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CROSSING THE INTERSECTION: HOW COURTS ARE NAVIGATING THE 'PUBLIC' AND 'PRIVATE' IN JUDICIAL REVIEW

The Hon. Raymond Finkelstein*

I recently discovered (or, more accurately, my associate[1] discovered) an American 'blog' on the Internet that had as its question for discussion 'The End of Judicial Review?' Posted there was a paper by well-known academic Mark Tushnet. In it, Professor Tushnet describes judicial review as a 'false god' which stands in the way of self-government[2] and he proposes an amendment to the US Constitution (I think facetiously) called the '*End Judicial Review Amendment*'.

I do not propose to consider directly whether judicial review is a false god or not. I will leave that question to the bloggers. My topic does, however, deal with this question indirectly because it hopefully demonstrates the increasing importance of judicial scrutiny of both the functions of government and what have been traditionally regarded as governmental functions. In particular, I believe that, if anything, such an important safeguard against the abuse of executive power should be strengthened and adapted to cope with modern circumstance — not abolished.

In Australia, judicial review represents the most important element in the administrative justice system. It is an aspect of the rule of law which guarantees that executive action is not unfettered or absolute but is subject to legal constraints. The duty of the courts is to determine those constraints. To quote Chief Justice Marshall in *Marbury v Madison*: 'It is emphatically the province and duty of the judicial department to say what the law is.'[3] Or, to use the words of our own Sir Gerard Brennan:

> 'judicial review is neither more nor less than the enforcement of the rule of law over executive actions.'[4] Like most of the common law, those statements go back at least to the writings of Sir Edward Coke. In fact, Coke would have gone even further by promoting the idea (long since abandoned) that fundamental laws are superior to the king's (or in our case the legislature's) and that government answers to a 'higher authority'.

The power of the court to review administrative action does not go beyond the declaration and, if necessary, enforcement of the laws which determine the limits on administrative power. The merits of the action must be distinguished from the legality. Nevertheless, as is increasingly becoming apparent, the gateway to merits review is being wedged open through review of a decision's 'reasonableness'. It may be opening even further by allowing review on the ground of 'faulty reasoning' and 'proportionality', but those thorny issues are for another day.

Initially, under the common law, courts had jurisdiction to scrutinise the exercise of statutory powers and to grant appropriate remedies. The courts acted to ensure that the repository of a statutory power did not act in excess of the power, did act when there was a duty to do so, and exercised the power in accordance with the conditions governing its exercise.[5]

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* *Paper delivered by Justice R Finkelstein, Federal Court of Australia, Melbourne, for the Victorian Chapter of the Australian Institute of Administrative Law.*

In Australia, the Supreme Courts of each State received the supervisory jurisdiction of the English courts and so face no constitutional constraints. On the other hand, the High Court derives its jurisdiction to grant prerogative relief (now called 'constitutional writs') from s75(iii) and (v) of the Constitution. The Federal Court's jurisdiction has several sources, in particular the *Judiciary Act 1903*, which confers the same powers as has the High Court, and the *Administrative Decisions (Judicial Review) Act 1977* (ADJR). Both the High Court and the Federal Court's supervisory jurisdiction, being constrained by the Constitution, may be narrower in scope than that enjoyed by State courts.

The grounds of judicial review are not always easy to define. Generally speaking, the role of the court in conducting judicial review is to consider what could be called the three 'I's:

- 'illegality' (whether the body has misdirected itself in law),
- 'irrationality' (whether the body's decision is so unreasonable that no reasonable decision-maker could have arrived at it) and
- 'impropriety' — procedural impropriety that is — which concerns whether there has been a departure from any procedural rules governing the conduct or a failure to observe the basic rules of natural justice.[6]

The grounds have been extended in the UK and may yet be extended by Australian courts.

The issue that I wish to consider is one that has come to the forefront of public law because of the changing patterns of modern-day government and the so-called 'shrinkage of state apparatuses'. I refer to the privatisation or outsourcing to private bodies of functions which had previously been performed by government itself. Most dramatic of all in Australia is the privatisation of public utilities, which have replaced various public monopolies with substantial elements of private monopoly power.

I propose to consider how judicial review has developed to respond to these changes and how it should progress. I will not discuss the scope of review. I am chiefly concerned with questions of amenability and how courts can approach the task of determining, within the law, when a private or quasi-private body, that is performing what were once public functions, is susceptible to judicial review.

In considering what actors should be amenable to review in this day and age, it is convenient to begin with what acts and actions have traditionally been accepted as justiciable. Before the 1980s, judicial review was confined to the exercise of power conferred by statute. Now it is clear that almost every executive decision is amenable to review. There are still some exceptions, including certain decisions in exercise of the prerogative like the power to enter into war, and so-called 'political' or 'policy' decisions.[7] Such decisions have always been immune from the costs and vagaries of superior court litigation,[8] although one cannot predict how long such immunity will last. In New Zealand, for example, the immunity given to the prerogative to grant mercy has been questioned.[9]

The principles of judicial review and amenability are not and have not remained stagnant. They have developed in response to changing social and administrative circumstances. Unfortunately, this is one area where our English peers have been (to use the words of Lord Cooke) more 'liberated' than ourselves.

The liberation began — predictably — in the 1960s. The case was *The Queen v Criminal Injuries Compensation Board; ex p Lain*.[10] It concerned a scheme for compensating victims of crime. The scheme was not established by statute or regulated by Parliament, but was promulgated under prerogative powers and funded with public moneys. Decisions relating to compensation were made entirely by a Board constituted by the executive. The Court held that the Board was amenable to the court's supervisory jurisdiction because it was a body of

'public', as opposed to purely private or domestic, character, with power to determine matters affecting subjects. The fact that the Board was constituted under the prerogative power and not by statute was no bar to justiciability.

Lord Parker CJ noted that the exact limits of certiorari had never been, and were not, specifically defined — the only limit consistent throughout was that the body was performing a *public* duty. He did not say what he meant by 'public duty'[11] but clearly concluded that the Board fell within this rubric. In reaching this conclusion, he noted that the Board was a servant of the Crown, that it had the recognition of Parliament in debate, and that Parliament provided the money to satisfy its awards.[12]

Lain's holding in relation to the amenability of the prerogative was confirmed by the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service*.[13] There, the Minister for Civil Service exercised the prerogative to vary the terms and conditions of the employment of staff at the Government Communications Headquarters to prevent them from belonging to national trade unions without prior consultation. The Law Lords found that executive action of this kind was not immune from judicial review merely because it was carried out in pursuance of a prerogative power. On the other hand, they confirmed that a decision may be immune from judicial review if its 'subject matter' was not properly justiciable.[14] As the Minister's decision was made in the interests of national security, this was an area in which the government was given 'the last word'.[15]

The 'liberation' continued into the 1980s, with *The Queen v Panel on Takeovers and Mergers; ex p Datafin*, a very important case.[16] Its importance is in the fact that the impugned decision was of a non-governmental private body. The decision-maker was the Takeovers and Mergers Panel. It had sole responsibility for enforcement of the code on Takeovers and Mergers. The code had received statutory recognition and there were sanctions in place for its breach, which the relevant Department or the Stock Exchange had statutory power to penalise. The Panel itself was an unincorporated association. It had no statutory or prerogative power. But it had immense powers to investigate and report breaches of the code and to apply or threaten sanctions.

In finding the Panel amenable to review, Sir John Donaldson MR described its lack of a statutory base a 'complete anomaly'.[17] Following *Lain*, he found that the Panel, without doubt, performed a 'public duty'. Although its powers were directly derived from the consent of institutions and members, ultimately the 'bottom line [was that] the statutory powers exercised by the Department … and the Bank of England.'[18] The other judges reached similar conclusions.

This was a significant change to the law. The question of amenability no longer depended upon the 'source' of the power, nor on whether the power derived from statute or not, but rather whether the body in question was exercising 'public functions or duties'. As I will later discuss, this criteria is broad and somewhat question begging.[19] How does one — more importantly, a judge — determine what is a *public* function or duty?

The English cases in which certain bodies have been found *not* to be amenable may be of assistance. Not surprisingly, they have typically involved social or cultural bodies — the Jockey Club, the Royal Life Saving Society, the Football Association, the Chief Rabbi.

In *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan*,[20] the applicant sought review of the Disciplinary Committee's disqualification of his horse and imposition of a fine. Many of the elements which one would have thought met the *Datafin* test were present — the Jockey Club was established by royal charter, it was acknowledged as regulating an important national activity, it exercised powers affecting the public, and if it did not exist the government would probably have stepped in. This notwithstanding, the Court of Appeal

decided that the Club's Disciplinary Committee was not amenable to judicial review. Why this seemingly odd result? According to the Court of Appeal, it was because the source of the Club's powers was not underpinned by any governmental interest, rather by the consensual agreement between the parties. The Club was not, in its origins, history, or constitution a 'public' body and it had not been woven into any system of governmental control.[21] Thus, while the Club's powers were in many ways 'public' they were in no sense 'governmental'.[22]

The distinction is, perhaps, made more clearly in *The Queen v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Cth; ex p Wachmann*.[23] There, Justice Simon Brown found that the decision of the Chief Rabbi to terminate a rabbi's employment was not amenable. He held that, to attract the court's supervisory jurisdiction, there must be 'not merely a public *but potentially a governmental interest* in the decision-making power in question.'[24] The Chief Rabbi was not performing a public function in the sense of regulating a field of public life that the government did or would ever seek to regulate.[25]

Are these cases correctly decided? Some commentators think not and have put them down to a 'relapse' into the 'source-based' test[26] while others, like Lord Woolf, have been content (or perhaps wise) enough to simply label them 'questionable'.[27] Rightly or wrongly, the decisions suggest that (in England at least) private or quasi-private bodies will only be amenable to judicial review if they are underpinned by 'governmental' action or are at least recognised by government. In assessing whether they are so underpinned or recognised, the English Courts will look at various factors – foremost being the source of the power (that is, whether it is statutory), and then other elements, including: the historical role of the state in the activity, whether the body relies on public funds, whether its decisions are recognised by statute or parliament or have public consequences, and whether they are supported by sanction.

In the United States, as one might expect, there is considerable jurisprudence on the effect of transferring governmental powers to private bodies, which have come to be known as the 'fifth branch of government'.[28] Of course, the constitutional setting in the US shapes the judicial treatment somewhat differently from Australia. But by analogy, it offers some food for thought.

Federal courts in the US have been willing to impose constitutional requirements on private actors. The Due Process Clause prohibits States from interfering with constitutional rights and there have been many challenges to private acts which have been argued to be 'State acts' that infringe on constitutional rights.

The US Supreme Court has admitted that its case law in this area has 'not been a model of consistency'.[29] It has adopted various 'State action tests' to determine when private participation in public duties might be deemed to be 'State action'. Despite the confusion, a number of themes emerge.[30]

First, the Supreme Court has made it clear that the relevant question is not simply whether the private body is performing a 'public function'.[31] The bar is set higher than that. In one case, the Court held that a finding of State action was available only when the function in issue had 'traditionally and exclusively' been reserved to the State.[32] Merely providing the services to the public or performing a function that government also performs is not sufficient. Depending on the State for funds is also not influential.[33] This test is somewhat hindered by the fact that, in the US at least, not many functions historically have been reserved exclusively to the State.

Another key test for amenability (if I can use the Anglo-Australian term) is the 'joint participation' inquiry. The question being whether the State has 'so far insinuated itself into a

position of interdependence' with the private actor that it must be recognised as a 'joint participant' in the challenged activity.[34]

Another test, the 'nexus' test, focuses on the extent of government regulation of the private activity. Here, the inquiry is whether there is such a 'close nexus between the State and the challenged activity' that seemingly private behaviour 'may be fairly treated as that of the State itself.'[35] This, to me, does not seem very different from the joint participation test. And, again, the nexus must be close indeed. Even the most extensive involvement with government will rarely lead to a finding of State action.

It is sometimes said that there must be a 'symbiotic' relationship between the two. That is: the private entity may be a state actor when it is 'entwined with governmental policies or when government is entwined in its management or control.'[36] In *Brentwood Academy v Tennessee Secondary School Athletic Association*, for instance, the Supreme Court found that the Association's nominally private character was overborne by the meshing of public institutions and public school officials in its composition and workings (such as its Board and governing bodies). Where government is seen to have a controlling interest in the body's governance, the body may have to answer to the Constitution. For example, Amtrak, a body incorporated by statute to provide train services in the US, has been held to be a government entity or, alternatively, a private entity acting for the government.[37] The Court has held that Amtrak was created explicitly for the furtherance of governmental objectives under the direction and control of directors, almost all of whom were appointed by the President.

The similarities between the criteria applied by the US courts in deciding amenability to constitutional requirements and those used by English courts in deciding amenability to judicial review are identifiable. Both look to a number of factors, including the historical role of government and the body's place in the regulatory framework. Nevertheless, the requirements seem to be reasonably strict in the United States perhaps because of a concern that judicial scrutiny would otherwise go too far.

What of developments at home?

Our courts have not been as 'liberated' as the English. But they are slowly making some progress.

For starters, the decision of the House of Lords in *CCSU*[38] that the prerogative is reviewable has been accepted.

In *Peko-Wallsend*[39], involving a challenge to Cabinet's decision to nominate part of Kakadu National Park for inclusion on the World Heritage List, the Full Federal Court held that the courts should accept responsibility for reviewing Executive decisions, subject to the exclusion of non-justiciable matters. This was notwithstanding that a decision may be carried out in pursuance of a common law or prerogative power. As it turned out, the impugned decision, concerning as it did issues relating to the environment, indigenous rights, mining and the economy, was 'beyond review'.

In *Victoria v Master Builders Association*,[40] the Full Court of the Supreme Court of Victoria also found justiciable the decisions of a body established under the prerogative and exercising non-statutory power. The Building Industry Task Force was established by the State government to deal with corruption in the building industry. It published a blacklist of proscribed builders. Its decision to do so was found to be amenable to review because it was taken in the exercise of a 'public duty'. The elimination of corrupt practices in the building industry was a matter of public importance and the Task Force directly represented the State of Victoria. Interestingly, Tadgell J described the Task Force as being the State's 'alter ego'

– similar to the US notion of a 'symbiotic' relationship.[41] In Eames' J words, there was a clear 'public law basis' to the Task Force, through which the State was addressing an issue of public importance.[42]

But what of the review of decisions by bodies that are not and do not represent the government?

Australian courts are moving towards acceptance of the English test that asks whether the body is exercising 'public functions' or making decisions of a 'public character'. Cases such as *Typing Centre of NSW v Toose*[43] and *Dorf Industries Pty Ltd*[44] have applied the *Datafin* test.

In *Masu Financial Management Pty Ltd*,[45] for example, the Financial Industry Complaints Services Ltd, which administers a complaints resolution scheme in relation to financial services was found amenable to review. The scheme was established under the Corporations Regulations and an ASIC policy statement, but the body itself was a private body not underpinned by statute. The New South Wales Supreme Court noted various elements which gave the decision a 'public character', making them amenable to review. Some elements are similar to those cited in the English and US cases, including: that the government was responsible for appointing a substantial proportion of members of the Board and the complaints panel; that the scheme was constituted in compliance with a policy statement issued by the government and was established under the umbrella of regulation; and that a decision could result in cancellation of a licence within the scheme.

