective regulator of the range of new social partnerships between the state, the market and civil society. In this reshaping, the moral-cultural notion of citizenship requires attention.

The argument is developed in four stages.

The starting point is the response of administrative law to managerialism's extensive use of outsourcing and privatisation to bring about reform in the public sector over the last decade. Administrative law has been increasingly marginalised as a tool for ensuring transparency and accountability in government. Attempts to recover relevance for public law have to date focussed on expanding the definition of what is "public", then detecting these "public" aspects in activities that have now been transferred to the private or community sector, and arguing for an extension of public law jurisdiction to cover those activities. Recent Federal Court cases on the industrial relations implications of contracting out "the business of government" highlight the dilemmas of this approach.

From there the paper canvasses some theoretical arguments that have been proposed as a way through the traditional bi-polar division between public and private law. Concepts such as "the third way" and "the third sector" have emerged as a way of describing the new

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3 John Paul II, Encyclical Letter, *Centesimus Annus* (May 15, 1991), no 49.

4 Mary Ann Glendon, "Beyond the simple market-state dichotomy", *Origins* 26 (9 May 1996) 797.

5 "*Centesimus Annus* and the Renewal of Culture", (1999) 2 *Markets and Morality: the journal of scholarship for a humane economy*.

paradigm of public administration that involves partnerships between government and both private and community sector organisations.
The paper's third section explores the relationship between notions of citizenship (a key concept in the moral-cultural system) and the legal framework for regulating new social partnerships. While public law advocates tend to focus on citizenship rights and market reformers focus on consumer power as the underlying principles that should guide public policy, a third model of citizenship, that focuses neither on rights nor power but on social engagement and connectedness, provides a way of understanding the evolving political economy and suggests directions in which the legal system might evolve.

From this point the paper moves to its conclusion, which is to suggest that if administrative law is to retain a role as the guardian of the public interest in the era of outsourcing, a new jurisprudential framework that takes account of the softening boundary between the bi-polar notions of "private" and "public" law, and creates a space for "social law", whose purpose is the promotion of the common good rather than private rights or strict adherence to public sector rules, may need to emerge. A modest proposal for initiating that evolution is suggested. The term "social contract" can take on a new meaning, one used to describe the nature of public-private partnerships to deliver social goods.

1 The ethic of contract

> There is a generally held view that government has for too long retarded economic growth through inefficiencies in the public sector…I want to point out that contracting out is actually far more subtle and effective than is generally realised. It will form part of virtually every reform we undertake…the government is firmly of the view that public sector reform must be applied to the whole public sector, not just those areas which produce tangible, tradeable outputs…Contracting out is not an end in itself, nor is it a substitute for other reform. Rather it is an extremely powerful and subtle management tool …[6]
>
> Alan Stockdale, Victorian Treasurer 1992-1999.

The Victorian Government under the leadership of Jeff Kennett and Alan Stockdale elevated to the status of dogma the belief that government does best when it does least. They were Australia's most effective missionaries of the revolutionary gospel which urged public administrators to render unto the purchaser what belonged to the purchaser and to the provider what belonged to the provider. The realms of policy-design and service-delivery should be kept separate, and service-delivery subjected to competitive forces of the market, enabling the government to work wonders. They healed paralysed government departments and haemorrhaging state finances, and fed the multitudes with a couple of major asset sales and "major events". They won many converts in other governments.

Contracting out, as the quote above foreshadowed, has now become the normal rather than an exceptional practice underpinning public administration in Australia. The state that steers rather than rows is a powerfully persuasive metaphor that inhabits and inhibits the imagination of policy-makers at all levels of government. Not only have those functions that "produce tangible and tradeable outputs" such as electricity and garbage collection been contracted out or privatised completely, but so have those social services that have traditionally been seen as the responsibility of government in its role as guarantor of social rights: health services, disability services, housing for the poor, public transport and employment assistance, to name just a few.

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6 "Contracting Out: A Victorian Perspective", conference paper delivered to the conference "Contracting Out Reforms in the Public Sector", Sydney, March 1994. Cited in *Protecting the Public Interest in the Contracting of Public Services to Private Providers,* Catholic Commission for Justice, Development and Peace (Melbourne) Issues Paper No 6, June 1999.

Dr Bob Officer, one of the chief architects of Victoria's contracting out framework, was appointed by the Federal Coalition Government to chair the National Commission of Audit in 1996. Unsurprisingly, the National Commission of Audit recommended the widespread use of marketisation, competition and various forms of privatisation to generate increased efficiency. Creyke sees this report and others produced by the Productivity Commission that call for increased use of outsourcing as signalling the "sunset for the administrative law industry", because privatisation removes a wide range of government decisions and public functions from the scope of administrative review, and in many cases, from the scrutiny of Parliament.[7]

Administrative Law in Retreat

> The delivery of government services by contractors, and the consequent 'privatising' of the relationship between service providers and members of the public, has the potential to result in a loss of the benefits which the administrative law system provides for individuals. In turn, this may affect the efficiency and quality of government administration. Further, since a contractor's connection with government will be governed by contract, the accountability mechanisms traditionally provided by ministerial responsibility and Parliamentary oversight may no longer be as effective.[8]

In an address to Free Speech Victoria on 25 August 1999, the former Auditor-General of Victoria, Ches Baragwanath reiterated the concerns of the Administrative Review Council about the negative consequences of contracting out:

- The growth in the use of commercial confidentiality to restrict access to government information;
- The diminution of public law accountability – that is, the exclusion of the jurisdiction of the Ombudsman and public law remedies such as administrative review legislation;
- Changes in the concepts of accountability, which become determined less by the public interest than by consideration of financial efficiency and cost-related numerical targets;
- Changing notions of "public interest", in that contracts limit the number of interested parties, whereas "public interest" recognises a wider range of constituencies;
- Increased, or changed, opportunities for corruption in the contracting process;
- A diminution in the challengability of contracts, brought about by the doctrine of privity of contract.[9]

As Seddon points out,

> What appears to be happening is that administrative law is being pushed out of the public sphere by re-labelling public activities. This relabelling is done by the expedient of using the mechanism of contract to fulfil public purposes. The rhetoric of contract, in particular "freedom of contract", is then employed to insulate the government from scrutiny."[10]

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7 Robin Creyke, "Sunset for the Administrative Law Industry: Reflections on Developments under a Coalition Government", *Administrative Law under the Coalition Government*, ed John McMillan, 1997, Australian Institute of Administrative Law, p 20.

8 Administrative Review Council Report No. 42, *The Contracting Out of Government Services*, 1998, p vi.

9 "Say Ches" *Eureka Street*, Vol 9 No 8 October 1999, p 34.

10 Nick Seddon, *Government Contracts*, 2nd Edition, Sydney, The Federation Press, 1999, p 282. See also Sue Arrowsmith, "Government Contracts and Public Law", (1990) 10 *Legal Studies*, 242.

The response of public law theorists to this phenomenon has been to attempt to regain territory for the public sphere, by arguing that where there is a recognisable "public" aspect to the activity that has been contracted out, administrative law should still apply.

> It is by no means a forgone conclusion that a decision taken under a government contract should invariably be free from public law remedies. It depends very much on the type of contract. For example, when the government has decided to carry out, by the use of contract, what were formerly governmental functions, or when the government is distributing public resources through contract, such as the use of a public sports facility or public housing, then, it is submitted, there is a sufficient public element to justify the higher level of scrutiny and accountability that is provided by administrative review.[11]

In other words, it should be possible to define the meaning of "public" in such a way as to allow a re-imposition of administrative review over those activities which outsourcing had delivered into private hands, particularly if the focus is not on *who* is doing the activity, but *what* is the activity that is being done. If a private body is involved in doing something that the "public sector" used to do, or the use of "public power", or the administration of "public resources" or the performance of a "public function", then that, so the argument goes, should allow administrative review greater scope for regaining lost ground.

This approach is not as helpful as it might seem. The problem is that it gets into the same "name" game that Seddon himself criticises: "Merely labelling something 'private' or 'public' tells us nothing about what form or level of regulation is appropriate…Further, the criteria for determining the difference between public and private are elusive."[12]

For example, the argument that if an activity or function is a "public" activity or function, then administrative law should apply, only begs the question: what is a public function?

Public Functions?

The question cannot be resolved simply by saying that a public function is anything that is, or once was, carried out by a public body. For example, is electricity generation and distribution a "public" function just because, once upon a time, only public bodies performed that function? And what about the areas of transport, education and health – are they inherently, essentially "public", to the extent that when their performance passes into private hands they must continue to be regarded as "public" functions and therefore subject to regulation by administrative law? Such services have been provided by private bodies, often religious organisations, since well before the state became involved in their more systematic and universal provision. Writing at the beginning of the post-war period of state expansionism, Hood Phillips could refer to the extension of "public functions":

> In recent times, especially since the industrialisation of most civilised countries, the scope of this [the executive or administrative] function has become extremely wide. It now involves the provision and administration or regulation of a vast system of social services – public health, housing, assistance for the sick and unemployed, welfare of individual workers, education, transport and so on – as well as the supervision of defence, order and justice, and the finance required therefore, which were the original tasks of organised government.[13]

The answer one gives to the question of what is a public function will depend to a large degree on one's political ideology and views about the proper limits on the role of the state. If the sphere of administrative law is co-extensive with the sphere of state activity, which is itself determined by the political culture of the time, then it is clear that value judgments and

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11 Seddon, p 279-80

12 Ibid, p 279.

13 O Hood Phillips, *Constitutional Law of Great Britain and The Commonwealth*, Sweet and Maxwell, 1952, p 12.

politics play a significant role in determining the legitimate scope of administrative law. So whereas social democrats of the baby-boomer generation, growing up in the period of state expansionism and coming of age in the Whitlam era, would associate the state with a wide range of social support type activities, from another perspective, that of the "new right" or the "neo-liberal", the winding back of this welfare state through contracting out represents a return to the proper limits of state activity to its "night-watchman" role. The turning of the tide against the public sphere is apparently mirrored in the policy in all three branches of government: "There is little doubt that the tide of judicial, political and bureaucratic opinion, in line with the wave of new managerialism and corporatisation, is to treat public contracts as closely as possible as 'private' conduct."[14]

Contracting out "the Business of Government"

However, recent decisions of the Federal Court in relation to industrial awards governing employees of former government bodies would appear to swim against this tide somewhat, by finding that outsourcing does not absolve the private sector contractor of the responsibilities of the former public sector employer. McMillan cites this as an example of the legal system being unable to keep pace with changes in public policy and administration, and adhering rigidly to the public/private law divide when what is really occurring is a blurring of that boundary.[15]

In *Employment National Ltd v CPSU*[16] Einfeld J held that when the business of the Commonwealth Employment Service (CES) was taken over by Employment National, the industrial awards that were in place for CES employees were also binding on Employment National.

The court applied the "substantial identity" test established in *Re Australian Industrial Relations Commission; ex parte Australian Transport Officers Federation*[17] ("ATOF") to conclude that since the activities being carried out by Employment National (EN) were substantially the same as those carried out by the CES, the business or part of the business of the CES had been transmitted to EN. Consequently, EN was a successor to the CES business and therefore bound, in accordance with s.149(1)(d) of the *Workplace Relations Act 1996* (Cth), by the award that was in place for CES employees prior to the introduction of the Job Network on 1 May 1998:

> The subsection is clearly intended to protect workers whose employers' business is being transmitted, and to ensure the continuity of awards during that process, provided the employer is succeeding to a business which is substantially identical to the one bound by the original awards. In this case the legislative policy and intent is that workers should continue to be protected (para 111).

If the legislative policy and intent is that the transmission of a business from one owner or employer to another does not unravel industrial agreements and awards, and if this principle applies to public sector businesses that are transmitted to private hands, then this may be a bridge across which the banner of administrative law could be carried from the one side of the public law/private law divide to the other. Does this instance of continuity suggest that something essentially "public" continues to exist in privatised entities such that administrative law is entitled to scrutinise the activities and possibly review the decisions of those entities?

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14 Seddon, p 278.

15 John McMillan, "Law and Administration: Conflicting Values", *Canberra Bulletin of Public Administration*, No 98, December 2000, 34. The ARC demonstrates similar constraints on its own thinking by making "recommendations relating to the contracting out process, and the application of private law and administrative law in situations where services are provided by contractors. The preservation of accountability and avenues of redress can be achieved through a mix of public and private law mechanisms." (ARC Report 42, p vi).

16 (2000) 173 ALR 201.

17 (1990) 171 CLR 216.

On the contrary, it could be argued that this decision is little more than a very strict application of private contract and industrial law, and that the outcome would have been exactly the same if the previous employer had been a private company.

However, the courts have treated the transfer of businesses differently when one or both of the employing bodies involved in the transfer are government entities.

First, in the *EN* case, the court admitted that its decision to find there had been a transfer of the CES business to EN was made easier by the fact that EN was a government-owned company:

> There is in my view no doubt that both EN and ENA [Employment National Administration Pty Ltd] are, as the CPSU put it, "emanations of the Commonwealth"…While they are run as fully competitive enterprises along commercial lines, both in their conception and in their operation they essentially provide services in accordance with departmental policy. The Commonwealth is in complete control of the companies. (para 78)

In other words, the public sector heritage of these bodies makes the argument for continuity of the award harder to resist. But Einfeld J made a tantalisingly cryptic observation about the other private sector operators in the new market created by the Job Network, who also, arguably, were as much successors to the CES as EN was:

> The fact that EN is in competition with over 300 other providers adds nothing of relevance to the question of whether this step [outsourcing the CES] amounts to a transmission, amongst other reasons because what is added by the competition cannot be determined when the other providers are not parties to this litigation. (para 83)

This begs the question: what if the CPSU had taken Drake, Wesley Mission, the Salvation Army, or Centacare to court, arguing that the employment conditions existing at the CES should continue to bind them? The logic of the court's decision would suggest that they too would be bound just as EN is bound.

In *PP Consultants Pty Ltd v Finance Sector Union of Australia*,[18] involving an agency relationship between a pharmacy and a bank, the High Court focused on the meaning of the word "business" in s149(1)(d), and concluded that cases in which government activities were transferred either to another government entity or to a private entity were to be distinguished from cases involving only two private employers:

> The Full Court[19] purported to apply *RE Australian Industrial Relations Commission*; Ex parte Australian Transport Officers Federation, a case concerned with the construction of a union eligibility rule, and *North Western Health Care Network v Health Services Union of Australia*. But those cases were concerned with the transfer of governmental activities from (in *ATOF*) one branch of government to another or (in *North Western Health Care*) from government to the private sector. The courts were not therefore required to identify or analyse the nature and components of a "business" in the orthodox sense of the word and in the context of a conventional business environment. [para 38]

The reason for distinguishing such cases was that:

> While the notions of "profit" and "commercial enterprise" will ordinarily be significant in determining whether the activities of a private individual or corporation constitute a business, they play little, if any, role in identifying whether one government agency is engaged in the business of government previously undertaken by another government agency. [para 13]

Unfortunately, this finding and these cases do not bring us any closer to identifying what kind of activities are inherently public in nature. At best they simply confirm the rather

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18 (2000) 176 ALR 205.

