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2007 AIAL ESSAY PRIZE

This edition of the *AIAL Forum* contains a sample of entries received for the ***2007 AIAL Essay Prize in Administrative Law.***

The essay prize competition is conducted in alternate years and is intended to advance the objects of the AIAL to:

(a) promote knowledge of and interest in administrative law; and

(b) publish, and encourage the publication of, papers, articles and commentaries about administrative law.

The competition is open to everyone and carries a prize of $2000. Essays may be submitted on any topic relating to administrative law and the winning entry is expected to display original thinking on the author's chosen topic. While the winning entry has traditionally been published in the *AIAL Forum*, the Institute has decided this year to publish (in this and following editions of the *Forum)* a selection of entries in the competition to showcase the high standard of entries received.

Choosing this year's winning entry was a difficult task and I am indebted to the other members of the judging panel, David Fintan, Stephen Goggs and Michael Peedom for their assistance in reading the entries and selecting entries for the final shortlist.

This year's winning essay appears in this edition of the *Forum*. Entitled, '*Avoiding the Worst of All Worlds: Government Accountability for Outsourced Employment Service'* and written by Rachel Harris this essay was considered by the judging panel to balance well the political, social and administrative law issues associated with a topical and practical issue affecting good governance in our community. Despite its emotive title, the essay was considered to be well constructed; to use sufficient and pertinent case studies to illustrate the ways in which the author argues accountability mechanisms are being eroded and to pose some interesting suggestions for future improvement.

Another topical entry dealt with the legislative regime governing telecommunications and broadcasting services in Australia arguing persuasively that, by imposing elaborate yet unenforceable statutory duties *('Duties of imperfect obligation'*) on industry players, attention has been diverted from the inadequacies of the communications regulatory system itself.

Only one topic, the enforceability of statutory provisions excluding judicial review, received attention in more than one entry while some other entries took a new look at some well established grounds of administrative law challenge such as jurisdictional fact review, 'mistake of fact' and 'no evidence', procedural fairness and ultra vires.

The role of administrative law in the political arena attracted the attention of several entrants. One essay considered the role of the Courts in resolving the internal disputes of political parties while another examined the application of public interest immunity in the context of calls for papers in the NSW Parliament.

Perhaps not surprisingly, the 'war on terror' provoked an entry to the competition. This produced a contemporary and sometimes provocative essay arguing that the Courts should play a more interventionist role in defending 'democratic values'.

I hope you will enjoy the entries appearing in this and following editions of the *Forum*.

Alan Bradbury
Vice President and Convenor of the 2007 AIAL Essay Prize

AVOIDING THE WORST OF ALL WORLDS:

GOVERNMENT ACCOUNTABILITY FOR OUTSOURCED EMPLOYMENT SERVICES

Rachel Harris*

1 OVERVIEW

This paper examines the impact of Government outsourcing within the context of recent changes to Australia's welfare system. A case study of Job Network employment services will show that outsourcing Government services may have the effect of diminishing Government accountability mechanisms, without necessarily diminishing Government control. The accountability mechanisms that have been weakened by outsourcing employment services to the Job Network are:

1. Judicial and merits review
2. Critique of Government policy by Non-Government Organisations (NGOs)
3. Public access to information via Freedom of Information (FOI) legislation

On the first issue, it will be seen that judicial and merits review do not apply to the Job Network, as the Job Network was created via contract rather than via legislation, and hence is not deemed to exercise statutory decision-making powers. It will be argued that the Job Network does indeed exercise statutory powers in practice, if not in name. Further, it is argued that the Government maintains influence over private Job Network Providers (JNPs), in much the same way as they influenced their public predecessors: the key difference is that the present relationship between JNPs and the Government is less transparent and accountable.

On the second issue of NGO critique, it will be argued that the capacity of NGOs to criticise Government policy has diminished due to the nature of their engagement with Government. As the State has retreated from the role of service provision, NGOs have been called upon

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to fill the gap. This has increased NGO budgets, while simultaneously compromising their ability to act as a check on Government power.

On the third issue of FOI legislation, it will be seen that the Job Network is not deemed to be a 'public body', and hence is not subject to the full bundle of administrative law rights and remedies. Further, the contractual relationship between the Government and JNPs is characterised as 'commercial in confidence'. Due to these characterisations, FOI legislation is largely impotent to unlock the details of Government dealings, for example tendering processes, which greatly diminishes Government transparency. These three factors are cumulatively described as producing 'the worst of all worlds'.

This paper concludes with speculative solutions to these problems. The first is to 'call a spade a spade' and allow JNPs to exercise statutory decision-making functions, given that they already do this in practice. This would bring the Government's relationship with the Job Network back within the realm of judicial and merits review. The second suggestion is that the relationship between NGOs and the Government be re-characterised as a 'social contract', which would allow NGOs to 'be themselves' and adhere to their core values, while also providing Government services. The third solution would be to ensure that a) the public has access to information with regards the Government's dealings with the Job Network; b) Government contracts with JNPs be routinely published; and c) 'commercial in confidence' exemptions to FOI legislation be made significantly more narrow. While these solutions would not produce an ideal world, it will be argued that they would, at least, avoid the worst of all worlds.

1.1 The birth of the Job Network

When the Keating Labor Government introduced its *Working Nation* reforms to Australia's welfare system in 1994, it began a welfare reform process that the Howard Government happily continued. This reform process would see the Australian Government progressively withdraw from a direct involvement in welfare provision, preferring instead to outsource employment services to private and non-government agencies. The Job Network was created in 1998 to replace Commonwealth Employment Services (CES), and is currently the primary point of contact for job seeking welfare recipients of employment age.

These changes were ostensibly introduced in order to free employment services from the burden of Government bureaucracy, and subject them instead to the rigours of the free market. In the Second Reading Speech to the Reform of the Employment Services Bill 1996, it was stated that '[t]he aim of this legislation is to establish the mechanisms to deliver employment services and to establish a fully competitive market for employment assistance to job seekers'. It was claimed that the changes would further use 'competition to drive improvements in quality, performance and price.'[1] The Senate blocked the Bill, prompting the Government to make these changes through use of its general constitutional power to enter into contracts, rather than through legislation. A web of contractual arrangements was forged with various private and community providers, who would take on the role of employment service provision. This became known as the 'Job Network'.

Employment services were contracted out on the assumption that free market accountability would be a better discipline on the Job Network than administrative law and bureaucratic regulation. This is based on the notion that '[u]nlike political institutions, for which decisions to ensure accountability have to be consciously made, the market has the advantage of having a naturalistic, built-in mechanism of accountability.'[2] The Government has nonetheless maintained substantial control over the Job Network, while simultaneously gaining an exemption from administrative law review. What has emerged is a 'highly regulated quasi-market'[3] kept on a short leash by DEWR (the Department of Employment and Workplace Relations).

Mark Considine explains:

> …the [Job Network] quasi-market is controlled by a government department that is the monopoly purchaser of services. This gives senior bureaucrats enormous power to steer this market from behind the safe walls built upon the commercial-in-confidence tender process, and contracts written leave the agencies with little room to manoeuvre. It also appears that, in such a system, neither bureaucrats nor successful contractors have incentives to have the details or processes enacted within these contracts exposed to outside scrutiny.[4]

In theory, this public-private mesh is considered desirable, as 'competition will drive down costs, enhance accountability, diminish reliance on breach action, and provide job seekers with a greater range of choice and individual service.'[5] However, in practice, welfare recipients are 'married' to a JNP, and it is very difficult for a person to choose another provider should they become dissatisfied. DEWR is the monopoly purchaser of services, and Centrelink is the sole supplier of clients. This amounts to a highly regulated and controlled 'market-bureaucracy'[6], with little accountability to the public it serves and ostensibly represents.

JNPs are subject to directions from the Government, which may be political or ideological in origin. These interventions diminish efficiencies that may otherwise have been gained by subjecting the Job Network solely to market discipline. The Government admittedly also had the capacity to steer the CES (Commonwealth Employment Service) (the predecessor of the Job Network), so this in itself is not a radical shift. The key difference is that, because the Job Network was contracted out, instead of legislated for, this 'steering' is no longer subject to the same checks and balances as before. The three key counter-balances to Government power that have been weakened are:

i. Judicial and merits review of administrative action

Services provided by the Job Network have been substantially removed from the ambit of administrative law. The package of administrative law rights and remedies roughly consists of judicial and merits review; Freedom of Information legislation; privacy legislation; and Ombudsman review. Of these, only the Ombudsman retains oversight of the Job Network.[7] This reduction has been achieved without the Government relinquishing control of the Job Network to the market, as DEWR still manages to discipline JNPs, predominantly via the private law of contract. In short, this allows the Government to substantially shirk *accountability* for the Job Network whilst still maintaining *control*.

ii. NGO critique

The second key benefit to the Government of outsourcing employment services to the Job Network is that of decreasing external criticism and community dissent.[8] In line with the neoliberal rhetoric of smaller government producing more efficient outcomes, NGOs have been contracted into the provision of employment services. This move has both captured and tamed these NGOs. Whilst Governments steer their activities, their capacity to reciprocally feed back into the public policy process through public comment, has significantly decreased. This has been achieved through a number of strategies, including disciplinary measures such as the exclusion of dissident organisations from major advisory boards; through de-funding said dissidents; through contracts requiring forewarning of media comment by NGOs; and through funding agreements that include confidentiality clauses.[9] This effectively neutralises a large number of agencies that would otherwise be best placed to criticise and inform Government welfare policy.

iii. Media and public scrutiny

The third key benefit to Government of 'contracting out', is that it acts as a 'cloaking device'[10]. This is because private providers are not subject to public access laws, such as the Commonwealth *Freedom of Information Act 1982*. This means that the substance of the relationships that the Government forms with private providers, and the performance of said providers, is 'secreted' from public view.

These checks were traded in exchange for the efficiencies of the free market, on the understanding that the market would take the wheel in respect of the outsourced functions. The promise of a free and unfettered market did not materialise, however, as the Job Network still remains subject to political controls. Without judicial or merits review, NGO critique, media scrutiny, nor even an unfettered 'free market', what we are left with is 'the worst of all worlds'.

1.2 Case study: breaching and the Job Network

The above assertions will be illustrated through a case study of one of the more controversial functions of JNPs - that of monitoring job-seeker compliance with 'activity requirements'.[11] These requirements include attending job interviews, attending TAFE courses, keeping a 'dole diary', and doing 'work for the dole'. Under the Government's 'mutual obligation' agenda, welfare recipients (which, as of June 2006 include those on Parenting Payment and the Disability Support Pension) who do not fulfil these obligations will have their payments reduced by up to 26% for 26 weeks, or suspended altogether for up to eight weeks. It is the role of JNPs to issue participation reports to Centrelink, which inform them when mutual obligations are not met, on the basis of which breach orders are made.

DEWR has the capacity to influence JNP decision-making with regards to participation reports, through contractual and other disciplinary mechanisms. The extent to which this control is being exerted is not clear, as the relationship between DEWR and JNPs is opaque, due to the aforesaid diminution of public accountability and transparency.

This situation is concerning because, while the Job Network is contractually answerable to the Government, it is not so contractually answerable to the public. The Government is not legally answerable to the public on behalf of the Job Network either. Further, the Government is not accountable to the public with regards its own dealings with JNPs, as these dealings are outside administrative law and are deemed 'commercial in confidence'.

Much of the literature on the Job Network is located in the public policy field, and is focused on how best to monitor policy implementation in a welfare framework comprised of 'some 11,000 community or church organisations [which are] in aggregate responsible for billions of dollars spent on welfare services.'[12] Enhancing contract compliance and control is usually considered to be key in this regard. To move beyond this approach, this paper poses the question: How appropriate is Departmental contractual control over the Job Network, given that this control is largely unsupervised? Stated in the alternative, if it is agreed that Government ceding unfettered control to the Job Network would be inappropriate, then how is the public to ensure that the Federal Government be held responsible and accountable for its dealings with the Job Network?

1.3 The way forward

Jenny Stewart has argued that 'Administrative law was not designed to deal with contracts, which by definition are instruments of exchange, rather than of command.'[13] But what happens when the Government uses contracts as a tool of Executive command, and are substantially unchecked? To put it simply, the less counterbalances there are to the exercise

of power, the more power the possessor holds. Planned or not, the outsourcing of employment services has substantially increased the power of the Australian Government. This is chiefly because it has decreased the counterbalances to Government power, by disempowering the judiciary, Parliament, NGOs, the public, the media and the market.

From here, two divergent paths present themselves: the first takes us back to the old days of the CES (it seems unlikely that there is political will to venture down this path); the other acknowledges the reality of Government outsourcing, and attempts to forge ahead and adapt. It will be argued that the latter of these paths should be chosen, for pragmatic reasons more so than on principle. This option would involve legislating to allow the Government to outsource some statutory decision-making functions with respect to employment services. It would also involve re-negotiating the 'social contract' between NGOs and Government, and introducing other amendments to Government Procurement and Freedom of Information legislation. It will be argued that such a course of action would not sacrifice anything more than that which has already been lost; it would merely be to 'call a spade a spade', and abandon the worst of all welfare worlds that we currently inhabit.

2. BACKGROUND

In this section the ideological framework the Government (more specifically DEWR) operates within will be sketched. This will provide background to the welfare agenda the Government is seeking to implement, as it is framed through economic and moral prisms. This ideological framework will be related to the current 'breaching' regime, which will form the focus of this case study on the Job Network.

2.1 Poverty as personal choice

According to the former Minister for Employment Services, Mal Brough MP, as many as one in six job seekers are 'cruising dole bludgers'. Brough alleges that 'these people are content to collect a benefit from the Australian taxpayer and feel that work would have a negative impact on their quality of life and free time…'[14]. These people do not deserve to be on welfare, because the welfare system is designed as a temporary stopover for citizens who are unemployed through no choice of their own. Brough goes on to warn those that feel 'relaxed about being unemployed', that he intends 'to make them feel a lot less comfortable and far more active.'[15] The eight week penalty system fits within this agenda, as according to Brough '[c]ompliance clearly is a strong motivator and also flushes out dole cheats'.[16]

According to Tony Abbott, '[i]t's the responsibility of government to try to put policies in place which over time, will allow people to improve their situation'. It is, in other words, the Government's responsibility to create a 'level playing field', which allows people to assert their own initiatives for self-improvement, unhindered by regulation or a heavy tax burden. It is not the job of Government to look after its citizens; this is the responsibility of the individual. Abbott continues:

> But we can't abolish poverty because poverty in part, is a function of individual behaviour. We can't stop people drinking; we can't stop people gambling; we can't stop people's substance problems; we can't making mistakes that cause them to be less well off than they might otherwise be. We cannot remove risk from society without also removing freedom, and that's the last thing that any government should do.[17]

Within this paradigm, unemployment and poverty are a product of individual choice. Welfare is not the solution, as it gives people an easy alternative to working for a living. Abbott explains that '[t]here are lots of dirty, difficult, risky and poorly-paid jobs which few people would choose to do if they had an alternative.'[18] Many of these low-paid, risky jobs will presumably proliferate under WorkChoices, the purpose of which is to increase the quantity

of work by decreasing its quality. It would defeat the purpose of the new Industrial Relations regime, if people were able to fall back on Welfare rather than take these 'dirty, difficult, risky and poorly paid' jobs.

Executive Officer of the Welfare Rights Centre, Michael Raper, asserts that the 'Welfare to Work' penalty system means effectively that '[i]f you were offered a job, any job, any position, and you decline it, you will suffer an 8 week no payment breach.'[19] This is supported by Abbott's statement that '[f]or people on the dole, however, there is no alternative to taking the job that's offered. Otherwise, unemployment is no longer a matter of inability to find work but a question of lifestyle choice'.[20]

2.2 Contracting out the State

'Dole bludgers' may be the rhetorical target of the Welfare to Work reforms, but there is a broader ideological agenda at work than kicking dole-cheats. The moral position 'Welfare to Work' takes is supplemented by a large dose of economic rationalism, key to which is the construction of an unfettered free market, consisting of economies, markets and money.[21] The 'invisible hand' of the market is argued to produce more efficient and productive outcomes than State regulation. For this reason, both Liberal and Labor, state and federal Governments, have, in the past 20 years, dismantled the welfare state, and cast its components adrift into a de-regulated, competitive marketplace. This has been described as the new "common sense" of politics[22], and has variously become known as Government 'outsourcing', 'contracting-out' and privatisation, or more metaphorically, governments choosing to steer rather than row.

Mark Aronson observes that in Australia, this economic paradigm has well and truly superseded that of the welfare state, as '[e]conomic theories of government intervention to correct market failure have been supplemented with theories of intractable failure by government itself.'[23] This politico-economic paradigm shift has come at a cost: chiefly a reduction in Government transparency and accountability. Richard Mulgan suggests it may be that the more efficient a service is, the less is its adherence to public law principles, and vice versa.[24] This is because bureaucrats are thought to value due process above achieving results efficiently.[25] Conversely, the private sector tends to dispense with procedural fairness and transparency, as it tends to hinder efficiency and capacity to compete. According to Dr Nick Seddon, contracting out impinges on accountability by:

- *'by-passing parliament'*: actions that would otherwise require legislation may be done by the Executive, the creation of the Job Network being a prominent example[26];
- *'keeping parliament in the dark'*: parliamentary committees are often denied access to details of contracts as these are tagged 'commercial in confidence';
- *'keeping people in the dark'*: the confidentiality of Government dealings with private providers also prevents public access to information;
- *'loss of control'*: if Government wishes to exert influence over a service provider, instead of issuing a command to rectify a problem, it must enter into a contractual negotiations with the provider;
- *'passing the buck'*: contracting out breaks the ministerial chain of command, and makes it less clear who is responsible and/or accountable for any problems;
- *'erosion of citizens rights'*: due to the principle of privity, a citizen does not have any right to sue on a contract between Government and a contracted service-provider. Rights to redress through Ombudsman, judicial or merits review are also corroded, as is the ability to make an FOI request.

- *'tying down future administrations'*: Governments are bound to fulfil contracts entered into by previous Governments, whether or not they wish to do so. [27]

The Executive is given power to enter into certain classes of contracts by legislation, but above and beyond this has a general capacity to enter into contracts without any statutory authority under s61 of the Constitution. Outsourcing allows the Executive to by-pass the legislative process, thus largely excluding parliamentary debate and public consultation. Aside from purportedly promoting greater efficiency, when government services are outsourced, they tend to fall into a black hole of 'commercial in confidence' subject matter, beyond the scope of public inquiry.[28] This means that contracts between individual JNPs and the Government are immune from scrutiny, and that the terms and conditions upon which these JNPs are engaged cannot be evaluated.

These two dimensions, economic and moral, are not necessarily co-supportive. This is because by handing over the reins to the market, the Government *potentially* cedes capacity to effect its moral agenda. However, as will be discussed, the Government has not ceded this control, and still exerts its moral and political influence over the Job Network. This is particularly the case in the compliance or 'breaching' regime, which JNPs play a key role in. Background to this regime will be detailed in the following section.

2.3 Case study focus: the breaching regime

Since July 2006, a new wave of 'Welfare to Work' reforms has taken effect. These changes have been introduced under the banner of 'Mutual Obligation', which creates 'a clear link between receiving income support payment and a job seeker actively participating in an employment related service and meeting their requirements.[29] Perhaps the most controversial of the Coalition Government's 'Welfare to Work' policy objectives, is the compliance regime JNPs are obliged to play a part in. This regime involves JNPs monitoring their clients' compliance with activity tests. To satisfy the 'Activity Test' the welfare recipient must:

> demonstrate they are actively looking for suitable paid work; accept suitable work offers; attend all job interviews; agree to attend approved training courses or programs; never leave a job, training course or program without a good reason; give Centrelink accurate details about any income earned; and enter into and carry out a Preparing for Work Agreement if asked.[30]

New applicants for Disability Support Pension and Parenting Payment now have reduced payments: single parents receive $30 less per week, and the disabled receive $45 less per week.[31] The range of people required to sign 'Activity Agreements' and subject to 'Activity Testing' has expanded, now including people with disabilities, single parents, very long term unemployed people, people on personal support programs, and mature aged unemployed people.[32]

Strict measures were introduced to ensure compliance with this regime. This notably includes 'breaching' customers who do not adequately cooperate with Centrelink, or partake enough in the employment services provided by the Job Network. If a client is 'breached' three times, or is given one 'serious breach' (for example, by being fired from a previous job for misconduct, or refusing to accept a 'reasonable' job offer), their payment will be cancelled for a period of eight weeks.

Centrelink continues to be responsible for making final decisions as to whether a breach penalty should apply. However, these decisions are substantially based upon information provided by Job Network members. JNPs are expected to ensure job seekers are aware of their obligations; actively encourage the engagement of job seekers; make reasonable efforts to contact job seekers before reporting non-compliance to Centrelink; and provide

appropriate documentation of their reasons for reporting or not reporting compliance to Centrelink.

3. DIMINISHED ADMINISTRATIVE LAW JUDICIAL REVIEW

In this section, the relationship between the Government and the Job Network will be evaluated within the context of administrative law doctrine. As will be seen, the relationship has been substantially extracted from the scope of administrative law review, rights and remedies. An account will be given of how this was done, as will the consequences flowing from this extrication.

The original (and arguably more legitimate) strategy the Coalition Government employed to implement their Welfare changes was to repeal the *Employment Services Act 1994* and introduce the Employment Services Bill. The legislature was hostile to this change, however, and the Bill was blocked. Impatient with Senate negotiations, the Executive changed tack and moved to instead create the Job Network through a matrix of contracts. An account of this is given below:

> **Senator Jacinta Collins**—I was actually hoping that the department could refresh my memory. The issue relates back to the Employment Services Act 1994. It appears that the government had intended to repeal that act by the proposed reform of the Employment Services (Consequential Amendments) Act and to introduce the Reform of Employment Services Act by the Reform of Employment Services Bill 1996, which was defeated in the Senate. Was it post that defeat that the government got advice that it did not really need this Bill to be passed anyway and went by executive power instead?
>
> **Mr. Gibbons**—What you have just read to us is partly correct. The government in introducing the Job Network had proposed to repeal the Employment Services Act –
>
> **Senator Jacinta Collins**—It wasn't Minister Reith back then, was it?
>
> **Mr. Gibbons**—to give the Job Network a statutory base with a fresh act. The legislation did not pass through the Senate in the timetable convenient to the government.[33]

The *Employment Services Act 1994* was never repealed by the legislature, and remains on the statute books. The Executive managed to avoid the 'check and balance' of the Legislature, by making 'a dubious distinction' between the purchase of employment service *processes*, which the Employment Services Act covers, and the purchase of Employment Service *outcomes*.[34] While the Executive has an indisputable power to enter into contracts on behalf of the government, Kate Owens notes that 'the question of whether legislation empowering specific government contracts modifies or displaces a more general executive power to contract is, perhaps, more controversial.'[35] Despite this uncertainty, or perhaps due to it, the Legislature passed an Act that retrospectively approved of the creation of the Job Network, rendering its legality no longer in question. The manner of the Job Network's creation was important and has continuing consequences, as by using the Executive power to contract rather than legislation to create it, administrative law review, rights and remedies substantially no longer apply.

3.1 Administrative law jurisdiction

To be reviewable, a decision must be of an administrative character and made 'under an enactment', as per the *Administrative Decisions (Judicial Review) Act 1977(ADJR)* (ss 3 and 5). The final decision to 'breach', or disqualify a job seeker from benefits due to an infringement of the activity test or an Activity Agreement, will fall under the ADJR Act. Centrelink has the official delegation to make this decision, even though 'these decisions are now made on the basis of information provided by Job Network Agencies.' JNP decisions with regards 'breaching' a client are deemed not to be made under an enactment, and hence not of an administrative character. This is due to the bifurcated nature of the decision to

breach a client, with the JNP sending through a negative participation report, and Centrelink making the final statutory decision as to whether or not to impose the breach penalty on the basis of this report.[36]

Such antecedent decisions made by the Job Network are not subject reviewable, as *Australian Broadcasting Tribunal v Bond*[37] ruled that only complete and final decisions, not pre-decisional errors, are subject to the ADJR Act. Further, *Neat Domestic v Australian Wheat Board*[38] and *Griffith University v Tang*[39] have firmly established that in Australia, judicial review will not be extended to government functions which have been contracted out. Meanwhile, a merits review application to the Social Security Appeals Tribunal is only available for 'officers' making decisions under the *Social Security Act 1991* (Cth). Since Job Network members are not officers, but 'merely provide services under the terms of their contracts,' their decisions are not subject to merits review either.[40]

3.2 Breach fluctuations

The imposition of financial penalties is not new to Australia's social security system; payment reductions for not cooperating with welfare providers have long existed. What has caused alarm in recent years is the explosion in the volume and severity of these penalties, since the Coalition Government came to office. Between 1997 and 2001, breaching penalties rose by 340 per cent[41]. Breaching rates have, on the whole, risen dramatically since the inception of the Job Network. In 1997-1998 breach rates were at 120,718[42], then rose dramatically to a high-point of 386,946 in 2000-2001. Following a surge of public pressure from community organisations to bring these figures down[43], they fell to 98,272 in 2003-2004, but in the 2005-2006 financial year rose again to 132,447.[44] In the 1999-2000 financial year, 24% of breaches originated from breach recommendations by JNPs. This spiked in the next 6 months to February 2001 to 39%. In that same year JNPs were responsible for at least 50% of all third breaches that result in an eight week non-payment period.'[45] While a high proportion of JNP recommendations are rejected by Centrelink and do not result in a penalty being imposed on the unemployed person, the fact remains that an increasing proportion of all breaches are initiated by JNPs.[46] Following the surge of public pressure to reign in this trend of increasing breach-penalties, the Government acted to bring down the level of breaching, and by 2003 they were back down to pre-1997 levels, though they have begun to rise steadily once more.[47]

The increase in breaching was caused by a combination of factors, including increased departmental pressure on Centrelink to discipline clients with breach penalties. The volume of breach reports being passed to Centrelink for evaluation also increased, as 'Job Network agencies came under contractual pressure to report non-compliance with participation plans.'[48] The above stated moral position of the Government with respect to welfare recipients may to some extent explain why it might seek, through DEWR, to control the Job Network in such a way as implement a more punitive compliance system.

This contractual pressure on the Job Network at one stage included a Key Performance Indicator (KPI) that stipulated that a set percentage of breach reports should be referred across to Centrelink. After this became public an outcry ensued, and 'breach quotas' are apparently no longer included as express contractual terms. There is no guarantee of this however, because these contracts are confidential. Indeed, the only reason the 'breach quota' policies became known was that the information was leaked by an anonymous source from within Centrelink. A system of accountability that relies upon phantom informants to break confidentiality is patently inadequate.[49]

The fact that breaching rates are so sensitive to political pressure from the Executive, through DEWR, either to bring breaching numbers up or down, suggests that administrative ideals are not being adhered to. The political sensitivity of breach rates troubles the ideal of

democratic accountability, because it indicates that those implementing the legislation (JNPs and Centrelink) are not doing so independently. This is more concerning in the case of the Job Network, because outsourcing social security functions to non-government bodies (i.e. JNPs) has taken such dealings outside of the ambit of merits and judicial review and FOI transparency mechanisms.

According to the 'separation of powers' doctrine, rules are to be created by the legislature, and their enforcement is delegated via the executive to lower level 'neutral' bureaucrats, who adjudicate individual cases. The role of the judiciary, in this case, is to act as a check upon the Executive, in order to ensure that they do not act in excess of the power they have been legitimately granted by the legislature. However, any pressure that DEWR puts on JNPs is not reviewable, as the relationship is deemed private and confidential, as opposed to public and transparent.

The power to take away a person's livelihood for a period of two months is grave, and the consequences for persons affected can be severe.[50] For this reason, the lack of exposure to judicial or merits review is significant because '[a] number of decisions made solely by [job network] members under their contracts can have important ramifications for job seekers.'[51] JNPs have a wide discretion as to what sort of assistance will be provided to the job seeker, for example, whether to attend TAFE, what training will be appropriate, and what job a client will be 'suitably' placed in. Owens notes that 'if a job seeker disagrees with any of these judgements and therefore refuses to cooperate, it is the member's responsibility to report them for a potential breach…'[52] Although Centrelink makes the final decision as to which clients will be breached, 'its decisions are instigated by, and reliant on, information provided by members. Indeed, members themselves have suggested that they essentially possess the power to breach job seekers.'[53]

3.3 Findings of fact v findings of law: a dubious distinction

The rationale for JNP decision making being exempt from review, is that it is characterised as a mechanical, antecedent 'fact finding' process, which requires no discretion. It is Centrelink that purportedly makes the normative decision as to how the relevant legislation applies to these facts. This is a dubious philosophical distinction, and although the problem is relatively abstract, it has very real consequences for the rights of welfare recipients.

Part B, clause 4 of the *Social Security Act 1991* sets out the obligation of specified classes of job seekers to fulfil their activity test requirements in order to be eligible for social security benefits. A JNP is obliged to inform Centrelink if these activity requirements have not been met, for example, where a job seeker refuses a job offer. This is construed as a question of fact, yet the determination of a 'breach' requires substantial normative input from the Job Network Member, and as such arguably involves questions of law. Aronson *et al* summarise the difference between questions of fact and law thus:

> A question of fact involves an inquiry into whether something happened or will happen, and is quite separate from any assertion as to its legal effect. A question of law involves the identification and interpretation of a norm, which is usually of general application.[54]

The finding that an activity test requirement has been breached is reliant upon the JNP being satisfied that there was no 'reasonable excuse'[55] for the participation failure, and that the client has not taken 'reasonable steps'[56] to fulfil their obligations. This is consistent with Aronson et al's observation that '[f]act finding inevitably involves a prior knowledge of what facts might be legally relevant. We cannot know which facts to look for unless we know why we are looking, and it is the law which tells us that.'[57] When a client does not do what they are expected to do, their conduct becomes 'reportable' to Centrelink: this is a discretionary judgement. In spite of being contractually bound to report all non-compliance with activity

agreements to Centrelink, 'in practice, studies have reported significant variation in agencies' willingness to recommend breaches.'[58] David de Carvalho further explains that 'while [a JNP's] funding contract gives them no *official* discretion about whether or not to report breaches or possible breaches, they do exercise a *de facto* discretion of this kind.'[59]

If it is accepted that JNP decisions actually involve the exercise of statutory discretions, and make 'findings of law', the fact that they fall outside the ambit of judicial review, is concerning. Further, the variability in JNP breach recommendations raises concerns in terms of treating like cases alike, a key element of administrative fairness. A solution could be to insist that DEWR control JNP decision-making more vigorously, given that they involve statutory discretions. However, this would potentially undermine the administrative law doctrine that prohibits the fettering of delegated discretions.

This exemplifies one of the unresolved contradictions in administrative law: the imperative to make administrative power accountable back up the chain of command; and the countervailing principle that discretion, once delegated, must be exercised by the delegate alone, unhindered by direction or dictation.[60] This doctrine labels as 'improper' 'an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case.'[61] This problem is exacerbated in the case of JNPs, because their relationships with DEWR are not subject to judicial review. This means that the public has no way of knowing whether or not discretions are being exercised appropriately by JNPs, or if they are being inappropriately fettered by DEWR.

4. DIMINISHED NGO SCRUTINY OF GOVERNMENT POLICIES

The State's retreat from welfare provision has provided the non-government sector an opportunity to fill the void that was left behind. This has been a mixed blessing. NGOs have been boosted financially, whilst simultaneously neutralised, as their capacity to publicly criticise Government policies has diminished. Their new role as government service providers has also compromised the ability of these NGOs to adhere to their own values and priorities. According to Considine, contractual pressure has meant that non-profits have been pushed to de-prioritise their own goals, such as 'granting everyone an equitable share of service resources', and 'responding to needs rather than to market signals'.[62]

DEWR disciplines the Job Network largely through contractual mechanisms. Written into contracts are terms requiring:

- strict confidentiality;[63]
- regular reporting to DEWR;[64]
- compliance with contractual Key Performance Indicators;[65]
- compliance with changing Departmental policies;[66]
- general departmental access to JNP premises and records; [67] and
- general departmental access to JNP databases and IT systems[68]

Job Network contracts are obtained through a process of competitive tendering, and exist under a cloud of uncertainty, given that there is no guarantee that their contracts with DEWR will be renewed. The Draft Services Contract includes a terms stating that '…DEWR may, as its sole option, extend the Service Period for one or more periods of time up to a total of three years, by giving notice to the Provider not less than 20 Business Days prior to end of the Service period.'[69] This uncertainty naturally acts as an ever-present discipline, encouraging JNPs to behave in such a way as to increase the likelihood that DEWR will re-engage them. If the Provider 'fails to fulfil, or is in breach of an of its obligations under [the]

Contract'[70], DEWR may exercise an array of remedies, including the withholding of funding instalments; the reduction of funding or fees; the reduction of participant numbers and the scope of the service, to name but a few.

Far from operating in a 'free market' where JNPs are at liberty to devise their own methods of producing optimal outcomes, free of regulatory or bureaucratic constraints, JNPs exist under DEWR's looming guillotine, constant surveillance, and detailed contractual regulations. Off-site contract managers at DEWR monitor JNP performance against contractual targets.[71] According to MacDonald *et al*, there has been at certain times 'increased pressure from [DEWR] on the Job Network and Centrelink to increase breaching'.[72] The Commonwealth Ombudsman similarly found that there was 'indeed increased pressure on the Job Network to apply breaches to customers without evidence or due process, and such recommendations were being readily accepted and processed by Centrelink.'[73]

4.1 The taming of the third sector

This partnership between NGOs and the government has come at a cost, and has in part recast these organisations in the government's own image. Contracting out Government services has allowed the Federal Government to 'tame' the welfare sector, as entering into partnerships with Government has increasingly meant that NGOs must become depoliticised. These partnerships put NGOs in a conflicted position, and Smith warns that in such situations:

> …voluntary sector and social movement organisations may find themselves practicing a politics that is profoundly ambiguous, namely, a politics that, in some ways, entails participation in implementing neoliberal policies and practices, and that, in other ways, resists such policies and practices.[74]

A large body of evidence suggests that, once welfare agencies have been brought on board, the Executive will not let them *be themselves*. Chalmers *et al* observe that this 'social coalition' causes '[d]iscrepancies from conflicting objectives and a lack of commitment from service providers to government goals. While governments pursue cost cutting and efficiency, community groups such as churches and charities may emphasise community service.[75] It has been alleged that this is part of a broader Government push to silence dissent, and 'by outsourcing welfare… the Howard Government has also been able to extend its reach to silence another group.'[76]

Organisations that have been critical of government policy have lost influence and favour to those willing to toe the government's line. Sarah Maddison and Clive Hamilton argue that both the Salvation Army and Mission Australia are two organisations that have been 'captured' through their willingness to work with government.[77] The appointment of members of these organisations to government advisory boards, to 'prestigious positions' and the allocation of 'large sums of federal government money' are just some of the benefits these 'tamed' organisations have garnered.[78] Their policy advice is also more likely to be taken on board.[79] Bacon asserts that the competitive tendering process is divisive and has corroded 'relationships between community agencies, which had hitherto involved the sharing of information, experience and resources.'[80]

Wilma Gallet, who instigated the Salvation Army's *Employment Plus* Job Network Agencies, articulates the conflicted position NGOs have found themselves in:

> The reality is that our agencies report increasing government control over their programs, and decreasing discretion and freedom to implement the kinds of programs that most truly reflect our core mission.[81]

Ray Cleary, the CEO of Melbourne City Mission, similarly 'raised concerns that the Job Network contract barred public comment on social justice issues; hence church-based providers could lose their independence to advocate for the marginalised.'[82]

The taming of welfare NGOs has been achieved through a variety of techniques, such as the Panopticon like 'EA3000'[83] IT system JNPs are required to use, and which DEWR has total access to. The efficacy of these techniques has been evinced by the shift in the changing behaviour of non-profit NGOs: In 1996 not for profits spent considerably more time with their clients than did the for-profit JNPs, but by 1999 there was little to no difference between these agency types[84], presumably due to the contractual and economic pressures inherent in NGO enlistment in the Job Network.

4.2 Biting the hand that feeds them

Whether the Government likes it or not, their relationship to JNPs is one of exchange, rather than purely command. This means that the Job Network has one bargaining chip up its sleave, namely, the power not to come to the table. Particularly when they work together, this power can be utilised to assert a 'check' upon the more draconian aspects of the Government's welfare policies.

In 2006 exactly this occurred, when JNPs boycotted a scheme whereby certain 'vulnerable' clients would be subject to 'financial case management' when they are cut off payment for 8 weeks.[85] This scheme would involve JNPs deciding what a client's financial priorities are, and paying their bills for them. Church-based JNPs were finally pushed to boycott this system, their chief objection being that the scheme was abhorrent to their 'core mission' or role as advocates of marginalised groups. It was claimed that 'the 8 week loss of income was simply punitive, that it didn't acknowledge the complex difficulties many people have sticking to the rules: undiagnosed mental illnesses are a big issue, and homelessness is another.'[86] This 'financial case-management' initiative fell on its face, given that there were insufficient JNPs willing to implement it.

Given that the Government needs these agencies to do its bidding, these boycotts may be used to pressure the Government to grant these 'advocacy NGOs' more independence in feeding back into the public policy process. There may be further opportunities for JNPs down the track to collectively 'bite the hand that feeds them' with regards the harsher aspects of the breaching regime, in order to avoid being completely coopted by the Government's agenda.

5. DIMINISHED PUBLIC SCRUTINY OF GOVERNMENT PERFORMANCE

Recent events involving Opposition Leader Kevin Rudd and his wife Therese Rein have brought attention to the ambiguous relationship between the Australian Government and the Job Network. After it was revealed in May 2007 that 58 employees of Rein's Job Placement business were paid less than award wages,[87] Rein was pressured to sell the business in order to avoid a real or perceived conflict of interest that may arise if Rudd becomes Prime Minister.[88] An underlying issue that received less attention was the more fundamental lack of transparency in the tendering process between the Government and individual JNPs. This lack of transparency means that if Rein had not committed to sell her Australian Job Placement Business, neither the public, the media, nor the Parliament, would be able to adequately assure itself that the conflict was not causing problems.