A major stumbling block toward broader application of judicial scrutiny has been legislative — in the form of the ADJR Act.[46] Whilst acknowledging its beneficial effects, some have suggested, and I agree, that the Act has retarded the development of the common law of judicial review.[47] It is difficult to justify the Act's restriction to decisions 'under an enactment'.[48] The practical effect of the test means that the Act draws an unrealistic line between what is 'public' and what is 'private' such that decisions that are not 'under an enactment' are relegated to the private realm and are immune (barring private remedy).[49]

As terms such as 'administrative' and 'under an enactment' are undefined by the Act, the interpretation of the concepts falls on the courts. So far, the High Court has resisted adopting an interpretation that would broaden the avenues of scrutiny. Indeed, some judicial statements by the High Court seem to foreshadow a preference for a more narrow common law approach to amenability.

In *Neat Domestic Trading Pty Ltd v AWB Ltd*,[50] the applicant sought relief under the ADJR Act in relation to the refusal by AWB (International) Limited to approve certain export transactions proposed by it which resulted in the Wheat Export Authority refusing its consent. The AWBI is the privatised version of the former Australian Wheat Board, effectively a monopolist wheat purchaser and exporter. Its monopoly is established by the *Wheat Marketing Act 1989*. Three members of the High Court (being a majority) held that the AWBI's decision was not a 'decision' under the ADJR Act because it was not of an 'administrative' character as required. In reaching this conclusion, the majority focused on three related considerations. First, the structure of the approval regime and the roles of the AWBI and the Authority; second, the 'private' character of the AWBI and its commercial objectives; and, third, the incompatibility of imposing public law obligations on the AWBI while at the same time accommodating the pursuit of its private interests.[51]

The decision may reveal the Court's predisposition towards questions of amenability generally. In particular, the statements relating to incompatibility between public and private objectives may indicate that when it comes to private and quasi-private bodies, commercial objectives may be a factor in rendering what might otherwise be amenable acts and

decisions impervious to review. But the importance of such comments for common law review will likely depend on whether the test for what is an 'administrative decision' can, or should be, equated with the inquiry at common law.

Interestingly, Gleeson CJ (who was not a member of the majority) expressed an inclination towards the view that the decision was a decision of an 'administrative character', focusing on the potential statutory monopoly the Board had, which he saw as being not only in the interests of growers but also in the national interest.[52] He rejected the focus of the majority's inquiry on the 'private' interests represented by the body.

Earlier this year, the High Court faced the issue again in *Griffith University v Tang* with much the same result. The decision focused mainly on whether the University's decision was a decision 'under an enactment' for the purposes of the Queensland *Judicial Review Act 1991*. But Justices Gummow, Callinan and Heydon also remarked, *obiter*, that the phrase 'administrative character' had an 'evident purpose' to exclude decisions of a 'legislative or judicial character'[53].

Let me now return to the problem I posed when I began.

The 'privatisation of the business of government' has resulted in private bodies occupying public roles and wielding what are, in effect, public powers. It is the private business person that the citizen now meets and deals with in ever increasing areas, not the public servant. Of course, there is a wide spectrum of ways in which private actors are involved in the delivery of what were formerly government functions. It may be achieved by statute, by authorising an existing private entity to perform the function, or by completely (or partially) privatising the function. From prisons to telecommunications services, numerous examples can be given.

The question for the courts will be: what test is appropriate to decide whether a private or quasi-private body is amenable to judicial review? Before getting to the 'what', we should perhaps first consider the 'why'.

Why should private or quasi-private bodies that have somehow become enmeshed in the functioning of government or bestowed with a monopoly that was previously public be susceptible to judicial scrutiny?

One answer is that these so-called hybrid bodies are just as much a concern to the citizen as public authorities. As Lord Denning recognised many years ago, such bodies have 'quite as much power as statutory bodies … They can make or mar a man by their decisions.'[54] It would be a lacuna in our law if there were no remedy to ensure that a corporation's power to, for example, regulate prison life, is exercised lawfully. Executive government should not be the only supervisory authority. In some cases, members of the public may have no other remedy if public law does not step in.

The function of the courts should be to ensure that all bodies — private or otherwise — that perform public functions do so in accordance with the law.

Of course, the commercial realities of the market and the demands of shareholders means that public law regulation should not be too all-embracing or strict. The majority in *NEAT* were not entirely mistaken in noting the potential incompatibility between private and public obligations. As we have seen from recent news events, private corporations owe duties to shareholders and, generally speaking, have a motive for profit above all other things. But just because private bodies have private concerns, this does not preclude them from also having public duties. Administrative law is, or should be, capable of accommodating the dual roles of these bodies.[55]

Turning to *how* Australian courts can draw the line between what is amenable and what is not: there is no simple litmus test.[56]

An obvious and easy inquiry is to consider the *source* of the relevant body's power. This is a test found in the ADJR Act and its State equivalents. If the power being exercised is derived from statute, such as in the case of the Australian Wheat Board or Telstra, then the body is presumptively amenable. Of course, there may be some difficulty in establishing that the power being exercised by a private body is 'public' in the first place. Moreover, there may be important exceptions to amenability where the decision is of a kind that is beyond the court's purview — I am speaking here of decisions that the cases sometimes describe as 'political'. If the decision-maker is 'government', the 'political' character of the decision may make it unreviewable. If the decision-maker is a private, for profit organisation, perhaps a decision's overriding commercial character may lead to the same result. It is in this area where the comments in *NEAT* may intrude.

A further key test is to consider the nature of the function performed, a test that has been applied since *Datafin*. Are the functions or powers 'public' in character? Do they seek to regulate areas of importance in public life?

History may also help in this regard. There are certain functions that have traditionally been regarded as an essential part of government and which, by their nature, should be subject to public law. Like Lord Woolf, I can see no justification for the law allowing quasi-private or privatised bodies to adopt lower standards to those previously required to be maintained when the power was exercised by a public body — or would be, if exercised by one.

A private company selected to run a prison, for example, although motivated by considerations of profit, should be regarded as subject to public law because the purpose and nature of imprisonment is a matter of public concern.[57] The provision of health services and utilities are similar examples of traditionally governmental functions. They may be contrasted with the activities of Jockey Clubs and rabbis, which are areas that governments have rarely sought to regulate.

If the decision or body has statutory underpinning, this will also be a significant factor. Also, as pointed out in the US cases: if the non-governmental body is so enmeshed in the governmental structure — if the State is its 'alter ego' — so that it operates as part of a regulatory system, it should be amenable to review. It may assist also to look at whether government is involved in the composition of the executive or board of the relevant body.[58]

One inquiry to come out of the English cases is to look at the consequences of the particular act performed or decision made. That is: does the act or decision have consequences in the field of public law? For example, are the body's decisions bolstered by statutory penalties or sanctions? Will the body's decision result in the loss of a licence?

Still another factor is to consider the rights and interests of the individual that are said to be affected. By this, I do not mean that one should consider the gravity of the impact on the individual of a particular decision.[59] Rather: does the act or decision impact upon the citizen as citizen?

In *CCSU*[60] Lord Diplock set out a test for assessing amenability, requiring the decision to either:

(a) alter the private rights or obligations of the person; or
(b) deprive him (or her) of some benefit or advantage which either (i) he had in the past been permitted to enjoy and which he could legitimately expect to be permitted to

> continue to enjoy or (ii) he had received assurance from the decision-maker that it would not be withdrawn without first giving him an opportunity to contest its withdrawal.

If applied to private bodies, this inquiry avoids the problem that arises when government uses different vehicles to deliver public services — the effects on the citizen are the same so why should public law apply any differently?

There may also be other, less tangible, factors courts need to consider to determine amenability. For instance: are there any public interest or policy factors which demand that the decisions or the acts of the body in question be afforded the safeguard of judicial review? Activities that affect civil liberties, for example, might arguably be open to judicial review for this reason.

Of course, all of the factors I have discussed may depend on what Oliver Wendall Holmes called 'a judgment or intuition more subtle than any articulate major premise'.[61] They may be as 'much a matter of feel as deciding whether any particular criteria are met.'[62]

But this should not dissuade — or exempt — courts from the task. Deciding complex questions like these has always been a feature of the common law, as Lord Reid famously pointed out: there are no words that will magically reveal for the judge the (right) result.[63] We do not believe in fairy tales in other areas of the law and public law is no exception.

Even if judicial review is available it unfortunately is not a panacea. Even if a certain power, exercised by a particular body, is found to be amenable to judicial review, the scope of review is limited – some might say 'minimal'. And courts in Australia are still (for the time being at least) barred from judging the merits of the exercise of administrative power.

Further, we cannot patch up the remedies against private bodies by pretending that they are organs of the state.[64] Private power does affect the public interest and the livelihoods of many individuals and it will continue to do so. But that does not necessarily always subject it to the rules of public law.[65]

On the flip side, I should note that the news isn't all bad for private corporations or bodies covered by public law. Some of these bodies might prefer judicial review to other (private) avenues of redress. That way, the body would enjoy the benefit of what Lord Diplock described as the safeguards imposed in the public interest against groundless, unmeritorious or tardy attacks upon decisions.[66] The application of public law scrutiny also bolsters the perceived accountability of such bodies in the eyes of the public. This will no doubt become more important as privatisation of public functions increases, particularly in the face of some resistance from the community.

Whatever the inherent limitations of judicial review, there is no denying its importance to the healthy functioning of the rule of law. It helps secure legitimacy, accountability and transparency in ways that private remedies cannot. And, to the extent that the courts are impeded from exercising judicial review of public decisions, 'the rule of law is negated'.[67]

Lawyers have an important role to play in these developments because it is their duty to speak up and test the principles at their earliest stages. The value of those endeavours cannot be understated. There is a real need to continually evaluate the means by which our society scrutinises administrative or public action, more so because such action is constantly evolving.

The Courts must also adapt. As one commentator has put it: judges will have to develop 'x-ray vision' to see through the private law forms or techniques that modern governments are

increasingly using.[68] Other courts seem to be acutely aware of the need to develop this capacity. It is time Australia caught up.

Endnotes

1 In addition to surfing the Internet, my associate Ms Eloise Dias spent much time undertaking research for this paper. I also wish to acknowledge the assistance of Ms Rebecca Taube, a researcher employed by the Federal Court.
2 Mark Tushnet, 'Democracy versus Judicial Review' (2005) *Dissent Magazine* Spring 2005, http://www.dissentmagazine.org.
3 5 US 87, 111 (1803).
4 *Church of Scientology v Woodward* (1980) 154 CLR 25, 70. In *Attorney General (NSW) v Quin* (1990) 170 CLR 1, 36, his Honour stated that that the purpose and extent of judicial review of administrative action is to enforce 'the law which determines the limits and governs the exercise' of administrative power. See also *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135, 157 (Gaudron J citing *Aala*).
5 Sir Gerard Brennan, 'The Review of Commonwealth Administrative Power: Some Current Issues' in Creyke and Keyzer (eds), *The Brennan Legacy* (2002) 22.
6 See Lord Diplock's statement of the grounds for judicial review in *CCSU v Minister for Civil Service* [1985] 1 AC 374, 410, as being what he would call 'illegality', 'irrationality' and 'procedural impropriety'.
7 See *CCSU v Minister for Civil Service* [1985] 1 AC 374, 418 (per Lord Roskill). See also Fiona Wheeler, 'Judicial Review of Prerogative Power in Australia: Issues and Perspectives' (1992) 14 *Sydney Law Review* 432, 451-460.
8 *Craig v South Australia* (1995) 184 CLR 163.
9 *Burt v Governor-General* [1992] 3 NZLR 672.
10 [1967] 2 QB 864.
11 Ibid 882.
12 Ibid 881.
13 [1985] 1 AC 374.
14 Ibid 406-7.
15 Ibid 412 (per Lord Diplock), see also 420 (per Lord Roskill).
16 [1987] 1 QB 815.
17 Ibid 835.
18 Ibid 838.
19 *Hampshire County Council v Beer (t/as Hammer Trout Farm)* [2004] 1 WLR 233, [16] (per Dyson LJ).
20 [1993] 1 WLR 909.
21 Ibid 923 (per Sir Thomas Bingham MR).
22 Ibid 923 (per Sir Thomas Bingham MR), 932 (per Lord Hoffmann LJ).
23 [1992] 1 WLR 1036.
24 Ibid 1041.
25 Ibid.
26 Murray Hunt, 'Constitutionalism and the Contractualisation of Government in the United Kingdom' in Michael Taggart (ed), *The Province of Administrative Law*, 33.
27 Lord Woolf, *The Importance of Principles of Judicial Review*, 71 (unpublished address, Hong Kong, 1996).
28 Eg, Harold Abramson, 'A Fifth Branch of Government: The Private Regulators and Their Constitutionality' (1989) 16 *Hastings Constitutional Law Quarterly* 165.
29 *Edmonson v Leesville Concrete Co*, 500 US 614, 632 (1991) (O'Conner J diss) cited by Scalia J for the Court in *Lebron v National Railroad Passenger Corporation*, 513 US 374, 378 (1995).
30 See Jodi Freeman, 'The Private Role in Public Governance' (2000) *New York University Law Review* 543, 575ff.
31 *Rendell-Baker v Kohn*, 457 US 830, 842 (1982). In that case, the Court had to consider whether the actions of a privately-owned and operated school for maladjusted students were properly described as "state actions". The Court held that although there was no doubt that the education of such students was a public function that was "only the beginning of the enquiry". The fact that the school depended on the state for funds was not seen as influential. See also *Jackson v Metropolitan Edison Co*, 419 US 345 (1974), *Edmonson v Leesville Concrete Co*, 500 US 614 (1991); *Lugar v Edmonson Oil Co*, 457 US 922 (1982).
32 *Jackson v Metropolitan Edison Co*, 419 US 345 (1974).
33 *Rendell-Baker v Kohn*, 457 US 830 (1982).
34 *Jackson v Metropolitan Edison Co*, 419 US 345 (1974).
35 *Jackson v Metropolitan Edison Co*, 419 US 345, 351 (1974); *Rendell-Baker v Kohn*, 457 US 830, 838 (1982).
36 *Brentwood Academy v Tennessee Secondary School Athletic Association*, 531 US 288 (2001).
37 *Lebron v National Passenger Corporation*, 513 US 374 (1995).
38 [1985] 1 AC 374

39 *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 279 (per Bowen CJ).
40 [1995] 2 VR 121.
41 Ibid 137.
42 Ibid 164.
43 Unrep.,15 December 1998, SCNSW
44 *Dorf Industries Pty Ltd v Toose* (1994) 54 FCR 350.
45 *Masu Financial Management Pty Ltd v Financial Industry Complaints Services Ltd (or FICS)* (2004) 50 ACSR 554.
46 *Re Minister for Immigration & Multicultural Affairs; ex parte Applicant S20/2002* (2003) 77 ALJR 1165, [157] (per Justice Kirby).
47 Ibid. See also C Mantziaris, "'Wrong Turn' on the Public/Private Distinction: *Neat Domestic Trading Pty Ltd*" (2003) 14 *Public Law Review* 197, 200 (describing the formulation in the Act as 'anachronistic').
48 Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2004) 15 *Public Law Review* 202, 207.
49 Geoff Airo-Farulla, '"Public" and "Private' in Australian Administrative Law' (1992) 2 *Public Law Review* 186, 190.
50 (2003) 198 ALR 179. The *Wheat Marketing Act 1989* (Cth) provided for consent to export wheat in bulk to be obtained by the Wheat Export Authority whose consent, in turn, depended on the consent from the relevant grower company, here the AWBI.
51 Ibid 193.
52 Ibid 187.
53 [2005] HCA 7, at 63
54 *Breen v Amalgamated Engineering Union & Ors* [1971] 2QB 175 at 190
55 Margaret Allars, 'Public Administration in Private Hands' (2005) 12 *Australian Journal of Administrative Law* 126, 143.
56 *Hampshire County Council v Beer (trading as Hamer Trout Farm)* [2003] EWCA Civ 1056, [12] (per Dyson LJ).
57 *R v Cobham Hall School; Ex parte "GS"* [1997] EWHC 943, [3-031].
58 See, eg, *Lebron v National Passenger Corporation*, 513 US 374 (1995) where the Supreme Court held that Amtrak was created explicitly for the furtherance of federal governmental objectives under the direction and control of directors, almost all of whom were appointed by the President.
59 See *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Cth; Ex parte Wachmann* [1992] 1 WLR 1036, 1042 (per Simon Brown J): 'whether or not a decision has public law consequences must be determined otherwise than by reference to the seriousness of its impact upon those affected.'
60 See above at fn 7.
61 *Lochner v New York*, 198 US 45, 76 (1905) (in relation to constitutional decisions). In that case, Holmes objected to the Court's use of substantive due process to invalidate New York's maximum hours legislation for bakers.
62 *R v Director General of the National Crime Squad* [2003] ICR 599, [13] (per Scott Baker LJ).
63 Lord Reid, 'The Judge as Lawmaker' (1972-3) 12 *Journal of Public Teachers of Law* 22.
64 *R v Jockey Club; Ex parte Aga Khan* [1993] 1 WLR 909, 933 (per Lord Hoffman).
65 Ibid.
66 *O'Reilly v Mackman* [1983] 2 AC 237, 282.
67 Sir Gerard Brennan, 'The Review of Commonwealth Administrative Power: Some Current Issues' in Creyke and Keyzer (eds), *The Brennan Legacy* (2002) 14.
68 Michael Taggart, 'Corporatisation, Privatisation and Public Law' (1991) 2 *Public Law Review* 77, 104

THE PUBLIC INTEREST
WE KNOW IT'S IMPORTANT, BUT DO WE KNOW WHAT IT MEANS

Chris Wheeler*

The issue

Acting in the *public interest* is a concept that is fundamental to a representative democratic system of government and to good public administration. However, this commonly used concept is, in practice, particularly complex, and presents two major obstacles to governments and their public officials acting in the *public interest*:

- firstly, while it is one of the most used terms in the lexicon of public administration, it is arguably the least defined and least understood – few public officials would have any clear idea what the term actually means and what its ramifications are in practice.

