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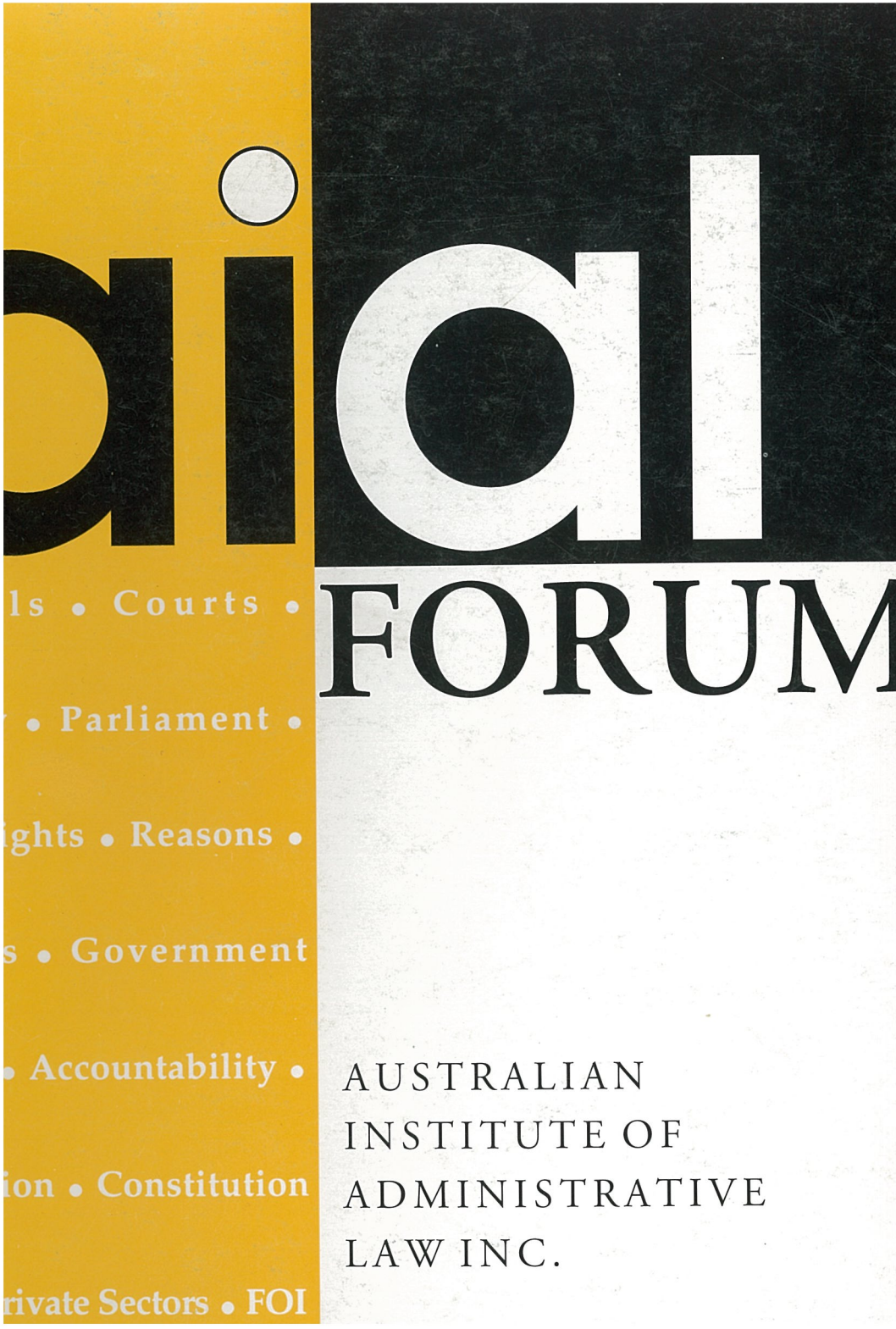

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DEVELOPMENTS IN ADMINISTRATIVE LAW

*Ron Fraser**

Government initiatives, inquiries, legislative and parliamentary developments

Proposal for an ACT Human Rights Act

Following wide community consultation and research, the ACT Bill of Rights Consultative Committee, chaired by ANU Professor Hilary Charlesworth, presented its report to the Chief Minister on 22 May 2003. It found that human rights for people in the ACT were covered 'only in a partial and haphazard manner', and in the absence of a bill of rights this fragmented approach 'would remain a serious barrier to the development of a human-rights conscious culture'. A bill of rights would have real significance for those marginal groups most vulnerable to rights abuse and with a limited capacity to advocate on their own behalf.

The report recommends a bill of rights in the form of a Human Rights Act (HRA) of the Legislative Assembly, rather than an entrenched bill of rights or a declaration of the Assembly. The proposal has broad similarities to the UK Human Rights Act, as well as drawing on ideas from New Zealand and South Africa. The rights to be protected are those set out in the two major human rights treaties to which Australia is a party (the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights), other than those not within the power of the ACT legislature to protect. The report proposes alternative provisions for 'reasonable limits' to some but not all rights to the extent justified in an open and democratic society.

The proposed model is designed to provide for 'a dialogue' between the legislature, executive and judiciary on human rights issues, while permitting the legislature to override the courts in the last resort, rather than providing for invalidation of incompatible primary legislation by the courts. The Supreme Court would have power, however, to give a non-binding determination that a law is incompatible with the HRA, and to invalidate incompatible subordinate legislation (unless specifically covered by primary legislation), and, together with other courts and tribunals, would be subject to a clause requiring interpretation of all ACT laws (including the common law) wherever possible in a way compatible with the HRA. Remedies would be designed to change behaviour and prevent future breaches of human rights, but could include damages where the court considers it necessary to provide an effective remedy. All bodies performing public functions (other than the legislature) would be required to act in accordance with the HRA, unless specifically required to do otherwise by legislation, and to report annually on their implementation of human rights.

The report recommends scrutiny of proposed legislation by the Assembly for compatibility with the HRA, monitoring by an ACT Human Rights Commissioner with additional educational and promotional functions, and regular review, initially after five years operation.

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It includes a draft Bill for government consideration and public discussion, and useful general comments by UN Committees on individual rights in the Covenants. The Chief Minister, while not ruling out other models, has undertaken to respond to the report within 3 months. (***Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee***, May 2003, available from the Executive Director, Policy and Regulatory Division, Department of Justice and Community Safety, phone (02) 6207 0520 or from website: www.jcs.act.gov.au/prd/rights/index.html)

Report on Australian Human Rights Commission legislation

The government's controversial Australian Human Rights Commission Legislation Bill 2003 was introduced into Parliament on 27 March 2003. The Bill is similar but not identical to an unsuccessful 1998 Bill. Under it the existing Human Rights and Equal Opportunities Commission (HREOC) is to be renamed the Australian Human Rights Commission (AHRC). Among the major changes in the Bill are proposals to reduce the number of commissioners from five to three and abolish the concept of designated commissioners, such as the Sex Discrimination Commissioner, and to require the AHRC to obtain the approval of the Attorney–General before intervening in litigation involving human rights (it has intervened in 35 actions in 15 years, including recently a number of high profile immigration matters). However, where the President is or was a judge, it is sufficient to notify the Attorney.

After extensive consultation, all but one of the members of the Senate Legal and Constitutional Legislation Committee – Senator Scullion (Country–Liberal Party, Northern Territory) – rejected the requirement for approval by or notification to the Attorney–General before AHRC intervention in litigation, while suggesting informal arrangements be developed to improve communications on this issue between the AHRC and the Attorney and requiring the AHRC to report annually on interventions. While a majority accepted the restructuring proposals (and other major proposals), acceptance was subject to each Commissioner being required to have a core designated area of responsibility, and to a requirement that one Commissioner have significant experience in Aboriginal or Torres Strait Islander community life. Labor, Democrat and Green Senators submitted a dissenting report rejecting the restructuring proposals and the other major changes, and proposing changes of their own. The retiring President of HREOC, Professor Alice Tay, welcomed the report. (**Senate Legal and Constitutional Legislation Committee, *Provisions of the Australian Human Rights Legislation Bill 2003*,** May 2003)

Commonwealth Bills and proposed government legislative program

On 20 March 2003 the government reintroduced into the House of Representatives what is now entitled the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No. 2]. At the time of writing, the Government was proposing, and the Opposition considering, the following amendments in a stated attempt to meet Opposition objections to the Bill: increasing the minimum age of detainees from 14 to 16; providing for up to 24 hours of questioning over 7 days in up to 8 hour blocks under a single warrant, replacing warrants for up to 48 hours continuous questioning that could be extended; provision for access to a lawyer of choice at any stage of proceedings, although questioning may commence in the absence of a lawyer, with safeguards to protect disclosure of sensitive information including higher penalties for breach of a secrecy provision, and provision for a right for ASIO to apply to a prescribed authority to prevent access to the lawyer of choice. **Note**: The Bill has now been passed by both Houses of the Parliament. It will be discussed further in the next Developments section. (See also under heading 'Scrutiny of Bills Committee' below for this Bill and the Criminal Code Amendment (Terrorism) Bill 2002. **And see Parliamentary Library Information and Research Services, *Bills Digests* No 133 of 2002–3 and No 128 of 2001–2; Commonwealth Attorney–General, News Release**, 11 June 2003)

In response to an Opposition Bill to provide for specific listing of the Hizballah External Security Organisation as a terrorist organisation, in place of the Government's Criminal Code Amendment (Terrorist Organisations) Bill 2003 – which confers general powers in relation to listing terrorist organisations – the Government itself introduced a second Bill, the Criminal Code Amendment (Hizballah) Bill 2003 allowing the specific listing of elements of Hizballah as terrorist organisations if they meet certain criteria. Both the specific and general Government Bills have passed through the House of Representatives. The Attorney–General has announced that once the law is passed he will make regulations listing the Hizballah External Security Organisation as a terrorist organisation; the regulation will be disallowable by either House of the Parliament and open to judicial review. (For the Government view, see: **Commonwealth Attorney–General, News Releases,** 2 and 5 June 2003.)

The list of government legislation proposed for introduction in the winter sittings of Parliament, commencing on 13 May 2003, includes the following items of administrative law interest (the quoted comments come from the government release):

- Administrative Appeals Tribunal Amendment Bill – 'reform the AAT to enable it to flexibly manage its workload and to ensure that reviews are conducted as efficiently as possible'.

- Classified Information Procedures Bill – 'implement measures to safeguard classified information that is tendered as evidence in the course of a criminal proceeding'. (Note: In addition, the Attorney–General has referred the question of 'Measures to protect classified and security sensitive information in the course of investigations and proceedings' for inquiry and report by the Australian Law Reform Commission by 29 February 2004 – see Attorney–General's News Release, and ALRC Media Release, both issued on 3 April 2003.)

- Legislative Instruments Bill – 'provide a comprehensive regime governing the making, registration, publication, tabling and sunsetting of delegated legislation'.

(The list of proposed government legislation is available from: http://www.pmc.gov.au/new.cfm)

Senate Scrutiny of Bills Committee

The following aspects of proposed bills are among the matters the Senate Scrutiny of Bills Committee has drawn to the attention of Senators or Ministers in its *Alert Digests* and *Reports* between 26 March and 14 May 2003:

- Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 2]: The Committee had previously been concerned with several aspects of the Bill, including provision for obtaining warrants to question a person not suspected of committing an offence, the possibility of detention for questioning for continuous periods without right to seek legal advice or communicate with anyone else, and problems concerning self-incrimination. Despite increased safeguards in relation to the issue of warrants, increased protections for people in detention and restrictions on the later admissibility of evidence obtained (but not on its derivative use), the Committee maintained its view that the provisions in question may appear to trespass unduly on personal rights and liberties and that it was for the Senate to weigh those considerations against the intended policy outcome of the Bill. (***Alert Digest No 4 of 2003***, 26 March 2003)

- Migration Legislation Amendment (Further Border Protection) Bill 2002 [No 2]: The Bill provides for the excision of certain islands from the Migration Zone under the *Migration Act 1958*. The Committee maintained its comment on a previous version of the Bill concerning its retrospective operation from 19 June 2002, likening this to 'legislation by press release' in assuming that both Houses of Parliament will accept and approve the bill without amendment. In its view, the provision may be considered to trespass unduly on personal rights and liberties. (***Alert Digest No 5 of 2003***, 14 May 2003)

- Private Health Insurance (Collapsed Organization) Bill 2003 and Private Health Insurance (Reinsurance Trust Fund Levy) Bill 2003: The Committee was concerned that the first Bill provided for the Minister to fix a levy by delegated legislation without reference to a cap or rate or formula for calculating it. It would normally expect one of these measures relating to delegated legislation. However, in view of the need for the Minister to take certain advice which had to be tabled in both Houses, and the provision for determination of the rate to be a disallowable instrument, the Committee made no further comment. In the case of the second Bill, the Committee sought the Minister's advice on the absence of Parliamentary scrutiny of principles involved in the determination of a levy, and the fact that the determination was not a disallowable instrument. (***Alert Digest No 5 of 2003***, 14 May 2003)

The Committee's *Alert Digests* and *Reports* are available from the Committee's website: http://www.aph.gov.au/senate/committee/scrutiny/index.htm

Creation of office of Inspector–General of Taxation

The Commonwealth has established a position of Inspector–General of Taxation to review systems established by the Australian Taxation Office to administer tax laws and systems established by tax laws to deal with administrative matters. The Inspector–General must consult at least once a year with the Ombudsman and the Auditor–General to assist in setting his or her work program. After completing a review, the Inspector–General must report to the Minister and a copy must be tabled in each House of the Parliament or otherwise made publicly available. There is detailed provision concerning the obtaining of information and its protection. (***Inspector–General of Taxation Act 2003*, Act No 28, 2003**, assented to on 15 April 2003)

Report on fee for review by Refugee Review Tribunal (RRT)

A report of the Australian Parliament's Joint Standing Committee on Migration has recommended that the provisions of Migration Regulation 4.31B relating to the fee payable by unsuccessful applicants to the RRT should remain in operation subject to a two-year sunset clause and a further review by the Committee. It also recommended that the fee be raised from $1,000 to $1,400 in line with the Migration Review Tribunal fee. Earlier reviews of the fee occurred in 1999 and 2001. The majority of the Committee considered there was no evidence that the fee discouraged bona fide applicants from pursuing an RRT review, and that there was evidence that without the fee the number of applications by those with no grounds for protection would be higher. The Committee recommended the provision of additional resources to enable the RRT to provide more expeditious hearings and finalisation of cases. Senator Bartlett, Leader of the Australian Democrats, submitted a dissenting report recommending that the regulation cease to apply after 30 June 2003. (**Joint Standing Committee on Migration, *2003 Review of Migration Regulation 4.31B***, 29 April 2003, available at the Committee's website: http://www.aph.gov.au/house/committee/mig/index.htm)

ALRC reports on civil and administrative penalties, and protection of human genetic information

The Australian Law Reform Commission (ALRC) has released its report on federal civil (court-imposed) and administrative penalties (eg for late payment of tax, social security breaches). The ALRC found that the current penalty schemes lack any real common structure, foundation or operational theory. Major recommendations include the enactment of a Regulatory Contraventions Statute to provide a set of principles, standards and processes applying to imposition of penalties, and improving the transparency of decision-making processes. (**ALRC Media release,** 19 March 2003; ***Prinicipled Regulation: Federal Civil and Administrative Penalties in Australia,* ALRC Report 95**, December 2002)

The ALRC's substantial report on the protection of human genetic information was released on 29 May 2003. It addresses many complex issues, including the need for amendment of discrimination laws, and of privacy laws in relation to human genetic material, and the protection of confidential genetic information and its limited disclosure to genetic relatives in some circumstances. The report recommends the establishment of a Human Genetics Commission of Australia. (**ALRC Media release**, 29 May 2003; ***Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC Report 96**, May 2003)

Changes in methods of access to Commonwealth government publications

As part of new arrangements for distribution of Commonwealth publications announced by the government in the Budget, existing arrangements for distribution of publications will be supplemented by establishment through the National Office for the Information Economy (NOIE) of a panel of contractors for printing and distribution of agency publications and the development of a searchable central electronic register of government publications. Reflecting a marked reduction in sales, the Government Bookshop Network will be closed in October. NOIE will assist agencies to make publications available through a range of mechanisms including online and mail order, telephone sales and availability in other retail/specialist bookshops. (**Media release by Minister for Communications, Information Technology and the Arts**, 13 May 2003)

ACT review of complaints mechanisms

The ACT Chief Minister has announced a review of complaints mechanisms to be conducted by a team from the Foundation for Effective Markets and Governance (FEMAG) based at the ANU. The formal title of the review is Review of Statutory Oversight and Community Advocacy Agencies. The team will be led by Mr John Wood, a former Deputy Commonwealth Ombudsman and President of ACTCOSS. The Chief Minister will shortly release details of a comprehensive consultative process to be undertaken by the FEMAG team. Greens MLA Kerrie Tucker and ACTCOSS director Daniel Stubbs have commented on the need for wider community involvement. (**ACT Chief Minister, Media Release 182/03**, 18 May 2003; ***Canberra Times***, 22 May 2003, page 11)

Judicial review

All decisions mentioned may be accessed on the Australian Legal Information Institute (Austlii) website:
http://www.austlii.edu.au

Failure to correctly identify the 'particular social group' on which a claim for refugee status depended

By a majority of 4:1 (Gleeson CJ dissenting on the central question of fact), the High Court held that the Refugee Review Tribunal (RRT) had misunderstood and misstated the 'particular social group', membership of which formed the basis of the applicant's claim for refugee status under the *Convention on the Status of Refugees* (Refugees Convention). This was a mixed question of law and fact. The RRT had concluded that the applicant would not be persecuted by reason of being a businessman in Russia. In the majority's view the applicant's claim had clearly been based on membership of a group of 'entrepreneurs and businessmen who publicly criticised law enforcement authorities for failing to take action against crime or criminals' (Gummow and Callinan JJ). Only after the relevant social group is correctly identified can a decision-maker properly decide the causal question of whether the applicant had a well-founded fear of persecution on the basis of membership of that group. The RRT's failure to address the case put to it was critical to the outcome of its review and constituted a breach of natural justice and a constructive failure to exercise jurisdiction.

The court granted discretionary relief to Mr Dranichnikov under section 75(v) of the Constitution, requiring the RRT to review the merits of the case according to law, rather than dealing first with his appeal from the Federal Court, as it normally would do. There was uncertainty whether he would be entitled to any remedy under the relevant but now repealed provisions of the *Migration Act 1958*, and there would have been a need to obtain special leave from the Full Federal Court for him to put his arguments. (***Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs***[1] **[2003] HCA 26, (2003) 197 ALR 389**, 8 May 2003)

High Court considering refugee claims of persecution on the basis of sexual orientation

On 8 April 2003 the High Court reserved its decision on two related appeals from the Federal Court in which the appellants are gay men from Bangladesh who were in a same-sex relationship in that country. Significant issues raised in the appeals include the appropriate definition in such a case of the 'particular social group' for the purposes of the Refugees Convention, and whether the RRT should have considered whether or not the need for a homosexual couple to live discreetly amounts to persecution. The alleged employment by the RRT of a 'doctrine of discretion' in such cases was canvassed in argument.. (***Appellant S395/2002* and *Appellant S396/2002 v MIMIA*; see Catherine Dauvergne and Jenni Millbank, 'Before the High Court: *Applicants S396/2002 and S395/2002*, a gay refugee couple from Bangladesh', (2003) 25 *Sydney Law Review* 97 [2003] *SydLRev* 6,** available in electronic form from Austlii; and **High Court Bulletin – No. 4**, as at 16 May 2003; and see transcript of special leave hearing available through www.austlii.edu.au)

***Impact in Federal Court of High Court decision about privative clauses in* Plaintiff S157/2002**

Following the High Court's decision in *Plaintiff S157/2002 v Commonwealth* (2003) 195 ALR 24 on privative clauses in the Migration Act (see discussion in (2003) 36 *AIAL Forum* 1 at 6–7), both successful and unsuccessful appeals continue in the Federal Court against decisions made on the basis of the decision of the Full Court in *NAAV of 2002 v MIMIA* (2002) 193 ALR 449 (discussed in (2002) 35 *AIAL Forum* 1 at 4–5). (Special leave to appeal to the High Court in a number of the *NAAV* decisions is being sought: see (2003) 37 *AIAL Forum* 20 at 32.)

At first the Federal Court developed two differing lines of authority in response to *S157/2002*. A narrow view of the use of 'jurisdictional error' in *S157/2002* was taken by Gyles J in *Lobo v*

MIMIA [2003] FCA 169, 6 March 2003. His Honour considered he was bound to follow *NAAV* (above) which he considered had only been overruled by the High Court in relation to procedural fairness, and could not grant relief because of s 474 of the Migration Act, despite the fact that failure of the Migration Review Tribunal to address the relevant statutory criteria would ordinarily amount to a constructive failure to exercise jurisdiction.

Despite *Lobo*, the trend in the Federal Court to adopt a broad view of the High Court's reference to 'jurisdictional error' is now orthodox. In *WADK v MIMIA* [2003] FCAFC 48, 18 February 2003, Hill J (with whom French and Marshall JJ agreed) clearly endorsed the broader view that the High Court in *S157/2002* had not needed to define the boundaries of jurisdictional error given its previous decisions in *Craig v South Australia* (1995) 184 CLR 163 and *MIMIA v Yusuf* (2001) 206 CLR 323. In *SBBG v MIMIA* [2003] FCAFC 121, 6 June 2003, the Full Court (Gray, von Doussa and Selway JJ – see also below), endorsed previous decisions of the Full Court and of single judges that the reasoning of the majority in *NAAV* was incorrect and no longer binding authority, and disapproved obiter views expressed by two judges in *Koulaxazov v MIMIA* [2003] FCAFC 75, 2 May 2003. (See also *Scargill v MIMIA* [2003] FCAFC 116, 3 June 2003.)

One significant issue yet to be definitively examined by the courts is the effect in the context of *S157/2002* of new provisions purporting to remove natural justice as a ground for review inserted by the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth)(see (2003) 35 *AIAL Forum* at 2–3).[2]

Failure to address persecution claims of Mandaen asylum seekers

The applicants in *SBAS*, a family of Sabaean Mandaeans who had left Iran in 2001, claimed refugee status on many grounds alleging general persecution of Mandaeans in Iran as well as individual acts of persecution they, including the children of the family, had experienced there because of their religion. Justice Cooper found that the RRT had failed to address the claims of each of the applicants 'in all their aspects' as it was required to, and failed to apply the test of a well founded fear of persecution under the Refugees Convention. His Honour examined Australian and other authorities on the meaning of "persecution", including the statement of Gaudron J in *MIMA v Haji Ibrahim* (2000) 204 CLR 1 (at 6–7) that '... the notion of "persecution" includes sustained discriminatory conduct or a pattern of discriminatory conduct against individuals or a group of individuals who, as a matter of fact, are unable to protect themselves by resort to the law or by other means', when the persecution is for a Convention reason. The RRT had not approached the matter by assessing the actual harm feared by the family on the basis of their being Mandaeans and then determining whether it would constitute persecution under the Convention. The court directed the RRT, differently constituted, to hear and determine the application for review according to law and the court's reasons. The decision may have implications for a number of other similar RRT decisions. A case raising similar issues has been remitted by the Full Court to a single judge for hearing. (***SBAS v MIMIA* [2003] FCA 528**, 30 May 2003; ***SBBG v MIMIA* [2003] FCAFC 121**, 6 June 2003)

Full Federal Court upholds* Al Masri *decision to release detainee awaiting removal

A unanimous decision of the Full Court (Black CJ, Sundberg and Weinberg JJ) has resolved differences within the court on whether or not the *Migration Act 1958* (Cth), in particular sections 196 (detention) and 198 (removal), prevents release from detention of detained unlawful non–citizens (including unlawful asylum seekers) who request the Minister to remove them from Australia in circumstances where there is no real likelihood or prospect of their removal in the reasonably foreseeable future. Although it said such a conclusion would not be lightly reached, the court upheld the decision of Merckel J in those circumstances to grant an order in the nature of *habeas corpus* for Mr Al Masri's release. It was not possible to

conclude that Parliament had intended to abrogate the fundamental right to liberty – which extended to those unlawfully in Australia – for a period of potentially unlimited and possibly permanent duration. The Court was fortified in its conclusions by its view that its decision was consistent with persuasive overseas authorities, with international obligations prohibiting arbitrary detention, and with constitutional considerations relating to the scope of the aliens power. Without needing to decide the question, the Court had difficulty in accepting that detention without limit of a person who had sought removal could be regarded as reasonably appropriate and adapted to an end sufficiently linked to the aliens power.

Despite the successful removal of Mr Al Masri from Australia after the original decision, the Full Court had jurisdiction to hear the Minister's appeal because there was a disputed costs order relating to an issue of continuing importance. The Minister has indicated he will appeal to the High Court, and has introduced legislation that appears to reverse the effect of the Full Court's decision as well as the decision in *MIMIA v VFAD* (see (2002) 36 *AIAL Forum* at 9). Following the decision, Emmett J granted interlocutory orders for release on certain conditions of six applicants whom he had previously concluded were not entitled to such relief, pending the Minister seeking leave to reopen proceedings to present new evidence. (***MIMIA v Al Masri* [2003] FCAFC 70**, 15 April 2003; for background see (2003) 35 *AIAL Forum* at 6 and 36 *AIAL Forum* at 9; ***NAGA & ors v MIMIA* [2003] FCA 460**, 17 April 2003; in another decision, a detainee was released on the same basis although she had not exhausted her review rights: ***VKAC v MIMIA* [2003] FCA 483**, 19 May 2003, RD Nicholson J; **Migration Amendment (Duration of Detention) Bill 2003**, passed by the House of Representatives on 26 June 2003).

Whether removal to country of origin would constitute* refoulement *(return) under the Refugees Convention

The failure to incorporate the Refugees Convention into Australia's domestic law meant that, even assuming that the applicant's allegations of fact as to his being a refugee would be established, s 198(6) of the Migration Act, providing for removal as soon as is reasonably practicable of an 'unlawful non-citizen' whose application for a visa has been refused and finally determined, was not subject to the *non-refoulement* (non-return) provisions of Article 33 of the Refugees Convention. ((***Applicant M38/2002 v MIMIA* [2003] FCA 458**, 15 May 2003)

Requirement of procedural fairness before exercise of discretion to disclose sensitive information to an applicant

In *NAFQ* the court accepted the Minister's claim of public interest immunity for documents that had been provided to the RRT under s 438 of the Migration Act. However, Moore J also held that there had been a denial of procedural fairness where the RRT, before exercising its discretion under s 438(3)(b) to disclose documents or information to the applicant or withhold them, had not given the applicant the opportunity to comment on Departmental advice about the significance of the documents (see ss 438(2)(a) and (b)). The RRT, in reviewing the refusal of refugee status, had a clear statutory mandate to have regard to the documents obtained from the Chinese authorities without disclosing them to the applicant, but that made it more significant for the applicant to have an opportunity to be heard first. An absence of procedural fairness constitutes an excess of jurisdiction which founds a writ of prohibition (cf Ryan J in *VBAC v Minister for Immigration and Indigenous Affairs* [2003] FCA 205, 17 March 2003), but in appropriate cases there might still be discretionary considerations for refusing relief. (***NAFQ v MIMIA* [2003] FCA 473,** 16 May 2002)

Discretion to refuse judicial review in view of availability of AAT review

The applicant, Ms McGowan, sought review of a decision by the Migration Agents Registration Board (the Board) to suspend her until she met certain conditions, and had also lodged an application with the Administrative Appeals Tribunal (AAT) shortly beforehand. Branson J exercised the court's discretion, both in relation to its jurisdiction to give relief under s 39B of the *Judiciary Act 1903* (Cth) and under s 10(2)(b)(ii) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), to decline to consider the application on the basis that there was an adequate alternative right of full merits review by the AAT. The respondent had indicated early in the proceedings that it would seek such an order and the proceedings were not well advanced. For the court to consider the application for judicial review could potentially result in further appeals to both the AAT and the court. (***McGowan v Migration Agents Registration Authority* [2003] FCA 482**, 20 May 2003)

Ministerial directions to ATSIC upheld

The Federal Court (Hely J) has upheld the legality of directions, concerning making grants to bodies where there may be a conflict of interest, given by the Minister to the Aboriginal and Torres Strait Islander Commission under s 12 of the *Aboriginal and Torres Strait Islander Commission Act 1989*. (***National Aboriginal and Torres Strait Islander Legal Services Secretariat v MIMIA* [2003] FCA 287**, 3 April 2003)

Administrative review and tribunals

Tasmanian review of administrative appeal processes

In December 2002, the Tasmanian State Service Commissioner released an Issues Paper on review of administrative appeal processes, for comment by 14 February 2003. The review is to make recommendations on the processes for effective review of administrative decision-making in Tasmania and the linkages that should exist between relevant agencies. Among the issues raised are opportunities for reduction of duplication, standardising arrangements for public access, common approaches to vexatious complaints and/or a 'public good' test for acceptance of cases, common mediation approaches, and administrative support and resourcing arrangements. (**State Service Commissioner, *Review of Administrative Appeal Processes: Issues Paper***, December 2002, available on the following website or from the office of the State Service Commissioner: http://www.ossc.tas.gov.au/issues/issues%20paper.pdf)

Ombudsman

European Ombudsman retires

The first European Ombudsman, Mr Jacob Soderman, appointed in 1995, retired on 31 March 2003. In January 2003 the European Parliament elected his successor, Dr Nikiforos Diamandouros, previously the first National Ombudsman of Greece (1998–2003). Mr Soderman's annual report for 2002 throws light on the development of the office of European Ombudsman. Since 1995 the Ombudsman has dealt with close to 12,000 complaints and opened over 1,500 investigations. Complaints exceeded 2,000 for the first time in 2002, an increase of 8% over the previous year; 92% were from individual citizens. Over 25% of complaints resulted in some benefit for the complainant. The major areas of complaint include lack or refusal of information, avoidable delay, unfairness, procedural errors and negligence; problems with calls for tenders for EU institutions were frequent. In 2002 Mr Soderman placed pressure on EU institutions to implement the Charter of Fundamental Rights, with some success, and sought in a variety of ways to increase public awareness of the right to complain to the Ombudsman. An opinion poll in 2002 showed that 87% of

European citizens were aware of their right to do so. The Ombudsman's website contains a comprehensive collection of material concerning the work of the office, including copies of decisions. (Source: **The European Ombudsman, Press Release No. 6/2003**, 24 March 2003; the website is at:
http://www.euro-ombudsman.eu.int/)

Freedom of information & privacy

Amendments to FOI Act to protect information relating to pornography sites and taxation matters

The Communications Legislation Amendment Bill (No. 1) 2002 will amend Part II of Schedule 2 to the *Freedom of Information Act 1982* (FOI Act) to exempt the Australian Broadcasting Authority (ABA), the Classification Board, the Classification Review Board and the Office of Film and Literature Classification in relation to documents containing offensive content copied from the Internet by the ABA pursuant to the scheme in Schedule 5 to the *Broadcasting Services Act 1992*, or containing information about how to access such material, eg the name of an Internet site, an IP address, a URL, a password or the name of a newsgroup. (Note also the AAT's decision that IP addresses and URLs in the possession of the ABA were exempt under section 40(1)(d) of the FOI Act: *Re Electronic Frontiers Australia Inc and Australian Broadcasting Authority* [2002] AATA 449, 12 June 2002.)

Information and documents protected by the secrecy provision in section 37 of the *Inspector–General of Taxation Act 2003* (see above under 'Government initiatives etc') have been made exempt under section 38 of the FOI Act by amendment to Schedule 3 of that Act.