The reason for the opaqueness of the Government-JNP relationship is that the individual contracts that make up the Job Network, and form the essence of the relationship between JNPs and the Government, are deemed 'commercial in confidence'. John Jessup describes the frustration that this can produce for unsuccessful JNPs:

> You would send in a request or a complaint or ask for clarification of what went wrong with your tender, or how you might enhance it for next time, and basically get told, "Sorry, we can't answer your question"; it's either commercially in confidence or they refer you back to the guidelines, or they say, "We don't know, you need to talk to Canberra."'[89]

Such commercial in confidence claims are not only a source of frustration for JNPs themselves; they frustrate basic principles of democratic accountability. In order to ensure that Governments are accountable for the fulfilment of their designated functions, it is essential that the public have access to *information*. In the case of the Job Network, this information includes details of the basis on which JNPs are contracted to perform Government services, and whether or not these functions are being met. Anecdotal evidence from those accessing employment services will not be sufficient to construct a detailed and holistic picture of how a Government service is being run. There is therefore a strong public interest dimension to making this information available, a view supported by Administrative Review Council, which stated:

> A service recipient may seek access to information in order to provide evidence of service delivery problems or support a view as what the contract requires. Access to information by members of the public in general and service recipients in particular may enable a broader evaluation of the performance of contractors.[90]

Confidential commercial information is exempt from the operation of the Commonwealth *Freedom of Information Act 1982* by virtue of ss 43 and 45, which are essentially designed to protect commercial value and privacy. This exemption is problematic, as the same information may hold private interests that support confidentiality, and public interests that support disclosure. [91] It may be in private interests that sensitive information be kept secret from competitors. Yet it is also in the public interest to know how the public purse is being spent, whether the tendering process is valid, whether the terms on which contractors are engaged are suitable, and whether on-going relations between DEWR and the Job Network are appropriate. It is presently too easy for Government lawyers, and the lawyers of the agencies they contract with, to include excessive commercial in confidence claims.

Tony Harris explained to ABC Radio National's *Background Briefing:*

> I've been approached by two very large financial institutions in Australia who are now complaining to me that governments are requiring confidentiality provisions which even they in the private sector believe are so restrictive as to be massively inappropriate. Now it appears to me that governments just don't want to be accountable, and are using private sector participation and so are reducing the amount of information that's available. It is really outrageous.[92]

It has been suggested that Government outsourcing is consistent with a general preference for secrecy. Warwick Funnel contends that 'government has found that it can still shield itself from a prying public by shifting as much responsibility for service delivery as possible to providers more at a distance from immediate public influence.'[93] Particularly in the case of services that a Department is relatively new to administering (as is the case with DEWR and the Job Network), and which may be the subject of political controversy, there is a 'natural inclination to disclose as little as possible'.[94] These assertions do not require conspiracy theories to be supportable; they are a mere manifestation of the logic of power and its accumulation. As Funnel explains:

> Secrecy has long been a characteristic of both government and private business. Societies controlled by privileged and powerful interest groups, classes or parties prefer secrecy to disclosure and are less compelled to answer for their actions… they particularly do not relish the exposure of their faults.[95]

5.1 The scope of secrecy

The Joint Committee for Public Accounts and Audit (JCPAA) consulted with various stakeholders in 2000 on the issue of Government use of commercial-in-confidence clauses. Commenting on this practice, the Australian National Audit Office stated that 'it is probably too easy at the moment for agencies to claim commercial-in-confidence. We think the weighting should come back the other way…'[96] The Senate Finance and Public Administration References Committee was less equivocal in the issue, stating:

> The Committee is firmly of the view that only relatively small parts of contractual arrangements will be genuinely commercially confidential and the onus should be on the person claiming confidentiality to argue the case for it. A great deal of heat could be taken out of the issue if agencies entering into contracts adopted the practice of making contracts available with any genuinely sensitive parts blacked out.[97]

The JCPAA directly addressed the problem of commercial-in-confidence claims with respect to DEWR Employment Services Contracts. Consultations with DEWR revealed a markedly secretive attitude to parliamentary inquiries. According to DEWR, it was 'satisfactory for the parliament to know the total cost of the Job Network and the outcomes being achieved for that money.'[98] In this view, it is enough for Parliament to know how much money goes into, and how many outputs emerge from, the black hole of the Government's relationship with the Job Network. DEWR explained that '[p]arliament will be able to have how many outcomes are being achieved in every category and how much public funds are being used to achieve those outcomes. I think that is what parliament requires.' According to this view, accountability relates merely to expenditure, as opposed to conduct.

The JCPAA firmly rejected DEWR's position, maintaining that 'the parliament and its various committees will determine what information is needed to scrutinise executive government'. In the present circumstances, the public and the parliament have no means of ascertaining whether or not there are genuine reasons for exempting government contracts from FOI legislation or notifying contracts in the *Purchasing and Disposal Gazette*.

5.2 Unsupervised contractual supervision

Richard Mulgan contends that a basic problem of contracting out is that the relationship it sets up is too narrow. He states:

> Because contracting out confines the duty of contractors to the performance of the terms of contracts and confines the right of supervising principals to enforcing the terms of the contract, it rules out the possibility of day-to-day supervision and intervention.[99]

In opposition to this description, it is here argued that the substance of the relationship is in fact broad, and that a good deal of 'micro-management' occurs by virtue of the comprehensive access DEWR has to the Job Network's IT system, records and statistics. The draft contractual provisions are Government policy objectives. For example 49.1(b) of the Draft Services Contract with JNPs states that:

> The provider must, in carrying out its obligations under this contract, comply with any of DEWR's policies notified by DEWR to the provider in writing, referred to or made available by DEWR to the Provider (including by reference to an internet site), including any listed in the Specific Conditions.[100]

Such provisions allow DEWR to influence and change day-to-day practices of JNPs. The example of the Breaching Regime discussed above illustrates the reality that DEWR indeed exerts heavy influence over JNP practices, particularly when aspects of JNP operations become politicised. It is here contended that the Job Network is in fact supervised closely by DEWR; the real problem is that this supervisory power is not balanced with accountability. It

is commonly accepted that outsourcing diminishes Ministerial responsibility, as Departments ostensibly relinquish control to NGOs. This allows Ministers to disclaim much responsibility for the day-to-day dealings of the Job Network. However, given that DEWR has ubiquitous access to JNP data and computer systems, they act as a highly intrusive 'all-seeing-eye' on JNP operations.

FOI and privacy legislation do have some bearing on the Job Network, but they do not apply directly. This is because although JNPs carry out public functions, they are not 'public bodies' for the purposes of the ADJR Act. FOI and privacy legislation apply to greater or lesser extents via contractual arrangements with various Departments, which impose idiosyncratic complaints procedures, privacy restrictions and access requirements. This causes some confusion, as agencies that now carry out Government functions do not have the same compliance and accountability cultures that exist in the public sector, and are often subject to differing requirements:

> Not only do these departments have different procedural requirements as noted above, but on interpretation of privacy issues in the same or very similar situations, they often differ, both between themselves and within each department. All of these factors make it difficult for an organisation such as Not For Profit to comply with privacy requirements at a best practice level.[101]

Given the privity of the contracts between DEWR and each individual JNP, citizens are not able to bring actions against individual JNPs for breaches of FOI or Privacy legislation. It is arguably inappropriate to rely on DEWR to instead police Job Network compliance in this regard, given that a major purpose behind this legislation is to provide direct, unmediated accountability to the citizenry, with respect to information pertaining to individuals, and policies that affect citizens more broadly.[102] Further, given these contractual arrangements are confidential, the public is presently not even able to assess whether or not the terms of JNP contracts *allow* DEWR to protect the public sufficiently.

It is suggested here, that in order to ascertain whether or not the system is working as it should, the blindfold of 'commercial in confidence' claims should be removed. The ubiquitous use of 'commercial in confidence' clauses in contracted out services has the potential to short-circuit the democratic system, by blacking-out the interface between the public and the Government that serves them.[103] This interface must first be transparent if it is to permit accountability. It is precisely this transparency that is undermined in the case of the Job Network, by over-use of confidentiality claims and the consequent non-applicability of Freedom of Information legislation.

6. CONCLUSIONS: AVOIDING THE WORST OF ALL WORLDS

In the arena of Employment Service Provision, there has, in recent years been a dramatic reduction in transparency and accountability. This paper has argued that this is due chiefly to the ousting of merits and judicial review, the 'taming' of NGOs engaged in the Job Network, and the 'secreting' of the Job Network and its relationship with DEWR from public view. The Job Network is not accountable to a 'free market', but rather a 'highly regulated quasi-market'[104], over which DEWR still exercises substantial and largely unsupervised control. The 'check' of the legislature is also avoided, because the basis of the Job Network was contract, rather than legislation.[105]

This paper will conclude with speculative solutions to the problem of Government accountability (and its precondition of transparency) for outsourced employment services. This will involve a reinvigoration of the three diminished counterbalances to Government power detailed in this paper, namely, administrative law review, NGO critique and public scrutiny.

6.1 Administrative law review

It is suggested that if government services must be outsourced, then administrative law supervision should be extended to cover the activities of outsourced agencies, given the nature of the power they exercise over the citizenry. This will mean making the job network, particularly with respect to their involvement in the compliance regime, subject to the full compliment of administrative law rights and remedies, including ombudsman review (as presently exists), merits review, judicial review, freedom of information legislation and privacy legislation. The why and the how of this enterprise is set out briefly below.

It was noted in the 2002 Report *Making It Work*, that in relation to the social security system, 'it is inevitable that mistakes will be made, or appear to be made, in some of the very high volume of matters handled by the system.[106] It was also maintained that 'there are many occasions on which its operation in relation to particular jobseekers can be reasonably described as arbitrary, unfair or excessively harsh.[107] This applies to JNPs as much as it does to Centrelink, as when someone is 'breached', it is the result of a number of incremental decisions, made by both JNP and Centrelink staff. In recognition of this, two key steps need to be taken:

1. the breaching regime should be clarified and simplified by giving JNPs the statutory delegation to make decisions to 'breach' welfare recipients;

2. these decisions must be made fully accountable, and the conditions under which they are made must be made transparent.[108]

In relation to the first point, outsourcing statutory decision-making functions directly to JNPs would clarify exactly who is responsible for such decisions, by removing the bifurcated decision-making process that is currently shared by JNPs and Centrelink.[109] Decreasing the complexity of the system would lead to less information loss and increased efficiency.

In relation to the second point, accountability would be achieved by making JNP decisions reviewable by the SSAT on the basis of merit. As it currently stands, according to s 129(1)(a) of the *Social Security (Administration) Act 1999* (Cth) a person may appeal to the SSAT if they are affected by 'a decision of an officer under the social security law'. In order to implement this change, the definition of 'officer' would need to be expanded to include relevant JNP staff exercising statutory delegations. This would entail usual rights of appeal to the AAT and Federal Court.

Judicial review would provide a further layer of accountability to JNP decision making. Allowing Government to contract out certain legislative functions set out in the *Social Security Act 1991* (Cth) would bring JNP statutory functions within the ambit of judicial review. Added benefits of judicial review would include, for example, giving welfare recipients recourse to natural justice, as described in the excerpt below:

> Courts have always placed strict requirements on the right of a person to be afforded natural justice before a penalty is imposed. This carries two principles relevant in the present context. First, the onus of establishing a breach of the law leading to the imposition of a penalty is on the party asserting that a breach has occurred. Second, a penalty cannot be imposed unless the person affected has a reasonable opportunity to present their case in answer to the assertions being made against them. Neither of these basic principles of the rule of law are sufficiently observed in the administration of the breaches and penalties system.[110]

In order to achieve this expansion of judicial review, it would be necessary to pass legislation equivalent to that proposed by the Employment Services Bill of 1996. In hindsight, it seems that opposition to this bill may have been misguided. This would allow JNPs to exercise statutory decision making functions, which would fall within the range of decisions

reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Given that JNPs already exercise these functions in practice (if not in name), to do so would merely 'call a spade a spade'. These decisions would then be subjected to supervision, which would check inappropriate fettering or dictation from DEWR.

This step has been taken in the UK, for example in the *Contracting Out (Functions Relating to Child Support) Order 2006*.[111] This order allows the Crown to contract out some of the Child Support Agency's functions to the private sector, namely 'some clerical case management, debt collection and additional trace activity.'[112] This does not mean that *every* function may be out-sourced; when debating this order Lord Skelmersdale asserted that he would 'need to be much more convinced that case management should ever be contracted out…'[113] This order may have given the Crown more explicit capacity to outsource some of its functions, however, it was debated and passed through Parliament. The relationship is consequently more transparent and operates within the realm of administrative law doctrine, rights and remedies.

While not a completely satisfactory solution, this legislative move would avoid the 'worst of all worlds' predicament that now exists, by bringing the Job Network back within the ambit of administrative law supervision. The bureaucratic burden of the Job Network being made transparent and accountable may result in decreased market efficiencies, but these efficiencies were already diminished by (unsupervised) Government controls. In any case, this trade off is arguably not too high a price to pay for a functional democracy.

6.2 NGO critique

In recent years the State has been reconfigured, with Government shrinking and the non-government sector being called upon to fill the gap. This has caused a blurring of boundaries between the government, non-government and business sectors. As these three sectors begin more and more to intermingle, new concepts of governance and accountability need to be developed.

An example of such re-conceptualisation can be found in the various 'compacts' being negotiated between Government and third sector agencies.[114] David de Carvalho has suggested a 'renegotiation of the social contract' between government and the non-government sector. Instead of a model of democracy where the government 'steers' and NGOs 'row', de Carvalho suggests that we adopt a model where the state directs and coordinates the activities of said NGOs, whilst recognising that each NGO responds to different community needs in different ways. State governments within Australia are already making such efforts, for example in June 2006 the NSW State Government and the NSW Human Services Sector began to implement the Working Together for NSW Agreement. This agreement seeks to provide a collaboratively designed framework setting out the 'values and principles that guide working relationships between the two sectors.'[115] A similar agreement has been forged in the UK, between the government and third sector.[116] Such agreements will hopefully go some way to ameliorating the 'conflict of interest' currently inherent in working with Government, by letting these NGOs 'be themselves' and adhere to their own community oriented value-base. More broadly, De Carvalho asks:

> Can we develop a form of contract that enhances both the ability of the public and Parliament to hold governments accountable for contracted services and the ability of civil society organisations to be faithful to their own ethos and accountable to their own mission?[117]

There is not space within this paper to do full justice to de Carvahlo's proposition. However, various academics and activists are increasingly engaged with this problem.[118] Suffice it to say, that de Carvahlo's call for the re-thinking and reinvigoration of civil society, warrants further consideration by all stakeholders, in particular, by Government.

Even without this, there remain advantages to NGOs, in bringing the Job Network within the scope of judicial and merits review. While NGO independence and capacity to criticise government may still be compromised, their relationship would nonetheless be open to public and judicial scrutiny, and their discretion more freely exercisable. Further, there has been increasing awareness of the costs and risks that NGOs take in taking up these Government contracts. NGOs will have to weigh up these risks, and it may well be that they start to reject contractual arrangements which compromise their advocacy work.

6.3 Public scrutiny

In order for government to be accountable it must first be transparent. In order to achieve this, steps must be taken to ensure that there is a much freer flow of information into the public domain. As Goodman asserts, '[i]n a system which actually withdraws basic income support as a penalty, it is critical that all safeguards work both efficiently and beneficially, as the system tends to assume guilt until innocence is proven.'[119]

The first step is to make government contracts available for public view. Nick Seddon suggests in this regard that

> there needs to be a radical change of policy by governments. The solution is to adopt the American habit of publishing government contracts in their entirety with deletions only for information that is genuinely confidential, such as trade secrets.[120]

In this vein, amendments should be made to the Commonwealth FOI and procurement legislation, to ensure that 'commercial in confidence' claims are not abused. This means that the mere presence of a commercial dimension to a transaction between government and a non-government party should not obscure the fact that the transaction is also profoundly public in nature. In short, the public nature of the Job Network needs to be properly recognised in Commonwealth procurement and FOI legislation.

Presently, the *Senate Order on Government Agency Contracts* requires DEWR to merely list the contracts it has engaged in, state whether or not there are confidentiality provisions therein, and provide a coded reason for such provisions, such as 'trade secret, other' or 'Privacy Act, other'.[121] The basic problem is that it is presently far too easy for Government lawyers to insert broad confidentiality provisions within Government contracts, with little justification. A range of accountability options aimed at ameliorating this problem is detailed below.

With respect to Parliamentary accountability, the Australian National Audit Office made the following recommendations:

> - that budget funded agencies… ensure that before they enter into any formal or legally binding undertaking, agreement or contract that all parties to that arrangement are made fully aware of the agency and contractor's obligation to be accountable to parliament;
>
> - that any future Requests for Tender and contracts entered into by a Commonwealth agency include provisions that require contractors to keep and provide sufficient information to allow for proper parliamentary scrutiny, including before parliamentary committees, of the contract and its arrangements.[122]

With respect to disclosure to the public, the Australian National Audit Office recommended that strict criteria be applied before information is deemed confidential from the public. Accordingly, information to be protected must:

- be able to be identified in specific rather than global terms
- have necessary quality of confidentiality

- prove that there is 'detriment to the confider' if made public[123]

The Victorian Parliament Public Accounts and Estimates Committee has recommended the creation of a legislative framework which renders Government contracts *prima facie* public, and requires 'specified information about all tender documents and the resulting contract to be made publicly available... unless application is made at that time restrict publication.'[124] A good example of such legislation is the ACT's Government Procurement Amendment Bill 2001, which restricts recognition of 'commercial in confidence' clauses. A poor example of this is the NSW *Freedom of Information Amendment (Open Government – Disclosure of Contracts) Act 2006*, which leaves the 'commercial in confidence' exemption fully intact, and contains the proviso that 'Information is required to be published under this section by an agency only to the extent that the agency has the information or it is reasonably practical for it to obtain the information.'[125]

Disappointingly, little has been done in recent years to correct the present information imbalance. David Marr laments:

> The failure of freedom of information laws, which the High Court last year confirmed gives federal ministers virtually a free hand to withhold documents from the public. Calls for reform of the FOI laws by the press, NGOs, lawyers' groups and the Commonwealth Ombudsman, have all been ignored.[126]

In order for the principles of 'Open Government' to be upheld, there must be a reversal of the onus that presently exists in favour of confidentiality. This is essential both to protect the basic rights of the citizenry to have access to information with respect to their individual dealings with Government agencies, and more broadly to ensure that the activities and relationships that Government agencies engage in are appropriate and accountable.

6.4 Summary

It has been argued here that outsourcing employment services has lead to a weakening of counterbalances to Government power, without the government needing to sacrifice control. This has lead to a crisis in accountability, which poses fresh challenges to Australia's democratic system.

Speculative solutions to these problems have been offered, in the hope that debate about Australia's welfare system and outsourcing more generally, may be reinvigorated. These solutions involve re-subjecting the Job Network to judicial and merits review, reconfiguring the Government's relationship with civil society, and amending FOI legislation in order to expose the Job Network to the light of public scrutiny. While these solutions admittedly would not produce an ideal world, it is suggested that they would, at least, avoid the worst of all worlds.

Endnotes

1 Senator Campbell 'Reform of the Employment Services Bill 1996' *Commonwealth of Australia Parliamentary Debates: Senate Official Hansard Thursday*, 12 December 1996, p.7260
2 Funnel, Warwick *Government By Fiat: The Retreat From Responsibility* University of New South Wales Press, Sydney, 2001, p.69
3 Considine, Mark 'Governance and Competition: The Role of Non-profit Organisations in the Delivery of Public Services' *Australian Journal of Political Science* 38:1 2003 p.75
4 Considine, Mark 'Governance and Competition: The Role of Non-profit Organisations in the Delivery of Public Services' *Australian Journal of Political Science* 38:1 2003 p.75
5 Carney, Terry, & Ramia, Gaby 'Mutuality, Mead and McClure: More 'big M's' for the Unemployed? (Paper presented at *Mutual Obligations and Welfare States in Transition in Australia, the US and the UK, Session 5*, a Conference organised by Australian Academy of Social Sciences, Sydney University, 2001) cited in Bacon, Rachel 'Rewriting the Social Contract? The SSAT, the AAT and the Contracting Out of Employment Services' *Federal Law Review* 2, 2002, p.3

6 See Considine, Mark 'Governance and Competition: The Role of Non-profit Organisations in the Delivery of Public Services' *Australian Journal of Political Science* 38:1 2003 p.75
7 This came into effect in 2005. Ombudsman only has recommendatory powers. See the *Migration and Ombudsman Amendment Act 2001*. The Privacy Commissioner imported privacy legislation principles into the contracts between Job Networks and the Government. However, given the privity of contract, only the Government may sue a JNP with regards these terms, on behalf of the citizen.
8 See Maddison, Sarah, & Edgar, Gemma 'Into the lion's den: Challenges for NFPs in their relationships with government' *Strategic Issues in the Not for Profit Sector* Chapter Eight, UNSW Press 2007 (forthcoming); Maddison Sarah & Hamilton, Clive "Non-Government Organisations" *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling Debate* Clive Hamilton & Sarah Maddison (Eds), Allen & Unwin, 2007, pp. 78-101,
9 Sawer, Marian 'Governing for the Mainstream: Implications for Community Representation' *Australian Journal of Public Administration* 61:1 2002 pp.42-46
10 Campbell, Joel 'Government Outsourcing Leads to Cloaked Figures' *The Quill* 94:9 2006 p.28
11 Social security recipients must comply with both Ádministrative' and Áctivity Test'requirements. Administrative requirements include providing Centrelink with details of any paid work undertaken and attending interviews. Failure to comply with Activity requirements generally attract higher penalties than that of Administrative requirements, however, it has been noted that 'many administrative requirements, such as attendance at interview, have been included in activity agreements. Should a breach of such a requirement then occur, it attracts the higher penalties applicable to activity test breaches.' Pearce, Dennis, Disney, Julian & Ridout, Heather *Making it Work: The Report of the Independent Review of Breaches and Penalties in the Social Security System* Fineline Print & Copy Service, Sydney, March 2002, p.5
12 Chalmers, Him, and Davis, Glyn 'Rediscovering Implementation: Public Sector Contracting and Human Services' *Australian Journal of Public Administration* 60(2), 2001, p.81
13 Stewart, Jenny, 'Administrative Law in the Age of the Contract' in John McMillan (ed), *Administrative Law under the Coalition Government*, 1997, p.152
14 Mal Brough, MP, Minister for Employment Services, Media Release: 'Brough to Target Cruising Dole Recipients' 20 May 2002, accessed at www.workplace.gov.au
15 Ibid
16 Ibid
17 Tony Abbott MP 'Background Briefing: Soul Searching About Welfare' ABC Radio National 1 October 2006, accessed at www.abc.net.au/rn/backgroundbriefing/stories/17488895.htm
18 Tony Abbott MP, Minister for Employment, Workplace Relations and Small Business, 'Speech: Motivating Job Seekers' CEDA Lunch, Canberra, 31 March 2000.
19 Raper, Michael, ABC Radio National, 6:12 Am, 10/11/06, accessible at http://www.abc.net.au/rn/breakfast
20 Tony Abbott MP, Minister for Employment, Workplace Relations and Small Business, 'Speech: Motivating Job Seekers' CEDA Lunch, Canberra, 31 March 2000
21 Pusey, Michael "Economic Rationalism, Human Rights and Civil Society" *Australian Journal of Human Rights* (1998) vol. 8, www.austlii.edu.au/au/journals/AJHR/1998/9.html p. 11
22 Smith, Miriam 'Resisting and reinforcing Neoliberalism: lesbian and gay organising at the federal and local levels in Canada' *Policy & Politics* 33:1 p.76
23 Aronson, Mark, 'A Public Lawyer's Responses to Privatisation and Outsourcing', in M. Taggart (ed.). *The Province of Administrative Law* Oxford, Hart, 1997, p.69
24 Mulgan, Richard *Contracting Out and Accountability* Graduate Public Policy Program, Australian National University: Discussion Paper 51 May 1997
25 Anyone who has applied for a job in the public sector would have an acute appreciation of this.
26 The so called 'WA Inc' saga was another example of how Executive contracting-out powers can be abused.
27 Seddon, Dr Nick 'Is Accountability A Cost of Contracting Out?' in Chris Finn (ed) *Sunrise or Sunset? Administrative Law for the New Millennium* Papers presented at the 2000 Administrative Law Forum, Australian Institute of Administrative Law Inc, 2000, pp.38-40
28 Mulgan, Richard, 'Government Accountability for Outsourced Services' *Australian Journal of Public Administration* 65:2 2006, p.48
29 Australian Federal Government 'New Compliance Arrangements' *Request for Tender – Job Network Services* Part 3.2.15, p.66. Accessible at DEWR Website www.workplace.gov.au under 'tender documents' November 2005.
30 Lackner, Sue, and Marston, Greg, 'System Error: An analysis of Centrelink Penalties and Job Network participation reporting' Paper produced by the Centre for Applied Social Research, School of Social Science & Planning RMIT University, August 2003, p.3
31 Additionally, people with disabilities who study full time now get $110-$165 less and single parents $60 a week less.
32 Australian Council of Social Services 'Welfare to Work – Effects & Solutions' available on www.acoss.org.au
33 Commonwealth of Australia Official Committee Hansard Employment, Workplace Relations, Small Business and Education Legislation Committee; Consideration of Additional Estimates Senate, Wednesday, 9 February 2000, p.69
34 Owens, Kate, 'The Job Network: How Legal and Accountable are its Unemployment Services?' *Australian Journal of Administrative Law* vol. 8 Feb 2001, p.52
35 Ibid, pp.51-52

36 Bacon, Rachel 'Rewriting the Social Contract? The SSAT, the AAT and the Contracting Out of Employment Services.' *Federal Law Review* 2002, issue 2, accessed at htpp://www.austlii.edu.au/au/journals/FedLRev/2002/2.htm, p.1
37 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321
38 *Neat Domestic Trading Pty Limited v AWB Limited* [2003] HCA 35 (19 June 2003)
39 *Griffith University v Tang* [2005] HCA 7 (3 March 2005)
40 Owens, Kate, 'The Job Network: How Legal and Accountable are its Unemployment Services?' *Australian Journal of Administrative Law* vol. 8 Feb 2001, p.58
41 Eardley, Tony, 'The Impact of Breaching on Income Support Recipients' *Social Policy Research Centre Newsletter* No 91 November 2005, p.1
42 ACOSS Tax Reform Hitlist: 'Breaching the Safety Net: the harsh impact of social security penalties', 2001, accessible at http://acoss.org.au/info/2001/305x.docp.3
43 Anon 'Breach Numbers Fall Below 100,000' *Rights Review* December 2004, p.3
44 "Centrelink Quarterly Breach Data" accessible at www.workplace.gov.au
45 ACOSS Tax Reform Hitlist: 'Breaching the Safety Net: the harsh impact of social security penalties', 2001, accessible at http://acoss.org.au/info/2001/305x.docp.10
46 Ibid, p.9
47 Eardley, Tony, 'The Impact of Breaching on Income Support Recipients' *Social Policy Research Centre Newsletter* No 91 November 2005, p.1
48 Ibid
49 The informant here referred to sent a number of anonymous faxes to the Welfare Rights Centre in Sydney signed 'the phantom' *Consultation with the Welfare Rights Centre, Sydney*
50 See ACOSS Tax Reform Hitlist: 'Breaching the Safety Net: the harsh impact of social security penalties', 2001, accessible at http://acoss.org.au/info/2001/305x.doc
51 Owens, Kate, 'The Job Network: How Legal and Accountable are its Unemployment Services?' *Australian Journal of Administrative Law* vol. 8 Feb 2001, p.58
52 Ibid
53 Ibid
54 Aronson, Mark, Dyer, Bruce, and Groves, Matthew *Judicial Review of Administrative Action* 3rd Edition, Lawbook Co., Sydney, 2006, p.185
55 '**Reasonable Excuse:** A reason given by the job seeker for a potential failure in relation to a specific requirement, for example a scheduled appointment with an Employment Service Provider / Community Work Co-ordinator of job interview, which is determined by Centrelink to be outside the job seeker's control or not reasonably foreseeable by the job seeker. This may also be taken into consideration by an Employment Service Provider when able to contact a job seeker prior to submission of a Participation Report.' Cited from a Centrelink training manual for the Centrelink Training Session for Welfare Rights Centre and the Commonwealth Ombudsman's Office, October 2006
56 '**Reasonable Steps:** The level of effort required of a job seeker in relation to ongoing participation requirements for example, a job seeker's job search and participation in other activities to improve their employment prospects… a failure is determined to have occurred where the reason for not complying was within the job seeker's control or was reasonably foreseeable by the jobseeker.' Cited from a Centrelink training manual for the Centrelink Training Session for Welfare Rights Centre (Sydney) and the Commonwealth Ombudsman's Office, October 2006
57 Aronson, Mark, Dyer, Bruce, and Groves, Matthew *Judicial Review of Administrative Action* 3rd Edition, Lawbook Co., Sydney, 2006, p.189
58 Bacon, Rachel 'Rewriting the Social Contract? The SSAT, the AAT and the Contracting Out of Employment Services.' *Federal Law Review* 2002, issue 2, accessed at htpp://www.austlii.edu.au/au/journals/FedLRev/2002/2.htm, p.4
59 De Carvalho, David 'The Social Contract Renegotiated: Protecting Public Values in the Age of Contracting' in T. Eardley and B. Bradbury (eds) *Competing Visions: Refereed Proceedings of National Social Policy Conference 2001* SPRC Report 1/02, Social Policy Research Centre, University of New South Wales, Sydney, 2001, p.130
60 Aronson describes two major schools of administrative law thought. The first is the 'incrementalist' model, which favours bureaucratic discretion, as policy is thought to be more suitable and responsive when developed at the 'coal face' of implementation. The other is the 'comprehensive rationality' model, which is intolerant of discretionary flexibility, given that it is seen to roam free of democratic accountability mechanisms. See Aronson, Mark, Dyer, Bruce, and Groves, Matthew *Judicial Review of Administrative Action* 3rd Edition, Lawbook Co., Sydney, 2006, pp. 275-6
61 Section 5(1)(e), Ibid, p.277
62 Considine, Mark 'Governance and Competition: The Role of Non-profit Organisations in the Delivery of Public Services' *Australian Journal of Political Science* 38:1 2003 p.73
63 Australian Federal Government *Draft Services Contract*, Appendix D to the Job Network Request for Tender document, part 22 entitled 'Confidential Information' p.169
64 Ibid, part 13 entitled 'Reporting' p.177.
65 There is potentially wide scope for Departmental discretion in defining these KPIs, which are defined in the *Draft Services Contract* as 'the indicators so described and set out in the Specific Conditions or as notified to the Provider from time to time' Ibid, part 1 entitled 'Interpretation and Precedence', p.169

66 This includes 'any of DEWR's policies notified by DEWR to the provider in writing, referred to or made available by DEWR to the Provider (including by reference to an internet site) including any listed in the Specific Conditions.' Ibid, part 49.1 entitled 'Compliance with Laws and Government Policies' p.199
67 Ibid, Part 49.1 entitled 'Access to Premises and Records' p.185, see also *Job Network Monitoring Authority Bill 2000*
68 This includes a 'DEWR override' power, which reads 'DEWR reserves the right to manage all aspects of providers' DEWR IT systems, including user accounts, system roles, security contact authorisation and all system access rights and may change these without notice to providers'. Ibid, Appendix E to the Job Network Request for Tender document, entitled 'Access to DEWR's IT systems', p.262
69 Ibid, Part 36 entitled 'Remedies', p.193
70 Ibid, part 2 entitled 'Term of This Contract' p.171
71 Lackner, Sue, and Marsdon, Greg, 'System Error: An analysis of Centrelink Penalties and Job Network participation reporting' Paper produced by the Centre for Applied Social Research, School of Social Science & Planning RMIT University, August 2003, p.19
72 cited by Schoonveldt, Simon, 'Do the lived experiences of people who have been breached by Centrelink match the expectation and intent of the Howard Government?' PHD Dissertation, University of Queensland, p.24
73 McLeod, cited by Schoonveldt, Simon, 'Do the lived experiences of people who have been breached by Centrelink match the expectation and intent of the Howard Government?' PHD Dissertation, University of Queensland, p.29
74 Smith, Miriam 'Resisting and reinforcing Neoliberalism: lesbian and gay organising at the federal and local levels in Canada' *Policy & Politics* 33:1 p.76-77
75 Chalmers, Him, and Davis, Glyn 'Rediscovering Implementation: Public Sector Contracting and Human Services' *Australian Journal of Public Administration* 60(2), 2001
76 Staples, Joan, 'NGOs out in the cold: the Howard Government Policy Towards NGOs' *Democratic Audit of Australia* Discussion Paper 19/06/2006, p.12 See also Maddison, Sarah, & Edgar, Gemma 'Into the lion's den: Challenges for NFPs in their relationships with government' *Strategic Issues in the Not for Profit Sector* Chapter Eight, UNSW Press 2008 (forthcoming); *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling Debate* Clive Hamilton & Sarah Maddison (Eds), Allen & Unwin, 2007.
77 For example, Patrick McClure, the former CEO of Mission Australia, headed the government's review of the welfare system, is a member of the community Business Partnership and in 2003 was made an Officer of the Order of Australia. Maddison and Hamilton link these successes to the public position McClure took during the GST debates, which was 'counter to the position of other major welfare groups and more aligned with the government's position'. Maddison Sarah & Hamilton, Clive 'Non-Government Organisations' *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling Debate* Clive Hamilton & Sarah Maddison (Eds), Allen & Unwin, 2007, pp.88-89
78 Hamilton, Clive & Maddison, Sarah, 'Dissent in Australia' *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling Debate* Clive Hamilton & Sarah Maddison (Eds), Allen & Unwin, 2007 p16.
79 For example the Salvation Army's zero
80 Bacon, Rachel 'Rewriting the Social Contract? The SSAT, the AAT and the Contracting Out of Employment Services.' *Federal Law Review* 2002, issue 2, accessed at htpp://www.austlii.edu.au/au/journals/FedLRev/2002/2.htm p.10
81 'Soul Searching About Welfare' Transcript of *Background Briefing* on ABC Radio National 1 October 2006, available at: http://www.abc.net.au/rn/backgroundbriefing/stories/2006/1748895.htm
82 Rapson, Michael, 'The Job Network: An Instrument of 'supply-side' profiteering' *Dissent* 20Autumn/Winter 2006
83 See Foucault, Michel *Discipline and Punish: The Birth of Prison* trans. Alan Sheridan, Random House, 1977
84 Considine, Mark 'Governance and Competition: The Role of Non-profit Organisations in the Delivery of Public Services' *Australian Journal of Political Science* 38:1 2003 p.73
85 'Charities unhappy with federal govt plan' June 5, 2006 *Sydney Morning Herald* Accessed at: *http://www.smh.com.au/news/NATIONAL/Charities-unhappy-with-federal-govt-plan/2006/06/05/1149359633640.html#*;
Horin, Adel 'Hillsong emerges to serve jobless' *Sydney Morning Herald* July 13 2006, accessed at: http://www.smh.com.au/news/national/hillsong-emerges-to-serve-jobless/2006/07/12/1152637740392.html
86 Carlisle, Wendy, 'Background Briefing: Soul Searching About Welfare' ABC Radio National 1 October 2006, accessed at www.abc.net.au/rn/backgroundbriefing/stories/17488895.htm
87 Coorey, Phillip and Davis, Mark 'Yes indeed Therese, we need to talk' *Sydney Morning Herald* May 26, 2007, accessed at www.smh.com.au 26/05/2007
88 Anon 'Rein to Sell Business' *Sydney Morning Herald* May 26, 2007 accessed at www.smh.com.au 26/05/2007
89 John Jessup, quoted in ABC Radio National *Background Briefing* Sunday 1 November 1998, Accessed at http://www.abc.net.au/rn/talks/bbing/stories/s19075.htm 23/05/2007
90 Administrative Review Council, *The Contracting Out of Government Services,* Issues Paper (1997) at para 5.42, cited in Moira Patterson 'Commercial in Confidence Claims, Freedom of Information and Public Accountability – A Critique of the ARC's Approach to the Problems Posed by Government Outsourcing' in

Creyke, Robin & McMillan, John *Administrative Justice – the Core and the Fringe*: *Papers presented at the 1999 National Administrative Law Forum* Australian Institute of Administrative Law Inc, 2000, p.244

91 Moira Patterson 'Commercial in Confidence Claims, Freedom of Information and Public Accountability – A Critique of the ARC's Approach to the Problems Posed by Government Outsourcing' in Creyke, Robin & McMillan, John *Administrative Justice – the Core and the Fringe*: *Papers presented at the 1999 National Administrative Law Forum,* Australian Institute of Administrative Law Inc, 2000, p.245

92 Tony Harris, quoted in ABC Radio National *Background Briefing* Sunday 1 November 1998, Accessed at http://www.abc.net.au/rn/talks/bbing/stories/s19075.htm 23/05/2007

93 Funnel, Warwick *Government By Fiat: The Retreat From Responsibility* University of New South Wales Press, Sydney, 2001, p.15

94 Moira Patterson 'Commercial in Confidence Claims, Freedom of Information and Public Accountability – A Critique of the ARC's Approach to the Problems Posed by Government Outsourcing' in Creyke, Robin & McMillan, John *Administrative Justice – the Core and the Fringe*: *Papers presented at the 1999 National Administrative Law Forum,* Australian Institute of Administrative Law Inc, 2000, p.244

95 Funnel, Warwick *Government By Fiat: The Retreat From Responsibility* University of New South Wales Press, Sydney, 2001, p.14

96 Joint Committee of Public Accounts and Audit *Contract Management in the Australian Public Service* Parliament of the Commonwealth of Australia, CanPrint Communications Pty Ltd, October 2000, p.29

97 Ibid

98 Ibid, p.31

99 Mulgan, Richard *Contracting Out and Accountability* Graduate Public Policy Program, Australian National University: Discussion Paper 51 May 1997, p.11

100 Australian Federal Government *Draft Services Contract*, Appendix D to the Job Network Request for Tender document, part 49.1 entitled 'Compliance with Laws and Government Policies', p.199. Accessible at DEWR Website www.workplace.gov.au under 'tender documents' November 2005.