- secondly, identifying or determining the appropriate public interest in any particular case is often no easy task - as Lyndon B Johnson once said: 'Doing what's right isn't the problem. It's knowing what's right'.

The concept – acting in the public interest

The over-arching obligation on public officials

Public officials have an over-arching obligation to act in the public interest. They must perform their official functions and duties, and exercise any discretionary powers, in ways that promote the public interest that is applicable to their official functions.

The primary purpose of non-elected public officials is to serve. Serving the public interest is one of the four dimensions of this primary purpose, the other three dimensions being:

- to serve the Parliament and the government of the day (not applicable to all public officials);

- to serve their employing agency (where applicable), and

- to serve the public as customers or clients.

Associated with each of these four dimensions of service are various conduct standards with which public officials in democratic countries are commonly expected to comply, each with its own objective(s). Experience has shown that there will be times when a public official will need to balance conflicting or incompatible conduct standards or objectives – where the public official has to make a decision that will serve one objective, but not another, or one

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more than another. While there is some flexibility inherent in the various conduct standards with which public officials are commonly expected to comply, the fundamental principle must be that public officials must resolve any such conflicts or incompatibilities in ways that do not breach their obligation to act in the public interest.

This issue was addressed by the Royal Commission into the commercial activities of the government sector in Western Australia (the WA Inc. Royal Commission). In its report the WA Inc. Royal Commission said that one of the two fundamental principles[1] and assumptions upon which representative and responsible government is based is that:

> The institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public.[2]

The Royal Commission noted that this principle (the 'trust principle') '…expresses the condition upon which power is given to the institutions of government, and to officials, elected and appointed alike'. Later in its report, it noted that '[g]overnment is constitutionally obliged to act in the public interest.'[3] This mirrored a statement made in a 1987 judgment of the NSW Supreme Court, Court of Appeal that '…governments act, or at all events are constitutionally required to act, in the public interest',[4] and a statement made in a 1981 judgment of the High Court of Australia that '…executive Government…acts, or is supposed to act, … in the public interest'.[5]

This does not mean, of course, that what is in the interests of executive government should automatically be considered to be in the public interest.[6]

The two components of the public interest

Acting in the public interest has two separate components:

- objectives and outcomes - that the objectives and outcomes of the decision-making process are in the public interest, and
- process and procedure - that the process adopted and procedures followed by decision-makers in exercising their discretionary powers are in the public interest.

The objectives and outcomes component is the aspect of the public interest most referred to in the literature. The process and procedure component appears to be less discussed, but is just as important. This component would include:

- complying with applicable law (both its letter and spirit);
- carrying out functions fairly and impartially, with integrity and professionalism;
- complying with the principles of procedural fairness/natural justice;
- acting reasonably;
- ensuring proper accountability and transparency;
- exposing corrupt conduct or serious maladministration;
- avoiding or properly managing situations where their private interests conflict or might reasonably be perceived to conflict with the impartial fulfilment of their official duties, and

- acting apolitically in the performance of their official functions (not applicable to elected public officials).

The meaning – trying to define the 'public interest'

Can the 'public interest' be defined?

It is important to draw a distinction between the question and its application – between what *is* the public interest, and what is *in* the public interest in any particular circumstance.

Equivalent concepts to the *public interest* have been discussed since at least the time of Aristotle (*common interest*), including by Aquinas and Rousseau (*common good*) and Locke (*public good*).

Although the term is a central concept to a democratic system of government, it has never been definitively defined either in legislation[7] or by the courts. Academics have also been unable to give the term a clear and precise definition. While there has been no clear interpretation, there has been general agreement in most societies that the concept is valid and embodies a fundamental principle that should guide and inform the actions of public officials.

The *public interest* has been described as referring to considerations affecting the good order and functioning of the community and government affairs for the wellbeing of citizens. It has also been described as the benefit of society, the public or the community as a whole.

In its 1979 report on the then draft Commonwealth Freedom of Information Bill, the Australian Senate Committee on Constitutional and Legal Affairs described the public interest as, '…a convenient and useful concept for aggregating any number of interests that may bear upon a disputed question that is of general – as opposed to merely private – concern'.[8]

The Committee also said that the:

> … 'public interest' is a phase that does not need to be, indeed could not usefully, be defined... . Yet it is a useful concept because it provides a balancing test by which any number of relevant interests may be weighed one against another. …the relevant public interest factors may vary from case to case – or in the oft quoted dictum of Lord Hailsham of Marylebone 'the categories of the public interest are not closed'.[9]

The meaning of the term has been looked at by the Australian courts in various contexts. In one case the Supreme Court of Victoria said:

> The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals…[10]

In another case the Federal Court of Australia said:

> 9. The expression 'in the public interest' directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances…
>
> 10. The expression 'the public interest' is often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest. It is sometimes used as a sole criterion that is required to be taken into account as the basis for making a determination. In other instances, it appears in the form of a list of considerations to be taken into account as factors for evaluation when making a determination...

> 11. The indeterminate nature of the concept of 'the public interest' means that the relevant aspects or facets of the public interest must be sought by reference to the instrument that prescribes the public interest as a criterion for making a determination…[11]

The dilemma faced by those trying to define the public interest was summed up in another case in the following few words:

> The public interest is a concept of wide meaning and not readily limited by precise boundaries. Opinions have differed, do differ and doubtless always will differ as to what is or is not in the public interest.[12]

The term was referred to in the following more colourful, but pragmatic, terms by an American commentator:

> Plainly the 'public interest' phrase is one of those atmospheric commands whose content is as rich and variable as the legal imagination can make it according to the circumstances that present themselves to the policy maker (under the supervision of the courts of course).[13]

It could have been this term that Lewis Carol was thinking of when he had Humpty Dumpty say:

> 'When I use a word…it means just what I choose it to mean – neither more nor less.'[14]

What is not in the public interest?

To understand the purpose or objective of the concept, in some ways it is easier to distinguish the public interest from what is not. For example the *public interest* can be distinguished from:

- *private interests* of a particular individual or individuals (although as discussed later there are certain private 'rights' viewed as being in the public interest)

- *personal interests* of the decision-maker (including the interests of members of their direct families, relatives, business associates, etc) - public officials must always act in the public interest ahead of their personal interests and must avoid situations where their private interests conflict, might potentially conflict, or might reasonably be seen to conflict with the impartial fulfilment of their official duties

- *personal curiosity* – ie, what is of interest to know, that which gratifies curiosity or merely provides information or amusement[15] (to be distinguished from something that is of interest to the public in general)[16]

- *personal opinions* - for example, the political or philosophical views of the decision-maker, or considerations of friendship or enmity

- *parochial interests* – ie, the interests of a small or narrowly defined group of people with whom the decision-maker shares an interest or concern; and

- *partisan political interests* - for example the avoidance of political/government or agency embarrassment.[17]

These can be categorised as 'motivation' type issues that focus on the private, personal or partisan interests of the decision-maker (and possibly also those of third parties).

What does the 'public' mean?

Most attempts to describe what is meant by the 'public interest' refer to the 'community', 'common' good or welfare, 'general' welfare, 'society', public' or the 'nation'. However, the issue of what constitutes the 'public' in 'public interest' has largely been unexplored.

When addressing this issue, academic commentators and judicial officers have taken it as a given that the 'public interest' relates to the interests of members of the community as a whole, or at least to a substantial segment of them - that it should be distinguished from individual, sectional or regional interests[18]. At the other end of the spectrum it is also widely accepted that the 'public interest' can extend to certain private 'rights' of individuals - rights that in many societies are regarded as being so important or fundamental that their protection is seen as being in the public interest, for example privacy, procedural fairness[19] and the right to silence.

However this conceptualisation of the public interest fails to identify and address an important implication. In my view the public interest must also be able to apply to the interests of groups, classes or sections of a population between those two ends of the spectrum. The 'public' whose interests are to be considered can in practice validly consist of a relatively small group, class or section of a total population.

The size and composition of the 'public' whose interests should in practice be considered in relation to any particular decision or outcome will be dependent on, or at least be strongly influenced by, such factors as the:

- *legal context* - the jurisdiction and role of the decision-maker;
- *operational context* - the issues to be addressed and the decision to be made;
- *political context* - whether the decision-maker is a representative of a group, class or section of the public that has, or is perceived by the decision-maker to have, a particular interest in and views about the decision to be made, eg, the decision-maker's political party and/or electorate (maybe better described as the political 'reality'); and
- *personal context* - whether the decision-maker has strong personal, philosophical or political views on the issue, or is subject to the direction of, or whose continued employment or career prospects are dependent on, the support of a person with such views on the issue.

While this last factor in particular is actually contrary to the whole concept of the 'public interest', the practical impact of human nature on decision-making cannot be ignored.

Sub-groups of a total population that could be considered to be the relevant 'public' whose best interests need to be considered by a decision-maker might be geographically based, ie, the residents of a particular area. This can be seen most clearly in a Federal system of government such as Australia, for example:

- in relation to the exercise of a discretionary power at the national level, the 'public' could refer to all residents of Australia;
- for a state public official, the 'public' whose interests are relevant will primarily be the residents of that state; and
- for a local public official, the 'public' would primarily be the residents of the local area.

Decision-makers at different levels of government, or in equivalent but separate levels of government (eg, separate state or local councils), will therefore have different views as to the 'public' that is relevant to their decision. One consequence of this is that they can have very different, but equally valid, views as to what constitutes the 'public interest' in relation to the same issue.

In the local government context another consequence would be that decisions made by elected local councils relating to the development of their area can be expected to be largely based on a perception of the public interest which is focussed primarily on the interests of their constituents (the rate payers) of that area, and possibly to a lesser extent on the interests of people employed by rate payers, working in or leasing premises owned by rate payers, or visitors who use goods and services supplied by rate payers. While legislation could require local elected decision-makers to consider a broader public interest extending beyond their council boundaries, given that their electorate is the local residents, it is arguable that such a requirement may have little effect in practice. In recognition of this parochial approach by local councils, the body that has planning approval powers for major developments in the CBD of Sydney has been structured to include representatives of both the local council and the state government.

Sub-groups of a total population that could be considered to be the relevant 'public' whose best interests need to be considered by a decision-maker might also include groups or classes of the general population. For example indigenous people, farmers, school students, first home buyers, residents of an area (particularly objectors) close to a proposed development, etc (certain decisions made for their benefit could be seen as being in the 'public interest'). As another example, while anti-discrimination legislation would be in the general public interest, the inclusion of each category of discrimination or each requirement to prevent a particular type of discrimination, that affects a specific group of the population, could be argued to be primarily in the interests of that group.

The possibility of an interest of a section of the public being in the 'public interest' was acknowledged in at least one court case, where the High Court of Australia said that:

> The interest of a section of the public is a public interest but the smallness of the section may affect the quantity or weight of the public interest so that it is outweighed by [another public interest]. It does not, however, affect the quality of that interest. [20]

Apart from this weight issue, in practice the interests of a small section or sector of the public may not be considered to be in the 'public interest' if they are seen as being contrary to the interests of the broader 'public'. Conversely, certain basic 'rights' or interests of minorities are seen in many societies as sufficiently important for their protection to be seen as in the 'public interest', even if the protection of those interests does not advance the interests of the majority, or may even run counter to them.

Is there a hierarchy of interests?

While decision-makers can be expected to be significantly influenced by their perception of the group, class, or section of the population that constitutes the 'public' whose interests they must consider, this does not mean that broader or higher public interests will be ignored.

In practice it can be seen that there is in effect a hierarchy of interests, for example the high level shared *values* of a society[21] would, where relevant, be the foundation for decision-making by public officials at all levels of that society. These shared values would include respect for significant private 'rights'.

The next level down of the hierarchy would be general public interests (for example the protection of the urban environment, the interests of the residents of a local government area, or the provision of social welfare for persons in need). At the base of the hierarchy would be private interests (for example the interests of an objector to a local development proposal or issues about a person's entitlement to social welfare benefits).[22]

It could be argued that the decision-making process in the public interest would involve decisions made at each level of the hierarchy not being contrary to an interest ranked at any higher level.

So what does the term mean?

In my view the meaning of the term, or the objective of or approach indicated by the use of the term, is to direct consideration away from private, personal, parochial or partisan interests towards matters of broader (i.e. more 'public') concern.

While the meaning of the 'public interest' stays the same, the answer to the question what is 'in' the public interest will depend almost entirely on the circumstances in which the question arises. In fact it is this 'rich and variable'[23] content which what makes the term so useful as a guide for decision-makers.

The application – identifying and assessing relevant public interests

Identifying relevant public interests

Making an assessment as to how the *public interest* applies in a particular circumstance can be thought of as a three stage process:

- firstly, identification of the relevant population – the 'public' whose interests are to be considered in making the decision;
- secondly, identification of the 'public interests' applicable to an issue or decision
- thirdly, an assessment and weighing of each applicable 'public interest', including the balancing of conflicting or competing 'public interests'.

As discussed earlier, the **first step** for the decision-maker is to be clear about which people, or which group, class or section of the general population is the relevant 'public' (or 'publics' if several different groups, class or sections are involved) whose best interests must be considered in making the decision.

The **second step** for the decision-maker is to identify the public interests that should guide the exercise of their discretionary powers. In other words, (non-elected) public officials exercising discretionary powers must determine the specific public interest objective or objectives that apply to their role (and/or that of any employing agency). This is done by reference to three sources of information:

- *Primary sources*:
    - the objects clauses in legislation, or in the absence of such provisions the spirit (intention) of legislation identified from the terms or provisions that establish either a public office or agency, or its functions, from explanatory memoranda or from relevant second reading speeches;

- the terms of legislation that establish a public office or agency and/or give it functions and powers; or
- any regulations, rules or by-laws that set out the functions and powers of a public official, public office or agency; and
- any procedural requirements that the public official is required by law to comply with in making the decision (including procedural fairness).