Federal Privacy Commissioner's guidance on publicly available personal information

The Privacy Commissioner has published a new information sheet concerning privacy and publicly available personal information. This is a new and complex area for private sector firms, and the Privacy Commissioner's guidance should be of considerable assistance to them as well as being relevant to Commonwealth Government agencies. (**Information Sheet 17 – 2003, *Privacy and personal information that is publicly available***, February 2003; see website:
http://www.privacy.gov.au/publications/index.html)

Western Australian proposals for new privacy laws

The Western Australian Attorney–General, Mr Jim McGinty, has released draft proposals for introduction of privacy legislation that would apply to State and local government agencies and private contractors doing government work, and would extend to the private sector in relation to health information. The legislation would be contained in a distinct 'Privacy and Personal Information Act', and not be combined with any other legislation such as the WA FOI or State Records Acts. It would incorporate a set of Information Privacy Principles similar to those in other jurisdictions but adapted where necessary. Some kinds of personal information, known as 'sensitive information', would be subject to special restrictions. The proposals include expanding the present office of Information Commissioner, currently with FOI responsibilities only, into a State Privacy and Information Commissioner, with power to investigate and deal with complaints about interferences with the privacy of individuals. The proposed State Administrative Tribunal (see (2002) 35 *AIAL Forum* at 1–2) would be able to review compensation determinations and award damages up to $40,000. Submissions are due by 30 June 2003, and may be made to the Privacy Working Group in the Office of the Attorney–General or emailed to: jim–mcginty@dpc.wa.gov.au with subject heading: ATT: PRIVACY WORKING GROUP. (**Office of the Attorney–General for Western Australia,**

Privacy Legislation for Western Australia: Discussion Paper **and** ***Policy Research Paper***, May 2003, available from the link at:
http://www.ministers.wa.gov.au)

Queensland Parliamentary report on the use of 'commercial-in-confidence' in relation to contracts

The Public Accounts Committee of the Queensland Parliament has produced a useful report on 'commercial-in-confidence' arrangements in relation to contracts. This is the latest in a long line of reports and statements in many Australian jurisdictions dealing with similar issues. The report recognises that commercial-in-confidence clauses are frequently applied to material that is neither confidential nor likely to damage commercial interests if disclosed. It recommends that the Premier and Minister for Trade direct all public bodies to develop and adopt guidelines consistent with a set of principles set out by the Committee, including the broad principles that 'information should be made public unless there is a justifiable legal or commercial reason why it should not be' and that the 'information needs for public accountability and public interest should take precedence', and the need to specifically identify commercial-in-confidence information. It should not be necessary for taxpayers to rely on FOI provisions to scrutinise government financial management, the report says. In the Queensland context it is also necessary to find a way of removing a final contract approved by Cabinet from the Cabinet exemption in the FOI Act and instead applying a commercial-in-confidence regime consistent with the stated principles. (**Queensland Legislative Assembly, Public Accounts Committee,** ***Commercial-in-confidence arrangements*****, Report No 61**, November 2002)

Other developments

Recent Parliamentary Library papers on East Timorese asylum seekers and on the power to deport

Two recent Current Issues Briefs issued by the Commonwealth Parliamentary Library shed considerable light on two complex interconnected issues relating to deportation or acceptance of people or groups of people who do not currently have a right to remain in Australia despite strong community ties. (***The East Timorese Asylum Seekers: Legal Issues and Policy Implications Ten Years On*****, Current Issues Brief No 17 2002–03 (18 March 2003), and** ***The High Court and Deportation Under the Australian Constitution*****, Current Issues Brief No 26 2002–03 (15 April 2003), Information and Research Services, Commonwealth Parliamentary Library.** Current Issues Briefs are available from:
http://www.aph.gov.au/library/pubs/CIB/index.htm)

Updated chronology of changes in the Australian Public Service

The Commonwealth Parliamentary Library has updated its chronology of changes in the Australian Public Service (APS) since 1975, including tables of parliamentary publications related to the APS. (***Changes in the Australian Public Service 1975–2003*****, Chronology No 1 2002–3 (2 June 2003), published by the Information and Research Services, Commonwealth Parliamentary Library;** the chronology is available at the following website:
http://www.aph.gov.au/library/pubs/chron/2002-03/03chr01.pdf)

UK Parliament considers curbs on ministerial advisers – similar issues raised in Australia

The Public Administration Committee of the UK Parliament has drawn up a draft Civil Service Act which among other things would curb the numbers and powers of special ministerial advisers. They would be subject to rules designed to prevent abuse and provide for a duty to act with integrity and honesty. A separate order regulating their conduct would prevent them bullying civil servants and trying to make them break their duty to be impartial. They would no longer have the power to give orders to Whitehall civil servants. The proposal, still to be considered by the government, arose out of the 'Jo Moore affair' in which Ms Moore, a special adviser in the Department of Transport, told civil servants to take advantage of 11 September 2001 to 'bury bad news'. (***The Independent***, 27 May 2003)

Similar issues of accountability of ministerial staff were raised by Professor Patrick Weller in a recent Occasional Senate Lecture, and are part of the inquiry by the Senate Finance and Public Administration References Committee into the *Members of Parliament (Staff) Act 1984*, submissions for which closed on 23 May 2003. (***Canberra Times***, 31 May 2003; **Professor Patrick Weller, 'The Australian Public Service: Still Anonymous, Neutral and a Career Service?'**, delivered on 30 May 2003, which is expected to become available from website:
http://www.aph.gov.au/Senate/pubs/occa_lect/index.htm)

See also Professor Meredith Edwards 'Ministerial Advisers and the Search for Accountability' (2002) 34 *AIAL Forum* 1 and David Williams 'Commentary on Meredith Edwards' Paper' (2002) 34 *AIAL Forum* 7.

Endnotes

1 Hereafter the Minister's current title is referred to in case names by the initials 'MIMIA'.
2 See generally Dr Caron Beaton–Wells, 'Restoring the Rule of Law – Plaintiff S157/2002 v Commonwealth of Australia', (2003) *10 AJ Admin L* 125, and the papers by Duncan Kerr and David Bennett in (2003) 37 *AIAL Forum* at 1 and 20.

DISQUALIFICATION OF JUDGES FOR PECUNIARY OR PROPRIETARY INTERESTS IN THE OUTCOME OF LITIGATION

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This paper was awarded the 2003 AIAL Essay Prize in Administrative Law.

Abstract

In Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd, *a majority of the High Court abandoned the rule of automatic disqualification which had applied where a judge had a direct pecuniary interest in a party or the outcome of the case and adopted instead, a reasonable apprehension of bias principle of general application. This article considers the application of the reformulated reasonable apprehension of bias test in the context of direct shareholdings in a litigant corporation. By assessing the test against its rational foundations and taking into account practical considerations, it argues that the test is problematic. Against these conclusions, the benefits of the test of automatic disqualification are assessed. Furthermore, two important qualifications to this rule are examined: the doctrines of necessity and waiver. Using the underlying rational foundations of the rule, these doctrines are assessed and the proper scope of their exercise delineated. In light of this analysis, this article looks to reforms that could be made to clarify this area and concludes that given the need for the public confidence in the impartial administration of justice to be maintained, prevention of these cases is imperative. In this context, Canadian guidelines are examined and the recent Australian judicial guidelines entitled 'Guide to Judicial Conduct' published for the Council of Chief Justices of Australia in June 2002 are reviewed. Finally, this article concludes that for the rule against bias to function properly, all change must be consistent with the underlying need to preserve public confidence in the impartial administration of justice.*

Part 1—Introduction

Unquestionably central to the preservation of public confidence in the administration of justice is the perception of judicial impartiality. As Lord Denning aptly stated, '[j]ustice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking "that judge was biased."'[1] But do 'right-minded people' go away thinking that a judge was biased when he or she holds shares in a company which is a party to or connected with litigation before the court?

This is one of the issues concerning pecuniary interests that faced the High Court in the recent decision involving the joint appeals of *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd.*[2] In this case, a majority of the Court[3] took the

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opportunity to abandon the rule of automatic disqualification which had applied where a judge had a direct pecuniary interest in the outcome of the case and adopted instead, an apprehension of bias principle of general application.

It is against this background that this thesis will examine the English and Australian approaches to pecuniary interest and automatic disqualification, and assess whether the High Court's reformulation of the test is consistent with the rational and doctrinal foundations of preserving public confidence in the administration of justice. This question will be approached in the following way. Part 2 will analyse the tests emerging from the cases against the rationale of the rule against bias. In light of these doctrinal foundations, Part 3 will examine the role of necessity, waiver and disclosure. Part 4 will examine the role of judicial codes of conduct, which have been adopted in Canada and recently in Australia. It will consider the extent to which these codes contribute to the maintenance of public confidence in the administration of justice.

Bias can present itself in two broad forms, actual bias and the appearance of bias.[4] Cases of actual bias seldom arise.[5] It is undesirable to make such an allegation because of the difficulty of proving actual bias and the potential damage to the integrity of the system by pursuing such a case.[6] For these reasons, it is usually the approach that allegations of actual bias are not pursued and instead, applicants argue that there is an appearance of bias.[7]

However, the issue that remains is determining the most appropriate test to be employed when assessing cases of apprehended judicial bias. In order to fully understand the implications of *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd*, it is important to first examine the approaches taken to the doctrine leading up to the case. Where there is an appearance of bias, historically, the application of the doctrine has resulted in a distinction being made between pecuniary and non-pecuniary interests.

Direct Pecuniary or Proprietary Interest

Arising from the maxim *nemo debet esse judex in propria sua causa*, no man is to be a judge in his own cause, in *Dimes v Proprietors of Grand Junction Canal*,[8] Lord Campbell held that the existence of bias is effectively presumed where the judge is shown to have an interest in the outcome of the case they were to decide, thereby resulting in automatic disqualification. In *Dimes*, the decision of the Lord Chancellor was set aside on the ground that he had a substantial shareholding in the respondent company.[9] Pursuant to Deane J's influential judgment in *Webb v R*,[10] Australian courts have confined the application of this rule of automatic disqualification to cases where there is a direct pecuniary interest. Conversely, in England, in *R v Bow Street Magistrate, Ex parte Pinochet Ugarte (No 2)*,[11] the House of Lords took the opportunity to extend the rule of automatic disqualification to non-pecuniary interests.

Pinochet (No 2)

The highly publicised chain of events surrounding the attempted extradition of General Pinochet, former President of Chile, from England are well documented.[12] Generally, interest was elicited due to the importance of the proceedings for international and human rights law, matters which do not concern this paper. However, it is out of these circumstances that arose the bias allegation against Lord Hoffmann and it is therefore necessary to briefly outline the background to the case.

In October 1998, Pinochet was visiting England to seek medical treatment when he was arrested pursuant to s 8(1) of the *Extradition Act 1989* (UK), in relation to warrants alleging various gross violations of human rights committed whilst in office.[13] Pinochet argued against

the validity of his arrest and in the Divisional Court succeeded in having the warrants quashed.[14] The prosecuting authorities appealed the decision and it was the issue of his immunity as a former head of state that brought this case before the House of Lords.[15] Before the commencement of the hearing, Amnesty International, among other human rights bodies, obtained leave to intervene in the appeal.[16] The majority consisting of Lords Steyn, Nicholls and Hoffmann upheld the appeal, ruling that Pinochet did not enjoy immunity in respect of the crimes alleged.[17] The restoration of one of the warrants was made subject to a decision being made by the Home Secretary as to whether to issue an authority to proceed.[18]

However, after the judgment was given, it became known of two possible connections Lord Hoffmann had with Amnesty International.[19] First, it became known that Lord Hoffmann's wife, Lady Hoffmann, had worked with the international secretariat of Amnesty International since 1977.[20] The connection this might have with Lord Hoffmann was not pursued. The more important allegation was that Lord Hoffmann was a director and chairperson of Amnesty International Charity Limited which carries out the charitable work of Amnesty International.[21] Pinochet's solicitors brought the Home Secretary's attention to these matters, however it appears no weight was given to them and on 9 December 1998, the Home Secretary issued an authority to proceed.[22] Pinochet argued that Lord Hoffmann's connection with Amnesty International created an appearance of bias and thereby requested that the order be set aside or have no effect.[23]

Upon Lord Hewart's dictum that 'justice should not only be done, but should be manifestly and undoubtedly be seen to be done,'[24] the House of Lords rejected, or at least modified the distinction between pecuniary and non-pecuniary interests. Their Lordships sought to promote the wider policy consideration of maintaining confidence in the judicial process by expounding notions of causes, interests and favour.[25]

The uncertainty possibly generated by this movement away from the traditional dichotomy may be limited by the Court of Appeal's statements in *Locabail*, where the Court expressed its reticence to further expand the rule of automatic disqualification beyond cases involving pecuniary interests and the particular facts of *Pinochet (No 2)*.[26]

Non-Pecuniary Interests

In cases involving non-pecuniary interests, the reasonable apprehension of bias test has operated in Australia. As formulated in *Livesey v New South Wales Bar Association*,[27] and adopted by Deane J in *Webb*, the test is:[28]

> [W]hether in all the circumstances, a fair minded lay-observer with knowledge of the material objective facts might entertain a reasonable apprehension that [the judge] might not bring an impartial and unprejudiced mind to the resolution of the question in issue.

In contrast, in *R v Gough*,[29] the House of Lords adopted the test of whether there was a 'real danger' of bias in cases involving non-pecuniary interests.[30] The currency of this test was affirmed and guidance given in *Locabail*.[31] However, it is important to acknowledge article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[32] Jurisprudence under this article has found that impartiality is to be determined:[33]

> [A]ccording to a subjective test, that is on the basis of a personal conviction of a particular judge in a particular case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.

This test has two limbs, a subjective and objective limb. Jurisprudence under this Convention generally indicates for the objective limb, tests more in tune with a reasonable apprehension of bias test.[34] The Convention came into force in England on 2 October 2000 under the *Human Rights Act 1998* (UK) and possibly foreshadows a movement towards a reasonable apprehension of bias test.

Unified Test for Australia

In *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd*, the High Court received the opportunity to re-evaluate the question of which test to apply in cases involving pecuniary interests.

Ebner v The Official Trustee in Bankruptcy[35]

This case concerned proceedings brought under the preference provisions of the *Bankruptcy Act 1966* (Cth).[36] Ebner's husband was bankrupt. The ANZ bank though not a party to the proceedings was a creditor and contributed to the funding of the action brought by the Official Trustee. The Official Trustee was seeking a declaration under ss 120 and 121 that the transfer of property from Ebner to his wife was void.[37] The bank thereby had a financial interest in the outcome of the case. The case came before Goldberg J, who at the outset disclosed that he was a contingent beneficiary under a family trust which owned approximately 8000 shares in the bank and that he was also a director of the trustee company of the trust.[38] An objection was made to the judge hearing the case. This was overruled by Goldberg J who held as there was no possibility of any significant impact on the share price of the ANZ bank, he did not have a real pecuniary interest in the case and therefore no person could entertain a reasonable apprehension of bias.[39] The decision was appealed and came to the High Court upon the principle in *Dimes*, the appellant having conceded that it could not establish a reasonable apprehension of bias.

Clenae Pty Ltd v ANZ Banking Group Ltd[40]

This case concerned litigation between borrowers of a foreign currency loan and the ANZ bank.[41] The trial was heard before Mandie J and lasted 18 days. Mandie J reserved judgment for 18 months and during that time both a key witness and the judge's mother died.[42] Upon the death of the judge's mother, Mandie J acquired 2400 shares in the bank. Mandie J did not disclose his inheritance and gave judgment in favour of the bank. An appeal was made regarding the issue of bias and whether even if it did apply, necessity required he give judgment anyway.

In deciding these two cases, the majority of the High Court decided to abandon the automatic disqualification rule, opting for a general reasonable apprehension test in cases concerning both pecuniary and non-pecuniary interests. Whilst this reformulation presents issues for the various manifestations of bias, the scope of this paper is confined to evaluating the appropriateness of this test in cases involving pecuniary interests in the form of shareholdings.

Part 2—Automatic disqualification or reasonable apprehension of bias?

Rationale of the rule against bias

According to Sir Thomas Bingham, 'the administration of justice is one of the cardinal functions of civil society'.[43] Indeed, the fundamental importance that we place upon the administration of justice in contemporary society gives rise to the ancillary or implicit need to preserve public confidence in the judicial system. This public confidence can only be

achieved if judges, as the guardians of the administration of justice, are seen to be impartial and independent. As L'Heureux-Dubé J remarks:[44]

> Impartiality implies, and demands, that all parties before the courts be equal, and equal under the law, and deserve to have their individual claims resolved with this basic and fundamental notion in mind.

It is to these ends that the rule against bias operates, as merely one pillar amongst others supporting the preservation of public confidence in the judicial system.[45] Furthermore, in line with the concept that justice must be seen to be done, the purpose of the rule is not to inquire into whether *in fact* a judge is biased but to preserve the appearance of impartiality, thereby guarding against a possibility of bias rather than a probability of bias.[46] If this is the rationale of the rule, to what extent do the particular tests uphold this rationale?

Reasonable apprehension of bias test

In *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd*, the majority adopted a reasonable apprehension of bias test that should be applied uniformly to cases involving pecuniary interests. According to the majority, the application of this test requires two steps. First, it must be identified what is said that might influence the decision-maker to judge a case on a basis other than its legal or factual merits.[47] Secondly, there must be a clear articulation of the 'logical connection between the matter and the feared deviation from the course of deciding the case on its merits ... Only then can the reasonableness of the asserted apprehension of bias be assessed.'[48]

In a case involving a judge holding shares in a company in litigation before the court, the shareholding would be identified as the basis upon which a judge might be influenced in their decision-making. In relation to the second step, the majority suggests that a practical way of assessing the logical connection between the matter and the feared deviation (and thereby determining whether there is a reasonable apprehension), where it is not suggested the judge has any other connection to the litigation, is to ask the question 'whether there is a realistic possibility that the outcome of the litigation would affect the value of the shares'.[49]

Why did the court depart from precedent?

The reformulated test represents a significant departure from the principle in *Dimes* of automatic disqualification for judges holding a direct pecuniary interest in a litigant or the outcome of a case. It has been asserted the principle in *Dimes* reflects the notion that pecuniary interests are different in kind from other types of interests and therefore warrant special treatment. According to Allison, there are three key justifications for the law's historical regard of economic interests as a more egregious form of bias. First, it is argued that given an economic interest is usually more objectively recognisable, it renders it more easily proven than other sources of bias.[50] Secondly, it is argued that people have a greater expectation that decision-makers will be free of economic interests in comparison to other forms of bias.[51] Thirdly, it is argued that given the objectively identifiable nature, economic interests are possibly more preventable or able to be remedied in comparison to other forms of bias.[52] Whilst not empirically tested, these justifications appear to be valid observations of economic interests and are to a degree acknowledged by the Court.[53]

However, the majority rejects the traditional justification of *Dimes* that 'in such cases public confidence in the administration of justice requires that there be disqualification regardless of the particular circumstances.'[54] This is because, despite the adverse public perception regarding pecuniary interests, bias is a complex creature requiring an analysis of the particular circumstances of each case. In today's society of trusts and complex financial arrangements, economic interests begin to exhibit their own ambiguities. For instance, the

facts of *Ebner v Official Trustee in Bankruptcy* give rise to arguably a direct or indirect interest. Here Goldberg J was a contingent beneficiary under a discretionary trust, but also a director of the trustee company.[55] The Federal Court found that he had only an indirect interest.[56] However, it was validly argued that his status not only as a beneficiary but also as a director gave him an element of control that imbued his interest with the requisite element of directness.[57] However, such a line of inquiry focused on classifying the interest detracts from the real question of whether there is a reasonable apprehension that the judge has an *actual* interest in the outcome.[58] Therefore, according to the majority, 'at the level of purely financial interest, the variety of arrangements under which persons may order their affairs makes a rigid distinction between direct and indirect interests artificial and unsatisfactory.'[59] Hence, the majority argue that there is no 'bright line' distinguishing direct interests from indirect interests and thus a uniform, principled approach should be taken.[60]

Does the use of a unified test accord with the rationale of the rule against bias?

In principle

The reasonable apprehension of bias test is better suited to preserving public confidence in the public administration of justice as in theory, it operates to identify specifically that which could give rise to the perception of bias rather than merely being an arbitrary rule invoked by technicalities.[61] Further, public confidence in the administration of justice does not only require the perception of impartiality. As Sackville, Finn and Kenny JJ of the Federal Court state in *Ebner v Official Trustee in Bankruptcy*:[62]

> Why is it to be assumed that the confidence of fair-minded people in the administration of justice would be shaken by the existence of a direct pecuniary interest of no tangible value, but not by the waste of resources and the delays brought about by setting aside a judgment on the ground that the judge is disqualified for having such an interest?

Indeed, it is equally important that judicial officers sit when they are required to and do not become subject to the manipulations of the parties, who seek to improve their chance of winning by bringing such actions so as to influence the composition of the bench.[63]

In practice

The intuitive appeal of a single test of uniform application in the area of apprehended bias to a great extent disguises the problems this test can have in practice. As argued in *Webb*, the reasonable person test is an objective test which operates as a touchstone of public perception on any particular situation and is thereby central to the preservation of public confidence.[64] These sentiments are echoed in *Johnson v Johnson*[65] where the majority state 'the hypothetical reasonable observer of the judge's conduct ... is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment of some judges of the capacity or performance of their colleagues.'[66]

Therefore, it is a necessary implication that this test must be able to be properly undertaken. The majority give guidance to how this may be done in a simple case of shareholdings in a litigant by arguing that a relevant factor might be the effect of the outcome upon the share price.[67] It must be noted that whilst the majority did not consider the impact of litigation on share price to be the ultimate test and that the weight to be given to this consideration may vary from case to case, it did identify it as a relevant consideration and therefore requiring some attention. The majority does acknowledge that at times assessing the effect on share value may be a 'matter of serious difficulty'.[68]

However, it is argued that on most occasions this will be a largely problematic and difficult question of causation, in which complex sectoral and economic events must also be taken into account. As McHugh J states in *Gambotto v WCP Limited*:[69]

> Sharemarkets are driven by many factors, not all of them rational or fair. Even the share prices of long established and profitable companies may fluctuate as much as 50 per cent in the space of a year ... The 'herd mentality' exists in the stock market as in other areas of life.

Judges should not defer to market prices questions relating to the apprehension of bias. Indeed, the criticism the majority places upon the 'bright line' approach[70] in terms of distinguishing between direct and indirect interests can be similarly levelled at this test, because it is argued there will seldom be a bright line distinguishing outcomes that affect share price against those which are benign.

Furthermore, even if factors in a case indicate with some degree of certainty that the outcome will affect share price, the facts of *Clenae Pty Ltd v ANZ Banking Group Ltd* demonstrate it is uncertain against what evidentiary standards such factors will be assessed. In this case, a report was published in *The Age* newspaper. The report described the judge's decision as 'a ground breaking judgment for 1750 foreign currency loans arranged by the ANZ bank in the mid-1980s'[71] and asserted that the plaintiff's success could have prompted many other similar claims to be brought.[72] It is certainly arguable such media reporting could have affected share price and clearly its nature as a possible test case is a relevant consideration. Yet, Charles JA rejected the article as evidence of its being a test case in the absence of any other evidence.[73] The conclusion that there was no effect on share value is accepted by the High Court. However, the speculative nature of the market as described by McHugh J demonstrates that the market does not always act merely on substantiated evidence (as is required by Charles JA), but can also act on lesser sources, even rumour.[74] It is argued that it is beyond the role of judges to apply legal standards so as to second guess how the market will in fact process information and use this as a means of assessing a perception of bias.

Indeed, since the purpose of using the reasonable person test is to gauge public perception of the situation, requiring the ascertainment of the effect on share price could add an unrealistic layer of complexity, as the mere identification of the interest may in fact create the perception of bias. As Galligan argues, 'since public perception can be fickle, it might be that the slightest hint of bias will be enough to dint public confidence'.[75] In an area that must remain sensitive to public perceptions of impartiality in the justice system, as Field comments:[76]

> [I]t is difficult to escape thinking that the ordinary person in the street might not have come to the same view as did the High Court in its construction of the reasonable person regarding the question of a judge holding shares in a party to a matter before the court.

Does automatic disqualification meet these issues?

The advantage automatic disqualification has in this particular context is that it avoids the nebulous issue of effects on share price. By focusing on the interest to determine disqualification, it appears to be a more certain test. However, *Dimes* itself provides little guidance as to how the principle should be used.

The Scope of the Test

Pursuant to *Dimes*, automatic disqualification has been invoked where the judge has a direct pecuniary interest in a litigant or the outcome of the case. Traditionally, Australian courts

have maintained this position.[77] However, in *Pinochet (No 2)*, Lord Browne-Wilkinson argues that there is 'no good reason in principle for so limiting automatic disqualification.'[78] The expansion of automatic disqualification to cover non-pecuniary interests appears to be an extraordinary step by the House of Lords in *Pinochet (No 2)*, especially given that no arguments relating to the extension of automatic disqualification were presented by counsel.[79]

So what triggered this extension? The answer to this may lie in the problems associated with the real danger of bias test used in England for non-pecuniary interests. As Deane J outlines in *Webb*, the difficulty with the real danger test is that it inherently requires an assessment of whether in fact the judge was affected by the interest, and thereby can be potentially very damaging to the judge involved.[80] Furthermore, such an investigation is clearly unnecessary when it is remembered that the purpose of the rule is to guard against the appearance of bias. In light of these problems, it can seen why the House of Lords may have been hesitant to make such adverse conclusions about one of their fellow judges.

Narrow test for automatic disqualification

It is argued that *Dimes* should be applied only in cases where there is a direct pecuniary interest in a litigant or the outcome of the case.[81] Upon four premises, Kirby J in dissent, in *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd*, supports this strict approach. First, it is argued the principle in *Dimes*, as a well established authority in this area does provide a 'bright line' principle which relieves parties from inquiring into what could otherwise be intrusive and embarrassing matters.[82] Further, the longevity of the principle and influence it has had upon legal practice mitigates against change.[83] Secondly, drawing upon fundamental notions of human rights, it is argued that at a normative level, judicial independence requires forbidding a judge having a direct pecuniary interest in a party to a case.[84] Thirdly, it is highlighted that the trend in jurisdictions such as New Zealand,[85] Canada[86] and South Africa[87] has been to maintain a separate rule to deal with disqualification for pecuniary interests. Fourthly, analogies are made with fiduciary law. This is because the prophylactic nature of the rule is acknowledged. In the preservation of public confidence, there is a greater need for a strict rule to prevent the appearance of bias.[88] This together with its practical utility as a standard that promotes judicial integrity leads Kirby J to conclude that the principle in *Dimes* should be retained.

To mitigate against the principle of automatic disqualification being invoked for the merest of shareholdings, a *de minimis* exception should operate. However as Kirby J argues, given the prophylactic nature of the rule, it should only operate in cases which are truly *de minimis* and not those simply concerning small interests.[89] The pecuniary interest involved would need to be 'trivial and insubstantial'[90] before this exception could be invoked.

The benefit of invoking the narrow principle in *Dimes* can be seen for instance, in cases involving substantial shareholdings. Charles JA in *Clenae Pty Ltd v ANZ Banking Group Ltd* argues that in cases where a judge holds a substantial shareholding in a litigant, the benefit of the reasonable apprehension of bias test is that, despite the fact that there is no direct effect on share value, a judge may still be disqualified.[91] The majority in their judgment, in espousing a uniform test, do not make particular comments on this matter. It is possible to argue that such comments were not made because it was concluded that in neither case were the shareholdings seen as considerable. However, in this regard, it is argued that Gaudron J's qualification at least recognises this issue. According to Gaudron J, 'a substantial shareholding or financial interest automatically results in a judge's disqualification if the company concerned is a party to litigation or has an interest in its outcome.'[92] This is because the substantial nature of the shareholding would raise the reasonable apprehension that the judge's close association with the company would lead him or her to not bring an impartial mind to the resolution of the question in issue.[93]

However as Cranston argues, the problem lies in assessing when the shareholding becomes large enough so that partiality may be questioned.[94] To simply examine the ratio of the shareholding to the company's total issued share capital would not go far enough.[95] It would also be necessary to assess the value of the shares in comparison with the judge's total assets.[96] However, this is clearly an inappropriate invasion of the judge's privacy.[97] The rule of automatic disqualification avoids these problems.

The strength of automatic disqualification is that if strictly confined to cases involving direct pecuniary interests such as *Clenae Pty Ltd v ANZ Banking Group Ltd*, it is possible to introduce more certainty into this area. The court has greater experience in dealing with issues of directness and indirectness (such as in torts analysis) and is better equipped to draw such a distinction in comparison with share price issues. It is acknowledged that in instances involving indirect interests, the reasonable apprehension of bias test should be used. It is argued that in this instance, given the *indirect* nature of the interest, it is appropriate if not necessary to draw upon all relevant factors which may give rise to the perception of bias, the effect of the litigation on share price being merely one factor that allows the court to draw the relevant inference about the nature of the interest and its connection to the judge.

Overall, it can be seen that the general reasonable apprehension of bias test, whilst intuitively appealing, can be problematic in the context of direct pecuniary interests in the form of shareholdings. Therefore, in order to minimise these problems, it is argued that the narrow principle in *Dimes* should be applied in such cases.

Part 3—Necessity and waiver

Operating alongside the reasonable apprehension of bias test are the doctrines of waiver and necessity. Currently, these doctrines function as exceptions to disqualification. Given the underlying values at stake, it is therefore important to assess their role in this context.

Necessity

A finding of a reasonable apprehension of bias usually results in disqualification and any judgment given rendered voidable. However, the ultimate decision still lies within the discretion of the court.[98] The doctrine of necessity can be invoked to displace disqualification 'so as to enable the discharge of public functions in circumstances where, but for its operation, the discharge of those functions would be frustrated with consequent public or private detriment.'[99] Therefore, as articulated in *Dimes*, in certain circumstances a judge with a disqualifying interest may still be required to hear a case where no judge without such an interest is available to sit.[100]

How does the doctrine of necessity sit within the broader rationale for the rule against bias?

The doctrine of necessity has traditionally been justified as preventing a 'failure of justice.'[101] In part, public confidence in the administration of justice stems from access to justice and fair trials. Whilst ostensibly these goals require the absence of reasonably apprehended bias, in certain circumstances it may cause a greater injustice to the parties involved if they are denied the opportunity to have their case heard or the ability to put forward their case in the best possible manner.[102] According to the majority in *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd*, the facts of *Clenae Pty Ltd v ANZ Banking Group Ltd* demonstrate an example of where the doctrine was required. In this case, the trial lasted 18 days and a key witness had died. Therefore, in such circumstances, it would have been unfair to have set the judgment aside and a retrial ordered.[103] Such an act, of itself, could undermine public confidence in the administration of justice.

As the approach of the majority shows, the present approach to the doctrine of necessity appears to have moved away from the concept that it be invoked only where there is no judge without such an interest available to sit. In *Clenae Pty Ltd v ANZ Banking Group Ltd*, although inconvenient, it was not strictly 'necessary' for Mandie J to hear the case as another judge without a shareholding could have been available. It appears the Court is moving towards a far more pragmatic approach and this must be examined in light of the underlying principles. If there was truly a reasonable apprehension of bias (and not as in *Clenae Pty Ltd v ANZ Banking Group Ltd* where it was held one did not exist), it could be argued that the invoking of such a qualification out of practicality could undermine public confidence. As Gaudron and McHugh JJ state in *Laws*:[104]

> Whatever the precise scope of the doctrine of necessity in the natural justice context, it seems contrary to all principles of fairness, that on the ground of necessity, a person should have to submit to a decision made by a person who has already prejudged the issue.

Indeed, the appropriateness of judges hearing a case after such an allegation has been made and they are aware of the fact the appearance of impartiality has been questioned is doubtful.[105]

Constitutional problems?

In addition, there may be constitutional reasons why this qualification may be unacceptable. Flowing from the High Court decisions led by Chief Justice Mason in the 1990s, Chapter III of the *Constitution* has begun to be regarded as a source of rights, with a greater emphasis on implications being made on the *manner* in which federal courts exercise judicial power.[106] This was first recognised in *Polyukhovich v Commonwealth*.[107] For instance, Deane J argues one of the purposes of the separation of powers is to prevent arbitrary decision-making.[108] Therefore, in order to achieve this, judicial power must be exercised in accordance with 'the essential attributes of the curial process'.[109]

This reasoning was supported by Toohey and Gaudron JJ.[110] Whilst the content of such statements may appear uncertain,[111] the Court has given some direction as to their meaning. In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,[112] Gaudron J states that 'impartiality and the appearance of impartiality are defining features of judicial power.'[113] More specifically, it has been stated that due process requires the observance of natural justice. According to Gaudron J in *Harris v Caladine*:[114]

> Judicial power is usually defined in terms of its subject matter, but it is a power that, for complete definition, requires description of its dominant and essential characteristic, namely, that it is exercised in accordance with that process which is referred to as 'the judicial process'. Thus, in general terms, it is a power which... involves the application of the *rules of natural justice*.

Similarly, Mason CJ, Dawson and McHugh JJ in *Leeth v Commonwealth*[115] state:[116]

> It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power.

Whilst the activism of the Mason era does not appear to be a feature of the current High Court, this idea of judicial process was recently affirmed in *Bass v Permanent Trustee*[117] and may indicate an area of development. Indeed, some commentators believe there is a constitutionally protected right to natural justice.[118]

What does this mean for the doctrine of necessity?

If the rule against bias, as a pillar of natural justice, is an essential part of a curial system, any attempt to make a Chapter III court or a state court vested with federal jurisdiction[119] to act in conflict with these principles would be unconstitutional. It must be noted that whilst all previous expressions of this idea have been in the context of the legislature enacting legislation in conflict with these concepts,[120] there would appear no reason why the common law would not be bound by the same principles. This is because the underlying purpose of protecting judicial impartiality and public confidence in the administration of justice overarches both areas. As Gummow J states in *Grollo v Palmer*:[121]

> An objective of the exercise of the judicial power in each particular case is the satisfaction of the parties to the dispute and the general public that, by these procedures, justice has both been done and been seen to be done. Accordingly, the rules as to reasonable apprehension of bias in their application to the courts have, at their root, the doctrine of the separation of the judicial from the political heads of power...Their Lordships somewhat understated the position when observing in the *Boilermakers' Case* that the fundamental principle which makes a combination of actor and judge appear contrary to natural justice 'is not remote from that which inspires the theory of the separation of powers'.

Therefore, it would certainly appear a broad approach to the doctrine of necessity is undesirable. While the majority refrains from entering this dialogue in their judgment in *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd*, both Gaudron and Kirby JJ drew upon these notions to reject the viability of necessity as a widespread exception.

According to Gaudron J, based on her previous statements, impartiality and the appearance of impartiality are key features of judicial power and are guaranteed by the *Constitution*.[122] Therefore, as impartiality is a constitutional requirement, necessity should only be invoked where, if the particular judge does not sit, a court cannot be constituted to hear the case.[123] Furthermore, her Honour adds that since constitutional requirements are not simply required to maintain the rule of law but also public confidence in the judiciary, which itself has a key role in maintaining the federal nation as articulated in the *Constitution*, this qualification must be limited.[124]

Similarly, Kirby J acknowledges the constitutional requirement of due process.[125] However, his Honour does not use these ideas to specify in what way the qualification should be applied. Instead, he merely argues that necessity does not apply to the facts of *Clenae Pty Ltd v ANZ Banking Group Ltd*. According to Kirby J, despite the inconveniences attracted by a new trial in these circumstances, '[r]etrial is the price that is paid by our system of law for upholding fundamental legal and civil rights.'[126] Indeed, it appears to be a price that should be paid if it promotes public confidence by showing that judges who have an interest in a party do not participate in the case.[127]

These approaches show a better appreciation of the principles of impartiality which underlie the rule against bias and what is required to preserve public confidence in the administration of justice. Gaudron and Kirby JJ recognise the problematic nature of the doctrine of necessity and therefore sensibly restrict its application so that if another judge can hear the case, a retrial is required.

What does this mean for waiver?

Despite having the opportunity to make some obiter comments on this issue, the High Court has refrained from considering the waiver exception in either *Ebner v The Official Trustee in*

Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd or *Johnson v Johnson*. However, it may be possible to extrapolate from the comments made on necessity to this area.

Doctrine of waiver

In the well known case of *Vakauta v Kelly*,[128] the High Court clearly stated the need for the doctrine of waiver. The court stated that in a situation where there is a reasonable apprehension of bias, it would be unfair for a party who is legally represented to stand by and wait until judgment is given, then, because the judgment is unfavourable, attack the decision on the ground of bias.[129] This is because it gives that party an unfair choice as to accepting or rejecting the decision.[130] Therefore, in such a situation, the party is deemed to have waived any objection they have on this ground.