101 Not For Profit Business Review *Submission to the Review of the Private Sector Provisions of the Commonwealth Privacy Act 1988* 15 December 2004, pp. 1-2

102 See Mulgan, Richard *Holding Power to Account* Antony Rowe Ltd, Great Britain, 2003, pp.98-103

103 See de Maria, William 'Commercial-in-Confidence: An Obituary to Transparency?' *Australian Journal of Public Administration* 60:4 Dec 2001, pp. 92-109

104 Considine, Mark 'Governance and Competition: The Role of Non-profit Organisations in the Delivery of Public Services' *Australian Journal of Political Science* 38:1 2003 p.75

105 Bacon summarises the present situation: The overuse of the Executive's power under s60 to contract out government functions to the private sector has the potential to radically restructure the Australian system of government. It does so by taking away from the courts the jurisdiction to oversee the exercise of public power through judicial review. Moreover, because this would occur via the exercise of Executive power, it bypasses any involvement by the Legislature, thereby threatening notions of representative democracy. Bacon, Rachel 'Rewriting the Social Contract? The SSAT, the AAT and the Contracting Out of Employment Services.' *Federal Law Review* 2002, issue 2, accessed at htpp://www.austlii.edu.au/au/journals/FedLRev/2002/2.htm, p.6

106 Pearce, Dennis, Disney, Julian & Ridout, Heather *Making it Work: The Report of the Independent Review of Breaches and Penalties in the Social Security System,* Fineline Print & Copy Service, Sydney, March 2002, p.16

107 Ibid, p.12

108 This issue of transparency, principally involving Freedom of Information legislation, will be dealt with in 6.3 below.

109 Presently JNPs are not required to detail circumstances that may explain non-compliance, and many 'do not submit such material and, as a result, Centrelink is not given an adequate foundation for its investigations and the likelihood of inappropriate imposition of breaches is substantially increased.' Pearce, Dennis, Disney, Julian & Ridout, Heather *Making it Work: The Report of the Independent Review of Breaches and Penalties in the Social Security System,* Fineline Print & Copy Service, Sydney, March 2002, p.68

110 Ibid, p.15

111 This order was made under powers conferred to the Crown by section 69 of the *Deregulation and Contracting Out Act 1994.*

112 Lord Skelmersdale 'Contracting Out (Functions Relating to Child Support) Order 2006, *Hansard: House of Lords Debates* Tuesday 20 June 2006, 7:36pm

113 Lord Skelmersdale 'Contracting Out (Functions Relating to Child Support) Order 2006, *Hansard: House of Lords Debates* Tuesday 20 June 2006, 7:36pm

114 See Casey, John and Dalton, Bronwen 'The Best of Times, the Worst of Times: Community-sector Advocacy in the Age of "Compacts"' *Australian Journal of Political Science* 41:1, 2006

115 New South Wales Government & the Forum of Non-Government Agencies *Working Together: An agreement between the NSW government and NSW non-government human services organisations* Jointly published by NSW Department of Community Services and the Forum of Non-Government Agencies, June 2006

116 see www.thecompact.co.uk

117 de Carvalho, David 'The Social Contract Renegotiated: Protecting Public Values in the Age of Contracting' in T. Eardley and B. Bradbury (eds) *Competing Visions: Refereed Proceedings of National Social Policy*

Conference 2001 SPRC Report 1/02, Social Policy Research Centre, University of New South Wales, Sydney, 2001, p.130

118 For example Marion Sawer, Sarah Maddison, Clive Hamilton, Richard Denniss, Joan Staples & Graham Maddox.

119 Goodman, James, 'New Deals and Privatising Unemployment in Australia *Journal of Australian Political Economy* 40 1997, p.31

120 Seddon, Nick 'Accountability and Contracting Out' in Finn, Chris *Sunrise or Sunset? Administrative Law for the New Millennium*: , Australian Institute of Administrative Law Inc, 2000, p.46

121 This list is available on the DEWR website at: www.dewr.gov.au/NR/rdonlyres/D9E4A4DC-A617-4B50-9506-F0D4A0F26CDD/0/MurrayMotion2006DEWR.pdf

122 Senate Finance and Public Administration Reference Committee *Commonwealth Contracts: A New Framework for Accountability,* The Parliament of the Commonwealth of Australia, Sept 2001, p.11

123 Ibid, p.10

124 Public Accounts and Estimates Committee, Parliament of Victoria *Commercial in Confidence Material and the Public Interest* March 2000, p.115

125 Section 11 *Freedom of Information Amendment (Open Government – Disclosure of Contracts) Act 2006*

126 Marr, David 'Careful, he might hear you' *Sydney Morning Herald* June 2-3 2007, p.31

References

Abbott, Tony, MP 'Background Briefing: Soul Searching About Welfare' ABC Radio National 1 October 2006, accessed at www.abc.net.au/rn/backgroundbriefing/stories/17488895.htm

ABC Radio National *Background Briefing* Sunday 1 November 1998, Accessed at http://www.abc.net.au/rn/talks/bbing/stories/s19075.htm 23/05/2007[126]

ACOSS 'Ending the Hardship: Submission to the Independent Review of Breaches and Penalties in the Social Security System', ACOSS INFO 316, 17 December 2001

ACOSS Tax Reform Hitlist: 'Breaching the Safety Net: the harsh impact of social security penalties', 2001, accessible at http://acoss.org.au/info/2001/305x.doc

Australian Council of Social Services 'Welfare to Work – Effects & Solutions' available on www.acoss.org.au

Allars, Margaret, 'The Rights of Citizens and the Limits of Administrative Discretion: The Contribution of Sir Anthony Mason to Administrative Law' *Federal Law Review* 28, 2000

Anon 'Breach Numbers Fall Below 100,000' *Rights Review* December 2004

Anon 'Charities unhappy with federal govt plan' June 5, 2006 *Sydney Morning Herald* accessed at: *http://www.smh.com.au/news/NATIONAL/Charities-unhappy-with-federal-govt-plan/2006/06/05/1149359633640.html#*

Anon, 'Soul Searching About Welfare' Transcript of *Background Briefing* on ABC Radio National 1 October 2006, available at: http://www.abc.net.au/rn/backgroundbriefing/stories/2006/1748895.htm

Anon 'Rein to Sell Business' *Sydney Morning Herald* May 26, 2007 accessed at www.smh.com.au 26/05/2007

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

Aronson, Mark, Dyer, Bruce, and Groves, Matthew *Judicial Review of Administrative Action* 3rd Edition, Lawbook Co., Sydney, 2006

Arora, Neil 'Not So Neat: Non-Statutory Corporations and the Reach of the Administrative Decisions (Judicial Review) Act 1977' *Federal Law Review* 32: 6 2004

Australian Federal Government *Draft Services Contract*, Appendix D to the Job Network Request for Tender document, part 49.1 entitled 'Compliance with Laws and Government Policies'

Bacon, Rachel 'Rewriting the Social Contract? The SSAT, the AAT and the Contracting Out of Employment Services.' *Federal Law Review* 2002, issue 2, accessed at htpp://www.austlii.edu.au/au/journals/FedLRev/2002/2.htm

Brough, Mal, Minister for Employment Services 'Job Network is Producing Results' Media Release 11 April 2001

Carlisle, Wendy, 'Background Briefing: Soul Searching About Welfare' ABC Radio National 1 October 2006, accessed at
www.abc.net.au/rn/backgroundbriefing/stories/17488895.htm

Carney, Terry, and Ramia, Gaby, 'Contractualism, Managerialism and Welfare: the Australian Experiment with a Marketised Employment Services Network' *Policy and Politics* 29, 2001

Chalmers, Jim, and Davis, Glyn, 'Rediscovering Implementation: Public Sector Contracting and Human Services'

Considine, Mark 'Markets, Networks and the New Welfare State: Employment Assistance Reforms in Australia' 28:2 *Journal of Social Policy* 1997

Considine, Mark 'Governance and Competition: The Role of Non-profit Organisations in the Delivery of Public Services' *Australian Journal of Political Science* 38:1 2003

Considine, Mark 'Governance and Competition: The Role of Non-profit Organisations in the Delivery of Public Services' *Australian Journal of Political Science* 38:1, 2000

Coorey, Phillip and Davis, Mark 'Yes indeed Therese, we need to talk' *Sydney Morning Herald* May 26, 2007, accessed at www.smh.com.au 26/05/2007

Creyke, Robin & McMillan, John *Administrative Justice – the Core and the Fringe*: *Papers presented at the 1999 National Administrative Law Forum* Australian Institute of Administrative Law Inc, 2000

Davies, A.C.L., *Accountability: A Public Law Analysis of Government by Contract* Oxford University Press, New York, 2001

De Maria, William 'Commercial-in-Confidence: An Obituary to Transparency?' *Australian Journal of Public Administration* 60:4 Dec, 2001

De Carvalho, David 'The Social Contract Renegotiated: Protecting Public Values in the Age of Contracting' in T. Earddley and B. Bradbury (eds) *Competing Visions: Refereed Proceedings of National Social Policy Conference 2001* SPRC Report 1/02, Social Policy Research Centre, University of New South Wales, Sydney, 2001

Eardley, Tony, 'The Impact of Breaching on Income Support Recipients' Social Policy Research Centre Newsletter No 91 November 2005

Finn, Chris Sunrise or Sunset? Administrative *Law for the New Millennium: Papers Presented at the 2000 National Administrative Law Forum* Australian Institute of Administrative Law Inc, 2000

Fraser, Nancy, and Gordon, Linda 'Contract Versus Charity: Why is there no social citizenship in the United States?' in *Socialist Review* vol. 22 July-September 1992

Funnel, Warwick *Government By Fiat: The Retreat From Responsibility* University of New South Wales Press, Sydney, 2001

Goodman, James, 'New Deals and Privatising Unemployment in Australia' *Journal of Australian Political Economy* 40 1997

Howard, John 'Getting the Big Things Right: Goals and Responsibilities in a Fourth Term' Transcript of the Prime Minister The Hon John Howard MP: Address to the Enterprise Forum Lunch, Hilton Hotel, Adelaide, July 8, 2004, accessed at http://www.pm.gov.au

Joint Committee of Public Accounts and Audit *Contract Management in the Australian Public Service* Parliament of the Commonwealth of Australia, CanPrint Communications Pty Ltd, October, 2000

Lackner, Sue, and Marston, Greg, 'System Error: An analysis of Centrelink Penalties and Job Network participation reporting' Paper produced by the Centre for Applied Social Research, School of Social Science & Planning RMIT University, August 2003

Maddison, Sarah, & Edgar, Gemma 'Into the lion's den: Challenges for NFPs in their relationships with government' *Strategic Issues in the Not for Profit Sector* Chapter Eight, UNSW Press 2008 (forthcoming)

Maddison Sarah & Hamilton, Clive "Non-Government Organisations" *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling Debate* Clive Hamilton & Sarah Maddison (Eds), Allen & Unwin, 2007

Marr, David 'Careful, he might hear you' *Sydney Morning Herald* June 2-3 2007, p.31

McIntosh, Kylie, Shauness, Jason, and Wettenhall, Roger *Contracting Out in Australia: An Indicative History* Centre for Research in Public Sector Management, University of Canberra, 1997

Mulgan, Richard *Contracting Out and Accountability* Graduate Public Policy Program, Australian National University: Discussion Paper 51 May 1997

Mulgan, Richard *Holding Power to Account: Accountability in Modern Democracies* Palgrave Macmillan, New York, 2003

Mulgan, Richard, 'Government Accountability for Outsourced Services' *Australian Journal of Public Administration* 65:2 2006

Not For Profit Business Review *Submission to the Review of the Private Sector Provisions of the Commonwealth Privacy Act 1988* 15 December 2004

Owens, Kate, 'The Job Network: How Legal and Accountable are its Unemployment Services?' *Australian Journal of Administrative Law* vol. 8 Feb 2001

Pearce, Dennis, Disney, Julian & Ridout, Heather *Making it Work: The Report of the Independent Review of Breaches and Penalties in the Social Security System* Fineline Print & Copy Service, Sydney, March 2002, p.5

Productivity Commission Report, 2002, cited in Lackner, Sue, and Marston, Greg, 'System Error: An analysis of Centrelink Penalties and Job Network participation reporting' Paper produced by the Centre for Applied Social Research, School of Social Science & Planning RMIT University, August 2003

Public Accounts and Estimates Committee, Parliament of Victoria *Commercial in Confidence Material and the Public Interest* March 2000

Pusey, Michael "Economic Rationalism, Human Rights and Civil Society" *Australian Journal of Human Rights* 8, 1998, accessible at:
www.austlii.edu.au/au/journals/AJHR/1998/9.html

Raper, Michael, ABC Radio National, 6:12 Am, 10/11/06, accessible at:
http://www.abc.net.au/rn/breakfast

Rapson, Michael, 'The Job Network: An Instrument of 'supply-side' profiteering' *Dissent* Autumn/Winter 2006

Sawer, Marian 'Governing for the Mainstream: Implications for Community Representation' *Australian Journal of Public Administration* 61:1 2002

Schoonveldt, Simon, 'Do the lived experiences of people who have been breached by Centrelink match the expectation and intent of the Howard Government?' PHD Dissertation, University of Queensland, 2003

Seddon, Dr Nick 'Is Accountability A Cost of Contracting Out?' in Chris Finn (ed) *Sunrise or Sunset? Administrative Law for the New Millennium* Papers presented at the 2000 Administrative Law Forum, Australian Institute of Administrative Law Inc, 2000

Senate Finance and Public Administration Reference Committee *Commonwealth Contracts: A New Framework for Accountability* The Parliament of the Commonwealth of Australia, September 2001

Staples, Joan, 'NGOs out in the cold: the Howard Government Policy Towards NGOs' *Democratic Audit of Australia* Discussion Paper 19/06/2006

Stewart, Jenny, 'Administrative Law in the Age of the Contract' in John McMillan (ed), *Administrative Law under the Coalition Government*, 1997

THE EXPLOSION IN ADMINISTRATIVE LAW AT THE STATE LEVEL

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Introduction

There is no doubt that administrative law in New South Wales is correctly described as a sunrise industry at the moment for legal practitioners. In recent years, increasing numbers are participating in judicial review and external merits review proceedings, many for the first time. The trend was noted in one context by solicitor, Nicholas Studdert in his article 'The Increasing Role of Administrative Law in Personal Injury Matters' [1]. It is unrelated to the well known 1980s federal expansion then caused by the 'new administrative law' (it was Victorian solicitor Emilios Kyrou who then called it a 'sunrise industry' for lawyers and identified new practice opportunities for them in 1987[2].

How long it will last is an open and interesting question. A combination of factors might explain the phenomenon:

1. the wholesale introduction of executive decision-making processes in NSW workers' compensation and motor accidents law;

2. the introduction of a limited administrative law jurisdiction to the NSW District Court (by way of permitting the ground of procedural fairness to be argued in order to seek to set aside a medical assessor's otherwise conclusive certificate in motor accident matters);

3. personal injury lawyers moving into the area by necessity and, by wider application by them of the new litigation skills they are developing;

4. The consolidation of and expansion of State super-tribunals such as the Administrative Decisions Tribunal of NSW and the Consumer, Trader and Tenancy Tribunal of NSW and the statutory appeal/judicial review rights so attached;

5. the NSW Parliament amending and seeking to strengthen privative or ouster clauses and adjusting jurisdiction in the industrial relations area;

6. testing, by certain law enforcement agencies, of the limits and scope of their powers in criminal investigations; and

7. the latent impact of the subject 'Administrative Law' being firmly established as a core and compulsory course of undergraduate study at all tertiary institutions leading to legal practice qualifications.

When combined with the continued growth of administrative law at the federal level and particularly since the introduction of the Federal Magistrates Court of Australia in 1999, with its large administrative, migration and privacy jurisdictions, and with 16 justices presently

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sitting in NSW (and on circuit), administrative law has been introduced to a much wider group of legal practitioners.

Finally, the present bench of the High Court of Australia has developed a strong sense of, and feeling for, administrative law, particularly in its development and nurturing of its special 'constitutional writ' jurisdiction and its robust response to Commonwealth privative clauses and statutes that seek to restrict access to judicial review (most recently in *Bodruddaza v Minister for Immigration and Multicultural Affairs*[3].

In response to Parliament seeking to restrict the grounds of judicial review, such as procedural fairness, the High Court's approach to modern statutory interpretation has been noticeably more broad and creative (as in, for example, *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*[4]*.)*

I propose to discuss in this paper some of the more interesting judicial review developments at the State level in NSW concerning the following areas:

1. the NSW Administrative Decisions Tribunal, on extending merits jurisdiction on appeals; the power to determine constitutional issues and the FOI 'override discretion';

2. the many challenges to the decisions of the new Motor Accidents Authority of NSW (MAA) and the new Workers Compensation Commission of NSW (as one door closes - personal injury litigation – another opens – judicial review);

3. testing the limits of the powers of NSW law enforcement agencies;

4. reasons for executive decisions;

5. re-visiting or re-opening government decisions;

6. life after *SAAP* – the rise of procedural ultra vires?

7. when to argue, intervene or appear as amicus for a government defendant or respondent; and,

8. State privative clauses.

I will review some of the developments in these areas and conclude with a personal wish list for future developments in State (and Federal) administrative law and tell you a little story about two dogs, Jacko and Ruffy.

Leave to appeal on merits – Administrative Decisions Tribunal, NSW (ADT)

The right to appeal to the Appeal Panel of the NSW Administrative Decisions Tribunal is governed by s 113 of the *Administrative Decisions Tribunal Act 1997* (NSW) (ADT) which allows (under ss 113(2)(a) and (b)) an appeal 'on any question of law' and 'with leave of the Appeal Panel', an appeal which 'extend(s) to a review of the merits of the appealable decision'. In numerous decisions, the Tribunal interpreted the extension of an appeal to the merits of the case as requiring a party to at least establish an arguable question of law.

It is now settled by the NSW Court of Appeal that there is no need for the applicant to first establish an actual or arguable question of law or error of law to enliven the right to a merits based appeal. *In Lloyd v Veterinary Surgeons Investigating Committee*[5], the NSW Court of

Appeal determined that the provisions in s 113(2)(a) and (b) of the ADT Act are not cumulative and are quite distinct sources of power empowering an Appeal Panel to deal with the merits of any appeal. The Court of Appeal held at [14] and [60]-[63] (per Tobias JA, with Spigelman CJ agreeing) that earlier dicta of the ADT Appeal Panels on the construction of the section were 'clearly in error'[6]; see also *Skiwing Pty Ltd v Trust Company of Australia*[7] where the 'jurisprudence' of the Appeal Panel in this regard was said to have been 'overturned' by the *Lloyd* decision.

Power to determine constitutional issues – NSW ADT

In *Attorney General v 2UE Sydney Pty Ltd*[8] (Spigelman CJ, Hodgson and Ipp JJA), the NSW Court of Appeal held that in considering the 'applicable written or unwritten law' in s115(1)(b) of the *Administrative Decisions Tribunal Act 1997* and s31(1) of the *Interpretation Act 1987* the Tribunal may have regard to any relevant constitutional limits in construing legislation. The Tribunal is competent to consider a Commonwealth constitutional immunity for political speech and interpret the relevant section so as to conform. It cannot, however, definitively determine a federal constitutional question[9]. In that case, the Appeal Panel was considering a constitutional argument in the context of alleged vilification in breach of s 49ZT(1) of the *Anti-Discrimination Act 1997*. For the purposes of that Act, the Tribunal's decision could be 'registered' as an enforceable judgment in the Supreme Court of NSW. The Court of Appeal held that a State Parliament cannot invest a court or tribunal with Federal jurisdiction.[10]

Further, applying *Brandy v Human Rights and Equal Opportunity Commission*[11], it held that a State tribunal was in the same position as a Commonwealth tribunal, namely, while it may validly consider issues arising under the Commonwealth Constitution, the presence of a scheme which gives judicial force to a tribunal decision upon mere 'registration' converts the Tribunal's otherwise permissible actions into an impermissible exercise of Federal jurisdiction[12]

The Court of Appeal referred to the Tribunal and the Appeal Panel variously as 'administrative bodies with statutory powers the exercise of which have legal consequences' (at [29]), as a 'quasi-judicial tribunal' (at [52]) and as an 'administrative tribunal' (at [57]) which did not possess any Federal judicial power such that it could determine Federal constitutional issues. It made a declaration that the Appeal Panel of the Tribunal had no jurisdiction to determine whether s49ZT of the *Anti-Discrimination Act 1977* (NSW), should be read down so as not to infringe the constitutional implication of freedom of communication about government or political matters.

In *Trust Company of Australia Limited* (trading as Stockland Property Management) *v Skiwing Pty Ltd* (trading as Café Tiffany's)[13] (Spigelman CJ, Hodgson & Bryson JJA), the Court of Appeal held that the Tribunal was not a 'court of a State' for the purposes of determining matters under the *Trade Practices Act 1974* (Cth) as it was not predominantly composed of judges (at [65]). Note also, in *Trust Company of Australia Ltd v Skiwing Pty Ltd* [14](Handley & Basten JJA and McDougall J), the Court of Appeal held that the Appeal Panel of the tribunal had the relevant characteristics to constitute a 'court' for the purposes of the *Suitors' Fund Act 1951* (NSW) (at [74]) and the costs of the appeal.

The return of the FOI 'override discretion' – NSW ADT

Mention should be made of the decision in *University of New South Wales v McGuirk* [15](Nicholas J) where the Court held that the jurisprudence of the ADT and its Appeal Panel was wrong in law as to the existence of what has come to be known as the public interest 'override discretion' in freedom of information matters.

The Appeal Panel had held that the discretion did not exist and that the tribunal could not hand over documents it had declared to be 'exempt' (it arose from a construction of s 55 of the *Freedom of Information Act 1989* (NSW) and s 124 of the *Administrative Decisions Tribunal Act 1997*(NSW)).

The Supreme Court held (at [103]) that is did exist and the Tribunal did possess discretion to release the contested subject documents. The decision has enormous implications for the future release of otherwise sensitive State government held documents. This is particularly so after NSW Court of Appeal's decision in *General Manager, WorkCover Authority of NSW v Law Society of NSW* [16] (Handley, Hodgson and McColl JJA) on the 'internal working documents' exemption in FOI. The Court gave the exemption a relatively restricted operation and gave some encouragement to future FOI applicants.

Judicial review of decisions of the NSW Workers Compensation Commission and the NSW Motor Accidents Authority ('MAA')

This is the largest component of the 'sunrise industry' in New South Wales, particularly for personal injury lawyers and administrative law lawyers. After the 1999 amendments to the State motor accidents legislation, a large part of binding decision-making is now undertaken by (expert) statutory 'non-curial' decision-makers.

Doctors (appointed as 'medical assessors') make binding determinations of the extent of injury, and experienced personal injury lawyers (appointed as 'claims and resolution service assessors') make determinations binding on the insurers as to damages (see, the *Motor Accidents Compensation Act 1999* (NSW)). The same is the case in the workers compensation area where the Compensation Court was abolished and entirely replaced by a statutory 'Commission' – (see, *Workplace Injury Management and Workers Compensation Act 1998* (NSW) and the *Workers Compensation Act 1987* (NSW)).

There is not a lot left here for the courts to do, when binding executive personal injury decisions are made – apart from exercising its supervisory jurisdiction in judicial review proceedings.

Some recent cases (amongst many) are as follows.

In *Campbelltown City Council v Vegan*[17], Wood CJ at CL held that the provisions in the State workers' compensation legislation providing for an appeal to an appeal panel by way of 'review' of the original medical assessment (including a review of a medical assessor's binding determination on medical conditions) gave rise, in the context of the relevant legislation, to a hearing 'de novo'. In *Campbelltown City Council v Vegan* [18], the NSW Court of Appeal effectively overturned that decision (but stopped short of formally doing so). Handley JA (with McColl JA agreeing) equated the nature of the appeal to the Appeal Panel with an appeal 'in the strict sense' to a superior court, with the aim being to redress error of the court below. Of the workers compensation medical Appeal Panel, his Honour said (at [17]-[18]):

> Administrative appeals were unknown, or relatively unknown, in Australia and Britain in 1950, but are now common in both jurisdictions. Parliament by providing for such appeals must be taken to have intended that an appeal to a superior administrative body should be similar to an appeal to a superior court.
>
> Since an appeal is a means of redressing or correcting an error of the primary decision maker a successful appeal should produce the correct decision, that is the decision the original decision maker should have made. It is therefore an inherent feature of the appellate process that the appellate decision maker exercises, within the limits of the right of appeal, the jurisdiction or power of the original decision maker.

Basten JA (with McColl JA 'generally' agreeing with his Honour's reasons) considered (at [76] to [87] and [131] to [137]) that the nature of the appeal to the workers compensation medical Appeal Panel was not entirely clear. His Honour noted the 'tendency' of the legislature to identify available grounds for an appeal but without separately determining the scope of the appellate tribunal's powers and that this had "given rise to difficulties in other situations". His Honour considered that the approach adopted by the primary judge may have been erroneous in this respect and suggested, tentatively (without deciding) that the proper approach may be to limit the powers of the Appeal Panel 'to addressing, and if thought necessary, correcting, errors identified in the certificate granted by the approved medical specialist…' (at [137]).

In the workers compensation area generally, the judicial review cases are building up. *Summerfield v Registrar of the Workers Compensation Commission of NSW*[19] (Johnson J at [19] sets out past challenges comprising a 'long line of cases' (see also, *Massie v Southern NSW Timber and Hardware Pty Limited* [20] (Sully J).

Notable also is *Dar v State Transit Authority of NSW* [21](Bell J) where the Court vitiated a medical Appeal Panel for failing to undertake an oral hearing and for (wrongly) presuming that the applicant desired this procedure. The Court applied the High Court decision in *Minister for Immigration and Multicultural Affairs v Bhardwaj* [22].

Similarly, in the motor accidents area, the case law is developing. In *Allianz Australia Insurance Limited v Motor Accidents Authority of NSW* [23](Sully J) the Court considered a determination of a claims assessor of the Claims and Resolution Service of the MAA (CARS) refusing a claim for exemption from assessment. The Court afforded the assessor a wide scope to make decisions, describing the CARS process as 'non-curial' and uniquely and purely executive and therefore written reasons provided should not be scrutinised too closely by a Court in judicial review proceedings. The Court dismissed the challenge.

In *Allianz Australia Insurance Limited v Crazzi* [24](Johnson J) the Court considered another challenge to a CARS assessment of damages for a motor vehicle accident. Three separate decisions were purportedly made in succession by the assessor. The first decision was a draft, mistakenly sent to the parties; the second decision omitted consideration of the question of interest which had not been argued but which was foreshadowed at the hearing, so the assessor held a further hearing many months later and then made a third decision. The final decision was held to be valid as the earlier decisions were infected with jurisdictional error. The Court applied and explained jurisdictional error and the effect of the decision in *Minister for Immigration and Multicultural Affairs v Bhardwaj* in this regard. The Full Federal Court decision in *Jadwan Pty Limited v Secretary, Department of Health and Aged Care* [25], which had also sought to explain the *Bhardwaj* decision, was distinguished by the Court.

See also *Kelly v Motor Accidents Authority of New South Wales* [26](Rothman J) (on appeal) where the Court dismissed a challenge to a decision of a claims assessor not to exempt a matter from claims assessment (thereby possibly binding the insurer to pay a determined amount of assessed monetary damages accepted by the plaintiff within 21 days after such determination).

In *Hayek v Trujillo*[27], the Court considered the late claims and the timing, exemption and litigation provisions of the *Motor Accidents Compensation Act 1999* (NSW) (MAA Act) and the status of a 'special assessment' certificate relating to the assessment of a dispute issued under s 96 of the Act.

District Court of NSW

Activity in the District Court of New South Wales is slowly on the increase after that Court gained administrative law style jurisdiction in 1999 (and commenced to determine applications in late 2003). The Act provides that the Court may determine procedural fairness disputes based on s 61(4) of the MAA Act. Under the Act, otherwise 'conclusive' decisions of medical assessors may be 'rejected' by the Court if there is found both procedural unfairness and 'substantial injustice' to a party. There are many decisions in this area, concerning both the substantive issue (for example, *Towell v Schuetrumpe* [28], *Nithiananthan v Davenport* [29] and *Mafra v Egan (No 1)*[30] and what happens once a medical assessment is rejected by the Court (usually, remittal, as in *Ragen v The Nominal Defendant (No 1)*[31]and *Ragen v The Nominal Defendant (No 2)* [32] but cf: *Nithiananthan v Davenport*[33].

The introduction of the District Court into this area brings new life and judicial minds to some interesting and complex administrative law questions. Divergent and some creative approaches are emerging. Publication of some District Court decision on the Lawlink web site has also assisted in lifting the quality and reasoning of many of the decisions. Applications made for merely tactical advantages by parties are usually readily transparent before the trial judges and are dispatched by the Court before the substantive personal injury hearing commences.[34]

Testing the limits of the powers of NSW law enforcement agencies

In *Ballis v Randall* [35](Hall J) the Court held unlawful the execution of three search warrants that were each executed covertly. The NSW police had waited until the suspect had travelled to Melbourne for the day and then they applied for and obtained warrants to secretly search and film the suspect's residential premises. Hall J held that while the search warrants were valid on their face, the execution of them was declared to have been unlawful. They are know as 'sneak and peek' warrants in the United States.

In *Dowe v Crime Commission* [36] (Hall J) the Supreme Court of NSW considered the validity of a number of statutory 'controlled operation' authorities purportedly issued pursuant to the provisions of the *Law Enforcement (Controlled Operations) Act 1997* (NSW). The instruments allow law enforcement officers to do that which would be otherwise illegal, such as, in the *Dowe* case, to deal with and sell 6 kilos of illegally imported cocaine to street level for criminal investigation purposes (and to improve the standing of their drug informant). An appeal hearing is presently fixed listed in the NSW Court of Appeal later in the year.

The right to reasons – new duty? Clarification? The demise of Osmond?

There are three significant recent decisions in this area:

As to the duty for administrative decision-makers to provide proper reasons, the NSW Court of Appeal has considered the duty in the context of a legal costs assessment 'panel' (comprised of two legal practitioners) under the *Legal Profession Act 1987* (NSW). In *Frumar v The Owners of Strata Plan 36957* [37](the Court held (at [42]) that the statutory duty of a costs assessor and the review panel to provide reasons, identified only the 'minimum' extent of the duty at common law. Further (at [43]-[45]), any such statement of reasons should have sufficient content not only to facilitate any right of appeal on questions of law, but also to determine questions of fact. The Court set aside the panel's decision as the reasons were inadequate in that the basis for the approach to costs assessment was not explained and calculations of the final amount of costs allowed were not set out. The Court's remarks also apply to the new, and similar, costs assessment regime under the *Legal Profession Act 2004* (NSW) which is to be part of national model legislation (*Frumar* at [26]).

The importance of fully stated reasons as an essential legal requirement for a quasi-judicial tribunal (the NSW workers compensation medical Appeal Panel) was discussed in *Campbelltown City Council v Vegan*[38] where the NSW Court of Appeal held that the Panel members had a duty to give full and proper reasons (at [24] per Handley JA with McColl JA agreeing) even though that was not an express requirement in the relevant legislation. The reasons were held to be inadequate and the Panel's decision was set aside. At common law, *Public Service Board of New South Wales v Osmond* [39] held that there is no general law duty for administrators to provide reasons for statutory decisions in the absence of 'special or exceptional circumstances' (see the cases on this cited in *Vegan* at [118]-[120]). In *Vegan*, the Court of Appeal held, as a matter of statutory construction and as a matter of principle, as the Panel was a quasi-judicial entity, it was required to provide reasons and indicated (at [106], per Basten JA with McColl JA 'generally' agreeing) that the authorities that underpin *Osmond's* case might 'no longer be as definitive as they once were'.

In *Saville v Health Care Complaints Commission*[40]the NSW Court of Appeal considered whether a failure of the NSW Medical Tribunal to provide adequate reasons would constitute a 'jurisdictional error' (as had been pleaded in the summons in that case). The Court held that the Tribunal's reasons were brief but sufficient in the circumstances (where consent orders were largely being sought by the parties and the Tribunal added its own orders). As to the consequences of a determination of inadequate reasons, it was considered (at [24] per Basten JA, Handley and Tobias JJA agreeing) that even if the reasons were inadequate, it was entirely another question to be resolved altogether whether the decision would be held to be invalid if subject to jurisdictional error.

As for review of the decisions of judges, the NSW Court of Appeal emphasised in *Nasr v NSW* [41](Beazley, Hodgson and Campbell JJA) that the test for the adequacy of a judge's reasons is a broad one and that the touchstone is not as much the identified error as it is identification of a 'substantial wrong or miscarriage'. The Court applied the principles in *Beale v Government Insurance Office of NSW* [42] where it was said 'Examination of nearly any statement of reasons with a fine-toothcomb would throw up some inadequacies'.

Re-visiting or re-opening Government decisions

Increasingly, State statutory decision-makers and tribunals are being asked to reconsider their decisions, or they are doing so of their own motion under the principles in *Minister for Immigration and Multicultural Affairs v Bhardwaj*[43].

This is occurring at all levels of government as the full implications of *Bhardwaj* are still being worked out by the Courts and the Executive. There are many reasons why and ways in which a party, the decision-maker or even a third party might seek to have a decision reopened or revisited.

The authorities in this area suggest the following matters are crucial in determining whether a decision may properly or lawfully be revisited:

1. the identity of the applicant;
2. the timing of the application; and
3. the reasons for the application.

The three principal ways in which an executive or tribunal decision may be revisited are where there is:

1. Invalidity by:

a. The decision being so affected by fundamental or jurisdictional error that it is not a decision at all (in fact, the exercise of the statutory power remains unperformed – the *Bhardwaj* decision); or

b. The decision being successfully challenged in a superior court in its supervisory jurisdiction and being set aside or quashed.

2. For 'obvious error' or under a 'slip rule' in curial proceedings or in some administrative review or external appeal contexts (such as in the Commonwealth AAT) – statutory or implied power or jurisdiction must be identified to exist for this to be available. For example, in the rule 36.17 of the *Uniform Civil Procedure Rules 2005* (NSW) provides that 'If there is a clerical mistake, or an error arising from an accidental slip or omission, in a judgment or order, or in a certificate, the court, on the application of any party or of its own motion, may, at any time, correct the mistake or error.' Provision for dealing with 'obvious error' is contained in the NSW workers' compensation and motor accidents legislation.

3. By exercising the statutory power from time to time if permissible – for example, by s 33(1) of the *Acts Interpretation Act 1901*(Cth) (also for example, s 48(1) of the *Interpretation Act 1987* (NSW)) which provides that a person or body which has a statutory function or duty may exercise that function or duty from time to time as occasion requires.

The fundamental principle that has emerged from the case law is that decision-makers may lawfully revisit decisions without a court order where those decisions can properly be considered as wholly invalid by reason of jurisdictional error. Indeed, they may well have a duty to revisit a decision in an appropriate case, see *Minister for Immigration and Multicultural Affairs v Bhardwaj* [44]. The difficult questions are -what is the jurisdictional error and when does that error render a purported decision wholly invalid?

It does not normally matter who first identifies the jurisdictional error. It may be pointed out by one of parties or the applicant, or it may be recognised or identified by the decision-maker himself or herself. Plainly, for the decision-maker to seek to revisit the decision, the decision-maker will need to be quite satisfied that a court would, if presented with the true facts, accept there was jurisdictional error and would (almost as a matter of course) invalidate the decision. The usual discretionary factors would also have to be borne in mind (delay, futility and a party being the source of his or her own problems). The key is, of course, the relevant statutory context – including the constating purpose of the statutory provisions – within which the primary decision was made. But the consequences of jurisdictional error may not always readily be discerned.

As Kirby J stated (in his dissenting judgement in *Bhardwaj*[45] the issue of invalidity:

> … presents one of the most vexing puzzles of public law. Principle seems to pull one way. Practicalities seem to pull in the opposite direction.

In *Allianz Australia Insurance Limited v Crazzi*[46] the Supreme Court of NSW held that a Claims Assessment and Resolution Service Assessor's assessment of a damages claim (after a non-curial hearing) was not able to be re-visited from time to time as it bound the insurer if the claimant accepted the determination within a fixed 21 days. The assessment could be quashed or held never to have been made on the ground of jurisdictional error (which was established in that case). This does not resolve the void/voidable distinction, which itself was not resolved in *Bhardwaj*..

The void/voidable distinction might never be resolved – see, for example, *Deveigne v*

Askar[47] in relation to an alleged invalidity or 'nullity' of certain District Court proceedings.

The resurgence of procedural ultra vires after SAAP?

If a procedural step is properly considered part of a statutory scheme whereby it encapsulates or constitutes a 'core element' of the duty to accord procedural fairness, failure to take that step is a jurisdictional error*: Italiano v Carbone*[48]. It is all a matter of statutory construction.

The principle was applied in majority decisions of the High Court in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*[49]. That case was also discussed in *Italiano v Carbone* [50]by Basten JA (in dissent on this point – on application only, the principle is still good) in the following terms:

> [*SAAP]* gives support to the contention that, in particular circumstances, breach of a mandatory statutory procedure may lead to invalidity of any resulting decision.[51]

Italiano v Carbone involved judicial review of a Consumer Trader and Tenancy Tribunal case where damages were made against an entity that was never a party before the Tribunal. The Court of Appeal set aside the decision.

The real implications of *SAAP* are still to be felt at the State level.

Legislative provisions that may properly be characterised as open to fall within the *SAAP* principle, include where:

1. an essential part of a statutory scheme is a strict procedure that must be followed before any relevant finding or determination can permissibly arise;

2. the language of the relevant statutory provision is such that it is mandatory that the decision-maker not make an adverse finding unless or until some other step is taken; and/or,

3. the provision provides for a fair procedure or is part of Parliament affording a fair procedure (in the context of what might otherwise have been characterised as procedural fairness) before the decision or finding may lawfully be made.[52]

When to argue, intervene or appear as amicus for a Government defendant or respondent

A continuing and difficult issue for government or public sector defendants is to know when, and if so, to what extent, to oppose an applicant in judicial review proceedings as an active party.

In Court proceedings, if the defendant is a statutory decision-maker (whether independent from his or her employer in this regard or not) the choice is usually to file an ordinary appearance and to contest the proceedings (asserting that the decision was valid or correct in law). That decision exposes the agency to full costs orders and possibly, judicial criticism.