19 *FSU v PP Consultants* (1999) 91 FCR 337.

unsatisfactory formulation that "the business of government" is whatever government does, and provide some solace and a straw to clutch at for those who argue that whenever the government stops doing something itself and hands over responsibility to a private agency, something "public" inheres in that activity and this inherence has legal consequences.[20]

However, there is a postscript to the *EN* case that suggests a more complex situation. The APS award that now covers EN employees has a very peculiar and very "private" feature. Clause 10 of the Australian Public Service Award 1998 deals with anti-discrimination. Sub-clause 10.1 states exactly what one would expect to see in an award governing employment in the public sector:

> 10.1 It is the intention of the respondents to this award to achieve the principal object of the Workplace Relations Act 1996 through respecting and valuing the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

However, sub-clause 10.3.4 states:

> 10.3 Nothing in this clause is taken to affect:
> …
> 10.3.4 the exemptions in s170CK(3) and (4) of the *Workplace Relations Act 1996.*

Those exemptions relate to the requirement of employers not to terminate an employee's employment on the grounds listed in s170CK(2)(f), which are the same grounds as those listed in clause 10.1 of the award. The exemption in s170CK(4), which is unaffected by clause 10.1 of the award, reads as follows:

> (4) Subsection (2) does not prevent a matter referred to in paragraph (2)(f) from being a reason for terminating a person's employment *as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed*, if the employer terminates the employment in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed. [emphasis added].

Is it not peculiar that the APS award envisages that someone employed under the award could be "a member of staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed"? Under what circumstances would that be the case? Well, one such circumstance would be when an activity being carried out by the public sector, in which people are employed under this award, is outsourced to religious agencies who, as successors to the business, might be obliged to recognise the award, yet who, as religious bodies, are also obliged to conduct their activities in a manner consistent with their religious identity. This curious feature of the award could be construed as recognition of the interpenetration of the public and private sectors in the delivery of social outcomes sponsored by government and of the evolution of a "third sector" between the purely public and purely private sectors.

2 Third Way and Third Sector

The British Government under Tony Blair has articulated a clear philosophy of public policy design and implementation that involves private and community sector agencies in achieving public policy outcomes, not as contracted extensions of the state but as partners. In this view, contracting out need not be seen as a disaster for public accountability. Contracts can

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20 A more recent case, *Stellar Call Centres Pty Ltd v CEPU* [2001] FCA 106 (21 February 2001), casts a shadow over even this tentative conclusion. Stellar successfully argued that it should not be bound by the awards and certified agreements that bound Telstra prior to the transfer of the call centre operations to Stellar.

also be used as a means of democratising public policy development and social service delivery.

"The Third Way" is the title of the Blair Government's manifesto, written by political philosopher and advisor to Blair, Anthony Giddens:

> Reform of the state and government should be a basic orienting principle of third way politics – a process of the deepening and widening of democracy. Government can act in partnership with agencies in civil society to foster community renewal and development. The economic basis of such renewal is what I shall call the new mixed economy.[21]

Giddens contrasts "the new mixed economy" with older versions:

> Two different versions of the old mixed economy existed. One involved a separation between state and private sectors, but with a good deal of industry in public hands. The other was and is the social market. In each of these, markets were kept largely subordinate to government. The new mixed economy looks instead for a synergy between public and private sectors, utilising the dynamism of markets but with the public interest in mind. It involves a balance between regulation and deregulation, on a transnational as well as a national and local level; and a balance between the economic and the non-economic in the life of society. The second is at least as important as the first, but attained in some part through it.[22]

Analysing further the concept of "a synergy between public and private sectors", we can see that the new mixed economy describes the interpenetration of the public and private sectors through contracting out. In other words, there is not just a public sector and a private sector (which includes the community non-profit sector) but a new third sector, a mixed sector that has characteristics of both the public and the private.

Mark Freedland has described this sector, created by the widespread use of contracting out, as the "public-service sector", which exists between the purely public and purely private sectors.

> It is the sector of the economy in which services or activities, recognised as public in the sense that the State is seen as ultimately responsible for the provision of them, are nevertheless not provided by the State itself, but by institutions which are intermediate between the market and the State. These institutions are, on the one hand, too independent of the State to be regarded as part of the State, but are, on the other hand, too closely and distinctively associated with the goals, activities, and responsibilities of the State to be thought of as simply part of the private sector of the political economy.[23]

Furthermore, in this third, public service sector:

> the State is left not just with that ultimate regulatory responsibility which we regard it as having for *all* activity occurring within its political economy, but with a higher level of responsibility which, although reduced from primary to secondary level, nevertheless still ascribes a partly public character to the activity in question.[24]

I would argue, for reasons that will become clear later in this essay, that the sector Freedland calls the public-service sector should be called the social service sector, where "social service" is used in a manner more expansive than is conventionally the case. Social service is a better term because the term "public services" implies that these services are

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21 Anthony Giddens, *The Third Way: the renewal of social democracy*, Polity Press: Cambridge 1998, p 67

22 Ibid, pp 99-100.

23 Mark Freedland, "Law, Public Services, and Citizenship – New Domains, New Regimes?" in Freedland, M and Sciarra, S (eds) *Public Services and Citizenship in European Law: Public and Labour Law Perspectives,* Clarendon Press, Oxford, 1998, p 3.

24 Ibid, p 4.

essentially public in the sense that the public, state sector should provide them. In that way, the term "public service sector" locks one into the very dualistic thinking that Freedland wants to escape. Social service, in my definition, is broader than the usual meaning of that term as "human services", ie labour intensive services such as health, education and welfare. Social service includes human services but extends beyond that category to include what might be termed essential social infrastructure that enables society to function, for example, telecommunications, water and power supply.

Be that as it may, the "third way"/ "third sector" approach to public sector reform has some characteristics in common with the first wave of public sector reform, characterised as New Public Management (NPM), and can be seen as an evolution from it. NPM was essentially a creature of neo-liberal thought, and saw contracting out as a means of exerting greater control over public finances and policy outcomes. In particular, grants of public monies to civil society organisations, and the relationship of such agencies to government, would be transformed under NPM.

New Public Management Grows Up

The separation of purchaser from provider, and policy development from policy implementation, was seen by the more zealous New Public Managers as a mechanism for imposing discipline on providers who up to then had been, so the theory goes, unaccountable for the funds they received from government and unresponsive to the needs of the community.

For example, the former head of the Victorian Department of Health and Community Services claimed that as a result of his reforms,

> Victoria has taken health and welfare reform from a system where government pays providers to do what providers like to one where they are paid to do what governments like. These reforms stop well short of the ultimate aim – a system in which providers compete to do what consumers like. Only then can we be sure that health and welfare resources are being appropriately applied.[25]

Since then, a more enlightened view of the community sector is beginning to emerge through "third way politics", one that does not assume, as the public choice theorists do, that such groups are nothing but self-interested utility-maximisers (unlike the public choice theorists themselves, of course). In this view, it is recognised that in many instances, the aims or purposes of government and the community groups are the same - the promotion of the public interest and the common good - and furthermore, that such groups, insofar as they represent attempts by the community to meet its own needs, are worthy not only of support, but are worth listening to for the experience they have in dealing with social problems. So the slash-and-burn reformers of the early nineties, who shut their ears to the advice of community sector providers lest one be "captured" by their agenda, and who enthusiastically advocated the increased use of legally binding and highly specific contracts to force community sector social service providers into becoming privatised extensions of the state, now find themselves oddly *passé* as the wisdom of a previous era's approach to funding agreements based on trust and goodwill undergoes a renaissance, albeit with a closer eye on outcomes and accountability.

Social Capital and Public Purposes

This more recent approach reflects the understanding of the role such community organisations have in building and sustaining what has been dubbed "social capital", and, consequently, the role that governments can play in supporting those organisations. "Social capital" has been popularised by texts such as Robert Putnam's *Bowling Alone* and Francis

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25 John Paterson, Foreword to the 1994-95 Annual Report of the Victorian Department of Health and Community Services, *Momentum*, 3(11):4.

Fukuyama's *Trust*.[26] Putnam's basic thesis can be summarised as follows: societies which have a strong tradition and culture of social interaction and social support between individuals and families through non-state and non-market networks and organisations such as churches, sporting clubs, choral societies, charities, etc, are better able to inculcate the habits of trust, compassion, honesty, and personal responsibility than those societies that do not have that tradition and culture. The differences show up in social pathologies such as crime, family breakdown, loss of personal responsibility and greater reliance on the state for the provision of social support.

Rather than seeking to undermine diversity, in accordance with a secularising, universalising, public ethic, policy-makers are increasingly recognising the value of partnering with civil society organisations in order to promote social engagement and self-help as a means of achieving the kinds of social outcomes for citizens, especially disadvantaged citizens, that were once conceived as only being able to be met by monopolistic public provision. It is a realisation that the common good is not necessarily about what is common to all, but "is the sum total of social conditions which allow people, either as groups or individuals, to reach their fulfilment more fully and more easily".[27] The "*détente* between universal and particular within liberalism",[28] which underpinned the strict separation of the public and private law in most Western democracies, has been gradually breaking down, allowing new and more dynamic mechanisms to emerge to fulfil the needs of citizens. For example, the funding of non-government schools is not for the purpose of allowing private providers to deliver the kind of education provided in state schools. It is a way of providing parents with a variety of educational philosophies and approaches from which they can choose, but more importantly, it is a way of promoting diversity and facilitating the engagement of individuals in the life of society through participation in the life of their communities. The contracting of church agencies to run Job Network programmes and public hospitals should also be premised on the notion that religious communities can and do contribute to the fulfilment of social purposes and responsibilities.

The legal system needs to adapt to be able to regulate these new social partnerships effectively, so that both the public purposes of the state and the values and role of the non-government organisation are supported. The law needs to develop categories that transcend the public-private dichotomy, that more effectively deal with the increasing incidence of state-market-civil society partnerships, as evidenced in the evolution of hermaphrodite bodies that are both public and private in their structure or in the functions they perform. In the search for new categories, notions of *public* sector and *public* function are less important than notions of *social* sector and *social* function. These notions are intimately related with the moral-cultural idea of citizenship.

3 Citizenship

Constitutional v. Market Citizenship

In his analysis of how the evolution of the public-service sector is stretching the capabilities of the public-private legal paradigm, Freedland identifies two rival notions of citizenship which, he claims, relate to the values and concerns of public law on the one hand and private law on the other and which "share" the terrain of public service sector between them. These rival notions are, respectively, "constitutional citizenship" and "market citizenship".

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26 Robert Putnam, *Bowling Alone: the collapse and revival of American Community*, New York, Simon and Schuster, 2000 ; Francis Fukuyama, *Trust: the social virtues and the creation of prosperity*, London Hamish Hamilton, 1995.

27 Vatican Council II, "*Gaudium et Spes*" (7 December 1965) no 26.

28 See Wendy Brown, "Wounded Attachments" (1993) 21 *Political Theory* 390.

Constitutional citizenship "implies a claim to participate in the processes of democracy; more generally, it implies a set of links between the State and the individual which it is the very business of public law to maintain in a meaningful and coherent condition".[29] Notably, and predictably, these links are asymmetrical, whereby the state has a set of obligations towards the individual, but the individual has few obligations to the state. Freedland's "constitutional citizenship" therefore has much in common with Marshall's classic formulation of social citizenship and the concept of guaranteed social rights.[30]

Market citizenship is the creation of neo-liberal thought, particularly of the "law and economics" school, and conceptualises the citizen as an individual who exercises economic power through making and enforcing economically sound and rational consumer contracts.

> Note how well this approach equips governments engaged in neo-liberal projects of privatisation to respond to the difficulties of absolute privatisation. Instead of simply denying the responsibility of the State for the activity in question, they can transform it into a responsibility for creating and maintaining consumer choice, and for policing the quality of service afforded to the consumer, in relation to the activity in question. Instead of formally severing the link between the citizen and the State in relation to a given service generally regarded as a public service, governments maintain that they have actually reaffirmed those links in a different form. Moreover, they can and do assert the superiority of that form, by contrasting it to the monopolistic form of service provision in the purely public sector.[31]

Freedland then postulates that in the public-service sector, constitutional citizenship is the notion of citizenship that regulates the relationship between citizen and state, while market citizenship regulates the relationship between the citizen and the service-provider.

For example, according to the principles of constitutional citizenship, while the private sector provider has taken over the primary responsibility of direct service-provision, either through a contract with the state or through "full" privatisation, the state maintains secondary, indirect, and ultimate responsibility to the citizen.

> It thus becomes apparent that if public law is to maintain its vigour, indeed its very integrity, in this sector, it is necessary to make sure that each of the divided parts of public responsibility is maintained in a state where it can be effectively asserted by the citizen – in other words, it is not possible, vis-à-vis the citizen, to "play both ends off against the middle" in three-sided public-service situations.[32]

The problem for the citizen is that it is very difficult to assert the public responsibility of the state when the state is not the primary service-provider and where there is no direct legal relationship between the citizen and the state in respect of the service in question. The "processes of democracy" are a fairly weak means of effectively asserting state responsibility. It might be argued that the electoral cycle acts as an effective means of ensuring that governments remain accountable for the public policy decisions they make in respect of contracting out and privatisation and for the performance of the service-providers. To the extent that any policy failure is sufficiently disastrous and widespread to attract the short attention span of the tabloid press at election time, this may be so, but it is not the kind of issue that normally loses elections.[33]

Similar problems arise with market citizenship. For the state to be able to claim that the consumer citizen keeps providers accountable through market choices, it is important that

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29 Freedland, op cit p 9.

30 TH Marshall, *Citizenship and Social Class*, Cambridge, Cambridge University Press, 1950.

31 Freedland, op cit pp 9-10.

32 Ibid, p 8.

33 The Intergraph controversy in Victoria, and the related saga of the role of the Auditor-General, is one example where it could be argued that the electorate did hold the government accountable for the consequences of its addition to contracting out.

competition between providers be strong. For example, the Administrative Review Council has argued that competitive market forces can substitute for administrative review as a mechanism for improving decision-making by public bodies.

Though its 1995 report *Government Business Enterprises and Commonwealth Administrative Law* dealt with GBEs rather than contracting out, both phenomena represent forms of public administration in which a direct line of accountability from delivered outcomes to government is more difficult to draw than in situations where government is the provider. The report defined GBEs as bodies that are controlled by government, that are principally engaged in commercial activity, and are separate legal entities from government.