In England, this exception has received attention in *Pinochet (No 2)* and *Locabail*. In *Pinochet (No 2)* tacit approval was given to the exception. In this case, the House of Lords rejected the argument mounted by counsel for the prosecuting authorities that by raising with the Home Secretary the possibility of bias, Pinochet had chosen the Home Secretary as the arbiter of the dispute and had thereby waived his right to seek redress from the House of Lords.[131] However, the House of Lords rejected this argument on the facts, not on the basis that waiver is an unacceptable ground of review.[132]

The currency of the exception was subsequently affirmed in *Locabail* where the Court of Appeal invoked the waiver exception to dismiss an appeal made. In this case, the Court clearly stated that the law did not allow the parties involved to sit and do nothing and thereby their inaction was taken to have been a waiver of their rights to complain about the relevant issue of bias.[133] However, in neither of these cases did the English courts have to consider the position under a written constitution that preserves judicial impartiality.[134]

Should the waiver exception continue to operate in Australia?

According to the principles of natural justice said to be constitutionally entrenched via Chapter III, the waiver exception falls foul of the same problems as the doctrine of necessity.[135] First, if *Pinochet (No 2)* is considered, which was a highly publicised case, confidence in the administration of justice is likely to be undermined if a party can waive their objections. This is because the source which causes the apprehension of bias is not addressed but merely pushed aside for convenience, and still remains in the public eye. Therefore, such a situation leaves it open for the public to perceive that fundamental concepts of impartiality are secondary to notions of expedience. While not all cases will attract as much attention as *Pinochet (No 2)*, a factor like media attention should not determine whether the waiver exception should be invoked. Rather, a principled approach should be taken regardless of the nature of the case.

Furthermore, the effect of waiver on the parties involved must be acknowledged. In a situation described in *Commentaries on Judicial Conduct*,[136] a court official had written a letter to counsel describing the judge's shareholding in the litigant corporation in the case and requested that counsel consent to the judge sitting on the case. The uncomfortable position counsel is placed in is effectively described. The lawyer responded:[137]

> I feel that it is unfair to put counsel in this position. I personally felt under pressure to consent and to waive any objection ... or to risk being seen as a troublemaker – one who unreasonably insists on technicalities ... I fear you may form a negative impression of me ... The mere fact that counsel is being asked to waive shows that the court thinks there is no problem; otherwise the judge would automatically decline to sit and the Chief Justice would not have instructed the court official to consult counsel.

Whilst in the majority of cases, counsel may waive without hesitation, this exception does demonstrate the uncomfortable position counsel can be placed in when the issue arises.

Aside from these practical issues, it is unlikely that constitutional requirements can be waived.[138] Kirby J, while President of the New South Wales Court of Appeal, expressed his disapproval of the waiver exception. In *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd*,[139] Kirby P argued the entitlement to waive should not be regarded as a mere private right as it concerns public confidence in the judicial system.[140] Upon this premise, the private litigant cannot waive the public's rights.[141] Such statements were reiterated in *Najjar v Haines*.[142] However, whilst these sentiments were not specifically reaffirmed in the recent High Court cases,[143] these comments in conjunction with his Honour's statements regarding necessity in *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd* indicate that a similar position would be taken. Likewise, it is probable that Gaudron J would take the same approach.

What does this mean for disclosure?

At the beginning of a case, it is usual practice for a judge who believes they have a potentially disqualifying interest, to disclose this to the parties. Aside from providing the opportunity of waiver to the parties, it also allows parties to draw attention to potential issues possibly overlooked by the judge. Before the High Court, in relation to *Clenae Pty Ltd v ANZ Banking Group Ltd*, counsel argued that a failure to disclose invoked in and of itself automatic disqualification or a reasonable apprehension of bias.[144] This may have been inspired by Ormiston JA's remarks in *Gascor v Ellicott*[145] that in certain circumstances, a failure to disclose can provide, as a matter of evidence, a basis for the reasonable apprehension of bias.[146] In *Dovade*, the NSW Supreme Court acknowledged this issue but reserved its position on the matter.[147]

In *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd*, the majority held that whilst a matter of prudence, disclosure is neither a right nor a duty.[148] Further, the majority found that to classify disclosure as a duty generating legal consequences was unhelpful and could detract attention from the real issue of determining bias.[149]

The view of the majority that there is no strict duty of disclosure is a sensible one. First, to require a judge to disclose all personal and fiduciary duties would be difficult to enforce and a failure to disclose would not itself constitute a breach of natural justice.[150] Furthermore, to investigate this issue may involve an inquiry into the judge's actual intentions which is undesirable.[151] Nonetheless, judges should as a matter of prudent practice make every endeavour to be fully informed of their affairs and make the necessary disclosures as promptly as possible.

Part 4—Judicial codes of conduct

The vigorous debate in this area suggests that the current law may be unsatisfactory. On the one hand, the principle in *Dimes* governing pecuniary interests appears draconian and the frequent disqualification of judges would not engender public confidence. On the other hand, using the reasonable person to evaluate appearance of bias is a flexible device, but appears to be uncertain in its application and possibly overly pragmatic. Furthermore, whilst qualifications to the rule such as the doctrines of necessity and waiver are practical devices for minimising instances of disqualification, they do little to preserve the underlying values at stake.

In order to bring greater certainty to this area, Canada and Australia have adopted judicial codes of conduct. This Part will briefly introduce the concept of the judicial code by setting

out the main elements of the Canadian code. It will then evaluate the effectiveness of the Australian code in dealing with the issue of shareholdings of judges. It is proposed that a judicial code should reduce the frequency that perceived conflicts of interest arise and provide a coherent and efficient process for dealing with the issue once it arises that is sensitive to both the impracticalities of these cases and the important need for the appearance of the impartial administration of justice to be preserved.[152] While the Australian code goes some way towards achieving these objectives, it is argued that the code would be more effective if it engaged more thoroughly with some of the broader issues involved and canvassed the usefulness of devices such as restrictive share portfolios, blind trusts, and a disclosure regime.

Judicial codes: The Canadian model

In governing the substantive law of bias and conflicts of interest, Canada has taken a similar approach to Australia, relying upon the common law to resolve issues of disqualification.[153] There is currently no formal structured regime of reporting conflicts. The Canadian Judicial Council has sought to give clarity to the area via two main works. First, in 1991, the Council produced *Commentaries on Judicial Conduct*,[154] a text which does not issue commandments or provide answers but rather presents generally 'the factors involved in considering the problem and then a discussion, often putting opposing points of view, on how a large number of judges say they react to the practical problems which arise from time to time in the life of any judge.'[155] It is a brief, but useful text that outside the case law context, describes the types of conflicts judges may face and contains general comments about how a judge might approach the matter, drawing attention to the main issues and pertinent cases.

The *Commentaries on Judicial Conduct* is further supplemented by *Ethical Principles for Judges*,[156] which was written as a set of principles to assist judges deal with various issues they might face whilst on the bench. Like *Commentaries on Judicial Conduct*, this is a short document, but it concisely outlines the way in which judges might approach matters. For instance, in the context of pecuniary conflict of interest issues, the document states that owning an insurance policy, having a bank account, using a credit card or owning shares in a corporation through a mutual fund would not normally give rise to a perceived conflict.[157] It is argued that such practical examples are beneficial to both judges, lawyers and the general public about the scope of conflict issues. This is because at the heart of this area is balancing the need to maintain public perceptions in the impartiality of the justice system against the sensible operation of the rule. In normal circumstances, a case alleging an appearance of bias purely because a judge had a bank account with the litigant bank would be absurd, and yet could be argued by a desperate party, resulting in a waste of valuable resources.

Ethical Principles for Judges should be applauded for its comprehensive yet succinct nature, demonstrating that useful provisions in this area can be made.[158] Of course, judicial guidelines or codes are not unanimously supported. It is often argued that they are capable of misuse, can be over-general or on the other hand fastidiously detailed and generally unhelpful.[159] A discussion of the general benefits of written guidelines is beyond the scope of this work. However, in the context of pecuniary conflicts of interest, an area in which cases of conflict of interest can be easily foreseen and therefore avoided, guidelines are invaluable. As the Redcliffe-Maud Committee in England stated:[160]

> Rules of Conduct cannot create honesty; nor can they prevent deliberate dishonest or corrupt behaviour. Rather, they are a framework for reference embodying uniform minimum standards. Their special value is in situations which are intrinsically complicated, or are new to the individual involved, where they provide a substitute for working out the right course of action from first principles on each occasion.

In an area where there is a real tendency for overly pedantic 'conflict' to arise (for instance where a judge has a bank account), widely accepted guidelines can prevent such inferences arising.

The Australian code: 'Guide to Judicial Conduct'

A) Background

In June 2002, the Australian Institute of Judicial Administration published for the Council of Chief Justices of Australia a '*Guide to Judicial Conduct*'.[161] This guide was undertaken by two retired Supreme Court Judges, the Hon Sam Jacobs, a former judge of the Supreme Court of South Australia and the Hon Jon Clarke, a former judge of the Court of Appeal of the Supreme Court of NSW, who was subsequently replaced by Brian Cohen, a former judge of the Supreme Court of NSW.[162] The scope of the task was to prepare a brief statement of principles which reflected judicial attitudes to issues of judicial conduct.[163] These principles were to be relevant to particular issues and therefore intended to be of guidance to members of the judiciary.[164]

In order to collate judicial attitudes, a survey was conducted throughout Australia.[165] This survey was based partly on the judges' own experiences but mainly from Thomas' *Judicial Ethics in Australia* and the two Canadian texts: *Commentaries on Judicial Conduct* and *Ethical Principles for Judges.*[166] The survey was completed by three members of each court in each state nominated by the Chief Justice of each respective court.[167] The work in a similar fashion to the Canadian texts seeks to give 'practical guidance to members of the Australian judiciary at all levels', thereby clearly stating its aim to be a positive and constructive source for judges to refer to in particular situations.[168]

Chapter three of the guide, entitled 'Impartiality' specifically addresses the issue of judges' shareholdings in litigant companies or companies associated with litigants. The guide briefly summarises the case law and the need for disclosure and prudently advises that it may be wise to lessen the range of investment in public companies so as to reduce the need for frequent disclosure. Further, it suggests that shareholding in a public investment company or a managed fund might be a sensible alternative.[169]

B) Effectiveness of the Guide

Preventing conflicts of interest

One obvious way to avoid pecuniary conflicts of interest involving shares is to impose a strict rule that judges may not own shares.[170] Whilst achieving the aim, it seems unduly restrictive and unnecessary and could well deter worthy candidates from accepting positions on the bench. The approach the guide takes is to recommend that judges undertake proper financial planning to avoid such conflicts.[171] The guide is therefore sensible in its approach, but does not detail what 'proper financial planning' might involve. Different devices, such as restricted share portfolios and blind trusts have advantages and disadvantages, which could have been usefully addressed by the guide. Outside the area of financial planning, another possible device for preventing conflicts of interest is a disclosure regime. Again, the merits of this device could have been usefully canvassed in the guide.

Restricted share portfolios?

It is possible for a judge to assess the kinds of companies that often litigate before the court and choose not to invest in those companies. For instance, McHugh J has made the conscious decision not to invest in insurance companies or newspaper companies.[172] However, this is a difficult thing for judges to do as the foreseeability of conflicts in everything but the most obvious of cases is uncertain.[173] Furthermore, the complexity of corporate

arrangements in modern society may make it difficult for a judge who owns shares to actually know that they are financially interested in a litigant corporation because they own shares in an ostensibly unrelated corporation.[174] Judges are extremely busy individuals, for whom it would be an onerous task to monitor and assess all potential conflicts.[175] It would appear, for these reasons Kirby J has chosen not to invest in shares at all.[176] However, it seems unfair to require judges to be deprived from investing in large successful companies, who by their very nature will be involved in litigation.

Blind trusts?

Upon appointment, judges could divest themselves of all shares and ask for the wealth to be reinvested by a mutual fund or trustee of a blind trust.[177] The key benefit of such arrangements is that it allows judges to continue to reap the rewards of modern commercial investments but by erecting a barrier between a judge and their investments, the central factor of knowledge of which companies have been invested in is eliminated, thereby removing any possibility that judgment can be affected.[178]

The trust is a useful device for specifically addressing the issue which gives rise to the appearance of bias. It is not the ownership of shares itself that causes the problem, but the knowledge that is associated with ownership. Therefore, the blindness feature is essential in avoiding such conflicts.[179]

It is argued that the guide should have specifically canvassed the blind trust as a device for avoiding such conflicts. Furthermore, it should have detailed the problems associated with blind trusts for judges. It is an expensive device and requires the judge to place a large amount of discretion with a trustee.[180] It may be financially imprudent to liquidate all assets before passing that money to the trustee and therefore tax law may need to be amended to provide roll-over relief or an exemption from capital gains tax liability. Further, the trustee has a duty to account and the judge has personal tax liabilities they must be able to truthfully meet.[181] These are not insurmountable problems and could be met by incorporating the use of auditors and other professionals, but these would add to the cost of such arrangements.

Disclosure regime?

Another issue that is not addressed by the guide is the question of whether Australia should adopt a formalised system of disclosure. If the court as a whole is responsible for the impartial administration of justice, it may be that a court-appointed registrar could alone be informed of the investments of the judges in the court and thereby be responsible for avoiding conflicts.[182] The benefit of such an approach is that the judge's financial affairs remain private, even from other members of the bench, but also allows a degree of planning to avoid conflicts. This would be a further step towards ensuring the accountability the public expects from the judiciary. The guide could have performed a useful function in canvassing the viability of such an idea and assessing what support it might receive.

In general, the guide can be viewed as a welcome addition to this area of debate. It raises the importance of judges considering how their investments interrelate with their judicial office. However, it would have been beneficial if greater analysis had been given to the issues of blind trust and restricted share portfolios and the concept of a formal disclosure system.

ii) Dealing with the issue of conflicts of interest

Practical examples

Assuming realistically that financial conflict of interest issues continue to arise, it is equally important for the guide to give some direction as to how such issues should be dealt with. The guide sets out broad descriptions of the issues that might give rise to perceptions of bias, in order to focus judges' attention to these matters. However, it is argued that the guide would have been more useful if it articulated, by using clear examples, circumstances in which a judge should or should not disqualify themselves. For instance, in contemporary society, a spouse's share portfolio should not be seen as source from which to raise the issue of an appearance of bias. However, if it became known that the spouse was not an active owner of those shares, but that the shares were in the primary control of the judge, more suspicion may be aroused. As noted above, the value of guidelines is that they provide an alternative to working from first principles on each occasion.[183] While examples are not a substitute for clear principles, they can perform a useful function, particularly in an area where public perception is so important. Clear examples can give guidance to the court and hopefully ensure that a balance is struck between preventing frivolous arguments being aired by litigants, and judges adopting an overly pragmatic approach.

Who should determine whether a judge should sit? Judge or court?

One issue that is dealt with by the guide is who should in fact determine the issue of disqualification. Traditionally, the practice has been for the judge concerned to hear and decide upon such objections made against him or her. The guide endorses this approach, adding that judges may do so in consultation with judicial colleagues.[184] Where there is uncertainty, the guide recommends that the judge should raise this issue at the earliest time with the head of the jurisdiction, the person in charge of listing and the parties or their legal advisers.[185] However, in taking this approach, the guide has not moved from traditional practice and does not address the problems with this approach.

If one were to step back and evaluate this practice it would appear to be a classic case of being a judge in one's own cause.[186] The validity of this practice publicly gained attention in *Kartinyeri v Commonwealth*.[187] In this case, an appeal was made to the High Court regarding the status of the *Hindmarsh Island Bridge Act 1997* (Cth). Before the case was heard in the Full Court, the plaintiffs sought that Callinan J be disqualified from hearing the case due to his prior involvement as a barrister in giving a joint opinion to the Minister for Aboriginal and Torres Strait Islander Affairs (a party in the case) on the legislation in question, thereby giving rise to the perception of bias from pre-judgment of the issue.[188] At first, Callinan J refused to stand aside. However, shortly after the substantive case had begun in the High Court, the plaintiffs sought review of his Honour's decision to continue to sit in the High Court.[189] The plaintiffs argued that the High Court has jurisdiction to disqualify one of its own members from determining a case in relation to issues of bias from two main sources. First, the statutory jurisdiction of the Court which requires that the principles of natural justice be observed in court proceedings. Secondly, the original jurisdiction of the Court in relation to constitutional matters pertaining to the essential requirements of Chapter III courts so that the Court may be properly constituted. [190]

This appeal was to be determined by the Full Court except Callinan J. However, the High Court did not resolve the question of whether the Full High Court has the power to disqualify a judge *of their own court* from sitting on a case, because shortly after the plaintiffs had sought review, Callinan J decided to disqualify himself.[191] His Honour's explanation for this change of stance was that he had been mistaken about the actual nature of his involvement in the case and now that he was fully aware of the work that he had done, he was of the opinion it was best for him to step aside.[192]

Assuming that the High Court does have the power to disqualify one of its own members,[193] the more interesting practical issue raised by Sir Anthony Mason is whether an appellate or collegiate court *should* determine the issue at first instance.[194] Seemingly based upon this idea and his own experience, Callinan J later said that '[i]f there is no legal inhibition upon it, and if it is convenient for it to be so made, I think it preferable that such a decision be made by another judge'.[195] However, the majority declined to adopt such a view, preferring to endorse the traditional approach that the judge determine the issue themselves.[196] An underlying factor supporting this may be the idea that in allowing the judge to first deal with the issue, it may be that they can easily explain the situation and extinguish any doubt rather than launching into a full scale investigation. However, it is argued that in this instance, neither the majority nor the minority have taken a convincing approach.

The traditional practice does not pay attention to the fundamental issue of addressing and preserving the appearance of impartiality. If the very process which purports to deal with this issue appears partisan, then it needs to be re-examined. On the other hand, requiring another judge to hear the matter is unappealing as it would be undesirable to make one judge assess the conduct of one of his or her peers. It would appear Mason's approach is the most preferable in this area. There is much to be said for requiring the court as a whole to address this issue, as the integrity and impartiality of any of the members of the court is a matter of concern for the whole court. Furthermore, this would also reduce the number of appeals on such decisions.

Again, the guide can be viewed as a welcome addition to this area of debate. However, it would have been beneficial if greater analysis had been given to the issue of the disqualification procedure. There are significant arguments against the current practice of judges themselves determining whether it is appropriate that they sit. Given that the guide recommends the retention of the status quo, it should at least have provided a reasoned approach for this position and addressed the concerns outlined above.

Part 5—Conclusion

The rule against bias plays a fundamental role in preserving confidence in the impartial administration of justice. *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd* has provided the High Court with the opportunity to re-examine this rule in the context of judicial disqualification for holding shares in a litigant corporation. At first blush, the majority's position of abandoning the ostensibly draconian and overly strict principle in *Dimes* is intuitively appealing. A reasonable apprehension of bias test of uniform application provides the court with an overarching principle which instead of operating automatically, aims to articulate that which creates the perception of bias and thereby addresses the underlying concerns at issue. However, a closer analysis reveals that in the context of direct pecuniary interests in the form of shareholdings, in practice, this test is problematic. The focus on the effect of the litigation on the value of the shares belies the ease with which public perception can be affected and is an inherently difficult and complex issue. Further, the strength of the rule lies in its prophylactic nature, which requires that it operate strictly and with certainty. On this level, the narrow principle in *Dimes* operating with a *de minimis* exception, provides the necessary strictness and certainty.

Operating alongside the reasonable apprehension of bias test are the considerations of waiver and necessity. Traditionally, these doctrines have functioned to require a judge to sit, despite a finding that he or she ought to be disqualified. However, as notions of procedural fairness have begun to be implied into Chapter III of the *Constitution*, the scope of the validity of these doctrines may be limited. Contrary to these notions, the majority's approach to the issue in *Clenae Pty Ltd v ANZ Banking Group Ltd* demonstrates that the court is moving towards a broader and more pragmatic application of the doctrine of necessity. However, such a relaxed approach to the doctrine disregards the underlying fact that if a

judge continues to sit despite the fact that there is a perception of bias, it is difficult to believe that public perceptions in the impartial administration of justice are maintained. It is for these reasons that the doctrine should only be invoked where there is no other judge that can hear the case.

While the Court has yet to deal recently with the issue of waiver, it is argued again that a strict approach should be taken. This is because a litigant may feel pressured to waive so as to not obstruct the court process, given that the judge has not felt it necessary to recuse themselves. Further, notions of impartiality extend beyond the parties involved and instances may arise in which the public perceive notions of expedience are more important than the appearance of impartiality.

What does this all mean for the Australian judicial process? The main conclusion to be seen from this analysis is that at the heart of preserving impartiality and public confidence in the administration of justice is the need to *prevent* such cases. In this regard, as can be seen from the Canadian context, guidelines can be useful. Australia has taken the step of producing guidelines which will hopefully add some clarity to the debate. However, disappointingly, this guide shies away from interesting practical steps such as canvassing debate regarding devices such as the blind trust, a closed register of interests and restricted share portfolios which are all practical options that need to be explored so as to find the right balance between allowing judges to invest freely and preventing perceived conflicts of interest. Further, once such an issue arises, there is much to be said for adopting the practice that where possible, the court as a whole take responsibility for the issue and collectively address whether the judge should sit.

What must remain at the fore of the analysis is the need to maintain public confidence in the impartial administration of justice. In order for the rule against bias to serve us well, any reform must be motivated by this consideration.

Endnotes

1 Metropolitan Properties Co (FGC) Ltd v Lannon [1969] 1 QB 577, 599.
2 (2000) 176 ALR 644.
3 Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; Kirby J dissenting.
4 For a general discussion of the rule against bias see: Mark Aronson and Bruce Dyer, Judicial Review of Administrative Action (2nd ed, LBC, Sydney, 2000) Chapter 10; P Craig, Administrative Law (3rd ed, Sweet & Maxwell, London, 1994) 326-34; Geoffrey Flick, Natural Justice: Principles and Practical Application (2nd ed, Butterworths, Sydney, 1984) Chapter 7; Richard Gordon, Judicial Review: Law and Procedure (2nd ed, Sweet & Maxwell, London) 30-3; De Smith, Woolf and Jowell, Judicial Review of Administrative Action (5th ed, Sweet & Maxwell, London, 1995) 528-9; B Jones, Garner's Administrative Law (7th ed, Butterworths, London, 1989) 170-7.
5 Locabail (UK) Ltd v Bayfield Properties Ltd [2000] 1 All ER 65, 70 ('Locabail')
6 Ibid 70, Charles Hollander and Simon Salzedo, Conflicts of Interest & Chinese Walls (Sweet & Maxwell, London, 2000) 123. However, it should be noted that under Part 8 of the Migration Act 1958 (Cth) bias challenges can only be made for migration decisions on the basis of actual bias. Therefore, this is the only area where actual bias challenges are growing. A recent case where this was argued is Debnath v MIMA [2001] FCA 27.
7 Aronson and Dyer, above n 4, 454.
8 (1852) 3 HLC 759 ('Dimes').
9 Ibid.
10 (1994) 181 CLR 41, 75 ('Webb').
11 [2000] 1 AC 119 ('Pinochet (No 2)').
12 Ibid 276; Nehal Bhuta, 'Justice without Borders? Prosecuting General Pinochet' (1999) 23 Melb U L Rev 499.
13 Pinochet (No 2) [2000] 1 AC 119,125 (Lord Browne-Wilkinson).
14 Ibid.
15 Ibid.
16 Ibid 126.
17 Ibid 127.
18 Ibid.

19 Ibid.
20 Ibid 128.
21 Ibid.
22 Ibid 129.
23 Ibid.
24 Ibid 135, citing Lord Hewart, R v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256, 259.
25 Ibid.
26 Locabail [2000] 1 All ER 65, 72-3.
27 (1983) 151 CLR 288 ('Livesey').
28 Webb (1993) 181 CLR 41, 67-8 (Deane J), citing Livesey (1983) 151 CLR 288, 293-4.
29 [1993] AC 646.
30 Ibid 670 (Lord Goff).
31 [2000] All ER 65, 73-4.
32 Opened for signature 4 November 1950, 213 UNTS 221, (entered into force 3 September 1953).
33 Hauschildt v Denmark (1989) 12 EHRR 266.
34 Hollander and Salzedo, above n 6 127; Piersack v Belgium (1982) 5 EHRR 169.
35 (1999) 91 FCR 353.
36 Ibid 355.
37 Ibid 356.
38 Ibid 359.
39 Ibid.
40 [1999] 2 VR 573.
41 Ibid 578.
42 Ibid 580.
43 Sir Thomas Bingham, 'Judicial Ethics', in Ross Cranston (ed), Legal Ethics and Professional Responsibility (Clarendon Press, Oxford, 1995), 35.
44 L'Heureux-Dubé J, 'Reflections on Judicial Independence, Impartiality and the Foundation of Equality', CIJL Yearbook, Vol VII, 95, cited by Justice D Ipp, 'Judicial Impartiality and Judicial Neutrality: Is there a Difference?' (2000) 19 Aust Bar Rev 212, 214.
45 Other rules might include the doctrine of separation of powers.
46 Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd (2000) 176 ALR 644, 647; Margaret Allars, 'Procedural Fairness: Disqualification Required by the Bias Rule' (1999) 4 The Judicial Review 269, 276.
47 Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd (2000) 176 ALR 644, 648.
48 Ibid.
49 Ibid 653.
50 John Allison, 'A Process Value Analysis of Decision-Maker Bias: The Case of Economic Conflicts of Interest' (1995) 32 American Bus L Jo 481, 515.
51 Ibid.
52 Ibid 516.
53 Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd (2000) 176 ALR 644, 652.
54 Webb (1993) 181 CLR 41, 75 (Deane J).
55 Ebner v Official Trustee in Bankruptcy (1999) 91 FCR 353, 362.
56 Ibid 368.
57 Ebner v The Official Trustee in Bankruptcy; Clenae v ANZ Banking Group Ltd, High Court Transcript of Proceedings, 14 June 2000, <http://www.austlii.edu.au>, [1095]-[1110].
58 Ibid [3620]-[3630].
59 Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd (2000) 176 ALR 644, 651.
60 Ibid 652-3; Dovade Pty Ltd v Westpac Banking Group (1999) 46 NSWLR 168, 188 ('Dovade').
61 Abimbola Olowofoyeku, 'The Nemo Judex: The Case Against Automatic Disqualification' (2000) Public Law 456, 473.
62 Ebner v Official Trustee in Bankruptcy (1999) 91 FCR 353, 365.
63 Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd (2000) 176 ALR 644, 650; Re JRL; Ex Parte CJL (1986) 161 CLR 342, 351 (Mason J).
64 Webb (1993) 181 CLR 41, 67-8 (Deane J).
65 (2000) 174 ALR 655.
66 Ibid 658.
67 Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ld v ANZ Banking Group Ltd (2000) 176 ALR 644, 653.
68 Ibid.
69 (1995) 182 CLR 432, 458.
70 Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ld v ANZ Banking Group Ltd (2000) 176 ALR 644, 653; Dovade (1999) 46 NSWLR 168, 188.

71 Anne Lampe, 'Quick to Fight ANZ Ruling', The Age (Melbourne), 16 October 1997, 3; Clenae Pty Ltd v ANZ Banking Group Ltd [1999] 2 VR 573, 592.
72 Clenae Pty Ltd v ANZ Banking Group Ltd [1999] 2 VR 573, 592.
73 Ibid 593.
74 This is reflected in the insider trading provisions of the Corporations Act 2001 (Cth). Section 1002A(1) refers to information that could affect share price as including matters of supposition.
75 D Galligan, Due Process and Fair Procedures: A Study of Administrative Procedure (Clarendon Press, Oxford, 1996), 446.
76 Andrew Field, 'The Law of Bias Revisited (and clarified by the High Court)' (August 2001) The Law Institute Journal 65, 69.
77 Eg Webb (1993) 181 CLR 41, Livesey (1983) 151 CLR 288.
78 Pinochet (No 2) [2000] 1 AC 119, 135.
79 Pinochet (No 2) [2000] 1 AC 119, 122-3, 129, 131-2.
80 Ibid 72.
81 Cf Charles JA in Clenae Pty Ltd v ANZ Banking Group Ltd [1999] 2 VR 573 who argues at 593 that the principle in Dimes should apply if at all, only where the judge has a direct pecuniary interest in the outcome of the case. This position is adopted by the English Court of Appeal in Locabail [2000] 1 All ER 65, 71. However, it is argued that the better view is to recognise that a perception of bias can manifest itself in either a connection with a litigant or the outcome of the litigation and therefore the broader test that includes both litigant and outcome should be adopted.
82 Ebner v The Official Trustee in Bankruptcy; Clenae Pty v ANZ Banking Group Ltd (2000) 176 ALR 644, 678.
83 Ibid.
84 Ibid 678-9.
85 Auckland Casino Ltd v Casino Control Authority [1995] 1 NZLR 142; BOC New Zealand Ltd v Trans Tasman Properties Ltd [1997] NZAR 49.
86 Ghiradosi v Minister of Highways for British Columbia [1966] SCR 367; Sacred Heart v Armstrong's Point (1961) 29 DLR (2d) 373; Energy Probe v Atomic Energy Control Board (1984) 8 DLR (4th) 735.
87 BTR Industries SA (Pty) Ltd v Metal & Allied Workers' Union [1992] 3 SA 673; President of the Republic of South Africa v South African Rugby Football Union [1999] 4 SA 147.
88 Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd (2000) 176 ALR 644, 682.
89 Ibid 686.
90 Ibid.
91 [1999] 2 VR 573, 594.
92 Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd (2000) 176 ALR 644, 666.
93 Ibid.
94 Ross Cranston, 'Disqualification of Judges for Interest, Association or Opinion' (1979) Public Law 237, 243.
95 Ibid.
96 Ibid.
97 Ibid.
98 Clenae Pty Ltd v ANZ Banking Group Ltd [1999] 2 VR 573, 603 (Callaway J).
99 Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70, 96 (Deane J) ('Laws').
100 Dimes (1852) 3 HLC 759, 787-8.
101 R Tracey, 'Disqualified Adjudicators: The Doctrine of Necessity in Public Law' (1982) Public Law 628.
102 Clenae Pty Ltd v ANZ Banking Group Ltd [1999] 2 VR 573, 603 (Callaway J).
103 Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd (2000) 176 ALR 644, 659.
104 Laws (1990) 170 CLR 70, 102.
105 Thomas McKevitt, 'The Rule of Necessity: Is Judicial Non-Disqualification Really Necessary?' (1996) 24 Hofstra L Rev 817, 838.
106 Leeth v Commonwealth (1992) 174 CLR 455, 490 (Deane and Toohey JJ); Polyukhovich v Commonwealth (1991) 172 CLR 501; George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoffrey Lindell (ed), Future Directions in Australian Constitutional Law (Federation Press, ANU,1994) 185, 190; Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process' (1997) 23 Monash Uni L Rev 248; Christine Parker, 'Protection of Judicial Process as an Implied Constitutional Principle' (1994) 16 Adelaide L Rev 341; Fiona Wheeler, 'The Rise and Rise of Judicial Power under Chapter III of the Constitution: A Decade in Overview' (2001) 20 Aust Bar Rev 283; Fiona Wheeler ' The Separation of Federal Judicial Power: A Purposive Analysis' Ph D Thesis (Law Program, Research School of Social Sciences, ANU, 1999).The word constraints of this paper prevent an analysis of the merits of implying such rights, for discussion on this issue see, eg, Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 Melb U L Rev 677, Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 Fed L Rev 1.
107 (1991) 172 CLR 501.
108 Ibid 607.
109 Ibid (Deane J).
110 Ibid 689 (Toohey J), 703 (Gaudron J).

111 Eg Henry Burmester in his commentary to Linda Kirk, 'Chapter III and Legislative Interference with the Judicial Process: Abebe v Commonwealth and Nicholas v The Queen' in Adrienne Stone and George Williams (eds), The High Court at the Crossroads: Essays in Constitutional Law (Federation Press, ANU, 2000) 142-7, briefly critiques the discretionary nature of judges articulating the essential attributes of the curial system.
112 (1996) 189 CLR 1.
113 Ibid 25, see also discussion at 23-4.
114 (1991) 172 CLR 84, 150 (emphasis added).
115 (1992) 174 CLR 455.
116 Ibid 470.
117 (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
118 Eg Patrick Keyzer, 'Pfeiffer, Lange, The Common Law of the Constitution and the Constitutional Right to Natural Justice' (2000) 20 Aust Bar Rev 87, 92-3.
119 Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51.
120 Eg Polyukhovich v Commonwealth (1991) 172 CLR 501 and Leeth v Commonwealth (1992) 174 CLR 455 are examples of the situations where this discussion has arisen.
121 184 CLR 348, 394.
122 Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd (2000) 176 ALR 644, 662.
123 Ibid 667.
124 Ibid.
125 Ibid 670.
126 Ibid 690.
127 Ibid.
128 (1989) 167 CLR 568.
129 Ibid 572 (Brennan, Deane and Gaudron JJ).
130 Ibid.
131 Pinochet (No 2) [2000] 1 AC 119, 136-7, 141, 143.
132 Ibid.
133 Locabail [2000] 1 All ER 65, 87.
134 Enid Campbell, 'Waiver of Judicial Disqualification for Bias or Apprehended Bias – a Constitutional Issue', Constitutional Law and Policy Review Vol 2 (3) 1999, 41.
135 See ibid for a discussion of this issue.
136 Canadian Judicial Council, Commentaries on Judicial Conduct, (Les Editions Yvon Blais, Quebec, 1991).
137 Ibid 74.
138 Campbell, above n 134, 42-3.
139 (1998) 12 NSWLR 358.
140 Ibid 373.
141 Ibid.
142 (1991) 25 NSWLR 224, 229.
143 Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd (2000) 176 ALR 644; Johnson v Johnson 174 ALR 655.
144 Ebner v The Official Trustee in Bankruptcy; Clenae v ANZ Banking Group Ltd, High Court Transcript of Proceedings, 14 June 2000, <http://www.austlii.edu.au>, [2020].
145 [1997] 1 VR 332.
146 Ibid 361.
147 Dovade (1999) 46 NSWLR 168, 192.
148 Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd (2000) 176 ALR 644, 659-60.
149 Ibid.
150 Melissa Perry, Disqualification of Judges: Practice and Procedure Discussion Paper (Australian Institute of Judicial Administration, Melbourne, 2001) 89.
151 Ibid.
152 It is interesting to note that this is also the approach taken by the Committee of Inquiry in relation to politicians' interests: see Commonwealth, Report on Private Interest and Public Duty, Parl Paper No 353 (1979).
153 See Ghiradosi v Minister of Highways for British Columbia [1966] SCR 367; Sacred Heart v Armstrong's Point (1961) 29 DLR (2d) 373; Energy Probe v Atomic Energy Control Board (1984) 8 DLR (4th) 735.
154 Canadian Judicial Council, above n 136.
155 Ibid 5.
156 Canadian Judicial Council, Ethical Principles for Judges, (Ontario,1998).
157 Ibid 42.
158 This view is supported by Chief Justice John Doyle, 'Judicial Standards: Contemporary Constraints on Judges – The Australian Experience' (2001) 75 *ALJ* 96, 103.
159 Ibid 100-1, see also Chief Justice Lamer cited in Martin Friedland, A Place Apart: Judicial Independence and Accountability in Canada, (Canadian Judicial Council, Toronto, 1995) 144.