Other options might include:

1. to put on a submitting appearance (Rule 6.11(1) of the *Uniform Civil Procedure Rules 2005* (NSW)) and let another interested party play the role of the contradictor (only available if there are opposing applications before the original decision-maker and

where both or some of them are also joined as parties). Leave can always be sought later to appear and play an active role if required (Rule 6.11(2) UCPR);

2. to examine the alleged grounds of review and accept them and agree or consent to orders setting aside the impugned decision (for those grounds pleaded or for other reasons); the applicant/plaintiff would expect an award of costs. However, if a government agency consents to vitiating orders without a hearing on the merits of the judicial review case taking place, the proper order is for each party to pay their own costs – provided the matter was effectively settled or was rendered futile and the agency acted reasonably up to that date,[53] or

3. to accept that the decision is invalid (or affected by jurisdictional error) and re-make the decision (applying *Bhardwaj*[54] either before litigation has commenced or by consenting to the applicant discontinuing pending litigation (without any order as to costs);

4. to determine that a new decision may be made as an exercise of the Interpretation Act power to make a decision 'from time to time as occasion requires' (provided there is no contrary intention in the Act – eg: *Kabourakis v Medical Practitioners Board of Victoria*[55]and *Crazzi*[56]– again, either as a term of settlement of pending litigation or before proceedings have commenced.

In judicial review proceedings, the defendant may be a tribunal or a quasi-judicial body, particularly one that hears evidence or submissions from two or more parties, or undertakes or conducts hearings and makes an impartial and binding determination (such as the NSW Workers Compensation Commission and the NSW Motor Accidents Authority).

Ordinarily, the tribunal or entity would not seek to participate in Court as an active party where there is an active contradictor based on the principles in *R v Australian Broadcasting Tribunal; Ex parte Hardiman*[57]. The rationale is that there is a risk that such participation might endanger the important perception of impartiality of the tribunal or its members if and when the subject matter of the impugned decision comes before it again upon remittal (ibid at p 36).

The options for an active role are:

1. if there is no or no adequate contradictor at the hearing, consider whether the Attorney-General should be joined as an active party (who can appeal if the Court makes the wrong decision).[58]

2. appear at the hearing and make submissions only going to the tribunal's powers, functions guidelines and procedures (as permitted *by Hardim*an);

3. maintain (or file, if not already filed) a submitting appearance and do not turn up (or appear once as a courtesy to the Court and seek to be excused from further attendance at the hearing); or

4. put on a submitting appearance, do not appear but maintain a 'watching brief' at court in order to monitor the progress of the hearing and, if necessary, speak to the solicitors and/or counsel for the relevant parties at a convenient juncture about particular issues or facts that might arise (perhaps, including implications of particular questions from the Bench).

In *Police Integrity Commission v Shaw*[59] the Commission was roundly criticised for appearing, arguing a position as to its jurisdiction to continue to conduct a hearing and for appealing that decision to the Court of Appeal. Basten JA held that the active participation of

both the Commission and the Commissioner in the proceedings was of 'particular concern' and raised the question whether there could later be a 'disinterested inquiry' in the particular matter then before it (at [42]). The Commission was undertaking an inquiry into a former Supreme Court judge as to whether there was any misconduct on the part of the NSW police force in relation to a particular alleged drink-driving incident and a missing blood sample.
See also, *Campbelltown City Council v Vegan*[60] where the Court held that NSW WorkCover should not have played an active role in the litigation (which should have been run inter-parties) and it should have confined its role to that of amicus curiae. The Court refused to make any costs order in relation to the Authority.

These cases were recently considered in the context of *Hardiman* in *Ho v Professional Services Review Committee No 295*[61] and in *Ho v Professional Services Review Committee No 295(No 2)*[62]. (NB: these are on appeal to the Full Court of the Federal Court). In that case, the Court held that the Committee, a quasi-judicial tribunal, dealing with Medicare disciplinary matters, should not have appeared and played an active contradictor as by doing so, it gave the appearance of future apprehended bias were the matter to be remitted to it (as formerly constituted). It was held that in future, the Commonwealth should be joined as an active party of the Commonwealth Attorney General should appear to argue as the contradictor.

A creative approach to the issue was displayed in *Murray v Legal Services Commissioner* [63] where the NSW Court of Appeal held in a solicitor's disciplinary proceedings, a failure by the Commissioner (made before the commencement of disciplinary proceedings) to provide the solicitor with a copy of the original complaint and to permit him to respond vitiated the later disciplinary proceedings. In so holding, that Court found that the Commissioner's submissions as made in Court unintentionally suggested pre-judgment of the substantive matter (at [102]) and requested that, on remittal, the Commissioner refer the matter out to the Law Society Council for it to further deal with the original complaint (at [103]).

State privative clauses

One of the larger issues that will need to be determined in due course by the High Court is the question of the effectiveness of judicial review of wide ouster or privative clauses of the States, such as the one in s 179 of the *Industrial Relations Act 1996* (NSW) considered this year (and largely avoided) in *Fish v Solution 6 Holdings Limited*[64] and *Batterham v QSR Limited*[65]. It has been described by some commentators as the 'mother of all privative clauses' – it is cast in such wide terms.

At the Commonwealth level, the last significant word was *Plaintiff S157/2002 v Commonwealth of Australia* [66]on the application of jurisdictional error in the face of a strongly-worded federal privative clause in the *Migration Act 1958 (*Cth).

In Solution 6, the High Court dealt with a NSW privative clause and held relevant presumptions of Parliament in enacting ouster clauses as set out by the majority judgment, including (at [33]):

> ...the "basic rule, which applies to privative clauses generally … that it is presumed that the 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". 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.

Whether the High Court follows through on this remark remains to be seen in a future case.

There is much activity at the State level (particularly in NSW) on the scope and effect of such State clauses. There is strong support among practitioners and commentators for the view that all that should be required to overcome an ouster clause is the establishment of a jurisdictional error. Upon that event, it can be said that a lawful decision was never made or the power never exercised – see, *Plaintiff S157/2002*[67] and the cases referred to there (per the majority). However, in the face of a State ouster clause, the NSW Court of Appeal is presently preoccupied with the task of identifying or characterising any errors as first constituting breaches of 'essential', 'imperative' and 'inviolable' provisions before setting them aside – see, for example, *Powercoal Pty Ltd v Industrial Relations Commission of New South Wales*[68]; Mitchforce Pty Ltd v Industrial Relations Commission[69]; *Uniting Church in Australia Property Trust (NSW) v Industrial Relations Commission of NSW*[70]; cf: *Tsimpinos v Allianz (Australia) Workers' Compensation (SA) Pty Ltd*[71].

See also, Keith Mason's excellent paper 'The New South Wales Landscape: Judicial Review at State Level' in *AIAL 3rd National Lecture Series*, 2006, AIAL, Canberra, p 79.

Wish list for State (and Federal) administrative law

Some of the developments I wish for (to achieve clarity and certainty) in this area include:

1 that 'error of law', whether or not appearing on any 'record' (however defined), be plainly justiciable for executive decisions in all matters, not merely for tribunals or quasi-judicial tribunals;

2 that the nature of an external or internal administrative appeal that is expressed by Parliament in broad terms (such as in providing merely for a 'review' by a panel) be settled;

3 that the bounds of the scope of a permissible State privative clause be finally determined and that the word 'inviolable' be stricken from the relevant State and constitutional writ jurisprudence (along with the word 'reconciliation' - in an administrative law context -and the 'Hickman principles'). The concept of jurisdictional error should be sufficient;

4 that the void/voidable distinction be settled so that it is capable of being explained sensibly to clients;

5 That procedural ultra vires rise from the ashes as an effective ground of review and that *Project Blue Sky* be distinguished or overturned;

6 that 'Wednesbury unreasonableness' be renamed 'manifest unreasonableness' (as suggested by Basten JA in *Saville v Health Care Complaints Commission* [72] and become useful and effective again (as it remains so in Tasmania); and,

7 That an applicant in any case has good prospects of succeeding on the apparently available (and so far largely unattainable) 'S20' ground of 'manifest irrationality'.

Harmonisation

In the near future, one might follow with interest the Commonwealth Attorney-General's new found interest in both Federal and State administrative law and his proposed 'harmonisation' project recently announced[73]. He is raising his project with the Standing Committee of Attorneys-General. From this we might see harmonising of:

- existing procedures across jurisdictions, for example by implementing a consistent approach to the availability of alternative dispute resolution and mediation;

- rules of standing;

- exemptions to application fees;

- the right to obtain reasons for decisions; and

- the level of assistance provided to unrepresented applicants. The Attorney has had some success with defamation law and regulation of the legal profession. It is hoped that some gains can be made in administrative law as well.

Jacko and Ruffy

I conclude with a heart-rending story highlighting a dubious development in what has come to be styled 'elder law' in NSW judicial review. It is an emerging area.

In *Allkins v Consumer Trader and Tenancy Tribunal*[74] Jacko, a dog, was allowed to be kept at a mobile home by a couple at a residential park at a seaside town in NSW. The park rules were made pursuant to s62 of the *Residential Parks Act 1998* (NSW). The plaintiffs had a dog, Jacko. He died. The plaintiffs sought to replace him with another dog, Ruffy. Ruffy was brought into the village without prior approval by management. Subsequent applications for approval were not granted. The merits challenge in the NSW Consumer Trader and Tenancy Tribunal failed as the park had a policy and it in fact had amended the rules so as not to allow such pets in future.

One might have thought that an opportunity presented itself to develop notions not only of procedural fairness but also of the circumstances in which 'accrued rights' might be preserved. In the Supreme Court of NSW (with Legal Aid funding and senior counsel) it was alleged there had been a denial of procedural fairness and the new park rules were invalid.

The summons was given short shrift by the Court and was dismissed with costs. The decision was a bit harsh -for the plaintiffs, one might even say - the plaintiffs were barking up the wrong tree. Alternatively, one might say that the plaintiffs had bitten off more than they could chew. However, I would not say that. I would say the decision was a bit –'ruff'.

Thank you.

Endnotes

1 (2007 – February) 45 Law Society Journal 55
2 ibid.
3 234 ALR 114 (18 April 2007)).
4 (2006) 231 ALR 592).
5 [2005] NSWCA 456
6 ibid at [57], [59]
7 [2006] NSWCA 276 (9 October 2006) at [48]
8 [2006] NSWCA 349
9 (ibid, at [30], [31], [32], [37], [98], [100], [104] & [105
10 at [54]-[55]).
11 (1995) 183 CLR 245
12 ([2006] NSWCA 349 at [70], [71], [75], [76], [80]).
13 [2006] NSWCA 185
14 [2006] NSWCA 387
15 [2006] NSWSC 1362

16 (2006) 65 NSWLR 502
17 [2004] NSWSC 1129
18 ibid
19 [2006] NSWSC 515), (31 May 2006)
20 [2006] NSWSC 1045), (6 October 2006)
21 [2007] NSWSC 260
22 (2002) 209 CLR 597.
23 [2006] NSWSC 1096, (16 October 2006),
24 [2006] NSWSC 1090, (18 October 2006)
25 (2003) 145 FCR 1
26 [2006] NSWSC 1444
27 [2007] NSWCA 139, (18 June 2007), (Mason P, Ipp and McColl JJA)
28 [2006] NSWDC 159, (Rein SC DCJ)
29 [2006] NSWDC 105, Phegan DCJ
30 [2006] NSWDC 22, (Johnstone DCJ)
31 [2007] NSWDC 84
32 [2007] NSWDC 85, (Johnstone DCJ)
33 [2006] NSWDC 105)
34 Note: I discussed some of the early cases relating to these developments in a paper titled 'Administrative Law in NSW Workers Compensation and Motor Accidents Compensation' delivered to the Australian Insurance Law Association seminar held on 18 August 2005 in Sydney.
35 [2007] NSWSC 422
36 [2007] NSWSC 166, see also [2006] NSWSC 1312.
37 [2006] NSWCA 278, (17 October 2006), Beazley, Giles and Ipp JJA)
38 supra at n17
39 (1986) 159 CLR 656
40 [2006] NSWCA 298 (2 November 2006)
41 [2007] NSWCA 101 at [19] – [27]
42 1997) 48 NSWLR 430 at 443-444 (per Meagher JA)
43 supra at 17
44 ibid, at [51] to [53] (per Gaudron & Gummow JJ).
45 Ibid at [101])
46 supra, n 24, (Johnson J)
47 [2007] NSWCA 45 (Hodgson, Giles and McColl JJA)
48 [2005] NSWCA 177 at [105] to [106] per Basten JA
49 (2005) 215 ALR 162; (2005) 79 ALJR 1009
50 [2005] NSWCA 177 at [63]
51 See also Einstein J at [2005] NSWCA 177 at [163].
52 (See, SAAP at [77] and [83] (per McHugh J -with Kirby J agreeing at [173] fn 129); [173] (per Kirby J); and [205] to [208] (per Hayne J -with Kirby J agreeing at [173] fn 129).
53 Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin (1997) 186 CLR 622 esp at 624.5 and 625.6 (McHugh J));
54 Supra, n 22
55 [2005] VSC 493 (Gillard J))
56 [2006] NSWSC 1090 (Johnson J)
57 (1980) 144 CLR 13 at 35 & 36
58 (See, eg, Police Integrity Commission v Shaw [2006] NSWCA 165 (per Basten JA) at [39]–[43]);
59 supra at n 58, per Basten JA at [39]–[43],
60 supra at n , at [54]-[64](per Basten JA with McColl JA agreeing
61 [2007] FCA 388 at [110]-[114](26 March 2007) (Rares J)
62 [2007] FCA 603 (28 March 2007) (Rares J)
63 (1999) 46 NSWLR 224 at [99]-[103] (per Sheller JA, with Priestly and Stern JJA agreeing)
64 (2006) 80 ALJR 959 ([2006] HCA 22
65 (2006) 80 ALJR 995 ([2006] HCA 23)
66 (2003) 211 CLR 476
67 supra at n , at [76]
68 (2005) 145 IR 327 at [56] & [57]
69 (2003) 57 NSWLR 212
70 (2004) 60 NSWLR 602
71 (2004) 88 SASR 311
72 [2006] NSWCA 298)
73 (see, his Media Release 113/2007 -19 June 2007 and his paper given to the 2007 National Administrative Law Forum in Canberra on 14 June 2007)
74 [2006] NSWSC 1093(Associate Justice Malpass) (19 October 2006)

LYING THROUGH LEGISLATION? COMMUNICATIONS REGULATION AND DUTIES OF IMPERFECT OBLIGATION

Rebecca Spiegelmann*

I. INTRODUCTION

The legislative regimes governing telecommunications and broadcasting services in Australia are fraught with an abundance of unenforceable statutory duties that divert civic attention away from the inadequacies of the communications regulatory system itself. Both the *Telecommunications Act 1997* (Cth) and the *Broadcasting Services Act 1992* (Cth) provide often elaborate explanations of regulatory policy and legislative objectives that are neither followed in nor achieved by the substance of the statutory provisions that follow. Such statements of object and policy act as a smokescreen for legislation which does not accomplish what it was said to do. They represent a kind of legislative dishonesty, promising regulation that does not in fact exist.

Administrative law has provided little respite for individuals deceived by these regulatory facades. A very restrictive approach has been taken by Australian courts to the enforcement of certain kinds of duties through the judicial system. In particular, 'imperfect' laws – which are statutory duties of general application containing significant elements of discretion – have become entirely unenforceable through administrative law processes. It seems that the law has developed in a manner which seems intended to circumvent rather than establish an identifiable law to deal with these public duties. This is a particularly interesting development when it is borne in mind that such duties have become endemic throughout Australian legislation.

This paper seeks to address the nature and impact of this lack of enforcement of statutory duties in relation to communications regulation. Initially, the status of 'imperfect' laws found in current telecommunications and broadcasting legislation within modern jurisprudence will be discussed. It will then be demonstrated that such laws impose important and far-reaching statutory duties on the Australian Communications and Media Authority ('ACMA') that have come to be regarded as entirely unenforceable by the courts. An explanation of the case law on point, in addition to a foray into the public choice theory of administration, will explain how regulation has been permitted to develop in this manner. Finally, whether the enforcement of such public duties would improve the regulatory system for telecommunications and broadcasting will be considered, as well as the possibility that other methods of regulation would be more appropriate in this field to correct the problems that lack of enforcement of public duties engenders. On the whole, this paper will attempt to discover the means by which to bring to an end the age we live in where 'Parliament…place[s] statutory duties on government departments and public authorities – for the benefit of the public – but has provided no remedy for the breach of them'.[1]

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II. DUTIES OF IMPERFECT OBLIGATION

ACMA has been conferred with the responsibility of regulating telecommunications and broadcasting services in accordance with the *Telecommunications Act 1997* (Cth)[2] and the *Broadcasting Services Act 1992* (Cth)[3] respectively. This includes the obligation to regulate in compliance with the objectives[4] and regulatory policies[5] of each of the Acts. These objectives include ensuring that standard telephone services, payphones and other carriage services of social importance are reasonably accessible to all people in Australia on an equitable basis and are supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community;[6] promoting the availability of a diverse range of radio and television services;[7] and promoting the provision of high quality and innovative programming by providers of broadcasting services.[8]

Such objectives, which ACMA must take into account in regulating the communications industries, cannot be regarded as discretionary powers conferred upon ACMA because the language used seems more obligatory than permissive.[9] However, these objectives do not appear to be entirely obligatory either, due to the vague manner in which they are expressed and the lack of any remedy that could be used to enforce them. They are not the standard statutory command we associate with the word 'duty'. In fact, these regulatory objectives seem to be a duty-power hybrid, imposing some duty upon ACMA to ensure that certain services are operated, but simultaneously granting complete discretion upon the authority to determine the appropriate scope and nature of those services.[10]

These hybrid obligations have come to be known as imperfect laws, or 'duties of imperfect obligation'.[11] They are 'laws which speak the desires of political superiors, but which their authors (by oversight or design) have not provided with sanctions'.[12] They merely create duties, without any correlating rights, and as such are in reality 'exactly equivalent to no obligation at all'.[13] It is clear that the objectives and statements of policy found in communications legislation are examples of these duties of imperfect obligation. They are unconditional general directives; they go to the root of the authority's activities in the provision of services; and they contain significant elements of discretion – these are the hallmarks of an imperfect duty.[14]

III. ISSUES OF ENFORCEMENT OF SUCH DUTIES

The question of enforceability seems to have been approached by the courts in four different yet interrelated ways – as an issue of justiciability, breach of a duty, the limits of mandamus and the ambit of standing to sue.

(a) Justiciability

Courts have held that duties such as these are non-justiciable, considering them to be political duties, rather than legal duties, which cannot be enforced by a court of law.[15] In *Yarmirr v Australian Telecommunications Corporation*,[16] applicants representing two aboriginal communities sought mandamus to enforce what they believed to be Telecom's obligation to provide them with interim satellite telephone services to replace their current system, which was unreliable and lacked a duplex speech path. The provision they relied upon was almost identical to the objective in the current *Telecommunications Act 1997* (Cth)[17] that the performance standards of telephone services accessible to Australians meet the social, industrial and commercial needs of the Australian community. The Federal Court of Australia found that:

> When Parliament imposes on a functionary a broad duty involving the development and application of policy, to be performed nationally, the fulfilment of which must be subject to many constraints and may be achieved in many different ways…but cannot be achieved absolutely, if only because it involves an

> ideal, detailed supervision by the courts of the manner of performance of the duty is not likely to have been intended.[18]

As Parliament had imposed on Telecom a plethora of functions, and provided discretion as to the resources to be made available in the discharge of those functions, an order of mandamus to provide the communities with satellite technology would necessarily involve making policy decisions to allocate resources, and thus the issue was not justiciable by the court.

(b) Breach of duty

The question of whether a duty on the defendant body to provide certain services or facilities to the plaintiff has been breached is also often regarded by the courts as a matter of statutory construction. It is to the scope – the required or permitted methods of performance – of particular statutory duties that this enquiry is directed. Imperfect duties involve obligations of general application; the courts interpret such vagueness (in combination with the lack of enforcement measures) as representing Parliament's intention to confer on the public authority a wide discretion as to how these obligations are carried out.[19] Nevertheless,

> whatever latitude is given to the authority, the mere assertion of a discretion as to performance of the duty will not be allowed to outweigh the fact that a duty, not a power, is in question, and can never therefore excuse complete failure to perform it.[20]

Consequently, it seems that without an absolute refusal on the part of the public authority to comply with the obligation conferred by Parliament, the courts are reluctant to find any breach of duty.

In fact, even if all the authority does in performing their duty is to, without lifting a finger, admit that they have a duty and that they are attempting to perform it, the courts will find that there has been no neglect or refusal to do their duty sufficient to render them in breach of that duty.[21] Add to this judicial generosity the fact that, as these duties are couched in the language of ambiguity and indefiniteness, the public body will be able to point to some small activity, no matter how tangential or trivial, that falls within the ambit of that duty; this would negate any absolute refusal or neglect. Thus, even if the case was justiciable, it would be difficult for the court, relying on the law as it stands now, to find a public authority in breach of any duty of imperfect obligation.

(c) The limits of mandamus

The principal judicial remedy for enforcement of any public duty is the writ of mandamus,[22] which can be sought either through the common law or under statute.[23] The award of mandamus is entirely discretionary.[24] A court can find that there may have been a breach of duty on the part of a public authority, but in its discretion refuse relief to the plaintiff on a number of grounds.[25] In some cases, the court does not even deal with the question of whether there has been a breach, making a decision based on the inapplicability of mandamus to the particular circumstances of the case.

The reasons why mandamus may not be obtainable for breaches of public duties are threefold. The first is impossibility of performance. Remedy will not be denied merely because compliance with the court's order would be difficult;[26] however, it will be denied if it would be impossible to abide by the order for mandamus.[27] Impossibility has also been held to encompass *legal* impossibility, which would exist, for example, where the authority concerned has ceased to exist.[28] The notion of impossibility, however, does not merely comprise total physical impossibility – the threshold is significantly lower than that. For example, mandamus has also been refused where the performance of the duty would entail

overwhelming hardship or inconvenience. In *Glossop v Heston and Isleworth Local Board*,[29] the plaintiff brought an action against his local sanitary authority to compel them to drain and clean a stream passing near his residence that had become filled with sewage. Although the defendants were found to have a duty to drain the stream, the Court refused to grant mandamus. One reason stated for denying the plaintiff any remedy was that the defendants only controlled one district through which the stream passed; to remedy the defect, the defendants would have to 'make arrangements with the authorities of other districts so as to have some combined effort by which to get the sewage away to some considerable and safe distance'.[30] Taking into account 'the difficulty of their position and the magnitude of the operations they must perform', the court believed it was 'bound to look at [the defendants'] conduct with the greatest indulgence'.[31] The court determined that the imposition of any order would be too difficult and inconvenient for the authority to perform in this situation and denied the plaintiff any remedy. It thus seems that mandamus will not be granted for breach of a public duty where the respondent can establish impossibility of compliance by *any* means, or overwhelming inconvenience by the only means open.

It has been suggested that inconvenience can also encompass unreasonable expenditure in performing a duty. However, it is not conclusively accepted that lack of funds will be sufficient to excuse a public authority from being the subject of mandamus. In some cases, mandamus has not been granted where the performance of a public duty would necessitate funds unavailable to the public body;[32] in other cases, having insufficient money to do what is needed to remedy a breach of duty has been held not to be a relevant consideration for a court exercising their discretion to award mandamus.[33] The best approach for the courts to take on this issue would be to insist on performance and leave the funding consequences to be rectified by the executive or the legislature;[34] otherwise, the public authority would be encouraged 'to disregard prudent limitations upon their expenses and them permit them to rely upon their own improvidence as an excuse for non-fulfilment of their statutory duties'.[35]

However, it seems Australian courts are moving in the opposite direction. Judgments have been emerging[36] which view monetary constraints on public authorities as an exemplar of the impossibility of performance ground for refusal of mandamus,[37] which in fact they are not. It is an incorrect assumption to make that a deficiency in funds is precisely equivalent to impossibility of performance – often there are means by which more money can be sought; or the duties of the authority could be altered so as not to require those funds. As stated previously, 'impossibility' involves considerations very different to those currently being employed by courts in cases where an order for mandamus would require some expenditure to be made by the public body. Nevertheless, the state of the law as it stands at present is that courts will often use their discretion to deny remedy by way of mandamus where a public authority argues it does not have the funds required to comply with the order.

Finally, courts are reluctant to compel performance of imperfect public duties through an order for mandamus where the duty involves the provision of services and facilities on a continuing basis, because of their inability to supervise the execution of the order.[38] This basis for refusing mandamus is relied upon in cases where the plaintiff is arguing, not merely that in a particular instance the public authority failed to perform a duty, but rather that the authority is consistently failing to perform a certain obligation to provide services or facilities.[39] In such situations, compliance would involve detailed procedures to be put in place and operated well into the future; an order of mandamus is considered futile because the court does not have the means, nor the power, to continue to supervise such activities for an indefinite period.

(d) Standing to sue

The final (perhaps more rightly labelled the *preliminary*) impediment to the enforcement of imperfect public duties is the system in place which determines who is granted access to the

courts. The question of standing for mandamus is an independent and preliminary matter relating to the applicant's right to raise an argument, rather than to the merits of their argument. The applicant is said to need a 'legal specific right' to have standing to bring an action seeking mandamus.[40] However, what 'legal specific right' essentially means still remains ambiguous. Some cases have held that this threshold will be satisfied where the applicant can demonstrate a substantial interest, or an interest greater than that of an ordinary member of the public.[41] Other decisions have determined standing based on whether the duty sought to be enforced was in fact owed to the applicant.[42] A more comprehensive exploration of the confusion that is the law of standing in Australia is beyond the scope of this paper.[43] However, it should suffice to say that the requirements of standing only occasionally pose problems for plaintiffs seeking to enforce imperfect duties. It could be that the reason the courts rarely delve into the complexities of the laws of standing in such cases is that it is simpler for them to decide the case (against the plaintiff) on one of the three grounds previously mentioned.

When the courts have mentioned standing in relation to the enforcement of imperfect duties, they seem to struggle with the concept of a private individual being able to enforce a public duty where the duty is one owed to an indeterminate number of people. The problem with gaining standing to enforce these duties is that any public duty is one which is owed to the Crown and thus cannot give rise *directly* to a right in any one person to bring proceedings due to non-performance of it.[44] Where the court can glean from that duty a correlative right in a certain individual to have that duty performed, so that their 'connection with the impugned decision is stronger than that of the general public',[45] standing requirements will be satisfied.[46] If the first approach to standing espoused above[47] is followed by a court, some individuals may be 'sufficiently affected by the…non-performance of a duty cast upon a public officer or corporation to be recognised as having a sufficient interest to bring proceedings in his own name to secure its performance'.[48] However, if the test relied upon is the latter, where the duty must be owed to the applicant in particular, it is unlikely that any applicant seeking to enforce a duty owed to the public at large will be granted standing. An example of this latter approach can be discerned in *Glossop*, where Lord James stated that:

> If the neglect to perform a public duty for the whole district is to enable anybody and everybody to bring a distinct action or to file a distinct claim because he has not had the advantages he otherwise would have been entitled to have if the Act had been properly put into execution,…the country would be buying its immunity from nuisances at a very dear rate indeed by the substitution of a far more formidable nuisance in the litigation and expense that would be occasioned by opening such a door to litigious persons…[49]

The success of an application for standing therefore depends on which approach the court relies on to determine standing; only if the approach, focusing on a sufficient interest on the part of the applicant, is relied on will a person affected by the non-performance of a public duty of general application be able to bring an action in mandamus to enforce that duty. However, as stated above, it seems that courts, to avoid the uncertainty of the law of standing, are inclined to grant the applicant standing in reliance on this test, but determine the case based on other considerations.

(e) The disparity in judicial reasoning

The differences in judicial reasoning evident in cases dealing with the enforcement of duties of imperfect obligation result from the judiciary's failure to recognise an identifiable law of public duties. This unwillingness on the part of the judiciary to do so is remarkable, considering the similarities between these categories of cases.[50] This has resulted in the confusing parallels of reasoning outlined above, which are based on similar factual matrixes yet diverge in both the law they apply and the precedents they rely upon.

The law needs to deal more purposively with the problems that this state of affairs engenders. Rather than addressing only one or two of the four paths of judicial reasoning outlined above, the courts need to begin to amalgamate the divergent case law. Those that regard the legal issue to be solely one of justiciability, the scope of mandamus or standing to sue seem to be avoiding the most fundamental issue that these cases raise and one that remains entirely unclear – whether imperfect duties have the capacity to be breached at all and, if so, whether they can ever be enforced. Other subsidiary issues that the courts need to address openly include whether these cases are justiciable in the first place; whether an individual can have standing to enforce a duty owed to an indeterminate group of people; and whether lack of funds is a sufficiently good reason to refuse to grant mandamus. The clarification of the law involving the enforcement of imperfect duties is absolutely essential if for no other reason than so, if a desirable outcome is unable to be gained through the legal system, the other branches of government can be certain that the responsibility lies with them to correct this unsatisfactory state of affairs.

IV. IMPERFECT DUTIES IN COMMUNICATIONS REGULATION

The existence of duties of imperfect obligation, and the improbability of their enforcement, is of particular concern in communications regulation because of the unique status of telecommunications and broadcasting in modern society. Australia, with a small population spread across a vast geographical area, relies heavily on communications technology to maintain a federal social, economic and cultural identity; these services are 'of a nature such that they are vitally essential to the continued function of the community governmentally, industrially, commercially, socially and otherwise'.[51] In addition, the importance of communications, information services and the media to overall economic activity has consistently grown – successful business in the modern age relies significantly on the availability of certain technologies, such as the internet, and access to up-to-date information from both around Australia and the world at large. The importance of broadcasting and the media also stems from the necessity of ensuring some level of freedom of information and speech to guarantee democracy can continue to thrive in Australia.[52] Thus, it is generally accepted that:

> postal and telephone services are among the most important amenities available to the people of the Commonwealth, and are essential to the conduct of trade and commerce as well as to the enjoyment of any real freedom in the dissemination of information and opinion.[53]

Yet to ensure that Australians gain these crucial benefits from their communications facilities and services, it is not sufficient that they be given the ability to communicate – they must have the capacity to communicate *effectively*. For example, is there any sense in providing rural communities with telephone facilities that only sporadically work, given that the utility of such facilities depends largely on the ability to communicate with others at *any* chosen time, such as in emergencies? Can information be free flowing in a society in which freedom of speech is possible but where freedom of the press is held in check[54] and established sources of information can no longer be trusted?[55] However, this fundamental ideal of effective communication is espoused solely through the objectives of both the *Telecommunications Act 1997* (Cth) and the *Broadcasting Services Act 1992* (Cth), and is therefore entirely unenforceable.[56] No matter how important the need for effective communication is in our society, the people of Australia have no enforceable right existing in legislation for it to be provided. There are no other legislative provisions in either Act which impose a duty on anyone to provide a certain standard of communications facility or service.[57] This is a fundamental failing of communications regulation in Australia.

The common law has in no way remedied this problem. It is surprising that in cases such as *Yarmirr*, which examine duties to provide communication facilities, the courts did not attempt to imply an overarching duty to provide a certain standard of service from the legislation. The

rationale for describing this omission as 'surprising' is founded upon an analogy that can be drawn between duties to provide telecommunications or broadcasting facilities and other duties to provide services or facilities of social import, such as that previously imposed on the Post-Master General (and the Postal Commission) to deliver mail and provide telephonic services.[58] In both *Bradley v Commonwealth*[59] and *John Fairfax Ltd v Australian Postal Commission*,[60] the Post-Master General and the Australian Postal Commission respectively withheld postal and telecommunications services from the plaintiffs. In determining whether the defendants had an implied obligation to provide certain telephonic and mail delivery services, the courts relied on the terms of each particular statute.[61] In interpreting the statute,

> when…it becomes necessary to resolve an ambiguity or obscurity, it is right to start from the assumption that if the Parliament intended to confer on the Postmaster-General an arbitrary power, subject to no conditions and to no review, to deprive any person of the liberty to use the postal and telephone services, with all the grave consequences that might ensue, it would use clear words for that purpose.[62]

The value of these services to society meant that clear language must be employed by Parliament to allow a service provider to deprive any person of those services. It was held that in both statutes there were no such provisions;[63] on the contrary, there existed numerous provisions which supported the inference that such duties were impliedly imposed by the Act and that they were enforceable by an individual by legal proceedings.[64]

This approach to the issue was decidedly different to that taken in *Yarmirr*. Interestingly, there was a prior judgment on point that was dismissed by these two cases as unauthoritative.[65] In *R v Arndel*, O'Connor J held that:

> taking the whole purview of the Act, it appears to be one of those Acts which, for the benefit of the public, empowers the Government by its officers to perform certain duties, but with no obligation on the part of the officers towards any member of the public. In these circumstances it is impossible to say that there is any duty owing by the Postmaster-General or by any officer of the Post Office to the applicants to receive transmit or deliver their correspondence which the Court could enforce by mandamus.[66]

This approach is remarkable for its similarity to that in *Yarmirr*. The question that needs to be asked is why, after a High Court case and a NSW Supreme Court case dismissing this reasoning, was it subsequently applied with such confidence in *Yarmirr*? This quandary is made more interesting by the noteworthy resemblance between the *Telecommunications Act 1997* (Cth) s 3(2)(a)[67] and the *Postal Services Act 1975* (Cth) s 7(1),[68] which provided that:

> The Commission shall perform its functions in such a manner as will best meet the social, industrial and commercial needs of the Australian people for postal services and shall, so far as it is, in its opinion, reasonably practicable to do so, make its postal services available throughout Australia for all people who reasonably require those services.

In *Fairfax v APC*, it was held that this section without question imposed on the Postal Commission a particular duty. Moffitt P also made it clear that these circumstances did not give rise to issues of enforceability because 'the function of operating the postal services, which led to the receipt for transmission to the respondents of postal matter had long been undertaken…Whatever duty the Act…places on the Commission to undertake a service, it *had* undertaken the function to operate the particular services'.[69] The court in this case distinctly said that, in a situation where a public authority has already undertaken a function conferred upon it by statute, enforceability of the broader function is *not* the issue; the issue is whether there is something else in the statute which either expressly or impliedly authorises the authority to deny the service or facility. This would suggest that the approach taken by the Federal Court in *Yarmirr* is erroneous – they should not have focused solely on the *Telecommunications Corporation Act 1989* (Cth) s 27(4) to define Telecom's potential

obligation, but rather interpreted the statute to discern any duty to provide a certain standard of service, in light of the great significance of this technology to people throughout Australia.

The contradictory case law – especially involving these industries of extreme social and economic import – on this issue suggests that something is amiss in the law of public duties. Not only are fundamental duties of imperfect obligation to ensure a certain standards of facilities and services unenforceable in the courts, but it seems the law is abandoning basic principles of statutory interpretation and refusing to even consider the possibility that the statute itself could imply such obligations. It is not suggested that a duty necessarily would have been implied in *Yarmirr*; merely that some attempt should have been made by the Court to endeavour to do so.

V. THE DICHOTOMY BETWEEN THE IDEALS AND ACTUAL OPERATION OF LEGISLATION

The explanation for the dichotomy in communications legislation between the ideals of a statute, as espoused in the unenforceable statements of objective, and its actual operation lies in an economic analysis of public law known as *public choice theory*. The basic assumption that this theory relies upon is that 'man' is rational and egocentric; it follows from this postulation that

> legislators, voters, leaders and members of political parties and bureaucrats act primarily out of self-interest (as rational maximisers of utility) and that legislative and bureaucratic outcomes can be understood and explained in terms of "the rational behaviour of those engaged in legislative and bureaucratic choice under prevailing political rules".[70]

The process of designing regulation is seen by public choice theorists as one in which politicians, to maximise support to guarantee their re-election, amalgamate the various interests of rival pressure groups in an 'attempt to customise law to maximise the total support they receive by alienating as few groups as possible'.[71] Regulation is not designed to meet the needs of the general public; rather, it is intended to benefit as many powerful interest groups as possible (through legislative compromise) so that more votes and other benefits can be obtained.[72] There are legitimate criticisms of public choice theory[73] that need not be delved into for the purposes of our discussion as they are not relevant or applicable to the particular state of affairs we are dealing with here.

One explanation for 'the divergence between the ostensible public interest goals and achievement (or lack of it)' in communications legislation could admittedly be that 'insufficient expertise and forethought was brought to bear on the methods of achieving the public interest goals'.[74] However, given that legislation with similar goals have been in force since federation, and from that time on the courts have declined on a continuing basis to enforce any public interest goals in the form of legislative objectives, this rationale for the current state of communications law seems inadequate. The 'legislative compromise' system of designing regulation advanced by public choice theorists, however, does seem to explain how telecommunications and broadcasting laws have withered away to become an empty shell flaunting non-existent ideals.

Public choice theorists envisage regulatory design as a process in which 'the initial motivation for legislation may have been dominated by ideological considerations, but narrow economic concerns motivate the special interest influence that does so much to determine its effect'.[75] In the process of legislative compromise, some things must be sacrificed. In designing our communications laws, our legislators relinquished enforceable standards of effective communication, in all likelihood due to the repeated assertions from private businesses that for business and competition to flourish, their metaphorical hands could not be tied by regulatory supervision of what is being supplied, and to whom. For all the possible inadequacies of public choice theory, it presents a very convincing argument

regarding the reasons for the degradation of our telecommunications and broadcasting legislation to regulatory regimes with lofty statements of ideals that are misleading, ineffectual and meaningless.

VI. WILL ENFORCING PUBLIC DUTIES IMPROVE THE REGULATORY SYSTEM FOR COMMUNICATIONS?

The imperfect duties enshrined in our communications legislation as 'objectives' of the Acts are the sole safeguards of fundamental societal needs such as that of effective communication. What is clear from the preceding discussion is that such duties ought to be enforceable. The remaining matter to be considered is the ideal approach by which this should be achieved.

(a) Enforcing imperfect duties already present in legislation

The first available option is that the duties of imperfect obligation already contained in communications legislation should be regarded as enforceable by the courts. It is possible that an amalgamation of the current case law[76] may have this effect; however, this cannot be guaranteed until an accretion of experience through case law engenders adequate guidance as to the proper nature and effect of these duties.