- *Secondary sources*:
  - government, council or board policy[24]
  - plans or policies:
    - made by or under statutory authority; or
      - approved by the Executive Government, a Minister, or a council or board; or
      - approved by a relevant agency or authorised public official.
  - directions given by Ministers within the scope of their authority.
- *Tertiary sources* (if none of the above sources answer the question):
  - agency strategic/corporate/management plans;
  - agency procedure manuals and delegations of authority; or
  - as perhaps a last resort, statements of duties for the decision-maker's position.

Options for assessing the public interest

The **third step** for a decision-maker is to assess and apply weightings/levels of importance to the identified public interests over and above the three sources of information referred to earlier, options available for making assessments as to what is in the public interest and the relative weightings to be given to competing or conflicting public interests would include:

- the revealed majority views or opinions of the public;
- the views of the elected representatives of the people; or
- an objective assessment by an impartial person of the public interests likely to apply.

In practice, basing assessments and decisions as to what is in the 'public interest' on the revealed majority opinion of the 'public' is not a workable option:

- often the 'public' does not have the full picture or may be misinformed
- a matter could be in the "public interest" even if it is not reflected by the revealed preferences or opinions of the majority, eg, an issue about which the public is unaware or unconcerned

- a matter could be in the 'public interest' even if it is contrary to the revealed preferences or opinions of the majority, eg, tax increases for public purposes, and

- there are matters where the 'ends' are clearly supported by the majority (eg, improved defence), but the means are not (eg, tax issues).

Basing assessments on the views of the elected representatives of the people is a far more appropriate and workable option. One way of looking at a democratic system of government is that it provides a process through which conflicting points of view of what constitutes the 'public interest' can be identified and considered in the development of policy and the making of decisions. A fundamental rationale for the parliamentary process of debate, for example, is to allow the community's elected representatives to assess competing interests and make informed decisions that are in the public interest.

At the risk of oversimplification, a complicating factor is that while the starting point for public officials to assess the public interest would usually be to identify what the public **needs** (ie, what is in the general interests of the public), the starting point for many politicians would usually be to identify what the public **wants** (ie, what are the likely views of the electorate). However, in a world of increasingly professionalised party-politics, parties and governments place increasing resources and effort behind attempting to shape and influence what the public might appear to want, in ways that are conducive to their own electoral prospects. The theory of democratic responsiveness has to be reconciled with the reality of the ways in which legislators generally, and Ministers in particular, can shape conceptions of the public interest to suit what might also be their own shorter term and more private interests.

In an ideal world, decisions as to what is in the public interest might be made by a decision-maker who is rational, dispassionate/disinterested and altruistic.[25] However, in the real world we can only hope to approximate this ideal. This may be achieved through such means as healthy, open public debate on issues of genuine 'public interest' contention; effective use of academic and non-government expertise in transparent processes that throw light on issues of contention; the contributions of an independent but responsible news media; and most importantly, an apolitical and professional public sector, prepared to formulate its own reasoned interpretations of the public interest and present these back to government, even though it must necessarily ultimately act in accordance with the lawful instructions, and be guided by the views, of the elected representatives of the people.

Unfortunately, in practice open public debate is often hampered by a number of factors, including excessive (if not obsessive) government secrecy; news media not always acting responsibly; contract employment of senior public officials and the ease with which some can be removed, which does not foster the giving of frank and candid advice to Ministers; and fact that the growth over time in influence (and numbers) of the personal staff of Ministers has not been balanced by increased levels of accountability.

Balancing conflicting or competing public interests

In practice, a decision-maker will often be confronted by a range of conflicting or competing public interest objectives or considerations. As part of the third step, decision-makers also need to balance any such conflicting or competing public interests. Such a weighing up and balancing exercise is usually based on questions of fact and degree. [26]

As was noted in the *McKinnon* case:

> 12 The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where **the** public interest resides. This ultimate evaluation of the public interest

> will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that 'the public interest' can be ascertained and served. In some circumstances, one or more considerations will be of such overriding significance that they will prevail over all others. In other circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable. For example, in some contexts, interests such as public health, national security, anti-terrorism, defence or international obligations may be of overriding significance when compared with other considerations. [27]

Where there are conflicting or competing public interests, it may be possible to address them through compromise or prioritisation. Sometimes it may be more appropriate to choose the 'least worst' option – the decision that causes the least harm rather than the most good. While there may be circumstances where public interest objectives are entirely incompatible, where one must be chosen at the expense of the other, in practice it is more likely that there will be degrees of incompatibility between various objectives.

Every policy decision, such as a decision to build a road or to approve a development application, requires a weighing up and balancing of interests, at least to some extent. In most cases there will be winners and losers. The decision-maker needs to consider all of those who may be affected as individuals but more importantly how the community at large may be affected.

The kinds of conflicts or incompatibilities that often arise include:

- where a decision would advance the interests of one group, sector or geographical division of the community at the expense of the interests of another – such a decision can be in the public interest in certain circumstances, for example, granting resident parking permits near popular destinations may be in the public interest even though it inconveniences non-residents, because it helps to ensure residents are not overly inconvenienced by people visiting nearby areas

- where a decision may affect people beneficially and detrimentally at the same time – for example a decision to improve public safety by operating CCTVs on every street corner may improve security but also may restrict the privacy of individuals

- where two government organisations are responsible for advancing different causes which both provide some benefit to the public – for example, it is likely that in many respects a body responsible for protecting the natural environment and a body responsible for harvesting forestry products have equally valid but conflicting views about the public interest

- where a decision requires a balancing of one public interest consideration over another – for example in the NSW FOI Act there are balancing tests that the Parliament has seen fit to impose in relation to certain exemption clauses, ie, that either disclosure of the documents in question would, on balance, 'be **in** the public interest', or 'be **contrary** to the public interest' (emphasis added).

Complying with statutory public interest tests

The situations addressed in legislation are often so complex that it is not possible for the legislature to comprehensively cover all matters that should be taken into account by decision-makers. In such circumstances it is not uncommon for legislation to identify a number of public interest type issues or matters to be considered by decision-makers in exercising their discretionary powers, and then to add a general 'catch-all' public interest test. As the majority in the High Court of Australia said:

> …the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable…'. [28]

In NSW, over 190 Acts require that the *public interest* be considered when implementing the Act or in making particular administrative decisions under the Act.[29] The form of words used in Acts includes the 'the public interest', 'in the public interest', 'contrary to the public interest', 'inconsistent with the public interest', 'necessary in the public interest', and 'serve the public interest'.

Statutory public interest tests usually seem to fall into one of the following three categories:

1. whether something should be done or permitted to be done (ie, whether something is 'in the public interest')

2. whether something should not be done or not permitted to be done (ie, whether something is 'contrary to the public interest'), and

3. a 'catch-all' consideration over and above various specific considerations set out in the statute (ie, decision-makers must consider the 'public interest').

As noted earlier, in practice the nature and scope of the *public interest* considered relevant by a decision-maker in complying with such a statutory test will be significantly influenced by the nature and scope of the decision-maker's powers, jurisdiction, etc.

There are provisions in two NSW Acts (the *Freedom of Information Act*, s.59A and the *Local Government Act*, s.12(8)) which are designed to assist decision-makers in determining whether certain actions would be contrary to the public interest. Given the impossibility of properly defining the public interest, both do so by specifying matters that are considered to be irrelevant to such an assessment, for example that disclosure/inspection of documents:

- could cause embarrassment to the government/council

- could cause a loss of confidence in the government/council, or

- could cause a person to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

While most statutory public interest tests relate to regulatory or approval provisions or schemes, another type relates to the availability of rights or protections. For example most of the whistleblower legislation in Australasia contain public interest type tests for determining whether a disclosure is protected. These Acts either refer specifically to 'public interest disclosures'[30] or state that disclosures that comply with the Act are made in the 'public interest'.[31]

In relation to each of these Acts, the agency or person who receives a disclosure must make a decision as to whether or not it is protected by the Act (ie, a disclosure made in the public interest). Whether or not such protection is available can have serious implications for the person making the disclosure. One difficulty associated with the public interest tests in whistleblower legislation is that, given the different contexts in which they are operating, whistleblowers and the recipients of their disclosures can and often do have very different conceptions of how important or significant a matter must be to be in the public interest.

Distinguishing between the public interest and the merits of the case

A clear distinction must be drawn between whether, on the one hand a decision was made in the public interest, and on the other the merits of the decision. Alternatives open to a decision-maker could all be in the public interest, but one might have greater merit than the other. This assessment of merit could be validly based on a range of criteria including any set out in statute, the policies or priorities of the government of the day or the agency concerned, the availability of resources, public pressure, etc.

In practice, in a number of circumstances the issue will not be whether a decision-maker has correctly identified the public interest, or has made an error in balancing competing public interests, as there will not be any clearly 'right' or 'wrong' answer. The relevant questions will actually be whether a decision was the 'best' decision in terms of the merits, ie, the correct (when there is only one decision) or preferable (when a range of decisions are available) decision based on the information available to the decision-maker. For example, in deciding how to allocate surplus government funds between two or more options, each of which is in the public interest (eg, between health, education or law and order), whatever decision is made will be 'in the public interest'. In this context, the primary questions that could arise would relate to the merits of the decision to put extra funding into one area and not another, and/or the appropriateness of the decision-making process.

The proof – demonstrating that the correct decision has been made

Having said that, in many circumstances public discourse will focus on whether the appropriate public interest has been correctly identified or whether there has been an appropriate balancing of conflicting public interests. At one end of the spectrum will be circumstances where the appropriate public interest considerations are clear from the terms of the relevant legislation. At the other end of the spectrum will be circumstances where there are conflicting public interests that are either very finely balanced or where the appropriate weighting to be applied to each is unclear.

As a generalisation it can be said that decisions made at either end of the spectrum are more easily supportable or defensible than decisions made in the grey area in between – at one end because the 'right' answer is clear and at the other end because there is clearly no 'right' answer and therefore the decision-maker has far more room to move.

Where a decision is contentious or otherwise significant, it should be expected that it is likely to lead to the expression of contrary views and active debate as to the merits. Such an outcome does not mean that the decision was wrong, only that the merits of the decision are being tested in ways that are entirely appropriate in our society. In such circumstances it is important to ensure that any such debate focuses on the merits of the decision and not the conduct or propriety of the decision-maker or the decision-making process. Where decisions are being made in this grey area, it is particularly important for public officials to be able to demonstrate that their decision was made on reasonable grounds, including which public interest issues were considered and the reasons why a particular interest was given precedence.

The more significant or contentious an issue, the greater the importance of ensuring that the basis for the decision is properly documented. For example, where a decision or a course of action is being considered by some third party, be it an interest group, opposition MPs, journalists, regulators, watchdog bodies, tribunals or courts, if the basis for a decision is properly documented this supports the credibility of the decision-maker and the decision-making process in the eyes of that third party, even if there is disagreement with the merits of the decision made. This generally increases the chances that any debate will focus on the merits of the decision and not the conduct of the decision-maker.

Proper documentation also helps to achieve a second important goal in this context. Properly documenting a decision helps ensure that there was adequate rigour in the assessment process, for example, helping to ensure that all relevant factors are taken into consideration and helping to highlight circumstances where decision-makers find themselves wanting to skate over certain difficult or inconvenient issues, or where they are experiencing some difficulty in explaining (or rationalising) the basis on which a decision was made.

Conclusion

Most commentators appear to have taken the view that it is not possible to effectively define the concept of the *public interest.* In my view, it is possible to determine what is meant by the *public interest* if a distinction is drawn between the concept and its application.

The *public interest* is best seen as the objective of, or the approach to be adopted, in decision-making rather than a specific and immutable outcome to be achieved. The meaning of the term, or the approach indicated by the use of the term, is to direct consideration and action away from private, personal, parochial or partisan interests towards matters of broader (ie, more 'public') concern.

The application of the concept is a separate issue and the answer to the question 'what is in the public interest?' will vary depending of the particular circumstances in which the question arises.

There are two separate components of the public interest – the process/ procedure component and the objectives/ outcomes component. In relation to the objectives/ outcome component, identifying what is in the public interest in any given situation is a primary obligation on public officials who are exercising discretionary powers. This is no simple task and in practice involves:

- who should be considered to be the relevant public?
- what are the relevant *public interest* issues that apply?
- what relative weightings should be given to various identified public interests and how should conflicting or competing public interests be addressed?

While in many cases there will be no clear answer to each of the questions, what is important is that a conscientious attempt is made to find appropriate answers, and that the decision-maker is able to demonstrate that the appropriate approach was followed and all relevant matters were considered.

Endnotes

1 The other fundamental principle was: 'It is for the people of the State to determine by whom they are to be represented and governed'.
2 In Volume 1, Chapter 1, at 1.2.5.
3 above at 3.1.5.
4 Per McHugh JA in *Attorney General (NT) v Heinemann Publishers Pty Limited* (1987) 10 SLWLR 86 (at p191) – the SpyCatcher Case.
5 Mason J in *Commonwealth of Australia v John Fairfax and Sons Ltd & ors* (1981) ALJR 45 (at p49).
6 See Note 5.
7 Attempts have been made in some Acts to define public interest, eg, s.24 *Surveillance Devices Act 1998* (WA) states that the public interest 'includes the interests of national security, public safety, the economic wellbeing of Australia, the protection of public health and morals and the protection of the rights and freedoms of citizens.' In some Acts there are also definitions of public interest information, eg, SA *Whistleblowers Protection Act 1993*.

