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# aial FORUM

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**Editors:** Alice Mantel



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# GOLDEN JUBILEE OF AIAL FORUM

This issue of *AIAL Forum* marks a milestone for the journal of the Australian Institute of Administrative Law. The *Forum* has progressed from the humble *Australian Institute of Administrative Law Newsletter*, first published in 1989, until it was superseded in 1994 by the journal. From these beginnings the *Forum* has progressed to being available online through the AIAL website, enabling its offerings to reach that broader audience which electronic access makes possible. Fifty volumes of the *Forum* later, the journal is now established as one of only a handful of Australian journals dedicated to provide articles on public law sharing insights into the practice of administrative law.

In the nearly 20 years since the introduction of the *Forum*, significant changes have occurred in this area of the law. From the foundational package of judicial and merits review reforms and the investigative functions of the Ombudsman, we have seen administrative law change and adapt to developments in public administration. Many government services and much regulation is now provided by bodies outside the core public sector; activities are often managed under interstate or international cooperative arrangements; and standards developed outside Australia are having an increasing influence domestically. Administrative law has needed to expand its institutions and approaches to respond to these different challenges.

These changes are reflected in the over 250 articles published in these 50 *AIAL Forum* volumes. From the heartland of administrative law – 'Is there too much natural justice?' and 'The structure of the Commonwealth Merits Review system' articles have moved to topics like 'The Legislative Instruments Bill – Lazarus with a Triple By-Pass?', 'The Equitable Geist in the Machinery of Administrative Justice', 'Non Statutory Review of Private Decisions by Public Bodies' and 'Review of Collegiate Decisions: Judicial Protection for 'Pissants''. The collection both charts the developments in government and provides a rich source of reflection on public administration and public law.

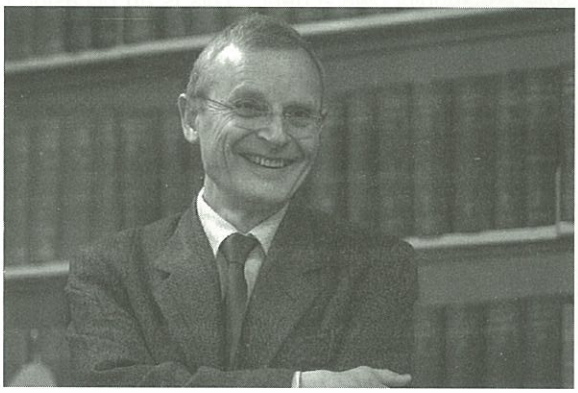
The calibre of the authors is also a tribute to the growth in stature of the journal, comprising, among others, justices of the High Court, judges from all levels of the court hierarchies, heads of agencies, including Secretaries of the Commonwealth Attorney-General's Department, its Chief General Counsel and equivalent State Crown Law Offices, principal

members or presidents of tribunals, the current head of HREOC, Commonwealth Ministers, including two Attorneys-General, five of the 7 Commonwealth Ombudsman, members of Parliament, the current Commonwealth Solicitor-General, academics, legal practitioners and informed citizens.

These contributions have been provided under the capable editorship respectively of Michael Sassella, Kathryn Cole, Dennis Pearce, Hilary Manson, Max Spry, its current editor, Alice Mantel, and the wise counsel of an Editorial Board drawn from Chapters of the Institute. To them we in the administrative community owe a debt. This is an occasion on which to acknowledge that debt and to offer our thanks.

Robin Creyke
National President
AIAL

# CELEBRATING A CAREER OF ACHIEVEMENTS UNSW FAREWELLS MARK ARONSON



**After 33 years at the University of New South Wales, Mark Aronson has retired, and is now Emeritus Professor. In addition to his publications in litigation and public torts, Mark Aronson is the primary author of *Judicial Review of Administrative Action*, now in its third edition with co-authors Bruce Dyer and Matthew Groves.**

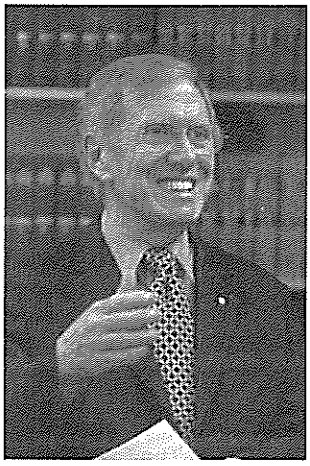
Mark has been involved in the NSW Chapter of AIAL since its inception. He was one of the organisers of the first NSW Chapter full day seminar in 1993 and contributed a paper: 'An Administrative Appeals Tribunal for New South Wales: Expensive Legalism or Overdue Reform?' [1]He has contributed to other NSW Chapter seminars including in August 2004 speaking on 'Reforming the ADJR Act' and was one of the commentators for the National Lecture Series delivered by the Hon J Spigelman AC, Chief Justice of NSW.

While officially retired, Mark is continuing to teach and research. He is currently teaching Advanced Administrative Law with Professor Carol Harlow.

At a farewell function on 25 May 2006, Justice Michael Kirby of the High Court of Australia and Professor Michael Taggart of the University of Auckland gave speeches, both erudite and engaging and they tell us much about one of the most significant contributors to Australian jurisprudence. Their speeches are reproduced on the following pages.

# PROFESSOR MARK ARONSON - DOYEN OF AUSTRALIAN ADMINISTRATIVE LAW*

*The Hon Justice Michael Kirby AC CMG***



**The rumour that Professor Mark Aronson was retiring from his post as Professor of Law in the University of New South Wales caused widespread gnashing of teeth and renting of clothes. Indeed, so much wailing has probably not been heard since the Sabine women lamented the defeat of their soldiers by the Romans in the third century BC. Happily, we now find that he is actually to return to work the very day after his 'retirement': teaching the advanced course in administrative law and tutoring graduates and undergraduates as he has been doing at this University these past thirty years.**

True, he is putting down the burden of full-time teaching. That certainly marks a watershed in the life of a much loved teacher and scholar. So it is appropriate that we should pause and celebrate his life to date and reflect on what may be ahead. I am glad to do so in the company of another hero of administrative law from New Zealand, Professor Michael Taggart

I have been coming to this University since 1962. That was the year I was first elected President of the Students' Representative Council of the University of Sydney. That office carried with it the right and obligation to attend the meetings of the Students' Union in the Round House of the freshly minted second University of Sydney, newly renamed the University of New South Wales. I came to know wonderful student leaders including John Niland, Alf van der Poorten, Heinz Harrant, Ian Ernst, Helen Duff and the marvellous Jessica Milner whose service to the University has continued into the present age. In those days, Sir John Clancy, a judge of the Supreme Court of New South Wales, was the Chancellor of this University. Sir Phillip Baxter was Deputy Chancellor. The soon to be Sir Rupert Myers and Professor John Clark were the Deputy Vice-Chancellors. The place was buzzing with scientists, technologists, economists and dramatists. It was a vibrant, confident, optimistic environment. But no lawyer was in sight, save for the Chancellor. The Law School was still a gleam in the eye of Mr Hal Wootten QC, then practising at the Bar. It was not to open for another decade[2].

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* *Text of remarks at the celebration of the work of Professor Mark Aronson, Law School, UNSW, 25 May 2006.*

** *Justice of the High Court of Australia. Foundation member of the Administrative Review Council of Australia 1976-1984.*

Also in 1962, in my presidential capacity, I went to a meeting of the National Union of Australian University Students at the equally new campus of Monash University in Melbourne - the second University of that city. It was then a place of fields and paddocks. Yet it too would grow into a great centre of scholarship and teaching. I have often thought of the Law Schools of Monash University and the University of New South Wales as twin creations of a confident era in Australia's history that saw the importance of tertiary education and did a lot about it.

At the time of my visits to UNSW and Monash, Mark Aronson was a boy of sixteen, still at school in Melbourne. He had been born in May 1946, just after the great and terrible War that had caused so much bloodshed and misery, including to his forebears in Europe. He was a bright student at school and opted for Monash University and its new Law School. He took the B Juris Degree in 1967. Two years later he graduated LLB with First Class Honours. He was awarded the Supreme Court Prize in Victoria in 1970. These brilliant results earned him a Commonwealth overseas postgraduate scholarship. He elected for Oxford University where he took the D Phil degree, studying under the redoubtable Professor (later Sir William) Wade.

Mark Aronson's special interest at the time was privative clauses. It is rumoured that he is one of only three people in the world who have ever fully understood the mysteries of the law on such attempts to oust the jurisdiction of the courts from review of administrative action in designated circumstances. He alone could work out the riddle that is Justice Dixon's opinion in *Hickman's Case*[3]. Sir Owen Dixon is dead and the second has lost his mind, but Mark Aronson remains[4].

Having emerged from Oxford where he taught as a casual tutor at Merton College, Mark Aronson returned to Australia and opted for Sydney and the new UNSW[5]. The Law School here had just been created. It says something about his sense of adventure that he applied to Dean Hal Wootten. He was one of a brilliant group of young academics whom the Foundation Dean recruited. He joined the Law School with Susan Armstrong, John Basten, Julian Disney and others who were to go on to fame as jurists and teachers. I urge Mark Aronson to record his memories of those early days of the Law School. He should subject himself to oral histories. He is one of those people, like my father and my brother David, with a perfect recollection of facts long ago and far away. He should put them down for the future. Rarely was there such an exciting moment in legal education as the foundation of the Law School at UNSW in 1971.

Such were Mark Aronson's credentials that in 1973, Hal Wootten offered him tenure as a lecturer and opportunities with Professor Harry Whitmore, to build a centre of true excellence in public and administrative law at this University. Mark Aronson seized the chance. He was fortunate to have Professor Whitmore as his mentor[6]. What Whitmore exuded in experience and wisdom, Mark Aronson supplemented with prodigious energy and enthusiasm.

Within two years of his arrival, we met. In February 1975, I had taken up the office of foundation Chairman of the Australian Law Reform Commission. The Commission's first projects concerned complaints against police[7] and criminal investigations[8]. On the latter, we needed sharp minds and energetic co-workers to match the talents of the Commissioner-in-charge of the project, Gareth Evans. Mr Evans was then a young academic from the Melbourne Law School and one of the first part-time Commissioners of the ALRC. Another, who was working on the project, was Mr F G Brennan QC, who was later to be so instrumental in the building of the new administrative law and who went on to become the Chief Justice of Australia. Professor Alex Castles, John Cain and Associate Professor Gordon Hawkins combined with a brilliant group of consultants to make a formidable team.

We borrowed undergraduate researchers to supplement our meagre resources. We drew on the young lecturers at UNSW to lead the enterprise. They came forward with enthusiasm. I remember visiting the UNSW Law School at that time. It had just welcomed my own great mentor, Julius Stone, as an Emeritus Professor. Here Stone found refuge from the sometimes unhappy rivalries of Sydney Law School, as it was then. Stone had great expectations of the ALRC and so did we all. If that body has succeeded as a useful institution for the reform of the law in Australia, it is because of the participation of first class scholars throughout its history. Fortunate it was in the participation of Mark Aronson and his colleagues from this faculty in the earliest days.

Mark Aronson made a big impact on our work in the project on criminal investigation. Curiously enough, it produced the Commission's report which was effectively the first Australian book on the processes of police investigation, arrest, summons and pre-trial procedure. The young Mr Aronson struck me as a clear thinker, an able expositor of the law and possessed of boundless energy. He was also a good looker, as his photo in the history of the law school attests[9]. It was at a time before he fell in love with leather coats and the other academic accoutrements of the 1980s.

We both count those optimistic years of the 1970s as a special period in our lives. He used them well. He wrote large contributions to the two major books that were to be the foundation of his future academic life. In 1976 he published *Litigation*[10]. In 1978 he published *Review of Administration Action*[11]. The latter ultimately gave way to the magnificent work *Judicial Review of Administrative Action*[12], for which he is justly famous. Each of these books was published with co-authors. But the idiosyncratic style of Mark Aronson is visible throughout its pages. He was the major contributor, as the whole world knows.

His academic life continued to flourish. His popularity and success as a communicator and lecturer and his devotion to his students, were rewarded. In 1975 he had been promoted to senior lecturer. In 1979 he became an Associate Professor. In 1993 he was appointed Professor of Law. It was a golden path that was assured to him from the moment of his arrival.

For almost three years from 1988, Mark Aronson worked as Senior Policy Adviser to the then Attorney-General of New South Wales (the Hon John Dowd QC MP). During this time he was on leave without pay from the University. Effectively, it was the only period following his arrival, that parted him from his university obligations. Whilst working for the Attorney-General he devoted himself to a number of important tasks. They included the abolition of the New South Wales *Transcover* Scheme and its replacement with a significantly modified common law entitlement to allow once again recovery of damages for transport injuries. He developed the Evidence Bill 1991 (NSW). This became the vehicle for implementing the ALRC *Uniform Evidence Act.* The decision of New South Wales to opt-in to this scheme was a critical moment in the advance of a national evidence law.

Mark Aronson also worked on the review of the law of damages for professional liability and for personal injuries and death. In this work he sought to devise an acceptable social trade-off between caps on damages and increased harm minimisation in areas governed by professional supervision and regulation. Whilst working for the Attorney-General he developed proposals for a wide-ranging review of criminal procedures; suggestions for new laws to reform vicarious liability in respect of police[13] and prisons; and reviewed the law on racial vilification provisions in the *Anti-Discrimination Act* 1977 (NSW). The racial vilifications provisions that followed were the first of their kind in Australia. They aroused considerable anxiety at the time from those concerned about their possible impact on free speech. However, ethnic communities and Aboriginal Australians supported the Aronson proposals, knowing the harm that racial vilification can cause.

Mark Aronson continued his association with the ALRC. This extended over his work on the Evidence Bill that evolved into the *Evidence Act* 1995 of the Commonwealth and of New South Wales. The same law has since been accepted in Tasmania and the Australian Capital Territory. More recently, it has been accepted in principle in Victoria. The circle is closing and the achievement is mighty. An important part of the credit belongs to Mark Aronson.

He worked with the ALRC as a consultant in its project on the *Trade Practices Act*[14] and on grouped proceedings in federal jurisdiction[15]. I feel sure that when he arrived in the Attorney-General's office to begin his three year stint, Sir Humphrey and Sir Claude must have welcomed into their midst as a formidable academic foe whom they hoped to seduce into their ways. Actually, it is a wonder that he was not elevated to the peerage during this service. But he maintained his independence and critical approach. After he completed this interval of interaction with ministers and officials, he went straight back to his critical writing and his advocacy of effective, but limited, review mechanisms for the lawfulness, fairness and rationality of administrative decisions.

But we should not praise Mark Aronson too much. He has had a lucky life. His arrival at UNSW coincided with the most remarkable development of administrative law that Australia has ever seen, and probably will ever see. The advent, in federal jurisdiction, of the Administrative Appeals Tribunal, the Administrative Review Council, the Ombudsman, the *Freedom of Information Act*, the passage of the *Administrative Decisions (Judicial Review) Act* and all the other developments of administrative law were a godsend to a young scholar who had chosen administrative law as his vocation. It cannot be said that he sat down to plan a career in an area that was bound to grow. He could not have known these amazing federal developments when he elected to study privative clauses at Oxford in 1969. Yet come they did.

These developments were also an important development in my own life. They encouraged my enthusiasm for law reform. They saw me appointed to the first Administrative Review Council which oversaw the changes under the leadership of Attorney-General Robert Ellicott QC MP. For Mark Aronson, the changes provided an enormous stimulation to his writing and thinking. They afforded a mighty contribution to his relevance. Suddenly, he was at the cutting edge of some of the most exciting Australian developments in law that had happened for decades. Had he chosen another field of law, say the Rule against Perpetuities, it is unlikely that he would have had so many challenging opportunities. But he chose administrative law at the dawn of its golden age.

I cannot understand how some people consider administrative law dull. It is never dull. Why, for example, do they say that administrative law is 'no glamour subject'. It is a whole lot more glamorous than most legal subjects. Indeed, I declare that it is in the Dame Edna class of glamour. It is always about power. Who enjoys it? Who can tame its exercise? Who abuses it? And who makes sure that it is exercised for the people in accordance with principles of legality, fairness and rationality? Those three little words sum up the essence of the developments of administrative law. Yet in between there is much effort and a great deal of law.

In the High Court, when we have a day in public law, when issues of administrative law are before the Court, my heartbeat quickens. I cannot say I feel quite the same emotions when the case concerns the *Income Tax Assessment Act* 1936 (Cth). But when a case on administrative law arrives, I always reach for the provocative, stimulating, insulting, upsetting, insightful opinions of Mark Aronson. His books are full of wisdom, criticism (much of it deserved) and constructive energy. He is a person of energy, even of excess:

If music be the food of love, play on
Give me excess of it...

It is Mark Aronson's success, as a scholar and as a teacher that has made him noticed. In the High Court, he has been repeatedly cited. If I look at the cases in recent years in which I have cited his opinions, they appear in a list that is like a modern history of Australian administrative law[16]. In one case, *Re Minister of Immigration and Multicultural Affairs; Ex parte Applicants S 134/2002*[17], he appeared as junior counsel with John Basten QC to defend a decision that had involved the *Hickman* principle. He convinced Justice Gaudron and myself. But alas, the majority (Gleeson CJ and McHugh, Gummow, Hayne and Callinan JJ) saw things differently. In the remaining three years of my service I look forward to his return to the Bar Table at the High Court in his spare time so that we can together correct this record.

Mark Aronson's colleagues regard him with respect and affection. Some of the comments on him that have been made by them include:

- 'When you walk past his classrooms, you frequently hear laughter';
- 'The quantity of food consumed by him is similar to quantity of judgments/legislation gobbled up: he is a man with hollow legs';
- 'He has strong opinions on law and all other matters - and states those opinions in strong terms – "That's self-indulgent crap" is one of the milder opinions expressed in the common room that might be modified slightly when put in his books; but still there are very few "with respects"'; and
- 'He is generous with knowledge, ideas and time. His colleagues can't count the number of times he has answered questions on litigation and administrative law matters (the number of times when the answers were understood might be a trifle lower)'.

Justice Beazley of the New South Wales Court of Appeal, tells me of his vast contributions to the Australian Institute of Administrative Law. He is an ever-ready participant to teach, instruct, discuss and entertain. For all of these contributions as a teacher, a scholar and a stimulus, on behalf of lawyers throughout Australia and of the judiciary, I express thanks.