Without new case law on point, the enforcement of imperfect duties is problematic and should not be endorsed. If a court was to enforce any one of the legislative objectives in an order for mandamus, due to the generality of language in which those statements are couched, it would have to specify exactly what a public authority must do in order to satisfy the broad objectives, an activity which is extraordinarily complex. For example, the court would need to determine what effective communication entails, the reasonable requisite standards of telecommunication technology and access to broadcasting and the media, what resources are available and how they are to be apportioned, whilst taking into account considerations of geography, demography, budgetary constraints, and economic, social or cultural needs. However, this is the traditional role of the legislature – it is their responsibility to determine what should be made available to the general public, how it can be done and allocate the resources in furtherance of those aims. A fundamental doctrine of judicial review, existing since such review was established, has been that an issue is non-justiciable where it would involve the adjudication of political questions; that is, where it is the prerogative of another branch of government – legislative or executive – to make the determination.[77]

For a court to enforce the imperfect duties in Australian communications legislation, this established doctrine could not be adhered to. The question is whether this doctrine should be eliminated as an obstacle, or its significance reduced,[78] a development which has already taken place to some extent in the United States.

An affirmative answer to this question would involve the acceptance of judicial policy making. This can be contrasted with interpretation, in which a judge exercises their power on the basis of a pre-existing legal source that they deem authoritative:

> When judges engage in interpretation, they invoke the applicable legal text to determine the content of the decision, whether by examining the words of that text, the structure of the text, the intent of its drafters, or the inherent purpose that informs it. But when a judge engages in policy making, they invoke the text to establish their control over the subject matter, and then rely on nonauthoritative sources, and their own judgment, to generate a decision that is predominantly guided by the perceived desirability of its results.[79]

In Australia, it is evident that judges confine themselves to an interpretative function.[80] However, in the United States judicial policy making has become a common occurrence. For

example, by 1995, prisons in a total of 41 US States had been placed under some kind of comprehensive court order to restructure the institution, as had the entire correctional systems of at least 10 states. Many of these orders 'specified such details of institutional administration as the square footage of cells, the nutritional content of meals, the number of times each prisoner could shower, and the wattage of light bulbs in prisoners' cells'.[81] Compare this to the approach taken by the NSW Court of Appeal in *Smith v Commissioner of Corrective Services*,[82] in which the court refused to make an order in the nature of mandamus to alter prison facilities so that prisoners, when in confidential consultations with their lawyers, could witness and monitor the disabling of listening devices installed in consultation rooms.

So which approach should be preferred? Based on the essential principles of democracy, the Australian method is superior. Although the courts in the United States have produced much beneficial social change, the have undermined basic democratic tenets in doing so. Judicial policy making engenders a serious legitimacy problem in that they violate our constitutional separation of powers principle; it involves judges making the decisions that our Parliamentary representatives have been elected to make. The foundation of any democracy is that decisions such as these are made by the citizens of the nation, either directly or through elected representatives. The fact that the legislature is not doing their job in representing the people of Australia is an unsatisfactory argument to counter this principle; 'we may grant until we're blue in the face that legislatures aren't wholly democratic, but that isn't going to make courts more democratic than legislatures'.[83] The legitimacy of judicial policy making is also undermined by the principle that judicial action should be guided and restricted by pre-existing law. If the court creates a substantive set of legal rules, as would be required if imperfect obligations were enforced, they would have to depart from this principle; although the court could 'base' the rules on duties implied from existing statutory provisions, the rules would just have be too detailed, and their development too sudden, for this explanation to be credible.[84]

Arguments have been proposed which contend that these long-standing principles of separation of powers and legal precedence are 'products of the eighteenth century and are now outdated or in need of significant reformulation'.[85] However, considering the separation of powers doctrine is enshrined in the *Australian Constitution* and that the importance of precedence in our legal system increases as the power of modern government expands, these propositions can be dismissed as inapplicable to the Australian judicial system. In general, it should be accepted that enforcing imperfect duties contained in communications legislation in their current form would be antithetical to fundamental notions of democracy and legal precedence and thus should not be supported as the proper approach to rectifying the problems inherent in communications regulation.

(b) Implying a duty to provide effective communication

As mentioned previously, a duty to deliver mail and provide telecommunications has been implied into statutes similar to the *Telecommunications Act 1997* (Cth).[86] It is possible that this approach could be imitated for duties to provide, for example, effective communication. In the mail-related cases, certain qualified powers had been conferred on the Post-Master General and the Postal Commission which would have been unnecessary to confer had the authorities had an unfettered power to determine when mail should not be delivered. In addition, the *Postal Services Act 1975* (Cth) s 7 included a provision that 'Nothing in this section shall be taken…to impose on the Commission a duty that is enforceable by proceedings in a Court'.[87] This subsection was held to be proof that s 7 did impose a particular duty on the Commission (although that duty could not be enforced).[88] Given that in the current *Telecommunications Act 1997* (Cth), the corresponding section to *Postal Services Act 1975* (Cth) s 7 does not include an equivalent to s 7(3)(b), and that there are no qualified powers granted to ACMA under the Act to ensure any communications facilities or

services are provided at a certain standard, it is unlikely that any duty to ensure the provision of effective communication services could be implied by the courts based on the principles espoused in these mail delivery cases.

In addition, we should have some reservations when applying these cases to our present system. This case law on the obligation to deliver mail does have limited, however significant, utility to our present discussion. First, these postal cases dealt with situations where services had been absolutely denied, whereas in cases like *Yarmirr*, only a certain *standard* of service had been denied; basic facilities continued to be provided. Secondly, every case previously discussed involved duties imposed on the providers of services; now, we find ourselves in the situation where duties are instead imposed on a *regulator* – this is one step removed from duties previously imposed on service providers. Regulators are being given these duties to ensure the provision of certain standards for services and facilities because the expansion of privatisation has rendered any former public duty unenforceable against the now private bodies providing the services. It is possible to assert that, if Parliament has elected to continue requiring the same objectives to be followed, despite changes occurring to the public authority obliged to follow those objectives, no real opposition to enforcing these duties against regulators, solely because of their position as a regulator, can be supported. However, such a shift in the type of public body subject to the imperfect duty should be sufficient to render these cases distinguishable from any situation that could arise under our present legislative regime.

It should also be acknowledged that looking to the courts to repair this omission in communications legislation is a wholly misguided approach. Regulatory systems should not be set up with courts in mind to supervise – the justice system should act as a fallback of last resort in the event that the regulatory design has unforeseen flaws. In determining the manner in which some right to effective communication be enshrined in statute, it is in fact the content of the legislation which must be altered in order to rectify the problems that imperfect duties raise in the context of communications regulation.

(c) Legislative intervention

The only other alternative to ensure the provision of effective communication is amending the regulatory regime in some way to impose a corresponding duty on service providers. There is a single argument against imposing any such restraint on telecommunications and broadcasting companies – that de-regulation would be more economically beneficial and efficient in ensuring a certain standard of effective communication is met. This line of reasoning is by no means authoritative, as it is equally probable that deregulation:

> undermines the service-based entitlements that went along with traditional regulation, entitlements which may have been inefficient in a strict economic reckoning, but which we have come to consider the public interest… deregulation may alleviate protectionism, regulatory ineptitude, and bureaucratic formalism. But, in time, it may also decrease established standards of operation and jeopardise the overall stability of infrastructure industries.[89]

In fact, empirically there is no hard and fast rule that countries with weak business regulation flourish in the world economy more than those with strong regulation.[90] The problem is that many theorists associate regulation of *competition* with regulation of *standards*, when in fact there should be a clear distinction between the two regulatory forms.[91] Regulation of competition 'destroys economic efficiency by placing restrictions on entry, restricting prices, restricting seat capacity in an industry like airlines, and the like'.[92] Regulation of standards, in contrast, can cultivate greater economic efficiency:

> Stringent standards for product performance, product safety, and environmental impact contribute to creating and upgrading competitive advantage. They pressure firms to improve quality, upgrade technology, and provide features in areas of important customer (and social) concern . . .

> Particularly beneficial are stringent standards that anticipate standards that will spread internationally. These give a nation's firms a head start in developing products and services that will be valued elsewhere . . . Regulation undermines competitive advantage, however, if a nation's regulations lag behind those of other nations, or are anachronistic. Such regulations will retard innovation or channel innovation of domestic firms in the wrong direction.[93]

Thus, any view based on the theory that 'reducing all regulatory costs is a good thing' is unsatisfactory and inadequate.[94]

Some kind of regulation of this field would therefore be beneficial. However, regulating a field is not as simple as amending the head statute to include a new duty – there are other methods of regulation, such as self-regulation through industry codes. Self-regulation

> is frequently an attempt to deceive the public into believing in the responsibility of a irresponsible industry. Sometimes it is a strategy to give the government an excuse for not doing its job. Equally, however, sometimes it does work better than government regulation because the industry is more committed to it and because it is more flexible than the law.[95]

In our pursuit to ensure some level of protection for effective communication, neither legislative amendment nor self-regulation is sufficient on its own to secure such an ideal. To rely solely on one method of regulation would be 'the formula for a disastrous regulatory order'.[96] A two-pronged methodology thus appears to be essential. Some kind of legislative amendment by Parliament is probably needed to set the regulatory process in motion. However, given the track record of legislative decision-making in this area,[97] the regulatory detail should be supplied by the industries themselves through industry codes and the like, in order to arrive at enforceable standards which take into account both consumers and the providers of communication services. The legislation should therefore outline a general duty to provide effective communication but reserve the enforcement measures and details of the obligation to be determined by industry standards and codes of practice.

VII. CONCLUSION

Parliament has been entirely dishonest in its description of the scope of communications legislation in Australia. Overindulgence in the use of duties of imperfect obligation render much of the intrinsic social value contained in the legislation unenforceable and hence useless. It is particularly worrying that these unenforceable duties represent the sole manifestation of an obligation to ensure the provision of effective means of communication. This state of affairs cannot be allowed to continue. Not only are imperfect duties deceptive in their intended operation, but they prevent vital reforms from being identified by functioning as a façade, behind which regulatory design failures can be concealed. The courts are ill-equipped – and incapable – of rectifying these regulatory flaws. Like the judiciary, on this topic we must defer decision to the legislature in the hope that finally they will represent the public interest and endow ACMA with measures to enforce these duties of imperfect obligation, which are imperfect in their operation but not in their conception.

Endnotes

1 *Attorney General, ex rel. McWhirter v Independent Broadcasting Authority* [1973] QB 629, 646 (Lord Denning MR).
2 *Australian Communications and Media Authority Act 2005* (Cth) s 8(1)(a).
3 *Australian Communications and Media Authority Act 2005* (Cth) s 10(1)(a).
4 *Telecommunications Act 1997* (Cth) s 3; *Broadcasting Services Act 1992* (Cth) s 3.
5 *Telecommunications Act 1997* (Cth) s 4; *Broadcasting Services Act 1992* (Cth) s 4.
6 *Telecommunications Act 1997* (Cth) s 3(2)(a)(i) and (iii).
7 *Broadcasting Services Act 1992* (Cth) s 3(1)(a).
8 *Broadcasting Services Act 1992* (Cth) s 3(1)(f).

9 William Wade and Christopher Forsyth, *Administrative Law* (9th ed, 2004) 233.
10 *John Fairfax Ltd v Australian Postal Commission* [1977] 2 NSWLR 124, 131-2.
11 David Campbell and Philip Thomas (eds), *The Province of Jurisprudence Determined by John Austin* (1988) 20-22.
12 Ibid 21.
13 Ibid.
14 AJ Harding, *Public Duties and Public Law* (1989) 26-7.
15 See, eg, *Attorney General v Tomline* (1880) 14 Ch D 58, 66; *China Navigation Co Ltd v Attorney General* (1931) 40 L1 LR 110, 112-3; *Mutasa v Attorney General* [1979] 3 All ER 257, 261-2; *Yarmirr v Australian Telecommunications Corporation* (1990) 96 ALR 739, 749.
16 (1990) 96 ALR 739 (*'Yarmirr'*).
17 *Telecommunications Act 1997* (Cth) ss 3, 8CM; *Telecommunications Corporation Act 1989* (Cth) s 27(4).
18 *Yarmirr* (1990) 96 ALR 739, 749.
19 See, eg, *John Fairfax Ltd v Australian Postal Commission* [1977] 2 NSWLR 124, 144, 151 (Mahoney JA).
20 Harding, above n 14, 52.
21 *Glossop v Heston and Isleworth Local Board* (1879) 12 Ch D 102, 119 (*'Glossop'*).
22 No equitable mandatory injunction will be granted to enforce compliance with a statutory enactment prescribing a positive duty; the proper remedy is the common law remedy of mandamus: *Glossop* (1879) 12 Ch D 102, 115 (James LJ), 117 (Brett LJ).
23 *Supreme Court Act 1970* (NSW) s 65; *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16 (under which orders in the nature of mandamus can be sought).
24 This is a consequence of the position of prerogative writs as writs of grace, not of right: Harding, above n 14, 84.
25 There must be 'good reason' shown for a discretionary refusal to occur: *R v Kelly; Ex parte Victorian Chamber of Manufacturers* (1953) 88 CLR 285, 309 (Fullager J).
26 *Bradbury v Enfield London Borough Council* [1967] 1 WLR 1311, 1324-5.
27 This doctrine is sometimes expressed as *lex non cogit ad impossibilia*: see, eg, *Re Bristol & North Somerset Railway Co* (1877) 3 QBD 10.
28 See, eg, *Tebbutt v Egg Marketing Board (NSW)* [1976] 2 NSWLR 179.
29 (1879) 12 Ch D 102.
30 *Glossop* (1879) 12 Ch D 102, 119.
31 Ibid.
32 *Re Bristol & North Somerset Railway Co* (1877) 3 QBD 10; *R (ex Rel Connelly) v Publicover* [1940] 4 DLR 43.
33 *R v Luton Roads Trustees* (1841) 1 QB 860; *R v Poplar Borough Council; Ex parte London County Council (No 1)* [1922] 1 KB 72, 74, 84.
34 Harding, above n 14, 117-8.
35 *McLeod v Salmon Arm School Trustees* (1952) 4 WWR (NS) 385, 386 (Sloan CJ) as cited in Harding, above n 14, 118.
36 See, eg, *Hicks v Aboriginal Legal Service of Western Australia* (2001) 185 ALR 689, 697 (where the court believed the authority did not have the means to make the grant of money sought under the order); *Smith v Commissioner of Corrective Services* [1978] 1 NSWLR 317 (where a remedy was refused because it would entail making alterations to parts of prison facilities).
37 Sometimes these cases refer to 'futility' rather than 'impossibility'.
38 Enid Campbell, 'Enforcement of Public Duties which are Impossible to Perform' (2003) 10 *Australian Journal of Administrative Law* 201, 207.
39 'Mandamus is at its least effective where the gist of the complaint is that there has been a systemic failure to perform a public duty, rather than an isolated failure': Aronson, Dyer and Groves, above n 21, 733.
40 Mark Aronson, Bruce Dyer and Andrew Groves, *Judicial Review of Administrative Action* (2004, 3rd ed) 677. See, eg, *R v Whiteway; Ex parte Stephenson* [1961] VR 168; *Ex parte Northern Rivers Rutile Pty Ltd; Re Claye* (1968) 72 SR (NSW) 165, 173. The *Supreme Court Act 1970* s 65 was read as liberalising the mandamus standing test by dispensing with the requirement that an applicant have a 'legal specific right'; however, the common law has reached the same position: Aronson, Dyer and Groves at 751.
41 Ibid 677-8.
42 Ibid 678.
43 For more thorough discussions on this topic, see, eg, Harding, above n 14, 194; P F Cane, 'Standing, Legality and the Limits of Public Law' [1981] *Public Law* 322; P F Cane, 'The Function of Standing Rules in Administrative Law' [1980] *Public Law* 303; G D S Taylor, 'Individual Standing and the Public Interest: Australian Developments' (1983) 2 *Civil Justice Quarterly* 353.
44 *John Fairfax Ltd v Australian Postal Commission* [1977] 2 NSWLR 124, 141.
45 Aronson, Dyer and Groves, above n 40, 646.
46 Ibid.
47 Above n 41.
48 *John Fairfax Ltd v Australian Postal Commission* [1977] 2 NSWLR 124, 141. See also *Bradley v the Commonwealth* (1973) 1 ALR 241.
49 *Glossop* (1879) 12 Ch D 102, 115.

50 The majority of proceedings in which duties of imperfect obligation are sought to be enforced involve the faulty provision of some service or facility, each of which is vital to the social and economic wellbeing of citizens; for example, sanitation and sewage disposal, postal services and telecommunications.
51 *John Fairfax Ltd v Australian Postal Commission* [1977] 2 NSWLR 124, 135.
52 See generally J Lichtenberg, *Democracy and the Mass Media: A Collection of Essays* (1990).
53 *Bradley v the Commonwealth* (1973) 1 ALR 241, 247.
54 See especially Jack R Herman, 'Freedom of the Press: Under Threat?' (2005) 28 *UNSW Law Journal* 909.
55 Quentin Dempster, 'Free Speech, The Commercialisation of News Value Judgments and the Future of the ABC' (2005) 28 *UNSW Law Journal* 924.
56 See Part III above.
57 The stipulations closest to comprising a duty to provide effective communication are those contained in the *Commercial Television Industry Code of Practice* s 4, which attempt to ensure impartial, fair and accurate content of news and current affairs programs: (2004) Free TV Australia <http://www.freetvaust.co.au/SiteMedia/w3svc087/Uploads/Documents/73931737-4d3f-4002-bf0c-aaafc9a5f900.pdf> at 6 October 2006.
58 But note the limited utility of these cases, discussed below at Part VI(b).
59 (1973) 1 ALR 241 (*'Bradley'*).
60 [1977] 2 NSWLR 124 (*'Fairfax v APC'*).
61 In *Bradley*, the statute concerned was the *Post and Telegraph Act 1901* (Com); in *Fairfax v APC*, it was the *Postal Services Act 1975* (Cth).
62 *Bradley* (1973) 1 ALR 241, 247.
63 *Bradley* (1973) 1 ALR 241, 248-9; *Fairfax v APC* [1977] 2 NSWLR 124, 132.
64 *Bradley* (1973) 1 ALR 241, 249-251.
65 It was said that the majority did not accept the reasoning of O'Connor J and thus that this statement cannot be authoritative: *Bradley* (1973) 1 ALR 241, 254.
66 (1906) 3 CLR 557, 581.
67 Formerly the *Telecommunications Corporation Act 1989* (Cth) s 27(4): see above n 17.
68 This section was discussed in *Fairfax v APC* [1977] 2 NSWLR 124, 132.
69 *Fairfax v APC* [1977] 2 NSWLR 124, 132 (emphasis added).
70 Neil Gunningham, 'Public Choice: The Economic Analysis of Public Law' (1992) 21 *Federal Law Review* 117, 121, quoting N Mercuro and T P Ryan, *Law, Economics and Public Policy* (1984) 143.
71 Jonathan Macey, 'Public Choice: The Theory of the Firm and the Theory of Market Exchange' (1988) 74 *Cornell Law Review* 52.
72 Gunningham, above n 70, 124.
73 See, eg, Gunningham, above n 70, 130-4; Anthony Ogus, *Regulation: Legal Form and Economic Theory* (1994) 73-5.
74 Ogus, ibid 56.
75 Gunningham, above n 70, 127.
76 See above III(e).
77 See, eg, *Marbury v Madison* 5 U.S. (1 Cranch) 137, 164-66 (1803).
78 Ralph J Bean, 'The Supreme Court and the Political Question: Affirmation or Abdication?' (1969) 71(2) *West Virginia Law Review* 97, 99.
79 Malcolm Feeley and Edward Rubin, *Judicial Policy Making and the Modern State* (1998) 5.
80 It should be noted that the categories of 'interpretation' and 'policy making' do overlap; for example, where judges rely on social policy to interpret texts. However, 'the mere fact that there is no bright line between them does not defeat the assertion that policy making is a distinct judicial function': ibid 8.
81 Ibid 13.
82 [1978] 1 NSWLR 317.
83 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) 67.
84 Feeley and Rubin, above n 79, 18.
85 Ibid 20.
86 See above Part IV.
87 *Postal Services Act 1975* (Cth) s 7(3)(b).
88 *Fairfax v APC* [1977] 2 NSWLR 124, 132.
89 R B Horwitz, *The Irony of Regulatory Reform: The Deregulation of American Telecommunications* (1989) 284.
90 Michael Porter, *The Competitive Advantage of Nations* (1990).
91 John Braithwaite, 'Responsive Regulation for Australia' in Peter Grabosky and John Braithwaite (eds), *Business Regulation and Australia's Future* (1993) Australian Institute of Criminology, Canberra, 81, 86.
92 Ibid.
93 Porter, above n 90, 647-9.
94 Braithwaite, above n 91, 85. It has even been suggested that the 'government's retreat from regulation constitutes a retreat from democratic process': Horwitz, above n 89.
95 Braithwaite, above n 91, 93.
96 Ibid 94.
97 See the discussion on public choice theory: above Part V.

REMOVAL FROM OFFICE AND SECTION 33 OF THE *ACTS INTERPRETATION ACT 1901*

Dennis Pearce*

The recent decision of the Federal Court in *Nicholson-Brown v Jennings*[1] was concerned with the suspension and subsequent removal from office of persons who held statutory appointments under a Commonwealth Act. The dismissal of a challenge to this action pointed to the significance of s 33 of the *Acts Interpretation Act 1901* (Cth) (AIA) to decisions relating to holders of public offices.

Acts Interpretation Act s 33

The relevant provisions of s 33 read:

> (1) Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.
>
> …
>
> (3) Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.
>
> …
>
> (4) Where an Act confers upon any person or authority a power to make appointments to any office or place, the power shall, unless the contrary intention appears, be construed as including a power to appoint a person to act in the office or place until:
>
> (a) a person is appointed to the office or place; or
> (b) the expiration of 12 months after the office or place was created or became vacant, as the case requires:
>
> whichever first happens, and as also including a power to remove or suspend any person appointed, and to appoint another person temporarily in the place of any person so suspended or in place of any sick or absent holder of such office or place:
>
> Provided that where the power of such person or authority to make any such appointment is only exercisable upon the recommendation or subject to the approval or consent of some other person or authority, such power to make an appointment to act in an office or place or such power of removal shall, unless the contrary intention appears, only be exercisable upon the recommendation or subject to the approval or consent of such other person or authority.
>
> (4A) In any Act, ***appoint*** includes re-appoint[2].

The effect of this section was crucial to the outcome of the decision in *Nicholson-Brown v Jennings* but it is also of general importance when considering whether action can be taken to suspend or remove a person from any office to which they have been appointed under a statutory power.

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Section 33(1)

Section 33(1) is of general significance to public service decision-makers as it negates the proposition that a power, once exercised, cannot be invoked again. The section indicates that a decision may be revisited unless there is a contrary intention evidenced by the legislation under which the decision has been made. This issue will have to be resolved by having regard to the nature of the decision and the legislation under which it is made. This whole issue including the scope of ss 33(1) and (3) was comprehensively examined by Robert Orr and Robyn Briese in 'Don't think twice? Can administrative decision makers change their mind?'[3] It is not proposed to revisit this general discussion.

In the present context, it is worth noting that Gray J at first instance in *Clark v Vanstone*[4] held that s 33(1) permitted a second suspension to be imposed on Mr Clark under an express power to suspend a Commissioner from office provided by s 40 of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). This ruling was not challenged on the subsequent appeal[5]. The express power to suspend in s 40 meant that it was not necessary to invoke the general power in s 33(4). However, the ruling indicates that it would seem to be possible to exercise that general power more than once if the circumstances required.

Section 33(3)

Section 33(3) relates to the making, etc, of an 'instrument'. For a period after the decision of the Federal Court in *Australian Capital Equity v Beale*[6] the operation of the section was confined to instruments that were 'legislative' in character. This was a significant limitation on the value of the section for public officials who had been accustomed to rely upon it to justify the revisiting of a wider range of decisions than those classifiable as 'legislative'.

The view taken in the *Australian Capital Equity* case was re-examined in detail and rejected by Emmett J of the Federal Court in *Heslehurst v New Zealand*[7] and by the Victorian Court of Appeal in *R v Ng*[8]. The view that now holds sway is that any instrument made under an Act may be revoked, amended or varied, regardless of its subject matter[9]. Accordingly, if an appointment were effected by means of an instrument, it would be possible to revoke that appointment pursuant to the power in s 33(3): provided, of course, that the legislation permitting the appointment by instrument did not evidence a contrary intention.

However, it is not usual for a public appointment to be made by an instrument. Some high level offices will be. However, appointments to most public offices, while made in writing, will not be done by way of a formal instrument.

Wilcox J in *Laurence v Chief of Navy*[10] made the important point that just because an appointment is made in writing it does not mean that it has been made by an 'instrument'. He said:

> I see a conceptual distinction between a power to issue an instrument, which itself has an operative legal effect, and a power to make a statutory decision which is immediately operative, but in the interests of good administration, is thereafter recorded in writing….It may be assumed that almost every exercise of statutory power to make a decision will be recorded in writing. Accordingly on [counsel's] argument, s 33(3) would apply to almost every statutory decision. It seems unlikely that parliament would have intended, in an indirect way, to make almost every statutory discretion subject to the possibility of revocation or amendment at any time.

In that case, Wilcox J held that the respondent could not revoke an approval that had been given for the applicant to resign from the Defence Force. The approval was in writing, but it was not an instrument and s 33(3) did not apply in relation to it.

From this it can be said that, except in those cases where the governing legislation requires an appointment to be made by an instrument, s 33(3) will not allow an appointment to be revisited. If this is to occur, it will have to be in reliance upon s 33(4).

It is against this background that *Nicholson-Brown v Jennings* may usefully be considered.

Nicholson-Brown v Jennings

The case involved an application to review decisions to suspend and then dismiss the two applicants from their positions as inspectors under s 21R of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the Commonwealth Act). The decisions had been made by the respondent, the Victorian Minister for Aboriginal Affairs, acting as a delegate of the Commonwealth Minister.

The Commonwealth Act required consultation with the relevant aboriginal community before an appointment as inspector was made. This consultation had occurred prior to the appointment of the applicants. The position of inspector was not remunerated. An inspector could make an 'emergency declaration' which had certain consequences under the Act.

It was decided that the management of aboriginal heritage sites should in future be dealt with under Victorian legislation and Bills were introduced into the Commonwealth and Victorian Parliaments to give effect to this decision. The qualifications for appointment as an inspector were significantly different in the proposed Victorian legislation than that which had existed under the Commonwealth Act at the time of the appointment of the applicants.

The respondent Minister wrote to all inspectors appointed under the Commonwealth Act who would not be qualified for appointment under the proposed Victorian legislation indicating that he was considering removing them from office 'in order to smooth the transition to the new arrangements'. The letter invited the inspectors to indicate why they should not be removed from office. It also indicated that, pending a final decision on the issue of dismissal, the appointments of the inspectors were suspended.

The applicants' solicitors responded to the respondent's letter and opposed their suspension and provided arguments why they should not be dismissed. The respondent said that he took their representations into account but proceeded to dismiss them.

The authority for the respondent's action was said to lie in the provisions of s 33(4) of the AIA. The applicants claimed that the requirements of s 21R of the Commonwealth Act and of s 33(4) had not been satisfied as the respondent had not consulted with the aboriginal community before making his decision. It was also claimed that s 33(3) of the AIA limited the operation of s 33(4).

Middleton J dismissed the applications. He said that the power of the respondent to appoint an inspector under s 21R of the Act was not contingent upon the recommendation, or subject to the approval or consent, of a local Aboriginal community, as referred to in the proviso to s 33(4). The concept of consultation was not the same as acting upon a recommendation, approval or consent and therefore the proviso in s 33(4) was not activated. Section 33(4) did no more than expand the power to appoint to include the power to remove (or suspend) an inspector. The proviso to s 33(4) was not applicable to the exercise of the power in the section in circumstances where there was no statutory obligation to act upon a recommendation, etc, before making an appointment.

Middleton J also rejected an argument put by the applicants that s 33(4) could be invoked either to suspend or remove an appointee, but not both. The section could be called in aid of each action and could be used sequentially in relation to the one appointment.

His Honour went on to observe that the power to make an appointment under s 21R did not require the making of an instrument, even though the appointment had to be 'in writing', and s 33(3) accordingly had no application. The observations of Wilcox J in *Laurence's* case above were cited. However, even if this conclusion was not correct, Middleton J said that s 33(3) did not impose a constraint on the exercise of the power under s 33(4) additional to that contained in the proviso to that section.

It should be noted that s 33(4) is not limited to written appointments. Exceptional though it will be, the section is capable of application to an oral appointment.

Contrary intention

Like all provisions of the AIA, s 33(4) applies 'unless the contrary intention appears'. The nature of the activity may be such that it is apparent that a decision cannot be undone: *Laurence's* case, above; *Minister for Immigration and Multicultural Affairs v Watson*[11]. The legislation under which the appointment was made or complementary legislation relating, for example, to public service conditions of employment, may create a contrary intention: see *Director-General of Education v Suttling*[12] . However, compare *Geddes v McGrath*[13] and *Thomson v Minister for Education*[14] in both of which cases the view was taken that the legislation under which the appointments were made did not intend to limit the power to remove the appointee from office.

(The decision in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[15] raises an interesting point in a different context. There Gaudron J said that the fact that the Minister could invoke s 33(4) of the AIA to dismiss an appointee to a public office meant that a judge could not be appointed to the position, it being incompatible for the holder of a judicial office to hold a position at the discretion of the Executive.)

Procedure for dismissal from office

Section 33(4) of the AIA does not affect any legislative or common law requirements relating to the manner in which a person's appointment may be determined. So procedural fairness requirements must be met[16] and the decision must be reached without breach of administrative law grounds of review[17]. If a procedure is set out in legislation that must be complied with before a person is removed from office, the section does not limit that requirement.

Summary of s 33(4)

The following propositions relating to the operation of s 33(4) may be garnered from this discussion:

- The section operates independently from ss 33(1) and (3).
- It applies to all statutory appointments, whether made by instrument or otherwise and whether in writing or not.
- It applies to suspension and removal from office and can be invoked in relation to the one employment.
- The power under the section may be exercised more than once in relation to the one appointment.
- The proviso to the operation of the section is applicable only to the matters to which it refers, namely appointments made on the recommendation, or requiring the approval or consent, of another person or authority.

- The operation of the section may be displaced by evidence of a 'contrary intention'.
- The section does not affect any requirements imposed by statute or the common law relating to the way in which a removal from office must occur.

Endnotes

1 [2007] FCA 634.
2 The equivalent provisions in State and Territory Interpretation Acts are: ACT: s 208; NSW: s 47; NT: 44; Qld: s 25; SA: s 36; Tas: s 21; Vic: s 41; WA: s 52. All these sections, except those of NSW, Qld and SA, have a provision equivalent to the proviso to s 33(4) of the Commonwealth Act.
3 (2002) 35 *AIAL Forum* 11.
4 (2004) 211 ALR 412.
5 (2005) 224 ALR 666.
6 (1993) 114 ALR 50.
7 (2002) 189 ALR 99.
8 (2002) 5 VR 257.
9 See, for example, *Glaxosmithkline Australia Pty Ltd v Anderson* (2003) 130 FCR 222; *X v Australian Crime Commission* (2004) 139 FCR 413; *Nicholson-Brown v Jennings*, above, n 1. Much reliance was placed in these cases and in those referred to in the text to observations of Brennan J when President of the Administrative Appeals Tribunal in *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs* (1978) 1 ALD 167 at 171-2.
10 (2004) 139 FCR 555 at 558.
11 (2005) 88 ALD 115.
12 (1987) 162 CLR 427.
13 (1933) 50 CLR 520.
14 (1993) 29 ALD 525.
15 (1996) 138 ALR 220 at 232.
16 *Barratt v Howard* (2000) 170 ALR 529.
17 *Nicholson-Brown v Jennings*, above n 1.

DEALING WITH REPEAT APPLICATIONS

*Chris Wheeler**

PURPOSE OF PAPER

The purpose of this paper is to put forward for debate possible options that could be made available for agencies and external review bodies to deal with unreasonable numbers of applications made by individuals exercising statutory rights to make FOI, privacy and other similar types of applications.

1. BACKGROUND

Resource allocation and equity

Agencies have limited resources, and in their interactions with members of the public the more resources they spend in dealing with one person, the less they will have available to spend on dealing with all others. This applies whether or not interacting with the public is part of an agency's core work (for example front line service providers such as police, health, education, welfare, complaint handlers).

People who interact with an agency multiple times generally have valid and appropriate reasons for doing so. It is in the public interest that more resources are devoted to people who are genuinely in particular need of assistance. A problem arises where people interact with an agency multiple times without a valid and appropriate need or for an inappropriate purpose. This raises resource and equity considerations that agencies cannot ignore.

Unreasonable conduct by complainants

The experience of the various Australian Parliamentary Ombudsman and many other organisations that deal with complaints is that some complainants act unreasonably when interacting with them. For example, they can be obsessive, overly demanding, overly persistent, rude or aggressive. While such complainants make up a fairly small percentage of all complainants to an organisation and they may be well-intentioned or have the highest of motives, dealing with them can take up an inordinate amount of time and resources and can result in staff stress and complaints. In effect, a small number of people can cause serious cost issues for the agency and equity issues in relation to other complainants. Anecdotal evidence from a wide range of sources suggests that this problem is growing, both in terms of numbers of complainants who act unreasonably and the seriousness of their 'unreasonable' interactions with agencies and external review bodies.

Dealing with unreasonable conduct by complainants

To better deal with unreasonable conduct by complainants, the eight Parliamentary Ombudsman of Australia have joined together in a national project to apply new management strategies and to study the effectiveness of their application. This National

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Project aims to minimise the adverse impact of unreasonable conduct on resource management and the relevant processes of each Ombudsman's office, minimise staff stress, minimise harm to people displaying unreasonable conduct, ensure equity across matters handled by Ombudsman offices and to achieve consistency of practice across all Ombudsman offices.

The Ombudsman have identified five categories of unreasonable conduct by complainants:

- *unreasonable persistence* – eg persisting with a complaint even though it has been comprehensively dealt with, reframing a complaint in an attempt to get it taken up again, showing an inability to accept the umpire's decision;
- *unreasonable demands* – eg insisting on outcomes that are unattainable, wanting what is not possible or appropriate, issuing instructions and demands;
- *unreasonable lack of cooperation* – eg presenting a large quantity of information which is not sorted, classified or summarised, presenting information in dribs and drabs, refusing to define the issues of the complaint;
- *unreasonable arguments* – eg holding irrational beliefs, holding conspiracy theories, and
- *unreasonable behaviours* – eg confronting, aggressive, threatening behaviour.

The Ombudsman have identified management strategies to address each category of unreasonable conduct:

- *unreasonable persistence* – through management strategies that are about *saying 'no'*;
- *unreasonable demands* – through management strategies that are about *setting limits;*
- *unreasonable lack of cooperation* – through management strategies that are about *setting conditions;*
- *unreasonable arguments* – through management strategies that are about *declining or discontinuing* involvement at the earliest opportunity;
- *unreasonable behaviour* – through management strategies designed around a *risk management* protocol.

The causes of unreasonable conduct by complainants and applicants

Broadly speaking, from their experience complaint handlers tend to find a variety of possible, sometimes overlapping, explanations for unreasonable complainant conduct, including:

- *aspirational*: seeking justice – a reaction to injustice, or perceived injustice, particularly where this has spiralled into a series of complaints/applications, counter accusations, conspiracy theories, justifications, etc [can last many years and increasingly involve previously uninvolved parties and a change in focus from the original injustice, or perceived injustice];
- *attitudinal*:
    - a sense of frustration with life generally;
    - dissatisfaction with government generally;
- *emotional*, eg due to anger or frustration arising out of:
    - a reaction to a problem for which an agency is seen as responsible, or

- aggrievement and indignation arising out of how the complainant was treated or the complaint was dealt with by the agency, often due to unmet expectations (whether reasonable or unreasonable);

- *psychological*:

  - an unreasonable sense of entitlement or unreasonable expectation of favourable treatment and outcomes (possibly associated with a mental disorder);
  - an inability to accept responsibility and a need to blame others for misfortune;
  - an obsessive or rigid focus on aggrievement;
  - a mental disorder [in the USA it is estimated that at least one in five adults suffer from a diagnosable mental disorder in a given year; about 6% of adults suffer from a serious mental illness, ie, mental disorder that interferes with some area of social functioning; and 2.6% of adults have severe and persistent mental illness, eg schizophrenia, bi-polar disorders, panic disorders, obsessive-compulsive disorders];

- *recreational*: a cheap and interesting, although often challenging, hobby [particularly for complainants/applicants not in full time employment].

Experts in the field offer a number of explanations for the behaviours that complaint handlers have identified from their own practice as difficult or unreasonable. For example, two of these that have been written about are the 'unusually persistent complainants' identified by Professor Paul Mullen Dr Grant Lester, Beth Wilson and Lynn Griffin[1]; and 'high conflict people' by Bill Eddy.[2]

Professor Mullen *et al* found in a study published in the *British Journal of Psychiatry* that unusually persistent complainants 'pursued their complaints for longer, supplied more written material, telephoned more often and for longer, intruded more frequently without an appointment and ultimately were still complaining when the case was closed'. They found that these complainants often wanted what a complaint handling system could not deliver – vindication, retribution, revenge. They identified this behaviour with querulance. The research undertaken in this area indicates that the distinguishing features of a 'querulant' may include:

- the querulous behaviour is most likely to have developed slowly, often precipitated by a court case (or other legal problems), or dismissal from work;
- the behaviour is disproportionate compared to the motivating loss or injury, it persists in the face of resulting negative personal or social consequences, and it will dominate a significant proportion of the querulant's mental life;
- there is likely to be an emotionally charged belief of being unjustly treated and a need to restore their rights, often with over-optimistic expectations of compensation which over time change to a quest for total vindication and vengeance (ie, retribution and/or revenge);
- over time the focus on their grievance may be lost and the number of grievances multiply, with an associated increase in the number of involved parties;
- they are likely to reason correctly, but from false premises;
- they are likely to reject all responsibility for any shortcomings or negative events;
- they will often present with significant volumes of paperwork;
- written communications may include:

- numerous notes of exclamation and interrogation;
- all surfaces covered with script (including margins);
- the substance of their complaint often being repeated in several different ways;
- undue grammatical emphasis and underlining, and use of capitalisation for especially important expression of frustration and coloured inks for emphasis;
- references to themselves in the third person by name or, for example, as 'the defendant'.[3]

Bill Eddy, attorney, mediator and clinical social worker, associates the behaviour of what he calls 'high conflict people' with the four personality disorders described in the Diagnostic and Statistical Manual of the American Psychiatric Association. His approach is published in his book, *High Conflict People in Legal Disputes*. Eddy identified a number of distinguishing features of high conflict personalities which could include:

- repeatedly getting into interpersonal conflicts;
- denial of inappropriate behaviour – focusing intense energy on analysing and blaming others;
- seeking to punish those 'guilty' of 'hurting' them;
- denial of responsibility for any part in causing conflicts, or responsibility for resolving conflicts, while trying to get others to solve their problems;
- constantly identifying as a helpless victim;
- emotional reasoning – assuming facts from how they feel;
- an inability to reflect on their own behaviour.