160 Prime Minister's Committee on Local Government Rules of Conduct (Lord Redcliffe-Maud, Chairman), Report, Cmnd. 5636, London, HMSO, 1974, 6, cited in Commonwealth, Report on Private Interest and Public Duty, Parl Paper No 353 (1979), 29.
161 AIJA, Guide to Judicial Conduct (2002, Australian Institute of Judicial Administration Inc).
162 Ibid vii.
163 Ibid.
164 Ibid.
165 Ibid.
166 Ibid.
167 Ibid.
168 Ibid 1.
169 Ibid 9.
170 Thomas White, 'To Have or Not to Have – Conflicts of Interest and Financial Planning for Judges' (1970) 35 Law and Contemporary Problems 202, 208.
171 AIJA, above n 161, 9.
172 Ebner v The Official Trustee in Bankruptcy; Clenae v ANZ Banking Group Ltd, High Court Transcript of Proceedings, 14 June 2000, <http://www.austlii.edu.au>, [410].
173 An example of an obvious case might be if a judge is an expert in defamation law and owns shares in a newspaper corporation.
174 White, above n 170, 208.
175 Ibid.
176 Ebner v The Official Trustee in Bankruptcy; Clenae v ANZ Banking Group Ltd, High Court Transcript of Proceedings, 14 June 2000, <http://www.austlii.edu.au>, [420].
177 White, above n 170, 210.
178 Ibid.
179 Ibid.
180 Ibid 217.
181 Ibid 218-19.
182 Professor Friedland also endorses the idea of a private system of disclosure: see Friedland, above n 159, 156.
183 See above, n 160.
184 AIJA, above n 161, 12-13.
185 Ibid, 12.
186 See eg Perry, above n 150, 90.
187 (1998) 195 CLR 337.
188 Sydney Tilmouth and George Williams, 'The High Court and the Disqualification of One of its Own' (1999) 73 *ALJ* 72, 73, Sir Anthony Mason, 'Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review' (1998) 1 Constitutional Law and Policy Review 21, 22.
189 Ibid.
190 Ibid.
191 Tilmouth and Williams, above n 188, 73.
192 Ibid.
193 For a detailed discussion of this issue see ibid.
194 Mason, above n 188, 22.
195 Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd (2000) 176 ALR 644, 691.
196 Ibid 661

RENEWING A GREAT IDEA FROM THE 1960s? THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA

*Ralph Simmonds**

Address given at the Annual Dinner of the AIAL Western Australian Chapter.

Introduction

My aim tonight is to reflect with you on an experience in institutional design that is also work in progress. In terms of the typology of administrative law, my paper raises issues of administrative process and bureaucratic rationality – it will become obvious that I do not regard the latter as an oxymoron.

My presentation is largely based on a paper I gave to a gathering of law reform commissions from across the Commonwealth in June of last year[1].

There are agencies like the Law Reform Commission of Western Australia (the Commission)[2] across the Commonwealth, all inspired, in different degrees, by what are now the Law Commission for England and Wales[3], and the Scottish Law Commission[4], both established in 1965[5]. The WA Commission had its origins, as will be explained shortly, in 1967, although we did not become a 'permanent' agency until the coming into force of the *Law Reform Commission Act 1972* (WA).

Now skip forward to 2003. We still operate under the same legislation, but, as I will also explain, we underwent a fairly dramatic restructure, in 1997, that very much changed how we worked. In a lovely closing of an historical loop, I learnt at the 2002 ALRAC that we were recently studied very closely by the Scottish Law Commission. They were (apparently) rather impressed by what they understood we had achieved. They particularly noted that our restructure had made us, in current 'bureau-speak', a lean agency. However, my source – a person very senior in the Scottish Commission – told me that in the final analysis they had decided not to follow 'the WA model'. He said, rather interestingly (and I suspect partly, but only partly, in jest), that they feared the new Scottish parliament would welcome such a restructure for the opportunity it would afford to reduce the Scottish Commission's funding.

I concluded from that exchange, not only that bureaucratic rationality was alive and well in Scotland, in partnership with a Scottish sense of humour, but also that we must have done something of interest to people other than ourselves.

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So just what have we done, and why? How has it worked out? What (if anything) does this say about what one of the great ideas of the 1960s is good for?[6] And, perhaps even more interestingly, what are we *not* good for?

The plan of these remarks is this. I begin by describing where the WA Commission now finds itself, cataloguing how we got there, and what we have been doing with our structure lately, in so doing providing my evaluation of the structure we have arrived at.

Then, to drive home my major points, and show that I am not parochial, I turn to look at creating another, national, organisation, one that would, like the Commission, be characterised by substantial part-time activity. I want to suggest that this sort of work requires continuing attention to single topics, and as such is not best done by law reform commissions. In some ways the AIAL is a model; but I want to suggest the generalisation of your institution. I do this drawing on an example from my main field of interest, commercial law.

30 Years of Law Reform in WA

WA has had a law reform body since 1967, and a permanent Commission with at least some full-time staff since 1972[7]. The Commission has had a history of considerable activity and success. But there were unmistakable signs of loss of momentum in more recent years.

The Commission over its first 30 years had produced 92 Final Reports.[8] In addition, it had produced 80 Discussion Papers (DPs). 53 Reports were implemented, in whole or in part; 6 did not require implementation; 6 did not recommend any legislative change; and thus 27 awaited implementation. At the request of the Attorney-General to whom we report, and to coincide with the thirtieth anniversary of the passage of our Act, we had published a detailed inventory of all of this activity[9]. That account showed the Commission and law reform in WA doing well. But it had not consistently been so.

Our history marks a waxing and waning of activity that was not always or even often explicable in terms of projects that dominated the Commission's agenda. Most recently, in the mid-1990s, the Commission had seen a clear weakening in governmental support manifest in fewer Commissioners, and fewer staff positions. This was not because law reform was not occurring. Major changes in social law, particularly in relation to health and education, involving formation of expert advisory committees and public consultation, as well as in the legal staples of commercial and public law, were afoot. But the Commission was not part of them.

There had been little change in the Commission's own modus operandi over this period[10]. It was measured, careful, technically thorough - and slow. DPs took on average 3.3 years, Final Reports 5.6 years. Most work was done using staff researchers, who could not be expected to be legally omnicompetent, and thus had to learn a Project's area as part of the process. Consultation was with the identified stakeholders, who were those who could be expected to respond to defined written proposals in the same form - in writing.

Against this background, the Commission in 1997 decided on a restructuring and on a new (for WA) approach to its work. It had parallels with the structure and approach being decided upon at the same time for what became the Law Commission of Canada[11].

The WA Commission went from 7 staff to 1, with no full-time researchers. Instead, we became geared to the use of consultants. Since 1997 we have made heavy use of them, with considerable results.

Our *Criminal and Civil Justice System Review*, Project 92 (1999)[12] is one illustration of what we were able to achieve that the Commission would have been hard pressed to achieve under its previous structure. In less than two years, over 50 consultants produced 27 Consultation Drafts (25 to 100 page documents) on different aspects of WA's civil and criminal justice system, as well as 3 further Consultation Drafts in the form of Background Papers that mapped out the basic characteristics of WA's civil and criminal justice system and standards for changes in them.

Project 92 also involved us conducting the widest range of public consultations in the Commission's history. These included 'Have your say' public meetings around Western Australia as well as an interactive television broadcast and a revamped Commission Web site.

The Final Report for Project 92 (also produced within the two year time frame) runs to 428 pages with 447 recommendations. With the Consultation Drafts and background papers, this represents the largest body of up-to-date literature on a state legal system in this country that has ever been produced at any one time.

Like the Canadians, we have found this approach to law reform has involved in it a much wider group than was the case previously. Like the Canadians too, we have discovered that we needed to develop a new set of skills, to do with project management[13]. This has been our principal practical challenge under this new approach to our work. It is one that has required considerable elements of what, in law reform commission terms at least, is creativity in the design of institutional arrangements. This creativity is manifest in the arrangements for our current large project, Project 94 *Aboriginal Customary Law*[14].

For Project 94[15], the Commission, with the advice of representatives of the indigenous community, appointed Ms Cheri Yavu-Kama-Harathuniam, a woman of the Cubbi Cubbi clan (North Queensland), as the full-time Project Manager, together with two fellow but non-indigenous members of the Crime Research Centre at the University of Western, Dr Neil Morgan and Dr Harry Blagg, as its Research Directors. We also had appointed two indigenous Special Commissioners for the project, in Mick Dodson and Beth Wood. In addition we had appointed a twelve person Aboriginal Research Reference Council, with its membership drawn from across the Aboriginal community in this state, including 'men and women elders, community representatives and relevant representatives of key indigenous agencies and peak bodies'[16]. The Special Commissioners and the Council will work throughout the project with the Research Directors, the Project Manager and the Commission on the development and implementation of the strategy for undertaking the research and consultation in the Aboriginal community that the project requires. That research and consultation have called for the development of protocols and procedures to respect the sensitivities and concerns, while encouraging the participation, of the Aboriginal communities across the state.

Out of this research and consultation, we expect there to be a series of papers and other material produced on a range of topics within the terms of reference. This is to permit further consultation to take place out of which the Final Report of the Commission can be prepared.

This structure is, like that we used for Project 92, quite different from anything that I understand the Commission to have used before the restructure. At the same time, the Project 94 structure is unlike the one we used for Project 92.

But beyond these sorts of changes in the way we have approached our work, restructuring went to the Commissioners themselves. We formalised the practical reality of recent years in WA, of a Commission of part-time Commissioners. There had been a full-time Commissioner, who was also the Executive Director. However, his role, with some notable exceptions, was primarily one of administrative coordination rather than directing policy formulation. The other Commissioners had all been part-time.

Now all of the Commissioners, including the Chairman, are part-time. We have an Executive Officer, our only full-time staff member, who coordinates meetings and other work of the Commissioners, keeps an eye on the structures we put in place for our projects (such as any specially appointed project management and research direction we contract in), and administers our office. The office has a part-time Finance Officer and editorial and secretarial staff on contract.

Further reform of the WA Law Reform Commission

It has become clear to us, from the work our restructuring has permitted us to do, that further reform of the Commission itself is needed.

The next step is non-lawyer representation on the Commission, rather like that in some other Australian states. We have begun this with the appointment of Special Commissioners for the purposes of our largest current reference, on Aboriginal Customary Law, as I have already indicated. But it seems to us there is scope for a position or positions of this sort on a regular basis, of a sort we understand the New South Wales Law Reform Commission has used.

Beyond this we would plan to use Project Commissioners, where we would be emulating our federal counterpart, the Australian Law Reform Commission (ALRC) as well as other Australian commissions. We would have such Commissioners appointed for their expertise in and capacity to manage particular projects, to further expedite deliberations at the Commission level.

But beyond these, we have continued to reflect on our structure. In the spirit of law reform, we want to ensure a healthy scepticism about ourselves as well as the legal system. Have we got the balance right, between the use of those with occasional connections with the process and those whose job it is (if not whose career it is: a different matter) to maintain the process?

My own view now is that, in a jurisdiction the size of WA and with the current budgetary environment, it is probably impossible to justify an establishment anything like that of the New South Wales Law Reform Commission (NSWLRC) or the ALRC. The size of our jurisdiction in particular is an issue. There simply are not enough possible candidates in, or interested in moving to, WA who are also likely to be attracted to full-time positions as Commissioners for fixed terms. Such terms are needed, in my view, to ensure the sort of periodic institutional renewal that I believe law reform agencies require. I do believe, however, there are sufficient numbers of candidates interested in part-time fixed term positions to provide the commissioners required. I also believe that the numbers of alumni commissioners thereby produced help to attract others.

What are law reform commissions like us good for? What are we not *best* for?

Our recent experience has also prompted me to ask these questions. Legal change is of course inevitable. The issue is the place for *directed* change, and within that for the sort that law reform agencies from the 1960s, like us or like ones with greater staff establishments, such as the ALRC or the NSWLRC, can help to produce.

In simple terms, I see the fit being where a recognisably legal issue of significance has arisen that Courts may not have confronted yet, or have confronted but are seen to have had difficulty with or not satisfactorily resolved. For their part, politicians are concerned that no ready solution of the issue has yet presented itself, they are not (yet) required themselves or through high profile arrangements (such as Royal Commissions) to produce one, and there is no specialised agency to which it would be 'more natural' to refer the matter. So that leaves out matters such as microeconomic reform (not sufficiently 'legal', and the 'solution' is clear) or the lessons of the collapse of the liability insurance market (the HIH Royal Commission). It leaves out (in Australia) reform of the law of insider trading (because of the Companies and Markets Advisory Committee).

But there is something more to this line of inquiry than that. I suggest that bodies like law reform agencies are not *optimal* for reform of an area where there is *already* outside government a commitment to, and ability to deliver on a continuing basis, high quality analysis and reform - whether or not this ability is the result of a law reform agency's work.

An obvious example for me is from commercial law, in the area of Personal Property Security Law reform. Here there is a coalition of academic and practising lawyers working as the Banking and Financial Services Law Association Personal Property Securities Committee. There was the ALRC's *Personal Property Securities* Interim Report No 64[17] on the subject. But the Committee has gone much further, both in technical terms, and in terms of building support for the project of modernising such law and making it uniform across Australia. There are lessons here, I believe.

Law reform by other means: the place for other institutions

The Personal Property Security Act (PPSA) project is a valuable case study for a number of reasons, and not only because it is one I am also engaged in, outside my work as a law reform commissioner. It is an area of considerable technical complexity for which law reform commissions would find it very difficult to assemble, let alone maintain, a strong team to tackle the issues. And such maintenance is necessary, in view of the way any new comprehensive law of this sort needs regular adjustment and updating at an equivalent level of sophistication to that of the original exercise. At least this has been the US and the Canadian experiences, with the law on which the PPSA is based – Article 9 of the Uniform Commercial Code[18]. Of interest are the common institutional arrangements adopted to deal with the matter in both countries, in Canada alongside its law reform agencies.

In both cases there are Uniform Law Conferences that are independent of government (a key element of law reform commissions, I believe), even if they have material support from governments. In the US, there is the National Conference of Commissioners of Uniform State Laws[19] and in Canada the Uniform Law Conference of Canada[20]. They both have membership drawn from lawyers in government and private practice and the academy, as well as from the bench. They can command the

array of sorts of specialised expertise that no law reform commission could have, let alone maintain, on its staff, nor afford to keep on a continuing retainer.

The US case is particularly interesting, because in the area of personal property security reform the Conference there works in partnership with another body, with even wider aims, not restricted to uniform or model laws, the American Law Institute (ALI)[21]. It has parallels outside the US, as the ALRC's *Managing Justice* Report No 89[22] notes, in the Singapore Academy of Law. And it has attracted attention, in *Managing Justice*, as a possible model to emulate in Australia, in an Australian Academy of Law[23].

Back to the Future: an Australian Academy of Law

In effect what I am commending here is a model that predates law reform commissions like the WA one, and that in a world like ours (rather than say that in the US) would exist alongside them. The model would seek to draw on the spirit of interest in the law for its own sake that I identify with the American Law Institute, on which the Australian Academy of Law is based.

Of course those involved in the law reform projects like the Article 9 one I have referred to have strongly instrumentalist aims. Some want law that is, for secured lenders (for whom most of them work), cheaper, faster, simpler, safer and more flexible, to use the language of the doyen of the would-be reformers of Australian secured transactions law, Professor David Allen of Bond University[24]. But there are others involved, with different instrumentalist aims, in service of such as consumers and governments.

What is of considerable interest in their projects is the way they come together over the project, and share an interest in better understanding that law in practical terms. My own (limited) experience, at the fringe of the matching Canadian PPSA enterprise, done through its Uniform Law Conference, was of a willingness to share experience, to talk through its implications, and work out legislative responses. This is as part of a continuing dialogue on the area of law under review; it is of a sort a discrete law reform reference would (rightly) not encourage because of our focus on the generation of the summative final report.

The ALI does all of this in a context of concern for 'legal improvement', as the ALI puts it, which may or may not translate into discrete reform proposals. It might yield something law reform commissions would find it hard to justify, a 'restatement' of areas of the law, like those in contract and torts that the ALI has produced. This is altogether apart from the Academy's possible contributions to the improvement of Australian legal education of the sort that attracted the ALRC's attention to the idea in their *Managing Justice* report.

Beyond these virtues, the Academy idea could not only assist in drawing on the resources of the national legal profession in the interests of law reform (as above), but also foster interchange and cooperation among constituencies from which its membership would be drawn. That is, in law reform terms, it would involve a partnership of such constituencies, without the Final Report pressures.

In these and other respects, the institution I have in mind embodies many of the virtues of your own Institute. The difference is largely I think in it its more general scope.

The Academy idea has not advanced much further since *Managing Justice*. It deserves to. And it deserves support in particular from bodies like yours, and from I would hope any one who has been even moderately convinced by my defence of one of the great ideas of the 1960s.

Endnotes

1 'Modernising Reforming National Law: Back to the Future? The Case for Another Institution', which was a paper for the Australasian Law Reform Agencies Conference (ALRAC) June, 2002, in Darwin. My title for this current version, as well as most of the ideas of the original version, borrow heavily from the work of Professor Rod Macdonald, FR Scott Professor of Public Law at McGill University, in particular 'Legal education on the threshold of the 1980's: whatever happened to the great ideas of the 60's?' (1980) 44 *Saskatchewan L Rev* 39; and 'Recommissioning Law Reform' (1997) 35 *Alberta L Rev* 831.

2 A mouthful: unlike our federal counterpart, we do not ever seem to have acquired a jurisdictionally portable acronym, like their 'ALRC'. 'LRCWA' has not caught on. So, as we are after all in Perth, I will from now on refer to the WA body as the Commission; others will have to be more distinctively described.

3 See http://www.lawcom.gov.uk/ (accessed 6 May 2003).

4 See http://www.scotlawcom.gov.uk/ (accessed 6 May 2003).

5 See Law Reform Commission of Western Australia, *30th Anniversary Reform Implementation Report* (Perth: the Commission, 2002), at 2.

6 Remembering, of course, the joke about the 1960s: If you can remember them, you weren't *really* there.

7 The material in this section is largely drawn from our *30th Anniversary Reform Implementation Report*, note 5, above.

8 For some Projects, of which there had been 92 brought to some sort of completion, more than one for the Project. Since then, we have produced one particularly noticeable further report: *Judicial Review of Administrative Decisions* (December 2002), with another, on contempt, close to completion. Preceding them were a number of further discussion papers, to add to the numbers ferred to in the text.

9 Our *30th Anniversary Reform Implementation Report*, note 5, above.

10 It is very well mapped out in the article by the last Executive Director of the Commission, Dr Peter Handford, in his 'The Changing Face of Law Reform' (1999) 73 *ALJ* 503.

11 Presaged by the most interesting article by Professor Rod Macdonald of McGill University (who was the inaugural President of the Commission) in his 'Recommissioning Law Reform', note 1, above.

12 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System* (Perth: the Commission, 1999).

13 I gather this from my conversations at ALRAC 2002, note 1, above, with Professor Roderick Wood of the Law Commission of Canada.

14 See our Web site for the terms of reference: http://www.wa.gov.au/lrc/, under 'Current references'.

15 The following text is from my paper 'Customary Law and Treaty: Notes for an Address', for the conference *Treaty - Advancing Reconciliation*, Murdoch University, 26 – 28 June 2002. That paper in turn drew on Neil Morgan, Harry Blagg and Cheri Yavu-Kama-Harathuniam, 'Aboriginal customary law in Western Australia', *Reform*, Issue 80 (2002) 11.

16 Morgan et al, note 15, above, at 12.

17 [Australian] Law Reform Commission, *Personal Property Securities* (Canberra: the Commission, 1993).

18 See a most useful recent account comparing the Canadian and US experiences, Ronald CC Cuming and Catherine Walsh, 'Revised Article 9 of the Uniform Commercial Code: Implications for the Canadian Personal Property Security Acts' (2001) 16 *Banking and Finance L Rev* 339.

19 See http://www.nccusl.org/nccusl/default.asp.

20 See http://www.ulcc.ca/en/home/.

21 See http://www.ali.org/ali/thisali.htm.

22 Australian Law Reform Commission, *Managing Justice* (Canberra: the Commission, 2000), at 150 – 154.

23 Ibid, at 150 ff.

24 His project is nicely chronicled in his 'Personal Property Security – a Long Long Trail A-Winding' (1999) 11 *Bond L Rev* 178. See also his more recent account, 'Uniform Personal Property Security Legislation for Australia [:] Introduction to the Workshop on Personal Property Security Law Reform' (2002) 14 *Bond L Rev* 1.

RECENT DEVELOPMENTS IN FREEDOM OF INFORMATION LAW

*Matthew Smith**

Paper presented at the ANU Public Law Weekend, Canberra, 2 November 2002,

An invitation to speak on 'recent developments' allows a broad discretion. I have read my present invitation as a request to review recent decisions of Australian tribunals and courts, and to use this as a launching pad for some comments on the current position of Freedom of Information (FOI).

My short impression is that activity on FOI in courts and tribunals since 2000 has been neither great in volume nor of general significance. However, I shall comment on the fourth FOI case to reach the High Court in twenty years of FOI. That case, *Shergold v Tanner,* is also the first for twelve years.[1]

In the Federal Court, I shall comment on the *Staff Development Case.* The other cases in that court which I located concerned:

- The interrelation of FOI and litigation in a court. In one case, it was accepted that a freedom of information request can be pursued concurrently with litigation without being an interference with the administration of justice.[2] Another case showed that it may be less easy to use in FOI proceedings material which was obtained during court proceedings.[3]

- An extension to legal professional privilege provided under the Extradition Act.[4] It was accepted in the Full Court that the concept of privilege embodied in s 42(1) of the FOI Act is that developed by the common law, ie with the current ambit set by a 'dominant' rather than 'sole' purpose test.

- The exemption for matter communicated in confidence by a foreign authority.[5] Wilcox J rejected an argument that the motives of the supplier might be relevant.

- The duty of agencies to search all data bases to which they have rights of access.[6] Beaumont J followed Victorian authorities and held that 'a document in the possession of the agency' embraced legal or constructive possession: a right and power to deal with the document in question, and was not confined to actual or physical possession.

- The ambit of a secrecy provision in the Migration Act.[7] The Full Court held that it did not prevent the Secretary divulging the name of the law enforcement agency in China which had supplied information leading to the applicant being refused a visa nor the words used in its request for confidentiality 'exclusive of their content'.

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In the State courts, no judgments on FOI have emerged from the NSW Supreme Court on appeal from the ADT, notwithstanding considerable activity in that Tribunal since it commenced in 1999.[8] Outside the Act:

- The Court of Appeal's cases exploring parliamentarians' rights of access to documents are of interest in their balancing of government secrecy against accountability.[9]
- An interesting recent judgment of Simpson J gave a broad effect to the FOI Act's protection against liability for defamation of suppliers of information to government.[10]
- Several judgments show plaintiffs using FOI legislation to investigate their claims before commencing litigation. In one of these, the plaintiff's case against the Commonwealth needed to rely entirely on documents obtained through FOI, due to Centrelink's policy of destruction after two years.[11]

In the Queensland Supreme Court, I found three FOI cases:

- A ruling that a communication from a local council was not from 'another government'.[12]
- Consideration of an exemption which applied unless 'disclosure is required by a compelling reason in the public interest'. [13]
- A ruling that the Local Government Association of Queensland was a 'body established for a public purpose by an enactment' and therefore subject to the Act. Atkinson J followed the approach that the Queensland FOI Act was directed towards opening to public scrutiny the information relating to public affairs held by agencies of the government and should not be given a restrictive reading.[14]

In South Australia a right of external appeal is to the District Court, but this jurisdiction seems seldom to be exercised and I found no recent decisions interpreting the legislation in that court or on appeal to the Supreme Court.

I found no decisions on the Tasmanian FOI Act.

In Victoria, I shall refer below to an important discussion in the Court of Appeal on the VCAT's 'override discretion'. I shall not attempt to assess the recent decision-making of that Tribunal, but in the Supreme Court I noted:

- A strong defence of a Tribunal decision which was not persuaded by the opinions of two witnesses called by the agency. Hedigan J said:

  > In my view, the Tribunal rightly stood against devising a principle by which persons exercising the statutory right to information might be so easily cut off from it, by a wide construction of the likelihood of impairment, supported by not much more than the statements of two persons who in effect work in conjunction with medical practitioners and not the members of the public.[15]

- Litigation over FOI requests concerning tendering processes for the Ambulance Service, and a Royal Commission into the handling of those requests. I have not attempted to explain any of this, but there is obviously an interesting narrative to be told by someone who is following it.
- A ruling allowing 321 FOI requests made by Esso arising out the Longford gas explosion to be aggregated when deciding whether their determination would substantially and unreasonably divert resources.[16]

In the Western Australian Supreme Court, I found:

- Two cases holding that physical possession is enough for a document to be a 'document of an agency'.[17]

- A ruling that an incorporated TV station run by three universities, a trotting club and the State government was not an 'agency' covered by the Act.[18]

In the Commonwealth AAT, FOI has continued to be a regular but minor part of its work. My impressions from the AAT decisions which pass in front of me as editor of the Administrative Appeals Reports are that:

- The FOI jurisdiction has been shrinking, and that cases deal mostly with the obsessions of private citizens and almost never with documents of much importance to government accountability.

- There has been a surge in 'adequacy of search' cases, which suggests increasing distrust of agencies, but the outcomes do not usually give foundation for this.

- The recent period of instability for that Tribunal arising from the long gestation of the ART does not seem to have adversely affected its work in FOI.

- Although the current members of the Tribunal seldom face novel points of interpretation of the Act, I think that recent cases show them evolving a more rigorous approach to the balancing of public interest which lies at the heart of many FOI cases. I shall return to this thought further below.

Finally, I shall return to an aspect of FOI which interested me during a short tenure on the NSW Administrative Decisions Tribunal,[19] and which continues to confront the current members of that Tribunal with awkward issues.[20] This is the power given to first instance FOI decision-makers under the NSW, Queensland, South Australian and Western Australian Acts and to the review bodies in Victoria and possibly also in South Australia and NSW, to decide to release documents notwithstanding that they may fall within a defined class of exemption. I shall refer to this as 'the override discretion'. My thesis proposed in the present paper is that this discretion is an important aspect of FOI legislation, and that it has been unfortunate that the Commonwealth Act has obscured its existence and has prevented the AAT and Federal Court giving it the emphasis and exploration which it deserves.

Shergold v Tanner

In this case,[21] an applicant sought access to consultants' reports concerning waterfront reform, but was presented in the AAT with the Principal Officer's certificate under s 36(2) that disclosure of the documents would be contrary to the public interest.[22] As a consequence, the AAT was confined by s 58(5) to considering whether 'there exist reasonable grounds' for that claim.

The issue for the High Court was whether the applicant could seek judicial review of the decision to sign the certificate. The Principal Officer argued that the Act implicitly foreclosed the Federal Court's jurisdiction under the ADJR Act or s 39B of the Judiciary Act through its provision that 'such a certificate, so long as it remains in force, establishes conclusively that the disclosure of that document would be contrary to the public interest'. The High Court rejected this contention in a short, unanimous, judgment.

I doubt whether this ruling will have general practical significance. There are significant hurdles of evidence, legal principle and costs which would seem to make judicial review of a conclusive certificate unattractive to most FOI litigants. Even assuming that evidence revealing the reasoning of the Principal Officer were discoverable without impermissible 'fishing', the litigant would then have to find reviewable error in this reasoning. As the judgment warns at [40]:

> It may be that various of the ground specified in s 5 [of the ADJR Act] can have but limited or no operation with respect to applications such as the present brought under the ADJR Act. For example, the range of relevant considerations may be very wide and the range of irrelevant considerations very narrow. The content of a requirement to provide natural justice to the person aggrieved by the decision may be very limited.

Beyond FOI, the judgment contains a useful recognition of 'the public law regime comprising the AAT Act, the Ombudsman Act and the ADJR Act',[23] under which the Federal Court usually exercises a jurisdiction over decisions overlapping the review powers of the AAT and Ombudsman, but in which its role is confined to considering 'whether the decision or action is lawful'.

In this respect, an interesting aspect of the judgment is the proposition at [27][24] that 'it is to be expected that the Parliament will clearly state its will ... where the Parliament, by redefining the jurisdiction of a federal court, withdraws rights and liabilities from what otherwise would be the engagement of Ch III' of the Constitution, and the suggestion at [33] that s 77(i) of the Constitution requires 'specificity' in a law defining the jurisdiction of a federal court. We might see elaboration of this reasoning, when the High Court considers the effect of the privative clauses inserted in the Migration Act by the 'Tampa' judicial review amendments.

The High Court did not find it necessary to reason from an appreciation of the objects of the FOI Act and its role in democratic government, and the judgment contains no reference to this. This is a pity, since it meant that the Court did not address a strong dissenting judgment of Burchett J in the Full Federal Court.

Burchett J thought that the object of the Act was to strike 'a balance between competing public interests' of secrecy and openness, and that taking a neutral approach to interpreting the Act was supported by previous dicta in the Federal Court against taking constructions leaning in favour of openness and accountability. He then confidently concluded that 'the manifest object of the provision for a conclusive certificate was to provide a ready means of establishing the existence of the exemption, or of an ingredient of it, and avoiding an inquiry upon legal evidence into the facts out of which it arose.'[25]

This reasoning proceeded from what I suggest below is a basic weakness in the Commonwealth FOI Act: that it is an Act which empowers only the release of documents which are not exempt, and leaves obscure and unregulated a discretion outside the Act to release documents where there is an overriding public interest in openness in relation to a particular document. These limitations mean that the Commonwealth Act can be characterised in its legal effect, not as an expression of Parliament's object generally to promote open government, but as an Act conferring only a limited right of access defined by exemption provisions which may be construed in accordance with their object of protecting secrecy. In legal terms, therefore, it is impossible to say that the Act 'promotes' either openness or secrecy as a general value of good government.

The reasoning of the other judges in the Court did not adopt reasoning inconsistent with such a 'neutral' or 'balanced' view of the Act. Black CJ avoided the topic by following reasoning similar to that taken by the High Court, drawing on the need for clarity if limitations on judicial review are intended. Finkelstein J approached the meaning of the phrase

'establishes conclusively' from the historical development of the common law of public interest immunity in judicial proceedings, rather than from an analysis of the stated or implicit objects of the Act.[26]

I suggest, in the light of all the judgments in this case and the previous judgments cited by Burchett J, that it is now clear that, without further reform of the Act, we cannot expect the Federal Court to adopt a general approach to the interpretation of the Commonwealth Act which favours government accountability. I suggest below that reforms would need to bring the override discretion under the Act, and to provide a clear statement that all documents are intended to be released where there is an overriding public interest in the promotion of open government.

Moreover, absent such reforms, it cannot be confidently predicted that the High Court would overrule the Federal Court's approach to construction of the Commonwealth Act[27] if it ever accepts another FOI case.

Staff Development Case

This line of cases with dauntingly long names[28] resulted from the failure of an apparently very sound business in 1998 to obtain further contracts under the Job Network program. It then tried to discover the criteria for financial viability which had been applied by the decision-makers. The Secretary resisted revealing under FOI not only the relevant parts of the Tender Assessment Operations Manual but also the particular assessment made of the applicant.

In the AAT the Secretary claimed exemptions under s 36 (for 'internal working documents'), s 39 (for 'documents affecting financial or property interests of the Commonwealth'), s 40 (for 'documents concerning certain operations of agencies'), s 43 (for 'documents relating to business affairs, etc'), and s 45 ('documents containing material obtained in confidence'). Some of these sections themselves contain various permutations which were separately argued. The Secretary was represented by Mr Peter Hanks QC and the proprietors of the business appeared in person.

The AAT's decision provides a mine of interesting information on the privatisation of government employment services and on how secrecy may or may not be beneficial to its operations. Deputy President Forgie identified and dealt with a multitude of issues arising under the exemptions claimed, and decided that none of them applied. It would be dangerous for me to attempt to summarise her reasoning shortly, both due to the convolutions of the statutory language and because the Federal Court has ordered the AAT to do the exercise again. However, I shall comment on the aspects of the Tribunal's reasoning which attracted attention in the Federal Court.

The first aspect concerns the Deputy President's rejection of the claim for exemption under s 36. Section 36 applies to a document which would 'disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency...'. I leave it to others to count how many sub-categories of documents this encompasses.

In the present case, the Deputy President concluded that the Operations Manual did not come within 'the category of documents described in s 36(1)(a)' because it 'does not contain any matter which, if disclosed, would disclose any consideration, in the sense of a consultation or deliberation, that has taken place. A consultation or deliberation may take place within the framework set out by the Operations Manual but the Operations Manual does not reveal it.'[29]

The Full Court thought that this revealed error of law 'in failing to consider whether or not disclosure of the documents would disclose matter **relating to**, as distinct from matter **in the nature of**, opinion, advice or recommendation or consultation or deliberation'.[30] It sent the matter back to allow the Tribunal to address this aspect of the definition, and then, if necessary, to consider the public interest under s 36(1)(b).