In the end, it is not Mark Aronson's colleagues in this fine Law Faculty that he has helped to build that are the most important people in his intellectual life. It is not the judges or the tribunal members whom he has sought to educate, to correct and to stimulate, that matter most. Those who matter most are his students. It is upon them that he will have his most profound impact, just as Julius Stone had upon me when he taught me jurisprudence and international law fifty years ago. Twenty and thirty and forty years on his lectures and his enthusiasm, his laughter and his energy will be in the minds of those who go on to become the leaders of the Australian legal profession. That is the way the wheel turns. That is the great contribution that scholars and teachers make to our discipline.

In the words of Sir Harry Gibbs[18], speaking of Sir Samuel Griffith, Mark Aronson has been an exemplar of unselfish dedication to the law. That dedication does not dry up now. On the contrary, it will expand and it will continue. I hope that he will find time to come to court more often, for he is a natural advocate. I hope that he will go overseas and share his wisdom with law schools far from here. It would also be timely if he could undertake empirical research with administrators (perhaps some of those he met in the New South Wales Attorney-General's Department) to see how administrative law truly operates on the ground. What happens when an administrative decision is quashed and the administrator is ordered

to start again? To what extent are the assumptions of administrative law born out in practice? How can we research the impact of administrative law in action? All of these would be worthy topics of enquiry of a scholar who has an unrivalled grasp of the law and of its principles[19].

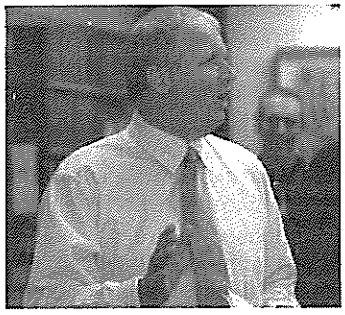
Perhaps too he could venture into new and challenging fields of law. Constitutional law is the older sibling of administrative law. Mark Aronson's insights into the Constitution and its operation could draw on his understanding of our polity and how its civil society operates under the law. As human rights law expands in Australia, there could be no better exemplar of its principles and teacher of the international dimension that liberates us from being captives of our jurisdiction or, indeed, the common law throughout the world. Great adventures lie ahead of Mark Aronson. We will watch them with great expectations.

Above all I hope that he will be acknowledged by the UNSW Law School. It is an amazing achievement to have taught in this Faculty, virtually from its beginnings: To have given such devoted service; to have taught thousands of law students; and to be cherished by virtually every one. On their behalf and on behalf of citizens beyond the ivy walls for whom administrative law is so important, I say a fellow lawyer's grateful thanks. In Kipling's words, speaking of his teachers, it can be said of Mark Aronson that his work endures:

> For his work continueth
> And his work continueth
> Broad and deep continueth
> Great beyond his knowing.

# MARK ARONSON: AN APPRECIATION

*Professor Michael Taggart**



**It feels like a kind of ANZAC Day: a gathering of the Australian and New Zealand Administrative Law Corps to honour one of our greatest administrative law teacher/scholars. Mark has not fallen on whatever the academic equivalent of Gallipoli is and so the 'Last Post' will not sound tonight. But he has honourably discharged himself from full-time teaching and this is an occasion to give thanks for what we have received and to reflect on a remarkably successful career.**

It is preposterous, of course, that the eternally youthful Aronson – I think of him as the Peter Pan of administrative law scholars - should be an Emeritus Professor, no matter how richly deserved that title is.

Mark and I first met in Sydney twenty years ago. Three things struck me then: his passion for argument, his analytical mind and what I can only describe as his boyish and infectious enthusiasm. It was an International and Comparative Law gathering and fate threw us together at the same dinner table. I knew his work from the earliest edition of the 'book' (co-authored with Harry Whitmore);[20] Mark had no reason to know who I was.

My memory of the evening has dimmed over the years – of course, Mark's is as sharp as a tack - but I distinctly recall animated discussion of two topics. We argued over whether Sir Owen Dixon was a bad writer and as such had been a bad role model for subsequent High Court judges. I took the affirmative and Mark, the negative (but he may have been playing Devil's advocate).[21] At some point we moved on to the merits of Sir William Wade as an administrative law theorist[22] and I soon discovered that he had been Mark's doctoral supervisor.

Mark was a force to be reckoned with – it was clear he had a mind like a steel trap, zero tolerance for sloppy thought and a finely tuned radar for bullshit. I liked him immediately.

Thereafter I kept an eye out for his work – I discovered he had another substantial string to his bow (a path-breaking book on *Litigation* that went through many editions) and of course, there was the Administrative Law 'book' for which he is justly famous. It simply got bigger and better over the years – new editions, a new name in 1996, new co-authors along the way but the constant has been Mark. His knowledge of the law is prodigious, his ability to process the outpourings of courts, tribunals and commentators is staggering, his technological competence is an obsession and his work ethic, immense. Frankly, I stand in awe of what he has achieved.

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* *Alexander Turner Professor of Law, Faculty of Law, University of Auckland.* *This is a slightly revised version of a speech given on 25 May 2006 to mark the retirement of Professor Mark Aronson from full-time law teaching at the Faculty of Law, UNSW.*

Mark has made an indelible impression with these books, not only in Australia but also around the common law world. The work is expository – yes, dare I say it, it aims to be of use to judges, practitioners, governmental advisers and law students - but it is theoretically underpinned and sophisticated, and is based on an enormously wide reading of law in context and an astute appreciation of politics.

A few years ago, John McMillan surveyed the academic contribution to Australian administrative law and said this about the then latest edition: '[N]ow the most up-to-date book on the principles of Australian administrative law ... [it] deserves recognition as the gold medalist in the field, being contemporary, learned, entertaining, even opinionated, but throughout a masterful analysis of a huge body of Australian and English case law and academic writing. The frequent citation of the book by Australian courts attests to its value.'[23] I cannot put it any better.

Mark's writing style is distinctive, even when penning supposedly dry textbooks. Administrative lawyers can spot Mark's writing in an instant. He writes marvellously well, and with a mischievous sense of fun – it is clear he loves what he does. The passion for administrative law comes off every page.

I like the paraphernalia of books: prefaces, forewords, indexes and the like. My favourite non-legal index is to one of Gary Larson's books of 'Far Side' cartoons, where the entries in the Index under the letters A-S and U-Z are all blank but there are 150 or so entries under the letter T, each one beginning with 'The one about...'.[24] By far the best law book indexes for their impish sense of fun and irreverence are those in the Administrative Law 'book'. Many scholars leave this supposedly mundane task (often to their chagrin) to professional indexers, but not Mark. And the result is some wonderful entries. My favourites from the latest edition include:[25]

**black hole**, jurisdictional issue
**bugs**, standing [one looks expectantly for an entry '**bugs**, sitting' – but alas not there] cynicism
**drive-by rulings** [the text confirms that this is when judges shot from the lip rather than the hip]
**Cats**, too many [but too few cats seems not to have been litigated]
**plebs**, to Tories
**volvo drivers**
**Laws J**, nude [a sobering image: one would have thought a leaf from the least dangerous branch would have been available]

One of the icons of the New Zealand advertising industry is a long running campaign for a soft drink called 'Lemon & Paeroa', produced only in New Zealand. Making a virtue out of this uniqueness, an ad campaign declared the drink to be 'world famous in New Zealand'.[26] In the legal academy, as in some other parts of the University, it is hard to become world famous from places like New Zealand, or even in bigger countries like Canada or Australia.[27] The concerns and legal responses can seem so local, the conditions uncongenial to generalisation beyond one's borders, the publication outlets limited and parochial, and cultural cringe can hang on. One of Mark Aronson's many achievements is that he has become genuinely world famous from Australia, while writing about Australian law in books and journals published in Australia - no mean feat.

Mark has gained this reputation by writing his big and wonderful books on judicial review of administrative action. In other words, writing about that part of Australian administrative law most recognisable and instantly usable by the rest of the common law world. I marvel at the fact that his first administrative law article in a refereed law journal appeared at the tender

age of 49! (Surely a contender for *The Guinness Book of [Academic] Records.*) And what's more that was a piece I cajoled him into writing for a special issue of Public Law Review.[28] After that he got a taste for law review writing and penetrating articles followed on the most intractable parts of judicial review – nullity, unreasonableness and the distinction between law and fact, collateral challenge and jurisdictional fact.

In a broader context, Mark's life has coincided with the rise of the professional law school and the emergence of the career legal academic. When Australia's first association of law teachers was formed in 1946 – the year Mark was born - it had only 13 members drawn from five law schools (comparative figures at around this time are 130 full-time law teachers in the UK and 40 across Canada).[29] Mark joined UNSW Law School two years after its doors opened in 1971 and, apart from three years away on leave advising government, has spent thirty years here: playing his part in making UNSW one of the leading law schools in the southern hemisphere. It has been a lucky time to be a law teacher in 'the Lucky Country'.

Mark has been an inspiration not only to his many students – some of the best of whom have emulated him and become legal academics – but also [30] to those of us labouring in the administrative law vineyard. Speaking personally, Mark has helped me enormously – cheerfully putting aside his work to improve mine (often at very short notice), venturing to the frozen Canadian prairie to give the best paper at an international conference I organised (while on long service leave, to boot), keeping me informed of developments as they happen (almost before they have happened through his computer wizardry), involving me in his teaching and generously citing and using my work in his teaching materials and his books (along with the work of many others). Through all this contact over twenty years, Mark's honesty, decency, intelligence, collegiality and sensitivity has shone through. He is a good mate as well as an inspiration.

It is a truism in law that we all stand on the shoulders of others and they in turn stand on the bones of those that have gone before us. There is seldom, if ever, a radical breakthrough or paradigm shift, but we know that some jurists make a demonstrable and distinctive difference in their specialty. Mark Aronson has done that in administrative law and in the process has put Australian administrative law and this Law School on the world stage. We know there is more scholarship to come, but this is an occasion to say to Emeritus Professor Mark Aronson thank you and well done.

**Endnotes**

1 (1993) 52 Aust J of Public Administration 208.
2 P O'Farrell, *UNSW - A Portrait* (1999) 88, 169. Professor J H Wootten was appointed foundation Dean in 1979.
3 (1945) 70 CLR 598.
4 But cf *Plaintiff 157/2002 v The Commonwealth* (2003) 211 CLR 476 at 499ff.
5 M Dixon, *Thirty Up, the Story of the UNSW Law School* (2001) 41.
6 Professor Harry Whitmore was later Dean from 1973 to 1976. See M Dixon, *Thirty Up*, 141.
7 ALRC 1, 1975.
8 ALRC 2, 1975.
9 M Dixon, *Thirty Up* (2001), 41.
10 Butterworths, 1976 (1st ed), 1979 (2nd ed), 1982 (3rd ed), 1988 (4th ed), 1995 (5th ed), 1998 (6th ed).
11 Law Book Co, 1978.
12 LBC Info Services (1st ed, 1996), (2nd ed, 2000), (3rd ed, 2004).
13 cf *Enever v The King* (1906) 3 CLR 969. See also ALRC 1, *Complaints Against Police*, Ch III, Vicarious Liability, pp 58ff.
14 ALR 68, *Compliance with the Trade Practices Act* (1994).
15 ALRC 46, *Grouped Proceedings in the Federal Court* (1988).
16 Re *Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 148 [58] See also at 140 [37] fn 46; *Ousley v The Queen* (1997) 192 CLR 69 at 131 fn 270 (Aronson and Dyer,

*Judicial Review of Administrative Action*, (1996)); *Abebe v Commonwealth* (1999) 197 CLR 510 at 587 [223] fn 209 (Aronson and Dyer, *Judicial Review of Administrative Action* (1996)); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 129 [126] fn 175 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 116 [191 fn 158, 116 [192] fn 163, 117 [194] 169, 118 [195] fn 171, 123 [211] fn 186 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 359 [110] fn 110 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Re Minister for Immigration and Multicultural Affairs; Ex parte PT* (2001) 75 ALJR 808 at 813 [27] fn 15 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Re Minister for Immigration and Multicultural Affairs; Ex parte Holland* (2001) 185 ALR 504 at 509 [22] fn 8 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 440 [173] fn 221 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at 250 [96] fn 60 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000)); *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at 1034-1035 [56] fn 57 and 58; 190 ALR 370 at 384-385 (Aronson and Hunter, *Litigation: Evidence and Procedure*, 6th ed (1998)); (2003) 211 CLR 441 at 472 [90] fn 92 (Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed, (2000)); *Griffith University v Tang* (2005) 221 CLR 99 at 133 [100] fn 133 (Aronson and Franklin, *Review of Administrative Action*, (1987)), 146 [142] fn [214]; *Ruddock v Taylor* (2005) 79 ALJR 1534 at 1560 [160] fn 145; 221 ALR 32 at 67 (Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004)); *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 80 ALJR 367 at 388 [96] fn 106; 223 ALR 171 at 194 (Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004)).

17 (2002) 211 CLR 441.

18 Cited in J D Heydon, 'Chief Justice Gibbs: Defending the Rule of Law in a Federal System', Inaugural Sir Harry Gibbs Memorial Oration, 26 May 2006, unpublished, 33 citing H T Gibbs, Sir Samuel Walker Griffith Memorial Lecture, 30 April 1984, 1.

19 Trail-blazing work in this respect has been performed by two other leaders in Australian administrative law. See Robin Creyke and John McMillan, 'Executive Perceptions of Administrative Law – An Empirical Study' (2002) 9 *Australian Journal of Administrative Law* and ibid, 'Judicial Review – An Empirical Study' (2004) 11 *Australian Journal of Administrative Law* 82.

20 H. Whitmore & M. Aronson, *Review of Administrative Action,* Law Book Company Ltd, Sydney, 1978.

21 See generally D. Ritter, 'The Myth of Sir Owen Dixon' (2005) 9 *Australian Journal of Legal History* 249.

22 Sparked, if I recall correctly, by the review essays by Carol Harlow, 'Politics and Principles: Some Rival Theories of Administrative Law' (1981) 44 *Modern Law Review* 113 and Denis Galligan, 'Judicial Review and the Textbook Writers' (1982) 2 *Oxford Journal of Legal Studies* 257.

23 J. McMillan, 'The Academic Contribution to Australian Administrative Law' (2001) *8 Australian Journal of Administrative Law,* 214, 215.

24 G. Larson, *Weiner Dog Art: A Far Side Collection*, Andrews & McMeel, Kansas City, 1990.

25 M. Aronson, B. Dyer & M. Groves, *Judicial Review of Administrative Action*, Thomson, Sydney, 3rd ed. 2004), 'Index'.

26 Richard Wolfe & Stephen Barnett, *From Jandals to Jaffas: The Best of Kiwiana,*Random House, New Zealand, 2003, 48-9.

27 See also G. Huscroft & M. Taggart, "David Mullan: In Appreciation" in G. Huscroft & M. Taggart (eds), *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan,* University of Toronto Press, Toronto, 2006, forthcoming.

28 M. Aronson, 'Ministerial Directions: The Battle of the Prerogatives' (1995) 6 *Public Law Review* 77. I put to one side here the slightly earlier article – 'An Administrative Appeals Tribunal for New South Wales: Expansive Legalism or Overdue Reform?' (1993) 52 *Australian Journal of Public Administration* – as it is not in a law journal.

29 M. Chesterman, 'Legal Explorations in Different Lands" in G.P. Wilson (ed.), *Frontiers of Legal Scholarship: Twenty five years of Warwick Law School,* John Wiley & Sons, Chichester, 1995, 21, 31. For comparative figures, see W. Twining, "A Nobel Prize for Law?" in Wilson, ibid., 46, 47 (U.K.) & M. Taggart, "Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law" (2005) 43 *Osgoode Hall Law Journal* 223, 254 (Canada).

30 M Aronson "A Public Lawyer's Responses to Privatisation and Outsourcing" in M Taggart (ed) *The Province of Administrative Law*, Hart Publishing, Oxford 1997.

# BLIND JUSTICE: THE PITFALLS FOR ADMINISTRATIVE DECISION-MAKING

***Steven Rares****

In the middle of the 19th Century two seminal decisions of the English Courts applied what were then called the principles of natural justice[1]. In *Dimes v Proprietors of Grand Junction Canal*[2], the House of Lords held that Lord Chelmsford, the Lord Chancellor, could not sit as a judge in a case in which he had a significant financial interest in one of the parties.

The second case, *Cooper v Wandsworth Board of Works*[3], held that it had been unlawful for the Board to have demolished the plaintiff's house under an order which it had made pursuant to a statutory power when it had not given the plaintiff the opportunity to appear before it to contest the making of the order. There Byles J[4] traced the heritage of the rule, referring to observations of Fortescue J in 1723 in *Dr Bentley's Case*[5] where he said[6]:

> ... God himself would not condemn Adam for his transgression until he had called him to know what he could say in his defence: Gen: iii.9

Today, these rules have been rechristened, or, to use the advertiser's vernacular, rebranded, as the rules of procedural fairness comprising, the bias rule and the fair hearing rule.

Administrative decision-making which involves the application of these rules is not akin to Groucho Marx' prescription for commercial success. He said 'the key to success in business is honesty and fair dealing – if you can fake those you've got it made.'

### *Rational for judicial review*

This supervisory jurisdiction has been seen by some as providing 'judicial protection against Leviathan'[7]. The rule of man, and its excesses and fallibilities, is supplanted by the rule of law. The intrusion of the executive into the area of reviewing its own conduct was stopped very early when Sir Edward Coke CJ famously told James I that the King is subject not to men, but to God and the law, and so his Majesty could not try cases[8].

Section 75(v) of the Constitution of the Commonwealth creates original jurisdiction in the High Court in all matters in which a writ of mandamus or prohibition, or an injunction is sought against an officer of the Commonwealth. The significance of s 75(v) was explained by Gaudron, McHugh, Gummow, Kirby and Hayne JJ in *Plaintiff S157/2002 v The Commonwealth*[9] as introducing:

> ... into the Constitution of the Commonwealth an entrenched minimum provision of judicial review. There was no precise equivalent to s 75(v) in either of the Constitutions of the United States of America or Canada. The provision of the constitutional writs and the conferral upon this Court of an irremovable jurisdiction to issue them to an officer of the Commonwealth constitutes a textual

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* *A judge of the Federal Court of Australia.* *This paper was presented to the Council of Australasian Tribunals NSW Chapter Inc on 26 May 2006. The author was assisted by his associate, Ms Anna Brown. Any errors are his alone.*

reinforcement for what Dixon J said about the significance of the rule of law for the Constitution in *Australian Communist Party v The Commonwealth*[10] . In that case, his Honour stated that the Constitution:

> "is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption."[11]

> The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.