In the end, what experts describe and analyse, no matter what approach is taken, boils down to what complaint handlers and others observe in practice, namely people who:

- make complaints or applications that are, under the circumstances, excessive in number;
- make inappropriate attempts to take control of a particular interaction or how their complaint/application is being dealt with, either generally or in some particular aspect;
- inappropriately express anger or frustration, eg by abusing, threatening or assaulting agency staff.

2. REPEAT APPLICATIONS

Each Australian State, Territory and the Commonwealth has enacted Freedom of Information (FOI) type legislation, giving members of the public the right to apply for access to documents held by government agencies, and to make review applications to external bodies where they are aggrieved by agency decisions or inaction. A number of these jurisdictions[4] have also enacted privacy legislation giving individuals the right to apply for access to personal information held by government agencies, and to make complaints to those agencies and review applications to external bodies concerning alleged breaches of their privacy.

Clearly the rights given to members of the public under such legislation are in the public interest and the vast majority of people who exercise those rights do so appropriately and for one of the legitimate purposes that such legislation is intended to facilitate.

This paper considers people who exercise statutory rights to make applications, review applications and appeals under FOI and privacy legislation (in this paper referred to as 'applicants').

The problem for agencies is that because people have a statutory right to make such applications, in most cases agencies cannot refuse to deal with them. The question is, are there circumstances where it would be fair and reasonable for an agency to be able to decline to deal with such an application?

3. THE PURPOSE OF THIS PAPER

This paper attempts to address three questions:

- Does the number of applications made by some applicants unreasonably impact on the resources of the agencies that have to deal with them, and on equity considerations in relation to other applicants?

- What criteria could appropriately be used to identify conduct by applicants that is so unreasonable as to be unacceptable?

- How can such criteria be fairly and impartially implemented?

4. DOES THE CONDUCT OF SOME APPLICANTS UNREASONABLY IMPACT ON THE RESOURCES OF AGENCIES AND CONSIDERATIONS OF EQUITY BETWEEN APPLICANTS?

4.1 FOI applications to agencies

In terms of the resource implications for agencies, little information has been published about the precise numbers and financial impact of multiple FOI applications from the same persons seeking largely the same or related information.

In recent decisions handed down in the General Division of the NSW Administrative Decisions Tribunal (ADT), reference was made to the history of applications made by one applicant to a particular agency and the increased workload created by those applications. The Tribunal noted that the agency had estimated that over the past year approximately 70% of the work that the agency did pursuant to the FOI Act was generated by this one applicant.

As a result of this increase in work, the agency had to re-direct a second member of staff to assist in the unit that dealt with FOI applications. According to the agency, the most significant single cause of the need to retain this extra staff member had been the applications made by this applicant. The annual report of the agency in question for 2005 contained the following statement:

> The [agency] received an unprecedented number of applications in 2005 [the statistics reported in the annual report indicate 29 new applications]. Nineteen internal reviews were conducted and eight external reviews were finalised. Over half of all applications, including internal and external reviews, were generated by one person. Additional resources continued to be directed towards managing the increased number of applications.

Another NSW agency has advised that in the 2005-2006 financial year, two FOI applicants (not being members of the media or Parliament) between them made 10 FOI applications and then lodged six review applications to the NSW ADT (one later withdrawn) against the agency's decisions. Processing the FOI applications cost the agency $2,230 (towards which

$480 was paid by the applicants) and the legal costs incurred in defending the appeals was $40,920 (a total net cost to the agency of $42,670).

The costing structures of all Australian Freedom of Information (FOI) type legislation incorporate socio-political policy objectives so that the fees an agency may charge were never intended to achieve full cost recovery. It was noted in the annual report of the former FOI Unit of the Premier's Department that:

> After assessing all factors, it was decided that NSW charging policy, in summary, should recognise the socio-political desirability of FOI, tempered with the recognition that scarce public resources are being used. The charging policy was therefore designed to have the following characteristics:
>
> - be as simple as possible;
> - for commercial users, be strongly based on a 'user pays' principle; and
> - for individual users making personal requests, public interest groups and persons who are experiencing financial hardship, be readily accessible and therefore inexpensive.
>
> The resulting policy, established by Ministerial order under section 67 of the Act, incorporates these features…
> The overall effect is to balance the value of the information provided against the cost and effort involved, even though the proportion of costs incurred is still small.[5]

The social policy objectives of FOI type legislation would seem to fully justify such a cost structure.

At the present time there are no fees prescribed under the NSW *Privacy and Personal Information Protection Ac 199t*. While s.73 of the *Health Records Information Privacy Act* 2002 refers to fees for copies, inspection of documents, amendments and fees prescribed by regulation (of which there are none) – it does not refer to fees for internal reviews or providing access to information.

4.2 Complaints to the NSW Ombudsman

While there is little available data about the impact on agencies of multiple applications from individuals seeking largely the same or related information, a glimpse of the problem can be seen from multiple FOI complaints made to the NSW Ombudsman. FOI complaints in the three and a half year period January 2004 to June 2007 (not including FOI complaints from MPs and journalists, which invariably relate to a range of issues and agencies) included:

- 25 from one individual (primarily about two related agencies),[6]
- 11 and 12 from another two,
- seven from another,
- six each from two more,
- five each from another two, and
- four from five more.

Thirteen individuals (3% of complainants) made 97 of the approximately 546 non-MP or journalist FOI complaints to the Ombudsman in that period (ie, 18% of such complaints).

People who are inclined to make multiple FOI complaints and/or review applications, appear generally to either make FOI complaints to the Ombudsman or make review applications to the ADT. It appears that less than 2% of FOI complainants to the Ombudsman also made review applications to the ADT. Of these, only four people made multiple FOI complaints to

the Ombudsman and also had multiple ADT decisions on review applications (35% of all such ADT decisions on FOI matters) between January 2004 and June 2007.

4.3 FOI review applications to the NSW ADT

In the judgment handed down in July 2006, the President of the ADT noted that one review applicant '… had filed 17 applications to which the respondent in the present proceedings…is respondent (6 have been finalised and 11 pending). He has 11 other applications in the Tribunal to which other agencies are respondents'. One year later (as at 30 June 2007), information on the ADT website indicated that this review applicant had been a party to 31 published decisions in the ADT (20 General Decision and 11 Appeal Panel[7]) – 21 in relation to one agency and 10 in relation to another five. This constituted 18% of all FOI decisions handed down by the General Division and almost 40% of all FOI decisions by the Appeal Panel since 1 January 2005. This applicant is also a party to two Supreme Court decisions on appeals against ADT decisions. In addition, at time of writing there were:

- a large number of further applications made by the applicant still before the General Division of the ADT (at least 27 matters with 5 respondents as at 30 June 2007);
- four decisions awaited from the ADT Appeal Panel, and
- several decisions awaited in Supreme Court appeals brought by either the applicant or a respondent agency.*

Of the 20 published General Division decisions relating to this review applicant (as of 30 June 2007), 11 primarily dealt with procedural/jurisdictional/cost issues and nine looked at the merits of certain applications. In only two of the merit cases was the agency decision to refuse access to documents overturned by the ADT, and in one of these the General Division decision was in turn overturned by the Appeal Panel. Fifteen of the General Division decisions have been the subject of an appeal to the Appeal Panel either by the applicant or the respondent agency.

This particular FOI review applicant is not the only multiple user of the ADT. Out of 112 FOI Act related published decisions handed down by the General Division between January 2005 and 30 June 2007, information on the website of the ADT indicates that 52 (46%) concerned review applications made by just seven applicants. While 20 concerned the review applicant referred to earlier, a further nine concerned another applicant (13 decisions since 2004 and at least 11 matters still on foot as of June 2007), six concerned a third applicant, five another applicant, and three applicants had four decisions each.

Looking at the 29 FOI published decisions handed down by the Appeal Panel between January 2005 and 30 June 2007, 11 concerned the review applicant referred to earlier and a further seven concerned people whose review applications were the subject of multiple decisions handed down by the General Division (in total approx 62% of Appeal Panel FOI related decisions). In this period, only nine Appeal Panel decisions in FOI related matters did not concern people who had multiple decisions in the General Division.

4.4 Privacy review applications to NSW ADT

Looking at the issue of applicants exercising statutory rights of access, it is also interesting to consider privacy review applications made to the NSW ADT.

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* *Some of the matters noted above are currently on foot and have not been resolved. Nothing in this article should be taken to be, nor is it intended to be, a reflection on the correctness, validity or proper outcomes of these cases*

As with FOI Act applicants, the majority of privacy related applicants to the ADT are the subject of only one decision (and very few take their matter to the Appeal Panel if they lose). However, there have been occasions over the years where some people have exercised their rights under the *Privacy and Personal Information Protection Act* to make numerous review applications to the ADT.

Between January 2004 and June 2007 one applicant to the Tribunal was a party to 19 privacy related decisions of the ADT and another applicant was a party to 16. Of the 83 privacy related published decisions handed down by the General Division and the Appeal Panel of the ADT in the three and a half years 2004 to June 2007, almost 40% concerned just these two review applicants[8]. Between them they were parties to 21 decisions by the General Division and 14 decisions by the Appeal Panel. Looking at individual years, the percentages of total privacy related ADT decisions concerning one or the other of these two applicants were:

- for 2004 – 29%
- for 2005 – 53%
- for 2006 – 37%
- for 2007 – 55.5% (30 June).

Between January 2004 and June 2007, over 50% of ADT privacy related decisions concerned just four people.

4.5 Cost and equity implications for external review bodies

External review bodies generally have fixed resources to deal with review applications – their budgets are not increased automatically in response to increases in the number of review applications lodged with them. In NSW, while a fee is charged to lodge a review application in the ADT, it is only $55.00 for each matter[9], which of course is in no way intended to cover the costs incurred by the ADT in dealing with a review application, whether or not it proceeds all the way to a published decision.

Generally speaking, only a certain number of review applications can therefore be dealt with by an external review body in any given period. Where particular individuals lodge numerous applications, this has equity implications for all other applicants.

4.6 Repeat complaints/review applications/appeals to Ombudsman and other external review bodies

The common link between the people who have made the most FOI and privacy related complaints/ review applications/appeals to external review bodies is that these primarily appear to concern, relate to or arise out of a particular event (or in some cases a series of related actions or events) involving the applicant personally and at least one of the agencies the subject of their complaints/review applications/appeals. Generally speaking, while such people will often make complaints/review applications/appeals concerning other agencies, these can generally be traced back to this single event (or related events). This reflects certain findings from research in this area that:

> The persistent complainants themselves were more likely to involve other agencies as the complaints procedure progressed, with 77% contacting at least one other agency (V.21%; P<0.001), and 37% contacting four or more (V.0%; P<0.01).[10]

Information from the Australian Ombudsman and Information Commissioners that deal with FOI complaints indicates that:

- repeat complainants are common (referred to variously as 'reasonably common' and 'very common');
- with very few exceptions, people who lodge multiple complaints/review applications/ appeals were concerned about one originating issue, and
- most complained about just one agency (or on occasion two related agencies).

5. WHAT ARE APPROPRIATE CRITERIA FOR IDENTIFYING CONDUCT BY APPLICANTS THAT IS UNACCEPTABLE?

5.1 Should the rights of the public to make applications and review applications/appeals be unlimited?

In principle, people should have the right to pursue a strongly held issue to the extent that the relevant legislation provides. For example, the FOI editor of *The Australian* newspaper taking a matter all the way to the High Court, or the FOI editors of daily newspapers making hundreds of FOI applications to a wide range of agencies about numerous issues.

The question is, should the rights of the public to make merit review applications be unlimited in all circumstances? If not, at what point and in what circumstances would it be reasonable for an agency to be able to take steps to seek to have an applicant's rights curtailed, to be able to recover from the applicant the full costs incurred in processing and determining each application, or for an external review body to limit an applicant's rights to lodge a review application.

While this issue is relevant to merit reviews generally, the scope of this paper is limited to applications/review applications/appeals under FOI and privacy legislation.

5.2 Are there existing statutory criteria for decisions or authorisations to refuse to deal with applications or applicants?

A wide range of different statutory provisions are in place in many Australian jurisdictions (and the UK and NZ) which authorise agencies to decline or refuse to deal with applications/applicants, or which allow decisions to be made by a tribunal/information commissioner to restrict an individual's ability to exercise rights under legislation.[11] Such provisions are generally intended to achieve equivalent outcomes to the powers of the courts to declare a person a vexatious litigant.

The *Supreme Court Act 1970* (at s 8.4) sets out provisions for a litigant to be declared by that Court to be a 'vexatious litigant' in relation to either proceedings against a particular person or, if brought by the Attorney General, in relation to proceedings generally in that court or an inferior court (not including a tribunal such as the ADT). These provisions require three criteria to be met:

- a criteria relating to observable conduct, ie, 'habitually and persistently…institutes… proceedings', and
- a criteria requiring an assessment of the merits of each of the proceedings in question, ie, 'without any reasonable ground', and
- a criteria generally requiring an assessment of the intention or motivation of the litigant in relation to each of the proceedings in question, ie, 'institutes vexatious legal proceedings'[12].

All three of these criteria must be met for such an application to the Supreme Court to be successful, which may explain why so few such orders are made.

Western Australia (in 2002), Queensland (in 2005) and the Northern Territory (in 2006) have each passed vexatious proceedings legislation that incorporate a range of alternative criteria covering the effect or the merits of proceedings as alternatives to the motivation/intention of the litigant.

In NSW the ability of agencies and the ADT to refuse to deal with applications or applicants is limited. Other than where documents are exempt or otherwise available, or advance deposits have not been paid, the only power available to agencies in NSW to refuse to deal with an FOI application is where this would substantially and unreasonably divert the agency's resources away from the exercise of the agency's functions (s 25(1)(a1)). However, this power can only be exercised by agencies in relation to individual FOI applications, not to repeat applications made by the same applicant.

The ADT has the power to dismiss individual proceedings if it considers those proceedings to be frivolous or vexatious, or otherwise misconceived or lacking in substance (*Administrative Decisions Tribunal Act 1997*, s 73(5)(h)). The few occasions where this power has been used by the Tribunal still involved a hearing prior to dismissal, which meant that resources were still expended on such things as planning meetings, document exchange and other Tribunal processes.

The ADT also has the power to award costs where it is satisfied that there are special circumstances warranting an award of costs. This power is seldom used as the ADT has held that the circumstances need to be out of the ordinary (while not having to be extraordinary or exceptional). In this regard, the ADT has held that an award of costs may be warranted where one party causes another party to incur costs because of unreasonable delays, or by making misconceived, frivolous, vexatious or insubstantial procedural or substantive applications (*Brooks Maher v Cheung*[13]).

Although related to complaints rather than applications, both the Ombudsman (at s13(4)) and the Privacy Commissioner (at s 46(3)) have the power to decide not to deal with complaints that are frivolous, vexatious or not in good faith, or where the subject matter is trivial. The Privacy Commissioner's powers extend to complaints that lack substance.

5.3 What are the possible criteria for decisions or authorisations to refuse to deal with applications or applicants?

The various criteria for decisions to refuse to deal with applications or applicants are analysed in various tribunal decisions looking at whether agencies can refuse access to information or refuse to deal with an application or applicant, or Tribunals/Information Commissioners can dismiss review applications or restrict the rights of individuals to exercise certain rights under legislation. These analyses often include references to such grounds as trivial, frivolous, repeated, irrational, vexatious, malicious, not in good faith, misconceived, and/or lacking in substance.

Table 1

Key Words	Definitions (for the purposes of this paper)
'*trivial*'	• an application of little substance, significance, importance or value
'*frivolous*'	• an application of minimal weight or importance, completely lacking in merit or unworthy of serious attention; an applicant's conduct that lacks seriousness, or • an applicant's motives that lack good sense or any good purpose
'*repeated*'	• a number of applications to the same agency for largely the same information • a very large number of applications to the same agency for information concerning or arising out of one event/issue (or possibly several related events/issues) • or a large number of external review applications concerning the same agency for largely the same information or information concerning largely the same events/issues
'*irrational*'	• an application that is nonsensical or misconceived; or an applicant's motives or intentions that lack good sense or any good purpose
'*vexatious*'	• an application that no reasonable person could properly treat as *bona fide*, ie, in good faith (a *vexatious application*); or • conduct that is clearly unreasonable and that creates serious inequities or a serious nuisance, eg unreasonable conduct causing annoyance, inconvenience, disruption or unwarranted expense (a *vexatious applicant*)
'*malicious*'	• an applicant motivated by an intention to cause harm, pain, suffering, unconscionable personal embarrassment or distress (particularly where it is clear the application serves no good or socially useful purpose)

As set out in Table 2 following, the key grounds or criteria set out in legislation and/or used by courts or tribunals for refusing/dismissing applications/ appeals can be categorised as relating to one of the following:

- the *motive* of the applicant
- the *conduct* of the applicant, or
- the *content* of the application.

Table 2

Categorisation of criteria

Motive	Conduct	Content
Frivolous, ie, an application made frivolously; with no serious purpose	**Frivolous**, ie, dealings with the agency that lack seriousness and promotes waste of public resources	**Frivolous, trivial and/or lacking in substance**, ie, the content of an application is of minimal weight or importance, is lacking in substance, is of no serious value or merit, or have no tenable basis in fact or law
Obsessive, ie, a strong idea, feeling or preoccupation that dominates or controls a person's thoughts and affects the person's behaviour	**Repeat** applications, ie: • a very large number of applications to the same agency concerning or arising out of one event/issue (or possibly several related events/issues), or • a very large number of review applications concerning the same agency (particularly where a significant number lack merit or merely raise procedural or interpretation issues) • any other obsessive or habitual behaviour or patterns of conduct that amount to an abuse of the right of access or review	**Repeat** applications for the same information, ie, applications to the same agency for largely the same information or about largely the same issue
Misconceived, eg to use the system or to exercise rights: • for an improper purpose • for a purpose other than that for which it is or they are designed and intended, or • for a purpose that cannot be attained	**Fundamental errors**, eg a failure to comply with mandatory requirements or preconditions for the making of such an application	**Exempt**, ie, it is apparent from the nature of the documents as described in the application that all the documents to which access is sought are validly exempt.
Vexatious intent, ie: • an application intended to cause annoyance, inconvenience, disruption or unwarranted expense • not in good faith	**Vexatious or unreasonable** conduct, ie, the conduct of an applicant in his or her dealings with the agency is clearly unreasonable and creates serious inequities or a serious nuisance, eg annoyance, inconvenience, disruption or unwarranted expense	**Unreasonable or irrational**, eg manifestly unreasonable or irrational demands or requests

Malicious intent, eg an application designed or intended to cause harm, pain, suffering, unconscionable personal embarrassment or distress (particularly where the application clearly serves no good or socially useful purpose)	**Threats**, ie, an applicant threatens violence or harm if the application is not approved	**False or misleading**, ie, clearly and intentionally false or misleading statements **Rude or defamatory**, ie, the content of an application is intentionally and unreasonably rude or defamatory

In practice, anecdotal evidence from a wide range of sources both within NSW and the other states and territories strongly indicates that the major problem area for agencies and external review bodies concerns repeat applications. I note that while it is not necessary for the purposes of this paper to conclude whether the applicants who have made the multiple applications referred to earlier in this paper fall into any of the above categories, the sheer numbers and their resource implications raise concerns that need to be considered.

5.4 Is success a relevant criteria in considering whether the making of a large number of applications is unreasonable?

It could be argued that because some repeat applicants are occasionally successful, their conduct is therefore not unreasonable. Some of the applicants who have made numerous review applications to the ADT have on occasion been successful – one such applicant was awarded $4,000 and the ADT ordered the agency to make a written apology and another successfully argued that the ADT had a public interest override power to release exempt material in certain circumstances. The possibility that people who make numerous applications to agencies or numerous review applications to the ADT might sometimes be successful does not justify or mean either that they were acting reasonably in making so many applications, or that it is reasonable for the agencies concerned or the ADT to be required to deal with all such applications. The other side of the success coin is that some journalists and MPs make large numbers of FOI applications to agencies with little success, but are clearly justified in doing so given the purposes of the FOI Act and the nature of their roles.

5.5 Can FOI legislation be an effective corruption fighting tool?

Some applicants might argue that they need to be able to make multiple FOI applications to agencies in NSW, followed by multiple complaints and review applications, to uncover 'corruption' that the agency concerned is trying to hide, or a failure by other agencies to uncover or properly address such corruption.

A primary distinction between corruption on the one hand and maladministration, incompetence or negligence on the other is that corruption requires an improper intention. Because it is agencies that are responsible for determining FOI applications, the proper implementation of FOI legislation relies to a significant extent on their good intentions. It could therefore be argued that FOI legislation is in practice unlikely to be an effective mechanism for a member of the public to uncover any corruption that an agency might be trying to hide. It could also be argued that if an FOI applicant is unsuccessful in obtaining evidence of corruption through one or two FOI applications and internal review applications to an agency, and one or two FOI complaints or review applications to external review bodies, multiple applications or complaints are unlikely to achieve a different result.

FOI legislation is in practice likely to be far more effective in corruption deterrence (through transparency) than corruption detection.

5.6 Should a distinction be drawn between members of the public and MPs and journalists?

When considering issues raised by people who make numerous FOI applications, it is important to distinguish between members of the general public on one hand and members of Parliament (MPs) and journalists on the other:

- members of the public who make numerous FOI applications are usually primarily concerned about one event or issue (or possibly several related events or issues) that concerned them personally, and generally make those applications to a limited number of agencies;
- MPs and journalists who make numerous FOI applications are usually concerned about any number of events or issues that do not concern them personally, and may make those applications to a significant number of agencies, and
- in NSW MPs and journalists seldom make review applications to the ADT.

The use of FOI by MPs and journalists serves one of the primary purposes of FOI legislation, ie, to enhance public participation in debate on public interest issues. In *Re Eccleston*,[14] the Queensland Information Commissioner noted that the enhancement of public participation in government was not an explicit purpose of the FOI law, but was implicit in some of its key concepts:

> Citizens in a representative democracy have the right to seek to participate in and influence the processes of government decision-making and policy formulation on any issue of concern to them. The importance of FOI legislation is that it provides the means for a person to have access to the knowledge and information that will assist a more meaningful and effective exercise of "that right".

This point has also been made by the other tribunals,[15] government ministers introducing FOI laws in some States,[16] and academics.[17]

6. HOW CAN SUCH CRITERIA BE IMPLEMENTED IN WAYS THAT ARE FAIR AND IMPARTIAL?

6.1 What options might be available to implement criteria for refusing/dismissing applications?

It is far easier for both agencies and external review bodies to demonstrate that conduct and content criteria have been met (such as those set out in Table 2), than to demonstrate that any motive based criteria have been met. Such assessments would be very subjective and in most cases would require a detailed investigation/examination of relevant information and circumstances, often including the need to apportion relative weightings to conflicting evidence and degrees of credibility to witnesses. This may explain why bodies such as the ADT, the Privacy Commissioner and the NSW Ombudsman seldom decline or discontinue matters based on an assessment that the matter or complainant/applicant is vexatious, frivolous, not in good faith or misconceived.

Applicants who make a very large number of applications to the same agency concerning or arising out of the one event or issue (or possibly several related events or issues) could be motivated by, for example:

- an honest belief that things have gone wrong (eg, that an agency or its staff have committed 'corrupt' acts) and a desire to either get to the bottom of it or to get an agency to recognise that it or its staff have acted inappropriately (such a belief may arise out of a rational assessment of the available information or could be based on a faulty premise, faulty reasoning, a desire to find someone to blame, delusion, etc);

- stubbornness;
- a strong idea, feeling or preoccupation that dominates and controls their thoughts and affects their behaviour (eg an obsession);
- a desire to be difficult (eg, to teach the agency or its staff a lesson).

The problem is that agencies that receive applications will seldom, if ever, be in a position to correctly identify the actual motive of an applicant. In fact, it can be expected that agencies will not have the technical expertise, or the necessary face to face contact with repeat applicants, to correctly identify their motivations. Agencies can really only respond to the conduct of applicants, and to the numbers and content of their applications.

Mechanisms that could therefore be considered for implementation of criteria for decisions to be made to restrict the rights of individuals to make applications or review applications include:

- agencies making decisions to refuse to deal with a matter based on objective criteria which could be subject of external review;
- agencies making decisions to impose 'conduct' related conditions on applicants relating to behaviour, the provision of requested information, time periods for compliance, etc
- agencies applying to an external review body (eg in NSW the ADT) for a declaration that the rights of a particular applicant be restricted or made subject to conditions, (eg related to fees and charges, prior approval of the external review body, etc).

6.2 What criteria might be appropriate for dealing with unreasonable conduct by applicants?

The relevant legislation in the Northern Territory and UK allow for a person to be declared a vexatious or repeat applicant. Any such declarations only apply to applications to a particular agency and can only be made by the Information Commissioner. In the NT Act the criteria on which the relevant Information Commissioner is required to be satisfied include that:

- over a period of time, the person has repeatedly applied to an agency for access to information or review of agency decisions about access to information, and
- the repeated applications are:
  - unnecessary [eg without serious purpose or value], or
  - an improper use of the right of access or review [eg frivolous or trivial], or
  - made for the purpose of harassing or obstructing or otherwise interfering with the operations of the agency [presumably applications that appear to be intended to cause, and possibly those that have the clear effect of causing, such things as inconvenience or expense].

The problem with these approaches is that the issue is whether an applicant who makes a large number of applications to the same agency is 'vexatious', requiring an assessment about issues of intention or motivation. From a practical perspective, the issue should be whether the number of applications to an agency about the same or similar issues is unreasonable given the impact on agency resources and equity considerations. Criteria based primarily on observable conduct and/or the content of applications that could be considered for inclusion in relevant legislation might therefore include:

- a significant number of applications to an agency over a specified period of time [say f or example 12 FOI applications in any 12 month period – not including applications made by MPs or journalists];

- a number of requests that would, if dealt with, substantially and unreasonably divert the resources away from their use by the agency in the exercise of its functions [an extension of the scope of s 5(1)(a1) of the NSW FOI Act which would allow agencies to consider the impact of repeat applications on their resources], or
- a number of requests for the same or substantially the same information/documents as in previous requests that were unsuccessful [particularly if there has not been a significant interval in time or significant changes in circumstances relating to the documents between the requests].

Because such criteria are based on objective, observable conduct or content, they could be implemented by agencies in relation to individual applications, subject to rights of external complaint or review. Further criteria that could be made available to an external review body might be:

- a number of applications have been made to an agency over a specified period that are an improper use of the right of access or review: for example, because they are without serious purpose or value, are for trivial information, they are so obviously untenable or manifestly groundless as to be utterly hopeless, misguided or misconceived, or there are no grounds to believe there is any reasonable chance of success, or
- a number of applications have been made to an agency that can fairly be characterised as obsessive, habitual, persistent or manifestly unreasonable in the circumstances [for example where there have been frequent requests, or requests that otherwise form a pattern, such as a series of requests for documents that the applicant is or should be aware clearly are, and will in all likelihood be claimed by the agency to be, covered by an exemption clause];

If provisions are introduced into FOI and privacy legislation to allow enforceable decisions to be made to restrict the rights of individuals to make applications or review applications generally, the appropriate decision-maker in each jurisdiction would probably best be the external review body with determinative powers.

6.3 What options could be made available for agencies and external review bodies to deal with unreasonable numbers of applications made by individuals exercising statutory rights?

In making a decision on an application by an agency to restrict the rights of individuals, options that could be made available to an external review body include:

- ordering that its consent was required for any further application to be made to the agency in question, or
- imposing a condition on any further applications to the agency in question that the applicant must pay the full costs incurred by the agency in dealing with them, or
- imposing an upper limit on the number of separate applications a particular individual may make to the agency in question in any given period.

If going down this track, it would be important to also consider including an offence provision in the relevant legislation to deter people from aiding or abetting a person to avoid or get around any such order or condition (for example people who step into the shoes of the person the subject of such an order to make further applications or who allow their names to be used to make further applications).

7. CONCLUSIONS

Experience from a range of jurisdictions shows that some people who exercise statutory rights to make applications/review applications/appeals under FOI and privacy legislation act

in ways that unreasonably impact on the resources of agencies, on equity considerations in relation to other applicants and/or the health and welfare of agency staff. While the numbers of applicants who act so unreasonably are small, their conduct or activities can have significant cost implications for agencies and external review bodies and create significant equity issues in relation to other applicants and to the work of the agency generally.

Legislation establishing such rights should address this issue in ways that authorise agencies and external review bodies to properly and fairly manage such unreasonable conduct/activities when they occur, without inhibiting or restricting the rights of the vast majority of applicants.

Endnotes

1 Grant Lester, Beth Wilson, Lynn Griffin and Paul E Mullen 'Unusually persistent complainant', *British Journal of Psychiatry* (2004), 184, 352-356.
2 Bill Eddy, *High Conflict People in Legal Disputes*, Janis Publications 2006.
3 Dr Grant Lester, Literature Review 2007.
4 Commonwealth, New South Wales, Northern Territory, Tasmania, Victoria, Western Australia.
5 *Freedom of Information Act 1989* – Annual Report 1989-1990, published by the former Freedom of Information Unit of the Premier's Department of NSW (pp.5-6).
6 Not the record-breaking review applicant to the ADT referred to later in the paper.
7 Including four decisions handed down on appeals brought by agencies.

8 Identified as GA & NZ
9 If an applicant does not have sufficient financial resources, this fee may be waived.
10 Lester G, Wilson B, Griffin L, Mullen PE, 'Unusually Persistent Complainants'*, British Journal of Psychiatry*, 2004, 184, p354.
11 Frivolous and vexatious type provisions:
Northern Territory, *Information Act*, s.42;
Queensland, *Freedom of Information Act 1992*, s.96A and s.96B
Western Australia, *Freedom of Information Act 1992*, s.67
South Australia, *Freedom of Information Act 1991*, s.18(2a)
New South Wales, *Administrative Decisions Tribunal Act 1997*, s.73(5)
Australian Capital Territory, *Administrative Appeals Tribunal Act 1989*, s.43A
United Kingdom, *Freedom of Information Act 2000*, s.14 & s.50
New Zealand, *Official Information Act 1982*, s.18
Repeated request type provisions:
Victoria, *Freedom of Information Act 1982*, s.24A
Northern Territory, *Information Act* (in the context of vexatious applications) s.42
Queensland, *Freedom of Information Act* (in the context of vexatious applications) s.96A
United Kingdom, *Freedom of Information Act 2000*, s.14
All documents exempt type provisions:
Western Australia, *Freedom of Information Act 1992*, s.23
Commonwealth, *Freedom of Information Act 1982*, s.24
Australian Capital Territory, *Freedom of Information Act 1989*, s.23
Tasmania, *Freedom of Information Act 1991*, s.20
12 In *Attorney General v Wentworth (1988)* 14 NSWLR 481 Roden J held that proceedings are vexatious for the purposes of s.84 of the *Supreme Court Act* if they are: instituted with the intention of annoying or embarrassing the person against whom they are brought; brought for collateral purposes and not for the purpose of having the court adjudicate on the issues to which they give rise; or, irrespective of the motive of the litigant, so obviously untenable or manifestly groundless as to be utterly hopeless (at 491).
13 [2001] NSW ADT 18 at [11])
14 *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* [1993] QICmr 2, para 71.
15 *Re Cleary and Department of the Treasury* (1993) 18 AAR 83; *Re Veale and Town of Bassendean*, unreported Information Commissioner of Western Australia, 1994, *Decision Ref D00494*.
16 See the Second Reading Speeches of *NSW (Legislative Assembly Debates* NSW 2 June 1988 p 1399) and Queensland *(Parliamentary Debates*, 5 December 1991, p 3849).
17 Peter Bayne 'Recurring Themes in the Interpretation of the Commonwealth Freedom of Information Act' (1996) 24 Federal Law Review 287 at 288; Peter Bayne 'Freedom of Information and Democracy: A Return to the Basics?' (1994) 1 *Australian Journal of Administrative Law* 107; 'Freedom of Information and Political Free Speech' in T Campbell and W Sadurski eds *Freedom of Communication* (1994) at 199; Anne Cossins 'Revisiting Government: Recent Developments in Shifting the Boundaries of Government Secrecy Under Public Interest Immunity and Freedom of Information Law' (1995) 23 *Federal Law Review* 226.

WHAT PROCEDURAL FAIRNESS DUTIES DO THE MIGRATION REVIEW TRIBUNAL AND REFUGEE REVIEW TRIBUNAL OWE TO VISA APPLICANTS?

Enzo Belperio*

> 'there are hours of innocent amusement yet to be had about the effect of section 422B.'
>
> Hayne J, *MIMIA v WACO* [2004] HCATrans 430

1. INTRODUCTION

The question that this essay seeks to answer can initially be stated simply: what procedural fairness duties do the Migration Review Tribunal ('MRT') and Refugee Review Tribunal ('RRT') owe to visa applicants? The answer to this question is not so straightforward. This is because it requires an analysis of the interplay between the broad natural justice hearing rule duties that exist at common law and the narrower duties that are set out in the *Migration Act 1958* (Cth) ('the *Migration Act*').

The *Migration Act* provides detailed procedures that must be followed when the MRT and RRT are reviewing decisions made by the Minister for Immigration, Multicultural and Indigenous Affairs.[1]

In *Re MIMIA; Ex parte Miah*[2] the High Court held[3] that the procedures contained within the *Migration Act* did not constitute an exhaustive code of procedures, as a clear legislative intention to exclude the common law hearing rule could not be found. The focus of this essay is on Parliament's legislative response to *Miah* and to what extent it has succeeded in excluding the common law hearing rule.

A The Migration Legislation Amendment (Procedural Fairness) Act 2002 (Cth)

Parliament responded to *Miah* with the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth) ('the *Amendment Act*'). The Explanatory Memorandum for the Bill states:

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> In *Re MIMA; Ex parte Miah* … the High Court held … that the "code of procedure" … in Subdivision AB of Division 3 of Part 2 of the Act did not exclude common law natural justice requirements. The majority considered that such exclusion would require a clear legislative intention and that there was no such clear intention in the Act.
>
> The purpose of this Bill is to provide a clear legislative statement that the "codes of procedure" identified in the Bill are an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.[4]

Six sections were inserted by the *Amendment Act*.

Sections 51A, 97A, 118A and 127A, inserted at the beginning of Subdivisions AB, C, E and F respectively of Div 3 of Part 2 of the *Migration Act*[5] all state:

> **Exhaustive statement of natural justice hearing rule**
>
> (1) This Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
>
> (2) Sections 494A to 494D, in so far as they relate to this Subdivision, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

Sections 494A to 494D provide methods by which the Minister must serve documents and when a person is taken to have received such documents.

Section 357A, inserted at the beginning of Div 5 of Part 5,[6] states:

> **Exhaustive statement of natural justice hearing rule**
>
> (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.
>
> (2) Sections 375, 375A and 376 and Division 8A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

Sections 375, 375A and 376 allow the Minister to decide whether information can be disclosed to the MRT. Division 8A of Part 5 provides procedures for the MRT to give or receive review documents.

Section 422B, inserted at the beginning of Div 4 of Part 7[7] states:

> **Exhaustive statement of natural justice hearing rule**
>
> (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.
>
> (2) Sections 416, 437 and 438 and Division 7A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

Section 416 provides that when a person makes a second application to the RRT, the RRT may, but need not, have regard to information contained in the first application. Sections 437 and 438 regulate the disclosure of certain information. Division 7A of Part 7 provides procedures by which the RRT can give or receive review documents.

For convenience I will refer to ss 51A, 97A, 118A, 127A, 357A and 422B collectively as the 'exhaustive clauses'.

B Problem to be answered

This essay seeks to analyse the effect the Amendment Act has had on the natural justice hearing rule obligations that the MRT and RRT owe to visa applicants. The scope has been limited to the MRT and RRT because these Tribunals represent, for the majority of visa applicants, the final decision-making stage. Although this means that only ss 357A (relating to MRT reviews) and 422B (relating to RRT reviews) are examined, the general principles established apply by analogy to the other exhaustive clauses.

It is clear that a reviewable error occurs when the statute is not complied with[8] and that no error occurs when both the statute and common law requirements are complied with. However, when the statute is complied with but the common law is not, determining whether the MRT or RRT has fallen into error depends on the operation of ss 357A and 422B. How these sections operate is presently unclear.

Chapter II analyses the three interpretive approaches that have been afforded to the exhaustive clauses, seeking to determine which is most defensible from a statutory construction perspective. I argue that these three interpretations have been mischaracterised as merely being a choice between 'wide' and 'narrow', and that this has resulted in some cases arriving at decisions which the authorities that they rely on would not have arrived at.

Chapter III analyses the extent to which the Amendment Act, once properly construed, has modified the natural justice hearing rule duties owed by the MRT and RRT. A conceptual framework is presented to determine which common law duties are excluded by the exhaustive clauses, and which are still owed. The Chapter also illustrates how the characterisation problem outlined in Chapter II can lead Courts on review into error. Finally, Chapter III demonstrates, as a case study, that the apparently conflicting cases of *MIMIA v Lay Lat*[9] and *Antipova v MIMIA*[10] were both correctly decided according to the framework that I propose.