The ARC argued that because GBEs operate as if they were private sector providers in a market, competitive pressures should guarantee their responsiveness to the demands of the citizen-consumer and lead to improved performance, and therefore administrative law was unnecessary to ensure accountability.[34] Despite the fact that the report identified that in many cases, GBEs do not operate in competitive markets, often have substantial market power, and do not face the same level of financial risk as genuinely private bodies, the ARC still managed to assert a groundless faith in the market as an accountability mechanism that rendered administrative law unnecessary.

In its 1998 report *The Contracting Out of Government Services*, the ARC recognised that the same argument could easily be applied in that context: competition rather than regulation will ensure improved customer service. However it qualified the tenor of its remarks about the value of competition:

> Where the service recipient has no real choice of service provider they may be unable to have their problems and complaints resolved. The then Department of Administrative Services, in its submission, suggested that while access to different suppliers theoretically provides consumers with choice, it is not of itself a remedy. A change does not correct or compensate for previous loss and inconvenience. A change may, in fact, increase the cost to the recipient, in extra travel for example. There would also be administrative costs involved.[35]

What is not clear is how strong the competition has to be before it begins to have any salutary effects on private providers and at what point in the competition continuum the state's administrative law structures might be withdrawn.[36]

Civil Society and Citizenship

These observations suggest that constitutional citizenship, whose rights are protected by public law, and market citizenship, whose power is protected by private law, are each, on their own, inadequate to the task of providing a conceptual framework for ensuring accountability of the state to the citizen in situations where their relationship is mediated by intermediary non-government organisations. This suggests that the focus of attention should shift from the individual citizen who is the service-receiver to the service-provider, and to the regulation of the relationship between the state and the service-provider.

It is submitted that the intermediary non-profit bodies of civil society embody a third concept of citizenship – which I will refer to as engaged citizenship. This notion of citizenship recognises that citizens are not simply atomistic individuals invested with either social rights and/or market power, but are involved in a variety of informal and formal networks and groups with other individuals, and it is these connections that empower them as individuals

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34 ARC Report No 38, 1995, AGPS, pp 38-39.

35 ARC Report No 42, 1998, AGPS, para 3.52.

36 See Hannes Schoombee, "Privatisation and Contracting Out – Where are we going?" *Administrative Law under the Coalition Government*, ed John McMillan, 1997, AIAL, p 135.

within society. The consequences for citizens of the decline of such organisations is felt across wider society:

> The decline of social capital threatens not only the capacity to act together, but individual well-being. Putnam's data strongly suggest that a significant degree of positive freedom, measured in confidence in the social order and one's fellow citizens, turns out to be essential to individual self-confidence and well-being.
> Read from this perspective, the [USA's] contemporary civic deficit is indeed rooted in the moral order. The problems of civility, declining social trust, the disconnection between polity and society, as well as the evident dysfunction of the political system itself, are ultimately consequences of widely held beliefs about the nature of society and how life is to be lived. Free agency, an orientation that exalts the maximising of individual advantage (defined according to individual preference) as the supreme guiding principle, has emerged as our dominant cultural strategy, counselling the individual to invest heavily in self-enhancement and personal advantage, with little left over for the cultivation of relationships that do not immediately advance these goals.[37]

Civil society organisations that promote engagement and connection are vital to the experience of an individual as a citizen, a member of the national community. They are both representative of and responsible to the individuals who claim membership or who, in some other way, are engaged through them with other individuals and groups. Their primary purpose may be "private" or limited, for example the promotion of religion, education, the development of the arts, or sport, or self-help and mutual support, the protection of animals or the environment, but, from a public policy viewpoint, they serve the public purpose of engaging individuals in the life of society, encouraging investment in shared goals, and enhancing the quality of life – in other words, they can serve the common good.

As such, it makes sense for governments to enter partnerships with these organisations for the promotion of civic engagement. Such partnerships are not without dangers, however. On the one hand, the state could dominate such partnerships and the civil society organisations will lose their non-state voluntary identity. On the other hand, the private purposes of these organisations might dominate, with the possibility that public resources are used inappropriately to promote socially divisive and exclusive networks. This is precisely why the legal system needs to evolve a conceptual framework for the regulation of such partnerships.

4 The new social contract

The need for a conceptual legal framework to protect both public values and purposes and those of civil society organisations in new social partnerships was highlighted in 2000 by concerns expressed from both sides of the relationship. For example the following represents the fear that some faith-based organisations have about loss of identity:

> As funds from state contracts begin to constitute the bulk of financial resources of church welfare groups, the culture of these organisations changes – for the worse. Instead of remaining relatively autonomous institutions of civil society, they could find themselves developing into pseudo-state organisations which cater to the state's welfare priorities rather than following their own agenda. A regulatory mentality, bureaucratic mindset and non-religious motivations may undermine the religious spirit of *caritas* that created and shaped these organisations.[38]

> The key issue is whether the voluntary groups and church groups can supplement state services without that relationship becoming blurred. A lot of voluntary organisations juggle two roles: they may provide services to their particular client group, but they also act as very important advocates on behalf

37 William M. Sullivan, "Free Agent Nation? The Political Consequences of Cultural Commitments", *The Responsive Community* Volume 11, No 1 Winter 2000, p 28. Though written about the USA, the salient points can apply with similar force to Australia.

38 Samuel Gregg, "Playing with fire: churches, welfare services and government contracts", *Issue Analysis*, No 14, August 2000, Centre for Independent Studies, Sydney.

> of that group. And it becomes more difficult for them to do that if they are integrated into the State system.[39]

On the other side of the ledger, there is a different set of concerns:

> With increasing pressure to contract out to the charitable and church sector work previously done by government departments such as the CES, concern has been around for some time that some of these religious bodies may attempt to impose religiously-based criteria on the staff they employ under those government programmes. In the worst case, the fear is that government funds could be used for covert evangelisation and proselytisation.[40]

The involvement of the then Commonwealth Minister for Employment Services, Tony Abbott, in this debate revealed a somewhat ambiguous attitude. On the one hand, he rose to the defence of church groups:

> No Australian Government has ever interfered with the freedom of religious organisations to run themselves. As Minister for Employment Services, I reject any attempt to tell Job Network members that they are not free to uphold their own ethos in their own internal employment practices.[41]

On the other hand, when the St Vincent de Paul Society criticised the Government for devolving too many of its responsibilities to the non-government sector, the Minister implied the Society did not have a solid grasp of the Catholic social principle of subsidiarity, which, he suggested, encouraged devolution to community organisations.

Assuming the Minister had read his Catechism closely, he would have found subsidiarity defined as follows:

> A community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather *should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.*[42] (emphasis added).

For "a community of a higher order" we can read "the state", which remains ultimately accountable for its efforts to promote the common good, and is responsible to the organisations of civil society ("communities of a lower order") for providing the conditions under which they can thrive (as long as those organisations themselves are acting for the common good). The principle does not suggest that the state should burden voluntary organisations with responsibilities more properly assumed by government.

In other words, the social *compact* between the state and organisations of civil society is one in which those organisations are owed an obligation by the state of support and non-interference; and the state is owed an obligation by these organisations to cooperate with the state's efforts to coordinate the delivery of social services in the interests of the common good.

I use the term "social services" rather than "public services" for the reasons mentioned in Section II of this essay. Social services is a better term to describe public services, since public services implies that these services are essentially public in the sense that the public, state sector should provide them. Social services include human services but extends beyond that category to include what might be termed essential social infrastructure that enables society to function.

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39 Lisa Harker, "The Religion Report", Radio National, 12 April 2000.

40 John Cleary, "The Religion Report", Radio National, 9 August 2000.

41 "Political correctness run amok", Ministerial media release No 63, 11 September 2000.

42 *Catechism of the Catholic Church*, St Pauls, Homebush 1994, no 1883.

But these services are social in another sense. They represent a *social* responsibility, not just a public responsibility. That is, all members of society, as citizens, are responsible for their production and delivery. This responsibility extends beyond the payment of taxes so that the state can deliver these services itself. It requires the establishment of voluntary organisations of civil society, as well as businesses. Between them, the state, the market and civil society are responsible for the provision of social services, though the ultimate responsibility for coordinating the efforts of all rests with the state, especially when the market fails. These sectors of society are then engaged in the constant negotiation of a *social compact* for the delivery of services and the fulfilment of their mutual responsibility.

This compact can be expressed in contracts between the state and non-government bodies, but these contracts are not "private" contracts, but "social contracts" and as such they should have a special legal status. They are not simply an exchange of money for goods or services like a private contract would be, but represent an arrangement for the delivery of social services and the fulfilment of mutual responsibility for the common good. Such contracts have a special character about them that the law should recognise.

The "Compact on Relations between Government and the Voluntary and Community Sector in England" provides an example of the kind of thinking that is required. Presented to Parliament in November 1998, the Compact

> provides a framework which will help guide our relationship at every level. It recognises that Government and the sector fulfil complementary roles in the development and delivery of public policy and services, and that the Government has a role in promoting voluntary and community activity in all areas of our national life.
>
> …They enable individuals to contribute to the development of their communities. By doing so, they promote citizenship, help to re-establish a sense of community and make a crucial contribution to our shared aim of a just and inclusive society. This Compact will strengthen the relationship between Government and the voluntary and community sector and is a document of both practical and symbolic importance.[43]

While the Compact is not a legally binding document, it is a "memorandum concerning relations between the Government and the voluntary and community sector." The Compact will initially apply to central Government Departments and to the range of organizations in the voluntary and community sector, and sets out a number of principles and undertakings on both sides. From the perspective of administrative law, the Compact provides the following:

> **Resolution of disagreements**
>
> 14. The Compact sets out a general framework for enhancing the relationship between Government and the voluntary and community sector. As far as possible disagreements over the application of that framework should be resolved between the parties. To assist this process, where both parties agree, mediation may be a useful way to try to reach agreement, including seeking the view of a mediator. Where behaviour which contravenes this framework constitutes maladministration, a complaint may be brought to the Parliamentary Commissioner for Administration in the usual way. The Government will, in the light of experience, consider whether there is a need to strengthen the complaints and redress process in relation to the Compact.

What is useful about this "compact" approach is that it establishes a formal framework for thinking about these partnerships and resolving disagreements about its application. While it is not a legally binding document, it does provide the basis from which a legal framework might evolve.

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43 Tony Blair, "Message from the Prime Minister", *Compact on Relations between Government and the Voluntary Sector in England.*

In terms of the argument presented here, such a compact might lead, in time, to a new type of contract and a new body of contract law, which I will call "social contract law".

How would "social contract law" differ from private contract law and public administrative law? It would regulate a new kind of contract, the "social" contract, which would have a special legal status conferred by statute (say, a *Social Contracts Act*), and would be any contract entered into by government for the delivery of social services, in the broad sense of that term, to the community. Such contracts might have at least the following four characteristics:

- A limited number of types of decisions or conduct made by the non-government contractor would be subject to administrative appeal to the Administrative Appeals Tribunal (or state/territory equivalent), but the grounds for appeal and available remedies would be strictly limited (say, to failure to observe natural justice in the former case, and to declaration in the latter).

- The state could not avoid vicarious liability, by virtue of privity, for failure of service-delivery by the contractor. The social contracts legislation would include a clause similar to that in Section 4 of the New Zealand *Contracts (Privity) Act 1982:*

  > Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract…the promisor shall be under an obligation, enforceable at the suit of that person, to perform the promise.

- "Commercial in confidence" could not be invoked to exempt social contracts from Freedom of Information requests.

- Social contractors would not be constrained from making public comment on any aspect of government policy.

- Non-government contractors would be required to have high standards of governance and conduct.

Conclusion

This list may not be exhaustive.[44] It is a tentative attempt to address a perceived need, to suggest a concrete proposal for the establishment of a new legal framework for regulating new public-private partnerships for the delivery of social services. If this proposal or something like it was implemented, a jurisprudential tradition would develop over time which would recognise and value the special nature of such social partnerships. The rapid multiplication and diversification of such partnerships in recent years has seriously tested the ability of the traditional public-private legal dichotomy to balance issues of public accountability on the one hand and the organisational autonomy of social partners on the other. The recognition that there is a public element about such partnerships is not enough to justify the full scrutiny of public administrative law to the decisions taken by private and civil society organisations engaged in these partnerships; but neither is the recognition that there is also a private, non-public element enough to justify the complete removal of such scrutiny.

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44 The English *Compact* document provides a list of "undertakings" by both parties, which might be incorporated into such contracts.

The development of such a legal framework strikes this author as important for another, not unrelated reason: the contemporary relevance of the law's role in the moral-cultural system. The public-private dichotomy reflects the historical influence of liberalism on the constitutionalism of Western democracies, in particular liberalism's view of constitutions as in some way encapsulating the social contract between free individuals and the state. This has created a lacuna in our legal reasoning that is becoming more obvious as liberalism's belief in the individual, unencumbered by social influences, networks and traditions, becomes increasingly untenable as the basis for a satisfactory understanding of citizenship. Notions of citizenship that privilege individual rights and freedoms, without reference to civil society and its organizations as the mediator and context for their exercise, cannot provide the basis for a public culture that values civil society organisations as legitimate partners for the state in the promotion of the common good.

In particular, the Enlightenment's rationalist project, which propelled the individual to the forefront of political theory, simultaneously devalued the significance of the individual's voluntary connections with others in communities and groups that sought meaning beyond the individual. It thereby initiated the privatisation of religion and morality described by Tawney. In the West there is an increasing awareness of the negative effects of this disintegration. Individualistic materialism has been found wanting, and the renewal of the moral-cultural system, in which the law must play a part, requires attention. Roy Webb, Vice-Chancellor of Griffith University, gave it attention in 1998:

> In the past Australian universities have, with some important exceptions, largely seen themselves as secular institutions, pursuing the preservation, transmission and development of knowledge without much reliance upon or regard for, and sometimes even with hostility towards, the religious and spiritual dimensions of life.
>
> At its most severe, the secularisation of our universities proceeded upon the assumption that the paradigms of religion and of scientific rationalism were in fundamental opposition; that sooner or later the domain of religion would be crowded out by the ever-increasing explanatory power of rationalist endeavour.
>
> I believe that we can now say that the most extreme episodes of secularism have passed.
>
> The re-emergence of emphasis on the spiritual, moral and ethical dimensions of life is evident in the Australian community in a number of encouraging ways, although there is still enormous distance to be covered.[45]

Our legal system currently regards, and guarantees, freedom of religion as an expression of individual choice. Governments are happy to fund religious schools for the same reason (and for the fiscal benefits as well); they fund religious hospitals because they are there. In other words, our legal system and public administration is indifferent to the religious nature of the contributions made by religiously-based organisations of civil society, regarding them as legitimate only insofar as they represent the collective choices of individual citizens. They are not valued as a constitutive and essential element of the political economy and the fabric of society. The evolution of a legal framework which does recognise those contributions as constitutive and essential, by recognising the special character of the social partnerships such organisations forge with the state for the common good, and which protects their identity and autonomy, would begin to cover some of that "enormous distance".