Although Parliaments frequently seek to limit the availability or scope of judicial review through the use of privative clauses[12], Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ emphasised recently that there is[13]:

> ... the "basic rule, which applies to privative clauses generally ... that it is presumed that the Parliament [or, it may be interpolated, a State parliament] does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies"[14]. In addition, it must also be presumed that a State parliament does not intend to cut down the jurisdiction of the Supreme Court of that State over matters of a kind ordinarily dealt with by the State Supreme Courts and which, if dealt with by those Courts, are amenable to the appellate jurisdiction of this Court under s 73 of the Constitution.

It is, of course, well established that it is for the repository of a power confided by statute to determine whether the power ought be exercised or not, on the merits as the repository sees them[15]. The court's responsibility is to review the procedure followed by the repository to ensure that the procedure conformed to what was required to be followed under the express or necessarily intended requirements of the statute and any applicable common law principles. Only if the repository conducted the procedure by which he, or she, or it reached the decision in a manner which did not conform with the conditions which the law mandated, does the power of the court to interfere with the decision arise. That power, previously described as prerogative, and now, in the Commonwealth context as 'constitutional', is to ensure that inferior tribunals and repositories of power do not exceed the jurisdiction which by law has been committed to them by, inter alia, adopting a step, a procedure, or a step in their procedures which was unauthorised.

### *Acting within power*

First, the decision-maker must understand the precise nature, extent and scope of the power which he or she or it is being called upon to decide whether or not to exercise. A failure to understand what the power is can be fatal to a decision. A decision-maker can be forgiven for not understanding some statutory powers because they are couched in language or found in statutes that raise an almost impenetrable fog as to their proper construction. For the correct approach to statutory construction see *Project Blue Sky Inc v Australian Broadcasting Authority*[16].

I will not pause to mention those models of legislative clarity such as the four volumes of the *Income Tax Assessment Act 1936*, or the also ever changing *Migration Act 1958* and

*Corporations Act 2001*. But the *Atlanta Journal* noted that the Ten Commandments contain 297 words, the United States Constitution's Bill of Rights contained 463, Lincoln's Gettysburg address, 266 words and an American regulation dealing with the price of cabbage apparently contained 26,911 words. So, we are not alone.

***Procedural fairness***

Secondly, the rules of procedural fairness, or principles of natural justice, usually attend the making of a decision. However, as has now happened under the *Migration Act 1958*, occasionally legislatures modify or eliminate these rules, although not always with the consequences which they intended. Thus, the Parliament[17] refashioned the rules by providing in s 422B that:

> (1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.

Whether the Parliament achieved its aim will depend on the extent to which the courts find that the procedures codified in statute 'deal' with matters with which the common law would otherwise deal. The very expression of that concept indicates a number of possible outcomes. However, a Full Court of the Federal Court has held that the expression 'in relation to the matters it deals with' is intended to overcome the effect of the High Court's decision in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*[18]. A decision-maker need not consider in each case, whether there is an applicable common law rule of natural justice and then examine the relevant sections to see whether it was expressly dealt with[19]. That is fortunate because the courts recognise that a decision-maker is likely to be a person without legal qualifications and Parliament could not have intended that 'the uncertainties of the common law rules were in some unspecified way and to some unspecified extent, to survive'[20].

In *SAAP v Minister for Immigration*[21] it was held that any failure to comply with the statutory regime of procedural fairness resulted in a jurisdictional error being committed for correction of which constitutional writs would issue unless the applicant for relief had been guilty of some personal default such as delay, acquiescence or waiver[22]. The flexibility of the common law discretion to refuse relief on the basis that the procedural defect was not significant was held to have been denied by the legislation.

It will be no comfort to decision-makers to be told that the requirements of the principles of procedural fairness develop over the years, so that what was once an acceptable procedure may become with time legally flawed. So much was held by Mason CJ, Deane and McHugh JJ in *Annetts v McCann*[23] when they said that many interests were protected in 1990 by those principles which less than 30 years before would not have fallen within the protection of the doctrine[24]. The common law process of gradual, principled development of the law to meet the needs of contemporary society has not shown any sign of atrophying in this area of law. This is especially so with the enormous variety of procedural issues with which the High Court and other Ch III courts have had to deal in recent years under the *Migration Act 1958*.

Recently, Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ said[25], that there was:

> ... the fundamental point that principles of natural justice, or procedural fairness, "are not concerned with the merits of a particular exercise of power but with the procedure that must be observed in its exercise". Because principles of procedural fairness focus upon procedures rather than outcomes, it is evident that they are principles that govern what a decision-maker must do in the course of deciding how the particular power given to the decision-maker is to be exercised. They are to be applied to the processes by which a decision will be reached.

The Court held that a decision-maker must determine whether material which he or she has is "credible, relevant and significant", to use the formulation of Brennan J in *Kioa v West*[26], before the final decision is reached. Such information is what cannot be dismissed from further consideration by the decision-maker before making the decision. But as their Honours said, such information is not to be characterised by the decision-maker's later choice when expressing reasons for the decision[27].

By that the Court meant that before deciding the matter, the decision-maker, once he or she had information before him or her which cannot be dismissed from further consideration as not credible, or not relevant or of little or no significance to the decision[28], was bound by the requirements of procedural fairness to draw the applicant's or the parties' attention to that information and invite a response. As that case recognised, issues may also arise as to how the decision-maker conveys such information: that is, it may not be necessary or, indeed in some cases, appropriate to disclose the form in which it has come to the attention of the decision-maker. For example, issues of public interest or confidentiality may require the decision-maker to formulate the substance of the information so as to protect the identity of an informant or a source[29].

Likewise, it is essential to avoid conducting proceedings in a way in which a party is deprived of a fair opportunity to correct an erroneous and factual assumption relevant to his or her credibility lest a jurisdictional error thereby occur[30]. It follows that administrative decision-makers cannot relieve themselves of the obligation to afford procedural fairness by disavowing reliance on such information in the reasons for decision, or by making their decision on other bases unrelated to the information.

Excessive delay in making a decision can also constitute a denial of procedural fairness amounting to a jurisdictional error[31]. Excessive delay *of itself* cannot usually invalidate the decision[32]. However, if there is excessive delay between the assessment of the demeanour of a witness at an initial hearing and the making of demeanour-based findings, then it can be concluded that this delay would affect the decision-maker's ability to fairly analyse the evidence. A delay of four and a half years between an oral hearing and a decision was held to give rise to a jurisdictional error[33]. One test that could be applied in situations of delay is whether the delay caused a 'real and substantial risk' of prejudice to a party to the decision[34].

In *Minister for Immigration v Bhardwaj*[35] the High Court held that a denial of procedural fairness by the decision-maker failing, accidentally, to consider the applicant's request for an adjournment, and deciding the application adversely, resulted in no decision at all. These circumstances constituted a constructive failure to exercise jurisdiction, as the decision-maker failed to afford him a hearing of the kind the legislation required the applicant be given. The decision-maker was thus not *functus officio* and could proceed to hear the matter afresh, as it did.

Another case of constructive failure to exercise jurisdiction is where the decision-maker fails to identify or mischaracterises the applicant's claim or application[36]. As Kirby J said[37]:

> Difficult as it may sometimes be to differentiate jurisdictional and non-jurisdictional error with exactitude, in a case where there has been a fundamental mistake at the threshold in expressing, and therefore considering, the legal claim propounded by an applicant, the error will be classified as an error of jurisdiction.

And, as Brennan CJ, Dawson and Toohey JJ said in *Darling Casino v NSW Casino Control Authority*[38] if a power must be exercised in accordance with the principles of procedural fairness, a failure by a decision-maker to adhere to a procedure which the decision-maker or the body establishing the issue referred for decision had previously declared publicly would

be followed in making the decision, may result in the decision being set aside for failure to accord procedural fairness.

Most administrative decision-makers set out seeking to achieve a fair result in accordance with the proper exercise of their powers. It is rare to find cases in which the courts would actually hold that the decision-maker was in fact biased[39]. But just as courts must ensure not only that justice is done but must be seen to be done, administrative decision-making will usually involve the consequence that departure from transparent and fair processes in accordance with the legislation will affect the validity of the decision reached.

A decision-maker must not only be unbiased but must be seen to be unbiased and unable to be influenced by personal considerations in validly exercising a power to make a decision affecting others under law. This same principle formed the basis of the decision by the House of Lords in the *Pinochet* proceedings[40] in 1999, setting aside its earlier decision because of the appearance of bias of Lord Hoffmann being a director of a charity which was wholly controlled by Amnesty International which had intervened in the proceedings. However, a minor and incidental involvement in the decision-making process by an official who is not the decision-maker and takes no part in the decision will not, ordinarily, affect the validity of the decision[41].

The principles of procedural fairness are reflective of the concern which the courts, as the guardians of the rule of law, have enshrined in principles directed to the protection of the individual from the state. Important common law rights are presumed not to be affected by legislation, or the exercise of administrative power, in the absence of statutory words of plain intendment[42].

***Relevant and irrelevant considerations***

A third fundamental concept in administrative decision-making is that the decision-maker must have regard to considerations which are relevant to the exercise of a power and must, conversely, ignore considerations which are irrelevant to that. A failure to take into account a consideration can only amount to a jurisdictional error if it be a matter which the decision-maker was bound to take into account in making the decision[43].

Keeping one's eye on the administrative ball in this way ensures that decision-makers do not exceed their authority by deciding matters on bases that are not open to them. The factors which determine whether a matter is one to which the decision-maker is bound to have regard are determined by the proper construction of the legislation, which may refer expressly to matters or necessarily imply that something is relevant. If the discretion to be exercised is unconfined, the decision-maker is authorised to consider any matter unless, having regard to the subject-matter, scope and purpose of the legislation it appears to be irrelevant to the exercise of the power[44]. Consideration of irrelevant material or the failure to consider relevant material in a manner that affects the exercise of power constitutes jurisdictional error[45].

***The formulation of reasons***

In the Commonwealth context most decision-makers can be required to give reasons[46]. The approach taken to judicial review by Australian Courts reflects an awareness of the boundaries of judicial review[47]. In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[48] Brennan CJ, Toohey, McHugh and Gummow JJ said:

> ... the reasons of an administrative decision maker are meant to inform and not be scrutinized upon by over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.

Various cases provide some guidance as to the content of reasons[49]. It may not be an error for the decision-maker to fail to discuss why contrary evidence was not accepted or to fail to discuss every conflict in the evidence in its reasons[50].

In *Minister for Immigration Multicultural and Indigenous Affairs v Yusuf* [51] it was held that it was sufficient if the decision-maker sets out its findings 'on those questions of fact which it considered to be material to the decision and to the reasons it had for reaching that decision'[52] This process focuses on the subjective thought processes of the decision-maker. It also '...entitles a court to infer that any matter not mentioned ... was not considered by the Tribunal to be material'.[53] That may reveal the presence of a jurisdictional error such as taking into account an irrelevant consideration or not taking into account a relevant consideration.

In *Public Service Board of NSW v Osmond*[54] the High Court emphatically held that at common law, an administrative decision-maker has no obligation to give reasons. However, just as in other areas of procedural fairness, this may not be an immutable truth. A strong Privy Council held in *Stefan v General Medical Council*[55] that there had been a trend in the law toward an increased recognition of the duty on decision-makers of many kinds to give reasons. Their Lordships held that the quasi-judicial character of the General Medical Council, and its authority to affect the right of doctors to practice medicine who appeared before it, gave rise to an obligation at common law on the decision-maker to give reasons notwithstanding the absence of any statutory requirement[56].

But in many non-federal contexts there is no statutory requirement to give reasons. However, as Dixon J noted in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*[57] this may not immunise decisions from judicial review:

> But it is for the commissioner, not for me, to be satisfied of the state of the voting power at the end of the year of income. His decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law.

That leads into the question of irrationality as a ground for review. Reasons can sometimes be very revealing in that regard though, as Dixon J showed, the absence of reasons is not fatal to such a conclusion being open on judicial review.

***Limiting the scope of judicial review***

Nonetheless, the jurisdiction of the courts in the area of judicial review has not developed without challenge by the legislature. The Administrative Law Council, in their report launched only last week, addressed the question of the desirable scope and circumstances in which limitations on judicial review may be justified.

One such area has been seen by the Parliament to be in the area of migration law. The report by the Council explains that an unmeritorious challenge to decision making is most likely to arise when the making of such a challenge provides some collateral advantage.[58] In some migration cases the Council said that this advantage may be twofold: not only does the

applicant benefit from the delay of the enforcement of decision, but often the making of such an application provides a basis for eligibility for a bridging visa. Despite the anecdotal evidence of abuse of these processes by some applicants, the Council was not convinced that such considerations justify a limitation on the right to judicial review, as any such limitation can apply indiscriminately to both applicants with and without merit.[59]

In light of such a conclusion, the Council saw that the appropriate response revolved around the establishment of procedures to minimize the amount of delay involved in the judicial process and to provide, to the extent possible, for a single avenue of redress[60].

***Irrationality***

Decisions should be and also appear to be rational and reasonable. An absence of rationality can result in finding that the decision is infected with jurisdictional error. An example of this is when a decision maker acts on material that forms an 'inadequate' basis for the findings made. This is because the inadequacy may support an inference that the decision-maker had applied the wrong test or was not 'in reality satisfied of the requisite matters'[61]. The demonstration of a defect in an irrational or unreasonable decision may lie in the evidentiary foundation relied on or available, or the logical process by which conclusions are sought to be drawn from it[62]. Moreover, decision-makers cannot merely engage in speculation, or rely on suspicions or impressions in forming reasons for decisions[63].

When decisions involve serious findings such as perjury, dishonesty, forgery or fraud, decision-makers are under a stronger obligation carefully to examine all the facts and base conclusions on proper foundations[64]. Failure to do so can result in a court holding that the decision-maker demonstrated such a 'closed state of mind' that a finding of ostensible bias could be made[65]. In *Applicant M164/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [66] Lee J stated:

> Serious findings of forgery, fraud or perjury cannot be based on a superficial examination of relevant events and materials, particularly where the conclusion reflects no more than a suspicion held by the Tribunal, and where the suspicion remains untested by reasonable use of powers available to the Tribunal to have further enquiries made in exercise of the Tribunal's inquisitorial function.

Although more difficult to establish, the doctrine of '*Wednesbury* unreasonableness' can also form a basis for a finding of jurisdictional error. A decision can be set aside if it is established that a decision maker reached a decision so unreasonable 'that is might almost be described as being done in bad faith' or 'so absurd that no sensible person could ever dream that it lay within the powers of [the decision-maker]'[67]. The ground of unreasonableness can overlap with the ground that the decision-maker took into account irrelevant, or failed to take into account a relevant consideration[68].

***Conclusion***

One peril of administrative decision-making in statutory tribunals is over-enthusiastic counsel. Recently, in the Administrative Appeals Tribunal during some concurrent expert evidence as to the reproductive possibilities of elephants in zoos, senior counsel for the zoos asked an Indian veterinarian about a photograph showing elephants in what might be described, were they humans, as a compromising position. The following exchange occurred[69]:

> **Dr Griffiths:** Could I ask you whether or not, it's not evident from this photograph, but do you have any recollection as to whether or not the cow elephant was chained or tethered when this photo was taken?
>
> **Prof Cheeran:** I don't think so because, the elephant is chained, a cow elephant is chained, hardly they would get a chance because the female genitalia is situated in such a way that it's at the very

bottom of the area, so the cow has to cooperate so much, so that – the penis goes up like a cobra[70] .... locate the extremity genitalia, so the elephant, cow elephant just stand like erect. A practical person cannot take this elephant, unlike in cow or other quadrupeds go forward like that.

**Dr Griffiths:** I don't think I want to take that topic any further. Perhaps I could change the subject.

Given the often complex and evolving nature of the law in this area, one may be tempted to characterise administrative decision making as a veritable minefield of reviewable errors for decision-makers. But it is better that in making decisions one acts honestly and fairly, with as much attention to all relevant requirements as possible, so that as the vast majority of decision-makers diligently do, one does one's duty according to law.