This essay concludes that, despite Parliament's apparent intention to codify the natural justice hearing rule, there are still some common law natural justice hearing rule obligations which apply to decisions made by the MRT and RRT. Determining which common law obligations apply depends, to a large extent, on the grammatical wording of the statutory obligations.[11] In addition, as a result of the Amendment Act, Courts may be more likely to suffuse the statutory obligations with common law values.[12]

II INTERPRETING THE EXHAUSTIVE CLAUSES

The Courts' focus has centred on the meaning of the phrase 'in relation to the matters it deals with'. As the exhaustive clauses state that particular divisions and subdivisions are exhaustive statements of the natural justice hearing rule in relation to the matters they deal with, it is necessary to determine exactly what the division or subdivision deals with before a Court can establish what the division or subdivision is an exhaustive statement of.

Three different interpretations have arisen. The first (referred to here as the 'whole division approach') holds that the whole division (or subdivision where appropriate) deals with one matter: the natural justice hearing rule. Under this approach, any obligations which exist at common law but are not imposed by the Migration Act are extinguished because the

division, as a single entity, is taken to be an exhaustive statement of the natural justice hearing rule in its entirety.
On the other hand, the second interpretation (referred to here as the 'exact text approach'), holds that each individual section of the division or subdivision deals with the particular obligation imposed by the exact text of that section, and nothing more.

Between these two approaches, a third interpretation (referred to here as the 'individual sections approach') agrees with the exact text approach in holding that it must be the individual sections which are examined rather than the division or subdivision as a whole, but differs from the exact text approach in holding that a section can 'deal with' more than just the exact text of the section. Under this approach, analysis must be undertaken to determine exactly what each section deals with, but it may be more general than the exact obligation that the text of the section provides.[13]

This chapter seeks to establish that the individual sections approach should be preferred over the whole division and exact text approaches.

The debate between these interpretations has in some instances been mischaracterised as being merely a choice between a 'narrow' and 'wide' interpretation of the matters which the sections deal with.[14] The 'narrow' cases typically cited are *WAJR v MIMIA*[15] and *Moradian v MIMIA*,[16] the 'wide' cases being *NAQF v MIMIA*[17] and *Wu v MIMIA*.[18] Whilst the latter cases are certainly 'wider' than the former, this artificial dichotomy does not tell the full story. This is because all four of these authorities adopt either the exact text or individual sections approach: none adopt the whole division approach.

The judges who have ruled in the principal authorities have asked themselves two questions. The first is whether the division is, in and of itself, an exhaustive statement of the natural justice hearing rule, or whether the individual sections must be examined to determine what they deal with. If the whole division is the exhaustive statement, no further enquiry is needed. However, if it is the sections which must be examined, then a second question follows: do the sections deal only with the exact obligations that they provide, or do they deal with something more general? This is the question on which the principal authorities in the Federal Court are currently divided, with *WAJR* and *Moradian* (the 'narrow' cases) adopting the exact text approach, and *NAQF* and *Wu* (the 'wide' cases) adopting the more general characterisation (the individual sections approach). Several cases, though, have followed what they call the 'wide' line of authority but have in fact adopted the whole division approach, notwithstanding that *NAQF* and *Wu* explicitly reject this approach.[19]

A Is the whole division exhaustive of the matter it deals with or are the individual sections exhaustive of the matters they deal with?

1 Case law

In *NAQF v MIMIA*[20] the applicant complained that the MRT misled him into not adducing evidence by implying that a visa would be granted and that therefore the only decision to be made related to the conditions of the visa.[21] Lindgren J held that the applicant was not misled by the MRT's conduct.[22] Given this finding, it was unnecessary to discuss the application of s 357A but Lindgren J chose to because the point was argued at length.[23]

The Minister submitted that so long as 'there can be found at least one provision within Div 5 giving protection of a 'natural justice hearing rule' kind',[24] then the 'matters it deals with' must be interpreted to mean all procedural aspects of the conduct of reviews.[25] His Honour rejected that submission, relying on the fact that Parliament has previously excluded natural justice with unqualified wording (such as s 476(2)(a)) and had not done so in this case.[26] His

Honour held that a search must be made within the division for a provision 'dealing with' a relevant 'matter', but did not identify the full reach of the expression.[27]

The decision in *NAQF* can be contrasted with cases which have adopted the 'whole division approach'.[28] The most important of these is *MIMIA v Lay Lat*.[29]

In *Lay Lat* the Minister had refused the visa application on the basis that he was not satisfied that the requirements of reg 131.214 were met.[30] Regulation 131.214 requires that an applicant must not be involved in business or investment practices which would not be acceptable in Australia.[31] The applicant claimed that he was denied procedural fairness because the Minister did not put to him that his application might be refused on those grounds.[32]

The Full Court[33] first held that there was no denial of procedural fairness,[34] because the applicant had in fact received correspondence from the Department asking for evidence relating to how he accumulated his substantial wealth[35] and other evidence before the Court indicated that the applicant appreciated that the issue would be an important one in determining his application.[36]

The Court further held that, in any event, the Minister did not owe a duty to provide information to the applicant due to the effect of s 51A combined with s 57(3),[37] as the applicant was outside of the migration zone when applying for the visa. The Court explicitly rejected the individual sections approach, stating:

> Counsel for the respondent submitted that the words "in relation to the matters it deals with" mean that the decision-maker must, in each case, consider whether there is an applicable common law rule of natural justice and then examine the provisions of Subdiv AB to see whether it is expressly dealt with. … We reject this submission.'[38]

The basis upon which the Court held that the whole division approach should be adopted was that the Explanatory Memorandum for the *Amendment Act* makes it plain that the *Amendment Act* was enacted to overcome the effect of the High Court's decision in *Miah*,[39] stating:

> the drafters of the Explanatory Statement and the Minister could hardly have made the intention of the 2002 amendments any clearer. What was intended was that Subdiv AB provide comprehensive procedural codes which contain detailed provisions for procedural fairness but which exclude the common law natural justice hearing rule.'[40]

2 Defending the individual sections approach over the whole division approach

The strongest argument in favour of the whole division approach is that it appears, from the Explanatory Memorandum which accompanied the Bill[41] that Parliament intended to completely exclude the natural justice hearing rule.[42] Whilst this is a relevant consideration,[43] it is balanced by the principle that:

> The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. … The function of the Court is to give effect to the will of Parliament as expressed in the law.[44]

The whole division approach results in all common law natural justice obligations being extinguished. This is inconsistent with the principle of statutory interpretation that 'an Act will not be construed as taking away an existing right unless its language is reasonably capable of no other construction'[45].

Several factors prevent the conclusion that the language of the exhaustive clauses is capable of no other construction. First, the phrase 'in relation to the matters it deals with'

imports a 'more specific limitation on the scope of procedural fairness than might have been achieved by a global reference to the conduct of reviews by the Tribunal'.[46] Further, 'matters' is expressed in the plural. If Parliament intended that there would only be one matter that the division dealt with (the natural justice hearing rule), it could have omitted the phrase 'in relation to the matters it deals with' entirely. To give effect to the words of this phrase,[47] the 'matters' must be examined more closely than the whole division approach allows.

B Do the individual sections deal with only the exact text of each section, or with something more general?

This second question is only relevant when the first question[48] is answered by rejecting the whole division approach. The cases below take as their starting point that it is the individual sections rather than the whole division which must be examined. This point becomes important when analysing the way in which some subsequent cases have misinterpreted these authorities.

1 The principal authorities

An example of the wider interpretation (the individual sections approach) can be found in *Wu v MIMIA*.[49] The applicant applied twice for a visa.[50] The Minister, in refusing the second application, placed weight on inconsistencies found between the first and second applications.[51] The issue to be decided was whether the Minister had an obligation to inform the applicant that the two applications would be compared and invite the applicant to comment on this;[52] it being common ground that s 57 did not apply due to ss 57(3)(a) and 57(3)(b).[53] Hely J first held that the common law hearing rule provided an obligation on the Minister to inform the applicant and invite comment.[54] His Honour then held that s 51A excluded that obligation.[55] His Honour did not explicitly state what it was that s 57 'dealt with', but gave his reasons as:

> The legislature cannot have intended that the common law hearing rule would continue to apply in circumstances where s 57 did not require the provision of information to an applicant…[56]

Implicit in this statement is that s 57 'deals with' the topic of provision of information to an applicant, and so is an exhaustive statement of the procedural fairness requirement to provide information.

A useful contrast to this can be found in *WAJR v MIMIA*.[57] The RRT found that certain documents which were crucial to the applicant's claim were concocted for the purpose of the application.[58] The applicant contended that procedural fairness required the Tribunal to put this to the applicant and invite him to comment on it before making its decision.[59] French J first held that s 424A, which requires the RRT to provide certain information to applicants, did not apply as the formation of a view about evidence by the Tribunal is not 'information' for the purposes of the section.[60] Secondly, his Honour held that, absent s 422B, there was a common law obligation to provide the applicant with this finding and invite him to comment on it.[61] His Honour then considered whether s 422B excluded this common law obligation. His Honour held that as s 424A did not require the RRT to notify the applicant of this information, the section did not deal with the common law obligation to provide that particular information, and so was not an exhaustive statement of that obligation.[62] This differs from the outcome in *Wu* because Hely J found, in that case, that s 57 was an exhaustive statement of the entire obligation to provide information to the applicant.

French J's reasoning was upheld in *Moradian v MIMIA*.[63] The Minister received adverse information about the applicant but did not inform him or give him a chance to respond.[64] The information was crucial in the decision-maker's decision to reject the application.[65]

Section 57 imposes obligations on the decision-maker to give particulars of relevant information to the applicant and invite the applicant to respond.[66] By s 57(3)(a) this does not apply where the visa is one which cannot be granted when the applicant is in the migration zone. As the visa which Moradian was applying for could not be granted whilst he was in the migration zone, the obligations prescribed by s 57 did not apply to the decision-maker.[67] Gray J held that, absent s 51A, the decision-maker had a common law obligation to provide this information to Moradian.[68] His Honour held that Moradian's right could only be abrogated by clear words, and that, absent s 51A, there were no clear words which abrogated the right.[69] His Honour then considered whether s 51A provided such clear words.

Under the exact text approach, the matter which s 57 deals with would be characterised as the right to receive and comment on relevant adverse information with respect to visa applications of a kind which can be granted when the applicant is in the migration zone, due to s 57(3).[70] On this interpretation, Moradian's situation was not 'dealt with' by s 57, and so s 51A would not abrogate Moradian's pre-existing common law right to receive the adverse information. Under the individual sections approach, s 57 deals with the provision of information in relation to the application of visas.[71] Applying this interpretation extinguishes Moradian's common law right, as s 57 would be exhaustive for visas which can be granted, as well as visas which cannot be granted, whilst the applicant is in the migration zone.

Gray J held that he was not bound by any authority on this question.[72] Gray J also held that, though he may have been prepared to accept that s 51A was ambiguous, the explanatory memorandum and other secondary material did not resolve the ambiguity.[73] For these reasons Gray J returned to the fundamental principle expounded in *Annetts v McCann*[74] in holding that whilst s 51A may contain 'indirect references, uncertain inferences or equivocal considerations',[75] there were no 'plain words of necessary intendment'[76] which excluded the principles of procedural fairness. On this basis Gray J adopted the exact text approach.[77]

2 Mischaracterisation of these authorities

In *VXDC v MIMIA*[78] the applicant claimed that common law procedural fairness required that the RRT notify him in advance of a particular adverse conclusion that it had made.[79] Heerey J held first that s 424A did not provide such an obligation because 'the Tribunal's finding … was a conclusion … on the available evidence; it was not 'information' within the meaning of s 424A'.[80] Heerey J then considered whether s 422B(1) excluded the common law requirement:

> … 422B(1) is saying that Div 4 is dealing with procedures and that the reader will find in the division all the law about the natural justice hearing rule (that being a procedural matter) in the conduct of such reviews.[81]

Heerey J continued, stating:

> This meaning presents itself as plausible once one accepts, in the words of Lindgren J in *NAQF*, that it is "inconceivable that the legislature meant the displacement of the natural justice hearing rule to be co-extensive with, and not to go beyond, the precise text of the express protections of a procedural fairness kind…[82]

Lindgren J, however, did not use this proposition in support of the whole division approach, instead adopting the individual sections approach.[83] Heerey J determined that:

> Parliament cannot have intended that the uncertainties of the common law rules were, in some unspecified way and to some unspecified extent, to survive.[84]

This essay will argue in Chapter III that, though the Minister may not have intended it,[85] once it is accepted that the correct interpretation is the individual sections approach then it follows that there are some common law rules which survive. Heerey J concluded that on the facts there was no breach of the common law requirement.[86] However, if on the facts there was a breach, Heerey J's approach would not have found a reviewable error, whereas the individual sections approach does find an error.[87]

A similar approach can be seen in *SZEGT v MIMIA*,[88] where Edmonds J characterised the debate as being about:

> … which of the competing views as to what the concluding words of s 422B(1) – 'in relation to the matters it deals with' – refer to: Whether they are to be confined to the exact text of the procedural fairness requirements to be found in Division 4 or whether they (the words) extend to something wider, such as all procedural aspects of the conduct of reviews by the Tribunal. The confined view is exemplified in the approach of French J in *WAJR* and Gray J in *Moradian* on the one hand, and the wider view is exemplified in the approach of Lindgren J in *NAQF* and Hely J in *Wu* on the other.[89] [Citations omitted]

NAQF[90] and *Wu*,[91] however, rejected the proposition that the words 'in relation to the matters it deals with' refer to 'all procedural aspects of the conduct of review by the Tribunal'. Nevertheless, Edmonds J appears to have chosen the 'whole division approach',[92] relying on authorities which only support the 'individual sections approach'.[93] He was saved from making a decision that was inconsistent with the authorities that he cited only because he decided that the common law procedural fairness requirement that the applicant alleged was breached (the 'duty to enquire') did not exist at law.[94]

To illustrate how this approach can result in inconsistent decisions, assume for a moment that the 'duty to enquire' does exist as a principle of common law procedural fairness (though at law it does not). The approach that Edmonds J took was that as Division 4 is an exhaustive statement of the natural justice hearing rule in relation to all procedural aspects of the conduct of reviews by the Tribunal, therefore the 'duty to enquire' that exists only as a common law principle is extinguished.[95] According to the authorities which Edmonds J cites as supporting the wider view, however, the individual sections of Div 4 should be examined to determine whether there is any section which deals with the 'duty to enquire'. If there is not, then the duty to enquire is not excluded by any of the sections within Div 4. Chapter III of this essay deals more specifically with how mischaracterising the authorities in this way can result in decisions being made which are not supported by the authorities. At the very least, characterising the competing interpretations as falling into the categories of 'wide' and 'narrow' has resulted in situations where the questions that the Court needs to ask itself become clouded.

3 Defending the individual sections approach over the exact text approach

If the principle that an Act should not be construed to take away existing rights unless no other construction is reasonably capable can be used to justify the individual sections approach over the whole division approach,[96] why should it not be used to justify the exact text approach over the individual sections approach? Gray J in *Moradian*,[97] citing *Annetts v McCann*,[98] held in favour of the exact text approach for this very reason.[99] The exact text approach, however, suffers from an equally fatal flaw, namely that it is inconsistent with the principle of statutory interpretation that an 'interpretation … [that has] no practical utility … should be avoided if the relevant words can bear a useful meaning, consistent with the purposes and objects of the … Act'.[100]

In *AA Pty Ltd v Australia Crime Commission*,[101] Finkelstein J held that s 59(7) of the *Australian Crime Commission Act 2002* (Cth) ('the *ACC Act*') did not give power to the Australian Crime Commission ('the ACC') to disseminate information to the Australian

Taxation Office ('the ATO'). Section 59(7)[102] gives the ACC power to disseminate information to a 'law enforcement agency', which is defined in s 4 of the *ACC Act* as being either the Australian Federal Police, a Police Force of a State, or an 'authority or person responsible for the enforcement of the laws of the Commonwealth or the States'. Finkelstein J held that the use of the definite article, 'the', in '*the* laws of the Commonwealth or the States' meant that the agency, to be defined as a law enforcement agency, must be responsible for enforcing all of the laws of the Commonwealth or the States, rather than only some of them.[103] Because the ATO is responsible for only some of them then it is not a law enforcement agency.[104]

The Full Court overturned this finding.[105] One of the grounds on which they rejected the proposition that 'the laws' meant 'all of the laws' was that counsel for AA Pty Ltd could not point to any authority or person within Australia, apart from the Australian Federal Police and Police Forces of the States, which has responsibility for enforcing all of the laws of the Commonwealth or the States.[106] As the Australian Federal Police and the Police Forces of the States are already included as the first two limbs within the definition of 'law enforcement agency', the construction held by Finkelstein J had the result that the third aspect of the definition does not have 'any work to do. The interpretation proposed by the respondents would have no practical utility'.[107]

The exact text approach suffers from the same defect. French J in *WAJR*[108] and Gray J in *Moradian*[109] held that ss 424A and 57 only dealt with the specific obligation to provide information that those sections imposed. Under this approach, the sections do not deal with any obligation to provide information that is not required by the sections. This means that under the exact text approach, no common law obligation to provide information will ever be exhausted by the exhaustive clauses. This becomes apparent by recalling that the exhaustive clauses only come into operation when the decision-maker or Tribunal complies with the statute but breaches a common law requirement. In every such circumstance, by definition there will not be a statutory provision which provides the common law obligation, and so the common law obligation will not be extinguished. The result of this is that the exhaustive clauses are rendered nugatory, as they do not actually exhaust anything. This must be avoided if, on the language of the statute, it reasonably can be. The individual sections approach does avoid it, by allowing the sections to deal with matters more general than the precise obligations that the sections impose.

III APPLYING THE INTERPRETATION TO DISCOVER THE RESULTS

This Chapter examines the most common circumstances where the MRT and RRT breach common law requirements but comply with the statutory obligations[110] and analyses which of these common law requirements still apply to the MRT and RRT.[111] Through this analysis this chapter seeks to establish some guiding principles for determining which common law requirements are excluded and which ones still apply.

In doing so, this Chapter illustrates the different results that can occur depending on which interpretive approach is used. As the exhaustive clauses only come into operation when the statute is complied with but the common law is not, those situations will never result in the whole division approach finding a reviewable error. This is because the whole division approach results in the division itself exhausting the natural justice hearing rule in its entirety. By identifying the situations where the individual sections approach does and does not exclude the common law hearing rule, this chapter illustrates the mistakes that can occur if Courts do not distinguish between the approaches in the way that Chapter II argues they should.

This Chapter is organised into five parts: Part A analyses the common law obligation to disclose the case against the applicant, Part B analyses the common law obligation to give

an applicant the opportunity to respond to the case against himself/herself and put forward his/her own case, and Part C extracts the guiding principles which are established by the analysis contained in Parts A and B. Part D illustrates the different results that occur depending on which interpretive approach is used, and Part E concludes by demonstrating that the Courts in *Lay Lat* and *Antipova* both produced the results that this framework predicts.

A Disclosure of the case against the applicant

The rule that applicants are entitled to know the case against them in advance developed as a common law requirement because Courts recognised that the opportunity to put forward one's own case will not constitute a fair hearing if the person who is affected by the decision does not know the case against him/her.[112]

1 The statutory requirements

The MRT and RRT's statutory requirements to disclose information to the applicant are primarily prescribed by ss 359A (for the MRT) and 424A (for the RRT). These sections require the MRT and RRT to 'give to the applicant … particulars of any information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review',[113] 'ensure … that the applicant understands why it is relevant to the review'[114] and 'invite the applicant to comment on it'.[115] Both of these sections state that they do not apply to information:

(a) that is not specifically about the applicant or another person and is just about a class of person of which the applicant or other person is a member; or

(b) that the applicant gave for the purpose of the application; or

(c) that is non-disclosable information.[116]

2 Common law requirements

The following three obligations that are examined are obligations which are not imposed by the Migration Act but have been, prior to operation of the exhaustive clauses, imposed by Courts upon the Tribunal on the basis of the common law natural justice hearing rule. The aim is to discover which of these survive the operation of the exhaustive clauses.

(a) Information not specifically about the applicant

As ss 359A and 424A do not apply to information that is not specifically about the applicant, there is no statutory obligation to provide this information to the applicant. The common law, though, in certain situations does impose such an obligation.

In *VAAC v MIMIA*,[117] the RRT wrote a letter to the Afghan Consul asking it questions relevant to the review, and received a reply.[118] The RRT did not disclose the letter or reply to the applicant.[119] The Full Court[120] held that whilst this did not constitute a breach of s 424A,[121] it did constitute a breach of the wider natural justice obligations.[122] The reason it did not breach s 424A was that it fell within the exception provided by s 424A(3)(a), as the information was not specifically about the applicant.[123] The Court held that the RRT still had an obligation beyond the statutory requirements to provide the applicant with copies of the documents.[124]

Another example is information that is known as 'country information'. *Miah*,[125] the case which instigated the Amendment Act, concerned whether the RRT had an obligation to disclose information about recent elections in the applicant's country. The High Court held

that whilst no obligation was prescribed by the Migration Act to disclose the information, an obligation did arise under the common law hearing rule.[126]

To determine whether the exhaustive clauses exclude this common law rule, what must be considered is whether ss 359A and 424A 'deal with' the common law hearing rule obligation to provide such information to the applicant.

It is possible to argue that ss 359A and 424A only deal with the Tribunals' obligation to provide information that does not fall under one of the exceptions. Supporting this argument is the fact that the three exceptions are prefaced with the phrase: 'This section does not apply to information …' This is an explicit statement that the section has no application to information of the type provided in the three exceptions. On this argument, the sections are not interpreted as saying that 'the Tribunal does not have to provide information which is not about the applicant', but rather the sections are taken to say: 'this section is silent as to the question of whether the Tribunal has to provide information which is not about the applicant'. As they are silent with respect to that question, it appears that the sections do not deal with the Tribunals' obligation to disclose information of the type which it received in *VAAC*.[127]

The contrary argument is that because the sections provide that some types of information, but not others, must be provided to the applicant, then they deal with the question of whether each type of information must be provided. Parliament, through the enactment of ss 359A and 424A, has specifically turned its mind to the information contained in the exceptions. The sections, in simplified form, state that 'information which is part of the reason for decision must be provided to the applicant, except information which is not specifically about the applicant'. From this perspective, it appears that the sections deal both with the obligation (that is imposed) to provide information which is specifically about the applicant, and with the obligation (that is not imposed) to provide information which is not specifically about the applicant.

The following hypothetical can assist in illustrating this second argument. Suppose that the sections are worded differently, and instead state that 'information which is part of the reason for decision and is specifically about the applicant must be provided to the applicant'. Whilst this hypothetical wording imposes the same positive obligation on the Tribunals, the question of what the hypothetical sections deal with is not as clear. It could be said that they impose the obligation on the Tribunals by only 'dealing with' the 'matter' of the Tribunals' obligation to provide information that is specifically about the applicant, and that Parliament has not turned its mind to the 'matter' of the Tribunals' obligation to provide information that is not specifically about the applicant. Conversely, it could be argued that on this hypothetical wording Parliament has evinced an intention to 'cover the field',[128] and so the hypothetical sections deal with the Tribunals' obligation to provide both types of information. The sections as they are actually worded, however, make the answer clearer. By explicitly addressing information which is not specifically about the applicant, the sections can be taken to deal with both obligations.

Finally, it is not critical that the sections state 'this section does not apply to information … that is not specifically about the applicant' instead of words to the effect of 'the Tribunal has no obligation to provide information that is not specifically about the applicant'. The latter wording appears to put the matter beyond doubt, unequivocally stating that there is no such obligation.[129] As for the former wording, whilst by itself it does not remove any obligation, it now must be read alongside, and in the context of, the exhaustive clauses.[130] Reading s 359A in the context of s 357A, and s 424A in the context of s 422B, makes it likely that the obligation to provide information to the applicant that is not specifically about the applicant, as it exists at common law, is extinguished.

(b) Non-disclosable information

Another exception contained in ss 359A and 424A is that those sections do not apply to information which is 'non-disclosable information'. The definition of 'non-disclosable information' in s 5 of the Migration Act includes 'information … whose disclosure would found an action by a person, other than the Commonwealth, for breach of confidence'.

The common law obligation to disclose information to an applicant, absent the exhaustive clauses, can still exist even where the Tribunal is presented with confidential information.[131] This has recently been confirmed by the High Court in *VEAL v MIMIA*.[132] In that case, the RRT received an unsolicited letter making adverse allegations about the applicant.[133] The letter was received after the hearing but before the RRT gave its decision.[134] The author of the letter requested that the letter be kept confidential.[135] The RRT did not disclose the content of the letter to the applicant and stated in its reasons that it had no regard to the letter.[136] The unanimous joint judgment[137] held that whilst the applicant should not have been allowed to see the letter, he should have been told 'the substance of the allegations'.[138]

The operation of the exhaustive clauses will exclude this obligation for the same reasons as discussed above in relation to information which is not specifically about the applicant.[139] Non-disclosable information is expressed as an exception to ss 359A and 424A in the same way as 'information not specifically about the applicant' is, and so the arguments are analogous.

(c) 'Surprising conclusions'

At common law, the MRT and RRT have obligations to disclose to an applicant any adverse conclusions which the applicant would not reasonably have been aware that the Tribunal was considering (referred to here as 'surprising conclusions'). Whilst a decision-maker is not obliged to disclose all of his/her mental processes,[140] a breach of procedural fairness can be found where an adverse conclusion is reached which the applicant was not given an opportunity to comment on.

This obligation is often breached when a Tribunal does not inform an applicant that it suspects that a document is not genuine. In *WAEJ v MIMIA*,[141] the applicant submitted an email to the RRT in support of his claim.[142] The RRT stated in its reasons that the document did not appear to be genuine.[143] The Full Court[144] held that if the RRT suspected that the document was not authentic, then the common law principles of natural justice required the RRT to express this concern to the applicant and afford the applicant a chance to respond to it.[145]

Absent the exhaustive clauses, the obligations outlined here exist only at common law. This is because 'the information to which s 424A(1) (and by analogy, s 359A) applies has been distinguished from the subjective thought processes, assessments or views of the RRT'.[146] Sections 359A and 424A can be taken, then, to deal with information that must be given to the applicant but not opinions formed by the Tribunal about that information. Such opinions are not explicitly excluded (in the way that 'information not specifically about the applicant' and 'non-disclosable information' are) but instead simply do not fall within the obligation which has been created by ss 359A and 424A. This makes it likely that Parliament cannot be taken to have turned its mind to the obligation to provide such opinions, and so therefore these sections do not deal with this obligation. The situation would be different if the sections explicitly stated that the sections did not apply to preliminary opinions of the Tribunal, or the weight that the Tribunal intends to place on certain information. Under the actual wording of the sections, though, the common law right still exists as it is not exhausted by ss 359A and 424A.

It is also possible that the statutory provisions may be interpreted to impose wider obligations as a result of the Amendment Act. In *MIMIA v Awan*,[147] the Full Court had to determine whether a breach of s 359A constituted jurisdictional error (and so could still be reviewed despite the privative clause, s 474). The Court found that one of the factors which confirmed the view that a breach of s 359A did constitute jurisdictional error was that because Parliament had now indicated that the section was to be an exhaustive statement of the natural justice hearing rule (by the Amendment Act), that indicated that Parliament intended a breach of s 359A to constitute a breach of an inviolable limitation.[148] Gray ACJ stated:

> The amendment … lends support to the … rationale for viewing s 359A as an application of the principles of natural justice.[149]

The emphasis is still on Parliament's intention. But the argument is that one can discover Parliament's intention as to the meaning of sections in Part 5 Div 5 and Part 7 Div 4 of the *Migration Act* by reference to the *Amendment Act*. If this reasoning continues, it is quite possible that courts will more strictly enforce the Tribunal's statutory obligation under ss 359A(1)(b) and 424A(1)(b) to 'ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review'. At present, this phrase has not been interpreted to mean that the Tribunal must disclose its opinions and conclusions that it is considering. However, if courts now know, as a result of the *Amendment Act*, that Parliament intends this to be the exhaustive statement of the natural justice hearing rule, then courts may interpret the phrase 'why it is relevant to the review' to mean that 'surprising conclusions' must also be explained, because these are essential to explaining to an applicant the relevance of certain information. If this eventuates, then the common law obligation will be 'exhausted' by ss 359A and 424A. It will not matter, though, because the common law obligation will have informed the meaning of the statutory obligation. It will live on in a different guise.

Regardless of whether it remains as a common law obligation or is included in an expanded interpretation of the statutory obligations, it is likely that the Tribunal's obligation to give notice of 'surprising conclusions' will remain.

B The applicant's opportunity to respond to the case against himself/herself and to put forward his/her own case

The common law natural justice hearing rule obligations with respect to the conduct of the hearing depend upon what is necessary, in the circumstances, for the person who is affected by the decision to receive 'fairness', or 'avoid practical injustice'.[150]

1 The statutory requirements

The following is a summary of the statutory requirements in relation to an applicant's right to respond to the case against him/her and to put forward his/her own case.

An applicant is entitled to submit written arguments to the MRT[151] and the RRT.[152] If the Tribunal does not consider that it should decide the review in the applicant's favour on the basis of the material before it, then the applicant is entitled to appear before the Tribunal to give evidence.[153] The notice of invitation to appear must be given to the applicant in a certain way and include certain details.[154] If the applicant does not attend the hearing the Tribunal may make a decision based on the written submissions.[155] Applicants may request the Tribunal to call witnesses but although the Tribunal is required to consider that request it is not required to comply with the request.[156] During the hearing, an applicant is entitled to an interpreter,[157] but is not entitled to be represented,[158] or to examine or cross-examine any other person appearing before the Tribunal to give evidence.[159] A hearing before the MRT

must, unless certain conditions are satisfied, be in public[160] and a hearing before the RRT must be in private.[161]

A request by the applicant under ss 361, 362 or 426 must genuinely be considered by the Tribunal, as opposed to merely superficially. In *MIMA v Maltsin*,[162] the MRT member announced at the beginning of the hearing that although the case involved many complex issues, the hearing had to end in two hours due to another commitment that the member had at 4pm.[163] Many of the witnesses were rushed through their evidence by the member, and some witnesses were not heard because time had run out.[164] The Full Court held the MRT breached its obligation under s 361(3) to consider the applicant's request to call witnesses.[165]

Determining what the Tribunal has to do to discharge its duty under the Migration Act to provide the applicant with an oral hearing is often examined with reference to common law principles of natural justice. In *MIMIA v WAFJ* [166] the applicant applied for a protection visa under s 36 of the Migration Act. The Minister denied the request. On review by the RRT, during the oral hearing the Tribunal member was rude and sarcastic to the applicant and continually interrupted him while he was talking.[167] The Full Court[168] held that:

> Such sarcasm and rudeness was unnecessary and unfair. … the respondent was denied a fair hearing and, therefore, … the review conducted by the Tribunal was not carried out according to law. [169]

Lee J referred to the judgment of Hill J in *NAQS v MIMIA* [170] which states:

> The Act does not contemplate that the Tribunal will merely engage in a pretence. … What happened in the present case is, in my view, so extreme that the only conclusion open to me is that the Tribunal did not conduct a review at all. It interrupted the applicant and did not permit the applicant to give explanations. It refused the applicant the opportunity of calling witnesses.[171]

The conclusion reached was that the hearing did not comply with the statutory provisions.[172] This was determined, however, by reference to common law principles. The Tribunals were found in *WAFJ* and *NAQS* to have, at the very least, not complied with s 425(1), which states:

> The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.

If that sentence were to be read literally, it appears that the Tribunals in *WAFJ* and *NAQS* did everything they were required to do. The Courts found, though, that the Tribunals' conduct did not *fairly* give the applicant an opportunity to give evidence and present arguments.[173]

This is an important observation because, as discussed above in relation to 'surprising conclusions',[174] the expansion of the statutory obligations achieved by analysing them in the context of the common law obligations may become more common as a result of Parliament's statement that the statutory provisions are an exhaustive statement of the natural justice hearing rule. This means that there will be obligations, such as the 'surprising conclusions' obligation and the obligation outlined here to 'not merely engage in a pretence', which find their genesis in the common law but will nonetheless survive the operation of the exhaustive clauses by being understood by courts as being necessary for the proper operation of Part 5 Div 5 and Part 7 Div 4 of the Migration Act.

2 The common law requirements

Two common law natural justice requirements relating to the conduct of an oral hearing are examined here. The question of whether an oral hearing is necessary at all is not examined

because it is unusual for this to be an issue under the *Migration Act*. This is due to the fact that ss 360 (for the MRT) and 425 (for the RRT) provide an applicant with the right to appear before the Tribunal. The more critical questions arise when considering how the hearing must be conducted.

(a) What happens when the Tribunal causes an applicant to wrongly believe that it accepts a particular argument, has read a particular document, or will contact a particular person?

There are a multitude of different ways in which the Tribunal's conduct at the hearing can result in an applicant not being given a fair opportunity to present his/her case or respond to the case against him/her.

The first of these is where the Tribunal gives the applicant the impression that the Tribunal accepts one or more of the applicant's arguments. The result can be that the applicant, believing the argument has been accepted, does not present it as fully as he/she would if he/she knew that the matter was in dispute. In *NAAG of 2002 v MIMIA*,[175] the applicant had applied for a protection visa. An important part of her claim was that she had been raped whilst in detention in Iran and that the reason she was raped was because she opposed the ruling regime.[176] During the hearing, she experienced difficulty in giving evidence about this through her male interpreter (she had requested a female interpreter).[177] The RRT member told the applicant that she need not continue as 'at this stage I have no intention of asking you any questions about what happened to you in detention'.[178] The applicant asked whether that meant that her claims 'were acceptable'.[179] The RRT member said to her:

> At this stage they are acceptable. … If I did have any concerns later I will write to you and give you an opportunity to respond in writing. But at this stage I'm prepared to accept what you say happened.[180]

The RRT, in deciding the case against the applicant, stated in its reasons that whilst it was satisfied that the applicant was raped, it was not satisfied that she was raped due to the fact that she opposed the ruling regime.[181] The RRT, in relation to the sexual assault, stated:

> … the Tribunal finds that this was a deeply unfortunate but ad hoc, opportunistic act by the person in question, not indicative of how her participation in the demonstration was regarded.[182]

The Full Court[183] held that the RRT had an obligation to give the applicant an opportunity to respond to this, because the Tribunal member stated that the RRT would write to the applicant if it had any concerns about the evidence given about the rape.[184] The Court stated:

> The Tribunal, however, deprived the appellant of the opportunity of giving oral evidence about the full circumstances of the rape, and thereby deprived her of the opportunity to place her case fully before it. The appellant might have made submissions, designed to focus the mind of the Tribunal on the political aspects of the rape.[185]

MIMIA v S154[186] provides a useful contrast to this. The Tribunal member of the RRT, immediately after the applicant had made a certain claim, stated to the applicant: 'Ok. I don't need to ask you any further question about that particular incident.'[187] The High Court[188] held that whilst a lawyer might consider that to mean that the RRT had accepted the claim, the relevant question is what the applicant would have interpreted the statement to mean.[189] By examining the transcript of the hearing the Court found that the applicant did not take it to mean that the RRT accepted the claim, and in fact later gave more evidence relating to the claim.[190] This meant that the applicant was not denied an opportunity to present her case.[191]

A denial of natural justice can also occur when the Tribunal wrongly represents to the applicant that it has a certain document or documents.[192] This can cause the applicant to not put forward the evidence contained in the documents because he/she does not think that

it is necessary. If he/she knew the truth (that the Tribunal does not in fact have the documents) then he/she could have made submissions relating to the information contained in the documents. This representation can deny an applicant the opportunity to fairly put forward his/her case.

A final example of this type of common law hearing rule is where the Tribunal indicates that it will contact the applicant or another person after the hearing and then does not. Again, the key consideration is whether this conduct denied the applicant the opportunity to fairly present his/her case. In *NAFF of 2002 v MIMIA*,[193] the RRT stated at the end of the hearing that it would write a letter to the applicant containing questions about inconsistencies in the applicant's evidence, giving the applicant a chance to respond to these concerns.[194] The RRT did not write such a letter to the applicant and instead dismissed the application.[195] The High Court interpreted the Tribunal member's comments to mean that at the end of the hearing, she did not think that the requirements of s 425 had been complied with.[196] If she later changed her mind, she needed to write to the applicant telling him that he would no longer have the opportunity that he had been promised.[197]

A useful contrast to this case is *Re MIMIA; Ex parte Lam* [198] where the Department wrote to Mr Lam asking for the contact details of his children's carer so that it could contact the carer.[199] The Department received the contact details, but did not contact the carer.[200] The Department cancelled Mr Lam's visa.[201] The High Court held that Mr Lam was not denied an opportunity to put forward any arguments and so no breach of natural justice was caused by the Department's actions.[202]

All of these common law natural justice obligations are likely to remain. This is because there are no sections in Part 5 Div 5 or Part 7 Div 4 which deal with unexpected actions of this type by the Tribunal. The divisions address and regulate the ordinary course of a hearing. There are, however, a large number of unexpected things that the Tribunal can do to prevent the applicant from having a fair opportunity to present his/her case. Three of these have formed the foundation for the immediately preceding discussion. This type of conduct by the Tribunal is not considered by the Migration Act because it is not conduct which should occur in the ordinary course of a hearing, but occurs because Tribunal members, like all humans, are fallible.

It is useful to recall the discussion throughout this Chapter regarding how the provisions in Part 5 Div 5 and Part 7 Div 4 of the Migration Act have begun to, and may continue to, be interpreted as statutory enactments of the common law, thereby providing broader obligations than their plain words indicate.[203] In order to comply with ss 360 or 425, the Tribunal is likely to be required not simply to invite the applicant to appear before it to give evidence and present arguments, but to do so fairly (as was the case in *WAFJ*[204] and *NAQF*,[205] discussed above).[206] If this continues, then ss 360 and 425 will deal with matters of the type discussed in the immediately preceding passages, and so will exhaust those common law requirements. The requirements will still exist, though, as implied in the statutory requirements.

(b) Is legal representation required at an oral hearing?