45 Cited in David Tacey, *ReEnchantment: the new Australian spirituality,* Harper Collins, Pymble, 2000 pp 8-9.

RE-OPENING TRIBUNAL DECISIONS: RECENT DEVELOPMENTS

Robert Beech-Jones[*]

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Tribunals v Delegates

As a general proposition, an administrative decision that has been validly made and perfected cannot be revoked or altered by the decision-maker unless there is statutory authority (express or implied) to revoke or alter that decision.[1] One possible source of such a power is s.33(1) of the *Acts Interpretation Act 1901 (Cth)*. Further, it seems that an 'invalid' administrative decision, being a decision that can be impugned for jurisdictional error or failure to observe procedural fairness or which was procured by fraud or misrepresentation, can be treated by the decision-maker as either having not been made or, perhaps more controversially, as being subject to an implied power of revocation by the decision-maker.[2]

These propositions cannot be easily translated to the merits review tribunals operating in the Federal sphere. The characteristics of these tribunals which affect the application of these principles include their presence in a relatively rigid hierarchy of merits review, the statutory requirement that upon the completion of the review they publish reasons for a decision[3] and their subjection to a statutory scheme of judicial review which is subject to a time limit in which the application for judicial review can be made which may be either strict,[4] or capable of extension upon the exercise of a judicial discretion.[5] These factors tend against there being an implication of some general implied power upon the part of a tribunal to revoke a valid decision and the tribunal being free to ignore an earlier "invalid" decision so that it can exercise its review functions again.

The problems of re-opening tribunal decisions are best illustrated by the scheme of merits and judicial review created by the *Migration Act 1958*. The Act provides for a scheme of the primary decision-making by delegates of the Minister and then review of many of those decisions by a merits-based tribunal, being either the Migration Review Tribunal ("the MRT")[6] or the Refugee Review Tribunal (the "RRT").[7] There are mandatory time limits in which application for review may be made to those bodies.[8] The MRT and the RRT must conduct their review in accordance with a detailed procedural scheme and at the conclusion

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1 See *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429, 442-444 and *MIEA v Kurtovic* (1990) 21 FCR 193; see generally Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22 MULR 30, 49.

2 See the discussion in *Leung v MIMA* (1997) 79 FCR 400, 411-412 (per Finkelstein J); see also *Ousley v The Queen* (1997) 192 CLR 92, 100.3 – 101 (per McHugh J) and 130.5 – 131.7 (per Gummow J).

3 See, e.g., s.43 of the *Administrative Appeals Tribunal Act 1975* (the "*AAT Act*"); ss. 368 and 430 of the *Migration Act 1958 (Cth)*.

4 See, e.g., s.478 of the *Migration Act 1958 (Cth)*.

5 Section 44(2A) *AAT Act*.

6 See Part 5 and Part 6 of the *Migration Act*.

7 See Part 7 of the *Migration Act*.

8 Sections 347 and 412.

of their review must publish reasons for their decisions.[9] After the publication of a decision, the Act provides for a limited form of judicial review to the Federal Court,[10] provided that an application for review is lodged within 28 days of the notification of the relevant tribunal decision. The time limit may not be extended.[11] The grounds of review in the Federal Court are restricted by the exclusion of certain grounds of review including a breach of the rules of natural justice[12] and *Wednesbury* unreasonableness.[13] Co-extensive with this scheme of judicial review is the conferral[14] of original jurisdiction on the High Court to grant a writ of mandamus, prohibition or an injunction (and an ancillary jurisdiction to grant *certiorari*[15]) against an officer of the Commonwealth, which includes the tribunal. In the case of both the RRT and the MRT, the grounds for the grant of these writs, at the very least, include a breach of the rules of natural justice.[16] There is no mandatory time limit in which such an application could be made.[17] The end result is to create a bifocated system of judicial review with different time limits and some grounds available in the High Court that are not available in the Federal Court, and *vice versa*.[18]

The application of the principles stated above to such a scheme can be problematic. If a conclusion is reached that the relevant tribunal has some power to revoke a valid decision, then it serves to undermine the hierarchy of the Act and, in particular, the time limits within which each next step may be made. For example, a party who has been unsuccessful in the RRT and who is out of time to apply for judicial review to the Federal Court, could apply to the RRT to re-open its decision and to present fresh evidence, and if a negative answer is received, seek judicial review of that decision by the Federal Court. Similarly, if the MRT or the RRT is free to ignore an earlier decision that is considered invalid for say, a failure to afford procedural fairness, then in effect that tribunal is exercising a judicial review function that is wider than that conferred upon the Federal Court and is otherwise only exercisable by the High Court.

Bhardwaj

A majority of the Full Court of the Federal Court in *MIMA v Bhardwaj*[19] considered the observations made in the previous paragraph unpersuasive when weighed against the injustice occasioned by a failure to give a review applicant an effective opportunity to be heard. Mr Bhardwaj had had his visa cancelled by a delegate of the Minister. He sought review of that decision by the then Immigration Review Tribunal ("the IRT") (the effective predecessor to the MRT). He was advised by the IRT that an oral hearing of his application for review would occur on a particular day. On the evening before the hearing, Mr Bhardwaj's agent sent a facsimile to the IRT advising it that Mr Bhardwaj's was sick and unable to attend. Unfortunately, it seems that the facsimile was misplaced and the Tribunal proceeded to make and publish a decision cancelling his visa (the "first decision"). Mr Bhardwaj's agent then made representations to the IRT. It then recommenced the conduct of the review. Ultimately, it published another decision that revoked the delegate's cancellation of Mr Bhardwaj's visa (the "second decision"). The Minister sought judicial review of the

9 Sections 368 and 430. By amendments made with effect from 1 June 1999, both Tribunals must give advance notice to the relevant applicant for review of the date upon which their decision will be published : ss 368A to 368D, 430A to 430D.
10 See Part 8 of the *Migration Act 1958 (Cth)*.
11 Section 478.
12 Section 476(2)(a).
13 Section 476(2)(b).
14 By s.75(v) of the Constitution.
15 See *Re MIMA; ex parte Durairajasingham* (2000) 74 ALJR 405 at para 29 (per McHugh J).
16 See *Re Refugee Review Tribunal; ex parte Aala (2000) 75 ALJR 52.*
17 But see Order 55 rule 17 of the High Court Rules.
18 See *Durairajasingham*, supra, at paras 7 to 15.
19 (2000) 99 FR 251.

second decision, arguing, in effect, that the IRT was *functus officio* by the time it was made. Given the time limits on applying for judicial review set out in the Act, it was not open to Mr Bhardwaj to then seek judicial review of the first decision. The Minister was unsuccessful before Madgwick J[20] and appealed to the Full Court and was again unsuccessful by a 2:1 majority.[21]

The majority (Beaumont and Carr JJ) appear to identify three bases upon which the IRT could either revoke or reconsider the first decision and make the second decision.

First, Beaumont and Carr JJ found that the IRT was entitled to treat its first decision as effectively "void" on the basis that, had an application for judicial review been lodged within time in the Federal Court, the first decision would have been set aside as there had been a breach of former s.360(1) of the Act which required the tribunal to give the applicant for review the "opportunity to appear before it".[22] Their Honours did not identify whether such an error was an error within jurisdiction, a jurisdictional error, or a failure to observe procedural fairness.

Second, Beaumont and Carr JJ identified s.33(1) of the *Acts Interpretation Act 1901* as a separate source of power for the RRT to conduct a review after the first decision and make the second decision. Section 33(1) provides:

> Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

Their Honours considered that the "occasion" required the re-performance of the duty in this case because of the procedural errors that occurred in relation to the making of the first decision.[23] Implicit in this approach is that the "occasion" identified in s.33(1) is an occasion that can be identified *by the Court* and is not a matter for the decision-maker.

Third, Beaumont and Carr JJ stated that there was an implied power on the part of the Tribunal to reconsider its decision in circumstances where in making that decision the Tribunal had, by its own mistake, failed to afford an applicant a fundamentally important right, the error was not in dispute between the interested parties, the error was material to the case before it and the request for the reconsideration had taken place within a reasonable time of the original decision.[24] Their Honours did not identify the source of this power or indicate whether it was an example of one or other or both of the propositions in the previous two paragraphs.

Lehane J dissented. His Honour held that the provisions of the Act described above led to the conclusion that the IRT could not revoke a decision once made and that a "contrary intention" was manifest for the purposes of s.33(1).[25] Lehane J held that if no contrary intention was present for the purposes of s.33(1), then the IRT's power to reconsider might be exercised on any "occasion" that it considers appropriate.[26] His Honour also rejected the proposition that the IRT could act as though its earlier decision was a nullity, as that would be inconsistent with the structure of the Act and particularly the judicial review scheme.[27]

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20 *MIMA v Bhardwaj* [2000] FCA 789 (unreported, 15 June 2000).
21 Beaumont and Carr JJ, Lehane J dissenting.
22 Supra at paras 42-45.
23 Supra at para 46.
24 Supra at paras 47 and 15.
25 Supra at para 56.
26 Judgment at para 57.
27 Supra at paras 59 to 64.

On 20 February 2001, the High Court (McHugh and Gummow JJ) granted the Minister special leave to appeal from the Full Court's decision.

When is a decision made?

The above discussion addresses the circumstance, if any, in which a tribunal may revoke or reconsider a decision after it has been "made". Subject to any peculiar statutory scheme that suggests to the contrary, a tribunal can, prior to making its decision, reconsider the steps it has taken in conducting the review (subject to compliance with the rules of procedural fairness).[28] A critical issue then arises as to what point in time a tribunal has in fact "made" its decision such that it has become *functus officio*. It seems that the focus must be on the statutory requirement to give reasons and publish them to the parties. The issue has recently been considered by the Full Court of the Federal Court in *Seminugus v MIMA.*[29]

Formerly, s.430 of the *Migration Act* required the RRT to prepare written reasons and to give them to the applicant for review and the Secretary of the Department[30] within 14 days after the "decision concerned is made". Many of the statutory requirements to give reasons in other Federal and State Tribunals are expressed in similar terms.[31] In *Seminugus* it was argued that the RRT had erred in failing to consider a submission which it received shortly after the member had signed the reasons for the decision and provided them to the Registry, but before they had been provided to the parties. Spender J was of the view, *obiter*, that a member of the Tribunal was able to "retrieve [his/her] decision at any time prior to a copy of it having been sent to either the Minister [i.e. the Secretary] or the applicant" [32] (i.e. prior to publication). Higgins J considered that once the decision-maker had signed the reasons and handed them to the Registry, the decision had been "published" and the Tribunal was *functus officio.*[33] Before this point the member could change their mind. Madgwick J considered that the decision had been made and was irrevocable once it had been communicated to someone outside the RRT, which could be by publication to a party but also by communication of it orally to an applicant at the conclusion of the hearing.[34]

Current Position

Accordingly, on the present state of the authorities, at least in the Federal sphere, it seems that the position is as follows:

(i) subject to any peculiar statutory scheme which provides to the contrary, prior to the making of the Tribunal's decision (see *Semunigus*), a tribunal can reconsider the steps it has taken in the course of determining the application for review;

(ii) after a decision has been "made", a tribunal can exercise any express power that is conferred on it to reconsider its decision (such as the slip rule);[35]

(iii) after the making of the decision, a tribunal *may* be able to reconsider the exercise of its review powers if it is (correctly) persuaded that its first decision was subject to jurisdictional error, a breach of procedural fairness or was procured by fraud or misrepresentation (*Leung*; *Bhardwaj*);

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28 Campbell, supra at 38.7.
29 (2000) 96 FCR 533.
30 Of Immigration and Multicultural Affairs.
31 See s.43 of the *AAT Act*.
32 Supra at para 12.
33 Supra at paras 78 to 79.
34 Supra at paras 101 to 104.
35 See, e.g., s.43AA of the *Administrative Appeals Tribunal Act 1975 (Cth)*.

(iv) after the making of a decision, and unless a contrary intention appears, a tribunal may be able to reconsider the exercise of its review power pursuant to s.33(1) of the *Acts Interpretation Act*, at least in circumstances where the "occasion" is as described by Beaumont and Carr JJ in *Bhardwaj*;

(v) otherwise, there may exist a residual implied power on the part of the relevant tribunal to reconsider the exercise of its review function in the circumstances identified by Beaumont and Carr JJ in *Bhardwaj*, summarised above.

The Administrative Decisions Tribunal (NSW) (the "ADT")

New South Wales is not subject to the constitutional limitations that affect the establishment of tribunals and inferior courts at the federal level. Thus the *Administrative Decisions Tribunal Act 1997* (NSW) (the ADT Act) confers on the ADT both a primary decision-making function,[36] which is analogous to that of a Court in that it resolves disputes between private parties, and a review function in relation to government decisions.[37] Section 89 imposes an obligation on the ADT to provide reasons for its decision that must be given to the parties. Section 87 confers to a power to amend the reasons where there is an "obvious error in the text" (ie a "slip" rule). Further the ADT Act makes provision for an internal appeal both for an error of law and, with leave, on the merits (ss. 114 and 115) as well to the Supreme Court on a question of law (s. 118).

Overall the considerations that have been identified above as warranting a limited view of the power of a tribunal to reconsider its decisions apply with equal force to the ADT. The appeal mechanism provided for in the ADT Act could be severely undermined by the implication of some general power reposed in the ADT at first instance to reconsider its decisions. Moreover if an order is made in a private dispute between the parties, say for example under the *Anti–Discrimination Act 1977*, it would seem undesirable for either a party or the tribunal to later call that into question when the statutory appeal mechanism has not been invoked. Whether this proves to be the case must await the outcome of the appeal in *Bhardwaj*.

36 See Chapter 4 of the ADT Act.

37 See Chapter 5 of the ADT Act.

PARLIAMENTARY PRIVILEGE AND JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

Emeritus Professor Enid Campbell[*]

Introduction

In the course of parliamentary proceedings ministers may sometimes provide explanations for decisions made by them or their subordinates, in purported exercise of statutory or prerogative powers. They may also make statements concerning the policy which has been applied, or is to be applied, in exercise of a power. Those who contest the validity of administrative action through litigation may seek to tender evidence of such statements to prove that a power has been exercised for an improper purpose or in bad faith; that a power has been exercised without regard to relevant considerations or with reference to irrelevant considerations; that a policy which has been applied, or is proposed to be applied, is not permissible; or that a decision-maker has otherwise acted contrary to law.

The question considered in this article is the extent to which the law of parliamentary privilege restricts the use of evidence of parliamentary proceedings for such purposes. Under English law and the laws of the Australian States, the controlling statutory provision is Article 9 of the English *Bill of Rights 1689*.[1] Under Australian federal law the controlling statutory provision is s16 of the *Parliamentary Privileges Act 1987* (Cth). This provision applies to the Legislative Assembly of the Australian Capital Territory[2] and it is substantially replicated in s6 of the Northern Territory's *Legislative Assembly (Powers and Privileges) Act 1992*.