## Endnotes

1 The principles were expressed in Latin as first, *nemo iudex in sua causa*; and secondly, *audi alteram partem*.
2 (1852) 3 HL Cas 759 [10 ER 301]
3 (1863) 14 CBNS 180
4 14 CBNS at 185
5 *The King v The Chancellor & c of Cambridge* (1723) 1 Str 557; 8 Mod 148 at 164; 2 Ld Raym 1334
6 8 Mod at 164
7 Aronson & Dyer, *Judicial Review of Administrative Action*,(3rd ed) Lawbook Co, North Ryde,2004 , at p 2
8 *Prohibitions del Roy* (1608) 12 Co Rep 63
9 (2003) 211 CLR 476 at 513-514 [103]-[104]: see too: Administrative Law Council Report No. 47 *The Scope of Judicial Review* (2006) p 16
10 (1951) 83 CLR 1 at 193; cf *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 381 [89], per Gummow and Hayne JJ
11 *Australian Communist Party* (1951) 83 CLR 1 at 193
12 see e.g. s 474 of the *Migration Act 1958* (Cth)
13 *Fish v Solution 6 Holdings Limited* [2006] HCA 22 at [33]
14 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 505 [72] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ
15 see *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 per Brennan J
16 (1998) 194 CLR 355
17 by enacting the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth); these amendments came into effect on 4 July 2002
18 (2001) 206 CLR 57 see *Minister for Immigration and Multicultural Affairs v Lay Lat* [2006] FCAFC 61 at [64]
19 ibid at [69]
20 [2006] FCAFC 61 at [70]
21 (2005) 215 ALR 162
22 215 ALR at 183-184 [79]-[80] per McHugh J, 203 [174] per Kirby J, 212 [211] per Hayne J
23 (1990) 170 CLR 596 at 599-600
24 See too *Carroll v Sydney City Council* (1989) 15 NSWLR 541 at 549A-G per McHugh JA, Kirby P agreeing at 543E; *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 115-116 per Mason J
25 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 ALR 411 at 416 [16]
26 (1985) 159 CLR 550 at 628
27 222 ALR at 416-417 [17]
28 ibid at 417 [20]-[21]
29 222 ALR at 418-420 [23]-[29]
30 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 84; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 222 [25]
31 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 223 ALR 171
32 223 ALR 171 per Gleeson CJ at 172 [5]; per Gummow J at 181 [43] and 184 [55]; Kirby J at 196 [102] (that prima facie excessive delay presumptively flaws an administrative decision with jurisdictional error); per Callinan and Heydon JJ at 213 [163] (phrased in the negative, that 'failure to make a quick decision would not of itself constitute jurisdictional error').
33 *NAIS*, supra at fn 31
34 223 ALR 171 per Gleeson CJ at 174 [10] and per Kirby J at 197 [106]
35 (2002) 209 CLR 597
36 *Dranichnikov v Minister for Immigration* (2003) 197 ALR 389
37 197 ALR at 407 [87]
38 (1997) 91 CLR 602 at 609

39 *Sun v Minister for Immigration* (1997) 81 FCR 71 at 134 per Burchett J and per North J (Wilcox J left this issue open at 124).
40 *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pincohet Ugarte (No 2)* [2000] 1 AC 119; see e.g. at 135E-F per Lord Browne-Wilkinson
41 *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 453 [44], 455-456 [50]-[52]
42 *Wentworth v New South Wales Bar Association* (1992) 176 CLR 242 at 252
43 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 per Mason J
44 ibid at 40 per Mason J
45 *Minister for Immigration v Yusuf* (2001) 206 CLR 323, 350-352 at [80]-[83]
46 see: s 13 of the *Administrative Decisions (Judicial Review) Act 1977* and s 28 of the *Administrative Appeals Tribunal Act 1975*: see too s 25D of the *Acts Interpretation Act 1901* and *Dalton v Federal Commissioner of Taxation* (1986) 160 CLR 246
47 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, op cit, 40-41 per Mason J
48 (1996) 185 CLR 186 at 272
49 *Military Rehabilitation and Compensation Commission v SRGGG* (2005) 215 ALR 459. *Comcare v Forbutt* [2000] FCA 837 These decisions have since been cited with approval in the Full Federal Court decision of *McGuire v Military Rehabilitation and Compensation Commission* [2005] FCAFC 52 at [33]
50 215 ALR 459 at 480 [96]. See also *Commonwealth v Angela* (1992) 34 FCR 313
51 (2001) 206 CLR 323 at 346 [68] per McHugh, Gummow and Hayne JJ
52 ibid at 346 [68] per McHugh, Gummow and Hayne JJ
53 (2001) 206 CLR 323 at 346 [69] per McHugh, Gummow and Hayne JJ
54 (1986) 159 CLR 656
55 [1999] 1 WLR 1293 at 1300F-G
56 [1999] 1 WLR at 1303G-1304A
57 (1949) 78 CLR 353 at 360
58 Administrative Review Council, "*The Scope of Judicial Review*", Report No. 47, 2006.
59 ibid at p 43
60 ibid at p 43
61 *Re Minister for Immigration and Multicultulral and Indigenous Affairs; Ex parte Palme* 216 CLR 212 at 223 [39] at 223 [39] applying *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 120
62 *Corporation of City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 at 150 [34]; see too per Iacobucci J in *Canada (Direction of Investigation and Research) v Southam Inc* [1997] 1 SCR 748 at 776-777 [56] referred to by Gummow J in *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at 657 [145] and Lee J in *M164/2002 v Minister for Immigration and Multicultulral and Indigenous Affairs* [2006] FCAFC 16 at [81]
63 *Applicant M164/2002 v Minister for Immigration and Multicultulral and Indigenous Affairs*, op cit at [80], [86]-[92] per Lee J
64 ibid at [117] per Tamberlin J
65 ibid at [118] per Tamberlin J
66 [2006] FCAFC 16 at [90]
67 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229 per Lord Greene MR
68 *Minister for Aboriginal Affairs v Peko-Wallsend* op cit at 40
69 Bar News: Summer 2005/2006
70 The author recollects the description as 'a black hooded cobra'.

# A CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES: APPLICATIONS AND IMPLICATIONS IN VICTORIA

*Tom Mosby and Udara Jayasinghe**

## Introduction

On 2 May 2006, the Charter of Human Rights and Responsibilities Bill 2006 (Vic) ('Charter') was introduced to the Victorian Parliament. The Charter was passed by Parliament on 20 July 2006 and received Royal Assent on 25 July 2006.

The commencement of the Charter will occur in two stages. The provisions relating to the types of rights protected by the Charter and the scrutiny of new legislation will commence on 1 January 2007. However, the provisions relating to the interpretation of laws and obligations of public authorities will only come into operation on 1 January 2008. This will allow government departments to review existing laws, polices and procedures to determine compliance with the Charter.

The Charter is based on the civil and political rights stipulated under the *International Covenant on Civil and Political Rights* 1966 ('ICCPR'), but does not include other types of rights such as those contained in the *International Covenant on Economic Social and Cultural Rights* 1966.

The core purpose of the Charter is to protect and promote the rights defined in the Charter in the development of new and existing legislation and to increase transparency in the consideration of those rights in parliamentary procedures. This will be achieved by, for example:

(1) requiring a Statement of Compatibility ('Statement') to be prepared and submitted with all bills introduced into parliament;
(2) requiring that actions of public authorities are compatible with the rights protected under the Charter; and
(3) requiring Victorian courts and tribunals to interpret statutes and statutory instruments in a manner that is compatible with rights.

Thus, the Charter is not intended solely as a guide for government departments, but encompasses public authorities, which are defined in the Act as including public officials, private entities with public nature functions, Victoria Police, local councils, Councillors and Council staff, Ministers and members of Parliamentary Committees.

Courts and tribunals are also defined as 'public authorities', but only when acting in an administrative capacity, for example, when hiring staff. When exercising their judicial function, the third element of the scheme of protection applies which requires courts and tribunals to interpret Victorian statutes and statutory instruments in a manner compatible with the defined rights.

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Although a unique legal instrument, the Charter has drawn much from overseas rights protection mechanisms. This article will first map out some of the salient features of rights protection in Canada, New Zealand and the United Kingdom. This provides a comparative framework to assess the implications of the Charter in Victoria and its substantive and procedural merits in promoting and protecting human rights in Victoria. The article will also briefly discuss the available legislative instruments in Australia that promote and protect human rights. The article will conclude with a discussion on the procedural requirements imposed by the Charter in policy and legislative development, the implications of the Charter in administrative decision making by public authorities, the remedies available under the Charter and the implications of the Charter in statutory interpretation by Victorian courts

**Summary of overseas rights protection mechanisms**

The make-up of the Victorian Charter is influenced by the rights protection models operating in Canada, New Zealand, South Africa and the United Kingdom as well as the *Human Rights Act* 2004 (ACT) (the 'ACT Act'). In developing the Charter, the Human Rights Consultation Committee had specifically recommended that the Charter should not be modelled on the United States Bill of Rights in order to ensure continued Parliamentary sovereignty.

The *Canadian Charter of Human Rights and Freedoms 1982* primarily protects civil and political rights. However, the Charter also includes a measure of cultural rights such as equality of the English and French languages as well as existing treaty rights with indigenous peoples. The Canadian Charter is constitutionally enshrined, and can only be changed by amending the Canadian Constitution. Unlike the Victorian Charter, the Canadian Charter offers an individual a right of action against any breach of the Charter. The Courts also have primary responsibility for monitoring human rights and they do so by reviewing legislation and making declarations of invalidity if an Act breaches the Charter.

In New Zealand, rights protection occurs through the *New Zealand Bill of Rights Act 1990.* The Act protects civil and political rights but does not automatically override any inconsistent legislation. Breaches of the Act by government agencies can result in an award of compensation. When faced with questions of interpretation, the Act requires Courts to rely on any consistent legislation. Proposed Bills are also subject to scrutiny by the Attorney General, who is required to inform Parliament about any provision that may be inconsistent with the Act. The Attorney General is also required to review proposed legislation and regulations to ensure that they do not conflict with any rights set out in the Act.

Rights protection in the United Kingdom is governed by the *Human Rights Act 1998* (UK) ('UK Act'). The UK Act protects the civil and political rights as framed in the *European Convention on Human Rights* ('ECHR') and courts are required to interpret legislation in a manner that is compatible with the ECHR. However, the UK Act also preserves the validity of legislation that may be inconsistent with the ECHR, despite Courts having the power to declare as invalid, any subordinate laws. Under the UK Act, a Minister presenting a Bill to Parliament must inform Parliament by way of a statement, whether the proposed legislation is compatible with the ECHR. Furthermore, an individual may bring an action to enforce a particular right and seek 'just and appropriate remedies'. However, compensation for human rights breaches is only available if no other remedy is appropriate.

**Rights protection in Australia**

***Commonwealth***

Before discussing the features of the Charter and its implications for Victoria, it is useful to identify the existing rights protection mechanisms in Australia. Prior to the enactment of the Charter and ACT Act, there was some provision for the protection of rights in Australia on

both a national and state level. On a national level, the Australian Constitution provided (and continues to provide) the following rights protection:

(a) a right to vote in federal elections (s 41);
(b) any compulsory acquisition of property by the Commonwealth to take place on just terms (s.51(xxxi));
(c) a right to a trial by jury for Commonwealth indictable offences (s 80);
(d) a prohibition against the making of any law which establishes, imposes or prohibits any religion or imposes a religious test as part of the qualification for any office or public trust (s 116);
(e) a prohibition against the imposition of any law that imposes a 'disability or discrimination' because of a person's state of residence (s 117); and
(f) a right of review, in the High Court, of certain decisions of the Commonwealth or an officer of the Commonwealth (s 75(v)).

In addition, the following domestic legislation draws on the ICCPR and other similar international treaties:

(a) *Racial Discrimination Act 1975* (Cth);
(b) *Sex Discrimination Act 1984* (Cth);
(c) *Disability Discrimination Act 1992* (Cth); and
(d) *Age Discrimination Act 2004* (Cth).

The operation of these Acts is overseen by the Commonwealth Human Rights and Equal Opportunity Commission ('HREOC') which has investigatory and reporting powers in relation to any purported breach. HREOC is also responsible for the examination of federal legislation for consistency with particular international human rights standards, including the ICCPR, and must report to the Federal Attorney-General who in turn, is required to report to Parliament. However, the Federal Government is not required to take any step to remedy any inconsistencies.

The *Privacy Act 1988* (Cth) and the *Freedom of Information Act 1982* (Cth) also provides some indirect rights protections.

***Rights protection in the Australian Capital Territory ("ACT")***

Prior to the enactment of the Victorian Charter, the ACT was the only Australian state or territory that had enacted specific rights protection legislation. The ACT Act, which resulted from extensive community consultation and came into operation on 1 July 2004 was therefore, a landmark event for rights protection in Australia.

The ACT Act promotes and protects civil and political rights, and can only be changed by an Act of Parliament. The Act requires Courts to interpret laws consistently with the Act. Unlike in Victoria, individuals do not have a right of action against government agencies or private individuals for breaches of a particular right, and there is no right to compensation for such breaches. In the ACT, the Attorney-General must undertake a review of proposed legislation and regulations for compatibility with the rights set out in the Act. Finally, when laws are introduced into Parliament, the Attorney-General is required to submit a compatibility statement highlighting the consistencies with rights protected by the Act.

***Rights protection in Victoria***

Whilst the Victorian Constitution does not refer to specific rights, it nonetheless provides some safeguards against rights abuse, for example, a right of access to information in the possession of Ministers and agencies, subject to exceptions (s 94H). Interestingly, whilst the

Constitution recognises Aboriginal people as the original custodians of the land on which the colony of Victoria was established (s.1A), at the same time, it states that the section is not intended to create any legal right or give rise to any civil cause of action or affect in any way the interpretation of the Constitution or of any other law in force in Victoria.

Prior to the Victorian Charter, the *Equal Opportunity Act 1996* (Vic) was the primary rights legislation in Victoria. The aim of the Act was to promote recognition and acceptance of the right to equality and opportunity and eliminate discrimination, and its operation was overseen by the Victorian Equal Opportunity Commission ('VEOC'). The VEOC could undertake conciliation and, if unsuccessful, refer matters to the Equal Opportunity Tribunal.

Other Victorian legislation that offered some form of rights protection include the:

(a) *Information Privacy Act 2000* (Vic);
(b) *Freedom of Information Act 1982* (Vic);
(c) *Evidence Act 1958* (Vic); and
(d) *Crimes Act 1958* (Vic).

At the same time, the Victorian Scrutiny of Acts and Regulations Committee ('SARC') was also responsible for the scrutiny of bills introduced into Parliament and reported to Parliament on whether the proposed law is likely to unduly breach rights or freedoms, for example, whether it:

(a) trespassed unduly upon rights or freedoms;
(b) made rights, freedoms or obligations dependent upon sufficiently defined administrative powers; and
(c) made rights, freedoms or obligations dependent upon non-reviewable administrative decisions or unduly required or authorised acts or practices that adversely effected personal privacy.

The SARC is an all party committee of both Houses of the Victorian Parliament. In considering whether a provision unduly trespassed on rights or freedoms, the SARC was guided primarily by a number of common law rights and freedoms, such as the privilege against self-incrimination.

**The Charter and its implications for Victoria**

The Charter is divided into 5 parts as follows:

(a) Part 1 includes the definition of 'public authority';
(b) Part 2 defines the rights protected by the Charter (although significantly, s 7 provides that the rights are not absolute, and need to be balanced against each other and other competing public interests);
(c) Part 3 consists of four elements as follows:
    (i) the scrutiny of new legislation by Parliament;
    (ii) instances when Parliament can 'override' the Charter in exceptional circumstances;
    (iii) the interpretation of laws by courts and tribunals; and
    (iv) obligations on public authorities;
(d) Part 4 sets out the functions of the Victorian Equal Opportunity and Human Rights Commission (including a reporting function), which replaces the VEOC; and
(e) Part 5 includes provisions relating to the review of the operation of the Charter.

As with the ACT, the Victorian Charter is not constitutionally entrenched and, therefore, may be amended or repealed as with any other piece of legislation. Furthermore, because it is

interpret the legislation in a way that is not only consistent with the Charter but also with its purpose.

According to the Explanatory Memorandum, the reference to statutory purpose under s 32(1) of the Charter is to ensure that 'courts do not strain the interpretation of legislation so as to displace statement's intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation'.[19]

Importantly, Australian courts have interpreted statutes in a manner that favours a construction which accords with the rules of international law, including international human rights law. As early as in 1908, the High Court of Australia held that:

Every statute is to be so interpreted and applied as far as its language admits so as not to be inconsistent with the comity of nations or with the established rules of international law.[20]

In *Minister for Immigration and Ethnic Affairs v Teoh*[21], the High Court determined that where the language of the legislation was susceptible of a construction which was consistent with the terms of the international instrument, and its obligations, then that construction should prevail.[22] Such precedents, although not directly applicable in the current context, may serve as persuasive judicial pronouncements in the interpretation of legislation in a manner which is consistent with the Charter.

## Conclusion

The measure of success of the Charter would to a large extent, depend on the extent to which its effect is incorporated by the public service in the development of legislative and policy proposals. Its perceived aim, to monitor legislative action, can only be effective if implemented by government departments. This would require extensive training to institutionalise the effect of the Charter including the training of public authorities of the effects of the Charter on their daily operations.

Critics of the Charter argue that its effect is limited in so far as it provides no remedies or causes of action for those whose rights are affected. Nevertheless, it remains that the Charter is a major step in the enforcement of human rights in Victoria. The Charter will be instrumental in developing a rights culture in Victoria. It will also ensure transparency in government decision making by enabling decisions of public authorities open to scrutiny in determining compliance with human rights.

### Endnotes

1 Section 28, Charter
2 Section 28(4), Charter
3 Section 29, Charter
4 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill (2006) (Vic),21
5 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill (2006) (Vic), 22
6 Section 4, Charter
7 Section 4(2), Charter
8 Section 38, Charter
9 Section 38(2), Charter
10 Section 38(3), Charter
11 Dr Simon Evans, 'The Victorian Charter of Rights and Responsibilities and the ACT Human Rights Act: Four Key Differences and their implications for Victoria' (2006) a paper presented at the Australian Bills of Rights: The ACT and Beyond Conference, Australian National University, 21 June 2006, p.10
12 Department of Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act (2006)*; www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf
13 Section 39(3), Charter

14 Department of Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (2006) 18; www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf
15 Justice JW Perry, 'International Human Rights and Domestic law and Advocacy' (2006) a paper presented at a Human Rights Legal Resource Centre Seminar, Melbourne, 7 August 2006, p 12
16 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24
17 Section 32, Charter
18 Explanatory Memorandum, 23
19 Explanatory Memorandum, 22
20 *Jumbunna Coalmine NL v Victorian Coal Miners Association* (1908) 6 CLR 309 per O'Conner J, cited in Justice JW Perry, 'International Human Rights and Domestic law and Advocacy' (2006) a paper presented at a Human Rights Legal Resource Centre Seminar, Melbourne, 7 August 2006, p 2
21 (1994) 183 CLR 273
22 ibid, per Mason J and Deane J, 287

# RETHINKING THE LEGAL ADVICE PRIVILEGE IN THE PUBLIC SECTOR CONTEXT

*Chris Wheeler**

Legal professional privilege, or client legal privilege, is quite a complex matter. There are all sorts of rules covering such matters as: whose privilege it is; what types of communications it applies to; the circumstances where it applies (for example the two heads of the privilege); the pre-conditions for its application (for example confidentiality and the dominant purpose test); and the circumstances where it does not apply or can be waived; where the common law or statutory tests apply, etc.

Before proceeding on, I would ask the reader to write down YES/NO answers against the following questions based on any knowledge and experience the reader may have from either being a client or a lawyer if they have worked in or with the public sector:

1. In the initial consultation between a lawyer and a public official, before the lawyer is briefed or receives instructions, is it standard practice for the lawyer to explain the nature and scope of legal professional privilege?

2. If it isn't standard practice, is it done most of the time?

3. Alternatively, is the giving of such an explanation the exception rather than the rule?

4. If you are a lawyer who has worked in or with the public sector, do you believe that most of the public officials who have sought your legal advice are **aware** of the essential elements of the nature and scope of legal professional privilege?

***The two sides to the privilege***

In the public sector accountability context, there are two sides to legal professional privilege:

- on the one side, legal professional privilege is said to assist the administration of justice by allowing communications between public officials and their lawyers to be kept confidential on the assumption that this will promote frankness and candour in communications between those officials and their lawyers, and

- on the other side, the effect of legal professional privilege is to reduce the accountability of public sector agencies and officials by allowing them to keep often vital information from a watchdog or regulatory body or a court.

Keeping relevant information from the other parties to a dispute, from the courts and from regulators and watchdog bodies is only justified if in fact confidentiality of communications between public officials and their lawyers achieves significantly greater frankness and candour than would otherwise be the case.