8 At 5.25.
9 At 5.28.
10 Appeal Division of the Supreme Court of Victoria in *Director of Public Prosecutions v Smith* [1991] 1 VR 63 (at 75), per Kaye, Fullagar and Ormiston JJ.
11 Full Court of the Federal Court of Australia in *McKinnon v Secretary, Department of Treasury* [2005] FCA FC 142 per Tamberlin J (at 245).
12 *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 128 ALR 238 per Lockhart J.
13 Glen O Robinson, 'The Federal Communications Act: An Essay on Origins and Regulatory Purpose', in *A Legislative History of the Communications Act of 1934* 3, 15-16 (Max D Paglan ed., 1989) (at 16).
14 Lewis Carroll, *Through the Looking-Glass* (1872)
15 *Director of Public Prosecutions v Smith* [1991] 1 VR 63 (at pp73-75), *R v Inhabitants of the County of Bedfordshire* (1855) 24 L.J.Q. B.81 at (p84) and *Lion Laboratories Limited v Evans* [1985] QB 526 (at p537)
16 Re *Angel and Department of Arts, Heritage & Environment* (1985) 9 ALD 113 (at 114).
17 A specific factor referred to in some NSW legislation, for example the *Freedom of Information Act*, s.69A, and the *Local Government Act*, s.12(8) and a matter referred to by Mason J in *Commonwealth of Australia v John Fairfax & Sons Ltd and ors* (1981) 55 ALJR 45 at (p49).
18 *Assessing the public interest in the 21st Century: A framework*, Leslie A. Pal and Judith Maxwell, December 2005, External Advisory Committee on Smart Regulation.
19 Per Mason CJ in *Attorney General (NSW) v Quin* (1990) 64 ALJR 627 and Lord Keith in *Glasgow Corporation v Central Land Board* [1956] SC(HL) 1 at p25.
20 In *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 (at p487) per Jacobs J
21 For example, those relating to freedom, fairness, justice, health, safety, security, etc.
22 From a societal perspective, such a hierarchy could be seen in some ways as almost the reverse of Maslov's Hierarchy of Needs pyramid.
23 See note 11.
24 Or in the Australian Federal context, Statements of Expectation and Intent approved by the relevant Minister (in the Commonwealth context per Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, June 2003)
25 'The public interest may be presumed to be what men would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently', per Lippmann, Walter, *Essays in the Public Philosophy*, Boston: Little Brown, 1955.
26 Per Mason CJ, Wilson and Dawson JJ said in the *Queensland Electricity Commission; Exparte Electrical Trades Union of Australia* (1987) 61ALJR 39.
27 Per Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCA FC142.
28 *O'Sullivan v Farrer* (1989) 168 CLR 210, per Mason CJ, Brennan, Dawson & Gaudron JJ (at 217).
29 Such Acts include the *Defamation Act 1974*, *Evidence Act 1995*, *Environmental Planning and Assessment Act 1979*, *Freedom of Information Act 1989*, *Local Government Act 1993*, *Occupational Health and Safety Act 2000*, *Ombudsman Act 1974*, *Police Act 1990*, *Privacy and Personal Information Protection Act 1998*, *Protected Disclosures Act 1994*, *Public Sector Employment and Management Act 2002*, and *Teaching Service Act 1980*.
30 *Public Interest Disclosure Act 1994* (ACT), *Whistleblowers Protection Act 1994* (Qld), *Whistleblowers Protection Act 1993* (SA, *Public Interest Disclosures Act 2002* (Tas), and *Public Interest Disclosure Act 2003* (WA).
31 *Protected Disclosures Act 2000* (NZ), *Protected Disclosures Act 1994* (NSW)

DEVELOPMENTS IN ADMINISTRATIVE LAW

Peter Prince*

Government initiatives, inquiries, legislative and parliamentary developments

Key developments

New Ministry

On 24 January 2006 Prime Minister Howard announced changes to his Ministry and the Administrative Arrangements Order. The changes included two promotions into Cabinet, four new appointments to the outer Ministry and four new parliamentary secretary appointments[1].

AWB inquiry

By Letters Patent dated 10 November 2005, the Hon Terence Cole was appointed Commissioner to investigate whether Australian companies including AWB Limited (the former Australian Wheat Board) mentioned in the Final Report of the Independent Inquiry Committee into the United Nations Oil-for-Food Programme (the Volcker Report) breached any Federal, State or Territory law. The Inquiry has the powers conferred by the *Royal Commissions Act 1902*. In light of evidence which emerged during the Inquiry, Commonwealth Attorney-General Philip Ruddock announced on 7 February 2006 that he had agreed to expand its terms of reference to cover BHP Billiton Limited, Tigris Petroleum Corporation Pty Ltd and related companies and persons[2].

Privacy review

The Attorney-General announced on 31 January 2006 that the Australian Law Reform Commission (ALRC) will review the *Privacy Act 1988*. Recent reports by the Privacy Commissioner and the Senate Legal and Constitutional Committee both recommended that a comprehensive review of the Privacy Act be undertaken. The review will examine to the extent to which the Privacy Act and related laws continue to provide an effective framework for the protection of privacy in Australia. The review is to be completed by 31 March 2006[3].

ID cards

In a series of interviews in January and February 2006 the Attorney-General indicated that an inquiry into the costs and benefits of a National Identity Card would be held in the near future[4].

Victoria: Human Rights Charter

The Attorney-General of Victoria, Rob Hulls, announced on 20 December 2005 that Victorians would get their own charter of human rights and responsibilities in 2007. Mr Hulls said Victoria would not be embracing a US style bill of rights. The Charter would be

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enshrined in legislation to commence on 1 January 2007, with a review likely after four years. As with the ACT Human Rights Act, courts would be able to make declarations that legislation was incompatible with the state's defined rights and freedoms. The declarations would be non-binding but the Attorney-General would be required to inform Parliament of them[5].

Parliamentary Developments

Key legislation

Key legislation dealt with by the Commonwealth Parliament in the Spring 2005 and Autumn 2006 sittings included:

Anti-terrorism legislation, including:

- ***Anti-Terrorism Act 2005***. Assented: 3/11/05; Act No. 127, 2005. Amended the *Criminal Code Act* 1995 to clarify that it is not necessary to identify a particular terrorist act to prove an offence. Also provides for a review by the Council of Australian Governments (COAG) of the operation of the legislation after 5 years.

- ***Anti-Terrorism Act (No. 2) 2005***. Assented: 14/12/05; Act No. 144, 2005. Amended several Acts to implement COAG agreed legislation (see AIAL *Forum* No 47). Provides for control orders over terrorist suspects for up to 12 months, allows suspects to be held in preventative detention for up to 14 days, bans organisations which incite terrorism, creates offences for urging hostility towards various groups and updates sedition offences.

Both Acts were the subject of considerable debate both in Parliament and the Australian community generally[6].

New legislation

Key legislation listed for introduction and/or debate in the Autumn session 2006 (February-March 2006, 4 sitting weeks) is shown below. Commentary is largely taken from http://www.pmc.gov.au/parliamentary/docs/proposed_legislation.doc. Items marked with an asterisk are intended for passage during these sittings.

- **Australian Citizenship Bill 2005**

  Restructures the 1948 Act and introduces a framework for the collection, use and storage of personal identifiers to increase the government's ability to accurately identify people seeking to become citizens; prohibits the Minister approving applications from those assessed to be direct or indirect risks to Australia's security

- **Law Enforcement Reform Bill**

  Provides for the establishment, functions and powers of an Australian Commission for Law Enforcement Integrity, headed by a statutory Integrity Commissioner, as an independent body with special investigative powers to look into possible corruption in Australian Government law enforcement agencies and to recommend remedial measures, including prosecution, to the relevant authorities. Implement the government's response to the Fisher Review of Professional Standards in the Australian Federal Police.

- **Australian Human Rights Commission Legislation Bill**

  Restructures and renames the Human Rights and Equal Opportunity Commission

- **Privacy Amendment Bill**

  Ensures that, in the event of an emergency or a disaster, Australian Government agencies can exchange personal information with each other, private sector organisations, non-government organisations and the states and territories. Implements review recommendations

- **Telecommunications (Interception) Amendment Bill 2006**

  See below under FOI, privacy and other information issues

- **Migration Amendment (Migration Zone) Bill**

  Amends the *Migration Act 1958* to provide greater certainty in the definition of 'migration zone'; clarifies powers in relation to the detention of persons on board vessels; expands the definition of 'excised offshore place' to include certain islands and territories in Northern Australia; and specifies an 'excision time' for the places that are added to the definition of 'excised offshore place'.

- **Migration Amendment (Visa Integrity) Bill**

  Amends the *Migration Act 1958* to strengthen provisions in relation to the integrity of the visa program and strengthen the provisions relating to the flow of information between the department and its clients

- **Migration Legislation Amendment (Border Integrity) Bill**

  Amends the *Migration Act 1958* to strengthen provisions in relation to border integrity; and amends the *Customs Act 1901* to ensure that the same reporting obligations exist under both migration and customs legislation

- **Airspace Bill**

  Creates a head of power for an Airspace Authority to take over the airspace management function currently performed by Airservices Australia and amends the *Air Services Act 1995* and the *Civil Aviation Act 1988.*

- **Therapeutic Goods Amendment (Repeal of Ministerial responsibility for approval of RU486) Bill 2005**

  Amended the *Therapeutic Goods Act 1989* to make it possible to evaluate, register, list or import abortifacients (medicines intended to induce an abortion) such as RU486 (mifepristone) for use in Australia without the approval of the Minister for Health and Ageing. The Commonwealth Therapeutic Goods Administration will determine whether such drugs can be prescribed. The Bill was sponsored by Senators Judith Troeth (Liberal), Fiona Nash (National), Lyn Allison (Democrat) and Claire Moore (ALP). All parties allowed a 'conscience vote' on this issue in the Federal parliament. The Bill passed the Senate on 9 February 2006 and the House of Representatives on 16 February 2006[7].

An amendment proposed by Andrew Laming (Liberal Qld) to allow the TGA to prescribe RU486 subject to disallowance by Parliament was defeated. A further amendment proposed by Jackie Kelly (Liberal NSW) retaining ministerial approval but giving Parliament the right to disallow a decision was also defeated.

Key Parliamentary Committee reports

Key Parliamentary reports tabled during the Spring 2005 and Autumn 2006 sessions included:

- **Joint Standing Committee on Migration**: *Review of Audit Report No. 1 2005-2006: Management of Detention Centre Contracts - Part B*

- **Senate Legal and Constitutional Affairs Committee**: *Inquiry into the administration and operation of the Migration Act 1958*. Interim report tabled 21 December 2005; final report due 27 February 2006.

- **Senate Foreign Affairs, Defence and Trade Committee**: *The removal, search for and discovery of Ms Vivian Solon*. Final Report tabled 8 December 2005[8]**.**

Ombudsman

Inquiry into deportation on character grounds

The Commonwealth Ombudsman has released a report into Administration of s 501 of the *Migration Act 1958* as it applies to long-term residents. The report highlights many deficiencies in the content and application of policies and procedures for cancelling the visas of long-term residents under s. 501 of the Migration Act (failure to pass character test). The report recommends that the Department of Immigration:

- review all cases where the visa of a long-term Australian resident has been cancelled under s. 501 and he or she is still in immigration detention or awaiting removal from Australia

- in the case of any person who may have held an 'absorbed person visa' (see discussion of Nystrom below), advise the Ombudsman whether the person was accorded procedural fairness and what action the Department intends to take

- develop a code of procedural fairness to guide the administration of s. 501

- review the application of s. 501 and other relevant provisions of the Migration Act and advise whether s. 501 should be applied to long-term permanent residents[9].

Telecommunications Industry Ombudsman

The Australian Communications and Media Authority is investigating more than a dozen voice over internet protocol (VoIP) providers who have yet to register for mandatory Telecommunications Industry Ombudsman Scheme[10].

The Courts

Minister's failure to consider whether deportee had 'absorbed person visa'

Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs[11]: Born in Sweden in 1973 while his parents were on holiday from Australia, Mr Nystrom arrived in this country when he was 27 days old. He has never left Australia. He also did not formally become an Australian citizen. After a number of criminal convictions, in 2004 the Minister purported to cancel a transitional (permanent) visa held by Mr Nystrom before deporting him.

In a 2:1 decision in the Full Federal Court, Moore and Gyles JJ said this was 'yet another disturbing application' of s. 501 of the Migration Act, suggesting that 'administration of this aspect of the Act may have lost its way.' The majority held it was jurisdictional error for the Minister not to consider the fact that the appellant was within the category of those deemed under the Migration Act to hold an 'absorbed person visa'.

While Emmett J disagreed and noted that 'the material before the Court indicates that the appellant is a thoroughly unpleasant man having been convicted of serious and odious crimes', he shared 'the disquiet expressed by their Honours concerning the circumstances in which a man who has spent all of his life in Australia and who has no knowledge of the Swedish language will be removed to Sweden and banished from Australia because of what must be characterised as an accident of history and an oversight on the part of his parents'.

On 16 December 2005, the High Court granted special leave for the Minister to appeal (see *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom (M95/2005*).

Lack of procedural fairness where RRT did not inform appellant of adverse letter

Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs.[12] VEAL and his wife, an Eritrean couple, were refused protection visas in 2001. They sought review by the Refugee Review Tribunal. The Department then received a letter which included the sender's name and address and which said that VEAL had admitted being accused of killing a prominent political figure in Eritrea and that VEAL supported and worked for the Eritrean government.

The Department forwarded the letter to the RRT, which upheld the refusal to grant VEAL a protection visa, without informing him of the existence or contents of the letter. The High Court held unanimously held that procedural fairness required the RRT to inform VEAL of the existence of the letter and the substance (although not the detail) of its contents before affirming the refusal to grant a visa.

The High Court held that the application of principles of procedural fairness depends on the particular circumstances of each case, so there are no absolute rules about disclosure of information from an informer or disclosure of the informer's identity to an interested person such as VEAL. In this case, procedural fairness at least required that VEAL know the substance of what was said about him in the letter.

Lack of procedural fairness where prolonged delay in determining visa application

Nais, Nait and Naiu v Minister for Immigration and Multicultural and Indigenous Affairs and Refugee Review Tribunal[13]. A husband, wife and daughter from Bangladesh were refused protection visas in May 1997. They applied to the RRT for review and after giving oral evidence at a hearing in May 1998, they did not hear from the RRT for three and a half years. In December 2001 they attended another hearing and in January 2003 the RRT

refused their application, noted that the husband made admissions that certain claims made by him and his wife were fabricated suggesting this indicated collusion.

By a 4:2 majority the High Court held that the RRT's decision, which centred on the credibility of the asylum seekers, was not made fairly. The procedure was flawed in a manner likely to affect the RRT's capacity to make a proper assessment of the family's sincerity and reliability. When the RRT, without explanation, draws out its procedures to such an extent that its capacity to discharge its statutory obligations is likely to be materially diminished, then a case of procedural unfairness arises.

Reasons for rejecting challenge to Work Choices advertising campaign

On 21 October 2005 the High Court published its reasons for rejecting a challenge to Government advertising promoting proposed changes to industrial relations laws. In *Combet and anor v Commonwealth of Australia*[14] Mr Combet, secretary of the ACTU, and Nicola Roxon, the shadow Attorney-General, contended that expenditure of public money on the advertisements was unlawful. Section 83 of the Constitution provides that no money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law. Schedule 1 of the *Appropriation Act (No 1) 2005-2006* (Cth) relating to the Department of Employment and Workplace Relations (DEWR) portfolio refers to the outcome of *Higher productivity, higher pay workplaces*. Combet and Roxon argued that the Parliament had not, by this item in the Appropriation Act, appropriated money for the advertising campaign.

The Court, by a 5-2 majority, held that it had not been shown that the drawings were not covered by the Appropriation Act. Section 7(2) of the Appropriation Act restricts the application of DEWR funding: it may only be applied 'for the departmental expenditure' of the Department. But the Act imposes no narrower restriction on the scope of the expenditure. Therefore it does not matter whether any part of the DEWR funding is spent otherwise than on activities leading to higher productivity or higher pay workplaces (or activities forming part of either of the other two outcomes), so long as it is 'departmental expenditure'. The plaintiffs did not contend that expenditure on advertising the reform package was not 'departmental expenditure'.

Administrative Review and Tribunals

Refusal to waive processing fee in FOI matter

Re Australian Privacy Foundation and Attorney General's Department[15]. The Australian Privacy Foundation (APF) sought a waiver of the processing fee for a request to the Attorney-General's Department under the *Freedom of Information Act 1982* for documents relating to the Anti-Money Laundering Reform process being undertaken by the Department.

Section 29(5) of the FOI Act states that in considering whether to reduce or not impose a charge for a request for information, the agency or Minister must consider whether the charge would cause financial hardship to the applicant and whether access to the documents in question is in the general public interest or the interest of a substantial section of the public.

The Administrative Appeals Tribunal noted that while its income was modest, the Australian Privacy Foundation had assets of more than $7,000. So a processing charge of $160 would not cause it financial hardship.

On the public interest issue, the Department argued that compared to s 36 of the FOI Act, there was a higher 'bar' under s 29(5) because this relates to the discretion to waive a charge, and Government policy has always been that such charges should be imposed

wherever possible. Release of the documents not only had to be in the interests of 'a significant number of people, a large class of persons', but the Tribunal had to be satisfied that the documents could and would be brought to the notice of public. In contrast, the APF argued that refusal to waive a fee for a not for profit organisation whose objects were consistent with the implied constitutional freedom of communication on matters of government and politics is 'both a burden and neither reasonable nor appropriate in the circumstances'. Given its finding on financial hardship, the Tribunal held that it did not need to decide this question.