My comment is that this illustrates the pitfalls facing even the most meticulous Tribunal when FOI exemptions are framed with verbose definitions with rolled-up alternatives. The lesson might appear to be that the Deputy President would have been on safer territory if she had based her decision under s 36 on an assessment of public interests, particularly since this was the basis on which she excluded other claims for exemption. However, as I shall describe, the Court thought error of law had been made in this respect also.

The Secretary had mixed success in his attack on the Deputy President's rejection of the claim for exemption under s 43. That exemption covers documents which would disclose one of three classes of information:

(a) 'trade secrets';

(b) 'other information having a commercial value that would be, or could reasonably be expected to be destroyed or diminished if the information were disclosed'; and

(c) (attempting a paraphrase): information concerning business, professional commercial or financial affairs of a person, organization or undertaking if the disclosure either would 'reasonably be expected to unreasonably affect' that body's 'lawful business, commercial or financial affairs' or 'could reasonably be expected to prejudice the future supply of information' to the Commonwealth or an agency.

In the present case, a key finding of the Deputy President was that the Department was not engaged in any trade, business or commercial activity but in the provision of government services through the agency of others. She held that the information in the Operations manual did not disclose a 'trade secret' within (a), nor 'other information having a commercial value' within (b), nor information concerning business or commercial affairs within (c). Although she thought that there would be disclosure of 'financial affairs' within (c), she thought that the balance of public interests favoured disclosure and that therefore disclosure would not unreasonably affect those affairs.

The Full Court supported reasoning by the judge at first instance, Drummond J, who upheld the Tribunal's conclusions in relation to paragraphs 43(1)(a) and (b). This, essentially, was that the information could not qualify as a 'trade' secret nor have a 'commercial' value because the Department's activities of procuring private service providers could not be said to bear a commercial, as opposed to an administrative or governmental, character. This is an important distinction in relation to government procurement decisions, and it is pleasing to see it being kept alive by the Court.

However, the Full Court seems to have assumed that the tendering activities might relate to 'financial affairs' within paragraph 43(1)(c), since it remitted this aspect for further consideration. It differed from Drummond J in relation to this paragraph, by finding error of law vitiating the Tribunal's reasoning that disclosure would not unreasonably affect the Commonwealth. It found the same error in the Tribunal's reasoning in relation to ss 39(1) and 40(1)(d) which refused to find a 'substantial adverse effect' from disclosure of the Operations Manual.

The Full Court held that the Tribunal's conclusions on these exemptions were dependent upon two positive factual findings:

(i) that even without disclosure it was open to a tenderer to manipulate the information given in its application; and

(ii) that if the criteria were known the Department would continue to have the same opportunities to identify any attempt to manipulate information.

The Court held that there was no evidence before the Tribunal which supported the making of these findings, so that the Tribunal's conclusions were therefore the result of an error of law and had to be set aside.[31]

As Drummond J's judgment makes clear, the Department's case in the Tribunal involved a 'paucity of proof as to the existence of a real risk of manipulation if the documents were disclosed',[32] and it might have been possible for the Tribunal to have rejected the claimed exemptions by going no further than to be unpersuaded by the mere assertion by the Department's witness that this would be the effect of disclosure. However, this was not the Tribunal's reasoning, and the Full Court could not uphold the decision on this basis.

As a precedent, this aspect of the case may seem to have slight importance, since it turns on particular reasoning by the Tribunal on the particular evidence presented in the case. However, I think that it and several other recent AAT cases can be used to illuminate several general points concerning the assessment of countervailing public interests under the FOI Act.

Assessing public interests bearing on the release of information

Such assessments are required under the Act through various phrases which define the categories of exemption and also, as I shall suggest below, when a decision-maker is given an ultimate discretion not to claim an exemption. For my present purposes, it is not necessary to dwell on differences between asking whether 'disclosure would be contrary to the public interest',[33] or 'disclosure would, on balance, be in the public interest',[34] or there would be 'unreasonable disclosure',[35] or 'unreasonably affect that person adversely',[36] or 'undue disturbance'.[37]

Generally, in relation to these assessments, recent cases suggest the following points:

(i) Each of these phrases invites, in the context of the particular interests protected by the exemption in which they occur, a judgment by the decision-maker in which the threat to the protected interests is measured and weighed against the interests of openness. The decision-maker then must make a value judgment which is informed by the objects of the legislation. So much is obvious, but not very helpful. General judicial expositions of 'the public interest' in FOI or other contexts describe this process,[38] but are of limited assistance since they only reveal the protean nature of public interest considerations and the need to address the particular circumstances of the case and the precise words in which a public interest test is expressed.

(ii) Recent assessments by review tribunals and information commissioners have accepted that general criteria favouring secrecy which were confidently proposed in the past have lost weight over the years.[39] One reason for this, I suggest, is that they have come to appear more in the nature of incantations than predictions which are verified by experience.[40] Recent cases show an appreciation that it is necessary to examine the reality of general predictions as to the effects of disclosure: both harmful and beneficial, and to do so with as much particularity as possible to the circumstances of the document in question.[41]

(iii) The Full Federal Court's insistence in the *Staff Development case* that positive findings on the effect of disclosure must be supported by evidence will reinforce this trend. When these issues are litigated in a review Tribunal, it is no longer sufficient to propose findings of adverse consequences from the advocate's table, and both parties need to attempt to locate and qualify the best available witnesses, armed with pertinent experience or reasoned opinion.[42] The Tribunal must then make its judgment on the evidence produced. Given the speculative nature of predictive opinions, the Tribunal will seldom be *bound* to be persuaded by such opinions.[43] If the evidence fails to persuade it of some anticipated danger or benefit then it may need to fall back on the statutory onus of proof.[44]

(iv) Another lesson from *Staff Development* is that there is a danger that the focus of a public interest assessment may be lost sight of where an agency distracts a Tribunal with a multitude of alternative claims for exemption. It is common that a single concern will dominate an agency's resistance to disclosure. In my view, that concern is likely to be better focused and proven to a review Tribunal if the advocate attempts to refine and formulate as precisely as possible the need for secrecy perceived by his or her client in relation to the particular document. Often, in my experience, if this is done, a single most applicable exemption can be located, other distracting issues of law and fact can be abandoned, and everyone in the proceedings will benefit from the isolation of real rather than meretricious issues. Even where multiple public interest 'factors' are identified, I suggest that the assessment of their strength will be greatly assisted if they are formulated with as much specificity to the particular case as possible, and then ranked in order of weight on each side of the balance. The outcome *may* then appear both obvious and satisfying. At times it seems to me that agency representatives - and even review Tribunals - lose sight of the ball when chasing ingeniously devised arguments for multiple alternative exemptions. Unfortunately, FOI legislation gives many opportunities for such a game to be played, but it is most unattractive to the spectators!

The 'override' discretion

A concern that FOI decision-making at all levels should be able to focus on the secrecy/openness balance which may justify a decision to refuse access to a particular document brings me to the end of my paper: where observations on recent developments overlap with discussion of the past and of future reform.

The 1979 Senate Committee report on the Commonwealth FOI Bill thought that the provisions which became ss 11, 14, and 18 of the Act demonstrated 'the bias in the Bill in favour of disclosure', and that s 14:

> makes it clear that even if the decision-maker is satisfied that a particular document comes within one or other of the exemptions specified by the Bill, that is by no means the end of the matter. The absolute duty to disclose a non-exempt document is not accompanied by the duty not to disclose a document which is exempt. The decision-maker still has a residual discretion to disclose, conferred upon him [by s 14][45] ... 'Properly' here is not a term of legal art: we read it rather as an invitation, which we wholly support, for decision-makers to apply a commonsense rather than narrowly technical approach to the application of the Bill's exemption provisions, and to confine their refusals to disclose only to those cases where there would be almost universal consensus that good government demanded it.[46]

However, the Committee decided to recommend the incorporation of reviewable public interest criteria in only some selected exemptions, and not to accept a proposal

> to confer upon the Tribunal power to order that access be granted to an exempt document where the Tribunal is of the opinion that the public interest requires that access to the document should be granted. In effect, this would amount to conferring upon the Tribunal the same discretionary power conferred upon an agency to release an exempt document.[47]

The Committee accepted that the Commonwealth Act should expressly direct that 'the Tribunal does not have power to decide that access to the document, so far as it contains exempt matter, is to be granted',[48] and that it should leave this crucial area of discretion unreviewable in the hands of the agencies. This was notwithstanding the Senate Committee's own opinion that 'public interest' in releasing a document is a test:

> which should be susceptible to application in any individual case by an adjudicator, skilled at weighing and balancing competing interests, who has had presented to him differing views as to what result the public interest requires in any given case. It is naïve to expect that a phrase such as 'public interest' can be administered properly by public servants, who clearly have an interest in non-disclosure.[49]

Unfortunately, as I have noted above, the Federal Court has not detected in the Act a general bias in favour of disclosure, but has emphasised the cold legal fact that the Act confers only a right to access *non-exempt* documents and imposes only a duty to release documents which cannot be brought within the exemption definitions when construed with their full amplitude. Moreover, it is clear in my opinion that the agencies' discretion to release exempt documents is *not* found in the Commonwealth FOI Act, but is only *assumed* by the Act to be *possibly* found elsewhere. [50] When the discretion is sought elsewhere, a host of difficulties facing its exercise can be pointed to: starting with concerns about the Crimes Act, a plethora of special secrecy provisions in other legislation, the confined nature of the protections given by ss 91 and 92 of the FOI Act which are only available for '*access required by this Act to be given*', and, recently, a concern about the effect of the Privacy Act on non-statutory discretions to release information.[51]

There seems to be general agreement that the net result of 20 years FOI experience under the Commonwealth Act is, as was noted in the 1995 ALRC/ARC report, that the Act has fallen short of achieving the hope that it would generate a culture of open and accountable government.[52] That report, and subsequent reformers, propose various measures to induce this culture.

However, in my view, these measures will be deficient unless they:

(i) bring the discretion to release exempt documents into the scheme of the FOI Act, imbue it with the objectives identified by the 1979 Senate Committee, and extend to it the protections of the Act; and

(ii) allow the exercise of that discretion in the hands of the agency decision-makers to be subject to the discipline of external merits review.

I found particularly unconvincing the ALRC/ARC's opinion when recommending against the latter of these reforms: 'In those few situations in which a document is technically exempt but its disclosure would not have an adverse consequence, it is sufficient to exhort agencies not to claim the exemption'.[53] Such exhortations were given by the 1979 Senate Committee, and failed in a government environment less legalistic than the present.

Moreover, recent experience in Victoria and NSW gives no evidence that my opinions are dangerous for good government.

The Victorian FOI Act contains provisions identical to those in the Commonwealth Act which leave an agency's discretion to release exempt documents to be found, if at all, outside the Act.[54] The effective exercise of that discretion is, however, brought to the centre of the Act by investing the review tribunal, the Victorian Civil and Administrative Tribunal, with:

> the power to decide that access should be granted to an exempt document (not being a document referred to in section 28, section 31(3), or in section 33[55]) where the Tribunal is of opinion that the public interest requires that access to the document should be granted under this Act.[56]

There is an extensive case-law on this provision,[57] and it is difficult to avoid the impression that it is responsible for the Victorian Act serving a more significant role in assisting government accountability to the public on important issues than has the Commonwealth Act.

In a recent discussion of the discretion in the Victorian Court of Appeal, it was said that:

> the tribunal must determine whether considerations of 'the public interest' are so strong as to outweigh, or override, those factors by which the documents are exempt documents, whether those factors derive simply from the public interest or more immediately from 'the private and business affairs' of those persons from whom information was gathered in the first place.[58]

Emphasis was given to the use of the word 'requires', and it was said:

> How strong the prevailing considerations of 'the public interest' must be in any given case will depend, as I have said, upon the nature and strength of the factors by reference to which the tribunal is empowered to grant access to a document which otherwise is exempt under Pt IV. The concept of tussle and victory itself suggests that 'requires' means 'demands' or 'necessitates', and that is what I think it means. How else could s 50(4) work sensibly?[59]

The NSW Act took an approach to the override discretion which differed from both the Commonwealth and Victorian Acts. It included its exercise within the right of access and the power to release conferred by the FOI Act.[60] Thus, the right is 'to be given access to an agency's documents in accordance with this Act',[61] and the fact that a document is an 'exempt document' allows, but does not require, a decision-maker to exercise the Act's power to refuse to release the document. The power to rely on the exemption is discretionary unless it is 'a restricted document that is the subject of a Ministerial certificate', in which case refusal of access is mandatory.[62]

Unlike the Commonwealth Act, where the relevant statutory object is described as 'creating a general right of access ... limited only by exceptions and exemptions ...', the NSW Act's object is not confined to releasing non-exempt documents, but is more general: 'conferring ...a legally enforceable right to be given access to documents held by the government, subject only to such restrictions as are reasonably necessary for the proper administration of the Government'. The legislative protections are then framed so as to cover any decision where 'access to a document is given pursuant to a determination under this Act', which would include a decision to release an exempt document taken in response to a request under the Act.[63]

The significance of this different structure of the NSW Act seems to have lain dormant while the right of appeal lay to the District Court, aided perhaps by the low volume of appeals and a provision which expressly excluded from the Court's consideration the exercise of the Act's override discretion. That provision was, however, repealed when in 1999 the jurisdiction was given to the Administrative Decisions Tribunal.[64] As a member of that new Tribunal, I thought:

(i) that primary decision-makers under the Act clearly had a discretion under the Act to release an exempt document unless it was a restricted document the subject of a Ministerial certificate; and, less confidently:

(ii) that the Tribunal also had this power under its duty to 'decide what the correct and preferable decision is'.[65]

I then attempted to describe how the override discretion could be approached at all levels of decision:

> [90] In general, whether there is occasion to exercise the override discretion must depend upon the particular exemption and the circumstances of the case. The statutory criteria for some exemptions themselves bring into balance all public interest considerations which could favour release or justify withholding. Other exemptions have more limited criteria. For these, satisfaction of the criteria provides a justification for withholding the document, but does not complete the decision-making. The decision-maker must decide whether there is something about the information itself or the surrounding circumstances which, bearing in mind the objects of the FOI Act and the rationale for any exemption which has been satisfied, persuades him or her that the exemption should not be claimed. The touchstone is whether withholding the document is 'reasonably necessary for the proper administration of the Government' (s 5(2)(b)).
>
> [91] Framing the question in this way produces a need to locate special or overriding circumstances or interests before an exempt document is released, but only in the sense that some reason particular to the circumstances should be found for not claiming the exemption. I would not see the question as necessarily suggesting that such a release would be rare, unusual or exceptional. In some areas of government, there may be many documents which fall within an exemption but, for example, whose public interest in release is overwhelming, or whose potential for relevant damage is so obviously remote as to leave disclosure totally innocuous.

My reasoning has been applied with varying degrees of enthusiasm in subsequent decisions of the Tribunal in its General Division and in its Appeal Panel,[66] but has not yet been examined by the Supreme Court. Recently, the President of the Tribunal suggested that:

> the Victorian tribunal has adopted a conservative test as to the circumstances in which it will consider submissions that the public interest override discretion be exercised. Similar caution should be adopted in this Tribunal pending further consideration of the question of whether the *Mangoplah* line of cases is correctly decided.[67]

The Tribunal has indeed been cautious in its use of this discretion, and I am aware of only two cases where it was exercised in favour of releasing an exempt document.[68] Almost invariably, the Tribunal has been able to say shortly that public interests were already balanced when an exemption was found to arise, or (where an exemption is 'one-sided') that the circumstances plainly justified invoking the exemption. Whether, the *Mangoplah* line of cases has encouraged agencies to release documents without a ruling by the Tribunal, is something which I would hope, but cannot verify.[69]

In my view, the fact that a review Tribunal should exercise a discretion to release exempt documents cautiously does not detract from the utility of conferring that power. To exercise it in this manner still provides a reassurance to the public that the FOI Act truly intends the release of every document significantly important to the public accountability of government unless a Minister has intervened with a 'conclusive certificate'. It also reassures an agency that a serious defence of secrecy in terms of one of the statutory exemptions will usually be upheld.

The existence of the discretion in the hands of both primary and review decision-makers is, in my opinion, essential to ensuring that the legislation will be applied by agencies according to the spirit which the 1979 Senate Committee anticipated and which the 1995 ALRC/ARC report found too often to have been ignored.

Endnotes

1 The three previous cases are: *Public Service Board v Wright* (1986) 160 CLR 145; *Waterford v Commonwealth of Australia* (1986) 163 CLR 54; *Swiss Aluminium Australia Ltd v Commissioner of Taxation* (1987) 163 CLR 421.

2 *Johnson Tiles Pty Ltd v Esso Australia Ltd (No3)* (2000) 98 FCR 311.

3 See *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2000) 96 FCR 317.
4 *Commonwealth of Australia v Dutton* (2000) 102 FCR 168, on appeal from (2000) 31 AAR 223.
5 *Gersten v Minister for Immigration and Multicultural Affairs* (2000) 61 ALD 445. An appeal was dismissed: see [2001] FCA 159.
6 *Beesley v Australian Federal Police* (2001) 111 FCR 1.
7 *NAAO v Secretary, Department of Immigration and Multicultural Affairs* (2002) 34 AAR 508, on appeal from *Kwok v Minister for Immigration and Multicultural Affairs* (2001) 112 FCR 94.
8 Noting that there is an internal right of appeal to an Appeal Panel. In *Dakin v SAS Trustee Corporation* (2001) 51 NSWLR 328, Dunford J addressed whether an appeal from the ADT Appeal Panel in *Chief Executive, SAS Trustee Corporation v Daykin* [2000] NSWADTAP 20 (on appeal from the decision cited below) should go direct to the Court of Appeal. The appeal itself does not seem to have proceeded.
9 Cf *Egan v Chadwick* (1999) 46 NSWLR 563 at [80-88] and [143].
10 *Ainsworth v Burden* [2002] NSWSC 620, applying obiter in *Morgan v Mallard* [2001] SASC 364.
11 Eg *Firth v Centrelink* [2002] NSWSC 564.
12 *Brisbane City Council v Albietz* [2001] QSC 160.
13 *Whittaker v Information Commissioner* [2001] QSC 325.
14 *Local Government Association of Queensland Inc v Information Commissioner* [2001] QSR 052.
15 *Medical Practitioners Board of Victoria v Sifredi* [2000] VSC 33 at [21].
16 *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246.
17 *Minister of Transport v Edwards* [2000] WASCA 349; *Information Commissioner for Western Australia v Ministry of Justice* [2001] WASC 3.
18 *Channel 31 Community Educational Television Ltd v Inglis* [2001] WASCA 401.
19 In *Mangoplah Pastoral Company Pty Ltd v Great Southern Energy* [1999] NSWADT 93; *Watkins v Chief Executive, Roads and Traffic Authority* [2000] NSWADT 11, and *Daykin v SAS Trustee Corporation* [2000] NSWADT 51.
20 In particular, following some observations I made in *Watkins*, above, differences have emerged as to the effect of s 57 of the NSW FOI Act on the review of claims for exemption for 'restricted documents' (see *BY v Director-General, Attorney General's Department* [2002] NSWADT 79 and cases cited therein).
21 23 May 2002, [2002] HCA 19, 76 ALJR 808, on appeal from *Shergold v Tanner* (2000) 102 FCR 215 and *Tanner v Shergold* (2000) 171 ALR 672. For a more extensive discussion of this case and the *Staff Development Case,* see Ron Fraser: *Freedom of Information: Testing the Limits of FOI Access – Some Recent Commonwealth Decisions* (2002) 9 AJ Admin L 207.
22 Another conclusive certificate was also signed under s 33A(2), in relation to a claim for exemption under that section. It was dealt with similarly in the judgments, and I shall ignore it in this paper.
23 See [20], [28-9], [36-9], and cf Black CJ below in 102 FCR 215 at 218, and Finkelstein J at 252.
24 See also [34] and [42].
25 102 FCR 215 at 229 and 244.
26 See 102 FCR 215 at 247-9.
27 Although in *Public Service Board v Wright* (1986) 160 CLR 145 at 153 the court had said that 'in the light of' an objects provision in the same terms as s s 3(1)(b) 'it is proper to give to the relevant provisions of the Act a construction which would further, rather than hinder, free access to information', this was in the context of the Victorian Act which contains an override discretion (see below). Moreover, it should not be assumed that, absent an expression of clear legislative intent, the considerations discussed in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 will be translated into the application of the FOI Act: cf the AAT discussion on this in *Re Herald and Weekly Times and Secretary, Department of Finance and Administration* (2000) 31 AAR 251 at 267.
28 Starting in the AAT with *Re The Staff Development and Training Centre and Secretary, Department of Employment, Workplace Relations and Small Business* (2000) 30 AAR 330, and then on appeals by the Secretary before Drummond J at (2001) 32 AAR 531, and before the Full Court at (2001) 114 FCR 301.
29 30 AAR at 354.
30 114 FCR 301 at 309 [30], their Honour's emphasis.
31 Above at 308 [23].
32 See 32 AAR at 541.
33 Cf s 36(1)(b).
34 Cf s 39(2), 40(2).
35 Cf s 41(1).
36 Cf 43(1)(c)(i).
37 Cf s 44(1)(b).
38 These were usefully collected recently by Senior Member Dwyer in *Re Zacek and Australian Postal Corporation* [2002] AATA 473 (18 June 2002) at [65] and ff; and by Deputy President Forgie in *Re Robinson and Department of Employment and Workplace Relations* [2002] AATA 715 (22 August 2002) at [38] ff.
39 Cf the decline of the '*Howard*' factors: see *Re Chapman and Minister for Aboriginal and Torres Strait Islander Affair* (1996) 43 ALD 139; 23 AAR 142 at 155, *Re Mijares and Minister for Immigration and Multicultural Affairs* [2000] AATA 214 at [18].
40 A recent examples of the AAT's current scepticism: 'Furthermore, the clear trend and preponderance of modern thought is away from those Howard principles which act as a shield against disclosure based upon the status and supposed discomfiture of public servants, and I find the proposition that an early draft of a

submission proposed for Cabinet but not actually submitted, should be exempt from disclosure because it may mislead and provoke captious public debate, is one which is difficult to justify'. (*Re Sutherland Shire Council and Department of Industry, Science and Resources* (2001) 33 AAR 508 at [38]).
Note also the robust assessment made in *Re McKinnon and Commissioner of Taxation* (2001) 34 AAR 194 at [89], in particular that 'deliberative processes may be enhanced by any public debate that may arise as a result of publication' of a consultant's report on tax reform.
Similarly, the assessment in *Re Wegner and National Registration Authority for Agricultural and Veterinary Chemicals* (2002) 34 AAR 344 at [23-27] that 'the public interest would be served by it knowing the credentials of experts called upon to review, independently, a request to register a product, which by its very nature, may have an unintended environmental impact', giving this greater weight than unsubstantiated concerns that revealing the name of the External Reviewer would cause personal difficulties.
Similarly in *Re Robinson and Department of Employment and Workplace Relations* [2002] AATA 715 at [65]: 'I am not satisfied that access [to a Federal Court judges' submission] would hinder the Remuneration Tribunal to any significant degree in carrying out its functions in a timely, efficient way at a reasonable cost to the community, that there would be public confusion or misleading of the public or that the frankness and candour of those making submissions to the Remuneration Tribunal would be significantly hindered.'

41 I attempted to describe such a process of reasoning in *Tunchon v Commissioner of Police* [2000] NSWADT 73 at [13] ff.

42 Recent examples where such evidence was found persuasive are *Re Meschino and Centrelink* [2002] AATA 627, and *Re Electonic Frontiers Australia Inc and Australian Broadcasting Authority* [2002] AATA 449 (12 June 2002).

43 Cf *Medical Practitioners Board of Victoria v Sifredi* [2000] VSC 33 at [16]: 'The estimation of whether the particular disclosure would be contrary to the public interest on the basis that it might be reasonably likely to impair the capacity of the Board to obtain similar information in the future is not a matter susceptible of proof as though it were a fact.'

44 In the Commonwealth Act, s 61.

45 It provides: 'Nothing in this Act is intended to prevent or discourage Ministers and agencies from publishing or giving access to documents (including exempt documents), otherwise than as required by this Act, where they can properly do so or are required by law to do so.'

46 *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978* at [9.2], see also [8.2], [15.2].

47 Above at [15.9(c)] and [15.10].

48 s 58(2).

49 Above at [19.24].

50 The object in s 3(2) 'that any discretions *conferred by this Act* shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information' therefore rings somewhat hollow. Particularly so, when the statutory tests of public interest and of harmful effects are not regarded as 'discretions'.

51 Cf the prohibition under Principle 11 of disclosure of personal information unless '(d) the disclosure is required or authorised by or under law'.

52 *Open government: a review of the federal Freedom of Information Act 1982*, especially at [4.12] and ff.

53 Above at [8.5].

54 Arguably, however, its protection under s 62 is broader, since it covers access which 'was required *or permitted* by this Act'. See the discussion on this in Kyrou & Pizer *Victorian Administrative Law* at [2591/2].

55 Which concern the exemptions for cabinet documents, documents created by the Bureau of Criminal Intelligence, and documents affecting personal privacy.

56 S 50(4).

57 Set out in Kyrou & Pizer, above, at [2497] and ff.

58 *Secretary, Department of Premier and Cabinet v Hulls* [1999] 3 VR 331 per Phillips JA at 340.

59 Above at 342.

60 The Queensland Act is similarly structured (see especially ss 21 and 28(1), and note the broad objects and reasons for enactment in ss 4 and 5). However, the external review body, an Information Commissioner, is expressly prevented from exercising the primary decision-maker's discretion to release exempt documents (see s 88(2)).
The Western Australian Act follows the Queensland Act with strong objects provisions and a discretion in the primary decision-maker to release all documents, but with the Information Commissioner expressly excluded from that power (see s 76(4)).
The South Australian Act is structured like the NSW Act, and includes rights of merits appeal to the Ombudsman and District Court. Both these bodies appear to have power to exercise the override discretion unless there is a Ministerial certificate, but a curious provision in s 42(2) directs the District Court that 'Where it appears that the determination subject to appeal has been made on grounds of public interest, and the Minister administering this Act or, if the agency concerned is a council, the council makes known to the District Court the Minister's or the council's assessment of what the public interest requires in the circumstances of the case subject to the appeal, the Court must uphold that assessment unless satisfied that there are cogent reasons for not doing so.'

The Tasmanian Act follows the scheme of the Commonwealth Act, with neither the primary decision-maker nor the external review body, the Ombudsman, having power under the Act to release an exempt document (see ss 3, 7, 12, 15, 48(4), 53).

61 S 16.

62 S 25(1) and (3).

63 See ss 64, 65 and 66.

64 The Ombudsman in 1992 was expressly given the power in s 52(6)(a) to *recommend* 'that the public release of the document concerned would, on balance, be in the public interest even though access has been duly refused because it is an exempt document.'

65 See *Mangoplah Pastoral Company Pty Ltd v Great Southern Energy* [1999] NSWADT 93 at [12-19] and [76-89].

66 Eg recently in the Appeal Panel: *Neary v Treasurer of NSW* [2002] NSWADTAP 4; and *N (No 4) v Commissioner of Police* [2002] NSWADTAP 10.

67 *BY v Director General, Attorney General's Department* [2002] NSWADT 79 at [80].

68 By the President in *X v Director-General, Department of Community Services* [1999] NSWADT 141 at [73-76], and by myself in *Daykin v SAS Trustee Corporation* [2000] NSWADT 51 at [56-72] - a decision set aside by the Appeal Panel on other grounds in [2000] NSWADTAP 20.

69 The ADT, like other Tribunals, has an active pre-hearing conferencing FOI procedure which encourages parties to isolate and reduce the documents and issues which deserve to be ruled upon judicially.

WHERE TO NEXT WITH THE FOI ACT? THE NEED FOR FOI RENEWAL— DIGGING IN, NOT GIVING UP

Ron Fraser*

Paper presented at the ANU Public Law Weekend, Canberra, 2 November 2000[1]

> *In a world of secrecy and opaque government, serious wrongs can occur which may never come to light. FOI legislation is at once a means of casting the light of scrutiny into the dark corners of government and a contribution to a new culture of openness in public administration.*
>
> Justice Michael Kirby[2]

> *The advent and operating principles of a redesigned smaller state, that functions solely as a marketplace, exploits and compounds existing design defects in Australian FOI legislation.*
>
> Rick Snell[3]

> *But the fight to reclaim the informational commons will also be complicated by problems of policy design and political mobilization. Imposing openness codes was easier when authority was closely held by national and sub-national governments. The task is more difficult when power has diffused away from governments and across borders.*
>
> Alasdair Roberts[4]

Introduction – the importance of FOI

In his inaugural professorial address at the Australian National University in March 2002, John McMillan argued that passage of the Commonwealth *Freedom of Information Act 1982* (FOI Act) had been of fundamental or constitutional importance. It had replaced the prerogative of government to decide what information to release, changed the onus of justification in relation to release of information, and replaced an unstructured government discretion with objective criteria by which an independent reviewer could judge release. At the same time McMillan noted that there had been many criticisms of the operation of the FOI Act in a number of recent reports.[5]

McMillan's views are significant because of his important role as one of the major contributors to the debate over open government in the late 1970s, and his role in shaping the fundamental principles on which FOI legislation could be founded, not least through his work on the influential 1979 Senate Committee's report on the FOI and Archives Acts.[6] I

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* *Information access consultant, Canberra. Former Principal Legal Officer in the Information Access Unit, Commonwealth Attorney-General's Department.* *My sincere thanks to Greg Terrill and Matthew Smith for very helpful comments on an earlier draft of this paper, and to Rick Snell for his immense contribution to our understanding of FOI at all levels: I have plundered his work shamelessly. Thank you also to Madeline Campbell and members of the old Information Access Unit team in the Attorney-General's Department for numerous passionate discussions and insights; it was a rare privilege to work with all of you. None of the above is responsible for what I may have done with their ideas here.*

agree with him that the adoption of FOI involved major and fundamental shifts, and that it contributed to and underpinned many of the trends to more open government that he identifies in his address.[7] Yet despite the symbolic significance of FOI legislation, its actual ability to provide access to significant government policy or administrative information that would genuinely empower citizens has been extremely limited at the Commonwealth level. Moreover, we can see now that there are many things FOI cannot do in the area of accountability, especially if governments and their advisers seek to evade it by not recording sensitive information. In some circumstances there may be better mechanisms, though with their own flaws, such as inquiries by Senate Committees where that process is available, or investigations by the Ombudsman or the Auditor–General.

Nonetheless, there is still a strongly felt need for freedom of information legislation, though some of the language of the 1960s and 1970s now sounds old-fashioned in the conservative 1990s and early 2000s, in particular the concept of 'participatory democracy'.[8] Nonetheless, what that term denoted is still of vital relevance, namely a desire to open up government so that ordinary citizens and groups and coalitions of groups can acquire the information to participate in and criticise the policy-making and administrative process.[9] These days the same concept is framed in terms of 'democratic deliberation', 'democratic discourse', a 'republic of reasons', the need for 'transparency', 'the informational commons' and so on.[10] In the same vein, the High Court has underscored the significance of the free flow of information and broad discussion in achieving a liberal democratic system of government,[11] and Justice Michael Kirby describes FOI as very important in making the idea of popular government 'a more robust and practical reality'.[12]

However, this should not blind us to the fact that FOI has had and still has many critics who would be glad to see it, if not destroyed, then rendered largely ineffective in its capacity to embarrass or challenge government. Others think that the concept has been rendered irrelevant by the changes in the nature of the state in the post-Thatcher/Regan period.[13] Yet others emphasise the need in a knowledge economy for access to the largest repository of information in a country (government), and the contribution of such access to the governance roles of citizens.[14] Alasdair Roberts penetratingly analyses the recent social, political and technological factors that tend to weaken FOI along with democratic participation in decision-making, but he is also prolific in ideas that can help redress the balance.[15] We need to be able at any time to argue the case for effective FOI legislation from first principles, starting from a realisation that the 'design principles' of the current Commonwealth Act are inadequate.

The current situation – neglect, inaction and defects

Twenty years is a long time in the life of a reforming statute that provides an arena for significant contest between government and citizen. My first year in the FOI Branch of the Attorney–General's Department saw a small party of officials happily celebrating the 'fifth birthday' of the FOI Act. Despite the 1986 retreat embodied in the imposition of charges, cessation of promotion of the Act and other changes to administration,[16] there was still a sense that the FOI Act was a live piece of legislation which was significant and demanded serious attention. At the time we were awaiting the report of the first major review of the operation of the Act by the then Senate Standing Committee on Legal and Constitutional Affairs.[17] There was still a significant commitment of resources to assisting agencies to administer the Act in the spirit in which it had been enacted.

Like human beings who celebrate birthdays and anniversaries, if we neglect Acts of Parliament they cannot function properly. In the twenty year history of the FOI Act it has been substantially amended only three times, the last occurring in 1991. None of the major amendments involved a completely systematic rethinking of the best ways to achieve the aims of FOI, the 1983 changes coming closest to that. The central proposals of the latest

1996 review by the Australian Law Reform Commission and the Administrative Review Council (ALRC/ARC report)[18] have not been implemented, and government has not given us any meaningful explanation why not.[19]

The criticisms are well-known, and I will take many of them for granted here.[20] Major difficulties are developing both in terms of the practical administration of the Act and in terms of its structure and the basic assumptions underlying it.[21] No real attempt has been made to update the Act to cope with the massive transformation of the state in the late 80s and 90s.[22] If these difficulties are not addressed, the gap between the pretence and the reality of FOI will widen ever further.

Even minor measures needed to remove redundant provisions of the Act have not yet been implemented, though I understand that some work has been done in this area. More significantly, the government has failed to introduce amendments to the Act to provide for its application to documents in the possession of contractors under outsourcing arrangements, despite the fact that this was promised on 3 February 1998 by the Attorney–General in a press release dealing with both privacy and FOI, and was reiterated by his Department in 2001.[23] Amendments were made to the *Privacy Act 1988* to cover outsourced personal information,[24] but there appears to have been stalemate in the bureaucracy about the means of amending the FOI Act, leaving a significant issue unaddressed.[25] Related issues concerning 'commercial in confidence' claims have also been ignored (see below).