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***Expansion of the scope of the legal professional privilege***

The view has long been espoused by lawyers and the courts that confidentiality of communications between lawyers and their clients is essential to ensuring the proper administration of justice. This is an article of faith for lawyers – a legal 'sacred cow'. The legal fraternity is so enamoured of the concept and so certain of its importance that over the years the courts have greatly expanded the scope of legal professional privilege, for example:

- apparently it was originally seen primarily as a protection for attorneys ('Legal professional privilege was initially protective of attorneys because they were bound by oath to keep their clients' secrets'[1]). By the late 19th Century it was accepted that the client was also protected by the privilege[2];

- originally the principle 'was a rule of evidence confined to judicial and quasily-judicial proceedings'[3], but was extended to cover legal advice – the 'legal advice privilege' – in the 1830s[4];

- the privilege was expanded in the 1880s to cover third parties acting as agents of the client seeking advice[5];

- the privilege originally only covered attorneys external to the client, but was extended to in-house lawyers in the 1980s[6];

- the privilege was originally subject to a 'sole purpose' test, but this was expanded to a dominant purpose test in the late 1990s[7], a change that has since been reflected in the *Uniform Evidence Acts*;

- the 'legal advice' head of the privilege originally only covered direct communications between solicitors and their clients, or the agents of either, but has been extended to non-agent third party authored documentary communications in certain circumstances – referred to in one case as 'the growing elasticity of the meaning of the term "agent"'[8];

- the privilege was extended to advice of a non-legal character where that non-legal advice is connected to the giving of legal advice[9].

***Expansion of the rationale for the legal professional privilege***

The courts have consistently argued that the privilege should not be extended beyond the scope justified by its rationale, for example that 'the privilege should be strictly confined within the narrowest possible limits consistent with the logic of its principle'[10]. To ensure this was not a significant impediment, over the years the courts have expanded the rationale for the privilege from a rule of evidence in litigation, to a substantive rule of law – see for example the comments of Lord Taylor of Gosford CJ in *R v Derby Magistrates' Court ex parte B*[11] that:

> Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case; it is the fundamental condition on which the administration of justice as a whole rests.

The expansion of the rationale by the courts to justify the expansion of the scope of the privilege was explicitly recognised in the recent case of *Pratt Holdings Pty Ltd v Commissioner of Taxation* in the Federal Court of Australia:

77...**Difficulties in applying the rationale for litigation privilege to the extended doctrine [to the giving of legal advice] have been recognised and resolved by expressing the rationale at a higher level of generality so that it can accommodate both aspects of legal professional privilege.** In Carter v Northmore Hale Davy and Leake (1995) 183 CLR 121 ('Carter') at 161. McHugh J commented that the rationale behind litigating privilege,

> 'hardly seems applicable to non-litigious communications between legal adviser and client unless the concepts of 'the legal system' and 'the administration of justice' are given extended and artificial meanings.'

His Honour continued however,

> 'Now that this court has held that legal professional privilege is not a rule of evidence but a substantive rule of law, the best explanation of the doctrine is that it is 'a practical guarantee of fundamental, constitutional or human rights'...By protecting the confidentiality of communications between lawyer and client, the doctrine protects the rights and privacy of persons including corporations by ensuring unreserved freedom of communication with professional lawyers who can advise them of their rights under the law and, where necessary, take action on their behalf to defend or enforce those rights. The doctrine is a natural, if not necessary, corollary of the rule of law and a potent force for ensuring that the equal protection of the law is a reality.'

78. **Stated thus, the rationale is capable of justifying both aspects of legal professional privilege...**[12]. (emphasis added)

Interestingly, in one of the recent 'Three Rivers' cases in the UK it was said that the principle of legal professional privilege '...is not based upon the maintenance of confidentiality, although in earlier case-law that was given as its foundation. If that were the only reason behind the principle the same privilege would be extended to such confidences at priests and doctors, whereas it has been settled in a line of authority stemming from the *Dutches of Kingston's case* (1776) 1 East PC 469 that is confined to legal advisers:...'[13].

### *An alternative rationale for the privilege*

An alternative rationale expressed by Deane J in *Baker v Campbell* is that legal professional privilege 'represents some protection of the citizen – particularly the weak, the unintelligent and ill-informed citizen – against the leviathan of the modern state.' While such a rationale may be applicable to some extent for private individuals, it is somewhat problematic in relation to public officials. They are part of that 'leviathan' – they are part of the 'state' apparatus, and are not in the same position as 'weak' or 'powerless' members of the public. And as for 'unintelligent' and 'ill-informed' – I would have thought that rigorous implementation of merit selection principles for more than a generation would have addressed this.

### *Who can rely on the privilege to avoid disclosure of communications (ie, who is the client)?*

Whenever courts have had cause to consider the question of legal professional privilege, it is almost standard practice that they emphasise that the privilege is that of the client and not the lawyer. Indeed in the *Uniform Evidence Acts* what was known in the common law as 'legal professional privilege' has been renamed 'client legal privilege'. This raises an interesting point in the public sector context as to who or what is the 'client'.

In looking at this question a distinction can be drawn between:

- who is the 'client' for the purpose of identifying communications that are covered by the privilege
- who is the 'client' for the purpose of determining who can assert or waive the privilege, and

- who is the 'client' for the purpose of determining who has access to privileged communications.

While the *Uniform Evidence Acts* may provide that for the purposes of the legal advice privilege the 'client' includes 'an employee or agent of a client' (ss117&118), in a practical sense it is important to consider who actually can rely on the benefits of the privilege. In this context, in the public sector the 'client' for the purposes of deciding who has access to communications between employees and an agency's lawyers would primarily be the organisation itself. While it may also extend to those persons within the organisation who deal with lawyers who have the authority to assert or waive the privilege, it would not include most employees of the agency. In other words, the privilege only protects communications between employees and their agency's lawyers from disclosure to external third parties, not from disclosure within the agency (eg to management).

The existence of client legal privilege is unlikely to increase the likelihood of frankness and candour in communications between employee public officials and their agency's lawyers. Even where such employees are aware of the existence and effect of the privilege, as they cannot rely on the privilege to prevent disclosure of their communications to management, they may have an overriding interest in **not** being frank or candid. After all, what an employee makes known to the agency's lawyers they are also effectively making known to the management of the agency. Information provided by employees to their agency's lawyers could therefore be used in ways that may not be in the interests of those employees (for example used in management or disciplinary action for incompetence, maladministration or misconduct). It is also always possible that the agency may decide to waive privilege over the information provided to the agency's lawyers by its employees, which could be released to regulators, watchdog bodies or other third parties who could potentially use the information in ways that are detrimental to the interests of those employees.

Where employees are unaware of the existence, nature and scope of the privilege, their level of frankness and candour in such communications is unlikely to be affected by the existence (or otherwise) of the privilege.

***Does the privilege work to the detriment of the privilege against self- incrimination?***

On a very practical level it is relevant to note that the circumstances where it would be most important for an employee to be frank and candid with his or her agency's lawyers may well be those where the employee should be able to rely on the privilege against self-incrimination. If employees were to be influenced by client legal privilege to be frank and candid in communications with their agencies' lawyers, they may unknowingly or inadvertently waive their right to refuse to answer questions that may open them up to criminal or civil penalty (including disciplinary action). Alternatively, if they are aware of this possibility, the existence of the privilege is unlikely to induce them to make any self-incriminating disclosure. Of course, in practice it is often hard enough to get employees to admit to any responsibility when things go wrong, let alone make self-incriminating disclosures.

***Is there empirical evidence that the privilege is effective in achieving its objectives?***

It is a very telling point that there does not appear to be any empirical evidence to support the assertion that the privilege has any material effect on frankness and candour in communications between public officials and their agencies' lawyers. If any other profession or calling wanted the courts to recognise an equivalent privilege for their members, they would of course be required to demonstrate, based on incontrovertible evidence that recognising such a privilege would be effective in achieving a valid and overwhelmingly important public interest objective.

Interesting remarks on this issue were made by Mason J (as he then was):

> A more persuasive reason for confining [legal professional privilege] is that **it is impossible to assess how significantly the privilege advances the policy which it is supposed to serve.** The strength of this public interest is open to question. **It may be doubted whether it does very much to promote candour on the part of the client to his legal adviser.** Candour on the part of public servants has ceased to be an important buttress to Crown privilege. And, even if the existence of the privilege does encourage the client to make full disclosure to his legal adviser, is that public interest so much stronger than the public interest in having litigation determined in the light of the entirety of the relevant materials? [14] (emphasis added).

Another issue with the privilege was referred to by Gyles J in a 2004 Federal Court case when he referred to 'some of the anomalies in the application of the principle':

> 58 ... According legal professional privilege to communications relating to legal advice unconnected with litigation is well established but has never been satisfactorily explained. As McHugh J noted in Carter v Northmore Hale Davy & Leake (1995) 183 CLR 121 at 161, the usual rationale:
>
> > 'hardly seems applicable to the non-litigious communications between legal adviser and client unless the concepts of "the legal system" and "the administration of justice" are given extended and artificial meanings.'
> >
> > ...
>
> 60 ... In many transactions, whether of a business or a private character, a client may consult, in addition to a lawyer, one or more of an accountant, a financial planner, a merchant banker and a financier for advice concerning the preferred structure of the transaction and one or more of those other advisers may bring its own lawyer into the consultations. Often some or all of the advisers and the lawyers will consult at the same time, each considering the same questions. It is not possible to explain rationally why a client's private explanation of its position and its objectives to a lawyer is privileged but precisely the same private explanation to the other advisers working on the same issue is not.
>
> 61 It is easy to see how the privilege is necessary to encourage candour on the part of a client who confronts or anticipates litigation to vindicate or defend legal rights as the client may need to disclose facts which are incriminating, discreditable or embarrassing in order to obtain sound advice. It is not so easy to see why a client who wishes to order its affairs to best advantage would need or require any encouragement for candour. Nor is it easy to see what corresponding public interest is served by preserving the secrecy of a client's reasons for a transaction (unless the client chooses to lift the veil) in cases where disclosure would serve the ends of justice or would enable a statutory inquiry to be properly conducted. [15]

This concern is reflected in comments made in another 2004 case before the England and Wales Court of Appeal, where the Master of the Roles made the following remarks:

> We have found this area of the law not merely difficult but unsatisfactory. The justification for litigation privilege is readily understood. Where, however, litigation is not anticipated, it is not easy to see why communications with a solicitor should be privileged. Legal advice privilege attaches to matters such as the conveyance of real property or the drawing up of a will. It is not clear why it should. There would seem little reason to fear that, if privilege were not available in such circumstances, communications between solicitor and client would be inhibited. [16]

### *Is the privilege effective to achieve frankness and candour in communications between clients and lawyers?*

It is open to question whether in fact the privilege is necessary to achieve its primary objective of ensuring frank and candid communications where public sector agencies and public officials are concerned.

It can be strongly argued that client legal privilege should not be necessary to ensure frankness and candour in communications between public officials and their agency's lawyers. For example:

- courts across the common law world have made it plain that in most circumstances public officials are expected to be frank and candid in their official communications, with or without the benefit of confidentiality;

- codes of conduct require public officials to be frank and candid in their official communications (which includes communications with any lawyer employed or engaged by their employer);

- legislation such as the *State Records Act 1998* (NSW), as well as principles of good administrative practice, require public officials to make full and accurate records (which also implies a statutory duty to be frank and candid in written communications);

- employees owe the common law obligation of fidelity to their public sector employer, which includes a duty to provide their agency with all relevant information (and, by implication, a duty to be frank and candid with any lawyer employed or engaged by their agency);

- employees also have extensive protections from personal liability under legislation such as the *Employee's Liability Act 1991*(NSW), as well as the principle of vicarious liability, and

- public officials often have statutory protection from liability for actions done in good faith for the purpose of exercising statutory functions.

The current situation therefore appears to be that:

- on the one hand the courts generally assume that public officials are expected to be full and frank in their communications with each other without the need for secrecy (other than in relation to high level decision-making and policy-making), and

- on the other hand the courts have effectively held that for public officials to be frank and candid in their communications with lawyers (who may also be public officials) they need the additional inducement of secrecy.

In other words, while public officials are expected to be frank and candid in their communications with each other, whether or not these communications may later be disclosed, apparently this may not be a reasonable expectation if one of them is a lawyer!

***Does the complexity of the rules undermine the achievement of the objectives of the privilege?***

Another problem is the complexity of the various rules and issues associated with the privilege. As Kirby J said in a 1997 High Court case:

> The doctrine's practical object is thus to remove from the client's concerns an apprehension that matters communicated to the lawyer for the purpose of securing such advice might thereafter be used against the interests of the client. If that were a possibility **and the rule were not simple and clear in its operation**, clients might not frankly and fully communicate their problems to lawyers and produce all documents and other evidence relevant to the provision of proper legal advice...the boundaries of the doctrine of legal professional privilege must take into account **the fundamental assumption of the system** that parties should ordinarily be able to communicate with their lawyers without fear that the confidentiality of their communication will be invaded **except in clear, limited and defined circumstances.**[17] (emphasis added)

The fundamental problem which appears to undermine this 'fundamental assumption of the system' is that the rule is not 'simple and clear' and the circumstances in which the confidentiality of their communications can be invaded are not 'clear, limited and defined'.

If anyone actually needs convincing on this point then they haven't read much of the case law. Examples of the issues that import complexity and confusion into the issue include: the continuing applicability of both statute and common law tests, depending on the circumstances; the use of two separate descriptors, ie, 'legal professional privilege' and 'client legal privilege'; the privilege only applying to 'communications' not documents per se; the position of copy documents; the dominant purpose test; who is actually the 'client'; the position of documents authored by agents and non-agent third parties[18]; the need for employed solicitors to have appropriate independence in their provision of legal advice[19]; the circumstances where the privilege can be waived, both explicit and implied; certain statutory provisions that remove the privilege; the recent apparent divergence between English and Australian authority on certain issues, etc.

***Do lawyers have a conflict of interests in relation to the privilege?***

When considering the privilege, courts commonly talk about the rationale for the privilege being the benefits that accrue to the system of justice, never to the obvious and significant commercial and professional benefits that accrue to lawyers from the privilege. For example:

- there are significant tactical advantages that can be achieved in court proceedings, or in client involvement with regulators or watchdog bodies – particularly when the main aim is to win or avoid liability;

- significant professional/commercial advantages accrue to lawyers who are able to offer clients the benefit of confidential advice (including in relation to actual or anticipated legal proceedings the advice of third party experts) which quite clearly would increase the demand for their services, particularly in areas where other professionals offer services, eg, commerce, taxation, planning and environment appeals, etc;

- nobody likes external scrutiny, from a client's perspective, the more they can involve their lawyers in relation to contentious, sensitive, embarrassing, etc issues, the better;

- on a personal level, lawyers avoid having to defend their advice/views before watchdog bodies or in courts.

I think it is fair to say that in fact lawyers have a significant conflict in relation to the whole issue of whether client legal privilege effectively achieves a valid public interest objective. This is a conflict which lawyers as a profession do not appear to be aware of.

This is a problem given that it is lawyers, and only lawyers, who put forward the arguments, make judicial decisions and draft legislation about the scope of the privilege.

***Client knowledge and awareness of the privilege***

One final point. I assume that there would be broad agreement with the proposition that in practice at least the legal advice head of the privilege would only work as intended if the client is aware of its existence and, at least in general terms, what it protects and what it doesn't protect. So with that in mind, think about your responses to my earlier questions about levels of awareness of the existence of the privilege and the scope of the privilege.

In my view it is past time that serious thought be given to whether the legal advice head of client professional privilege is effective in practice in achieving its stated objectives or rationale in the public sector context.

**Endnotes**

1 *Waldron v Ward* (1654) Style 450, 82 ER 853; *Preston v Carr* (1826) 1 Y & J 175 at 178-9.; *Minet v Morgan* (1873) LR 8 Ch App 361.
2 per Stone J, [2004] FCAFC 122 at 70
3 per Wilson J in *Baker v Campbell* (1983) 153 CLR 52) .
4 see *Greenough v Gaskell (1833) 1 My.&K.98*
5 *Wheeler v Marchant* (1881) 17 CH D675
6 *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54
7 *Esso Australia Resources Limited v Federal Commissioner of Taxation of the Commonwealth of Australia* (1999) 201CLR 49
8 see Finn J in *Pratt Holdings Pty Limited v The Commissioner of Taxation* [2004] FCAFC 122 at 41 & 50
9 see *Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 550 and Taylor J in *Babel v Air India* [1988] 1 CL317, at 330
10 see Wigmore *Evidence* Volume 8 para 2291 McNaughton rev. 1961, and Lord Edmund-Davies in *Waugh v The British Railways Board* [1980] AC 529 at 543
11 1996] AC 487 (at p 509)
12 per Stone J , [2004] FCAFC 122, at paras 77-78
13 see *Three Rivers District Council & ors v Governor and Company of The Bank of England* [2004] UK HL 48, at 86
14 *O'Reilly and others v Commissioner of State Bank of Victoria and others* (1982) 44 ALR 27, at p 42
15 *Kennedy v Wallace* [2004] FCA 332 (23 March 2004)
16 Lord Phillips of Worth Matravers in *Three Rivers District Council v Governor and Company of the Bank of England (No. 6)* [2004] QB 916, at para 39
17 *The Commissioner, Australian Federal Police & Anor v Propend Finance Pty Limited & Ors* [1997] HCA3
18 *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122
19 *Commonwealth of Australia & Air Marshall McCormack in his Capacity as Chief of Air Force v Vance* [2005] ACTCA 35 (23 August 2005); *The Attorney-General for the Northern Territory of Australia v Kearney* (1985) 158 CLR 500, and *McKinnon and Secretary, Department of Foreign Affairs and Trade* [2004] AATA 1365, at 51.

# THE HISTORY OF MILITARY COMPENSATION LAW IN AUSTRALIA[+]

*Peter Sutherland**

## Introduction

There is a very substantial body of material available on the history of veterans' law in Australia, most notably the *Toose Report* (1975) which is a goldmine for those interested in the development of the Australian repatriation system. The *Toose Report* includes Pt 2 'History of Repatriation Legislation' which surveys the development of Australian repatriation legislation from Federation to the post- World War 2 period, and also, equally importantly, includes detailed historical information on all of the many issues considered by that Review, such as Departmental administration, service, entitlements, review and appeals, medical treatment, etc. The more recent history of veterans' law is neatly summarised in Ch 3 of the *Clarke Review* (2003).

It is however, quite noticeable that the attention of historians has generally been focused on compensation for injuries arising out of war service and that the history of compensation for injuries suffered in peacetime service is less widely discussed. Annex F of the *Tanzer Review* (1999) included a useful summary of legislative and conceptual changes in military compensation since World War 2, however there does not appear to be any comprehensive historical study available on peacetime military compensation in Australia. In this paper, I can make only a very brief start on this subject.