Freedom of Information, privacy and other information issues

Landmark freedom of information case

McKinnon v Secretary Department of the Treasury[16]. On 3 February 2006 the High Court granted leave to appeal in a landmark FOI case that will test the ability of government ministers to issue 'conclusive certificates' preventing the release of official documents on public interest grounds. The challenge has been brought by *The Australian's* freedom of information editor Michael McKinnon after the Treasurer Peter Costello issued such a certificate in 2003 to block release of documents on income tax and the first home buyers scheme.

Justice Kirby observed that 'they do not leap out as …very secret sort of documents', noting that 'what is legally significant is whether the correct test has been applied' under s 58(5) of the FOI Act by the Administrative Appeals Tribunal. In this matter the AAT agreed that there were reasonable grounds for the claim that the disclosure of the documents would be contrary to the public interest. Justice Kirby stated that there is 'a delicate balance that Parliament has created in the Act which is protective of that small zone to which the Act will not penetrate, but that small zone, in an accountable democracy, is an important matter to define correctly. That is why it does seem to be a matter which this Court should examine.'[17]

New telecommunications interception regime

On 16 February 2006 the Attorney-General Philip Ruddock what he described as 'the most comprehensive amendments to the *Telecommunications (Interception) Act 1979* since its inception. The amendments implement recommendations from the *Report of the Review of the Regulation of Access to Communications* by Anthony Blunn AO. According to Mr Ruddock, the Bill represents 'a fundamental shift in the interception regime to extend privacy safeguards to all stages of electronic communications …They also assist our law enforcement and security agencies to keep pace with increasingly sophisticated methods of avoiding detection'. The official media release stated that the amendments will[18]:

- introduce a new stored communications regime which prohibits access to stored communications held by a telecommunications carrier unless a warrant is issued

- implement the Blunn recommendation that law enforcement agencies be able to intercept the communications of a person who will communicate with a suspect in limited and controlled circumstances, and

- permit a warrant to be sought allowing the interception of a particular telecommunications device (rather than service).

Privacy Commissioner revokes General Insurance Information Privacy Code

Commonwealth Privacy Commissioner Karen Curtis has signed an instrument which will revoke the General Insurance Information Privacy Code from 30 April 2006. Under the Privacy Act organisations can develop their own privacy codes, which when approved, replace compliance with the National Privacy Principles (NPPs). The General Insurance Information Privacy Code was approved on 17 April 2002. However a 2005 review concluded that given the cost, the low number of privacy complaints, and the degree of industry take-up of the Code, it could not be said that there was value in the continued operation of the Code. Organisations that had adopted the Insurance Industry Privacy Code will now need to comply with the NPPs[19].

Public administration

Shergold sets standard for Ministers resignation

The Secretary of the Department of Prime Minister and Cabinet, Dr Peter Shergold, laid down guidelines for resignation of government ministers in an address to the National Press Club on 15 February 2006.

Dr Shergold said that 'if the failure is a failure of ministerial direction … or if a minister had their attention drawn to matters and then took no action, then it seems to me that a minister would be clearly responsible for the failures within their department'.

Dr Shergold promised that as with the Palmer report into the Department of Immigration, 'if something comes out of the Cole Commission which suggests that there are failures within the Public Service, then you can have my absolute commitment that we will move to address them with the same vigour'[20].

Other developments

New Human Rights Commissioner

On 15 December 2005 the Attorney-General Phillip Ruddock announced the appointment of Mr Graeme Inness as the new Human Rights Commissioner and Acting Disability Discrimination Commissioner. The appointment of Mr Inness for a five year period follows the expiry of Mr Sev Ozdowski's term as Human Rights Commissioner on 7 December 2005. Mr Inness was previously Deputy Disability Discrimination Commissioner[21].

Blair gets ID card proposal through House of Commons

The UK Government has introduced revised legislation for an ID card scheme that would store biometric information such as fingerprint, iris and face recognition data. The proposal was first approved by the House of Commons in October 2005, but rejected by the House of Lords in January 2006. The Government argues that ID cards will help combat identity theft, abuse of state benefits, illegal immigration, organised crime and terrorism. Subsequently, on 13 February 2006, the House of Commons passed a compromise scheme, under which the cards will not be compulsory for everyone. However from 2008 anyone applying for or renewing a passport will have to pay for an identity card as well. An amendment requiring the scheme to be entirely voluntary was rejected. The legislation will now be returned to the House of Lords[22].

Review by the UK Law Commission on the desirability of post-legislative scrutiny

The UK Law Commission has stated that 'As the body charged with keeping all the law under review we are concerned both at the volume of legislation that is passed by Parliament and whether it accurately gives effect to the underlying policy aims.' It noted that 'there is no systematic practice of reviewing laws after they have been brought into force to ensure they are working as intended'[23]. The consultation paper examines the potential for developing a more formal system of reviewing laws (post-legislative scrutiny) and encouraging better regulation.

Endnotes

1 See media release at http://www.pm.gov.au/news/media_releases/media_Release1752.html. See full ministerial list at http://www.dpmc.gov.au/parliamentary/ministry_list.cfm.

2 See official website with full terms of reference, transcripts, submissions and other material at http://www.ag.gov.au/agd/www/UNoilforfoodinquiry.nsf.
3 See media release including terms of reference at http://www.law.gov.au/ag.
4 See transcripts at http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Interview_Transcripts. See parliamentary library e-brief at http://www.aph.gov.au/library/INTGUIDE/LAW/IdentityCards.htm.
5 See media release at http://www.dpc.vic.gov.au/domino/Web_Notes/newmedia.nsf/0/a4ec80ecaab0073eca2570dd007e7448?OpenDocument
6 The Commonwealth Parliamentary Library maintains a comprehensive guide to developments on terrorism law in Australia. See the parliamentary library's terrorism law website at http://www.aph.gov.au/library/intguide/law/terrorism.htm. This site includes links to the Prime Minister's announcement about a specific terrorist threat requiring the urgent passing of the *Anti-Terrorism Act 2005*, early drafts of the No. 2 Act made public by the ACT Chief Minister and Boe Lawyers, e-briefs and bills digests prepared by the library analysing both Acts, as well as Parliamentary Committee reports and key articles.
7 See report tabled on 8 February 2006 by Senate Standing Committee on Community Affairs at http://www.aph.gov.au/senate/committee/clac_ctte/ru486/report/report.pdf.

See bills digest at http://www.aph.gov.au/library/pubs/bd/2005-06/06bd096.pdf and parliamentary library research note at http://www.aph.gov.au/library/pubs/rn/2005-06/06rn19.htm.

8 For terms of reference, reports and links to submissions, see http://www.aph.gov.au/committee/inquiries_comm.htm.
9 See report at www.comb.au
10 See Dorothy Kennedy, "Regulator reviews status of VoIP providers", *Australian Financial Review*, 3.1.06, p. 12.
11 [2005] FCAFC 121 (21 July 2005)
12 [2005] HCA 72, 6 December 2005
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14 [2005 HCA 61
15 [2005] AATA 1204, 6 December 2005
16 [2006] HCATrans 13
17 see Elizabeth Colman, "High Court to hear test case on FOI", *Weekend Australian* 4.2.06, p. 2.
18 See media release at http://www.ag.gov.au/agd/WWW/agdhome.nsf/Page/Latest_News
See Brendan Nicholson, "Proposal to tap innocent people unwarranted", *The Age*, 16.2.06 at http://www.theage.com.au/news/national/
19 See media release at http://www.privacy.gov.au/news/media/06_02.html
20 See Andrew Fraser, "Shergold sets out guidelines on ministerial responsibility", *Canberra Times*, 16.02.06, p. 2.
21 See media release at http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases2005
22 Source: Andrew Gray, "Blair wins crucial ID card vote", *The Age*, 15 February 2006, p. 16. For further information, see links to UK material in parliamentary library e-brief at http://www.aph.gov.au/library/INTGUIDE/LAW/IdentityCards.htm
23 See consultation paper and press release at http://www.lawcom.gov.uk/post_leg_scrutiny.htm

THE *LEGISLATIVE INSTRUMENTS ACT 2004* — IS IT THE CHERRY ON THE TOP OF THE LEGISLATIVE SCRUTINY CAKE?

Stephen Argument*

Introduction

In the (soon to be superseded) 2nd edition of *Delegated Legislation in Australia*, Professor Dennis Pearce and I stated:

> [T]he Commonwealth is no longer leading the way for the other jurisdictions. Particularly as a result of the failure of successive Commonwealth Government(s) to secure the passage of the Legislative Instruments Bill, the Commonwealth can no longer be said to be leading the way on scrutiny of delegated legislation, as it was 20 years ago.
>
> The fact is that the Commonwealth is now very much behind several other jurisdictions, particularly in relation to regulatory impact assessment and staged repeal of delegated legislation. Experience with the Legislative Instruments Bill does not promote optimism that this slide will be arrested in the near future. This is not to suggest, however, that the quality of the work of the two Senate committees has fallen away. Rather, it is a reflection of the fact that, at present, the Commonwealth jurisdiction probably has more to learn from some of its State counterparts than they have to learn from it. It also means that, until such time as the Commonwealth passes the kinds of amendments contained in the Legislative Instruments Bill, jurisdictions such as Victoria (in particular) will be setting the example that had previously been set by the Commonwealth. [1]

At around the same time, I suggested that the Commonwealth was 'leading from behind'. [2]

Almost six years on (and having written the Legislative Instruments Bill off on several occasions[3]), I find myself not only speaking about the Legislative Instruments **Act** but also in the peculiar position of extolling the virtues of the scrutiny of subordinate legislation regime that now operates in the Commonwealth jurisdiction.

For one very important reason, it is now without peer.

Application to instruments 'of a legislative character'

The single most significant element of the *Legislative Instruments Act 2003* (LIA) is its application to all instruments made in exercise of a power delegated by the Parliament that are 'of a legislative character'. Section 5 of the LIA provides that an instrument is 'of a legislative character' if:

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

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

Why is this definition significant?

The significance of this definition is that, unlike other jurisdictions, the regime provided for by the LIA operates by reference to what an instrument *does*, rather than by what it is called. While the operative definitions in some other jurisdictions refer to instruments having a legislative character, the fact is that, in all other Australian jurisdictions, whether or not an instrument is subject to the relevant regime for publication, tabling and disallowance is governed by whether or not the instrument in question is a 'disallowable instrument',[1] a 'regulation',[2] a 'statutory instrument',[3] a 'statutory rule',[4] a 'subordinate law',[5] 'subordinate legislation'[6] or 'subsidiary legislation',[7] depending on the jurisdiction.

The effect of this approach to instruments is that all that is required for an instrument *not* to be subject to the relevant publication, tabling and disallowance regime is for it to be designated as something other than the term that triggers the operation of that regime. From a theoretical perspective at least, it is difficult to justify a process that operates on the basis of what legislative instruments are called, rather than what they do.

Nomenclature should be irrelevant, not the least because (in my experience) it is a reflection of variations in bureaucratic practices and preferences, drafting approach or in what the Parliament might be prepared to allow at a particular time. More importantly, however, I consider that this sleight-of-hand with nomenclature has, in the Commonwealth at least, been the single biggest contributor to the explosion of 'quasi-legislation' that occurred in the 25 or so years prior to the enactment of the LIA.[8] I am confident that the LIA has put a stop to this exponential growth in legislative instruments that fall outside of the publication, tabling and disallowance regime, and the discipline that this regime brings with it.

Why is the publication, tabling and disallowance regime important?

In my work on quasi-legislation, I have always said that there are four basic problems. They are:

- the proliferation of instruments not covered by the existing regimes;
- the poor quality of drafting of such instruments;
- the inaccessibility of such instruments; and
- the lack of appropriate parliamentary scrutiny for such instruments.

The LIA addresses all four issues. Proliferation becomes irrelevant, because instruments are now covered by the LIA, irrespective of what they are called. All that matters is whether or not they are 'of a legislative character'.

Poor drafting is addressed in two ways. First, s 16 of the LIA gives the Secretary of the Attorney-General's Department an obligation to 'cause steps to be taken to promote the legal effectiveness, clarity and intelligibility to anticipated users, of legislative instruments'. These steps may include (but are not limited to):

- undertaking or supervising the drafting of legislative instruments; and
- scrutinising preliminary drafts of legislative instruments; and

- providing advice concerning the drafting of legislative instruments; and
- providing training in drafting and matters related to drafting to officers and employees of other departments or agencies; and
- arranging the temporary secondment to other departments or agencies of Australian Public Service employees performing duties in the department; and
- providing drafting precedents to officers and employees of other departments or agencies (s16(2)).

Section 16(3) of the LIA also requires the Secretary to cause steps to be taken to prevent the inappropriate use of gender-specific language.

The second way in which the drafting issue is dealt with is in the sense that if instruments are recognised as having a legislative effect and have to be registered, then surely agencies will take more care to ensure that they say and do what they are supposed to do. It is too much of a risk not to do so.

It is the accessibility issue that is arguably the most important, however. What the LIA does is ensure that people can work out what the law is, by virtue of the fact that all 'legislation' is now publicly available. Requiring that instruments be tabled in the Parliament could have been enough in itself (in the sense that the Table Offices of both Houses are an excellent source of documents and information tabled in the Houses) but the LIA does more. It establishes a Federal Register of Legislative Instruments (FRLI),[9] on which all legislative instruments must be registered. If they have to be registered on FRLI, you would like to think that this guarantees that they can be found. Indeed, if nothing else, it helps ensure that persons affected by legislative instruments can at least be aware that they exist. This is another great leap forward.

The parliamentary scrutiny issue is dealt with by the fact that the LIA ensures that instruments of a legislative character receive appropriate scrutiny *by the legislature*.

Is the definition a cure-all?

It would be naïve, however, to suggest that the introduction of this definition is a panacea. In addition to the significant workload issues that the operation of the LIA creates for Commonwealth agencies (see further below), a threshold issue for Commonwealth agencies is now determining whether or not an instrument is 'of a legislative character'. This can be a difficult proposition.

The concept of ‘legislation’ is generally defined by distinguishing legislative and executive activity. The distinction was authoritatively made by the Donoughmore Committee (the Committee on Ministers’ Powers) of the United Kingdom Parliament in 1932 (Report, 1932, Cmd 4060).[10] The Donoughmore Committee distinguished legislative and executive authority by adopting the approach that legislative activity involves the process of formulating general rules of conduct without reference to particular cases (and usually operating prospectively), while executive action involves the process of performing particular acts, issuing particular orders or making decisions that apply general rules to particular cases.