I shall deal first with the position under Article 9 of the *Bill of Rights 1689* and then with the position under s16 of the federal Act. At appropriate points reference is made to recommendations of the United Kingdom Parliament's Joint Committee on Parliamentary Privilege.[3]

Article 9 of the Bill of Rights

Article 9 provides:

> That the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament.

At the very least this provision means that participants in parliamentary proceedings cannot be subjected by courts to any liabilities on account of what they have said or done in the course of parliamentary proceedings.[4] But courts have taken the view that Article 9 also imposes restrictions on the admission and use of evidence of parliamentary proceedings,

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1 In most States Article 9 applies by virtue of statutory provisions: see *Imperial Acts Application Act 1969* (NSW), s6 and Sched 1; *Constitution Act 1867* (Qld), s40A; *Imperial Acts Application Act 1984* (Qld), s5; *Constitution Act 1934* (SA), s38; *Constitution Act 1975* (Vic), s19; *Imperial Acts Application Act 1980* (Vic), Part II Divn 3; *Parliamentary Privileges Act 1891* (WA), s1. In Tasmania Article 9 applies as a matter of necessity: *R v Turnbull* [1958] Tas SR 80 at 83-4. See also *Egan v Willis* (1998) 195 CLR 424.

2 *Australian Capital Territory (Self Government) Act 1988* (Cth), s24.

3 Report, HL Paper 43-I; HC Paper 214-I (April 1999).

4 Article 9 does not, however, protect members from the exercise of the disciplinary and punitive powers possessed by the Houses of which they are members.

and does so even in cases in which it is not sought to fix anyone with a liability for what has been said or done in the course of parliamentary proceedings.[5]

In *Prebble v Television New Zealand Ltd*[6] the Judicial Committee of the Privy Council, on appeal from New Zealand, ruled that Article 9 means, inter alia, "that parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross examination, inference or submissions) that the action or words [in parliament] were inspired by improper motives or were untrue or misleading".[7] The Judicial Committee and Australian courts have, however, accepted that a court does not act in breach of Article 9 if it receives and makes use of evidence of parliamentary proceedings for non-contentious purposes, for example to prove that certain documents were tabled in a parliament on a certain day.[8]

There are relatively few reported cases in which courts have expressly ruled on the admissibility of evidence of parliamentary proceedings in litigation to contest the validity of administrative acts.

In *R v Secretary of State for Trade; Ex parte Anderson Strathclyde p/l*[9] the party seeking judicial review sought to adduce evidence of what a minister had said in the House of Commons to show that the minister had wrongly divested himself of a statutory power and that in consequence a decision by his deputy to allow a takeover of a company was invalid. A Divisional Court concluded that Article 9 of the *Bill of Rights* precluded admission of this evidence. In the Court's opinion there was:

> no distinction between using a report in Hansard for the purpose of supporting a cause of action arising out of something which occurred outside the House, and using a report for the purpose of supporting a ground for relief in proceedings for judicial review in respect of something which occurred outside the House. In both cases the court would have to do more than take note of the fact that a certain statement was made in the House on a certain date. It would have to consider the statement or statements with a view to determining what was the true meaning of them, and what were the proper inferences to be drawn from them.[10]

The United Kingdom Parliament's Joint Committee on Parliamentary Privilege has, however, noted a number of later cases in which evidence of parliamentary proceedings was received by a court, without objection, either in support of or in opposition to an application for judicial review.[11] The Committee has recommended enactment of legislation along the lines of

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5 See E Campbell, "Parliamentary Privilege and the Admissibility of Evidence" (1999) 27 *Fed L Rev* 367.

6 [1995] 1 AC 321.

7 Ibid, p 337.

8 *R v Turnbull* [1958] Tas SR 80 at 84; *Sankey v Whitlam* (1978) 142 CLR 1 at 35-7; *Finnane v Australian Consolidated Press Ltd* [1978] 2 NSWLR 435 at 438-9; *Uren v John Fairfax and Sons Ltd* [1979] 2 NSWLR 287 at 289; *Mundey v Askin* [1982] 2 NSWLR 374 at 375; *NSW Branch of Australian Medical Association v Minister of Health and Community Services* (1992) 26 NSWLR 116; *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 337; *R v Smith; Ex parte Cooper* [1992] 1 Qd R 423 at 429-30. This is also the position under s16(3) of the *Parliamentary Privileges Act 1987* (Cth): *Amman Aviation Pty Ltd v Commonwealth* (1988) 81 ALR 710 at 717-18 (FC). See also *Egan v Willis* (1998) 195 CLR 424 at para 133(1) per Kirby J.

9 [1983] 2 All ER 233.

10 Ibid, p 239 per Dunn J.

11 Report (n 3 above) para 49. In four of the cases cited there was an issue about the legality of ministerial policies regarding release of prisoners on parole: *In re Findlay* [1985] AC 319; *Pierson v Home Secretary* [1997] 3 All ER 577 (HL); *R v Home Secretary; Ex parte Venables* [1998] AC 407; *R v Home Secretary; Ex parte Hindley* [1998] QB 751. In *R v Home Secretary; Ex parte Brind* [1991] 1 AC 696 the issue was the legality of a ministerial directive to broadcasters. What the minister had said in Parliament was used to support the validity of the directive. In *Secretary of State for Foreign Affairs; Ex parte World Development Movement* [1995] 1 WLR 386 (QBD) evidence of statements made before two parliamentary committees was admitted to prove that the grant of aid in support of the construction of a dam in Malaysia was not

s16(3) of the *Parliamentary Privileges Act 1987* (Cth), though not quite as sweeping as the Australian provision. Specifically it has recommended enactment of a statutory provision to the effect that:

> No court or tribunal may receive evidence, or permit questions to be asked or submissions made, concerning proceedings in Parliament by way of, or for the purpose of, questioning or relying on the truth, motive, intention or good faith from anything forming part of those proceedings in Parliament or drawing an inference from anything forming part of those proceedings.[12]

This prohibition should, the Joint Committee has recommended, be coupled with a proviso to the effect that courts may take statements or conduct in Parliament into account "when there is no suggestion that the statement or action was inspired by improper motives or was misleading and there is no question of legal liability", for the statement or conduct.[13]

In addition the Joint Committee has recommended that Article 9 of the *Bill of Rights 1689* "should not be interpreted as precluding the use of proceedings in Parliament in court for the purpose of judicial review of governmental decisions"[14] and "that the exception of judicial review proceedings from the scope of Article 9 should apply also to other proceedings in which a government decision is material".[15] These recommended exceptions to the general exclusionary rule of evidence would not derogate from the well settled principle that participants in parliamentary proceedings are immune from legal liability for what they say or do in the course of those proceedings.

The Joint Committee justified the recommended exceptions to the general exclusionary rule on the basis that "ministerial decisions announced in Parliament would be less readily open to examination" by the courts "than other ministerial decisions".[16] Furthermore were the exceptions not accepted, Article 9 of the *Bill of Rights* "would become a source of protection for the executive from the courts".[17]

Section 16 of the *Parliamentary Privileges Act 1987* (Cth)

Section 16(1) affirms the application of Article 9 of the *Bill of Rights 1689*. Ensuing subsections seek to amplify the meaning and effect of the Article. Section 16(2) contains a non-exhaustive definition of what are to be regarded as proceedings in the federal Parliament. Section 16(3) restricts the uses which may be made of evidence of federal parliamentary proceedings in litigation[18] and proceedings before tribunals.[19] It provides as follows:

> In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of—

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authorised under the relevant statute. In *R v Secretary of State for the Home Department; Ex parte Fire Brigades Union* [1995] 2 AC 513 evidence of parliamentary proceedings was adduced for the purpose of determining the legality of a government decision not to issue a statutory instrument to bring a statute into operation.

12 Report (n 3 above), para 86.

13 Ibid.

14 Ibid, para 55.

15 Ibid, para 59.

16 Ibid, para 51.

17 Ibid.

18 The restriction applies to all Australian courts.

19 The term "tribunal" is defined in s3(1) to mean "any person or body (other than a House, a committee or a court) having power to examine witnesses on oath, including a Royal Commission or other commission of inquiry of the Commonwealth or of a State or Territory having that power".

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;

(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

There are some exceptions to the general principle[20] in s16(3) but none are relevant for present purposes.

Section 16(3) presents some problems of interpretation. In *Laurance v Katter*[21] Davies JA described the subsection as "at least ambiguous" and suggested that "its literal meeting is also arguably absurd".[22] In his view the subsection must be read in the light of s16(1), that is Article 9 of the *Bill of Rights*. So read, s16(3) does not, in his view, prohibit the reception and use of evidence of federal parliamentary proceedings if the object is not to impeach or question the freedom of speech or debates in parliament.[23] On this reading of s16(3), Davies JA held that the subsection did not prohibit the reception of what a Senator had said in debate to prove the content of a statement made outside the House. (In *Rann v Olsen*[24] a Full Court of the Supreme Court of Australia rejected the proposition that s16(3) must be read down in the way suggested by Davies JA.)

In *Laurance v Katter* Fitzgerald P said he was unsure about "what para (c) [of s16(3)] encompasses which is outside paras (a) and (b)". He went on to say:

> So far as words spoken in parliament are concerned, para (c) forbids generally (subject to statutory exceptions …) any inference or conclusion in a court or tribunal proceeding with respect to the meaning of what was said, whereas paras (a) and (b) effect a similar prohibition which is limited by reference to the relevance or attempted use of the meaning of the words spoken in parliament in the particular proceedings.[25]

Pincus JA expressed concerns about the effect of para (c). He pointed out that it places:

> no limitation on the sort of inferences or conclusions the drawing of which may bring the provision into operation. Legal inferences and conclusions are not excluded, subject to s16(5). Inferences or conclusions wholly favourable to the parliament and its members are not excluded, nor need the inferences have anything to do with the standing or credit of members of parliament, past or present.[26]

There is only one reported case in which the effect of s16(3) in judicial review proceedings has been considered - *Hamsher v Swift*[27] in 1992. This was a case in which review was sought of a refusal to grant permanent resident status to several United States citizens. In support of the application for review (under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)) the pleadings referred to a ministerial statement in Parliament. None of the

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20 Subsections16(5) and (6).

21 (1997) 141 ALR 447 (Qld CA).

22 Ibid, p 489.

23 Ibid, p 490. What is meant by impeaching or questioning proceedings in Parliament was also considered by Queensland's Court of Appeal in *O'Chee v Rowley* (1997) 150 ALR 199.

24 (2000) 172 ALR 395 at paras 114-27, 256 and 284.

25 (1997) 141 ALR 447 at 481.

26 Ibid, p 483.

27 (1992) 33 FCR 545.

respondents referred the Federal Court to s16(3). Nevertheless French J considered that paras 16(3)(b) and (c) prohibited reception and use of the statement. The prohibition could not be waived by an individual.

The applicants in this case had made reference to the ministerial statement as evidence of a decision in 1989 and also in support of a contention that departmental action taken in 1986 did not amount to a disposition of their applications for permanent resident status but rather deferred consideration of the applications. Reference to the ministerial statement was, in the opinion of French J, for the purpose of establishing the minister's intention or otherwise inviting the drawing of inferences from it.[28]

A few years before this case, another judge of the Federal Court, Beaumont J, had ruled that s16(3) precluded reception of the Hansard record of a Senator's question of a minister and part of the minister's answer. The case, *Amann Aviation Pty Ltd v Commonwealth*,[29] was one in which the plaintiff sought damages for breach of contract. It alleged unlawful termination of its coastwatch contract with the Commonwealth. The plaintiff's pleadings claimed that, before the contract was terminated, the Commonwealth had entered into an agreement with Skywest Aviation Pty Ltd that that company would supply the services which the plaintiff had agreed to supply, and that a director of Skywest (Sir Peter Abeles) had suggested to the minister that the Commonwealth should grant the plaintiff no concessions in the performance of its contract. The question asked of the minister in the Senate was whether the minister had had a telephone conversation with Sir Peter Abeles concerning the coastwatch contract, and, if so, the nature and purpose of the conversation. Beaumont J considered that use by the court of the extract from Hansard was prohibited by paras (b) and (c) of s16(3). What was sought to be done was to use Hansard to justify an inference that the minister had been influenced by Sir Peter Abeles in relation to the decision to terminate the plaintiff's contract. The tender of Hansard was, in the opinion of Beaumont J, "by way of or for the purpose of questioning the motive, intention or good faith of the minister" and also "by way of, or for the purpose of, inviting the drawing of inferences or conclusions from what was said in the Senate …".[30]

This was not, of course, a case in which a plaintiff sought to fix liability on a minister in respect of something said or done in the course of parliamentary proceedings. The action alleged to be unlawful was action taken outside Parliament and evidence of what had been said in Parliament was tendered to prove the alleged illegality. The case may be regarded as one of a kind which the United Kingdom Parliament's Joint Committee on Parliamentary Privilege recommended as an exception to the general rule about exclusion of evidence of parliamentary proceedings.[31] For what was in issue was the legality of a government decision—a decision to terminate a contract.

Subject to the exceptions contained in ss16(5) and (6), the prohibitions of s16(3) of the 1987 Act are expressed in terms which apply to proceedings in any court or tribunal, regardless of the nature of the proceedings. Literally construed s16(3) applies to all proceedings for judicial review of administrative action taken outside the course of parliamentary proceedings.

28 Ibid, p 564.

29 (1988) 81 ALR 710.

30 Ibid, p 718.

31 Report (n 3 above), paras 56-59.

I have elsewhere discussed the constitutional issues presented by s16(3) of the 1987 Act.[32] For present purposes it is sufficient to mention but one of the grounds on which the constitutionality of s16(3) might be assailed. It is that, unless read down, it can operate to inhibit the exercise of federal judicial powers, contrary to implications found in Chapter III of the federal Constitution.[33] Federal judicial power is reposed in the High Court by s75 of the Constitution and includes a supervisory jurisdiction.[34] Supervisory jurisdictions are also reposed in the Federal Court by s39B of the *Judiciary Act 1903* (Cth), the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and Part 8 of the *Migration Act 1958* (Cth).

The numbers of cases in which the success of an application for judicial review will depend on whether a party is able to tender evidence of what has been said or done in the federal Parliament is not likely to be great.[35] There could, however be cases in which s16(3) operates to prevent a fair trial and in which the court finds it necessary to order a stay of the proceedings.[36] In such a case s16(3) might serve to "impair the judicial functions of finding the facts, applying the law or exercising any available discretion in making the judgment or order which is the end and purpose of the exercise of judicial power".[37]

The High Court of Australia has not yet had occasion to consider the constitutionality of s16(3) of the 1987 Act. In *Laurance v Katter*[38] Fitzgerald P was of the view that the subsection is a valid enactment in exercise of the federal Parliament's power under s49 of the Constitution. In his opinion the legislative power so conferred is not subject to implied constitutional limitations.[39] In contrast Pincus JA was of the view that s16(3) does not validly operate in relation to the conduct of proceedings for defamation. This was because of the implied constitutional freedom of political communication and the impact of s16(3) on that freedom.[40] Davies JA's narrow interpretation of s16(3) was clearly influenced by the presence of that implied freedom.[41]

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32 See n 5 above. The article was, however, written and published before the decision in *Rann v Olsen* (2000) 172 ALR 395.