The failure to take action on these measures is a recipe for freezing the FOI Act in time and, of more immediate importance, allows a continued decline in the standards of FOI knowledge and administration by agencies.

A similar situation exists in relation to the ALRC's report on its review of the *Archives Act 1983.*[26] Most of the recommendations leading to wider and easier availability of Commonwealth records of archival significance have not been implemented at this stage.

The appointment and report of the Access to Information Task Force in Canada is in stark contrast to the current situation in Australia. There have been major criticisms of the Canadian *Access to Information Act 1982*, and it is 17 years since the Act was last reviewed, so it is important not to exaggerate the differences in attitude. The fact that the Task Force was made up of public servants, with significant public and research input, has both limited the amount of change it has proposed, and increased the likelihood that it will be acceptable to government. While specific recommendations do not always contain the best solutions (in my view), the Task Force has taken seriously the question of how to achieve a better administrative culture of openness. I will be surprised if government is as indifferent to its report as our government has been to the ALRC/ARC report. [27]

The problem is that changes to the FOI Act, and even to its administration, have had no political priority even in the case of purely machinery matters. Such neglect in areas like income tax, corporations, trade practices or migration is simply impossible to imagine. These laws are in the frontline of government concern, and when some defect or loophole is identified in carrying out government policy, it is promptly attended to.

It is not as though we do not have significant and detailed proposals for change, both legislative and administrative, in the work of commentators like Rick Snell, Greg Terrill, Spencer Zifcak, Moira Paterson, Peter Bayne, Anne Cossins and others.[28] For example, Table 2 of Snell's 1998 article is an important starting point for any reconsideration of the design of FOI, and can serve as a benchmark for advocating reform.[29] I have time to deal only with a few of these matters, and have regrettably not been able to look at the best form of external review.

Renewing and supporting the foundations of FOI

Initiative for legislative change – the Freedom of Information (Open Government) Bills 2000 and 2002[30]

An initiative for reviving the process of reform was provided by the FOI (Open Government) Bill first introduced into the Senate in 2000 by Democrat Senator Andrew Murray. It lapsed as a result of the 2001 election but was reinstated in the same form in 2002.[31] The Bill seeks to implement most of the recommendations of the 1996 Report.[32] Significantly, it has been examined by the Senate Legal and Constitutional Legislation Committee, and despite the negative approach of the submissions and evidence of the Attorney–General's Department (presumably with Government approval), there was cross-party support for the most significant of the ALRC/ARC report's recommendations proposing creation of an FOI Commissioner and recasting the objects clause. (Importantly, the Committee also accepted the need for changes to the fees and charges structure, but I do not have time to deal with that here.)[33] This was in accordance with the views of most of the submissions.

Cross-party support for these two measures is of great significance because their implementation could be expected to have a major effect on the practical administration of FOI by agencies. It could provide some basis for continued approaches to the government parties stressing the need for these two measures if FOI is to be administered properly in the future. At the same time, the opposition Labor Party and the minor parties should be supported in their generally more sympathetic approach to FOI. John McMillan is right that there is a need to build 'a non-aligned culture of support for FOI within the legislature'.[34]

I believe that academic lawyers, political scientists and others could play a more active role, for example by seeking the establishment within an appropriate academic centre or national institute of a standing Forum on Open Government (FOG!) to promote dialogue between academics of all persuasions, politicians, public servants, media representatives, lawyers and citizen groups and individuals who use FOI. It would be good to see concern with FOI and Open Government extended beyond lawyers to other groups who can offer valuable insights into governance and citizen participation issues. Such a Forum could be within a single university or could span a number of institutions in a partially virtual format. It could seek partnerships and financial support from media organisations, law foundations, the Australian Research Council and so on.

Recasting the objects clause[35]

The replacement objects clause proposed by the ALRC/ARC and accepted by the Senate Committee contains a far more explicitly democratic objective for the FOI Act than the existing clause. It speaks of giving effect to the principles of representative government and of:

- enabling people to participate in the policy, accountability and decision-making processes of government;
- opening the government's activities to scrutiny, discussion, comment and review; and
- increasing the accountability of the executive branch of government.

As proposed by the ALRC/ARC report, it would also be desirable to include an acknowledgement 'that the information collected and created by public officers is a national resource'.[36] This is foundational to an open attitude to government-held information, and would be helpful in not restricting the FOI Act to an accountability role. This point can be

important in interpretation, for example in relation to the scope of the personal privacy exemption in s 41.[37]

The revised objects clause provides a symbolic statement that should influence administration and interpretation of the Act. Arguably Victoria and New South Wales have adopted an interpretation of the Act that favours disclosure, but that has not been the case in the Commonwealth jurisdiction. [38] As Matthew Smith points out in his paper (reproduced above), the High Court avoided this issue in its recent decision in *Shergold v Tanner*,[39] and it is uncertain what view it would take if it did address it. The clause accepted by the Senate Committee overcomes the court-created flaw in the present provision depriving it of any interpretative power.

Rick Snell told the Senate Committee that, although largely symbolic (though I think it would be more than that), the proposed change would be likely to produce a 'fundamental transformation in the way that the FOI game is played in Australia ... it would have a dramatic impact on the way that agencies approach the interpretation of the exemption provisions and the application of the Act ...'.[40] Given the importance of the active acceptance of the aims of the Act in changing administrative culture, taking such a step is vital to a renewal of the practice of the Act.[41] But it is not enough on its own.

***A mechanism to improve and underwrite compliance – an FOI Commissioner*[42]**

Most commentators agree that there is a need for a body with the functions of monitoring, auditing and promoting the consistent and efficient administration of the FOI Act. FOI is not an area in which government agencies can be left entirely to their own resources. This is because of the complexity of the legislation, the self-interest of agencies in non-compliance with the full rigour of the legislative requirements, and the difficulties of keeping FOI knowledge current without central assistance. In this respect the FOI Act has more similarities to the Privacy Act than to the AAT and ADJR Acts.[43]

By facilitating consistency and best practice an FOI Commissioner would contribute significantly to a more open administrative culture, which virtually everyone agrees is the major need if FOI is to succeed.[44] Such an authority could be expected to work in partnership with agencies in achieving routine and well-informed compliance with the often complex and frustrating provisions of the present Act, and help to identify ways it could be simplified. Training in FOI could become a requirement for officers administering FOI or making FOI decisions.[45] It would provide what we now lack, a continuing player committed to the legal policy of the FOI Act.

The cost of establishing such an office need not be great, perhaps somewhere in the vicinity of $1–2 million. These costs could be minimised by co-location with the Ombudsman (as suggested by the ALRC/ARC report),[46] or by conferring the FOI Commissioner role on the Ombudsman, and creating a special unit as recommended in the recent Senate Committee report.[47]

It could be argued that the other jurisdictions in Australia do not have such a mechanism, but where there is external review by an Information Commissioner or the Ombudsman there is a tendency for those bodies to act to some extent as the central standard setting bodies for FOI.[48]

Renewal of government commitment to presumption of disclosure

It is 17 years since a Labor Cabinet directed that 'agencies should not refuse access to non-contentious material only because there are technical grounds of exemption under the (FOI) Act'.[49] This position was reinforced by Labor Minister for Justice Duncan Kerr in a letter to

his fellow Ministers in October 1994.[50] A similar direction from the present Attorney–General, who is politically responsible for administration of the FOI Act, circulated to all agencies and publicised at FOI Practitioners' Forums and in other ways, would provide leadership in regenerating administration of the FOI Act and improving compliance by agencies with the legal policy of the Act of favouring disclosure wherever possible.[51]

Reforming the structure of exemptions (or 'withholding provisions')

> *Exemptions should be designed to serve as a tool of last resort, difficult to justify as the lifespan of information increases, and subject to reassessment.*[52]

Despite, or even perhaps because of, submissions to them concerning the need for a reconsideration of the general structure of the exemption provisions,[53] the Senate Committee last year left questions of the exemptions structure *and* specific amendments to exemption provisions until another day. [54] It is important to pressure federal politicians to establish a *process* to (a) address the individual exemptions that urgently need amendment, and (b) examine proposals for recasting the exemption regime in a way more consistent with the Act's broad objects. The two can only be kept apart with difficulty, which is probably one reason the Committee shelved the issue, but it is totally unsatisfactory to be left with no hint of an ongoing process. What that process should be is hard to say, but I believe the Senate Committee should be pressed to ponder that question and not simply wash its hands of the matter.

Even a poor exemptions regime would not be critical if government and its agencies had internalised the real objects of the Act and were prepared to make all information available that would not cause serious harm to legitimate interests. Sadly, this is not the case, and we need to try to amend the exemption structure to create a greater degree of openness enforceable through external review if necessary. The withholding regime would be improved enormously by a successful amendment to the objects clause as recommended above,[55] but there are other major elements that should form part of a package.

Probably the most pressing need concerning existing exemptions relates to the so-called 'commercial in confidence' exemptions and their relation to government agencies and to contractors. As the ARC and the ALRC/ARC report and others have recognised, this area urgently needs both legislative and administrative attention, but will inevitably raise major issues of design. It would be preferable to have information concerning the commercial activities of all agencies dealt with under s 43 of the FOI Act, which has a public interest component in one of its exemptions, rather than have some protected by a blanket protection in Schedule 2, while uncertainty remains as to the application of s 43 to other agencies. In addition, issues raised by the application of the business affairs and breach of confidence exemptions in the context of outsourcing need urgent attention, including the question of adding a public interest test to the other components of s 43(1) in addition to the present unreasonableness test in s 43(1)(c)(i).[56] These interconnected issues are too important to be ignored just because their solution is difficult and will arouse opposition from some quarters.

The most significant *structural* problems with the present exemptions system (or as Rick Snell calls them, 'withholding provisions', which conveys a less rigid impression to decision-makers) come down to the complexity and lack of coherence of the system, the categorical manner in which many of them are expressed that encourages knee-jerk identification of documents as exempt rather than careful consideration in each case of the degree of expected harm and the balance of the public interest, and the general failure of the public interest test to yield much in the way of disclosure.[57] Matthew Smith (above) has identified some progress in the latter respect in AAT decisions, but there is a long way to go. The benchmark here is *Re Eccleston* in which the Queensland Information Commissioner not

only brilliantly expounded the democratic and practical implications of a public interest test but also decided that significant deliberative process documents relating to the impact of the *Mabo* decisions must be disclosed.[58]

One approach to a withholding regime that is focused on the harm of disclosure is that proposed by Snell and Tyson, namely to apply a substantial harm test at the threshold in relation to all withholding provisions:

> A more stringent threshold test (of substantial harm) demonstrates a stronger presumption in favour of openness and, in practice, would reduce the volume of material withheld (without endangering interests that properly deserve protection).[59]

I agree strongly with the general thought, but would propose translating that aim into practice in a slightly different way. Such a model is advanced for the sake of debate and discussion, and not in any doctrinaire way.

It seems to me that the essential requirement of a fair dinkum withholding structure is that in virtually all cases it allows the balancing of all factors of the public interest relevant to disclosure of specific information, starting from a genuine principle (in the words of the New Zealand Act) 'that the information shall be made available unless there is good reason for withholding it'.[60] Introduction of the following elements of a withholding regime would, in my view, make a significant difference:

1. A general provision to the effect that *information is to be made available unless disclosure would cause substantial harm* (i.e. writing into the legislation an equivalent to the approach mandated by Cabinet in 1985). This would be combined with the discretion referred to in 5 below.

2. A *specific substantial harm test* for as many withholding provisions as possible, although not all provisions can be dealt with in the same way. The word 'substantial' needs to be defined in terms of gravity of effect rather than as something that is 'real or of substance and not that which is insubstantial or nominal'.[61] Similar but separate withholding provisions with public interest tests seem to me to be needed for deliberative process information (s 36) and personal privacy (s 41). In addition, I believe it is important to follow the New Zealand lead here and to substitute for the class exemption for Cabinet documents a harm based test. (I am under no illusions about the difficulty of doing this. Apart from the threat to monopoly of information, it would take public servants out of the comfort zone where certain kinds of information don't need to be considered for disclosure on the merits, and it would involve some compliance costs.)

3. *Reshaping the present public interest tests* so that they become integral components of the withholding provisions and take explicit account of the *impact of a decision to withhold information on achievement of the objects of the Act* (as Anne Cossins has long suggested ought to be the case in relation to all exemptions, but certainly those with a public interest component).[62]

   If the test for withholding information where there is a public interest component is put in terms of a requirement to weigh (i) a reasonably expected substantial prejudice to a listed interest against (ii) aspects of the public interest favouring disclosure, including (iii) the gravity of the impact of refusal of the information on fulfilment of the objects of the Act, this would provide decision-makers with guidance as well as making clear to them, the AAT and the courts that the specific democratic deficit of non-disclosure has to be considered in each case.

4. Wherever possible, introducing a *public interest component* into provisions which do not currently have one, so that the actual harm of disclosure and non-disclosure can always be weighed against each other. This is important in relation to the 'commercial in confidence' exemptions, including breach of confidence (s 45), to which I would add legal professional privilege (s 42) and (if it is not repealed as recommended by the ALRC/ARC report) the secrecy provision in s 38. I hope to expand on these suggestions in another place.

5. Introducing *a genuine discretion under the FOI Act* (not just 'outside' it) to disclose information that could be withheld, and extending the protections in ss 91 and 92 to a bona fide exercise of that discretion, subject to proper consideration of the interests of third parties. (It is doubtful whether s 18(2) would be held by the AAT or the Federal Court to provide a discretion, and the matter should be put beyond doubt.)[63] This would provide flexibility to agency decision makers to disclose information that is technically exempt but which would cause no conceivable harm to any legitimate government or third party interests; in the case of third party interests there should be provision for consultations. (In some jurisdictions, such as New Zealand and Canada, some withholding provisions are excluded from such a discretion. If third party interests are safeguarded through consultation, there seems no need to exclude any provisions from the discretion.)[64]

6. *Allowing the Administrative Appeals Tribunal to review the discretion to disclose information*, which, in the (hopefully rare) cases where there is no specific public interest component of a withholding provision, would allow consideration of an overriding public interest in disclosure.

7. *Removal of conclusive certificate provisions* from the deliberative process and Commonwealth–State provisions because they unfairly upset the public interest balancing process; they are not used in this context in State legislation (except now in the Northern Territory). In practice they also play little real role in relation to security, defence and international relations and Cabinet and Executive Council documents, given that in any case AAT composition and procedures for hearing such matters would take account of the information's sensitivity. I agree with the ALRC/ARC report that Executive Council documents do not need special protection as other provisions will suffice.[65]

8. In addition, Peter Bayne has persistently raised the question of *adding a provision along the lines of s 6 of the Queensland FOI Act to require a decision-maker to take account of the identity (and perhaps the particular interest) of the applicant in determining the consequences of disclosure and the balance of public interest.*[66] The ALRC/ARC report endorsed a version of this, and it should be implemented.[67] At a later stage consideration needs to be given to taking this further to cover the particular interest of the applicant.

These changes would, I believe, create a much fairer balance between the interests of citizens and government without in any way imperilling genuinely sensitive information, and would give far greater effect to the open government ideals of the FOI Act than is occurring under the current structure. In light of the present provisions of the Commonwealth FOI Act they may seem radical, but not when viewed in the light of experience elsewhere (especially New Zealand). The important first point is to get consideration of improvements back on the agenda, and to employ something like the above as a basis for discussion.

Disclosure mechanisms

Every avenue should be exploited that will lead to the greater routine availability of government-held information.[68] This was a major thrust of the ALRC's review of the Archives Act,[69] and was a major theme of the Canadian Task Force Report in 2002.[70] Such an approach is a vital element of an administrative culture favourable to release, reserving the really contentious documents for disputation under FOI rules. The major danger here could be if agencies take to using their information resources to raise revenue by adopting sale prices that unduly limit citizen access to such information.[71] Of course, the Swedish example is the light on the hill: the vast bulk of all government documents are made readily and routinely available either immediately or rapidly after oral request.[72]

A suggestion of Greg Terrill's for overcoming the excessive individualism of the FOI Act would be very valuable in shifting FOI from a one-off release mechanism to one where the disclosure of information to an applicant is followed fairly quickly by publication of a meaningful description of the documents released, eg on the agency's website.[73] This would mean that others interested in the material could also obtain access to the information, unless only that applicant is entitled to access it, but the first applicant would normally have some prior advantage, important to news media. If it is impossible at first to obtain legislative change to this effect, it might still be feasible for the Senate to require agencies to table such statements regularly in a way similar to the 'Harradine List' of policy files – the inconvenience of that for agencies could lead to voluntary performance of this task!

In Canada an interested person can find out the terms of requests made under the federal Access to Information Act since 1999, although to learn the results it is necessary to contact the agency concerned.[74] This is only possible because the Department of Public Works and Government Services already records the terms of FOI requests made to all agencies – although it is understood the record of requests is not complete – and a public interest body makes monthly FOI requests for the details. Something similar could happen here through cooperation. That in itself would help broaden the utility of particular requests to the wider public, and I cannot see why we could not take the extra step and make general information available about the result of requests for policy or administrative documents.

I have not sought to raise the question of rights of access to information that is not in documentary form, but it should be considered as part of a study of the wider issues of open government. Access to such information is provided for in the New Zealand *Official Information Act 1982*, and reportedly works well.[75] It allows for some response even when documents do not exist, and the absence of documents may become a matter of comment by the Ombudsman. This might serve to counter the situation, to which the existence of FOI may well contribute, where records are not created in order to facilitate 'plausible deniability', as in a number of the circumstances investigated by the Senate Select Committee on A Certain Maritime Incident Inquiry.[76]

Renewing FOI from outside

Compliance measures

One method for attempting to get the best out of the present flawed FOI system, and for impressing the argument for reform on the government of the day, is to undertake in-depth studies of the compliance of agencies with the requirements of the relevant FOI Act and of the mechanisms by which they or the government as a whole evade compliance. The pioneer of this work is Associate Professor Alasdair Roberts,[77] and his ideas have been further developed by Rick Snell in an Australian context in several important articles.[78] Snell constructs a continuum that includes: administrative activism, administrative compliance, administrative non-compliance, adversarialism and malicious non-compliance, all of which I

can remember encountering in days gone by. I do not have time to discuss the details and implications here, but in a period of government resistance to change in FOI arrangements, development and application of concepts of compliance would allow FOI users and supporters to identify the kinds and levels of agency compliance, work with particular agencies to improve their performance, and to publicise persistent poor performers. Undergraduate and graduate projects of the kind run by Rick Snell at the Universities of Tasmania and Wollongong as part of their administrative law courses can provide a lot of useful information in this area.[79]

Until a specialist monitoring authority is achieved, such work would also benefit from the involvement of the Ombudsman, and perhaps from work by the Administrative Review Council. One or both of these could take a leaf out of the book of the Western Australian Information Commissioner who sponsored a workshop of agency participants to identify best practice standards and performance measures which have since been made available as a practical guide for agencies.[80]

Renewing FOI usage – building a constituency

Among the major flaws of FOI legislation identified by Greg Terrill is that it relies on isolated individuals asking for information by a mechanism which inevitably advantages government because of its role as repeat player.[81] These criticisms serve to indicate the inherent limitations of such legislation, although adoption of the above suggestions on disclosure mechanisms could go some way to redressing the imbalance.

At the same time, FOI is not necessarily limited to use by largely isolated individuals. Many of the early proponents of FOI were strongly influenced by Ralph Nader,[82] and Nader's view in 1970 was that:

> there need to be institutions, be they universities, law reviews, public interest law firms, citizen groups, newspapers, magazines or the electronic media who systematically follow through to the courts on denials of agency information.[83]

The expectation was that, as in the United States, access to government-held information would expose important instances of abuse of power in areas of consumer law, environmental issues, local government and so on.[84] The actual experience has fallen short of the expectations at Commonwealth level, and perhaps to a slightly lesser extent at State level. We have not so far seen much in the way of well-funded organisations with a specifically FOI orientation like the Nader inspired FOI Clearing House, the FOI Coalition, the Reporters' Committee for the Freedom of the Press and many others in the United States.

Among those who are potential members of an FOI constituency are journalists and other media workers, lawyers, politicians, academic students of government, historians, business (one of the largest users of FOI in the United States and Canada), and lobby and community groups.[85] Some of these groups, of course, will have contradictory interests in relation to FOI, and many remain to be convinced that FOI is of more than marginal utility to them.[86]

There has been a good beginning in the study of the use and promotion of FOI by print journalists, and interesting projects are in progress.[87] The preliminary results show a largely spasmodic use of FOI by journalists in Australia, and some work in bringing the existence of the Act to public attention, while there are some solid examples of FOI contributing significantly to major stories.[88] However, journalists are among those most frustrated by the unnecessary width and abuse of discretions.[89] We need studies at the Commonwealth and State levels that look at their needs and those of users such as historians, political scientists, environmental and community groups and so on.[90] Parliamentarians are another group who

need consideration as potential members of an FOI constituency.[91] Such studies may help us to understand how we can involve such groups in active advocacy for new and more effective FOI laws and administration.

Greg Terrill has also suggested we need to foster courses where students are encouraged by their lecturers to use FOI both for obtaining access to information and to test the responsiveness of the system and to keep pushing when they do not succeed. Rick Snell of the University of Tasmania has been doing this for years, but it would be good to see such opportunities in other universities and in areas such as political science and public administration, as well as law. Academic lawyers could act as advisors to students in other disciplines on the mechanics of making requests and challenging refusals. One outcome of work of this kind could be to amass compelling evidence of needless secrecy, as Jim Spigelman (now Chief Justice of New South Wales) did in the 1970s in his book on political secrecy in Australia.[92]

What I want to suggest is that, even if government remains resistant to FOI change, there are still steps that could be taken by a wide range of interested people to achieve greater use of FOI and greater pressure for FOI reform. Even without the private and corporate resources of the United States, surely we could learn enough from the example of organisations like the National FOI Coalition to set up a wide-ranging body to advocate for Open Government measures and against unnecessary restrictions on access.

It would be necessary to coordinate media and legal organisations, including the Communications Law Centre, the Public Interest Advocacy Centre, the Media, Entertainment and Arts Alliance, environmental and community groups, university teachers in public administration, law, politics and history, and so on. A national organisation would need a website and some part-time labour at first, but need not initially require a huge amount of funding. Approaches to Law Foundations and philanthropic foundations for financial support would be needed.

I have no idea whether we can find the depth of interest to make it possible to achieve this end, but I fear that if we do not do so, FOI will continue to degenerate as a useful mechanism to make supposedly liberal democracy more open, responsive and participatory.

Conclusions

To summarise in a very general way, I believe that advocates of open government need to keep up the pressure on the Federal government to make changes to the objects clause of the FOI Act and establish an office of FOI Commissioner that will provide an institutional guarantee of greater integrity in the FOI system than exists at present, and to institute a process for exploring ways of renewing and redesigning the Act and its administration – from exemptions, to fees and charges, to proactive disclosure measures, to review processes and so on. No government body is currently looking at the need to keep the FOI Act abreast of the major changes happening in the structure of the state, and how to shape it and other mechanisms to serve the end of open government in new circumstances. In Alasdair Roberts' words: 'Old FOI laws no longer seem to cover the most important loci of social power.'[93] The price will be growing irrelevance.

Secondly, however, we should seek to build up the intellectual and practical strength of the open government position in the community and the academy, rather than putting all our eggs in the problematic basket of government action. At the same time, there are ways of assessing the compliance of individual agencies with FOI requirements. These can be utilised to help improve the performance even under the present Act.

The threats and realities of war and terrorism can be expected to reinforce other contemporary trends that favour demands for secrecy and the construction of a 'national security state'. At the same time, growth of secrecy can generate countervailing demands for transparency. This happened in the United States and Australia following governmental deceptions in the Vietnam War and the abuse of power in Watergate and its cover-up.[94] Roberts gives a number of recent similar examples,[95] and our experience with government claims of children being thrown overboard and attempts to withhold information about the sinking of SIEV-X may point in the same direction.[96] In this climate of secrecy, there are nonetheless countervailing forces that could favour a renewal of the ideal of greater access to government information as one of the means to allow participation, debate and challenge in relation to government actions and policy.

Whatever the social, economic and political pressures fostering secrecy, it remains true in Roberts' words that the 'right to self-government – which is itself a basic human right – means little if citizens lack the information needed to make intelligent decisions'.[97] Those opposed or indifferent to FOI have not won the intellectual argument. We need to see they do not win the practical argument either.

Endnotes

1 A shorter version of this paper was published in (2003) 103 *FoI Review* 2.
2 Justice Michael Kirby, 'Freedom of Information: The Seven Deadly Sins', Address to Justice, the British Section of the International Commission of Jurists, Fortieth Anniversary Lecture Series, 17 December 1997, available through the High Court's website.
3 Rick Snell, 'Rethinking Administrative Law: A Redundancy Package for Freedom of Information?' in S Kneebone (ed.), *Administrative Law and the Rule of Law: Still Part of the Same Package?*, Papers presented at the 1998 National Administrative Law Forum, AIAL (1999), 84 at 96.
4 A Roberts, 'The Informational Commons at Risk' (August 2000) at 3, available at: http://faculty.maxwell.syr.edu/asroberts/research.html, and published in David Drache (ed.), *The Market or the Public Domain: Global Governance or the Asymmetry of Power* (2001), 175 (book not sighted).
5 John McMillan, 'Twenty Years of Open Government – What Have We Learnt?', Inaugural Professorial Address, 20 March 2002, at 7–8, available through ANU Faculty of Law website; since published in a revised form by the ANU Centre for International and Public Law and the Federation Press as Law and Policy Paper 21, 2002.
6 *Freedom of Information: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill, and aspects of the Archives Bill 1978*, AGPS (1979).
7 Note 5 above at 7 and *passim*.
8 John McMillan, 'Freedom of Information in Australia: Issue closed' (1977) 8 *F L Rev* 379; Ralph Nader, 'Freedom From Information: The Act and the Agencies' (1970) 5 *Harvard Civil Rights – Civil Liberties Law Review* 1.
9 See eg Kent Cooper, *The Right to Know*, New York (1956) quoted in Anthony S Mathews, *The Darker Reaches of Government*, Berkeley (1978) at 34: 'Openness also tends to create "centres of outside analysis" which frequently enrich planning by enlarging the known policy options.'
10 S Zifcak, 'Freedom of Information: Back to the Basics', in R Creyke and J McMillan (eds), *Administrative Law: the essentials*, Papers presented at the 2001 National Administrative Law Forum (2002) 93 at 95–97, and A Roberts, note 4 above; and see R Snell, 'Administrative compliance – evaluating the effectiveness of freedom of information' (2001) 93 *FoI Review* 26.
11 See *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, *Nationwide News v Wills* (1992) 177 CLR 1, *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. For a recent commentary, see Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374; see also Anne Cossins, 'Revisiting Open Government: Recent Developments in Shifting the Boundaries of Government Secrecy under Public Interest Immunity and Freedom of Information Law' (1995) 23 *F L Rev* 226 at 264–268, Peter Bayne and Kim Rubinstein, 'Freedom of Information and Democracy: A Return to the Basics?' (1994) 1 *A J Admin L* 107, and Tom Brennan, 'Undertakings of Confidence by the Commonwealth – Are There Limits?' (1998) 18 *AIAL Forum* 8.
12 Note 2 above.
13 See HW Arthurs, 'Mechanical Arts and Merchandise: Canadian Public Administration in the New Economy' (1997) 42 *McG LJ* 29, referred to by Snell, note 3 above at 85.
14 See eg Luc Juillet and Gilles Paquet, 'Information Policy and Governance', *Report 1 – Access to Information Review Task Force* (Canada), available from website: http://www.atirtf-geai.gc.ca.

15 Alasdair Roberts, note 4 above; see also 'Structural Pluralism and the Right to Information' (2001) 51 *University of Toronto Law Journal* 243, 'Less Government, More Secrecy: Reinvention and the Weakening of Freedom of Information Law' (2000) 60 *Public Administration Review* 298, 'Closing the Window: How Public Sector Restructuring Limits Access to Government Information' (1999) 17 *Government Information in Canada/Information gouvernementale au Canada*.

16 *Freedom of Information Laws Amendment Act 1986* and *FOI Memo No. 84: FOI Laws Amendment Act 1986*.

17 *Freedom of Information Act 1982: Report on the Operation and Administration of the Freedom of Information Legislation*, Senate Standing Committee on Legal and Constitutional Affairs, Canberra (December 1987).

18 *Open government: a review of the federal Freedom of Information Act 1982*, Australian Law Reform Commission (Report No 77) and Administrative Review Council (Report No 40), AGPS (1995).

19 Ron Fraser, 'Freedom of Information: Commonwealth Developments' (2001) 9 *A J Admin L* 34 at 35–36; Rick Snell has referred to the tragedy 'that an increasingly dilapidated, antiquated and flawed *Freedom of Information Acct 1982* (Cth) continues to diminish [the informational] commons' in note 10 above at 30.

20 See in particular ALRC/ARC report, note 18 above, especially para 2.12 and references and chap 4; and Commonwealth Ombudsman, *Needs to Know: Own Motion Investigation into the administration of the Freedom of Information Act 1982 in Commonwealth Agencies* (June 1999). For a comparative critique, see Rick Snell, 'The Kiwi Paradox – A Comparison of Freedom of Information in Australia and New Zealand' (2000) 28 *F L Rev* 575.

21 See Ombudsman note 20 above for practical problems, Snell notes 3, 10 and 20 above and 52 below for critiques of design and structural flaws.

22 On the transformation and its implications for FOI see e.g. Snell note 3 and Arthurs note 13 above; see also discussion in Luc Juillet and Gilles Paquet, note 14 above.

23 News Release, Attorney–General, The Hon. Daryl Williams AM QC MP, 3 February 1998, 'Freedom of Information to apply to Government Outsourcing'; repeated by Departmental spokespersons before a hearing of the Senate Legal and Constitutional Legislation Committee on 5 March 2001 in its inquiry into the FOI (Open Government) Bill – see Fraser, note 19 above at 35, n 10.

24 *Privacy Amendment (Private Sector) Act 2000* (Cth).

25 On the general issue see *The Contracting Out of Government Services*, Administrative Review Council Report No 42 (August 1998). See also Ron McLeod, Commonwealth Ombudsman, 'Commentary' (2001) 29 *F L Rev* 359 at 361–362, and Moira Paterson, 'Commercial in Confidence Claims, Freedom of Information and Public Accountability – A Critique of the ARC's Approach to the Problems Posed by Government Outsourcing', in Robin Creyke and John McMillan (eds), *Administrative Justice – the Core and the Fringe*, Papers presented at the 1999 National Administrative Law Forum (2000), 243.

26 *Australia's federal record: A review of Archives Act 1983*, ALRC Report No 85 (1998).

27 See *Access to Information: Making it Work for Canadians: Report of the Access to Information Task Force*, Government of Canada (June 2002). For supporting materials, see website referred to in note 14 above.

28 See references throughout this paper. Peter Bayne's work has been more technical than that of some of the others and is less referred to here, but has been vital to the development of ideas concerning the design of legislation.

29 Note 3 above.

30 Some of what is said here is based on my submission to the Senate Legal and Constitutional Legislation Committee, Inquiry into the FOI Amendment (Open Government) Bill 2000, Submission No 16, or on Fraser, note 19 above. See also Report of the Committee dated April 2001.

31 The 2002 Bill has since been discharged and replaced by the Freedom of Information Amendment (Open Government) Bill 2003 moved by Senator Murray which reflects many of the recommendations of the report of the Senate Legal and Constitutional Legislation Committee.

32 See Second Reading Speech by Senator Murray, 5 September 2000, *Hansard*, Senate, 17318ff; and Explanatory Memorandum circulated by Senator Murray, available on the Senate *Hansard* site.

33 See Committee's report, note 30 at 53–57.

34 McMillan, note 5 above at 9.

35 For more detail see Fraser note 19 above at 36–37.

36 Para 4.9 and recommendation 4.

37 For some other minor suggested changes, see my submission to the Senate Committee, note 30 above, at 13–15. On s 41, see *ibid*, at 24.

38 *Commissioner of Police v District Court of NSW* (*Perrin's Case*) (1993) 31 NSWLR 606 (CA); *Victorian Public Service Commission v Wright* (1986) 160 CLR 145 (HCA) as interpreted by Victorian courts and tribunals. See *News Corp Ltd v NCSC* (1984) 1 FCR 64 and *Searle Australia Pty Ltd v PIAC* (1992) 108 ALR 163 for decisions of the Full Federal Court that there is no 'leaning' position in the Commonwealth FOI Act. Discussed in Cossins, note 11 above at 268ff.

39 (2002) 188 ALR 302.