There has always been debate about the most appropriate mechanism for delivering peacetime military compensation in Australia. Essentially there are three policy options available:

1. alignment with the workers' compensation arrangements for civilian employees of the Commonwealth Government;

2. alignment with the repatriation system developed during and after World War 1 to meet the needs of the hundreds of thousands of veterans returning from active service overseas; and

3. a separate scheme for peacetime military compensation, based on the specific nature of military service.

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Between 1901 and 1948, for the most part, separate schemes operated under Regulations made under the *Defence Act 1903* and the *Naval Defence Act 1910*. The variants of these schemes were not well developed in a policy sense, were discretionary in character and at various times overlapped with civilian compensation arrangements.

Between 1949 and 2004, peacetime military compensation was aligned with Commonwealth employees compensation, however a tangle of dual entitlements with the repatriation system were put in place essentially on an ad hoc basis to meet specific policy challenges.

In 2004, a separate comprehensive, legislative scheme for Defence Force compensation was established by the *Military Rehabilitation and Compensation Act 2004*, providing coverage of injuries incurred in service after the commencement of the scheme on 1 July 2004

In the preparation of this paper, I have called upon, without explicit acknowledgment, material contained in two books – *Veterans' Entitlements Law*, of which I am co-author with Professor Robin Creyke, and the *Annotated Safety, Rehabilitation and Compensation Act 1988*, of which I am co-author with John Ballard. These books together provide comprehensive annotations of relevant Court and Tribunal decisions in respect of military compensation, however they do not attempt to provide a comprehensive history of the legislation which they annotate or of veterans' law more generally. I extend my thanks to Robin and John for their work on these books.

**1901 - 1949**

***The Commonwealth contingent in the Boer War***

In the very early days of the Commonwealth, the Commonwealth Government showed a marked lack of enthusiasm for military compensation, by failing to make adequate provision for the 4,000 men who participated in Commonwealth contingents in the Boer War in South Africa. Each Commonwealth recruit was required to sign an acknowledgment that he had no claim upon the Commonwealth Government 'in case of disablement or death'. In contrast, members of State contingents and their dependents received disability pensions paid by the Imperial Government under the provisions of Army Order No 150 of 1901, as given effect by a Royal Warrant of August 1902. In addition, Victoria and New South Wales paid pensions to a number of members under State legislation. This group of Commonwealth veterans finally accessed some Commonwealth veterans' benefits after World War 1, but not fully equivalent entitlements[1].

***Defence Act 1903 and Naval Defence Act 1910***

The Commonwealth first made provision for compensation for the Defence Forces of Australia in ss 57 and 124 of the *Defence Act 1903* (No 20/1903), which stated:

> PART III. – THE DEFENCE FORCE
> Division 4. – General Provisions
> *Provision for families of men killed, &c.*
> 57. When any member of the Defence Force is killed on active service or on duty, or dies or becomes incapacitated from earning his living from wounds or disease contracted on active service or on duty provision shall be made for his widow and family or for himself, as the case may be, out of the Consolidated Revenue Fund at the prescribed rates.
> PART XI. – REGULATIONS
> *Regulations*
> 124.(1.) The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for securing the discipline and good government of the Defence Force, or

> for carrying out or giving effect to this Act, and in particular prescribing matters providing for and in relation to:-
>
> ...
>
> (h) The insurance of their lives by married members of the Permanent Forces for the benefit of their wives and families;
>
> ...
>
> (t) The payment of compensation to wives and families of members of the Defence Forces as provided in Part III. Division 4 of this Act.

Section 57 provided for injuries or death 'on active service or on duty', thus providing coverage for both war service overseas ('active service') and injury in peacetime service ('on duty').

The *Naval Defence Act 1910* (No 30/1910) established a separate legislative regime for the Naval Forces, including s 44 in relation to pensions:

> 44. Funds may be established in such manner and subject to such provisions as are prescribed for providing for the payment of annuities or gratuities to members of the Naval Forces permanently injured in the performance of their duties, and for the payment of annuities or gratuities to members of the Permanent Naval Forces who are retired on account of age or infirmity.

The *Naval Defence Act* included, in s 3, a definition of 'active service' which defined it as 'service in or with a force which is engaged in operations against the enemy, and includes any naval or military service in time of war'. The Act also amended the *Defence Act 1903* to confine its scope to the Military Forces of the Commonwealth (ie. the Army).

Regulations were promulgated under the *Defence Act* and were in existence by 1909, providing for payments of compensation to be made on the basis of a discretion exercised by a Board appointed to inquire into each case of injury or disablement. The Board could recommend compensation only if the serviceman had not contributed to the injury by any default of his own[2].

***Workers compensation for Commonwealth employees***

Modern workers compensation legislation had its origin in Imperial Germany in 1884 however the legislation in Australia is British-based, particularly drawing on the *Workmen's Compensation Act 1897* (UK) which initially was designed to protect British workers in what were regarded as dangerous trades and subsequently came to embrace workers in 'any employment'.

The development of workers compensation legislation in Great Britain was a direct response to the unsatisfactory nature of common law litigation as a protective mechanism against unsafe work places and work practices. In particular, common law remedies were unsatisfactory because of the cost and difficulty of litigation and the defences of accident, acquiescence, contributory negligence and common employment which greatly favoured the employer[3].

The Office of the Commissioner for Employees Compensation described the inadequacy of common law remedies in the Nineteenth Century:

> The doctrine of common employment ensured that the employer was not liable where injury to one of his workers was caused by the negligence of another employee. No damages could be recovered if there was any element of contributory negligence on the part of the worker. By application of the principle "volenti non fit injuria" the employer again avoided liability if he could show that the injury was attributable to a risk which the worker was aware of and accepted when he took employment. (1987, p 1)

The early history of workers compensation in Europe and America is briefly summarised in the Interim Report of the Heads of Workers' Compensation Authorities:

> 2.1 Workers' compensation is a product of the late industrial revolution. The first modern workers' compensation legislation was Bismarck's Imperial German Accident Law of 1884 which provided a model for similar European statutes, beginning with measures in Austria-Hungary in 1887 and in Norway in 1894. This "German model", represented by the legislation of 1884 and 1900, constitutes one of the two major streams of workers compensation development.
>
> 2.2 The second major stream was represented by the English Workmen's Compensation Acts of 1897 and 1906. This model was largely followed by various British Dominions (eg the Australian States and New Zealand) and in most of the United States. The first Australian legislation was in South Australia in 1900 with Victoria being the last State to enact such a measure in 1914.
>
> 2.3 A major difference between the German and English models was the former system's concern with accident prevention and rehabilitation, as well as compensation, whereas the English-influenced schemes were almost solely concerned with income support to compensate wage loss as a result of industrial injury.
>
> 2.4 In the United States, the earliest legislation was the victim of successful constitutional challenge; however, from 1911, the various State jurisdictions adopted measures which survived such challenges. The major variant in the United States was that, while the English model retained recourse to the common law action for negligence, there was an abrogation of this tort remedy in an "historic compromise" in exchange for a more certain system of no-fault benefits.
>
> 2.5 In Canada, after 1914, the provincial schemes not only involved abrogation of the common law action but were financed by levies collected by the workers' compensation administrative agency rather than premiums collected by private insurance companies.
>
> 2.6 The earliest Australian workers' compensation statutes, following the model of the 1897 English legislation, confined coverage to a number of defined classes of "dangerous employment". The concept of general coverage of workers in all industries and occupations came with the 1906 English Act, a concept which was then adopted by the various Australian jurisdictions[4].

Compensation for Commonwealth employees was introduced by the *Commonwealth Workmen's Compensation Act 1912* (No 29/1912) ('the 1912 Act') which stated:

> 3(1) "Workman" means any person who has entered into or works under a contract of service or apprenticeship with the Commonwealth ... but does not include –
>
> ...
>
> (c) any member of the Naval or Military Forces of the Commonwealth while engaged on active service.

The original Bill for the Act purported to exclude Defence Force personnel entirely from the coverage of the Act, a measure explained by the Prime Minister and Treasurer, Mr Fisher, in the following terms:

> ... the Naval and Military Forces are also excluded, as more fitting for treatment in another measure[5].
>
> The honourable member for Parramatta inquired why members of the Defence Forces were excluded from the provisions of the Bill. I would remind him that under the Defence Act power is taken to provide relief for members of the Defence Forces injured while on duty. ... Regulations have been framed, and I think that payments have been made under them. (p 4660)

The Government's position appears to have been influenced by concern about the financial implications of creating a legislative right to compensation which could be drawn upon by large numbers of servicemen in the event of a major war. Under the Defence Regulations, access to compensation was discretionary and thus more able to be controlled in quantum and eligibility criteria by the Government of the day.

Many members of the House of Representatives and many Senators opposed the Government's intention on two broad grounds: compensation under the Regulations was

discretionary and could be refused on arbitrary grounds; and there was no assurance that military personnel (particularly other ranks) would receive amounts of compensation comparable with their civilian counterparts. This view was reflected by Mr Archibald, the Member for Hindmarsh, who stated in the Parliament:

> It is desirable that our soldiers should always be citizens, and subject to the ordinary laws of the community so far as it is possible without endangering military discipline. ... their compensation should in no way depend on the temper of their superior officer, because we know what military men are, especially military men from the Old Country or Europe. Those who are serving in our Army and Navy should be compensated for injuries in the same way as the citizens in our industrial army[6].

A compromise was reached in the Senate whereby the Act would cover military personnel in their peacetime employment but would not cover members of the Naval or Military Forces while on 'active service'. 'Active service' was not defined in the 1912 Act, however the definition in the *Naval Defence Act* (supra) provided a reasonably certain basis for its application.

Accordingly, between 1912 and 1930 (when the 1912 Act was repealed), compensation for injuries sustained in peacetime military service was covered by the same legislation as compensation for civilian employees of the Commonwealth. While this was the legal position, I think it is possible that further research may reveal that a form of dual entitlement continued to operate in practice for military personnel during this time, with compensation entitlements for peacetime injuries being determined under the Defence Regulations as well as under the 1912 Act.

***World War 1***

On the outbreak of the 1914-18 War, Australia offered to make available for service overseas a force of 20,000 volunteers. Major-General WT Bridges, who was given the task of raising the force, advised the Government on 8 August 1914 that pensions should be guaranteed to men enlisting and to their dependants in case of death, and compensation in the case of disablement through wounds[7].

The *War Pensions Act 1914* was assented to on 21 December 1914 and provided for compensation for death, injury or disease incurred as a result of active service outside Australia. The scheme of this Act was later enhanced by the *Australian Soldiers' Repatriation Fund Act 1916* and the *Australian Soldiers' Repatriation Act 1917* and was finally consolidated into the *Australian Soldiers' Repatriation Act 1920*. This Act, later renamed as the *Repatriation Act 1920*, continued as the principal legislative basis for compensation for war service until its repeal and substitution by the *Veterans' Entitlements Act 1986* (the VEA).

Under the Repatriation Act, compensation was payable for injuries or death suffered during war service, including service in World Wars 1 and 2, Korea, Malaya and Vietnam. Progressively, other benefits and entitlements were introduced for veterans, including service pension, special allowances and enhanced arrangements for medical treatment such as the 'Gold Card'.

***Commonwealth Employees Compensation Act 1930***

The 1912 Act was repealed and substituted by the *Commonwealth Employees' Compensation Act 1930* (No 24/1930) (the 1930 Act) which stated:

> 4(1) ... "Employee" ... does not include –
>
> ...
>
> (b) any member of the Naval, Military or Air Forces of the Commonwealth;

discretionary and could be refused on arbitrary grounds; and there was no assurance that military personnel (particularly other ranks) would receive amounts of compensation comparable with their civilian counterparts. This view was reflected by Mr Archibald, the Member for Hindmarsh, who stated in the Parliament:

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The Second Reading Speech, delivered by Mr Beasley, Assistant Minister, made only passing reference to the complete exclusion of the Defence Forces from the coverage of this Act:

> Clause 3 provides for the repeal of the Act of 1912, but safeguards the employees' rights for which eligibility was acquired under that statute. Clause 4 contains a new definition of "employees" and indicates the classes of workers who will be entitled to the benefits of this legislation. Honourable members will notice that members of the naval, military and air forces, do not come within the definition and will, therefore, not be subject to the provisions of the bill. The impracticability of including the members of the fighting forces, who may, at times, be required to proceed on active service, will be appreciated by honourable members[8].

It appears that there was little or no division of opinion on this issue in the Parliament (a stark contrast to the controversy in 1912). An explanation for this lack of interest may possibly found at another point in the Second Reading Speech where the Minister said:

> The standing of civil employees of the Defence Department required special consideration by virtue of the fact that provision for payment of compensation had already, to an extent, been applied by regulations under the Defence Act 1903–27 and the Naval Defence Act 1910-1918. To ensure regularity, clause 14 makes provision for the repeal of any relevant regulations which may at present be in operation under the acts that I have mentioned. The usual safeguards have, however, been provided so that the rights of any employees shall not be affected in circumstances which ordinarily would have been appropriately dealt with in such regulations prior to the passage of this legislation. (p 5627)

This reference to use of the Defence Regulations for civilian Defence employees suggests that the Regulations made under the *Defence Act* and the *Naval Defence Act* may have been in widespread use at that time as a mechanism for military compensation, given that their coverage had been extended even to civilian employees of the Department of Defence. Other possible explanations for the exclusion of the Defence Forces from the civilian compensation scheme may be found in the availability of the *Repatriation Act 1920* as the preferred compensation vehicle for all of the Defence Force personnel who were veterans of World War 1, and in the relatively limited benefit structure of the 1912 Act, which capped the amount of compensation payable at a relatively low amount and did not cover occupational diseases.

While the Defence Forces were compensated under Regulations made under the Defence Act during the 1930s, there is evidence that the general principles of workers compensation, and particularly the fundamental bases of the 1930 Act, provided guidance to the discretionary application of those Regulations. This is illustrated by two cases on record in the National Australian Archives:

> 1. Lance Corporal W Ring suffered a hernia during bayonet practice on a slippery surface in a hall on 5 April 1933. The medical advice was that the hernia could be fully repaired by appropriate surgery, however this would involve a significant period of incapacity after the surgery. The member declined to undergo surgery as he had just recently gained employment and would lose that employment if he took sick leave. Instead, he sought payment of lump-sum compensation under r 173 of the Financial and Allowance Regulations, made under the Defence Act, in respect of an injury of a permanent nature. Legal advice to the decision-maker drew upon the "reasonable to undergo treatment" test well established in the general principles of workers compensation. In this case, the legal adviser considered it was reasonable for the member to refuse treatment and therefore compensation for permanent injury should be paid. The legal adviser also noted that the circumstances of the bayonet practice gave rise to a risk of a common law action. (NAA: A432, 1934/339)
>
> 2. Signaller TE Ward, a part-time member of the Forces, was injured while returning to camp from leave on 9 June 1941. As a result of his injuries, his right leg was amputated. In the Inter-departmental Committee Report submitted to Cabinet on Ward's case, it was pointed out that the principle of admitting liability for compensation in respect of injuries sustained while travelling to or from a place of employment was accepted in other Commonwealth compensation legislation such as the Commonwealth Employees Compensation Act and the Repatriation Act. Cabinet accepted the general principal of admitting liability for injuries received by part-time members of the Forces while travelling

to or from a place of employment and directed that Sig. Ward and other Defence Force members in like circumstances be compensated through s 57 of the Defence Act. (NAA: A2700, 1219B)

### *World War 2*

Following the outbreak of war in 1939 and the enlistment of the Second AIF, the *Australian Soldiers' Repatriation Act 1940* applied the Repatriation Act to servicemen and servicewomen engaged in World War 2. The Act provided for grant of pensions to members of the Forces with active service outside Australia where incapacity or death resulted from any occurrence happening during the period from enlistment until discharge. For members who only had home service, compensation entitlement arose only where incapacity or death was directly attributable to Defence service. Provision was made for Australian mariners in the *Seaman's War Pensions and Allowances Act 1940*. The *Australian Soldiers' Repatriation Act 1920* (shortened in 1950 to the *Repatriation Act 1920*) was described by the Attorney-General and Minister for External Affairs, the Right Hon Dr H V Evatt KC, in 1944 in these terms:

> The *Australian Soldiers' Repatriation Act 1920-1943* is not based upon any well-known type of legislation. Though it may have something in common with Workers' Compensation, it is an instrument which is largely *sui generis*. It represents the desire of the Australian people, through their National Parliament, to ensure that members of Australia's gallant fighting forces who have become wounded or sick as the result of their service shall be properly cared for, and that they and their dependants, and the dependants of deceased members, shall be provided for by a war pension and otherwise assisted in the economic struggle of life. The bearing of these forces in the field commands the admiration of the world, and too much cannot be done in the way of repatriation to recompense them for the sacrifices they have made in the sacred cause of liberty. (O'Sullivan, 1944, Foreword)

The history of veterans' law during World War 2, and its aftermath, is discussed in the *Toose Report* at pp 34-39.

Demobilisation of the Australian World War 2 Armed Forces was, to all intents and purposes, completed by February 1947, however a great many members had been enlisted or re-engaged for short terms of further service to become part of the British Commonwealth Occupation Forces in Japan. Because of the difficulties in setting an immediate and arbitrary cut-off date for the cessation of war-based entitlements, and in order to clarify discharge entitlements and arrangements, the *Interim Forces Benefits Act 1947* (No 46/1947) was enacted and provided for general compensatory benefits to members who continued to serve in the period 1947-49. (Skerman 1961, pp 179-80)

## 1949 - 2004

### *Commonwealth Employees Compensation Act 1948*

Members who enlisted in the Permanent Forces after 30 June 1947 were excluded, by Cabinet decision, from war service and Interim Forces compensation benefits, which gave rise to Inter-Departmental consideration of future military compensation arrangements.

A Draft Report prepared by the Department of the Treasury (Defence Division) in 1947 considered two options for military compensation, coverage under the 1930 Act or use of the Regulations under the Defence Act, showing preference for the first option. The Draft Report stated:

> Following on the decision of Cabinet (Agendum No. 1241C. See 40/2075) that the provisions of the Repatriation Act were to cease to apply to Permanent Defence personnel in respect of injuries or death attributable to service after 30th June 1947, consideration is given in this Report to the provision to be made by way of compensation for death or injury of members of that personnel.
> ...