33 The chapter entitled "The Judicature".

34 The original and entrenched supervisory jurisdiction of the High Court rests on paras (iii) and (v) of s75.

35 This is mainly because of statutory rights to supply written reasons for administrative decisions, for example under the *Administrative Appeals Tribunal Act 1975* (Cth) and/or the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The United Kingdom Parliament's Joint Committee on Parliamentary Privilege reported that it has received a letter from the Attorney-General for the Commonwealth in which he stated that (in the words of the Committee) s16 of the *Parliamentary Privileges Act 1987* (Cth) had not proved inhibiting to the judicial review of administrative action and that, given the rules and process of administrative decision-making in Australia, it is unlikely that an applicant for judicial review would suffer from being unable to rely on privileged parliamentary material to challenge a minister's decision": *First Report* (n 3 above), n 143.

36 See Campbell (n 5 above) at 374. In *Rann v Olsen* (2000) 172 ALR 395, judges of a Full Court of the Supreme Court of South Australia were clearly divided on the question whether it was appropriate for them to stay an action for defamation in which issues of parliamentary privilege had been raised. The case had come to the Full Court on a case stated by the trial judge. Three of the five judges constituting the Full Court (Doyle CJ and Mullighan and Lander JJ) thought that the question of whether a stay be ordered should be left to the trial judge. The other two judges (Prior and Perry JJ) favoured a stay.

37 *Nicholas v The Queen* (1998) 72 ALJR 456 at para 23 per Brennan CJ.

38 (1996) 141 ALR 447 (Qld CA).

39 Ibid, pp 478-81. In the prior case of *Amann Aviation Pty Ltd v Commonwealth* (1988) 81 ALR 710 at 718 Beaumont J had no doubt about the constitutionality of s16(3). Neither of these judges, however considered the relationship between the legislative powers conferred by s49 and s51(xxxvi) of the Constitution. Section 51 of the Constitution is the principal section which defines the legislative powers of the federal Parliament, but the exercise of those powers is controlled by other provisions in the Constitution and implied limitations on federal legislative powers.

40 (1996) 141 ALR 447 at 483-6.

41 Ibid, pp 490-1.

In *Rann v Olsen*[42] a Full Court constituted by five judges of the Supreme Court of South Australia ruled that s16(3) does not infringe the implied constitutional freedom of political communication.[43] The Court also rejected a submission that s16(3) is invalid because it "requires or authorises a court, exercising the judicial power of the Commonwealth, to exercise that power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power".[44] Doyle CJ thought this submission lacked substance and he dealt with it shortly as follows:

> Relevantly s16(3) … is no different from any other rule of law that operates to exclude certain evidence from consideration by the Court. Plenty of examples come to mind, and they are examples which may involve application of the law in a manner that may have a telling or even decisive effect on the outcome of a case. The law relating to professional legal privilege and public interest immunity is a good example. These rules may result in the Court not receiving evidence which could have a decisive effect on a case.[45]

Were the High Court to hold s16(3) invalid it would still have to consider the effect of Article 9 of the *Bill of Rights 1689* so far as it applies to the federal Parliament. Article 9 applies to that Parliament not merely by force of s16(1) of the federal Act of 1987 but also by force of s49 of the Constitution.[46] At the time the Constitution came into operation there was very little case law on the question of the extent to which Article 9 might inhibit reception and use of evidence of parliamentary proceedings in courts of law. Certainly there was no judicial ruling on the use of evidence of parliamentary proceedings in litigation to contest the validity of administrative action which had taken place outside a parliament.

In *R v Murphy*[47] Hunt J observed that English case law on the impact of Article 9 on curial rules of evidence was relatively modern. The earliest English decision he considered significant was *Church of Scientology v Johnson-Smith*.[48] Many years later the Judicial Committee of the Privy Council expressed the view that s16(3) of the *Parliamentary Privileges Act 1987* (Cth) was an accurate statutory rendition of the effect of Article 9.[49] And it rejected the narrow reading of that provision in *R v Murphy*—a reading which s16(3) of the 1987 Act was designed to combat.[50]

The High Court of Australia has, to date, not had occasion to rule on the effect of Article 9 on the admission and use of evidence of parliamentary proceedings in litigation. In interpreting this provision the High Court is entitled to have regard to its history and purpose. So far as Article 9 applies to the federal parliament the court may have regard to how the provision had been interpreted up to 1901. Neither the terms of the federal Constitution nor judicial precedent obliges the High Court to hold that s16(3) of the *Parliamentary Privileges Act 1987* (Cth) is merely declaratory of any effect of Article 9. Equally the Court is free to interpret Article 9 in a way which is consistent with the exercise of the judicial power of the Commonwealth, as defined in ss 75 and 76 of the federal Constitution. The Constitution

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42 (2000) 172 ALR 395.

43 Ibid, paras 128-189.

44 Ibid, at para 190.

45 Ibid, para 191.

46 Section 49 provides that "the powers, privileges and immunities of the Senate and the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until so declared shall be those of the Commons House of the Parliament of the United Kingdom, its members and committees, at the establishment of the Commonwealth".

47 (1986) 5 NSWLR 18 at 26.

48 [1972] 1 QB 522.

49 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 333. This was also the view of Fitzgerald P in *Laurance v Katter* (1996) 141 ALR 447 at 481; cf Pincus JA at 484.

50 See Sen. Deb. 7 Oct. 1986 at 892, 894-5; HR Deb. 19 April 1987 at 1154-6.

could well be interpreted as precluding an interpretation of Article 9 of the *Bill of Rights 1689* which impairs the ability of courts of federal jurisdiction to perform their functions under the Constitution and federal legislation, among them adjudication of the validity of actions of the executive branch of government.

Arguments in support of the proposition that Article 9 should not be interpreted as precluding admission and use of evidence of parliamentary proceedings when the validity of governmental acts is in issue in litigation before courts must surely be strengthened by the recent recommendations of the United Kingdom's Joint Committee on Parliamentary Privilege.[51] And if Article 9 does not preclude a court from receiving evidence of parliamentary proceedings in order to determine whether a House of a parliament has exceeded its powers,[52] must it not follow that Article 9 does not preclude reception by courts of evidence of parliamentary proceedings when the court has to decide whether an officer or agency of the executive branch of government has exceeded their power?

51 See n 3 above.

52 *Egan v Willis* (1998) 195 CLR 424; *Egan v Chadwick* (1999) 46 NSWLR 563.

CIVIL AND ADMINISTRATIVE TRIBUNALS – CAN THEIR PERFORMANCE BE IMPROVED?

The Hon Justice Kellam[*]

Paper presented to the Annual General Meeting of the Australian Institute of Administrative Law (Queensland Chapter), Brisbane, 13 September 2000.

The topic upon which I was asked to address you tonight was whether the performance of tribunals, be they administrative or civil, can be improved. The simple answer to that is yes, but the detail is more complicated.

Improvement in performance depends first upon Government providing an appropriate structure and appropriate resources. It depends on the way tribunals manage the structure and resources they have provided to them.

Tonight I want to deal with the three different approaches taken by Governments in New South Wales, Victoria and the Commonwealth to provide structures which they have considered will provide improvement in the performance of tribunals. I will discuss the question of what, if any, benefits have been derived in Victoria from the new approach taken there.

I propose then to discuss some of the ways tribunals can improve their performance within the structure provided to them.

Over the last 25 years there has been significant growth in the number and variety of tribunals serving the community both in Victoria and throughout Australia. Tribunals were established during this period as specialist bodies to deal with a variety of issues as particular needs arose. It has always been the intention of Parliaments that such Tribunals be relatively informal, cost effective, efficient and, in comparison with courts, be able to apply specialist knowledge to the issues before the tribunal.

However, at least in Victoria and New South Wales, a large number of tribunals developed in a piecemeal fashion in response to *ad hoc* issues seen by Parliament to be relevant at the time of the creation of such Tribunals. It was argued in both States that this undisciplined proliferation of tribunals led to a number of undesirable consequences, including duplication of administrative infrastructure, inconsistency of approach and unduly narrow specialization by some tribunals. In particular, it was argued that tribunal members were insufficiently independent of the Executive.

A discussion paper entitled “Tribunals in the Department of Justice: A Principled Approach” was distributed widely throughout Victoria in October 1996 and numerous submissions were made in response to it. The paper proposed an improvement to the tribunal system by the creation of a large, judicially-led amalgamation of tribunals. It was argued that small tribunals dealing with specialist areas were not sufficiently accessible, efficient or cost-effective, and that a large tribunal would:

- improve access to justice;
- facilitate the use of technology;

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- complement measures to increase the use of alternative dispute resolution programmes;
- streamline the administrative structures of tribunals;
- develop and maintain flexible cost-effective practices;
- introduce common procedures for all matters yet retain the flexibility to recognize the needs of parties in specialised jurisdictions;
- achieve administrative efficiencies through the centralization of registry functions; and
- achieve more efficient use of tribunal resources.

It should be noted that the recent proposed amalgamation of Commonwealth Tribunals was said in the explanatory memorandum to the Administrative Review Tribunal Bill 2000 to be for similar reasons.

It was argued, too, that tribunals had been insufficiently independent and inconsistent. I can only speak for Victoria in this regard but many of the criticisms of the proliferation of tribunals in Victoria were justified. This is not a criticism of the membership of those tribunals, but a criticism of the structure and a criticism of the way in which governments treated such tribunals. In the years leading up to the creation of VCAT it was not uncommon for there to be a perception of political interference with tribunals as the result of the appointment of members who were known by the government of the day to have a viewpoint of a particular type. Tribunals were perceived as an appropriate dumping ground for unwanted public servants or as places where some friend of the government of the day might be appointed. For example, it was not unknown in Victoria for a parliamentarian who had lost a seat in an election to be soon after appointed to a tribunal. It was not uncommon for the terms of members of tribunals not to be renewed for reasons which were not explained, but which were clearly not related to issues of merit.

Another matter of concern has been the insidious depreciation of the value of remuneration paid to tribunal members. In Victoria, only one increase in remuneration has occurred in the last nine years.

The discussion paper suggested that longer terms of appointment for tribunal members and senior judicial leadership would improve these areas of tribunal concern.

The Judicially Led Amalgam

It is interesting to note that arguably the two most significant reforms which have taken place in recent years, the tribunals systems of Victoria and New South Wales, are judicially led amalgams. This process commenced in Victoria with the creation of a judicially led administrative review tribunal, the former Victorian AAT, in 1984. In many ways the Victorian AAT at the time of its creation was a copy of the Commonwealth Administrative Appeals Tribunal. That model of the judicially-led administrative review tribunal has been taken a step further in both New South Wales and Victoria by the inclusion of jurisdictions other than administrative review.

Administrative Decisions Tribunal of New South Wales

In October 1998 the Administrative Decisions Tribunal commenced operation in New South Wales. That Tribunal incorporates the functions of the former Legal Services Tribunal, the

former Equal Opportunity Tribunal, the former Community Services Appeals Tribunal and, in addition, it has a substantial administrative review jurisdiction including the hearing and determination of *Freedom of Information Act 1989* appeals. Formerly these appeals were heard in the District Court. The ADT continues to accrue jurisdiction, with its Community Services Division and Retail Leases Division both commencing in 1999.

The amalgamation of tribunals by the New South Wales Government aimed to promote a more efficient and effective tribunal justice system. In the course of introducing the legislation, the Attorney-General for the State of New South Wales, the Honourable J.W. Shaw said:

> The growth of tribunals has fragmented responsibility for determining legal rights, leading to a lack of consistency and in some cases arbitrary decision making. It may also lead to poor resource allocation in relation to decision making.

These were the same arguments as those which led to the evolution of VCAT in Victoria. The ADT and VCAT have developed a close working relationship. Only last month two deputy presidents from VCAT went to Sydney to spend a week each working with the ADT. Closer communication between Australian tribunals is most important. Soon the Australian Institute of Judicial Administration will set up a Tribunals Committee to further such communication.

Victorian Civil and Administrative Tribunal

I turn now to the establishment of the Victorian Civil and Administrative Tribunal, now known by the acronym VCAT, the evolution of which I, not surprisingly, have greater knowledge.

The establishment of VCAT was the most far reaching change to the operation of the tribunal system ever undertaken in Victoria, if not in Australia.

There has always been broad bipartisan, political support for what has taken place in Victoria. It was a Labour government which established the Victorian AAT in 1984. A Liberal Party government created VCAT in 1998. The Labour opposition at the time generally supported the legislation which created VCAT.
Having had a change of government in Victoria since the establishment of VCAT it is gratifying that the present Attorney-General wholeheartedly supports the work of VCAT and its commitment to providing high quality and affordable access to justice for all Victorians.

Last financial year, the VCAT operated within a budget of approximately $20 million. It determined in the order of 90,000 applications. It now does more civil business than the Magistrates' Court in Victoria. There are 42 full-time members of whom 18 are women. There are 145 part-time or sessional members. In addition 9 magistrates, 6 of whom are based in rural Victoria, are sessional members of the Tribunal.

VCAT performs the quasi-judicial functions of 14 Tribunals, Boards and Authorities which operated previously within the Department of Justice. In addition it performs the disciplinary functions of a number of previously separate organisations which operated outside the Department.

More specifically, VCAT encompasses the jurisdictions of the old Victorian Administrative Appeals Tribunal, the Anti-Discrimination Tribunal, the Credit Tribunal, the Domestic Building Tribunal, the Estate Agents Disciplinary and Licensing Appeals Tribunal, the Guardianship and Administration Board, the Residential Tenancies Tribunal and the Small Claims Tribunal. VCAT assumed the licensing appeals functions and the inquiry and

disciplinary functions of the Motor Car Traders Licensing Authority, the Prostitution Control Board and the Travel Agents Licensing Authority and the licensing appeals and disciplinary functions of the former Liquor Control Commission. It should be noted that for the most part these jurisdictions are exclusive to VCAT and not concurrent with court jurisdictions.

In addition, the Tribunal has a number of new jurisdictions such as jurisdiction to hear and determine disputes under the *Retail Tenancies Reform Act 1998* and under the *Fair Trading Act 1999* and to review decisions of the Psychotherapists Registration Board, the Dental Practice Board and most recently the Chinese Medicine Registration Board.