40 See *Committee Hansard*, Senate, Legal and Constitutional Committee, 5 March 2001 at 2 (evidence of R Snell).

41 Some further changes to the clause in the Bill are suggested in my submission to the Senate Committee, note 30 above.

42 I have drawn here on my submission to the Senate Committee, note 29 above. See also Fraser note 19 above at 37–39.
43 *Administrative Appeals Tribunal Act 1975* (Cth) and *Administrative Decisions (Judicial Review) Act 1977* (Cth).
44 See Canadian ATI Task Force Report, note 27 above, chap 11, as well as ALRC/ARC report, note 18 above especially at paras 4.12–4.13.
45 See Report of the Legislative Review Committee (South Australia) (September 2000) at para. 6.4. See also the call for a Commissioner in association with outsourcing: 'If no monitoring body is appointed, the value of applying the access provisions of the FOI Act would be lost.' Robin Creyke, 'The contracting out of Government Services – Final Report: A salutation' at 4, address at the launch of the ARC's Report No 42, note 25 above.
46 Note 18 above, para. 6.30.
47 Note 30 above, recommendation 1(d) and para. 3.114.
48 See eg the Western Australian Information Commissioner's role in 'ensuring that agencies are aware of their responsibilities under the FOI Act' and periodic report cards on their performance.
49 See *FOI Memo No 77: Government directions on administration of FOI Act* (June 1985), para 6, and *New FOI Memo No 19: Preliminary and Procedural Points* (December 1993), para 2.6.
50 *Freedom of Information Act 1982: Annual Report 1994–95* at Appendix R. Unfortunately for the impact of this letter in later years, it was buried at the back of the report rather than being placed in a prominent position at the front. The change of government in March 1996 would also have deprived it of continuing impact.
51 Unfortunately, the United States Attorney–General John Ashcroft has repudiated the Janet Reno direction, which was to release information unless it is 'reasonably foreseeable that disclosure would be harmful', in order to achieve 'a maximum responsible disclosure of information'. The new direction stresses the nondisclosure of information when there is a 'sound legal basis to do so' and the Department of Justice undertakes to defend agencies which make a decision to refuse information in such cases. Some Democrat Senators have expressed concern with this development. See: *USA Today*, 17 January 2002, available through: http://www.usa.today.com .
52 Rick Snell and Nicole Tyson, 'Back to the drawing board: Preliminary musings on redesigning Australian Freedom of Information' (2000) 85 *FoI Rev* 2 at 3.
53 In particular from Fraser, note 30 above and Snell, note 40 above. A basic structure similar to that summarised here was developed in my submission. It is drawn essentially from Snell & Tyson note 51 above, Snell note 10 above, Cossins note 11 above, and the New Zealand *Official Information Act 1982*. However, the precise form of the proposals may not appeal to those commentators.
54 This issue is discussed in Fraser, note 19 above at 39–40.
55 See especially Cossins note 11 above at 268–274 for the effect of this in practice.
56 For the arguments, see the view of a minority of four members of the ARC in *The Contracting Out of Government Services*, ARC Report No 42, at 73–75, and Moira Paterson note 25 above; Chris Finn, 'Getting the Good Oil' (1998) 5 *A J Admin L* 113; on s 43 and government agencies, see Fraser, 'Freedom of Information: Testing the Limits of FOI Access – Some recent decisions' (2002) 9 *A J Admin L* 207 at 213–215.
57 Despite the comments in *Searle Australian Pty Ltd v PIAC* (1992) 108 ALR 163 at 169 that fulfilment of the first part of an exemption with a balancing public interest test does not cast an onus on the applicant, that is the way they are normally applied; and note Wilcox J in *Arnold v Queensland* (1987) 13 ALD 195 at 209 who referred to a prima facie exemption if information falls within the first part of an exemption with a balancing public interest test.
58 *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60; see also discussion by Cossins, note 11 above at 271–274 and note 61 at paras 109.8.3–109.9.6.
59 Paraphrased in Queensland Legal, Constitutional and Administrative Review Committee, *Freedom of Information in Queensland: Discussion Paper No.1* (8 February 2000), at 18.
60 *Official Information Act 1982* (NZ), s 5.
61 This is the view taken in one line of cases in the AAT based on the view of Muirhead J in *Ascic v Australian Federal Police* (1986) 11 ALN N184 at 185; see eg Forgie DP in *Re Electronic Frontiers Australia Inc and Australian Broadcasting Authority* [2002] AATA 449 at [83]. For a different view represented in many AAT cases, see eg Beaumont J in *Harris v Australian Broadcasting Corporation* (1984) 50 ALR 551 at 564, and Hall DP in *Re James and ANU* (1984) 6 ALD 687 at 699.
62 See Anne Cossins, *Annotated Freedom of Information Act New South Wales* (1997) at paras 1.13.11–1.13.12.
63 ALRC/ARC report, note 18 at para 8.3.
64 See Snell note 20 on New Zealand.
65 See note 18 above, para 9.14 and recommendation 50.
66 See P Bayne, submission to the ACT Legislative Assembly's Standing Committee on Justice and Community Safety, point 5, and 'Recurring Themes in the Interpretation of the Commonwealth Freedom of Information Act' (1996) 24 *F L Rev* 287 at 305 and 320–321.
67 ALRC/ARC report, note 18 above, para 4.11 and recommendation 6; see also clause 11A in Schedule 1 of the FOI (Open Government) Bill 2002.
68 See ALRC/ARC report, note 18 above, para 4.17.

69 ALRC, note 26 above chap 18, especially paras 18.8–18.24.
70 Note 27 above, chap 8.
71 See ALRC/ARC report, note 18 above, para 6.26.
72 J Lidberg, 'Freedom of Information as a journalistic tool – a comparative study between Western Australia and Sweden' (2001) 95 *FoI Rev* 42.
73 Greg Terrill, 'Individualism and freedom of information legislation' (2000) 87 *FoI Rev* 30 at 31.
74 The database is available on the following website set up by Alasdair Roberts: http://track.foilaw.net. Note that the Canadian Task Force (note 27 above) recommended that 'information on completed requests across government be made available to the public on a government Web site' (Recommendation 7.3). Under the US Electronic FOI Act there is 'a requirement to post documents or links to information for which there have been multiple access requests' (Canadian Task Force Report at 119).
75 See Snell, note 20 above.
76 See http://www.aph.gov.au/senate/committee/maritime_incident_ctte/index.htm, and Patrick Weller, *Don't Tell the Prime Minister* (2002). The Committee's report was published on 23 October 2002.
77 Previously of Queen's University, Ontario and now Director of the Campbell Public Affairs Institute at the Maxwell School of Syracuse University. See his paper on 'Limited access: Assessing the health of Canada's freedom of information laws', April 1998, and many other papers and articles available from website at note 4 above; and see note 15 above.
78 See notes 3 and 10 above.
79 Numerous undergraduate studies of this kind have been done through the University of Tasmania Law School and the University of Wollongong under Rick Snell. See http://www.foi.law.utas.edu.au/ research link.
80 See Office of the Information Commissioner Western Australia, *FOI Standards and Performance Measures*, May 1998, available from: http://www.foi.wa.gov.au/.
81 Greg Terrill, *Secrecy and Openness: The Federal Government from Menzies to Whitlam and Beyond* (2000), eg at 115, and article referred to in note 73 above; R Hazell, 'Freedom of Information in Australia, Canada and New Zealand' (1989) 67 *Public Administration* quoted R Snell, 'In search of the Freedom of Information constituency: Case 1 – The Media' (1998) 78 *FoI Review* 81 at 82: 'Yet Hazell notes that this direct empowerment in the absence of informational go-betweens was overly optimistic: "with the wisdom of hindsight it was naïve to suppose that individual citizens ever would be the major users of the legislation. The public are seldom direct consumers of government information: they rely on others (the media, interest groups, political parties) to process the information for them and to select items which will appeal to their own particular range of interests and prejudices."'
82 Eg Terrill, note 81 above at 17 and 91–92; see also R Fraser, 'FOI and citizen participation in public policy and decision making', Grad Dip in Pub Law essay (1986) at 5–6 and Appendix 1 (author's possession).
83 Quoted Snell, note 3 above at 105.
84 See McMillan, note 7 above at 389–391. And note for use of the US FOIA up to the early 1980s, Harold C Relyea and Suzanne Cavanagh, 'Press Notices on Disclosures made Pursuant to the Federal Freedom of Information Act, 1972–1980' (1982) 3 *Journal of Media Law and Practice* 144.
85 See Snell, note 3 above at 105–106.
86 See Roberts, note 4 above at 28, on the difficulty today of constructing 'coalitions that are powerful enough to push for adoption of policies that promote openness'.
87 For other recent writing on the media and FOI see eg Nigel Waters, *Print Media Use of Freedom of Information Laws in Australia*, Australian Centre for Independent Journalism, University of Technology, Sydney (January 1999), and 'Freedom of information works for the media in New Zealand' (1998) 77 *FoI Rev* 66; Snell, note 80 above; Ross Coultheart, 'Why the FOI Act is a joke or 'don't shoot the media, we're doing our best'' (1999) 81 *FoI Rev* 43; Lidberg, note 71 above; Anina Johnson, 'You Don't Know what you've Got until it's Gone: The French Media's Use of FOI' (2000) 85 *FoI Rev* 6; Paul Atallah and Heather Pyman, 'How Journalists Use the Federal Access to Information Act', *Report 8 – Access to Information Review Task Force* (January 2002); note also a work with a chapter on FOI by Rick Snell and Matthew Ricketson: Stephen Tanner (ed), *Journalism: Investigation and Research*, Pearson (2002).
88 Waters (1999), note 87 above, especially at 15–25.
89 See e.g. Coultheart note 86 above.
90 Note that Terrill, note 81 above, is an example of an historical study where an attempt to use the provisions of the Archives and FOI Acts for research purposes was accompanied by a considerable amount of frustration – see eg 85 and 121–122.
91 On parliamentarians, see Rick Snell and James Upcher, 'Freedom of information and parliament: A limited accountability tool for a key constituency?' (2002) 100 *FoI Rev* 35.
92 Jim Spigelman, *Secrecy: Political Censorship in Australia*, Sydney (1972).
93 Note 4 above at 28.
94 See Terrill, note 81 above at 45–49.
95 Roberts, note 4 above at 12–15.
96 See note 76 above, and resources at: http://www.sievx.com/.
97 Note 4 at 29.

HOW HAS THE PRIVATE SECTOR REACTED TO THE PRIVACY ACT—A PRACTITIONER'S PERSPECTIVE?

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Paper presented at the ANU Public Law Weekend, Canberra, 2 November 2002

Introduction

It is almost 12 months since the Federal Privacy Act 1988 was extended to private sector organisations with a turnover of $3 million or more[1], as phase one of the privacy implementation within the private sector. At that time, the Federal Privacy Commissioner, as regulator was given jurisdiction to monitor, guide and penalise those businesses failing to meet the 10 National Privacy Principles (NPPs).

In my view, since 21 December 2001, the Privacy Commission and the private sector have engaged in one of the more productive regulatory relationships Australia has experienced in recent years. Although largely over-shadowed both in the media and the boardroom as an item of major note by more fundamental corporate governance issues striking at the core of companies' survival, the privacy rollout and the call for compliance to Australian businesses has proceeded smoothly, without exception.

It has been said that good news does not make for interesting press. Despite this risk, this paper makes no apologies for sharing a good news story about the Federal Privacy Commissioner's approach to facilitating privacy compliance within Australia's private sector and the private sector's response. However, my final message is a challenging one. At this point, we do not know whether privacy has been implemented effectively within the private sector. From the ground, there are signs of difficulties in embedding compliance programs.

This paper gathers my perspectives, as a corporate governance practitioner, adviser and reviewer/auditor of privacy compliance programs, of the first year of the operation of the Privacy Act in the private sector, and highlights trends and challenges. Three key areas of observations are addressed:

1 The response of Australian business to the call for action on privacy reform.

2 The actions and response of the regulator, the Federal Privacy Commissioner, in moving the private sector towards compliance.

3 Meeting the challenge of successful privacy implementation.

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The Response of Australian Business – setting the context

Pre-21 December 2002 concerns

During the early part of 2001, the media and some industry organisations developed an increasingly worrying picture about the demands which would be placed on business in meeting the Privacy Act start date of 21 December 2001. This scenario was supported by the Chartered Secretaries Australia (CSA) survey results[2] of Company Secretaries in the Top 200 companies conducted in May 2001 (Survey No 3). The survey highlighted a significant concern that 42.3 per cent of respondents believed that they did not have sufficient time to prepare for the new obligations under the Privacy Act.[3] However, by November 2001, many business advisers and industry organisations were acknowledging what the Privacy Commissioner had been pledging, that the Commissioner would be taking an educative, facilitative approach in the first year of the Act's operation in the private sector.[4] With Christmas looming, there was a collective sigh of relief.

For the 12 months leading up to 21 December 2001, the Privacy Commissioner had adopted a range of measures to involve affected businesses and prepare for the rollout of privacy laws. This included the 'open letter' approach in which the Commissioner sought assistance with, and feedback on, guidelines to clarify the NPPs, and on guidelines for organisations and industries wishing to develop their own approved code to replace the NPPs. Suggestions and comments were sought on the type of information and assistance which businesses would find most useful as they prepared for the commencement of the Act.

The private sector was also flooded with a plethora of self-help privacy toolkits and a range of privacy health checks from industry bodies, the consulting sector and law firms. In the main, the products on offer were remarkably standard in nature featuring step by step instruction on determining the application of the Privacy Act, analyses of personal information use, assessing privacy exposures and developing privacy compliance policies, statements and programs. The Australian/New Zealand Standard on Compliance AS/NZS 3806: 1998 has formed the basis of many of the products and approaches on offer. Despite these offerings, in the main private sector organisations were to take a low key, in house approach to preparing for the privacy implementation.

Getting privacy on to the agenda: Yet another legal compliance issue

One of the challenges for the Privacy Commission has been managing business' view that privacy is just another compliance issue to be added to the already overflowing in-trays of Australian compliance officers. Another compliance issue to compete for the officer's time – to be absorbed, developed into organisational policy, pushed through the Board approval and a compliance manual/implementation program created.

The reality is that adherence to the requirements of the Privacy Act is yet another matter of legal compliance for business. Privacy obligations are placed on company legal compliance registers by company secretaries, along with the list of other legislative requirements the business must meet, and as time allows, addressed according to well-established management discipline and principles for ensuring that organisations 'get it right' in relation to their legal obligations. However, we are observing a subtle change. Although we continue to encounter this minimalist approach to privacy control, 18 months ago it pervaded. What has changed? We are now in a time of unprecedented focus on corporate governance, legal and regulatory issues. Boards and audit committee members are feeling their immediate fiduciary and shareholder confidence pressures, and are more motivated to tackle governance issues, than at any time since the corporate collapses of the 80s.

Over the past three months, Deloitte's experience is that compliance issues including privacy are being given far more attention in the boardrooms of Australian companies than ever before. Best practice management and treatment of legal and business exposures and ensuring the processes are in place to deal with the risks are being brought forward on board and audit committee agenda across the country. This augurs well for successful privacy implementation.

These observations are fully consistent with the findings of a recent survey[5] targeting Australia's top-500 listed companies by revenue with the largest group of respondents coming from organisations of more than 100 employees. The survey indicated that 96 per cent of the directors and 92 per cent of senior management were strongly committed to implementing legal compliance. Some 91 per cent have appointed a compliance manager and all organisations surveyed had identified the key laws relevant to their business activities.

The Features of the Private Sector's Response

What then have been the key features of the private sector's response?

A smooth and uneventful transition.

Despite the many gloomy predictions during 2001, my on-the-ground observation is that the private sector transition to the new privacy law reform implemented on December 21, 2001 has been remarkably smooth and uneventful.

The CSA survey results[6] of Company Secretaries in the Top 200 companies' compliance pre- and post-law reform reflect a similar sentiment. The surveys conducted in May 2001 and February 2002 indicated widespread acceptance of the need for privacy regulation in the private sector and the broadly-held view that the change process has not been burdensome in its initial requirements, nor in its implementation (92 per cent of respondents).

Post-implementation of the Act, the need for some finetuning of the Act was identified by 69 per cent of respondents, which CSA further specifies as including greater clarification of penalties for non-compliance and clearer explanations of principles.

In conclusion, 88 per cent of respondents in the post-Privacy Act survey indicated that they were not experiencing any difficulties in complying with the Act. Some 92 per cent indicating that ongoing compliance with the Act was not seen to place an unnecessary burden on companies.

Table: Chartered Secretaries Australia: post Privacy Law Reform Survey Results

Now that the Privacy Act has come into effect, do you believe there was sufficient time To prepare your Company's database of clients/customers for the new obligations under the Act?	
Yes = 77%	No = 23%
Are you experiencing any difficulties in complying with the Act?	
Yes = 12%	No = 88%
In your view does the Act require fine tuning?	
Yes = 31%	No = 69%

Did your organisation implement the Act by adhering to the National Privacy Principles (NPP) in the Act or did your organisation develop it's own privacy codes?	
NPP = 88%	Own 12%
Did your company appoint the Company Secretary as the Privacy Officer?	
Company Secretary = 62%	Compliance Officer = 15% / Other = 23%
Do you believe that ongoing compliance with the Act will place an unnecessary burden on your company?	
Yes = 8%	No = 92%

Heightened awareness that consumers take the issue seriously

Through Privacy Commissioner media releases, media reports and their own consumer feedback, business is aware that privacy is important. Since 21 December 2002, the Privacy Commissioner has reported a three-fold increase in calls to the Office and a four-fold increase in written complaints to the Office. During the first six months of the new Act's operations, the Office of Federal Privacy Commissioner (OFPC) received more calls to the hotline (13,450 calls in total) than for all of 2001 (8,177 calls in total). Written complaints to the OFPC also rose with 456 written complaints lodged in the first six months, compared to 194 written complaints lodged during all of 2001.[7]

The key issues reported by the OFPC as of concern by consumers include:

- inappropriate disclosure of information;
- accessing information;
- being pressured into consenting to many uses of information in order to receive a good or service from an organisation (bundled consents);
- direct marketing continuing after asking an organisation not to make contact; and
- unnecessary collection of information.

Business opting in

Section 6EA of the Privacy Act allows private sector organisations who would not otherwise be covered by the Act to elect to be treated as an organisation for the purposes of the Act. This includes being exposed to random audit and investigation by the Privacy Commissioner. The potential attraction of the provision is that small businesses may be able to generate increased consumer confidence and trust if they are able to demonstrate to their clients and customers that they are subject to, and abide by, the NPPs and operate under the Privacy Act.

A public register of businesses who have elected to 'opt-in' is available on the OFPC website. To date, some 75 small businesses have opted-in with the majority of businesses represented being community, employee and cooperative credit units and consulting organisations.

Development of industry codes

The Privacy Act allows organisations and industries to have and to enforce their own privacy codes that continue to uphold the privacy rights of individuals while allowing some flexibility of application for organisations. Under section 18BB the Commissioner may approve a privacy code, provided certain criteria are met.

Numerous private sector codes have been developed as at 1 November 2002, including the General Insurance Information Privacy Code and the Clubs Queensland Industry Privacy Code. Several codes are under development, eg the Market and Social Research Privacy Code and Australian Casino Association Privacy Code.

Incorporating privacy into corporate risk management and internal audit programs

More progressive boards and audit committees have identified privacy compliance as a corporate risk and have incorporated privacy as an exposure within the company's corporate risk management program. Unlike the public sector where corporate risk management programs are now well established – some 70 per cent of agencies within the Commonwealth have commenced corporate risk programs – the private sector is just starting to establish programs for systematically identifying risk.[8]

By taking a risk-based approach to managing privacy obligations, privacy risks can be identified, assessed, prioritised and then treated through removal of the risk or mitigation, in an ordered and auditable manner. Privacy controls can be established which are designed to address the real risks associated with personal information management within the business.

In the profession's experience, some but not sufficient, companies have placed or plan to place privacy onto the internal audit program to ensure that the controls for managing privacy issues are effective and implemented. As part of the audit program, the company's internal auditors with the cooperation of corporate and line management conduct a privacy review or audit regularly. The audit program has the benefit of preparing the company for random audits by the Privacy Commissioner.

Balancing the regulator's role – Getting the approach right

Administrator v Watchdog?

The Federal Privacy Commissioner, Malcolm Crompton, has maintained (without appearing to waver) the moderate and reasonable regulator approach. Quoted many times [9] as stating that his approach is to help business to comply with the Act, our observation is that Crompton has demonstrated that this is not purely rhetoric. One of the new regime's more scathing commentators, Dr Robert Clarke, was reported as criticising the Privacy Commissioner in the prelude to 21 December 2001 for being an administrator when he needed to be a watchdog.[10] The Privacy Commissioner has made no apologies about his more facilitative approach. This approach is fully consistent with the best practice messages used for achieving the necessary levels of legal compliance motivation.[11]

The five key messages going to Australian business from the OFPC are clear and persuasive. In summary, the messages read:

Pride – Highlighting the business' reputation for integrity and the benefits that will flow. Good privacy is good business and compliant privacy practices will build positive relationships with customers whilst meeting responsibilities under the Act.

Up to date – Managing privacy fits in with the business' focus on progress and governance reform.

Active rather than passive – Emphasising advantages in taking the initiative in privacy control rather than waiting for an incident to occur.

Piece of cake – Privacy control is not complex and requires modest outlay.

Over a barrel – If all else fails, privacy control is a compliance requirement.

Setting the tone for handling transgressions – the Transurban Response

Earlier this year, the private sector watched the OFPC's handling of the Transurban case as somewhat of a test of whether the Privacy Commissioner's actions would be consistent with his published approach. In the case of Transurban, an ex-employee had disclosed thousands of customer credit card numbers over the internet. The OFPC conducted a review of Transurban's information handling practices, as a result of the disclosure. The review found that Transurban needed to address certain areas to reduce the overall risk of further privacy breaches. An independent review at the time also found Transurban had 'best practice' data security consistent with the nature of the information held.

In a press release, the Privacy Commissioner publicly commended Transurban for its promptness and decisiveness at the time of the breach. The actions taken by Transurban included the issue of a press release immediately following the incident and publication in the Melbourne press of an open letter apologising to customers and informing them of its intended actions.

The challenges and shortcomings of the private sector's response

It is only 10 months since the Privacy Act commenced its operation within the private sector. As this paper has highlighted, the indications are that the basis for a healthy regulatory relationship has developed between the private sector and the Federal Privacy Commissioner. However, these are the earliest days of a major private sector implementation program for the Federal Government. The real challenge for both regulated and regulator is to ensure that the privacy management and controls put in place over the past year are effective and are actually embedded into the everyday operations of Australian business. There are some hurdles to overcome before we can conclude that the private sector response has been sufficient.

Window dressing or substantial implementation?

Have the private sector organisations put in place effective privacy programs? At this point, there is limited evidence available from the OFPS or from the private sector itself from which to draw any significant conclusions. Privacy policies, statements and consent notices on websites, in marketing materials and business forms have become common place as public indicia of business' compliance with privacy obligations.

In the absence of any data of significance, some practical insights and general observations as a practitioner may be of value. At this time of year, internal audit programs are well underway in most private sector organisations. Tasked by boards and audit committees to provide assurance about the levels of compliance, privacy audits should now be standard items on Australian company audit programs, in preparation for potential external monitoring of compliance and for the purposes of providing feedback on the effectiveness of the internal privacy program. My concern is that privacy audits are not to be commonly found on audit programs. The challenge for the private sector is to correct this.

In Australia, audit functions have been slow to respond to a world-wide call to add value in relation to non-financial performance as well as financial performance. Privacy compliance, as a non-financial performance item, is often overlooked. Privacy is marginalised as a compliance issue in some organisations. Management of the issue has been given to Legal, Human Resources or Information Technology functions. Although skilled in the technical issues of their disciplines, our experience is that direct knowledge of risk management, internal control and compliance methodologies and processes is often lacking with the result

that the strength of the program is often corporately inconsistent, less rigorously pursued and less effective than it would be if it was considered a mainstream compliance issue.

Many private sector organisations (and public sector organisations!) have significant gaps between the way they currently control their business to manage their compliance exposures and established best practice.[12]

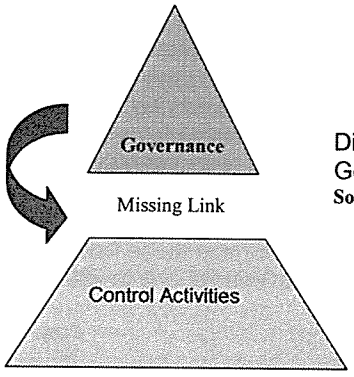

Diagram: The Missing Link – Linking Governance & Control
Source: Deloitte Touche Tohmatsu

In Australia and globally, companies are struggling with the following four vital elements of effective compliance:

1 **Risk assessment**: Developing responses to compliance issues, which are risk-based. This means first determining the risks and exposures arising from the management of personal information.

2 **Control Activities** – Good risk mitigations and control: Once the risks are identified, then determining the most appropriate mitigation strategies or internal controls.

3 **Monitoring** – Program Regularly updated: Ensuring the risk assessment is revised and still current, and regularly monitoring the controls and their usage through regular audits to determine whether they are still effective in minimizing the potential for breach of privacy obligations.

4 **Information and Dialogue**: Board, audit committee, staff and clients educated about the controls and monitoring process to ensure understanding, and necessary motivation to implement.

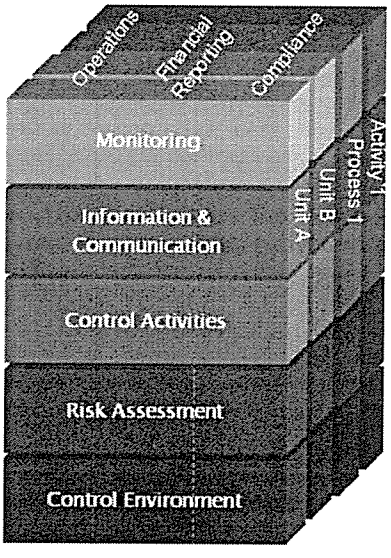

Diagram: The elements of a best practice control infrastructure – Source: Deloitte Touche Tohmatsu

A recently released survey [13] confirms what the internal audit and consulting profession is encountering anecdotally every day. The National Compliance Survey conducted by Ernst and Young of the top 500 companies listed on the Australian Stock Exchange identified a major gap between the committed stance taken by board members and senior management in operating a compliant company and the actions of the company in managing for compliance.

The Ernst and Young survey revealed a significant disparity between the Board's intentions and the reality of day-to-day operations. In some 42 per cent of respondents, compliance is not yet considered a standard part of business practices. In the highly regulated financial services sector, where compliance is paramount for business licensing purposes, 34 per cent of respondents did not see compliance as a core business function.

69 per cent of respondents had undertaken a risk assessment of their compliance obligations and identified higher priority legal requirements. Of these organisations, only 71 per cent had developed written processes to enable staff to manage these risks. More telling was that only 19 per cent saw 'communicating expected behaviours to staff' as a key objective of a compliance program.

Likely impact of CLERP 9 and Sarbanes-Oxley

The Treasurer's recently announced corporate governance reform package has major potential to improve Australian company management of privacy and other compliance obligations. Specifically, a number of the reform proposals focus on the need for the Board to ensure it is receiving adequate information and assurance from management about the processes the company has in place for managing legal obligations and risk exposures. The responsibility for this has been placed firmly with Board audit committees in a set of best practice principles. The principles clearly establish the audit committee's responsibility for maintaining the quality of the internal controls of the company. For many companies, a significant communication and understanding gap has developed between the Board/Audit committee and company internal audit/management. As a result, internal controls have subtly fallen off the agenda.

The CLERP 9 proposals also reinforce the need for a risk-based approach to managing a company's obligations. Before determining management strategies, a company should first establish what the risks are and then develop management strategies that will minimise the likelihood of the risks occurring. The Australian/New Zealand Risk Management Standard AS/NSZ 4360:1999 provides a very clear blueprint for making this happen.

This risk-based approach is entirely consistent with and reinforces the Privacy Commissioner's recommended approach. To establish an effective privacy response, first establish the risks via a risk assessment, then work to determine the best strategies for dealing with the risk. The Commissioner's advice to Transurban was to undertake a risk assessment[14].

The US equivalent to CLERP 9, Sarbanes-Oxley legislation goes much further. Every year, listed companies will be required to undertake an effectiveness audit of their internal control program. Compliance controls such as OHS and privacy will be a critical part of the review.

The challenge for the Privacy Commissioner: Sharing lessons

The private sector is poor at sharing lessons and best practices. We just have to look at the corporate governance debate for evidence. Despite being at the forefront of the corporate governance debate for many years during the early 90s, there is little publicly available best practice material on corporate governance in Australia directly relating to Australian

companies. Some 10 years on, the ASX has established the ASX Corporate Governance Council to develop best practice materials and standards for private sector governance.

My hope is that it will not take 10 years for best practice lessons on private sector privacy implementation to be developed and shared. Currently, apart from the sporadic survey of professional and industry members by active associations, there is little feedback or better practice information based on the Australian privacy experience readily available to the private sector. Although the OFPC does release updates or information sheets on topical issues these could not be described as sharing of private sector learnings or experiences with the implementation process.

It will be more than 18 months before the extension of the privacy legislation to the private sector is due to be reviewed and the outcomes reported. There is a clear need for the OFPC to be surveying participants, gathering better practice case studies and materials from private sector organisations to encourage increasing competence in management of personal information. The results would prove beneficial also to the next wave of private sector organisations to be covered by the Act with effect from 21 December 2002.

Conclusions

With the Privacy Act 1988 poised to cover small business from 21 December 2002, the implementation of privacy law across the private sector remains in its early stages. Over the past 18 months, through the effective approach taken by the Privacy Commissioner and his office, the private sector has been carefully prepared for the rollout of privacy laws. I believe we have witnessed one of the more successful and productive rollouts by a Commonwealth regulator.

To date, the private sector privacy rollout has been a good news story about building successful regulatory relationships. However, the final challenge is yet to be faced. How effective has the private sector been in implementing solid and enduring compliance programs into the many individual businesses and organisations? The indications from the ground is that there is still much to be done.

Endnotes

1 On 21 December 2001, the Privacy Amendment (Private Sector) Act 2000 (Cth) came into effect. It extended the Federal Privacy Act 1988 obligations to business with a turnover of more than $3 million and to health service providers, regardless of their size. On 21 December 2002, the Act was further extended to certain businesses under $3 million.

2 Chartered Secretaries Australia Ltd, CSA Rapid Response Survey No 3 – May 2001, http://www.csaust.com/news/index.cfm?part=5&subpart=5&subpart=3 accessed 31 October 2001

3 Interestingly, this was to be in direct contrast to a later survey conducted shortly after the enactment of the Privacy Act in February 2002, whereby 77 per cent believed they had sufficient time.

4 *Privacy Act waits in the wings*, Mark Fenton Jones, *Australian Financial Review*, 6 November 2001.

5 Ernst and Young, National Compliance Survey, 2002 http://www.ey.com accessed 28 October 2002.

6 Chartered Secretaries Australia Ltd, *CSA Rapid Response Survey No 3 – May 2001*, http://www.csaust.com/news/index.cfm?part=5&subpart=5&subpart=3 accessed 28 October 2002.

7 http://www.privacy.gov.au/media accessed 27 October 2002.

8 Methodoligies consistent with the Australian/New Zealand Risk Management Standard 4360:1999 are most common.

9 http://www.privacy.gov.au/media accessed 27 October 2002.

10 *Privacy Claws*, Sue Cant and Garry Barker, *The Age* 4 December 2001.

11 Sharpe, Brian *Making Legal Compliance Work*, (1998) CCH Australia

12 Australian/New Zealand Standards AS/NZS 3806: 1998, 7799.2:20000, 4400-1995, 4369:1999; OFPC Information Sheets, http://www.privacy.gov.au/publications.

13 Ernst and Young, National Compliance Survey, 2002 http://www.ey.com accessed 28 October 2002

14 http://www.privacy.gov.au/media accessed 27 October 2002.

A VERY DYNAMIC ISSUE: INTERNATIONAL DEVELOPMENTS IN PRIVACY IN THE LAST 12 MONTHS

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Paper presented at the ANU Public Law Weekend, Canberra, 2 November 2002

Introduction: International Developments in Privacy, 2002

In 2000-2001 it seemed that we were constantly hearing of some new privacy 'scandal' arising from the collection and use of personal information by the private sector. During this period, we saw the enactment and then in December 2001 the coming into force of the *Privacy Amendment (Private Sector) Act* 2000 (Cth).[1] The year 2000, then, and to a lesser extent 2001 were the years of the private sector privacy debacle.[2] 2002, on the other hand, owing to developments in the wake of the events of September 11, has seen a different focus of concern for privacy advocates. More attention is now given to 'big brother'-like surveillance by law enforcement, and the collection and use of personal information by government. This is because legislatures around the world have sought to give additional powers to law enforcement, for the stated purpose of aiding the 'war against terror'.[3] We might expect that, following the achievement of a long-standing goal of privacy advocates – legislation covering the private sector, however qualified it might be[4] – and in light of the understandable focus on *government* surveillance, developments in relation to privacy in the private sector would be sunk to mere background noise.

Quite the contrary, in fact. For people interested in information privacy law and policy, there have been plenty of international developments to think about since the private sector amendments to the *Privacy Act* came into force in December 2001. Interestingly, too, many of the same issues are cropping up in a number of jurisdictions.

My purpose today is both ambitious, and unambitious. It is ambitious because I aim to highlight some of the recent international developments, to seek to draw some common themes and to identify issues that people concerned about individual privacy (whether companies who have to observe it, or individuals who are worried about its loss) will need to keep an eye on, during the next few years. It is unambitious, because I raise more questions than I can possibly answer. This is an overview paper of the present position. Issues in this area will continue to be as fast-moving into the future as they have been in the last 2 or so years.

Specifically, there are four international developments, occurring in (approximately) the last 12 months, that I want to highlight today. Each has a significant impact on the environment in which private sector entities will be operating when it comes to the collection, use and disclosure of personal information:

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1. Developments in the common law relating to privacy. There have been some important cases handed down particularly in the United Kingdom that address the common law relating to privacy, the most recent on 14 October 2002. Such changes in the 'background' privacy law inevitably has an impact on the way we understand the privacy principles embodied in legislation such as the *Privacy Act* 1988 (Cth);

2. Changing rules whereby private sector entities may be *required* to *retain data*. If enacted, such data retention laws may mean more 'stockpiling' of information by private sector bodies. As we know, once information is stored, people have a tendency to find new uses for it (the phenomenon known as 'data creep').[5] Thus such 'data retention' laws have significant implications for the application of the *National Privacy Principles*.

3. The issue of *access* to data held by private parties – in particular, questions surrounding access sought by *other private parties* seeking to enforce private rights.

4. The need to consider the impact of *other laws* on privacy interests. For example, methods for the enforcement of copyright rights are one area of concern.

The survey below will, I hope, make one thing very clear. There has been a great deal of action internationally in the last year, in ways that impact on the collection and use of personal information and which are not covered by the Privacy Act as amended, or Australian privacy law generally. Developments in the common law relating to breach of confidence in the United Kingdom rely on legislation, specifically the *Human Rights Act* 1998, which has no counterpart in Australia. Orders by law enforcement for data retention by third parties are likely to fall within 'law enforcement exceptions' to the *Privacy Act* and the *National Privacy Principles*.[6] Access to data by private parties would also fall within such exceptions,[7] as would in at least some cases situations where other laws or other interests – such as copyright – impact on privacy rights. In other words, I want to argue that, while there is much to be proud of in the fact that we now *have* private sector privacy legislation, there is going to be a lot of debate in areas at the edges of that legislation, or that fall into gaps in its coverage. I want to sound this warning loud and clear, particularly in light of the need for future review of the legislation.[8] And I wish to make a plea that we constantly monitor the protection of privacy interests, or intrusion on privacy interests, *outside* the remit of the legislation. In an area where developments in technology constantly move the goal posts, to be complacent now we have legislation would be foolish, to say the least. Developments in the last 12 months indicate some areas we should monitor.