A consequence of the decision of Cabinet as indicated above is that members of the Permanent Forces will revert to the cover of the provisions of the Defence Act. It is desirable, therefore, to consider whether this method of compensation is preferable to a pension scheme and to review the appropriateness of the provisions of the Defence Acts, regard being had to:

a) the provisions of the Regulations under the Acts which, in the case of Army and Air personnel (other than Air Force Officers who take deferred pay in lieu of Superannuation pension), place a limit of £750 in lump sum payments;
b) the requirements that the disability is "directly attributable" to service;
c) the necessity for having uniform conditions for the three Defence Services;
d) the desirability or otherwise of setting off against the compensation provision the Government's contribution to pension in cases of total or partial incapacity as provided in the present Commonwealth Employees' Compensation Act;
e) the possibility that some members will not become contributors to the Defence Forces Retirement Act when it becomes law.

Pension Method of Compensation

Advantages which may be attributed to the pension method in preference to the lump sum method of compensation are :

1) a more adequate provision is made for a member injured at an early age;
2) better provision is made for a wife and children;
3) payment continues during the whole of incapacity;
4) a lump sum may be wasted;
5) the Commonwealth may be relieved of an invalidity pension.

On the other hand, the lump sum method has the following in its favour:

1) it avoids a considerable increase in public expenditure;
2) it restricts the cost and difficulties of administration;
3) in view of the desirability of uniformity in injuries compensation, there is no impact on State policy and the possibility of increased costs therefrom in three States being passed on to the Commonwealth by way of State deficits is avoided.

The general conclusion to be drawn from the foregoing is that the pension method makes more adequate provision for the member who is retired on account of injury for his family. Where, however, the member receives, as is proposed under the Defence Forces Retirement Scheme, a pension on account of invalidity, a lump sum payment by way of compensation has advantages. Where no such pension is payable and the member is totally and permanently incapacitated, weekly payments of compensation should be continued indefinitely.

...

Future Compensation Provision

...

The main disadvantage of the present civil service compensation scheme if applied to the Permanent Defence Forces is in regard to the set-off of the Commonwealth contribution to any Superannuation pension against weekly compensation payments. As the proposed Defence Forces Retirement Scheme makes provision for incapacity pensions which will include a substantial Commonwealth subsidy, set-off of this subsidy against the weekly payments of compensation under the Commonwealth Employees' Compensation Act would result in a reduction or total loss of compensation.

It is understood, however, that amendments of the Commonwealth Employees' Compensation Act, including an increase of benefits and complete elimination of set-off, are under consideration by the Treasury.

Elimination of the set-off of pension against compensation will resolve any difficulty associated with compensation to members of the Permanent Forces who will be contributors to the Defence Forces Retirement Fund. In view of the large numbers who will not be contributors to that fund, e.g. members of the Regular Army Special Reserve, Citizen Forces and possibly some permanent members of the Forces desirous of retaining deferred pay, it is desirable to consider whether the provisions of the Commonwealth Employees' Compensation Act compare favourably with the present compensation provisions to members of the Permanent Defence Forces. It is considered, however, that, the provisions of the Act compare favourably at present and even more so if suggested Treasury proposals are implemented.

The provisions of the Commonwealth Employees' Compensation Act are limited in their application to Australia but employees injured outside Australia receive the benefit of those provisions on an act of grace basis. A similar privilege should be applied to any member of the Permanent Defence Forces injured outside Australia.

On this understanding, it is recommended:
1) that the amendment of the Australian Soldiers' Repatriation Act arising from the Cabinet's decision of 26th May, 1947, to exclude injuries attributable to service in the Permanent Defence Forces after 30th June, 1947, from the provisions of that Act be implemented as soon as possible;
2) that the Commonwealth Employees' Compensation Act be amended to permit the provisions of that Act to be applied to the personnel of the Defence Forces not on active service. (NAA: A571, 1948/430)

The *Commonwealth Employees' Compensation Act 1948* (No 61/1948) provided for the inclusion of Defence Force personnel within the coverage of the 1930 Act. The Second Reading Speech to the Bill was made by Mr Dedman, Minister for Defence, Minister for Post-war Reconstruction and Minister in charge of the Council for Scientific and Industrial Research, who stated:

> As already mentioned, it is proposed to extend the provisions of the act to employees of the Commonwealth outside Australia and to members of the peacetime defence forces. Such members, if injured in future, will receive the benefits of the Employees' Compensation Act, and if retired on account of the injury, they will receive the full benefit of the recently enacted Defence Forces Retirement Benefits Act. The present provisions of the Australian Soldiers' Repatriation Act, Defence Act, Naval Defence Act and any service regulation in relation to pension, compensation or other benefits for these peacetime members in respect of incapacity or death will be terminated. The benefits at present being paid to injured members of the peacetime forces will be reviewed and adjusted as an act of grace on the basis of the new provisions in this bill. All injured employees who, at the time this bill comes into force, are receiving weekly compensation payments under the 1912, 1930 and 1944 acts shall, it is proposed, receive the increased weekly payments provided in this bill[9].

Commonwealth employees' compensation coverage of Defence Force members on peacetime service under the 1930 Act commenced on 3 January 1949. This coverage did not include cadets, for whom act-of-grace compensation arrangements continued to apply. The *Repatriation Act 1920* continued to apply to active service such as the Malayan Emergency and service in South Vietnam.

One important issue arising from the application of the 1930 Act to military personnel was the legal test applied to link the injury suffered with the employment of the member. Under the Repatriation Act, coverage was continuous – any injury sustained during the period of war service (with some exclusions relating to self-inflicted wounds and dereliction of duty) was compensable. However, under civilian workers compensation legislation such as the 1930 Act, an injury must arise 'out of' or 'in the course of' the employment – the first requiring a causal link with employment and the second a temporal link with the activity of employment. It was argued that Defence personnel are always on duty because of the special nature of Defence service, however this was not accepted by the High Court in *Commonwealth of Australia v Wright*[10]:

> ... To support a claim for compensation the accident to a civilian employee must have arisen out of or in the course of his employment, or when travelling to or from his employment, that is to say, to or from a state of activity called "employment", as distinct from the place where that activity takes place. And so I think it is a proper inference from the Act that to support a claim for compensation the accident to a soldier must have arisen out of or in the course of his service, which would include travelling on that service to or from a military camp, and when going on leave from the camp or returning to the camp on the expiration of leave; but not otherwise for personal reasons. Neither a permanent civilian employee, even one liable as is a permanent soldier to be called upon to perform his duties at any time, eg. a fire brigade employer, nor a permanent soldier is entitled to worker's compensation if injured, say whilst taking part in a hotel brawl, on the ground that he is always in employment or service.

In cases of air accidents, until 1973, a member may also have been entitled to compensation under the *Air Accidents (Australian Government Liability) Act 1963* in respect of death or injury sustained while travelling as an air passenger at Government expense or in Government-owned aircraft[11].

***Compensation (Commonwealth Government Employees) Act 1971***

The *Compensation (Commonwealth Government Employees) Act 1971* (No 48/1971) (the 1971 Act) repealed and substituted the 1930 Act providing a new workers compensation scheme for Commonwealth employees, including the Defence Forces. The substantive provisions of the Act commenced on 1 September 1971. For the first time, cadets were included in the coverage of the Commonwealth scheme by virtue of r 11 of the *Compensation (Commonwealth Government Employees) Regulations* (SR 1971, No 112), which also commenced on 1 September 1971.

The 1971 Act provided an enhanced benefit structure, including a wider coverage of disease than the 1930 Act. The notice and claims provisions of the 1971 Act were, however, reasonably similar to those in the 1930 Act and required a notice of injury to be given within strict time limits. These strict provisions about notice of injury and form of claim continue to be very relevant in the present day because of the substantial volume of new claims for injury from the 1950s, 1960s and 1970s which continue to be received by the Military Compensation and Rehabilitation Service (MCRS) in the present day. The notice and claim provisions were significantly relaxed by amendments commencing on 1 July 1986 by the *Social Security Legislation Amendment Act 1986* (No 33/1986).

***Dual entitlement for peacetime service***

On 7 December 1972, the *Repatriation Act 1920* was extended to peacetime military service, subject to a three year qualifying period. This was an attempt to retain former National Serviceman in an all volunteer force. Coverage under the *Compensation (Commonwealth Employees) Act 1971* was retained as well but the benefits under one Act were to be offset against the benefits payable under the other[12].

The problems inherent in a system of dual entitlement was discussed at length in the Report of the 'Black Hawk Inquiry':

> 69. Dual entitlement refers to the ability for a claimant to receive benefits under two compensation schemes for the same injury or illness. This has been possible since 7 December 1972 for many, but not for all, ADF personnel depending on the type of service they have rendered. Benefits under the SRCA are offset against those under the VEA. Dual entitlement needs to be considered since, in effect, it has created a third, and more generous compensation scheme. Since 1972 it is estimated that there are approximately 210,000 former and serving members of the ADF that have eligibility for dual entitlements.
>
> 70. The misunderstanding of the offsetting arrangements amongst recipients and administrators is widespread. Dual coverage generates additional administration but has no real independent review procedures of the application of complicated offsetting provisions. Overpayments arising when calculating the effect of dual entitlement cause distress to recipients, when "expected" lump sums or pensions are withheld or reduced and the recipient is often confused by the reasons provided.
>
> 71. There is a separate method of assessment of injury under the VEA. A condition accepted under both the VEA and the SRCA results in an offsetting arrangement. This includes a "notional assessment" that has no legislative base. This happens when part of the condition is defence-caused and part is not. A "notional" apportionment is made in order to decide the incapacity from the defence-cause portion. The concept itself is difficult to explain to a claimant.
>
> 72. The Office of the Australian Government Actuary has reported that the cost of dual entitlement is greater than coverage under one or the other of the base schemes, principally because of the offsetting calculation. This is inconsistent with the intent of the arrangements for dealing with dual eligibility[13]. See annexes H and I.
>
> 73. An inquiry conducted by the Honourable Mr Justice Toose in 1975 looked at the same issue of dual entitlement. At that time submissions were made which supported the placement of the compensation arrangements for members of the Defence Forces solely within the *Repatriation Act*

*1920* replacing the *Compensation (Commonwealth Government Employees) Act 1971* (C(CGE) Act 1971).

74. Under the provisions of section 98A of the C(CGE) Act 1971 a claimant could elect not to receive certain benefits. Thus, if VEA benefits were the higher, the member could elect not to receive the weekly incapacity payments available under the C(CGE) Act 1971.

75. Mr Justice Toose expressed the following view on how the two Acts should work together:

> Broadly, where the amount of compensation awarded under the Compensation Act equals or exceeds the amount which could be paid under the Repatriation Act, no Repatriation payment is made. However, if it is less, Repatriation pension is paid at the level necessary to bring the total from both sources up to the amount that would have been paid had the Compensation Act not applied. This the member or dependant receives the more beneficial of the two provisions.

76. It was recognised that the two schemes had different levels and forms of benefit, entry criteria were different and the proof required was different. In the circumstances where the same source, that is the Commonwealth of Australia, provided both benefits this situation ought not to apply.

77. Dual payments and responsibilities mean a lesser administrative and support service by the two providers that lowers the overall standard of administrative efficiency. This comes about because claims for the same condition are examined by two sets of staff who use two sets of rules and apply two sets of policy guidelines. That can result in decisions whereby a condition is accepted under one scheme and not accepted under another.

78. When a member forgoes weekly compensation payments under SRCA in favour of a VEA disability pension there are consequences. The person would not be considered for a rehabilitation program from the Military Compensation and Rehabilitation Service (MCRS). It is presumed that the incentive to get back into the workforce has been dissipated. The earlier that intervention can occur the greater is the chance of a successful rehabilitation program and of an early return to work. Anything that operates to delay the intervention lessens the prospects for new employment. Proposed arrangements under the Veterans' Rehabilitation Scheme (VRS) will address these problems. (Department of Defence, 1997, pp 16-18)

On 30 October 1981, the concept of 'peacekeeping service' was introduced into the *Repatriation Act 1920* by the *Repatriation Acts Amendment Act 1981* and was backdated to 9 January 1947.

A new concept of 'hazardous service' was introduced into the Repatriation Act in 1985. This was in recognition of the fact that operations could occur that were not warlike in nature (eg clearance diving) but which had a higher degree of risk than normal peacetime service. The disability compensation cover provided under the Repatriation Act (and later under the VEA) for members on hazardous and peacekeeping service was the same as that for operational service.

### *Veterans' Entitlements Act 1986*

On 22 May 1986, the *Veterans' Entitlements Act 1986* (No 27/1986) (the VEA) commenced. Members on peacetime service continued to be covered under the VEA. The compensation entitlements for peacetime service were basically the same as for other forms of service, but were subject to the civil standard of proof, less generous than that for operational service. The extension of cover under the VEA for peacetime service was seen as an interim measure until such time as a military compensation scheme could be put in place[14].

Mr Clyde Holding, the Minister representing the Minister for Veterans' Affairs, in the Second Reading Speech to the Bill for the VEA described the Act as designed to achieve the following:

> ... to consolidate, rationalise and simplify the entitlements available to members of the veteran community. It represents the most important and comprehensive overhaul of the repatriation system since its establishment over 60 years ago. (*Hansard*, HR, 16 October 1985, p 2178)

A similar sentiment was expressed by the shadow Minister of Veterans' Affairs, Mr Tim Fischer, in his speech:

> ... the legislation which it replaces - the Repatriation Act of 1920 and other associated legislation - has been acknowledged as being unnecessarily complex, cumbersome and, in fact, obsolete. The object ... is to rationalise and simplify this convoluted lacework of previous legislation by replacing the existing statutes with one single, consistent document. (*Hansard*, HR, 12 November 1985, p 2499)

***Safety, Rehabilitation and Compensation Act 1988***

On 1 December 1988, the *Commonwealth Employees' Rehabilitation and Compensation Act 1988*(No 75/1988) repealed and substituted the 1971 Act. The CERC Act, which in 1992 was renamed as the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act), made some significant changes to the previous compensation scheme, including:

- an enhanced focus on rehabilitation and return to work;
- expanded lump-sum benefits for permanent impairments with impairment determined by an approved Guide modelled on the American *Guides to the Evaluation of Permanent Impairment*, which are also the source documents for the VEA's GARP;
- restricted access to common law actions for damages;
- introduction of premium and contribution arrangements.

The introduction of the SRC Act did not include any significant measures applying only to the Defence Forces, however several features of the Act were of particular relevance to the Military Compensation and Rehabilitation Service (MCRS) which administers the Act (as a delegate of Comcare) in respect of Defence Force personnel:

- the transitional provisions in Part X of the Act have been the subject of very significant litigation in relation to the closure of access to common law (in *Esber v Commonwealth of Australia* (1992) 174 CLR 430, the High Court held that actions commenced before 1 December 1988 were not affected by the new Act, and in *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, the High Court upheld the restriction on common law rights for actions arising after 1 December 1988) and in relation to the availability of compensation for permanent impairment where the injury was suffered before 1 December 1988 (see *Brennan v Comcare* (1994) 50 FCR 555, *Comcare v Levett* (1995) 60 FCR 14, *Department of Defence v West* (1998) 85 FCR 491, and *Comcare v Maida* (2002) 36 AAR 69);
- compensation for incapacity and for medical treatment become relevant only when the member is discharged from the Defence Force. At the time of discharge, members tend to make their first claim for compensation for injuries accrued during service life, leading to very long time periods between injuries and claims;
- compensation for permanent impairment under ss 24 and 27 of the SRC Act forms a much higher proportion of compensation expenditure for military personnel than for civilian employees of the Commonwealth, because of the inherent rigours of military training and the consequent high incidence of back and limb injuries. This high cost of compensation for permanent impairment was exacerbated by the decision of the Federal Court in *Schlenert v Australian and Overseas Telecommunications Corporation* (1994) 49 FCR 139 where the Court (by majority) held that employees who suffered permanent impairment before the commencement of the SRC Act on 1 December 1988 nevertheless were entitled to compensation for non-economic loss under s 27 of the Act,

even though no such entitlement existed under the 1930 or 1971 Acts. The effect of *Schlenert* was finally reversed, in relation to applications for NEL made on or after 7 December 2000, by the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2002* (No 144/2001).

### *Military Compensation Act 1994*

The *Military Compensation Act 1994* (No 54/1994) (the MCA), which commenced on 7 April 1994, closed off future access to dual entitlements under the VEA and the SRC Act, except for members who have operational service. The MCA also made some other, not very significant, changes to the application of the SRC Act to Defence Force members, including extension of cover to holders of honorary rank, members of philanthropic organisations providing services to the ADF and discharged members involved in approved post-discharge resettlement training.

Mr Punch, Parliamentary Secretary to the Minister for Defence, moved the Second Reading Speech:

> This measure, to establish a Military Compensation Scheme for members of the Defence Force, can be viewed against the recent history of compensation measures for that Force. In 1972, benefits under the Repatriation Act, which was originally designed for members on active service, were made available to Defence Force personnel on peacetime service. This cover was in addition to, but offset by, normal Commonwealth compensation cover. The Veterans' Entitlements Act, which replaced the Repatriation Act in 1986, provides for a continuation of this dual entitlement for members on peacetime service, but only until such time as a Military Compensation Scheme is established.
>
> In recognition of the special nature of Defence Force peacetime service, this Bill establishes a Military Compensation Scheme which will provide members with compensation and rehabilitation benefits available under the Safety Rehabilitation and Compensation Act, together with the following additional benefits: cover for the unintended consequences of medical treatment provided at Commonwealth expense; and, where members are discharged within 45 weeks of the date of an injury or illness that gives rise to compensation, supplementation of any earning to ensure payment equivalent to the member's normal defence salary up to the 45th week point. In addition, cadets, non-members with honorary rank, philanthropic representatives and ex-members on discharge training will be provided with cover under the enhanced Safety Rehabilitation and Compensation Act.
>
> Although cover under the Veterans' Entitlements Act is to cease for Defence Force members on peacetime service, the Government recognises that significant numbers of these members are already eligible for benefits under that Act. These personnel will retain their choice of coverage for any period of entitlement that has arisen under the Veterans' Entitlements Act before commencement of the military compensation scheme.
>
> The Government also recognises that the Military Compensation Scheme will be attractive to the non-peacetime categories of operational, peacekeeping and hazardous service, even though it was conceived primarily for Defence Force members rendering peacetime service. Because of its significant lump sum and rehabilitation benefits, which are not available under the Veterans' Entitlements Act, there will be situations where the provisions of the Military Compensation Scheme would be more appropriate to an individual's personal circumstances than those of the Veterans' Entitlements Act. That is not to say that the latter is in any way inadequate - the point is that its emphasis is on medical care and pensions rather than the lump sum and rehabilitation benefits available under compensation legislation.
>
> A key feature of the Military Compensation Scheme, therefore, is that Defence Force members on operational, peacekeeping or hazardous service will be able to choose between Veterans' Entitlement Act coverage or the enhanced Safety Rehabilitation and Compensation Act coverage. This entitlement to choice will provide a balance in the level of benefits provided for the various categories of service in that it acknowledges the greater risk and difficulty association with non-peacetime service.
>
> I might emphasise that the Government does not envisage any change to the current arrangements for administration of compensation benefits. In particular, as a function of its responsibility as an employer, the Department of Defence will administer the Military Compensation Scheme benefits that arise under the enhanced Safety Rehabilitation and Compensation Act. I commend the Bill to the House and present the explanatory memorandum. (Hansard, HR, 15 December 1993, p 4092)

***Additional compensation under the Defence Act***

The *Toose Report* (at pp 58-68) expressed its support for separation of military compensation arrangements from Commonwealth civilian employee compensation, but its consideration of the best available option for military compensation was affected by the likelihood (in 1974) of a National Compensation Scheme, as proposed by the National Compensation Bill 1994. The move to national compensation arrangements did not survive the fall of the Whitlam Government, however there has been a continuing underground voice since 1974 for a radical reshaping of military compensation arrangements.