The Tribunal has judicial leadership. Its President is a Supreme Court Judge and it has two Vice-Presidents, each County Court Judges. The judicial members are responsible for the administration of the Tribunal. It is divided into two Divisions, a Civil Division and an Administrative Division, each headed by one of the County Court Judges. Each of the Judges and each Member of the Tribunal has a fixed 5 year term of tenure at the Tribunal. The members, many of whom are sessional, are from a wide range of disciplines. Legal members are the most numerous but there are doctors, accountants, engineers, planners, academics and the like amongst the members. The Civil Division has a number of lists which are each headed by a Deputy President and which might be said to hear inter-parties matters, such as anti-discrimination, credit, domestic building, residential tenancies, retail tenancies and the like. Similarly the Administrative Division has a number of lists, each of which is headed by a Deputy President. There are senior members and ordinary members attached to one or more lists. The Administrative Division is basically an administrative review jurisdiction. It deals with reviews of Freedom of Information decisions, planning decisions, State tax decisions, land valuation and in addition reviews the decisions of a number of licensing and disciplinary bodies such as the Medical Board, Nurses Board and various other professional and business organisations.

It is interesting to observe that the distinction between civil and administrative tribunals which existed previously in Victoria has been blurred, if not removed, by the creation of VCAT. The administrative review functions are now seen as a quasi-judicial rather than an administrative function in Victoria.

Has there been an improvement in performance because of amalgamation?

Many members of previously separate tribunals viewed the introduction of VCAT with real trepidation. Some concerns which had a real basis were that the collegiality of the small tribunal would be reduced by the creation of a very large tribunal. Other concerns were that the degree of expert specialization would decrease with a large amalgamated tribunal. A further concern was that the tribunal would become increasingly legalistic and that the appointment of judicial leadership would not lend itself to informality and user-friendliness or accessibility.

It is, of course, for others to judge whether or not these concerns now have any justification. However we have endeavoured to meet each of these concerns. First, each individual list, of which there are 13, is managed by a deputy president. In a number of cases that deputy president was the former head of the tribunal whose jurisdiction is now managed by a list. Substantial managerial discretion is delegated to such heads of lists. Furthermore, we have endeavoured to make the Tribunal more, rather than less, informal, particularly by the introduction of mediation and compulsory conference procedures. In addition, substantial time has been spent on professional development and training in relation to such matters as the proper conduct of a hearing, writing of reasons for decisions and issues of potential conflict and bias.

However, although the Tribunal is only two years old, it is apparent that there has been a significant improvement in other ways. First, there can be no doubt that the Tribunal is more independent than many of the individual tribunals were in the past. Each member has a five-year term. Although appointments are made by the Governor-in-Council, a protocol has been reached between the Attorney-General and the President of the Tribunal as to an appropriate process of appointment. That process is based upon merit. Since the commencement of the Tribunal no political interference has been experienced in the appointment of, or the termination of employment of, members, and we do not anticipate that it will in the future. The political price to be paid by such interference is now a high one in that each judge has the entitlement to return to his court. Indeed each sits in his or her respective Court as well as in the Tribunal.

The fact that the Tribunal has a substantial budget and the fact that it is led by a Supreme Court judge means that the Tribunal has instant accessibility to the Attorney-General of the day. This is a significant issue in terms of budget and other issues of principle which affect the Tribunal. I understand that many of the constituent parts of VCAT when they were individual tribunals had real difficulty in communicating with the government of the day. One example of the increased status of the Tribunal is that the President of VCAT sits on a Courts Consultative Council with the Chief Justice, the President of the Court of Appeal, the Chief Judge of the County Court, the Chief Magistrate and the Attorney-General and the Head of the Department of Justice. Access to such consultative bodies was not available to the smaller tribunals. Indeed, a recent consequence has been that the Attorney-General has accepted that Tribunal members' salaries should be independently reviewed by the JRT which reviews judges' salaries annually.

The President of the Tribunal is required to report annually to the Parliament. I believe that an annual report of this nature is a powerful tool in educating both the public and Parliament about the operations and needs of the Tribunal. Concerns expressed in such a document from the President of a tribunal of the nature of VCAT are more likely to receive attention than they did in the past.

The capacity for improvement in processes and efficiency within VCAT has been substantial. For example, it was not uncommon in the past for three of the constituent tribunals to be conducting hearings in one major provincial centre at the same time. In certain circumstances, three members in three cars incurring three costs of accommodation could take place. With the amalgamation of the Tribunal, a number of members now sit across jurisdictions. Now one member can go to a provincial city and deal with a number of matters which previously were the province of separate tribunals. This is obviously efficient. However, more than this, it provides significant career satisfaction for members who are now able to have a variation in the types of case which they hear.

The VCAT Act requires, uniquely in such legislation as far as I am aware, that the judicial members have a statutory obligation for the training, education and professional development of members of the Tribunal. Immediately upon the commencement of VCAT, a Professional Development and Training Committee was established. This enables each list to conduct seminars on matters of specific relevance to its list but also is an opportunity for all members to be involved in areas of common interest such as ethics, or decision-writing. In addition, further list-specific training is conducted throughout the year. Funding is provided for the purposes of cross-cultural training of members. A considerable amount of work has been done by the mediation committee in relation to mediation training for members.

Last year the issue of the need for assistance on the judicial learning curve came to prominence in the media and throughout legal circles. As you will be aware, the AIJA has

been deeply involved in discussions which it is hoped will lead to the creation of a National Judicial College. The Victorian Attorney-General has appointed a Judicial Education Working Party chaired by the Chief Justice, with a view to the creation of a Judicial Studies Council. He intends that it will have responsibility for continuing professional education for VCAT members as well as the judiciary. I believe professional training and education is an area which VCAT is equipped to handle particularly well. At VCAT, a New Members' Handbook has been developed, which provides newly appointed members with a convenient guide to practical aspects of membership. We have a mentoring programme for new members. There is also a New Members Committee which provides practical support and assistance to newly appointed members.

However, notwithstanding the work done internally by any tribunal, there must be a recognition by Government that access to justice includes access to competent and well-trained members. This year for the first time we have an actual budget figure allowed for training. We are hopeful that that figure will be increased in years to come. From these funds, eight members will undertake a Monash University diploma course in Tribunal Procedures this year, as well as conducting the many other list specific seminars. The issue of professional training and development is a significant one. The development and maintenance of community respect for Tribunal decisions is closely related to that issue. I believe that resources for adequate professional development are more likely to be provided in the context of VCAT, than was likely in the context of the numerous smaller tribunals which existed previously.

Many of the members of VCAT are qualified to sit in a number of jurisdictions that were previously managed by separate boards and tribunals. The flexibility to use the expertise of members across a broad range of lists increases VCAT's effectiveness. For example most reviews of decisions of the Medical Board justify the inclusion of a member with medical qualifications. This was not possible under the old AAT. A number of doctors, nurses and other professional persons are now members of VCAT. More than that however, it enables a cross fertilisation of management and hearing culture between lists, broader experience for members, and enables members to accumulate new perspectives and knowledge. VCAT has found that this results in greater career flexibility and satisfaction for members. Rotation of Deputy Presidents occurs. This gives new focus to senior members, breaks down further cultural differences between old tribunal jurisdictions and contributes to Deputy Presidents and Senior Members having the significant leadership and responsibility in the Tribunal. It also gives them greater career satisfaction, and a broader experience with the attendant possibilities of other judicial appointments becoming open. Already, one Deputy President has been appointed to the County Court since the commencement of VCAT.

Members are not the only people at VCAT benefiting from the amalgamation. The reorganisation of seven former registries into a single registry with three sections has produced staff efficiencies and enhanced career opportunities for registry staff.

The VCAT Act places a substantial emphasis upon mediation which is a significant factor in the conduct of proceedings before the Tribunal. In many cases now before the Tribunal, mediation is being used successfully where it was not used previously. In particular, since the commencement of VCAT, mediation has been used with considerable success in anti-discrimination matters. A Mediation Committee has been established to develop a Code of Conduct for VCAT mediators and is now conducting a study of the mediation work done in VCAT. Monash University conducted a research project upon mediation in planning cases. However, we are yet to maximise our capacity to use mediation as a tool for dispute resolution and I plan to take steps this year to achieve this by creating a central mediation unit led by a senior member to co-ordinate all mediations and to ensure that appropriate standards are maintained.

There is increasing recognition of the benefits afforded by mediation, not only within the Tribunal. Research indicates that mediation empowers people in a way that hearings do not and that people who have been through mediation feel better about the results, even if they 'lose', than if they go through hearings. With this in mind, several of the lists at VCAT are reviewing their approach to mediation, with the aim of increasing significantly the percentage of cases which proceed to mediation.

The benefits for members of the public of the amalgamated tribunal extend beyond the ease of accessibility afforded by a single Tribunal when making an application. In its first year of operation, list members conducted hearings at 52 venues throughout Victoria including Melbourne, suburban locations and rural centres. This year hearings were conducted at 114 venues. The ability of members to sit across various lists greatly increases the access of rural and regional Victorians, in particular, to the Tribunal. Last month, VCAT Online commenced, an internet based electronic application process which cost over $1 million to develop. It is the first interactive electronic lodging process of its type in any Australian court or tribunal. Application can be made at any time from any place and the system will issue a receipted application form with the date of hearing over the internet. At the moment this is restricted to residential tenancies cases, but we are exploring ways of internet electronic lodging in other areas. Although this project commenced before the creation of VCAT there can be no doubt that it was given great impetus by the creation of the amalgam, as was an electronic order processing system which permits many parties to receive their certified order at the hearing.

As with all processes of change, the establishment of VCAT was more a starting than a finishing point. The evolution of VCAT is ongoing. There have been substantial logistical and cultural difficulties associated with the amalgamation of so many previously separate organizations. Many of these difficulties have been surmounted. With very few exceptions, the overwhelming majority of VCAT members and staff have had the strength of character to accommodate the many changes that have taken place, with enthusiasm and good grace.

However, much work remains to be completed in the evolution. For example, VCAT inherited from the various bodies that preceded it an ad hoc bundle of practice notes. Not only were practice notes in different form, but in some instances they applied different approaches to similar situations. Their language was inconsistent and, in some cases, convoluted and overly legalistic for the many people without legal representation who use VCAT. Following the introduction of several practice notes that cover the whole of VCAT, such as expert evidence, all of the practice notes are being rewritten. All will adopt the same format and style, and all will be written in plain English so as to be accessible to non-represented parties.

I am hopeful that the Tribunal will be provided with a permanent duty lawyer scheme to assist the numerous unrepresented users.

I expect that over a period of time the work undertaken by the Tribunal will expand. For instance, a number of Bills before Parliament now expand the jurisdiction of the Tribunal.

The Information Privacy Bill which is designed to establish a regime for the responsible collection and handling of personal information in the Victorian public sector, has had its second reading. If passed in its present form, VCAT will have jurisdiction to hear complaints after a conciliation by the Privacy Commission in much the same way as it does in Equal Opportunity matters.[1]

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1 The *Information Privacy Act 2000* has now been enacted. It received assent on 12/12/2000.

The Autumn 2000 session of Parliament included the *Chinese Medicine Registration Act 2000*, *First Home Owner Grant Act 2000*, and the *Psychologists Registration Act 2000*, all of which expanded the jurisdiction of the tribunal.

Summary

It is interesting to note that the Commonwealth, in creating the Commonwealth AAT, led the way towards the judicially-led tribunal which resulted in the creation of the large amalgams in New South Wales and Victoria. It would appear that the Commonwealth is now heading away from that model. In Victoria there was bipartisan political support for the appointment of judicial leadership as a necessary step in ensuring the independence of the tribunals which were the subject of the amalgamation. I am confident that that leadership has been a significant aspect of the public perception of the independence of the Commonwealth AAT, the former Administrative Appeals Tribunal of Victoria and now the New South Wales Administrative Decisions Tribunal and VCAT. There are of course many issues relating to tenure of members of tribunals, but I think we would all agree that the longer the term, the greater the perception of independence. Accordingly the 5 year terms of VCAT members are a significant improvement on past arrangements in Victoria.

We shall all await with interest, the developments in the Commonwealth tribunal sphere. Interesting developments were proposed by the Administrative Review Tribunal Bill. Although the proposed ART structure of divisions and a four-tiered hierarchy mirrored the VCAT model, there were significant differences. The Bill set out no qualifications required of the President or other members. The Bill provided for performance agreements to be entered into by all members other than the President, and for a code of conduct to be prepared. Tenure is not fixed, but cannot exceed 7 years although a member may be reappointed. Whether these arrangements would enhance or detract from the independence of the Commonwealth Tribunal is unclear.

However, whatever might be happening in the Federal arena, I think it is likely that the judicially-led amalgam is here to stay in the foreseeable future in Victoria, New South Wales and in a different way in South Australia.

I am, of course, not submitting that a tribunal of the type created in Victoria and New South Wales is appropriate everywhere. There are advantages in discreet tribunals dealing in specialized areas. The particular disadvantages of lack of independence and inconsistency of approach which applied in Victoria may well not apply elsewhere if tribunals are given appropriate resources and are guaranteed independence. However, the creation of VCAT in the Victorian context has significantly increased the independence of the Tribunal and has enabled the Tribunal to be efficient in using the resources which are made available to it. I think it is likely that over a period of time the Tribunal will be able to negotiate more substantial resources for the professional training and professional development of its members than would have been the case with the constituent small tribunals. The Tribunal is now very well known in Victoria. Hardly a day goes past that some issue relating to the Tribunal does not appear in a major metropolitan daily newspaper. On the one hand, there are difficulties with this in the sense that a criticism made of the Tribunal has much more public force than in the past because it is now so well known to the community. Nevertheless, on balance, it appears to me that a public institution which is well known to the community is, as long as it gains the respect of the community, more likely to be understood and appreciated by the community.

A final matter relating to whether the performance of tribunals can be improved is the issue of communication. All tribunals are grappling with better ways of communicating with the public and with the users of tribunals. The report “Courts and the Public”, which was

produced by the Australian Institute of Judicial Administration in 1998, and was written by Professor Parker previously of Griffith University, deals with many ways in which the needs of the public might be met.

VCAT has expended considerable effort and money in producing annual reports. These reports ought to be as transparent as possible in relation to the activities, successes, failures and difficulties of the Tribunal. VCAT's Annual Reports are written as much to be read by the community and users of the Tribunal as they are to fulfil their statutory purpose.

However, there are other ways for tribunals to communicate with the public. An appropriate and useful web site has been set up by VCAT which is in itself an extensive legal resource because of its links. We have established user groups who meet regularly. We encourage constructive criticism of our processes and performance by such user groups. Publication of guidelines as to the operation of the Tribunal is another important way of meeting the needs of the public. We are working upon the production of some of our guidelines in a number of languages other than English. Having rules, practice notes and the like written in plain simple English is important. Tribunals should have available to their public a service charter indicating what services will be provided, what standard of services will be provided and advising users as to how they might make a complaint about the operation of the Tribunal. We have such a charter and we now have electronic monitoring of complaints.