Of course, in considering these specific issues and concerns, we should not lose sight of the 'bigger picture' of privacy protection. The reality today in our highly networked, information-intensive society remains one of erosion of information privacy. The basic issues have not changed just because private sector legislation has been enacted, here and overseas. While Privacy Commissioners worldwide work hard to inculcate a 'culture of privacy',[9] they are working against some strong factors that push in an opposite direction. As database and data mining technology become more sophisticated and less expensive, companies increasingly have the capacity to gather large and detailed 'dossiers' on their customers.[10] In an environment where 'information is money', and power, the incentives for such collection are strong.[11] Furthermore, new technologies only strengthen the trend towards collecting ever more detailed, and personal information.[12]

We have some reasons to be (cautiously) optimistic. Privacy legislation contains principles which, when applied, can counter this trend. Principles such as NPP 1.1, which prevents an entity collecting information unless it is 'necessary' for one of the entity's functions,[13] and, in Australia at least, the NPP 8[14] which provides that individuals must, if practicable, have the option of transacting anonymously, hopefully discourage some of this large-scale collecting. Our own Privacy Commissioner has generated an amazing amount of guidance and

information for the private sector in a relatively short time. Elsewhere around the world, other Privacy Commissioners are putting their decisions and recommendations in particular (de-identified) cases online: aside from the Australian site,[15] the Canadian Privacy Commissioner's site,[16] and the equivalent New Zealand site,[17] are worth mentioning specifically. Looking at those decisions, there is reason to be optimistic that at least in some areas, the system is working. These decisions also should reassure us that similar general principles are being accepted in other countries. But the trend towards collection and use of personal information is strong. Regardless of how we handle the particular issues that I wish to highlight today, vigilance in countering these trends is always going to be necessary if we are to provide meaningful protection for the privacy of individuals.

But my focus today is different: it is on some of the 'new' or 'edges' issues that are rising to prominence internationally.

The Common Law of Privacy: Developments in the United Kingdom

2002 has seen a number of cases handed down in the United Kingdom which deal with claims by individuals for infringements of what might be broadly designated as their 'information privacy interests'[18] – by which I mean the interests of the individual in preventing disclosure or other use of information about themselves. The legal basis on which the claims are put in the cases has varied, the most common claim being one for breach of confidence.

What has this to do, one might ask, with information privacy as conceived under legislation like the *Privacy Act* 1988 (Cth)? Surely these areas of law are conceptually different?[19] There are three points to make about this line of authority. First, while only one of these cases required the court to consider an independent claim for damages arising from the UK's *Data Protection Act* 1998,[20] the Act and the EU Data Protection Directive[21] which the Act stems from rate frequent mention in cases where some interference with privacy is being asserted. As a result, we are seeing the development of judicial understandings of terms in that Act which may be worth looking at when issues arise under the Australian legislation. The English legislation is differently worded, and owes its expression to a large extent to the EU Data Protection Directive, but some terms and ideas are common or at least similar.

Second, developments in the common law in relation to privacy interests are an important background to the requirements under data protection legislation such as the *Privacy Act* 1988 (Cth). The *National Privacy Principles* are stated very broadly, and need to be read against a background of what people in a society consider is appropriate conduct in relation to personal information. Case law even in relation to common law actions contributes to the development of this understanding.

Finally, the *Privacy Act* does not supplant general law obligations of confidence.[22] Private entities, particularly those collecting sensitive information, need to be aware of both sets of obligations.

***Protecting Privacy in England through the Action for Breach of Confidence*[23]**

When we look at the English case law, what we see is a line of authority whereby the traditional action for breach of confidence is being expanded to cover more and more 'privacy' interests.[24] The Court of Appeal has noted: [25]

> an increase in the number of actions in which injunctions are being sought to protect the claimants from the publication of articles in newspapers on the grounds that the articles contain confidential information concerning the claimants, the publication of which, it is alleged, would infringe their privacy.[26]

The action for breach of confidence, the Court suggests, *can* extend to protect 'private interests'.[27]

In *A v B & C*,[28] a decision of the United Kingdom Court of Appeal handed down in March 2002, an English premier division footballer sought an injunction to prevent a national newspaper publishing stories about his two extra-marital affairs. A's claim was framed as a claim for breach of confidence. The Court of Appeal overturned the injunction which had been granted by the judge at first instance.[29] It found that the 'relationship' between A, and the two women C and D with whom he had an affair, was 'not [of a kind] which the court should be astute to protect when the other parties to the relationships do not want them to remain confidential'[30] – as compared to a marital relationship, the confidentiality of which a court would protect.[31] It is notable that the decision in the case reflects a conservative morality, while advocating a very liberal attitude towards the press – affirming that courts are not 'censors or arbiters of taste', and that '[w]hether the publication will be attractive or unattractive should not affect the result'.[32] The case is also notable for the effort by the Court of Appeal to provide guidelines for trial judges confronted with such actions where breach of confidence is made the cause of action in a case where privacy interests are sought to be protected.

Most recently, the Court of Appeal handed down its decision in *Naomi Campbell v MGN Ltd*. The act complained of was the publication, by the Mirror, of an article that disclosed that international model Naomi Campbell was a drug addict, and receiving therapy through Narcotics Anonymous. The article included a photograph taken of Ms Campbell leaving (or arriving at) a NA meeting. The case represents the most recent treatment of privacy by the Court of Appeal, and the first which considers the *Data Protection Act* in detail. However, complicating the case were some key concessions by counsel for Ms Campbell. Ms Campbell had claimed in the press that she had not taken drugs. It was therefore conceded that the media could correct that deception. What was complained of, therefore, was the publication of the additional information (in the form of the photograph, and the fact that Ms Campbell was receiving treatment through NA). The breach of confidence claim failed on appeal, the court taking the view that the additional details were a 'legitimate, if not essential, part of the journalistic package' designed to demonstrate that Ms Campbell had misled the public in claiming not to be a drug addict.[33] In identifying when privacy will be protected, therefore, the case itself will be of little assistance owing to its unusual facts.

Campbell v MGN is a particularly interesting case, because claims were *also* made under s 13 of the *Data Protection Act* 1998. It is the first Court of Appeal case that has had to consider, in detail, a claim under the *Data Protection Act*. I argued above that international developments highlight the importance of some of the gaps in Australia's privacy legislation. Note that such a claim could not even have been brought in Australia, owing to the broad exemption under s7B(4) for acts done 'in the course of journalism' (even aside from the absence, under Australian law, of such a private right of action – the point is, complaint could not even be made to our Privacy Commissioner). The *Data Protection Act* claim failed, however, because the actions by the media fell within the UK media exemption.[34]

In these (and other similar) cases the United Kingdom courts have examined in some detail the values which a right of privacy seeks to protect, and the kind of information which may be considered sufficiently 'private' to be worth protecting. As these cases frequently concern celebrities asserting a right of privacy, the courts have also had to engage in an explicit balancing of privacy interests against interests in freedom of expression (a balancing required, of course, by the *Human Rights Act* 1998 (UK)). The decisions are a not insignificant contribution to the international jurisprudence on privacy.

However, a note of caution is necessary in looking to any of these decisions for guidance in Australia. The rapid expansion of the action for breach of confidence, and of privacy law in

general in the United Kingdom, owes much to the enactment of the *Human Rights Act* 1998 (UK). That Act requires a court to act 'in a way which is not incompatible with a [European] Convention [on Human Rights and Fundamental Freedoms] right'.[35] As a result, a court must not act in a way incompatible with Article 8 of the Convention, which mandates 'respect for [a person's] private and family life, his home and his correspondence.' As the Court of Appeal noted in *A v B & C*:

> These [Convention] articles [ie Art 10 and Art 8] have provided new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court ... The court, as a public authority, is required not to act 'in a way which is incompatible with a Convention right'. The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving new strength and breadth to the action so that it accommodates the requirements of those articles.[36]

Australia, on the other hand, has no *Human Rights Act* or equivalent constitutional provision. While there are some very tentative suggestions in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[37] that common law protection of privacy is not entirely barred by existing case law,[38] there is no support for following the very broad approach being adopted by the United Kingdom Courts – at least just yet.

The Second Development: Data Retention Requirements by Private Parties, and Law Enforcement Access to Privately-Held Data[39]

At the outset of this paper I referred to privacy advocates' focus in 2002 on concerns relating to *government* surveillance and government collection of personal information. As I noted, this focus has been made necessary by legislative developments all over the world which have sought to give additional powers to law enforcement agencies, to counter the 'new' threats from terrorism. Advocates have been concerned to ensure proper safeguards on such law enforcement powers.

This sudden spurt of legislative action to shore up or increase law enforcement powers has not left the data collection practices of the private sector untouched. Quite the contrary. There have been several high profile, and controversial moves to require private parties who are in possession of certain kinds of information to retain that information for a certain period of time – either generally, or, at least, on law enforcement entities obtaining an order for retention. The obvious targets for such requirements are telecommunications providers, who have the potential to retain and supply very detailed information which could be very helpful to investigations. Airlines, too, have been a target for such suggestions.

The first of these developments is in the *Council of Europe Convention on Cybercrime.*[40] This Convention was signed in December 2001, and contains provisions which seek to harmonise *substantive* law, but also considerable *procedural* provisions to supplement the powers of law enforcement, and to facilitate assistance between law enforcement entities in signatory countries. In particular, Article 16 of the Convention requires a signatory country 'to enable its competent authorities to order and similarly obtain the expeditious preservation of specified computer data, including traffic data, that has been stored by means of a computer system...', and requires each country to have legislation to oblige a person 'to preserve and maintain the integrity of that computer data for a period of time as long as necessary, up to a maximum of ninety days, to enable the competent authorities to seek its disclosure.'

More recently, in July of this year, the European Parliament agreed to a new Directive on the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector.[41] The Directive contains some important privacy protections,[42] but privacy advocates have drawn particular attention to Article 15, which provides that:

> Member States may, *inter alia*, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid out in this paragraph [that is, to safeguard national security, defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorized use of the electronic communication system.]

Note that it is left to each country to determine whether to introduce such laws.[43] This issue has been a particular source of controversy in the United Kingdom, where internet service providers rejected efforts by the Home Office to convince them to subscribe to a Code of Practice whereby they would voluntarily retain such data.[44] It is not clear, at this stage, whether the Minister will choose to use his reserve powers under the legislation to compel ISPs to comply.[45]

There has been controversy too in Canada, where similar provisions for the retention of data by ISPs have been proposed in order to bring Canada into line with obligations it could incur if it signs the *Cybercrime Convention.*[46] Another development in Canada has been a recent proposal by the Canadian Customs and Revenue Agency to retain passenger information on every traveller entering Canada, obtained from airlines, for 6 years. In this case, it would be the government agency actually retaining the information, albeit information obtained from a private party. The proposal has met strong protest from Canada's Privacy Commissioners.[47]

The sheer number of examples where data retention requirements are being discussed, or sought by governments, shows that these are not isolated incidents – but indicative of a trend (how long the trend will last, or how much it will be opposed by members of the public, is another question).

It is worth noting that there are no such explicit requirements for information retention here in Australia,[48] either in relation to telecommunications data, or in relation to airline information,[49] although such requirements have been proposed by the Australian Communications Authority in the past.[50] At present, ISPs in Australia have obligations to provide 'reasonably necessary' assistance to law enforcement agencies,[51] subject to certain limitations, for example the requirement of an interception warrant if the *content* of communications passing over communications networks is to be revealed.[52] History indicates a high level of cooperation with government agencies,[53] and indeed the Privacy Commissioner here in Australia has noted that:

> the Privacy Act is not intended to deter organisations from lawfully cooperating with agencies performing law enforcement functions. Police and other enforcement bodies are generally reliant on the *voluntary* cooperation or organisations to provide information.[54]

Retention of data, particularly wholesale retention of data where no particular offence or suspicion justifies the retention, raises distinct, and troubling privacy issues. Information, once stored, has a tendency to be used for other purposes: we can imagine that if data is retained ISPs can expect more requests for information. There are also objections in principle to allowing government to build databases, using personal information obtained from (or retained by!) third parties, without the individuals' consent, and for purposes not of preventing any particular crime or providing any service, but rather for the sake of having the information available for *potential* use, in case the need comes up. As a result, this is a disturbing trend, that warrants (no pun intended) watching (no pun intended).

The Third Development: Access to Data Held by Private Parties

The third international development that is worth noting is increasing disputes over access by *private parties* to information held by *other* private parties, for the purpose of enforcing

private rights. These disputes are exemplified by the increasing frequency of 'John Doe' suits in the United States, where internet service providers are asked for information identifying individuals who have posted allegedly defamatory comments online.

The first point to note here is that, clearly, access to information held by others for the purposes of enforcing private rights has a very long history: this is what third party subpoenas have always been about in the context of existing legal proceedings.[55] And the common law has long recognised that a private party can seek information from a third party even prior to legal proceedings being brought, for the purpose of identifying potential defendants.[56] Note that, in each case, *some* proceedings must be filed before the order can be made against the innocent third party requiring them to provide the information.

It is predictable that the more information is collected and stored by a private party (and, as noted above, more and more information *is* being held by private parties), the more likely they are to be the target of such requests. Furthermore, because so many transactions online can occur with apparent anonymity,[57] it is becoming more common for potential plaintiffs to seek identifying information from intermediaries – particularly telecommunications carriers and even more particularly, from ISPs. Under most legislative privacy regimes, if a party A (who we assume is bound by the legislation) is holding information and simply receives an *informal request* from wronged party B for the identity of a third party wrongdoer, A may breach the privacy rules if they comply with that informal request.[58] This is something that private entities bound by privacy legislation will need to be very aware of. If, however, a court order or subpoena is obtained by B, then compliance by A will not be a breach – it will be covered by exceptions.[59]

Now, the obvious question is – why should we care whether wrongdoers can be identified? Why have I highlighted this as an 'issue to watch' in relation to privacy and the private sector?

First, there are issues of *process* which, in my view, need to be borne in mind and which, I would argue, should be monitored on an ongoing basis by Privacy Commissioners, and privacy advocates. Subpoenas are frequently issued without a judge first approving it; a judge will look at a subpoena usually only if it is challenged. *Norwich Pharmacal* proceedings are generally held in the absence of the alleged wrongdoer. An innocent third party has little incentive to challenge either subpoenas or *Norwich Pharmacal* orders – their interest, usually, is to get out of the proceedings as soon as possible. In my view, therefore, it is important that the individual alleged wrongdoer have a chance to make submissions or to forward submissions through the party subpoenaed. ISPs or others in receipt of such orders should be required to make reasonable efforts to inform the individual. It is not clear that current law provides an assurance of this procedure. The United Kingdom Court of Appeal has, however, held that it is a desirable procedure to follow: *Totalise Plc v The Motley Fool Ltd, Interactive Investor Ltd.*[60]

Second, there are issues of *scale*. If significant numbers of such orders or subpoenas are sought, individuals are likely to feel that they are, in fact, living in a 'big brother' state – but where the enforcer is not the State (subject to democratic control) but private parties with private interests – such as copyright owners. ISPs and other data holders, on the other hand, are likely to resent the increase in calls on their resources.[61] Such developments need to be monitored closely.

Third, we need to monitor further developments in legislation, for example, in the copyright area. A dramatic example of the issues is provided by the current *Verizon* dispute in the United States. The Recording Industry Association of America (RIAA) has brought suit against the ISP Verizon.[62] In that suit, the RIAA is seeking to use provisions of the United States Copyright Law[63] to obtain access to information about a Verizon subscriber who is

alleged to be an egregious copyright infringer. If the RIAA is successful, it will mean that, in the United States, an ISP will be required to provide information on user identity even in the absence of *any* proceedings being filed. This means, in effect, there would be no court oversight at all. Legislation which would allow such a result should not be encouraged, and should be challenged – or at least scrutinised very closely if proposed. As noted above, such issues are not going to arise as breaches of the *Privacy Act* 1988 – as exceptions will apply. Rather, this is another area which Privacy Commissioners are well placed to consider part of their general remit, if developments on the ground warrant concern.

The Fourth International Development: The Impact of Other Interests

The final issue I want to highlight, very briefly, is the growing impact of other laws and other interests on information privacy. I am thinking in particular here of the impact that copyright law may have on privacy interests.[64] Copyright owners are increasingly relying on technology to protect their interests in copyright work. In particular, systems for 'digital rights management' are being developed which have the potential to allow copyright owners to monitor, and even bill for, each individual use or access to of a copyright work. This was not possible in an analogue world but is increasingly possible with digital works. Thus I might 'access' a movie online, and be charged each time I viewed it, with a slightly higher charge, perhaps, if I wanted to pause or review elements of it. Such systems clearly have the potential to amass large databases of information on individuals' reading and viewing habits.

Generally accepted Fair Information Practices, and the Australian *National Privacy Principles*, prohibit 'unnecessary' collection, and collection of information in an unfair, or unreasonably intrusive way.[65] But would such collection be 'unreasonable', if done to protect copyright rights and to ensure that each use was remunerated? Copyright owners would probably argue that such a system would allow them to charge much less to people who wanted only to access a work once – thus benefiting people who would not, otherwise, be able to access expensive intellectual works. It is doubtful whether such activities would be affected by NPP 8, which requires the provision of anonymous transacting 'where practicable' – it would be relatively simple to argue that any anonymous system was not 'practicable'. Furthermore, the *National Privacy Principles* clearly allow use or disclosure of information where the individual has 'consented' (as they might have to, in order to obtain access to a copyright work) (NPP 2.1(b)), or if the secondary purpose is 'related' to the primary purpose of collection, and the individual 'would reasonably expect' the organisation to use or disclose the information.

The response to this issue has so far been quite disappointing. The European Union Directive on Copyright in the Information Society recognises the issue but satisfies itself with an exhortation stating that privacy protections 'should' be incorporated into digital rights management systems.[66] United States legislation allows users to 'circumvent' technological measures in order to protect their own privacy, but that exception is extremely limited, and in any event would be available only to those with the skill to do the work themselves.[67] And in Australia, the issue was only very briefly touched on, without offering any firm conclusions, by the *Copyright Law Review Committee* in its recent report *Copyright and Contract.*[68]

Conclusions

No doubt, I have raised far more questions than I can possibly answer. Hopefully, I have provided at least an overview of some of the issues that are arising in the international sphere which have implications for the protection of privacy in relation to the private sector here in Australia. There have been important developments in the common law in relation to privacy in the United Kingdom. And a number of other issues at the edge of current Privacy legislation should, I hope, convince you that there is action at those edges, as well as action in the centre.

Endnotes

1 Subject to the grace period allowed to some small businesses.

2 Dixon, Tim, '2000: A Chronology of Privacy Debacles' (2001) 3(9) *Internet Law Bulletin* 117 (outlining such debacles as the proposed merger of the DoubleClick database with offline material identifying individuals; the proposed sale of a database of personal information on children by Toysmart, and others).

3 In Australia, a raft of legislation concerned with the powers of law enforcement was introduced into Parliament on 13 March, 2002, and subsequently referred to the Senate Legal and Constitutional Legislation Committee on 20 March 2002. The Senate Committee issued its report on 20 May 2002: *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills* (report available at http://www.aph.gov.au/senate/committee/ legcon_ctte/terrorism/report/Security.pdf (last visited October 28, 2002)). On June 27 2002, the Senate rejected the bill dealing with interception of communications passing over telecommunications systems (*Telecommunications Interception Legislation Amendment Bill* 2002 (Cth)), suggesting that it would unnecessarily extend government surveillance powers: Yeng, Than, 'An ISP's responsibility for co-operating with government agencies in Australia' (2002) 5(2) *Internet Law Bulletin* 13, 19. For a general overview of the developments internationally (including, for example, the US's infamous 'PATRIOT' Act, see Electronic Privacy Information Center (EPIC) and Privacy International, *Privacy and Human Rights 2002: An International Survey of Privacy Laws and Developments* (2002) at 24 (available at http://www.privacyinternational.org/survey/phr2002/) (last visited October 10, 2002)

4 See for example the frequent criticisms of Graham Greenleaf: eg Greenleaf, "Tabula Rasa': ten reasons why Australian privacy law does not exist' (2001) 24 *UNSWL Jo* 262; Greenleaf, 'Private sector Privacy Act passed (at last).' (2000) 7(7) *Privacy Law and Policy Reporter* 125. Note also the criticisms of the Australian law made by the European Commission's Article 29 Working Party: Hughes, Aneurin, *A Question of Adequacy? The European Union's Approach to Assessing the Privacy Amendment (Private Sector) Act 2000 (Cth)* (2001) 24 *UNSWL Jo* 270.

5 Joel Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, 52 *Stan L Rev* 1315, 1324 (2000); Simson Garfinkel, DATABASE NATION: THE DEATH OF PRIVACY IN THE TWENTY-FIRST CENTURY (2000) at 75 ('Once the day-to-day events of our lives are systematically captured in a machine-readable format, this information takes on a life of its own. It finds new uses. It becomes indispensable in business operations.'); see also Electronic Privacy Information Center (EPIC) and Privacy International, *Privacy and Human Rights 2002: An International Survey of Privacy Laws and Developments* (2002) at 24 (available at http://www.privacyinternational.org/ survey/phr2002/) (last visited October 10, 2002) (noting the problem of 'purpose creep', where 'data collected for one purpose is used for another').

6 *Privacy Act* 1988 (Cth), Schedule 3 (*National Privacy Principles*) (hereafter 'NPPs'), NPP 2.1(f), 2.1(g) and 2.1(h).

7 Esp NPP 2.1(g) (where use of disclosure is 'required or authorised by law').

8 There are areas even aside from those I have mentioned which highlight gaps (or broad exemptions) in our legislation. For example, the Privacy Commissioner of Canada has issued comments on a case where related companies were sharing information – which emphasised the need to make sure customers appreciate potential sharing between related companies: see Privacy Commissioner of Canada: *Alleged Disclosure of personal information without consent for secondary marketing by two telecommunications companies* (16 October 2002), available at http://www.privcom.gc.ca/cf-dc/cf-dc_021016_5_e.asp (last visited 28 October 2002). Our exemption in this scenario is fairly broad: *Privacy Act* 1988 (Cth) s13B.

9 See Office of the Federal Privacy Commissioner, *Information Sheet 13-2001: The Privacy Commissioner's Approach to Promoting Compliance with the Privacy Act* (available at www.privacy.gov.au, last visited 28 October 2002).

10 Daniel Solove has chronicled the rise of database technology in some detail: 'Privacy and Power: Computer Databases and Metaphors for Information Privacy' (2001) 53 *Stan L Rev* 1393

11 See generally Cohen, Julie, 'Privacy, Ideology, and Technology: A Response to Jeffrey Rosen' (2001) 89 *Georgetown L Jo* 2029.

12 For example, privacy advocates have recently raised concerns regarding the wireless Internet and the use of technologies using the Global Positioning System, that allow pinpointing of an individual user's geographical position (raising new possibilities for the collection of behavioural data): see *Something to Watch Over You,* The Economist, 15 August 2002 (available to subscribers at http://www.economist.com/displayStory.cfm?Story_ID=1280634) (last visited 28 October 2002). Digital television, and the possibilities for collecting detailed information about customers' viewing habits, also raises significant privacy issues: David Martin, *TiVo's Data Collection and Privacy Practices*, Privacy Watch Report, Privacy Foundation, March 26, 2001 (http://www.privacyfoundation.org/privacywatch/report.asp?id=62&action=0) (last visited 28 October, 2002); see also EPIC and Privacy International, *Privacy and Human Rights 2002* (above n5, at 74ff – discussing interactive television). The latest development I have noticed is the implantable human ID chip, the 'VeriChip' – a product of Applied Digital Solutions. ADS has launched a campaign in the United States to promote the device, offering discounts to the first 100,000 people who register to get embedded with the microchip: *Implantable Chip, On Sale Now,* Wired News, 25 October 2002 (available at http://www.wired.com/news/print/0,1294,55999,00.html) (last visited 28 October, 2002). Further issues surround the development of 'ENUM', a technology that aims to

have one contact number for multiple means of communication (email, internet, telephone, mobile): see *Privacy and Human Rights,* above n 5, pp66ff.

13 NPPs, above n 6, NPP 1.1

14 *Id.*

15 http://www.privacy.gov.au

16 http://www.privcom.gc.ca/index_e.asp

17 http://www.privacy.org.nz/top.html

18 'Privacy' as such tends to be applied to a large number of quite different situations. I am concentrating here on *information* privacy – the subject of legislative regimes such as the *Privacy Act* 1988 (Cth) which are concerned with the collection, use and disclosure of personal information, and the access and correction rights of information subjects: Jerry Kang, *Information Privacy in Cyberspace Transactions*, (1998) 50 *Stan L Rev* 1193, 1202-06. Kang distinguishes two other forms of privacy (1) *decisional* privacy: the individual's ability to make decisions without interference, and (2) *spatial* privacy – those principles which shield the individual's 'territorial solitude' from invasion by government (through for example searches), and from private invasion by the law of tort (eg trespass).

19 *R on the application of Ann S v Plymouth City Council* [2002] EWCA Civ 388, para 33 ('The common law obligation to keep a confidence is conceptually quite different from the statutory obligation to process data in accordance with the data protection principles and from the right to respect for private life enshrined in Article 8(1) of the European Convention on Human Rights, although there are overlaps.').

20 *Naomi Campbell v MGN Ltd* [2002] EWCA Civ 1373 (Phillips MR, Chadwick and Keene LJJ, 14 October 2002; [2003] 1 All ER 224). The claim for under the Act was unsuccessful. Under s13 of the *Data Protection Act* 1998, an individual has a private right of action if they suffer damage as a result of a failure to comply with the requirements of the legislation; see also Article 22 of the *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, O.J. L 281, 23/11/1995 p. 0031 – 0050 (hereafter the 'EU Data Protection Directive').

21 Above n 20.

22 *Privacy Act* 1988 (Cth), ss 90, 91

23 *See generally* Singh, Rabinder and Strachan, James, 'The Right to Privacy in English Law' [2002] 2 *European Human Rights L Rev* 129; see also *Privacy Law and Policy Reporter,* volume 8(7) (several articles dealing with the common law 'right' of privacy).

24 *Naomi Campbell v MGN Ltd* [2002] EWCA Civ 1373 (Phillips MR, Chadwick and Keene LJJ, 14 October 2002; [2003] 1 All ER 224); *Campbell v Frisbee* [2002] EWCA Civ 1374 (Phillips MR, Chadwick and Keene LJJ, 14 October 2002); *A v B & C* [2002] 2 All ER 545, [2002] 3 WLR 542 (Lord Woolf CJ, Laws and Dyson LJJ, 11 March 2002). An earlier case that informs this line of caselaw is *Douglas v Hello! Ltd* [2001] QB 967; [2001] 2 All ER 289 (Court of Appeal, Brooke, Sedley and Keene LJJ, 21 December 2000).

25 *A v B & C*, above, n 24, para 3.

26 Ibid.

27 Ibid, para 11(vii)

28 [2002] 2 All ER 545, [2002] 3 WLR 542 (Lord Woolf CJ, Laws and Dyson LJJ, 11 March 2002).

29 *A v B Plc* [2002] E.M.L.R. 7 (Queens Bench Division, Jack J, 10 September 2001).

30 Above n 20, para 44.

31 *Id* para 43.

32 *Id,* para 12(xiii).

33 Above n 24, para 62.

34 *Data Protection Act,* s 32.

35 *Human Rights Act* 1998 (UK), s 6

36 *A v B & C* [2002] 2 All ER 545, para 4

37 (2001) 185 ALR 1

38 See Greenleaf, Graham, 'Privacy at Common Law – Not Quite a Dead Possum' (2002) 8(7) *Privacy Law and Policy Reporter* 129; Stewart, Daniel 'Protecting privacy, property, and possums: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*' (2002) 30 *Fed L Rev* 177.

39 Note: the Electronic Privacy Information Center (EPIC) maintains a website with links to documents on this issue: http://www.epic.org/privacy/intl/data_retention.html (last visited 28 October, 2002).

40 Council of Europe, *Convention on Cybercrime*, 23.XI.2001, available at http://conventions.coe.int/Treaty/EN/WhatYouWant.asp?NT=185 (last visited 28 October 2002).

41 *Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector*, OJ L 201/37, 31/7/02.

42 See for example Article 6.1, Article 12 (dealing with directories of subscribers), and Article 13 which deals with unsolicited communications.

43 Such laws are already in place in the UK, the Netherlands, France, Spain and Belgium; similar authority exists in New Zealand: EPIC and Privacy International, *Privacy and Human Rights 2002,* above n5.

44 Millar, Stewart, *Internet Service Providers Say No to Blunkett,* The Guardian, 22 October 2002 (available at http://www.guardian.co.uk/internetnews/story/0,7369,816523,00.html (last visited 22 October 2002).

45 *Id.*

46 Geist, Michael, *Federal Proposal Tells Only Part of the Cybercrime Story,* The Globe and Mail, 3 October 2002, available at http://www.theglobeandmail.com/servlet/ArticleNews/printarticle/gam/20021003/TWGEIS (last visited 10 October 2002).

47 See Canadian Privacy Commissioner, 'Letter from the Privacy Commissioner to the Honourable Elinor Caplan, Minister of National Revenue, about CCRA's plans to establish a massive 'Big Brother' database on the foreign travel activities of all law-abiding Canadians', 26 September 2002 (available at http://www.privcom.gc.ca/media/nr-c/02_05_b_020926_e.asp (last visited 28 October 2002). Similar issues have arisen in the United States: see EPIC's information page on the issue: http://www.epic.org/privacy/airtravel/ (last visited 28 October 2002).

48 In relation to Airline information, Customs here in Australia obtains advance passenger information, but such information is not retained: *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills,* above n 3, para. 4.68 and following. Note also that in Canada, Customs were last year given the power to obtain such information on undertakings not to retain the information; the proposal to *retain* the information is new.

49 For more detail, see Yeng, above n 3, at 19.

50 Australian Communications Authority, *Record Keeping Rules – Discussion Paper*, available at http://www.aca.gov.au/consumer/discussion/recordkeeprules_dp.pdf) (proposing a 2 year retention rule for certain 'core' data).

51 See *Telecommunications Act* 1997 s 313(3), and s 282(6)

52 *Telecommunications (Interception) Act* 1979 (Cth)

53 Yeng, above n 3, at 13.

54 Office of the Federal Privacy Commissioner, *Information Sheet 7 – 2001 Unlawful Activity and Law Enforcement.*

55 *Supreme Court Rules,*1970 (NSW), Rule 37.2

56 Such orders are known as *Norwich Pharmacal* orders at common law, after the case in which they were first recognised: *Norwich Pharmacal Co v Commissioners of Customs & Excise* [1974] AC 133. They are now embodied in most court rules, including the *Supreme Court Rules* 1970 (NSW) , Section 3.1.

57 By 'apparent' in this context I mean that in fact, the individuals are frequently, although not always identifiable via information such as unique IP addresses. To the 'observer', however, without the information that links the IP address of a user to a name and address of a person, the transactions online, including communications, will frequently be anonymous if the user chooses not to use a name, or to use a pseudonym.

58 But see NPPs (above n 6), NPP2.1(f), and the Internet Industry Association of Australia's *Draft Privacy Code* Version 1.0 (August 2001), available at http://www.iia.net.au/privacycode.html), which provides that the Code Subscriber may disclose if they have 'reason to suspect that unlawful activity has been, or is being or may be engaged in, and uses or discloses the Personal Information as a necessary part of its investigation of the matter…' (Provision 6.8(f)) (the provisions are in the same terms). 'Unlawful activity' is potentially of wide application, and it is not 100% clear whether the 'investigation' has to be purely internal to fall within the exception.

59 Under the Australian NPPs, (above n 6) the relevant exception would be NPP 2.1(g) – the 'use or disclosure is required or authorised by or under law'.

60 *Totalise Plc v The Motley Fool Ltd, Interactive Investor Ltd* [2002] 1 WLR 1233; [2002] FSR 50, esp paras 26-28. The reasoning in the case, it should be noted, was based to a significant extent on the *Human Rights Act* 1998 (UK) and the *Data Protection Act* 1998 (UK). There is no guarantee that such an approach would be adopted in Australia. On the contrary, in the one NSW Supreme Court case that has mentioned the *Totalise* decision, the judge did not appear inclined to agree with its reasoning: *Airways Corporation of New Zealand v The Present Partners of Pricewaterhouse Coopers Legal* [2002] NSWSC 521

61 One of the reasons which Verizon has given in the proceedings in the United States is the fear of a flood of automated requests for information from copyright owners: see Verizon, *Opposition of Verizon Internet Services to Motion to Enforce Ex Parte Subpoena Issued July 24, 2002,* 30 August 2002, available at http://www.eff.org/Cases/RIAA_v_Verizon/20020903_verizon_opposition.pdf (last visited 28 October 2002). See also Yeng, above n 3.

62 The Electronic Frontiers Foundation (EFF) maintains a website with links to information on this case: http://www.eff.org/Cases/RIAA_v_Verizon/ (last visited 28 October 2002). The case has attracted media attention in the United States: see eg Krim, Jonathan, *A Story of Piracy and Privacy,* The Washington Post, 5 September 2002.

63 Specifically, 17 USC §512(h).

64 See generally Bygrave, Lee, 'The Technologisation of Copyright: Implications for Privacy and Related Interests' [2002] 2 *EIPR* 51; Cohen, Julie, 'The Exclusive Right to Read' (1996) 28 *Connecticut L Rev* 981

65 *NPP* (above n 6), NPP 1.1

66 *Directive 2001/29 of the European Parliament and of the Council of May 22, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society* [2001] OJL167/10ff, esp Recital 57.

67 Samuelson, 'Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised' (1999) 14 *Berkeley Technology L Jo* 519, at 553ff

68 Copyright Law Review Committee, *Copyright and Contract* (2002), available at www.clrc.gov.au (last visited 28 October 2002).