This was given particular impetus by the Black Hawk helicopter accident in June 1996 which had a profound effect on the outcome of the *Inquiry into Military Compensation arrangements for the Australian Defence Force* (1997). This Inquiry discussed general principles of compensation in the following manner:

> **The Nature of Military Service**
>
> 16. There has been longstanding recognition by the Australian community that military service is different to other forms of employment and therefore warrants separate arrangements particularly in regard to pay and allowances, compensation and superannuation. Since World War I there have been distinct arrangements for the repatriation and compensation of members of the Australian military forces. Similarly, since 1948 separate superannuation arrangements have been in place.
>
> 17. The purpose of repatriation provisions was explained in the 1918 Australian Soldiers' Repatriation Bills as "An effort on the part of the nation ... to aim at and as far as possible secure the satisfactory re-establishment in civil life of the returned soldier that carries with it also the obligation that where men returned maimed or wounded, in order to secure their satisfactory re-establishment in civil life, everything possible should be done to secure their return to health, or to make good physical defects from which they are suffering. (Minister for Repatriation, Australian Soldiers' Repatriation Bill 1918, Hansard vol 84, p 4309)
>
> 18. The same rationale applies to the modern ADF where service is characterised by the following:
>
> - a liability for combat operations that is both compulsory and continuous, which has no parallel in any other employment;
> - limited ability to control risk (and hence deaths and injuries) during the conduct of operations;
> - adherence to a legal code of military discipline which limits normal civil freedoms and the choice that members can exercise in undertaking employment activities;
> - an employment policy that emphasises a high level of physical fitness and where injury or illness that permanently effects the individual's physical fitness standard for their job usually results in loss of employment in the ADF;
> - the availability of a comprehensive in-house health service designed to conserve ADF personnel for operational duties, providing early intervention and return to work that absorbs much of the initial cost of injury compensation;
> - personnel management practices that facilitate early treatment and return to work after injury and limit the likelihood of long-term absence from duty for other than major injury and illness;
> - a personnel employment policy where there is no likelihood of return to work in the ADF following discharge on disability grounds; and
> - a culture of care and support for the welfare and whole of life needs of ADF members and their families.

**Compensating for Risk**

19. Disability allowance, or those allowances with a disability element, are paid to all members of the ADF who are employed in a particular set of circumstances. These allowances may be considered as incentives for ADF members to undertake hazardous activities. They are not a substitute for an adequate compensation arrangement in the event of injury.

20. ADF members are required to train in peace for war. This necessarily involves inherently dangerous activities such as live fire battle practices, nap-of-the-earth-flying, night flying operations with night vision goggles, clearance diving and submarine exit training to maintain combat standards through realistic training.

21. The ADF seeks to minimise the risk involved in such activities through stringent safety precautions. This reduces, but does not eliminate the danger as the Black Hawk accident all too clearly demonstrates. In the operation of military equipment in simulated operational conditions there is comparatively little margin for error. Where errors occur there are likely to be dire consequences.

22. Any attempt to compare the incidence of death or injury within the ADF with that of other occupational groups is difficult:

- The ADF Health Service provide comprehensive in-house health-care, which tends to reduce the reporting of compensable cases and perhaps the incidence of claims made for compensation.

- It relies on reported cases and, from experience, it is clear that ADF members, until recently at least, have tended not to report their injuries until late in their military career.

- The measurement of injury rates is not a true measure of the inherent danger or risk in an occupation nor is it the basis for any compensation system. It is more of an indication of the effectiveness of peacetime occupational health and safety measures.

23. A study conducted by Lieutenant Colonel S. Rudzki[15] into injury rates in Army suggests that injury occurrence in the military is much higher than that occurring in the civil sector. His research was based on injury reports submitted over the period 1987 to 1991 and 1995/96 and showed that the injury rate per 1000 soldiers per year ranged between 133 and 247. The most comparable civilian data was from Worksafe Australia in 1993 where the highest reported rate was 65 injuries per 1000 workers per year.

24. With regard to severe injury, a search of ADF superannuation records for the period 1991-96 revealed that on average seven members per year suffer severe injury/illness that results in discharge. Of that number it was assessed that 4 or 5 would be compensable cases. These figures account for the permanent force only; they do not include Reserves or Cadets. The average figure is only indicative since the number of severe injury cases fluctuated significantly from year-to-year. Further, an analysis of permanent impairment claims in the Commonwealth jurisdiction in 1995-96 shows that the ADF generated 82 per cent of claims with the majority being for chronic permanent physical disability.

25. An examination of superannuation data on deaths in the ADF shows that they average around 40 per year and of these, Department of Defence data indicate that around thirteen per year are compensable. Such averages can also be misleading since the numbers fluctuate from year-to-year, eg 34 deaths in 1994-95, 48 deaths in 1995-96, and the statistical period can be affected by date of receipt of accident reports.

26. The key issue for consideration is perhaps not so much whether service in the ADF involves more risk than other employment, but rather whether that risk should be reflected in compensation arrangements or in some other way. (Department of Defence 1997, pp 7-9)

As a result of this Inquiry, the Commonwealth Government introduced additional compensation for severely injured members of the ADF and for the families of members killed in compensable circumstances. The Inquiry also accepted the view that there should be a single Act for the ADF for peacetime service[16].

These additional benefits were originally paid under *Defence Determination 1998/3* and, after 6 January 2000, were paid under Chapter 10, Part 5 of *Defence Determination 2000/1.*

The additional benefits comprised:

- Additional Death Benefit (ADB) payable to a surviving spouse and dependent children if 'as a result of an injury suffered, the member died, or dies, on or after 10 June 1997' (10.5.5-7);
- Severe Injury Adjustment (SIA) is payable to a member who suffers a 'severe injury' (as defined in 10.5.2) on or after 10 June 1997 and who has a degree of permanent impairment of not less than 80% (10.5.8-11); and
- reimbursement of the cost of financial advice (10.5.22).

**2004**

***Military Rehabilitation and Compensation Act 2004***

The move towards a new Military Rehabilitation and Compensation Scheme was endorsed by the *Tanzer Review* in 1999:

> **The Proposed Scheme**
>
> 6. After analysing the current arrangements, and following extensive consultation, the Review concludes that it would be inappropriate to attempt to amend the current schemes. Neither the SRCA nor the VEA individually provides a totally acceptable solution. Rather the Review considers that there should be a new scheme set up under its own Act of Parliament. There is widespread support for a new scheme but there are differences of opinion on the most appropriate legislative vehicle. The new scheme would be built from best practice principles and essential attributes of a model modern compensation scheme and would recognise the distinctive nature of military service. It would also take an holistic approach to injured personnel by integrating the safety, rehabilitation, resettlement and compensation elements.
>
> 7. The Review recommends that this new scheme should be a comprehensive one incorporating a military specific occupational health and safety component. The merging of the safety and compensation functions in this way makes an unequivocal statement about the importance of taking an integrated, modern approach to this whole area of operational support. This will remove the ADF from the operation of the *Occupational Health and Safety (Commonwealth Employment) Act 1991*. The Safety, Rehabilitation and Compensation Commission (SRCC) is unconvinced by the arguments advanced by the Review in favour of this separation. From the Review's point of view, this integrated approach to prevention and compensation is essential to the achievement of the objectives of the new scheme.
>
> 8. The SRCA appropriately forms the backbone of the benefits structure of the new scheme. However, it should also include the additional compensation which is currently payable under the Defence Act Determination and certain aspects of the VEA such as the medical assessment system, health care cards and the more beneficial standard of proof for warlike and non-warlike service.
>
> 9. The new scheme should apply to all those groups who were covered by the Military Compensation Act 1994. Thus the new scheme should cover the Permanent Force, the Reserves, former members of the ADF undergoing resettlement training, members of the Australian Services Cadet Scheme, and certain philanthropic organisations and holders of honorary rank. The benefits should apply equally to all groups on the principle of like compensation for like injury. However, in the case of self employed specialist Reserves who are deployed on overseas operations, the Review recommends that income support compensation needs to recognise their actual earning capacity. The specialists perform an essential role and their continuing recruitment is in jeopardy if more satisfactory arrangements are not put in place.

The *Tanzer Review* initially resulted in a move to co-location of MCRS and DVA offices, followed later by the transfer of the MCRS from the Department of Defence to the Department of Veterans' Affairs. The recommendations of the *Tanzer Review* were taken up in the Military Rehabilitation and Compensation Bill 2003 which proposed the establishment of a new compensation scheme for Defence Force personnel injured in peacetime service (including non-warlike and warlike service).

The Minister for Veterans' Affairs, Mrs Danna Vale, tabled the Second Reading Speech to the Bill in the House of Representatives on 4 December 2003; it stated:

The *Military Rehabilitation and Compensation Bill 2003* is the governments detailed response to the findings of the inquiry into the Black Hawk disaster and the recommendations of the Tanzer review of military compensation for a new scheme that recognises the distinctive nature of military service.

This bill sets in place the most comprehensive changes in military compensation legislation in nearly two decades.

From the commencement date, planned for 1 July 2004, the new scheme will cover all injuries or conditions arising from service in the Australian Defence Force (ADF).

This bill has no impact on current veterans or war widows who are receiving benefits under the Veterans' Entitlements Act 1986 (VEA). Current beneficiaries under the Safety Rehabilitation and Compensation Act 1988 (SRCA) will continue to receive their benefits under that act.

An exposure draft of the bill was published in June this year. Subsequent consultation with the veteran and Defence Force communities has been important in developing the legislation.

Several changes resulted from the consultation process, among them:

- inclusion of a further choice of part lump sum and part periodic payments for permanent impairment;
- extension of time allowed to choose between a lump sum and weekly payments from three to six months; and
- eligibility for the special rate disability pension safety net payment for those who are unable to work more than 10 hours per week – this encourages some part-time work for eligible members.

**Governance**

The new scheme will be administrated by an independent Military Rehabilitation and Compensation Commission, supported by the Department of Veterans' Affairs.

**Rehabilitation**

Rehabilitation is emphasised and aimed at providing injured members with the support they need to make a full recovery and to return to work where possible. Assistance provided will be sensitive to an individual's needs and circumstances. Protocols will be developed in consultation with defence and ex-service organisations to document the manner in which rehabilitation is managed.

The bill also addresses the need for assistance in the transition to civilian life for ADF members being discharged on medical grounds.

**Compensation**

The bill adopts the VEA's beneficial "beyond reasonable doubt" standard of proof for warlike and non-warlike service and the normal civil standard of "reasonable satisfaction" for peacetime service claims. It uses the statements of principles from the VEA in linking injury, disease or death with service.

There will be two types of compensation available to injured members—economic loss and non-economic loss.

Compensation for economic loss will be through incapacity payments. These payments will match, and in many cases surpass, payments under the VEA and the SRCA.

A safety net will provide a choice for eligible veterans between receiving taxable incapacity payments up to age 65, or a taxfree special rate disability pension payment for life.

Commonwealth-funded superannuation benefits will be taken into account when calculating incapacity payments so a Commonwealth benefit is not paid twice, extending the practice that already applies under the SRCA to Commonwealth public servants and members of the Australian Defence Force.

Permanent impairment payments are non-economic loss compensation. For warlike and non-warlike service, these payments will match the VEA, while members who are severely injured will have their compensation enhanced.

In most cases, permanent impairment payments for injuries from peacetime service will be enhanced from those available under the SRCA.

Members entitled to the maximum permanent impairment compensation will receive the same amount regardless of whether they were injured on warlike, non-warlike or peacetime service. In addition they will receive a lump sum payment for each dependent child.

**Death**

For eligible partners and dependants of members who die as a result of ADF service, the bill combines the best elements of existing entitlements. For widowed partners, benefits include:

- an additional aged-based amount of up to $41,200 for death connected to non-warlike or peacetime service, and up to $103,000 for death connected to warlike service; and
- a choice of a periodic payment equivalent to the VEA war widow's pension, or its lump sum lifetime equivalent.
- Dependent children may be eligible for a lump sum death benefit, initially set at $61,800 plus a weekly allowance.

These benefits are in addition to military superannuation benefits, free lifetime health care for widows through the gold card, and ancillary benefits including education allowances for dependent children.

**Treatment**

This bill blends the VEA and SRCA regimes for medical treatment. Where members have accepted conditions that do not require regular, ongoing treatment, payment will be made for reasonable costs of treatment required.

Where members require ongoing treatment, care will be provided using the VEA gold and white repatriation health cards.

**Continuation of Veterans' entitlements**

A number of entitlements currently provided in the VEA will continue to be available, including the service pension for warlike service, income support supplement for widowed partners, funeral benefits, and gold card at age 70 for veterans with warlike service.

**Conclusion**

The Military Rehabilitation and Compensation Bill and the associated transitional and consequential provisions bill are proof of this government's commitment to a military-specific rehabilitation and compensation scheme that will meet the needs of all Australian Defence Force members and their families in the event of injury, disease or death in the service of our nation.

The *Military Rehabilitation and Compensation Act 2004* (No 51/2004) received Royal Assent and commenced on 27 April 2004, along with the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004* (No 52/2004). The substantive provisions of both Acts commenced on 1 July 2004, by Proclamation in *Gazette* GN 22 of 2 June 2004 at p 1396.

A number of subordinate instruments have been made under the two Acts, including:

- *Military Rehabilitation and Compensation Regulations 2004* (SR 2004, No 156);
- *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Regulations 2004* (SR 2004, No 157);

- *Military Rehabilitation and Compensation (Members) Determination 2004 (No 1);*
- *Military Rehabilitation and Compensation (Pay-related Allowances) Determination 2004 (No 1);*
- *Guide to Determining Impairment and Compensation* - MCRA Instrument No 1 of 2004;
- *Motor Vehicle Compensation Scheme* - MCRA Instrument No 2 of 2004;
- *Determination for Providing Treatment* - MCRA Instrument No 3 of 2004;
- *Determination of Specified Rate Per Kilometre* – MCRA Instrument No 5 of 2004;
- *Determination of Rate of Interest* – MCRA Instrument No 6 of 2004;
- *Approval of Classes of Payments for the Purposes of Paragraph 431(1)(b)* – MCRA Instrument No 7 of 2004;
- *Number Specified in Writing by the Commission for the Purposes of the Definition of "Specified Number" in Subsection 138(3) of the Military Rehabilitation and Compensation Act 2004* - MCRA Instrument No 9 of 2004.

Copies of these Regulations and Instruments are available on the Web Site of the Military Rehabilitation and Compensation Commission: *www.mrcs.gov.au.*

From here, the history is yet to be made.

## BIBLIOGRAPHY

Ballard JO and Sutherland P, 2003, *Annotated Safety, Rehabilitation and Compensation Act 1988*, Sixth Edition. The Federation Press, Leichhardt, NSW and SoftLaw Community Projects, Kingston, ACT.

Baume P, 1994, *A Fair Go: Report on Compensation for Veterans and War Widows*, Report of the Veterans' Compensation Review Committee. AGPS, Canberra.

Creyke R and Sutherland P, 2000, *Veterans' Entitlements Law*. The Federation Press, Leichhardt, NSW and SoftLaw Community Projects, Kingston, ACT.

Department of Defence, 1997, *Inquiry into Military Compensation arrangements for the Australian Defence Force* (the Black Hawk Inquiry), Department of Defence, Canberra.

Heads of Workers' Compensation Authorities Australia, 1997, *Promoting Excellence National Consistency in Australian Workers' Compensation*, Final and Interim Reports to Labour Ministers' Council. HWCA Australia Secretariat, Melbourne.

Hill EF and Bingeman JB, 1981, *Principles of the Law of Workers' Compensation*. The Law Book Company Limited, Sydney.

Office of the Commissioner for Employees Compensation, 1987, *Workers' Compensation Legislation in Australia 1987*. AGPS, Canberra.

O'Sullivan GJ, 1944. *War Pensions Entitlement Appeals under the Australian Soldiers' Repatriation Act 1920-1943*, Government Printer.

Productivity Commission, 2004, *National Workers' Compensation and Occupational Health and Safety Frameworks*. Report No 27, Canberra.

Review of Veterans' Entitlements, 2003, *Report of the Review of Veterans' Entitlements* (the Clarke Report). Deakin, ACT.

Skerman AP, 1961, *Repatriation in Australia A History of Development to 1958*. Repatriation Department, Melbourne.

Tanzer N, 1999, *The Review of the Military Compensation Scheme* (the Tanzer Review). Department of Defence, Canberra.

Toose PB, 1975, *Report of the Independent Enquiry into the Repatriation System* (the Toose Report). AGPS, Canberra.

**Endnotes**

1 Skerman 1961, p 3
2 Hansard, HR, 30 October 1912, p 4836
3 Hill & Bingeman 1981, pp 1-2
4 HWCA 1997, pp 26-27
5 Hansard, HR, 24 October 1912, p 4658
6 Hansard, HR, 30 October 1912, p 4835)
7 Toose 1975, p 20
8 Hansard, HR, 7 August 1930, p 5626
9 Hansard, HR, 16 September 1948, p 532
10 (1956) 96 CLR 536, 551
11 Toose 1974, p 60
12 Tanzer 1999, Annex F
13 Attachment to report to Department of Defence March 1997.
14 Tanzer 1999, Annex F
15 Lieutenant Colonel Rudzki, Injuries in the Army – The Need for Change, Australian Defence Force Journal No 122, Jan/Feb 1997.
16 Tanzer 1999, p 1

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