A further improvement which is called for in tribunals across Australia is improved accessibility of decisions. This can be done several ways by the use of websites, perhaps Austlii, or by publications. However, another way of communicating to the public, and one method by which the Tribunal operates, is to produce short summaries of significant decisions. A more detailed consideration of these issues can be found in Professor Parker's report.

The tribunal system in Australia is in good hands. The tribunal system in this country is likely to expand notwithstanding whatever might be happening in the Commonwealth sphere. Tribunals provide access to a justice system which is not otherwise available to many members of our community, and continual improvement of our tribunals will enhance community confidence in the decisions which are made.

HOW THE FRENCH UNDERSTAND THE *INQUISITORIAL* SYSTEM

Professor Antoine J Bullier[*]

This is an edited version of a lecture delivered to the Australian Institute of Administrative Law (Western Australian Chapter) on 24 May 2001 in Perth WA.

> "It is not in winning 40 battles that my real glory lies, for all those victories will be eclipsed by Waterloo. But my code civil will not be forgotten, it will live forever".[1]

The importance of codification in the French psyche is paramount. The famous British jurisconsult James Fitzjames Stephen considered the French system as *the great rival system of criminal procedure.*[2]

The first Code of criminal procedure, called the Code of Criminal Instruction, was promulgated in 1808. A new Code, called the Code of Procedure (CPP), was promulgated in 1958[3] just 150 years later. Perhaps this suggests that the French need a strong man to update or change their codes because at the time Général de Gaulle was head of the French government.

The first major difference between the Australian and French legal systems is linguistic: in Australia, just as in most common law countries, English is the language spoken in court; in the civil law countries a Latin (Romance) language is spoken (except in Germanic Europe).

In Australia, while some people like Joan Dwyer[4] and Margaret Allars[5] advocate an inquisitorial system, some commentators, like Sir Anthony Mason[6] speaking at the AAIJAC in 1999, seem less enthusiastic about a system of that kind .

But what do we mean by *inquisitorial* or *accusatorial* system? Should we equate *inquisitorial* with an *activist, investigative, dynamic* judge? A clue to its basic meaning stems from its linguistic roots.

Inquisitorial comes from the Latin: *inquiere, inquisivi, inquisitum:* to ask.

The Latin root is *quae*, connected with *quaestio*: questioning. In old French "question" ominously means torture. So when a book published (and banned) in 1960 during the Algerian war was called *La question* everybody knew it was about torture exercised by the French army on the Algerian rebels. In English the root has derivations and cognates like "query", "quest". The verb *quaeso/ro* means to seek, to get, to obtain, to acquire, carrying with it a sense of *requesting to be told*.

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1 Napoléon at Saint-Helena, quoted in CJ Friedrich: “The Ideological & Philosophical Background”, *The Code Napoléon & the Common Law Tradition*,1956, New York, NYU Press, p 7.

2 E M Wise (ed); “The French Code of Criminal Procedure”, (rev ed 1988), *The American Series of Foreign Penal Codes*, Little, Col, USA, p XV.

3 loi 31 déc.1957 & Ord.58-1296 23 déc. 1958, loi of 30 déc 1985, 9 sept 1986, 6 juil. 1989, 10 juil. 1991, 4 jan 1993, 24 août 1993, 23 juin 1999.

4 Joan Dwyer; "Overcoming the Adversarial Bias in Tribunal Procedure", (1991) 21 *Fed L Rev* 225; Joan Dwyer; "Fair Play the Inquisitorial Way" (1997) 5 *A Jo Admin Law* 5.

5 Margaret Allars; "Neutrality, the Judicial Paradigm & Tribunal Procedure", (1991) 13 *Syd LR* 337.

6 A Mason, "The Future of Adversarial Justice", (2000) 27 *Brief* 20.

Accusatorial comes from the Latin: *ad causam provocare*: to call one to account: the accused is the one called to account**,** *accountable*.

Inquisitorial: the emphasis lies with the active role: *questioning*. Accusatorial : the emphasis lies on the passive role: *to be asked questions*.

One system focuses on the accused: accusatorial and will try to protect him/her. The other focuses on the act of questioning, looking for something, seeking. In these two adjectives we can see the main difference between the two systems. One is centred on the accused and his/her protection and rights. The other on the official whoever he/she might be, who will ask the questions. One system is *question*-centred the other *questioner*-centred. One system will focus on the questions asked; the other on the answers.

How can we define an inquisitorial system?

In Australia, coroner's inquests, tribunals such as the Refugee Review Tribunal and Royal Commissions follow a form of inquisitorial procedure.

In the common law countries the inquisitorial system has a negative image. The reminiscences of the Spanish Inquisition, the defiance *vis à vis* the Church of Rome and its law (Canon law) and of course the fact that all dictatorships use the inquisitorial system give such a system a deplorable name. In modern English the adjective *inquisitorial* has a negative connotation, while in French *inquisitorial* along with *accusatorial* are totally neutral technical terms.

In the common law world many people still believe that once committed for trial before a French criminal court one is supposed to prove one's innocence. This is not exactly the case but it is not totally false either. One must not forget that the very name of the Code before 1958 was Code of *Criminal Instruction.* For the French "instruction" is almost the equivalent of penal procedure. *Instructio*: means in Latin: *to build a case against someone*.

What is the definition of an inquisitorial system?

Even in France it is only in criminal law that we can truly speak of an inquisitorial system.

There are three main criteria:

1) a *parquet* (the prosecution);
2) a judge of instruction;
3) evidence by any means of proof.

1) A parquet:

In the French system, the *parquet* or the *Public Ministry* or the *standing judiciary* is a corps of people holding a judicial office. They are not trial judges. The name comes from the fact that they used to speak from the well of the court (its wooden floor). Each criminal court has a *parquet* attached to it. In the police court, the *parquet* is replaced by a police officer.

The *parquet* represents the executive branch of government; it is subordinate to a special hierarchy and independent vis à vis the judge. The Minister of Justice is the true head of the *parquet*. He/she can issue orders to the prosecutors (CPP art 36). The chief prosecutor has also authority over his/her subordinates (CPP art 37). These people can be removed from office after advice from the High Council of the Judiciary. The Minister of Justice can give

general directives on criminal policy but cannot give orders concerning individual cases (CPP art 30-1).

The Minister can order prosecutions. The chief prosecutor of a court must obey such a direction and require the particular prosecutor of a criminal court to do so. The prosecutor will then be obliged to make some written submissions about the matter.

But the head of the Prosecution, the General Prosecutor and Chief Prosecutor can prosecute without orders or even against their superiors' orders. If they prosecute on their own volition, it is still valid. If they refuse to prosecute, their supervisors cannot replace them to prosecute. At the hearings, significantly, a subordinate can contradict his/her written submissions (CPP art 33). The members of the same *parquet* can replace each other for the same case.

In France, the *parquet* is the only one to engage public action. The judges cannot do it on their own volition. The *parquet* cannot be held responsible (for prosecuting) except in very peculiar circumstances.
The *parquet* is not a judge but a party in the criminal trial. The *public ministry* is the plaintiff and cannot stop the machinery once engaged. The standing *judiciary* will, however, control and direct the whole trial.

It is the *parquet* that will approach *(seize)* the judge of instruction. The parquet will ask the judge of instruction to perform any act conducive to "*the discovery of the truth*". The prosecution may lodge an appeal against all the decisions of the judge of instruction.

2) A Judge of Instruction

The judge of instruction or the *judge instructeur* or the *judge informateur* is the keystone, the archetype, of the inquisitorial system. He/she is supposed to be the most powerful person in France. He/she is the most distinctive person in the French criminal trial.

The judge will be asked by the prosecution[7] to start a judicial investigation commencing with the process of instruction of the case. *Judges of instruction* are junior judges of the Tribunal of *Grande Instance*. This is a problem; the *status* had to be dissociated from the *function*. Because of the problems of dealing with cases of terrorism a young graduate cannot assume the functions of *judge of instruction* in certain very specific matters.

Judges of instruction are seconded for 3 years to conduct judicial investigations of serious offences. They may have assistants. Six per cent of the criminal cases are dealt with by a *judge of instruction*; the others by the *parquet* alone.

The *judge of instruction* will collect, select and present the evidence, interview witnesses and decide whether or not there is a case to answer. The *judge of instruction* had the power to detain people during the investigation. He/she lost this power in January 2001[8] and the *judge of freedoms and detention* has replaced him/her.
The judge is not answerable to the chief prosecutor. The police/gendarmerie[9] are at his disposal. The function of the judge is primarily to investigate. He may widen the scope of his inquiries to include any relevant persons but may not without the permission of the

7 CPP arts 51 & 80.

8 Act n°200-516 June 2000 on the Presumption of Innocence, art 145.

9 The police is a national force under the supervision of the Minister of the Interior while the gendarmerie is a paramilitary force under the supervision of the Minister of Defence. These two forces can investigate criminal matters.

prosecutor investigate other matters.[10] He will exercise his powers through a series of warrants which are delegations to the police or the gendarmerie. The judge will order reports to be made on technical aspects of the case: medical, psychiatric, etc. Instruction is a written procedure and supposed to be secret.

The judge will interrogate the defendant in his office with a clerk and *in camera*. He/she will put questions to the defendant officially under examination. The replies are not given under oath.[11] Counsel will be present to protect the defendant's rights. There will be confrontation with hostile witnesses and all of them will be asked to sign a statement which they may refuse to sign. Other witnesses are questioned under oath.[12]

3) Evidence by any means of proof

Evidence is an important subject in criminal law. It is of paramount importance, though in the French system evidence is an under-researched subject. Only a handful of PhDs have been written on it. Very few manuals or textbooks and no treatises have ever been written on criminal evidence. The major exception is H. Lévy-Bruhl *La preuve judiciaire.*[13] Even the word evidence cannot be translated into French law. We use the term proof but it is different so we use other methods and translate it into French law, such as criminal procedure or the criminal process. *Evidence* has the meaning in French of "obviousness"

The Code of penal procedure has no general theory concerning evidence. A person is presumed innocent until proven guilty legally. In criminal law testimony is essential. The trial judge can only make up his mind on evidence brought to him at the hearing. Evaluation of evidence is free and unconstrained. All statements will have been consigned to the *dossier.* At the end of the instruction, the judge must examine whether there are sufficient elements to make up the offence.

Onus of proof

Art 427 al.2CPP: "*actori incumbit probatio; onus probandi incumbit ei qui dicit*: "he who advances something must prove it". It is up to the prosecution to prove the case. The onus is heavier for the prosecution than for the plaintiff because of the presumption of innocence. According to the French 1789 Declaration of Human Rights: "*Any person accused of an offence is presumed innocent until proven guilty legally".* In the French context, what is the presumption of innocence?

This presumption means that the suspect does not have to establish his/her innocence. The right of silence does exist - it has been so declared in a famous case by the European Court for the Protection of Human Rights.[14] The benefit of any doubt must be given to the accused. But of course arrest, custody and detention pending trial are exceptions. The prosecution must prove *mens rea.*

The standard of proof

Any means of proof are admitted.[15] The categories of proof include written documents, testimony, expert reports, observation of witnesses *in situ*. Inferences can be made from

10 Art 80-al.1 C.P.P.& Crim.10 mai 1994 Bull.n°180; Crim 1er déc 1998, Bull n°323.

11 Stefani, Levasseur & Bouloc; *Procédure pénale*, Paris, 2000, Dalloz, 17 e Ed, p 557 n°668.

12 CPP art 103.

13 H Lévy-Bruhl: *La preuve judiciaire*, Paris, 1964.

14 Funcke 25 fév 1993 Dalloz (1993) 457.

15 CPP, art 427.

statements made by people. Witnesses must take an oath in court. Confession is an element of proof but it must be corroborated and can be discarded by the judge. The court may appoint experts. There should not be any coercion of witnesses. The probative value of evidence is freely appreciated by the judge. In the French system, evidence is appreciated through a process of *inner belief and intimate conviction .*

All the evidence obtained during the early phase of the criminal procedure is only of probative value of the charge and must be produced at the trial. At the hearing there is consideration of the written *dossier* prepared by the *juge d'instruction* but the accused and witnesses may be examined and questioned. The bench can stop the examination of witnesses when they choose fit.

There is no hearsay rule as such. The inquisitorial system is supposed to aim at the discovery of the truth through the unrestricted evaluation of the evidence. French courts are concerned more with the weight or value of the evidence than its admissibility.

The principle of *inner belief* has been introduced by the Code of Criminal Instruction art 427:

> According to the free scrutiny principle, the law does not demand of judges and jurors that you take account of the means by which you were convinced. The law does not prescribe rules according to which the completeness or the sufficiency of the evidence can be determined, it only requires that you reflect in silence and with careful thought in order to determine in sincerity of your consciences what impression has been made upon your reasoning by the evidence adduced against the defendant and the way he/she has defended him/herself. The law asks only one question which sums up your entire duty: Are you thoroughly convinced?

The court is therefore free to determine guilt or innocence without having to express what weight has been given to the various means of proof produced to it. The trial judge may therefore decide to attach little or no weight to a confession but he may also attach full weight to a confession which has been retracted.

In the Anglo-Australian system, the parties are primarily responsible for the trial, while the judge is neutral. The prosecution and the defence are basically equal. The collection, selection and presentation of the evidence belong to the parties. In the common law system the judge is an arbiter who ensures fair play. The prosecution is conducted not by the holder of a judicial office but by a barrister or solicitor who may or may not be a civil servant.

In the Anglo-Australian system, if the accused pleads guilty, there is no trial, just sentencing. This is not the case in France where the whole process will go on. The French system does not accept that a party should determine the evidence even if it is the evidence *par excellence*: confession. The very word "trial" cannot be translated into French. The Anglo-Australian system is based on the principle of equality between the parties. This is not the case in the French system where holders of judicial office represent the prosecution.

The basic differences between the two systems, apart from the language used in court, are:

- Who is responsible for the collection, selection and presentation of the evidence - the parties or a judge?

- In the Anglo-Australian system any evidence produced in court must be tested in that court. In the French system all the collection of evidence has been performed upstream. The day in court is just a rehearsal of what has happened before.

The result: 7.3% acquittals before the French Assize Court; 45% before the British-English Crown Court.[16]

Conclusion

When we look at the differences between the French criminal trial and the Australian criminal trial, there is no doubt that the French way of doing things would not meet the standards of a *fair trial* in the United States or in Canada. The inquisitorial system accordingly has a very bad name especially in criminal law. British and Irish judges had to admit that the French system is acceptable only because the United Kingdom and the Irish Republic are members of the Council of Europe and of the European Union and accept the jurisdiction of the Strasburg and Luxemburg courts. It is almost certain that 30 years ago the French system would have been considered not protective enough of human rights. It is up to Australian readers to judge for themselves the acceptability of such procedures.

16 A Sanders & R Young: *Criminal Justice*, London, 2000 (2nd ed), Butterworths, p 599; Frase: "Comparative Criminal Justice as a Guide to American Law Reform", (1990) 78 *Cal L Rev* 631.