A similar basis for distinction was adopted in Australia, by the High Court. In *Commonwealth v Grunseit*,[11] Chief Justice Latham stated that:

> [t]he general distinction between legislation and the execution of legislation is that legislation determines the content of the law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases. (at 82)

Likewise, in *Minister for Industry and Commerce v Tooheys Ltd*,[12] the Full Court of the Federal Court stated that:

> [t]he distinction [between legislative and administrative acts] is essentially between the creation or formulation of new rules of law having general application and the application of those general rules to particular cases. (at 265)

More recently, French J of the Federal Court cited, with approval, the definition put forward in the 1st edition of Pearce, of *Delegated legislation* referring to 'instruments that lay down general rules of conduct affecting the community at large which have been made by a body expressly authorised to do so by an Act of parliament'.[13]

The distinction is not always easy or logical to make, however, nor does it always produce the most logical result. In making a decision in a particular case, for example, an administrator will often formulate a general principle that will be applied to the determination of such cases in the future. Similarly, Acts of Parliament – which would logically be regarded as legislative – can sometimes properly be seen as executive or administrative in character, because of their application to a particular fact situation or to a named individual.[14]

This aspect of the legislative/administrative distinction was considered last year, by Selway J of the Federal Court, in *McWilliam v Civil Aviation Safety Authority*.[15] After referring to two of the leading authorities on this issue,[16] Selway J stated:

> [T]hese decisions should not be understood as suggesting that administrative and legislative decisions fall into two mutually exclusive categories and that such categories can be identified by particular characteristics. (at [39])

His Honour went on to state:

> That difficulty is exacerbated in relation to administrative functions simply because, under the Westminster system of government, the executive branch may exercise legislative powers delegated by the Parliament. This has the practical effect that it is impossible under Australian constitutional arrangements to draw a clear or 'bright line' distinction between legislative and administrative powers. (at [41])

Indeed, Selway J concluded that 'there is no reason in principle why the same decision could not be described as being both an administrative and a legislative decision' (at [42]). His Honour makes a very good point and provides perhaps the only logical way of dealing with the *Gary David* and *Kable* situations (discussed in footnote 16).

In the particular case, Selway J noted that counsel for the Civil Aviation Safety Authority had 'properly' conceded that a decision under a particular provision could be legislative or administrative 'depending upon the nature of the decision and who it affected'. His Honour went on to state:

> For example, a decision requiring all pilots to adopt a particular safety procedure when approaching airports might be viewed as a broad policy decision which might be characterised as being a decision that was not of an administrative character. On the other hand, a decision that a major airport was unsafe for use by commercial airlines and prohibiting that use might be characterised as an administrative decision. Such a decision would be made by a statutory body (rather than by the Parliament or the Governor General in Council), it would be made in an 'Instrument' (rather than by an Act or Regulation), it would relate to a specific airport, it would be based upon specific findings, rather than broad policy considerations and so forth. (at [43])

This latter point, in particular, echoes similar issues grappled with by the courts in distinguishing between administrative and judicial power.[17]

The bottom line is that Commonwealth agencies now face a difficult task in determining whether or not an instrument is 'legislative'. Whether or not an instrument is legislative determines whether or not the instrument must be registered if it is to continue to have effect. Significantly, there is no scope for agencies to register instruments 'just to be on the

safe side', as the Attorney-General's Department, which is responsible for the new regime, has indicated that this approach is not acceptable. In its *Legislative Instruments Act e-bulletin No 1* (April 2004), the Attorney-General's Department stated:

> Relying on registering everything, just to make sure all legislative instruments are caught, may not be the best way to go. [The Office of Legislative Drafting] is unlikely to accept instruments for registration that are clearly not legislative without a very good reason.

And here's the sting:

> Agencies should obtain legal advice from their legal service provider as soon as possible, to resolve the question of legislative character of an instrument.
>
> If requested, [the Office of Legislative Drafting] can also provide formal advice of this nature on a billable basis …

The difficulty with this approach is that it is not instruments that are 'clearly not of a legislative character' that are the problem. It is the instruments where it is not clear, that are the problem. It is the kind of instruments that Selway J was dealing with in *McWilliam* that are causing the headaches. If the question was 'clear', it would not be an issue.

Obviously, there are interesting times ahead. With its commencement on 1 January 2005, the LIA applies to all instruments made after that date. The more problematic application to existing instruments is a ticking time-bomb, in the sense that Commonwealth agencies had until 1 January 2006 to lodge for registration legislative instruments made between 1 January 2000 and 31 December 2004. Agencies then have until 1 January 2008 to lodge for registration instruments made before 1 January 2000 (LIA, s 29). In both cases, failure to lodge an instrument by the relevant date has the effect that, on the day after the last lodgment day, the instrument:

(a) ceases to be enforceable by or against the Commonwealth, or by or against any other person or body; and
(b) is taken to have been repealed (s 32).

As a result, there is currently a real pressure on agencies to make the call as to whether their instruments are legislative or not. And to get it right.

Other strategies

Professor Jim Davis has recently drawn my attention to another way of dealing with the potential conundrum of whether or not something is a legislative instrument. He pointed to provisions in the Auslink (National Land Transport) Bill 2004 that expressly deal with the issue of whether or not various instruments are legislative and, if so, the extent to which the LIA applies.[18] Clearly, this is a very sensible approach.

What about the effect on the Senate committee?

It should not be forgotten that the increased workload issue does not apply only to agencies. It is inevitable that the LIA will also mean more work for the Senate Standing Committee on Regulations and Ordinances, as that Committee's 'net' must surely have widened, with many instruments that previously escaped the Committee's attention now coming within its remit.

I was surprised to discover that I said as much in 1992, when dealing with the 'quasi-legislation' problem:

> [D]oubts have been expressed about the capacity of the Parliament to cope with ever-increasing volumes of legislative and quasi-legislative instruments. Ultimately, the burden is placed on committees such as the Senate Scrutiny of Bills Committee and the Senate Standing Committee on Regulations and Ordinances. Therefore, if the Parliament adopts a more rigorous approach to quasi-legislation it must also re-evaluate its own processes for dealing with quasi-legislation.[19]

It will be interesting to observe whether, in fact, the workload of the Regulations and Ordinances Committee increases.

Other features of the Legislative Instruments Act

A summary of the key provisions of the LIA is attached (Attachment A), together with a list of key dates (Attachment B). In brief, the other key features of the LIA are:

- the introduction of consultation requirements in relation to legislative instruments;
- the reduction of the period within which an instrument must be tabled from 15 sitting days of making days to 6 sitting days of the instrument being registered; and
- the introduction of a 'sunsetting' regime for legislative instruments, with a 10 year sunset period.

I do not propose to discuss any of these issues in any detail. One thing that might be noted, however, is that the consultation requirements set out in Part 3 of the LIA are much less onerous than those that would have been imposed by previous versions of the legislation. Section 17 requires a rule-maker to undertake 'appropriate' consultation before making a legislative instrument. The obligation is imposed 'particularly' where the instrument is 'likely … to have a direct or substantial indirect effect on business' or is 'likely … to restrict competition' (s 17(1)). Consultation is very much at the discretion of the rule-maker, however, in that the obligation is on the rule-maker to be satisfied that 'any consultation that is appropriate and that is reasonably practicable to undertake' has been undertaken. This provision contrasts with the more detailed and prescriptive consultation requirements set out in previous versions of the legislation (and recommended by the Administrative Review Council, in its report on *Rule making by Commonwealth agencies*[20]).

Section 17(2) provides rule-makers with guidance in determining whether any consultation that has been undertaken was 'appropriate'. Section 17(3) indicates what form consultation might take. Section 18 exempts certain categories of instruments from the consultation requirements. Section 19 provides that a failure to undertake consultation does not affect the validity or enforceability of a legislative instrument.

While it remains to be seen what use rule-makers make of the Part 3 requirements, it should also be noted that these requirements do not in any way derogate from the consultation requirements imposed as part of the Regulatory Impact Statement (RIS) process, by the (Commonwealth) Office of Regulation Review.[21]

Apples and oranges … and lemons

In preparing this paper, it belatedly came to my attention that, in the abstract that I provided to the organisers of this conference, I agreed to re-visit my 'Apples and oranges' paper.[22] In that paper, given to the conference held in Sydney, in 1999, I foolishly attempted to assess the performance of the various legislative scrutiny committees against each other. Big mistake - and not one to be repeated.

That said, the exercise that Professor Dennis Pearce and I have recently been engaged in, for the purposes of the new edition of *Pearce and Argumen*t, have generated some

thoughts, some of which equate with elements of the 'scorecard' that I developed as part of the 'Apples and oranges' paper.

The first thing to note is the significant developments that have taken place since 1999.

I have already said enough about the LIA.

Another significant development (and I should stress that the issues that I now discuss are in no particular order) is the establishment of a scrutiny of bills committee in NSW. To be more precise, in 2003, the NSW Parliament established the Legislation Review Committee, a committee with a scrutiny of bills function, as well as a scrutiny of subordinate legislation function.[23]

The establishment of the Legislation Review Committee brings to five the number of jurisdictions with a committee that performs a scrutiny of bills function.[24] Those jurisdictions are now in the majority! It also brings to four the number of jurisdictions in which the committee performs a dual function.[25]

An innovation that was brought in by the NSW committee has been the establishment of a panel of expert legal advisers, who are called upon according to their particular areas of expertise.

For me, an interesting side-issue with the establishment of the NSW committee is its relationship to calls for the establishment of a Bill of Rights. Between 1999 and 2001, the NSW Parliament's Standing Committee on Law and Justice investigated the desirability of a statutory Bill of Rights for NSW. The committee reported in October 2001, finding that it was *not* in the public interest for the NSW government to enact a statutory Bill of Rights.[26] The committee went on to recommend the establishment of a scrutiny of bills committee.[27] The NSW government accepted the recommendation.

Three other interesting developments have occurred in the ACT. First, the ACT enacted the *Legislation Act 2001*, an innovative piece of legislation that combined (among other things) the *Interpretation Act 1967* (ACT) and the *Subordinate Laws Act 1989* (ACT), the two pieces of legislation within which the ACT committee had primarily operated. More importantly, however, the Legislation Act established the *ACT Legislation Register*, an electronic database that is now the authoritative source of ACT legislation.[28] It is a marvellous resource.

Second, the ACT enacted the *Human Rights Act 2004*, which provides 'an explicit statutory basis for respecting, protecting, fulfilling and promoting civil and political rights'.[29] The effect of that Act has, no doubt, been dealt with comprehensively by others at this conference. From a legislative scrutiny committee perspective, however, the key development is the role given to the ACT committee, under s 38 of the Human Rights Act, to report to the Legislative Assembly on human rights issues raised by bills presented to the Assembly. Curiously, however, the committee has no role in relation to human rights issues raised by *subordinate* legislation.

Third, the ACT committee has (only very recently) appointed a second legal adviser, with one legal adviser now devoted entirely to the scrutiny of bills function and the other to the scrutiny of subordinate legislation function.

Another development since 1999 is not really a development at all, in the sense that some very good work has not yet come into fruition. Between 2000 and 2002, the Victorian committee conducted an extensive inquiry into the operation of the *Subordinate Legislation Act 1994* (Vic). It is telling that the first recommendation of the committee's report, entitled

Inquiry into the Subordinate Legislation Act 1994,[30] was that the Subordinate Legislation Act be amended to introduce a similar concept to that contained in the LIA. This was that the publication, tabling and disallowance requirements of the Subordinate Legislation Act apply in relation to instruments 'of a legislative character'. Unfortunately, the government did not support that recommendation.[31]

So the Commonwealth remains as the only jurisdiction with the cherry on top of its legislation cake.

The final issue that I would like to flag in this context is that of the Internet accessibility of the work of the various committees. In the 'Apples and oranges' paper, I noted that material relating to all the committees except the South Australian committee was in some way accessible via the Internet. I am pleased to note that, this time around, South Australia is no longer the poor relation and that a wealth of material on the committees' work is now available on the Internet.

I should also take this opportunity to thank the staff of the various secretariats, who I have annoyed by e-mail, with questions about committee statistics, etc.

Other issues

I would like to conclude by flagging some issues that I believe that Professor Pearce and I will be looking at when (if?) we come to revise *Pearce and Argument* the next time. One is the evolution of the dual role of committees. It will be interesting to see whether there is a tendency for the scrutiny of bills function to dominate the work of committees with the dual function. Of course, we will follow the development of the NSW committee with particular interest, as it has developed out of a committee with a very strong track record in scrutinising subordinate legislation.

A related issue is whether the work of committees with the dual function might be quarantined in some way, either by establishing a subordinate legislation subcommittee (as in Victoria) or by having separate legal advisers for the different functions (as in the ACT).

I see the real challenge now as ensuring that scrutiny of subordinate legislation does not get left by the wayside. Given that it is subordinate legislation that has led to the development of this conference as a valuable and ongoing institution, it would be a little odd if the scrutiny of bills function came to be the dominant focus of the committees that attend.

Another issue is whether the motion for disallowance is a dying art. Having recently re-examined the issue for the purposes of the re-write of *Pearce and Argument*, I was struck by the paucity of disallowance motions in most of the jurisdictions. What does this mean? Surely the subordinate law-makers are not learning?

A related issue, which is far too controversial for me to touch, is whether the fact that, as more and more governments have 'the numbers' in the legislatures from which the various committees are drawn has any influence in the number of disallowance motions. I would like to think not.

In that vein, the make-up of the Senate after 1 July 2005 might be thought to have an effect on the work of the two Senate committees. Again, I would like to think not. It has to be noted that the Regulations and Ordinances Committee, in particular, has a long history both of bipartisan operation and of respect for its recommendations. It has previously operated (with no evidence of diminished effectiveness) in situations where the government has had a majority in the Senate and, presumably, will do so again.

Another bite at the cherry

Though it is obviously too early to assess the full impact of the LIA, I cannot but applaud its enactment (which, frankly, came as something of a surprise). Apart from finally bringing the Commonwealth jurisdiction 'up to speed' with various of the States, the LIA then takes the Commonwealth into the lead. The application of the LIA regime on the basis of instruments 'having legislative effect' is a substantial improvement on the regimes operating in all other jurisdictions. It means that legislative scrutiny applies regardless of how an instrument is designated. It operates on the basis of what the instrument *does*, rather than what the instrument is called. In so doing, it addresses the quasi-legislation issue head-on. This is a truly momentous development and one that other jurisdictions would do well to follow.

ATTACHMENT 1

LEGISLATIVE INSTRUMENTS ACT 2003
KEY PROVISIONS

Section 2	Commencement provisions
Section 5	Definition of 'legislative instrument'
Section 6	Instruments specified as 'legislative instruments'
Section 7	Specific exemptions from definition
Section 10	Attorney-General's power to certify whether or not an instrument is legislative
Section 12	Prohibition against retrospective operation of legislative instruments
Section 16	Secretary of Attorney-General's Department's obligations re drafting standards, etc
Sections 17-19	Consultation requirements
Section 20	Federal Register of Legislative Instruments
Section 24	Obligation to lodge 'new' legislative instruments
Section 26	Obligation to lodge explanatory statements
Section 29	Obligation to lodge 'old' instruments
Sections 31, 32	Effect of failure to lodge
Sections 33, 34, 35	Provisions relating to compilations
Section 36	Early backcapturing
Sections 38, 39	Tabling requirements
Section 42	Disallowance provision
Section 44	Specific exemptions from disallowance provisions
Sections 45-48	Provisions dealing with the effect of disallowance
Section 50	Sunset provision
Section 51	Attorney-General's power to defer sunsetting
Section 52	Requirement that Attorney-General table list of instruments due to sunset
Section 54	Specific exemptions from sunset provisions
Sections 59, 60	Provisions for review of operation of Act

ATTACHMENT 2

LEGISLATIVE INSTRUMENTS ACT 2003
KEY DATES

1 January 2005	Act commences and applies to all new legislative instruments
1 January 2006	Legislative instruments made between 1 January 2000 and 31 December 2004 must be lodged for registration
1 January 2008	Legislative instruments made before 1 January 2000 must be lodged for registration
	Review of operation of Legislative Instruments Act to commence
1 April 2009	Review of operation of Legislative Instruments Act to be completed
1 April 2013	Suggested review date for legislative instruments made between 1 January 2000 and 31 December 2004
1 April 2015	Suggested review date for legislative instruments made before 1 January 2000
1 April 2016	Sunset date for legislative instruments made between 1 January 2000 and 31 December 2004
1 January 2017	Review of operation of sunsetting provisions to commence
1 October 2017	Review of operation of sunsetting provisions to be completed
1 April 2018	Sunset date for legislative instruments made before 1 January 2000

Endnotes

1 Argument, S, 'The Sad and Sorry Tale of the (Commonwealth) Legislative Instruments Bill', in Kneebone, S (ed), *Administrative Law and the Rule of Law: Still Part of the Same Package?* (1999, Australian Institute of Administrative Law, Canberra), at p 260.
2 See, eg, Argument, S, 'Legislative Instruments Bill–R.I.P.?', 1998 (17) *AIAL Forum* 37;.'The Legislative Instruments Bill: Lazarus with a triple by-pass?', 2003 (39) *AIAL Forum* 44; and 'The Legislative Instruments Bill lives!', 2004 (40) *AIAL Forum* 17.
1 *Legislation Act 2001* (ACT), s 9;
2 *Subordinate Legislation Act 1978* (SA), s 4; *Interpretation Act* (NT), s 61.
3 *Statutory Instruments Act 1992* (Qld), s 7.
4 *Subordinate Legislation Act 1989* (NSW), s 3; *Subordinate Legislation Act 1994* (Vic), s 3; *Statutory Instruments Act 1992* (Qld), s 8.
5 *Legislation Act 2001* (ACT), s 8;
6 *Statutory Instruments Act 1992* (Qld), s 9; *Subordinate Legislation Act 1992* (Tas), s 3.
7 *Interpretation Act 1984* (WA), s 5.
8 See, generally, *Pearce and Argument* (note 1), at [1.11] to [1.18]. See also 'Quasi-legislation: Greasy pig, Trojan Horse or unruly child?', paper delivered to the Fourth Australasian Conference on Delegated Legislation and First Australasian and Pacific Conference on the Scrutiny of Bills, held on 28-30 July 1993 (published in (1994) 1 (3) *Australian Journal of Administrative Law* 144).
9 Available at www.frli.gov.au.
10 The Committee on Ministers' Powers, see Report, 1932, Cmd 4060.
11 (1943) 67 CLR 58.
12 (1982) 42 ALR 260.
13 *Latitude Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 110 ALR 209, at 228-9, referring to Pearce, DC, *Delegated Legislation in Australia and New Zealand* (1977, Butterworths, Sydney), at [1].
14. For example, the *Community Protection Act 1990* (Vic) expressly applied to the care or treatment and the management of a named individual, Gary David. Similarly, the *Community Protection Act 1994* (NSW) expressly applied only to Gregory Wayne Kable. See also discussion in *Randwick City Council and Another v Minister for Environment and Another* (1999) 167 ALR 115, at 134-5.
15 [2004] FCA 1701.
16 *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615 and *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 185 ALR 573.
17 See, eg, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, at 267.
18 See clause 5(4), which provides that the instrument in question is a legislative instrument but that neither the disallowance provisions nor the sunsetting regime applies, and clause 17(4), which provides that the relevant instrument is not a legislative instrument.
19 See Argument, S, 'Parliamentary scrutiny of quasi-legislation', 15 *Papers on Parliament* (May 1992), p 26.
20 Parliamentary Paper No 93 of 1992.
21 See Attorney-General's Department, *Legislative Instruments Act e-bulletin No 2* (May 2004). See also the Office of Regulation Review website, at www.pc.gov.au/orr/reform/risaims.html, for the RIS requirements.
22 'Apples and oranges: A comparison of the work of the various Australian delegated legislation committees', 1999 (21) *AIAL Forum* 34.
23 The Legislation Review Committee is established under the *Legislation Review Act* 1987 (NSW), by amendments made by the *Legislation Review Amendment Act* 2002 (NSW). See also, Argument, S, 'NSW committee to protect rights and liberties', *Law Society Journal*, 41 (9) October 2003, p 53.
24 The others being the ACT, the Commonwealth, Queensland and Victoria.
25 The others being the ACT, Queensland and Victoria.
26 Standing Committee on Law and Justice, *Report No 17 A NSW Bill of Rights* (October 2001), Finding 1, p 114.
27 Ibid, Recommendation 1, p 132.
28 See ss 18 to 26. The ACT Legislation register can be found at www.legislation.act.gov.au.
29 See ACT Human Rights Office website, at http://www.hro.act.gov.au/index.html.
30 September 1992, available at www.parliament.vic.gov.au/sarc/publications.htm. See, in particular, Recommendation 1, at pp 18-38.
31 I should also note that, in addition to setting out an analysis of the operation of the Subordinate Legislation Act, the report also contains an excellent summary of the legislative scrutiny situation in various other jurisdictions (including several overseas jurisdictions).

A REVIEW OF NATURAL JUSTICE PRINCIPLES AFTER JARRATT

Max Spry*

Introduction

This evening I would like to discuss the entitlement to, and content of, natural justice in the context of the termination of employment of senior public servants.

When will a senior public servant be entitled to natural justice? And, what is the content of natural justice in such circumstances? The two cases I wish to consider are the High Court's recent decision in *Jarratt v Commissioner of Police for NSW*[1], and the full Federal Court's decision in *Barratt v Howard*.[2]

What are the practical implications of these decisions? As a lawyer, how does one advise a person in the position of a Mr Barratt or a Mr Jarratt? On the other hand, if you are acting for a public sector agency in such circumstances, what would your advice be?

Jarratt v Commissioner of Police for New South Wales

On 5 February 2000 Mr Jarratt was appointed – for a term of five years – to the position of Deputy Commissioner of the NSW Police Service. He was removed from that position on 12 September 2001.

In a press release issued by the NSW Police Commissioner it was said that Mr Jarratt had been removed 'on the grounds of performance'. However, and this was not disputed by the Commissioner, Mr Jarratt was given no opportunity to respond to any performance issues prior to the recommendation that he be removed from his office.

It was the Commissioner's case that Mr Jarratt was not entitled to an opportunity to be heard because his removal was pursuant to s 51 of the *Police Service Act 1990* (NSW) (the Act).

Section 51 of the Act relevantly provides that a Deputy Commissioner 'may be removed from office at any time' by the Governor on the recommendation of the Police Commissioner, providing that any such recommendation must first be approved by the Minister.

The issue for the High Court was whether the exercise of power pursuant to s 51 of the Act was conditioned by the requirement to afford Mr Jarratt natural justice. The High Court held unanimously that it was.

The Commissioner's arguments – dismissal at pleasure

It was the Commissioner's case – accepted by the NSW Court of Appeal – that Mr Jarratt held office 'at the pleasure of the Crown' and hence he was not entitled to natural justice.

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As Gleeson CJ explained in *Jarratt*, where an office is held at pleasure, whoever may remove the office holder may do so at any time and without providing any justification to the office holder or to a court considering the decision.[3]

In the NSW Court of Appeal, Mason P (with whom Meagher and Santow JJA agreed) said that s 51 of the Act did not support an implication of a duty of procedural fairness. Rather, s 51 stood 'in the long line of provisions affirming and applying the dismissal at pleasure principle as an opportunity of last resort to the Executive in the efficient administration of a disciplined police force. The words "at any time" suggest this'.[4] His Honour also considered that the rights of return to public sector employment and to compensation provided for in ss 52 and 53 supported this approach.

This argument received short shrift in the High Court.

According to Gleeson CJ, the respondents 'are driven to rely on an implication, founded upon the words "may be removed at any time", read in the context of the common law principle as to service of the Crown at pleasure'.[5] But, Mr Jarratt's removal did not involve the exercise of Crown prerogative. 'We are concerned with a statutory scheme for the management of the Police Service and the employment of its members, likely to have been intended to embody modern conceptions of public accountability'.[6] Further, his Honour said: 'The Act provided the framework and context of the applicant's appointment, and determined the nature and extent of his rights.'[7]

The other members of the Court approached the matter in the same way.[8]

In holding that Mr Jarratt was entitled to be accorded natural justice, the decision may be read as a simple application of the principle stated in *Annetts v McCann*.[9] It will be recalled that in that case, Mason CJ, Deane and McHugh JJ said: 'It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.'[10]

And, as Gleeson CJ said in *Jarratt*: 'There are no plain words of necessary intendment, in s 51 of the Act or elsewhere, that indicate that the power of removal conferred by s 51 may be exercised without giving a Deputy Commissioner a fair opportunity to be heard.'[11]

Mr Jarratt was entitled to procedural fairness.

Content of procedural fairness

The High Court did not need to decide what the content procedural fairness should be in the *Jarratt* case. The respondents had conceded that Mr Jarratt had not been accorded procedural fairness at all and the case was decided on that basis.

However, the Court made it plain that the content of natural justice, where it applies, is not fixed. Gleeson CJ said: 'Of course, to conclude that the requirements of natural justice must be complied with leaves open the question of the practical content of those requirements in a given case.'[12]

And, in their joint judgment, McHugh, Gummow and Hayne JJ said, referring to *Barratt v Howard*: 'No doubt the content of the hearing rule may vary from case to case.'[13]

In *Barratt v Howard* a full Federal Court said that the content of procedural fairness 'depends upon the statutory framework', as well as the particular circumstances of the case.[14]

The facts in *Barratt v Howard* may be shortly stated for present purposes. In December 1997 Mr Barratt was appointed to the office of Secretary to the Department of Defence for a term of five years commencing in February 1998. He was appointed under ss 36 and 37 of the *Public Service Act 1922* (Cth) (the PSA). In mid 1999 procedures were commenced to terminate Mr Barratt's employment. These procedures – under s 37 of the PSA – involved the Secretary to the Department of Prime Minister & Cabinet (PM&C) advising the Prime Minister to recommend to the Governor-General that Mr Barratt's appointment be terminated.

Mr Barratt successfully obtained a declaration in the Federal Court that he was entitled to procedural fairness before any report was made by the Secretary of PM&C to the Prime Minister recommending his employment be terminated.

The Secretary of PM&C then wrote to Mr Barratt advising him, amongst other things, that he was considering whether to report to the Prime Minister that he recommend to the Governor-General that Mr Barratt's employment be terminated on the following grounds:

(a) that the Minister for Defence has lost trust and confidence in your ability to perform the duties of Secretary to the Department of Defence; and

(b) that this lack of trust and confidence is detrimental to the public interest because it is prejudicial to the effective and efficient administration of the Department of Defence.[15]

The Secretary of PM&C asked Mr Barratt if he wished to place any material before him. In his letter to Mr Barratt, the Secretary of PM&C also included material setting out the reasons why the Minister for Defence had lost trust and confidence in him.

Mr Barratt then returned to the Federal Court seeking a further declaration that procedural fairness required that he be given a 'statement of the grounds upon which the Minister for Defence states that the Minister has no trust and confidence in [him].'

This application was dismissed. Mr Barratt appealed to a full Federal Court, which dismissed his appeal.

In preparing his report, the Full Court said, the Secretary of PM&C is required:

(a) to consider whether the proposed reason for termination has been established to his satisfaction; and

(b) whether the circumstances relied upon warrant a recommendation that Mr Barratt's appointment be terminated.[16]

Natural justice required that Mr Barratt be heard 'in respect of all aspects of the report'.[17]

But that did not mean that Mr Barratt was entitled to further and better particulars of the basis upon which the Defence Minister had lost trust and confidence in him. The Secretary of PM&C was not bound to inquire of the Defence Minister why he had lost trust and confidence in Mr Barratt.

In *Jarratt*, Callinan J made a number of observations about the content of procedural fairness in the circumstances of that case. His Honour said that Mr Jarratt was entitled to:

(a) reasonable notice of the Police Commissioner's intention to recommend removal, and, perhaps, notice of the Minister's intention to approve the recommendation;

(b) The notice should give reasons for the recommendation (and arguable also for the approval).[18]

However, his Honour stressed that he had used the word 'reason', rather than the word 'cause' deliberately as the word 'cause' 'may imply a need for dereliction in duty before removal'. However, s 51 of the Act does not require that.

Without attempting to be comprehensive, incompatibility, restructuring, or the emergence of a superior performer might well and quite properly provide a reason for removal. But it must be assumed that there be a reason in fact capable of articulation and communication to the officer concerned; otherwise caprice might rule. The applicant should also have the opportunity to attempt to persuade the Commissioner and perhaps the Minister not to proceed, even if the reason be any of the three that I have suggested as possible examples of a sufficient reason.[19]

Interestingly, however, Callinan J observed that the Act requires appointments to be made on the basis of merit (which is also defined in the Act). His Honour continued: 'It might therefore reasonably be assumed that the applicant must have been appointed on merit and that accordingly, subject to the Act, would retain his position for its term unless his service ceased to be meritorious.'[20]

It is noteworthy, also, that the Public Service Act, considered by the Federal Court in *Barratt v Howard*, expressly excluded the merit principle in relation to the appointments of Departmental Secretaries.[21]

Would the reason given in *Barratt v Howard* be sufficient in circumstances like those in *Jarratt*? Must dismissal be for a 'cause' or simply for a reason that may be logically articulated? This is perhaps a question best left for another day.

In terms of the requirements of natural justice, would a person in Mr Jarratt's position be entitled to further and better particulars if the reason given was that the Minister had lost and trust and confidence in him?

While it seems likely that the answer to this question would most likely be yes, it can only be answered in the circumstances of each particular case, having regard to the particular legislation under which the person is employed.

Mr Jarratt's remedy

Where there has been a denial of natural justice in the exercise of statutory powers, the law does not recognise a cause of action for damages. The person aggrieved by the failure to observe the requirements of natural justice is confined to public law remedies.

Nevertheless, at trial, Mr Jarratt was awarded damages in excess of $600,000.00. The award of damages was upheld by the High Court.

Given the Commissioner's failure to accord Mr Jarratt natural justice in recommending his removal from his office, the decision to remove him and to terminate his contract of employment was invalid. As a consequence of this invalidity, the refusal to allow Mr Jarratt to perform his duties for the balance of the term and receive his remuneration was without justification and 'amounted to, or was 'analogous to', wrongful dismissal'.[22]

Mr Jarratt was not, therefore, limited to administrative law remedies but was entitled to an award of damages. Here the amount of those damages was calculated by reference to the balance of Mr Jarratt's term of employment.

Summary

In short: does natural justice apply?

Whether or natural justice applies or not depends on the terms of the statute under which the employee or officer concerned is employed. The terms of the statute need to be considered carefully and one must not start with any preconceived notions of Crown prerogative. In *Jarratt* it was suggested that there may be cases where Crown prerogative will continue to apply but these cases are now likely to be few and far between.

If, natural justice applies, what is its content?

Again the terms of the statute, as well as the particular circumstances of the case, need to be considered carefully. The content of procedural fairness in *Barratt v Howard* might not be the same in all cases, even in those cases involving public servants at the very pinnacle of the public sector. For example, what difference, if any, would the 'merit principle', or the seniority of the officer concerned, play in determining the content of natural justice?

Endnotes

1 *Jarratt v Commissioner of Police for New South Wales* (2005) 79 ALJR 1581.
2 *Barratt v Howard* (2000) 96 FCR 428.
3 *Jarratt* at [8].
4 *Commissioner of Police (NSW) v Jarratt* 59 NSWLR 87 at [113].
5 *Jarratt* at [26].
6 *Ibid*.
7 *Ibid* at [10].
8 See for example Callinan J at [79] and Heydon J at [157].
9 *Annetts v McCann* (1990) 170 CLR 596.
10 *Ibid* at 598.
11 *Jarratt* at [25].
12 *Ibid* at [9].
13 *Ibid* at [51].
14 *Barratt v Howard* at [54].
15 *Ibid* at [21].
16 *Ibid* at [77].
17 *Ibid*.
18 *Jarratt* at [145].
19 *Ibid*.
20 *Ibid* at [122].
21 *Barratt v Howard* at [33].
22 *Jarratt* at [58].