In *WABZ v MIMIA* [207] the Full Court[208] considered whether the applicant was denied procedural fairness because the RRT refused to allow her solicitor to represent her at the hearing.[209] Their Honours first held that at common law the applicant had a natural justice hearing rule right to a solicitor to represent her.[210] Their Honours then considered what effect s 427(6) of the *Migration Act* had on that common law right.[211] French and Lee JJ stated:

> An applicant so appearing is 'not entitled ... to be represented before the Tribunal by any other person'. But that is a statement about entitlements. It does not exclude the rules of procedural fairness insofar as they may require representation in the circumstances of a particular case.[212]

The common law right to legal representation, where it exists, is likely to be excluded by the exhaustive clauses. This is because ss 366A and 427(6), which provide that an applicant is not entitled to be represented, specifically deal with the question of an applicant's entitlement to representation. Absent the exhaustive clauses, it is open to interpret these sections as merely stating that 'this Act does not create a positive obligation on the Tribunal to allow an applicant to be represented, but any common law obligation may exist' as the Full Court did in *WABZ*. However, when they are read in the context of the exhaustive clauses, as they now must be, it is clear that Parliament's intention must be taken as excluding an applicant's right at common law to representation at the hearing, whatever the circumstances.

C Guiding principles

From the analysis undertaken in this Chapter, there are certain guiding principles that can be extracted. Consider a fact situation where, absent the exhaustive clauses, the statute is complied with but a common law natural justice hearing rule obligation is not. It is these situations which will be affected by the operation of the exhaustive clauses. The two questions which need to be asked are:

(1) since Parliament has enacted the Amendment Act stating that the division is an exhaustive statement of the natural justice hearing rule, can we now interpret what was previously only a breach of a common law natural justice hearing rule obligation as a breach of a particular section in the division?

(2) if the answer to question (1) is no, then is there any section in the division which 'deals with' a topic that includes the particular common law obligation that has not been complied with?

It is hard to predict how question (1) will be answered in each and every case. From the analysis in this chapter it appears likely that ss 360 and 425 will be interpreted to cover, in general, a fair oral hearing. This means, for example, that if the Tribunal is rude, sarcastic and continually interrupts the applicant,[213] or causes an applicant to wrongly believe that it accepts a particular argument,[214] has read a particular document,[215] or will contact a particular person,[216] then this conduct may now be interpreted to be a breach of ss 360 or 425. Similarly, a failure to disclose 'surprising conclusions'[217] may now constitute breaches of the obligation under ss 359A(1)(b) and 424A(1)(b) to 'ensure, as far as is reasonably practicable, that the applicant understands why [the information that is being disclosed] is relevant to the review'.

If, however, the particular common law obligation breached has not been subsumed in any section in the Migration Act, then an examination must be made as to whether there is a section which 'deals with' a topic that includes the common law obligation. Where the statute provides an identical obligation to the common law obligation that has been breached, then the exhaustive clauses need not be examined: it can immediately be determined that the Tribunal has breached the statute. In examining the exhaustive clauses, then, the two most common situations which we are faced with are, first, where the statute provides an obligation which is similar to, but does not actually subsume, the obligation that has been breached, and second, where the statute states explicitly or by necessary implication that the Tribunal has no obligation to comply with the common law obligation which has been breached.

The first of these situations can be illustrated by re-examining the cases where the Tribunal comes to surprising conclusions, continually interrupts the applicant, or causes the applicant to believe something which is false. It was argued above that these may fall within expanded statutory obligations, in which case they will survive in statutory form. However, if it is decided that they do not fall within an expanded interpretation of the statute, then it is likely that under the individual sections approach the statute does not deal with them, and so the common law obligation remains.

The second of these situations is where a section mentions the common law obligation that has been breached, but does so only to state that the Tribunal does not have such an obligation. There are two ways in which a section can do this. First, it can simply state that the Tribunal has no obligation to do a certain thing. Examples discussed above are ss 366A and 427(6)(a) which provide that an applicant may not be represented before the MRT and RRT. Absent the exhaustive clauses, such a section can be taken simply to say that 'the Tribunal has no obligation to allow the applicant to be represented'. It has been held that, absent the exhaustive clauses, this simply means that the statute does not create that obligation but does not mean that the statute excludes the common law obligation.[218] When read alongside the exhaustive clauses, however, using the individual sections approach, the section must now be understood as meaning 'the Tribunal has no obligation to allow the applicant to be represented, and this section is an exhaustive statement of the Tribunal's obligation to do so'. This necessarily implies that the common law obligation is excluded.

Second, the common law obligation can be specifically excepted from the obligation created by the statute. The relevant examples discussed above are those concerning information that is not specifically about the applicant and non-disclosable information.[219] Sections 359A and 424A provide that certain information must be given to the applicant, but the sections create exceptions for information not specifically about the applicant and non-disclosable information. These sections are harder to analyse than ss 366A and 427(6)(a) above, because the 'representation' sections state simply that the applicant is not entitled to representation. Sections 359A and 424A differ in that they state that the sections themselves do not apply to the types of information outlined in the exceptions. This distinction, whilst important, is not critical to the outcome. This is because when read together with the exhaustive clauses, it still should be found, under the individual sections approach, that the sections 'deal with' the obligation to provide the types of information contained in the exceptions.

D The errors which can be caused by not using the 'individual sections' approach

Where a section can be found which, as interpreted, subsumes the common law obligation, then all three approaches will hold that the common law obligation is excluded, but that an identical statutory obligation exists. In this situation, there is no difference in the result of the case no matter which interpretive approach is used.

Where no section can be found which completely subsumes the common law obligation, this essay identifies three different circumstances in which the result will depend, to some extent, on which of the interpretive approaches discussed is applied.

Where a section imposes an obligation which does not include a common law obligation, and makes no mention of that common law obligation, then it cannot be said to 'deal with' a topic that includes that obligation. In these situations, the exact text approach will produce the same result as the individual sections approach (the common law obligation will not be excluded), but the whole division approach will exclude all common law obligations including that one (because under the whole division approach, the entire natural justice hearing rule is exhausted by Part 5 Div 5 and Part 7 Div 4).

Where a section states that the Tribunal has no obligation to do a particular thing, all three approaches produce the same result. Even if a section only 'deals with' the exact text of the section, the exact text of these sections is that the MRT and RRT have no obligation to do the particular thing. And the whole division approach, it has been noted, excludes all common law obligations.

Where a section states that the Tribunal has an obligation which would ordinarily include a particular common law obligation, but this common law obligation is an exception, then both the individual sections and whole division approaches reach the result that the common law obligation is excluded. The exact text approach, however, following Gray J's reasoning in *Moradian*,[220] would find that these sections only 'deal with' the Tribunal's obligation to give information which is specifically about the applicant and is classified as disclosable information. As to the question of whether the Tribunal has an obligation to provide the information outlined in the exceptions, the exact text approach finds that the sections do not exclude the obligations which exist in the common law.

E Applying this analysis to Lay Lat and Antipova

On 12 May 2006, two judgments were delivered by the Full Court of the Federal Court.[221] The cases were *MIMIA v Lay Lat* [222] and *SZCIJ v MIMIA*.[223] Both cases adopted the whole division approach. One may have been excused for thinking that this would put the debate to rest, but exactly a week later Gray J delivered judgment in *Antipova v MIMIA*,[224] adopting the exact text approach and explicitly refusing to follow *Lay Lat* and *SZCIJ*.

Analysing the facts of these cases through the framework proposed by this essay shows that the decisions of *Lay Lat* and *Antipova* are consistent with this proposed framework. The guiding principles summarised in Part C of this chapter produce the same result as the Court in each of these two cases. *SZCIJ*, however, was in my view incorrectly decided.

The facts of *Lay Lat* are set out above in Chapter II, Part A, Division 1 of this essay. Relevantly, in adopting the whole division approach the Court made the following remark:

> 'The intention to exclude the common law rules in the present case is especially plain when s 51A(1) is read with s 57(3). The Legislature could hardly have intended to provide the full panoply of common law natural justice to visa applicants who are required to be outside Australia when the visa is granted, while conferring a more limited form of statutory protection upon onshore applicants.'[225]

This is correct, but it should not lead to the view that procedural fairness must be excluded in all cases. Section 57(3) states:

> (3) This section does not apply in relation to an application for a visa unless:
>
> (a) the visa can be granted when the applicant is in the migration zone; and …

The effect of s 57(3) is that the obligation to provide information to applicants outside of the migration zone has been specifically excepted from the obligation created by the statute to provide information to applicants generally. Under the individual sections approach this results in the section 'dealing with' the Minister's obligation to provide information to applicants both inside and outside of the migration zone. Due to s 51A(1), the section is an exhaustive statement of that obligation, and so the Minister is not required to provide information to people outside of the migration zone.

SZCIJ v MIMIA[226] relies entirely on the reasoning of *Lay Lat*. The applicant's complaint in *SZCIJ*, however, was that the RRT 'made findings on a number of matters which it did not put to her'.[227] This is characterised above in Part A,[228]Division 2(c) of this chapter as 'surprising conclusions'. The Court in *SZCIJ* found that:

> For the reasons given in *Lay Lat* at [59]-[67] we hold that the common law natural justice hearing rule did not apply.[229]

It has been argued in this essay that the obligation to disclose 'surprising conclusions' survives the exhaustive clauses, and it is my view that due to the different complaints which were made in *Lay Lat* and *SZCIJ*, the result from *Lay Lat* cannot be superimposed onto the facts of *SZCIJ* without a detailed analysis of the sections contained in the Migration Act. My conclusion is only valid, of course, if the individual sections approach is accepted over the whole division approach, and Chapter II of this essay explains why I think it must be.

Antipova v MIMIA[230] provides a useful contrast. The applicant claimed that she was denied procedural fairness by the MRT because, first, it imposed a time limit on the hearing and continually interrupted her whilst she was giving evidence, secondly, it misled her about the issue to be decided, and thirdly, it failed to inform her that it did not propose to give any weight to a letter which she had tendered on the basis that it was unsigned.[231]

Gray J first held that s 360(1) of the Act had not been complied with, as the applicant had not been allowed 'to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review'.[232] His Honour then considered what the situation would be if the MRT's conduct in this case could not be classified as a breach of s 360.[233] His Honour held that s 357A would not exclude the common law obligations which have been breached by the MRT, stating:

> The present case is relatively easy. No provision of Div 5 deals with the imposition of time limits on the hearings of the Tribunal. Unless it be s 360(1), no provision deals with the process by which evidence is adduced at a Tribunal hearing. There is certainly no provision dealing with the 'matter' of a Tribunal member interrupting answers to question. No provision gives the Tribunal member a right to control and censor the evidence given by refusing to hear what the applicant for review wishes to say.[234]

One might suggest that s 360 deals with the conduct of the MRT at the hearing, and so is exhaustive of the MRT's procedural fairness obligations with respect to its conduct at the hearing. According to the framework proposed in this essay, however, either s 360 subsumes the common law obligations (in which case the MRT has breached s 360) or s 360 provides an obligation which is similar to, but does not actually include the common law obligations which the MRT breached, in which case s 360 does not deal with those common law obligations. Either way, the obligations survive the exhaustive clauses.

Gray J concludes by addressing the 'observations, which are clearly obiter'[235] made by the Full Court in *Lay Lat* on the effect of s 51A. He states:

> The obiter remarks in *Lay Lat* are entitled to great respect, appearing as they do in a considered judgment of a Full Court, but I cannot bring myself to accept that they are correct.

Whilst the reasoning in *Lay Lat* and *Antipova* is very different, both cases produce the results which are predicted by the guiding principles outlined in Part C of this chapter.

IV CONCLUSION

Chapter II of this essay argued that the individual sections approach should be preferred over the whole division and exact text approaches. Given this conclusion, Chapter III examined the way in which the exhaustive clauses have modified the obligations of the MRT and RRT to afford procedural fairness to visa applicants.

Certain guidelines have been extracted to determine, under the individual sections approach, whether a section 'deals with' a common law obligation. The courts' willingness to

expand the statutory obligations by reading them in the light of the common law will be critical to how this area of the law develops. If courts prove reluctant to do this, it will be the grammatical wording of the statutory obligations that will determine the outcome of many cases. Under the individual sections approach:

(1) where a section provides an obligation which is similar to, but does not actually subsume, the common law obligation that has been breached then the section will not deal with that common law obligation and so the obligation will remain;

(2) where a section states that the Tribunal does not have a particular obligation, then the section does deal with a topic that includes the obligation mentioned and so excludes it; and

(3) where a section states that the Tribunal has a positive obligation, but explicitly excludes from that positive obligation a particular common law obligation, then the section does deal with a topic that includes that particular common law obligation and so excludes it.

In many cases it can be seen that whether a common law obligation exists depends only on the way that a certain statutory obligation is expressed. For example, ss 359A and 424A currently state that 'information must be disclosed except information not about the applicant'. This means those sections fall into the third category listed above, and so any common law obligation to provide information not about the applicant is excluded. However, if the sections stated that 'information which is about the applicant must be disclosed', then even though that wording creates the same positive obligation on the Tribunal as the actual wording does, this hypothetical wording would place the section in the first category listed above when we consider whether information not about the applicant must be disclosed. It cannot be said with certainty that Parliament has intended, in the hypothetical case, to exclude information not about the applicant and so the section does not 'deal with' that obligation.

This essay has also illustrated that the exact text and whole division approaches can produce different results from the individual sections approach. Where sections are interpreted more broadly to include common law obligations, then the three approaches will produce identical results: the common law obligation will be excluded but the obligation will be subsumed in the statutory obligation. However, in two of the three grammatical wordings listed above in this chapter, one of the exact text and whole division approaches produces a different result from the individual sections approach. In the first, the whole division approach excludes the common law obligation whilst the individual sections and exact text approaches do not. In the second, all three approaches exclude the common law obligation. In the third, the individual sections and whole division approaches exclude the common law obligation whilst the exact text approach does not.

Endnotes

1 The procedures that the MRT must follow are contained in Division 5 of Part 5 of the *Migration Act*, and the procedures that the RRT must follow are contained in Division 4 of Part 7 of the *Migration Act*.
2 (2001) 206 CLR 57.
3 Gaudron, McHugh and Kirby JJ; Gleeson CJ and Hayne J dissenting.
4 Explanatory memorandum, Migration Legislation Amendment (Procedural Fairness) Bill 2002 (Cth), [3]-[4].
5 These Subdivisions provide procedures which must be followed by the Minister when making a decision on an application for a visa and when cancelling a visa.
6 This Division provides procedures to be followed when the MRT is reviewing a decision.
7 This Division provides procedures to be followed when the RRT is reviewing a decision.
8 See especially *SAAP v MIMIA* (2005) 215 ALR 162.
9 [2006] FCAFC 61.
10 2006] FCA 584.

11 This is analysed in Chapter III of this essay.
12 See particularly Chapter III, Part A, Division 2(c) and Chapter III, Part B, Division 1 of this essay.
13 This analysis is undertaken in Chapter III.
14 See *VXDC v MIMIA* (2005) 146 FCR 562 and *SZEGT v MIMIA* [2005] FCA 1514, discussed below in Chapter II, Part B, Division 2 of this essay.
15 (2004) 204 ALR 624 (French J).
16 (2004) 142 FCR 170 (Gray J).
17 (2003) 130 FCR 456 (Lindgren J).
18 (2003) 133 FCR 221 (Hely J).
19 See Chapter II, Part B, Division 2 of this essay.
20 (2003) 130 FCR 456 (Lindgren J).
21 Ibid, 458.
22 Ibid, 466.
23 Ibid.
24 Ibid, 467.
25 Ibid.
26 Ibid.
27 Ibid, 475.
28 See *VXDC v MIMIA* (2005) 146 FCR 562 and *SZEGT v MIMIA* [2005] FCA 1514, discussed below in Chapter II, Part B, Division 2 of this essay.
29 [2006] FCAFC 61.
30 Ibid, [2].
31 Ibid.
32 Ibid, [3].
33 (Heerey, Conti and Jacobson JJ).
34 Ibid, [56].
35 Ibid, [50]-[53].
36 Ibid, [46]-[59].
37 Ibid, [60]-[70].
38 Ibid, [69]-[70].
39 Ibid, [64].
40 Ibid, [65]-[66].
41 See Chapter I, Part C, Division 1 of this essay.
42 Heerey J stated in *VDXC v MIMIA* (2005) 146 FCR 562, 570: 'Parliament cannot have intended that the uncertainties of the common law rules were, in some unspecified way and to some unspecified extent, to survive.' This judgment is examined more closely below in Chapter II, Part B, Division 2 of this essay.
43 Due to ss 15AA and 15AB of the *Acts Interpretation Act 1901* (Cth).
44 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518 (Mason CJ, Wilson and Dawson JJ).
45 *Australian Crime Commission v AA Pty Ltd* [2006] FCAFC 30, [33] (Nicholson, Mansfield and Branson JJ); citing: *Sargood Brothers v Commonwealth* (1910) 11 CLR 258, 279 (O'Connor J); and *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 45 ALR 609, 617 (Mason ACJ, Wilson and Dawson JJ). See also *Coco v R* (1994) 179 CLR 427, 436-438 (Mason CJ, Brennan, Gaudron and McHugh JJ).
46 *WAJR v MIMIA* (2004) 204 ALR 624, 637 (French J).
47 For the principle of statutory construction that all words should be given effect, see particularly *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 (McHugh, Gummow, Kirby and Hayne JJ) citing *The Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ) and *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1, 12-13 (Mason CJ); and see generally the cases cited in D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia* (5th Ed, 2001), 36-37.
48 Examined in Part A of this Chapter.
49 (2003) 133 FCR 221 (Hely J).
50 Ibid, 223.
51 Ibid, 226.
52 Ibid, 227.
53 Ibid, 226. Section 57 is similar to ss 424A and 357A in specifying that certain relevant information must be disclosed to the applicant. Sections 57(3)(a) and 57(3)(b) provide two conditions which must be satisfied before s 57 is enlivened.
54 Ibid, 227.
55 Ibid, 228.
56 Ibid.
57 (2004) 204 ALR 624 (French J).
58 Ibid, 627-628.
59 Ibid, 629.
60 Ibid, 635.
61 Ibid, 635-637.
62 Ibid, 637.
63 (2004) 142 FCR 170 (Gray J).

64 Ibid, 174-176.
65 Ibid, 175.
66 Ibid, 173.
67 Ibid.
68 Ibid, 177. His Honour held at p 184 that the obligation had been breached by the Minister.
69 Ibid, 177-178.
70 Ibid, 178.
71 Ibid, 178.
72 Ibid, 179-180. He characterised Lindgren J's comments in *NAQF* as obiter because the application was dismissed on other grounds. He did not consider himself bound by the ruling in *Wu* because it did not appear that Hely J had considered a submission of the kind put on behalf of Mr Moradian.
73 Ibid, 180-181.
74 (1990) 170 CLR 596.
75 Ibid, 598 (Mason CJ, Deane and McHugh JJ).
76 Ibid.
77 (2004) 142 FCR 170, 181.
78 (2005) 146 FCR 562.
79 Heerey J, at pp 566-567, referred to this common law obligation as 'the second rule of natural justice identified by the Full Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 591-592.
80 (2005) 146 FCR 562, 567.
81 Ibid, 569.
82 Ibid, 569-570.
83 See above Chapter II, Part B, Division 1 of this essay.
84 (2005) 146 FCR 562, 570.
85 See the Explanatory Memorandum which accompanied the Bill for the *Amendment Act*, in Chapter I, Part C, Division 1 of this essay.
86 Ibid.
87 See below Chapter III, Part A, Division 2(c) of this essay.
88 [2005] FCA 1514
89 Ibid, [29]
90 (2003) 130 FCR 456 (Lindgren J).
91 (2003) 133 FCR 221 (Hely J).
92 [2005] FCA 1514 [29], stating: 'the correct approach to s 422B(1) is that it extends to all procedural aspects of the conduct of reviews by the Tribunal. … That would be enough to dispose of this ground.'
93 Ibid, citing *NAQF* (2003) 130 FCR 456 and *Wu* (2003) 133 FCR 221 as exemplifying the 'wider view'.
94 [2005] FCA 1514, [29].
95 Ibid.
96 As this essay did in Chapter II, Part A, Division 2 above.
97 (2004) 142 FCR 170.
98 (1990) 170 CLR 596.
99 (2004) 142 FCR 170, 181.
100 *Australian Crime Commission v AA Pty Ltd* [2006] FCAFC 30, [25] (Nicholson, Mansfield and Bennett JJ); citing *Minister of State for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565, 574.
101 (2005) 219 ALR 666.
102 Of the *Australia Crime Commission Act 2002* (Cth).
103 (2005) 219 ALR 666, 674-675.
104 Ibid.
105 *Australian Crime Commission v AA Pty Ltd* [2006] FCAFC 30 (Nicholson, Mansfield and Bennett JJ).
106 Ibid, [25].
107 Ibid, citing *Minister of State for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565, 574 as authority for the proposition that 'such a construction should be avoided if the relevant words can bear a useful meaning, consistent with the purposes and objects of the … Act'.
108 (2004) 204 ALR 624.
109 (2004) 142 FCR 170.
110 The statutory obligations are Part 5 Div 5 for the MRT and Part 7 Div 4 for the RRT.
111 Assuming that the individual sections approach, as argued in Chapter II of this essay, is the correct interpretive approach.
112 See generally Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 505; and Robin Creyke and John McMillan, *Control of Government Action: Text, Cases & Commentary* (2005) 573-576.
113 Sections 359A(1)(a) and 424A(1)(a).
114 Sections 359A(1)(b) and 424A(1)(b).
115 Sections 359A(1)(c) and 424A(1)(c).
116 Sections 359A(4) and 424A(3).
117 (2003) 129 FCR 168.
118 Ibid, 174-175.

119 Ibid.
120 (North, Merkel and Weinberg JJ).
121 (2003) 129 FCR 168, 175.
122 Ibid, 178-179.
123 Ibid, 175.
124 Ibid, 178.
125 (2001) 206 CLR 57.
126 Gaudron, McHugh and Kirby JJ in the majority, and Gleeson CJ and Hayne J in dissent.
127 (2003) 129 FCR 168.
128 Borrowing that phrase from constitutional jurisprudence where an inconsistency between a Commonwealth and State Act needs to be resolved according to s 109 of the Commonwealth Constitution, see generally *Ex parte McLean* (1930) 43 CLR 472, 483-484 (Dixon J).
129 This essay discusses this form of wording in Chapter III, Part B, Division 2(b) with respect to ss 366A and 427(6) which deal with whether the Tribunal has an obligation to allow the applicant to be represented at the hearing.
130 See *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 (McHugh, Gummow, Kirby and Hayne JJ) for the proposition that 'the process of construction must always begin by examining the context of the provision that is being construed'. See generally *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 for the principle that sections of a statute need to be read in the context of their surrounding provisions.
131 See *NAVK v MIMIA* (2004) 135 FCR 567, 589 (Beaumont, Conti and Crennan JJ).
132 (2005) 222 ALR 411.
133 Ibid, 412-413.
134 Ibid, 412.
135 Ibid.
136 Ibid, 412-413.
137 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).
138 (2005) 222 ALR 411, 413, 419-420.
139 Discussed above in Chapter III, Part A, Division 2(a) of this essay.
140 See *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 591-592.
141 [2003] FCAFC 188.
142 Ibid, [50].
143 Ibid, [51].
144 (Lee, Hill and Marshall JJ).
145 [2003] FCAFC 188, [54]. See also *WACO v MIMIA* (2003) 131 FCR 511, 521-525 (Lee, Hill and Carr JJ) for further discussion about this natural justice obligation.
146 Dr Caron Beaton-Wells, 'Disclosure of adverse information to applicants under the *Migration Act* 1958' (2004) 11 *Australian Journal of Administrative Law* 61, 64.
147 (2003) 131 FCR 1.
148 Ibid, 7 (Gray ACJ), 26 (Merkel J).
149 Ibid, 7.
150 *Re MIMIA; Ex parte Lam* (2004) 214 CLR 1, 14 (Gleeson CJ).
151 Section 358.
152 Section 423.
153 Section 360 for the MRT and s 425 for the RRT.
154 Outlined in s 360A for the MRT and s 425A for the RRT.
155 Section 362B for the MRT and s 426A for RRT.
156 Sections 361 and 362 for MRT and s 426 for RRT.
157 Section 366C for the MRT and s 427(7) for the RRT.
158 Section 366A for MRT and s 427(6) for RRT.
159 Section 366D for MRT and s 427(7) for RRT.
160 Section 365.
161 Section 429.
162 [2005] FCAFC 118 (Spender, Kenny and Lander JJ).
163 Ibid, [41].
164 Ibid, [42]-[47].
165 Ibid, [47].
166 (2004) 137 FCR 30.
167 Ibid, 52-57.
168 Ibid, (Lee and RD Nicholson JJ, French J).
169 Ibid, 57 (Lee J).
170 [2003] FCA 1137, [16]-[18], [63]-[68] (Hill J).
171 Ibid, [64]-[65]
172 *MIMIA v WAJF* (2003) (2004) 137 FCR 30, 57; and *NAQS v MIMIA* [2003] FCA 1137, [66].
173 Ibid.
174 In Chapter III, Part A, Division 2(c) of this essay.

175 [2003] FCAFC 135.
176 Ibid, [39]-[40].
177 Ibid, [41].
178 Ibid.
179 Ibid.
180 Ibid.
181 Ibid, [49].
182 Ibid.
183 Ibid (Gray, Moore and Weinberg JJ).
184 Ibid, [53].
185 Ibid.
186 (2003) 201 ALR 437.
187 Ibid, 439.
188 Ibid (Gleeson CJ, Gummow, Callinan and Heydon JJ; Kirby J dissenting)
189 Ibid, 444.
190 Ibid, 445-447.
191 Ibid, 447.
192 See generally *Muin v RRT; Lie v RRT* (2002) 190 ALR 601; and *Re RRT; Ex parte Aala* (2000) 204 CLR 82.
193 (2004) 221 CLR 1.
194 Ibid, 6.
195 Ibid.
196 Ibid, 11-12.
197 Ibid.
198 (2003) 214 CLR 1.
199 Ibid, 6.
200 Ibid, 6-7.
201 Ibid, 8.
202 See for example the comments of Gleeson CJ at (2003) 214 CLR 1, 14: 'No practical injustice has been shown. The applicant lost no opportunity to advance his case. He did not rely to his disadvantage on the statement of intention.'
203 See particularly Chapter III, Part A, Division 2(c) of this essay.
204 (2004) 137 FCR 30.
205 [2003] FCA 1137.
206 See Chapter III, Part B, Division 1 of this essay.
207 (2004) 134 FCR 271.
208 Ibid (French, Lee and Hill JJ).
209 Ibid, 247 (French and Lee JJ).
210 Ibid, 290-291. The fact that this exists as a common law principle does not mean that every breach will result in a reviewable error. The test is still whether not allowing representation resulted in 'unfairness': *SFTB v MIMIA* (2003) 129 FCR 222, 230-231 (Weinberg, Stone and Jacobson JJ).
211 (2004) 134 FCR 271, 294-295.
212 Ibid, 294.
213 *MIMIA v WAFJ* (2004) 137 FCR 30; *NAQS v MIMIA* [2003] FCA 1137.
214 *NAAG of 2002 v MIMIA* [2003] FCAFC 135; cf *MIMIA v S154* (2003) 201 ALR 437.
215 *Muin v RRT; Lie v RRT* (2002) 190 ALR 601; *Re RRT; Ex parte Aala* (2000) 204 CLR 82.
216 *NAFF of 2002 v MIMIA* (2004) 221 CLR 1; cf *Re MIMIA; Ex parte Lam* (2003) 214 CLR 1.
217 *WAEJ v MIMIA* [2003] FCAFC 188; *WACO v MIMIA* (2003) 131 FCR 511; *Naidu v MIMIA* [2004] FCAFC 184.
218 See *WABZ v MIMIA* (2004) 134 FCR 271.
219 Discussed above in Chapter III, Part A, Divisions 2(a) and 2(b) of this essay.
220 (2004) 142 FCR 170.
221 Consisting of Heerey, Conti and Jacobson JJ.
222 [2006] FCAFC 61.
223 [2006] FCAFC 62.
224 [2006] FCA 584.
225 [2006] FCAFC 61, [68].
226 [2006] FCAFC 62.
227 Ibid, [4].
228
229 Ibid, [8].
230 [2006] FCA 584.
231 Ibid, [53].
232 Ibid, [82].
233 Ibid, [93].
234 Ibid.
235 Ibid, [96].

A RIGHTS-BASED APPROACH TO JUDICIAL REVIEW? THE HIGH COURT IN *GRIFFITH UNIVERSITY V TANG* AND THE DANGERS OF DISMISSING ULTRA VIRES

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Introduction

The theoretical basis of judicial review of administrative decisions comes from the doctrine of ultra vires. The doctrine, based on upholding the rule of law, allows the courts to examine administrative decisions to ensure that they are within the scope of the power under which they were made. If decisions are made outside, or without, power, the court can hold them to be *ultra vires* and thus illegal. Such an exercise of judicial power does not threaten the separation of powers, as the court is merely ensuring that the will of Parliament is achieved by scrutinising the decisions of its delegates. Given that the judiciary is an unelected and unrepresentative arm of the government, and according to the doctrine of separation of powers, subordinate to the will of the people as expressed through the Parliament, the limitation that *ultra vires* places on review powers is consistent with the judiciary's position in the Government.

The post-World War II expansion of the administrative state has been accompanied by a willingness on the part of the judiciary in countries including the United Kingdom and Australia to take a broader approach to the question of legality of decisions. As well as looking at the express provisions of the legislation conferring power, courts routinely imply requirements of reasonableness and fairness into the limits placed on decision-makers. The use of *ultra vires* to justify the expansion of judicial review by judicial implication of Parliamentary intention has been described as a convenient fiction, or 'fig leaf' to cover the realities of increasing judicial influence, based on standards of conduct that are not drawn from any statute.

The limits of *ultra vires* as a basis for judicial review have prompted a search for an alternative source of authority for judicial scrutiny of public decision-making. In the United Kingdom, a theory of 'higher-order' law has emerged. According to common law constitutionalists, the common law provides a set of 'higher-order' rights that must be observed by Government. In this paper, I will examine the emergence of this new, rights-based approach to the exercise of judicial power in the United Kingdom. I will argue that its focus on the *effects* of the exercise of public power, rather than the limits governing the source of the power is an unstable basis for achieving meaningful accountability in public decision-making.

The recent decision of the Australian High Court in *Griffith University v Tang*[1] provides a compelling illustration of the limiting effect of a rights-based approach when applied in a conservative court, in a jurisdiction with very little statutory rights protection. While a rights-based approach was successfully used to hold government accountable in a series of

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decisions in the UK, the approach leaves much to judicial discretion and thereby threatens traditional notions of separation of power as well as casting doubt on the legitimacy of the judiciary. Without a legislative bill of rights making individual rights legally enforceable the adoption of a rights-based approach has the potential to significantly limit judicial review.

The doctrine of ultra vires as a justification for judicial review

The origins of judicial review lie in what Aronson calls review for 'simple ultra vires'[2]. The doctrine of *ultra vires* has been described as 'the central principle of administrative law.'[3] The following is a brief and simplified résumé of the doctrine. Because responsible government must act in accordance with the rule of law, the courts have a role in determining whether they have acted within the 'four corners of the law'. Administrative acts and decisions can therefore be reviewed by the courts and found invalid if they have breached the law, or are outside the scope of the power given to the decision maker by law.[4]

This justification for the exercise of judicial power is attractive for its consonance with traditional views of parliamentary sovereignty. In a review for 'simple' *ultra vires*, a court looks to the Act under which a decision is made and determines what limits are expressly contained in, or can be implied into, the exercise of power as authorised by the Act. In such a case, the court is not purporting to do anything more than ensuring that parliamentary intent is fulfilled by those to whom Parliament has delegated power.

Statements of this traditional role for the judiciary are numerous. In Australia, for example, Brennan J said in *Ainsworth v Criminal Justice Commission*[5] that administrative law:

> depends at base on the principle that any person who purports to exercise an authority conferred by a statute must act with the limits and in the manner which the statute prescribes.[6]

As Selway observes, this statement positions judicial review as one aspect of 'the proper role of the courts in both recognising and enforcing parliamentary sovereignty. The courts had jurisdiction to interfere because the relevant act was ultra vires and invalid.'[7] In performing judicial review, the courts are not trumping Parliament's authority, but working to ensure it is appropriately obeyed.

Expansion of the doctrine

In both the UK and Australia there has been a progressive expansion in the grounds for which a court will find an action *ultra vires*. Courts have considered, under the banner of ultra vires, questions of affording natural justice, improper purposes, legitimate expectations and unreasonableness in decision-making. While this development can certainly be applauded for strengthening scrutiny over the increasingly powerful administrative arm of government, it poses a threat to the cogency of the *ultra vires* doctrine.

The courts have sought to minimise the implications of this expansion, continuing to assert that such principles can be implied into the intent of legislators conferring power. The expansion by implication does not, according to judicial orthodoxy, threaten the principle of parliamentary supremacy over the judiciary:

> The fundamental principle [of judicial review] is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully…this intervention is based on the proposition that such powers have been conferred on the decision-maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a *Wednesbury* sense, reasonably. If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is *Wednesbury* unreasonable, he is acting ultra vires his powers and therefore unlawfully.[8]

The attempt to incorporate new grounds into traditional ideas of *ultra vires* has been met with cynicism by some commentators. Wade, for example, argues that the courts 'can make the doctrine mean almost anything they wish by finding implied limitations in Acts of Parliament…'[9]. Commentators and the judiciary have argued that *ultra vires* is simply too narrow to form a justification for the current scope of judicial intervention in administrative decision-making. Perhaps the most famous statement comes from Sir John Laws, in his article 'Law and Democracy'[10]. Laws argued in that article that while illegality as a ground of judicial review can be easily traced to the imperative of ensuring that decision makers act within the limits prescribed by a proper construction of the Act that confers power, *Wednesbury* unreasonableness and procedural unfairness cannot. In fact, according to Laws, 'their roots have grown from another seed altogether.'[11] Laws argued that these principles:

> …are, categorically, judicial creations. They owe neither their existence nor their acceptance to the will of the legislature. They have nothing to do with the intention of Parliament, save as a fig-leaf to cover their true origins.[12]

As Laws points out, by 'creating' principles like *Wednesbury* unreasonableness and procedural fairness, "the courts have imposed and enforced judicially created standards of public behaviour."[13] If authorisation for such principles does not come from the legislature, where does it come from?

It could be said that through 'judicial creations' such as those described above, the courts have effectively extended judicial control over the legislature, reversing the traditional position of Parliamentary supremacy over the judiciary. Such a reversal is manifestly undemocratic, as it allows judges to invalidate decisions made by elected representatives and as such threatens traditional understandings of the separation of powers.

Common law constitutionalism

The threat of the expansion of judicial influence identified by critics like Wade has prompted a search for another basis on which judges can justify their increased participation in public decision making. In 'Law and Democracy', Laws argued that there was no need to rely on the 'fig leaf' of parliamentary intention and *ultra vires* because judges could instead rely on a 'higher order law': 'a law which cannot be abrogated as other law can, by the passage of a statute promoted by a government with the necessary majority in Parliament.'[14] Laws challenged traditional arguments about the need for Parliamentary supremacy by arguing that democratic power should not, in fact, be absolute. To function properly, according to Laws, there are some 'limits which…[democratic governments] should not overstep.' These limits were the substance of the 'higher-order' law that Laws advocated. Laws' theory has been reflected in the writing of other commentators, including Dawn Oliver, Trevor Allan, Paul Craig and Jeffrey Jowell. Thomas Poole refers to the theories of this group of writers as 'Common Law Constitutionalism'. Poole has pointed out that the theory re-positions the court in the hierarchy of government. Rather that its traditional role as the enforcer of Parliament's will, the court emerges as the guardian of rights and values:

> The essence of the theory of common law constitutionalism is the reconfiguration of public law as a species of constitutional politics centred on the common law court. The court, acting as primary guardian of a society's fundamental values and rights, assumes, on this account, a pivotal role within the polity.[15]

Importantly for the purposes of this paper, Poole argues that the key difference between this justification for judicial action and that provided by the *ultra vires* principle is that according to common law constitutionalists, 'unlawfulness…becomes a function of rights: a decision of a public body is unlawful if it violates (unjustifiably) the claimants rights.'[16]

It is worth noting at this point that common law constitutionalism in the UK is still generally an academic, extra-judicial phenomenon. Most judges still profess to be working within the general framework of the *ultra vires* doctrine, though some theorists and judges have gone as far as arguing that the judiciary could respond to unjustifiable infringement of 'higher order' or 'constitutional' rights by overturning an offending statute.[17] There are also some cases in the United Kingdom that evince an approach by the judiciary that shifts the focus of inquiry from the power source of the decision in question to the effect of the decision on the exercise of rights, namely those rights set out in international human rights instruments.

The 'anxious scrutiny' standard

R v Secretary of State for the Home Department; Ex Parte Budgaycay[18] is an interesting example of the way rights-based discourse has crept into judicial review in the United Kingdom. *Bugdaycay* concerned several applications for judicial review of decisions to deport asylum seekers from the United Kingdom after their applications for refugee status had been refused. The relevant application to this paper was that of Mr Musisi, a Ugandan who had arrived in the UK seeking asylum from Kenya. Mr Musisi was challenging the Home Department's decision to return him to Kenya (rather than the decision not to grant refugee status). The court held that the decision to return Mr Musisi to Kenya was *Wednesbury* unreasonable[19], because the Home Department had failed to take Kenya's breaches of Article 33 of the *Refugees Convention* into account in determining whether Kenya was a safe third country for the return of a failed applicant for asylum. The House of Lords saw fit to apply a high standard of scrutiny to the decision in question *because of the rights at stake*. Lord Bridge of Harwich acknowledged the limits of the scope of judicial review of administrative decisions, but went on to say that:

> Within those limitations, the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.[20]

Lord Templeman also took this approach

> In my opinion where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision making process.[21]

Similar sentiments have been expressed in other UK cases. In *R v Ministry of Defence, Ex Parte Smith*[22], the Court of Appeal (Civil Division) agreed with the following statement by counsel for the appellant:

> The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.[23]

To determine the appropriateness of the decision in question in theses cases, rather than focussing solely on the source of the power of the decision maker, the courts looked as well to the gravity of the effect of the decision.

The debate in the UK has been complicated by the enactment of the *Human Rights Act 1998*, which explicitly authorises judicial reference to the existence of rights contained in the *European Convention on Human Rights* when reviewing the action of government or public authority. While this by no means settles the debate about *constitutional* rights advanced by some common law constitutionalists, it does provide a basis in the United Kingdom for

scrutinising administrative decisions with reference to their effect on rights, or at least the rights legally protected by the *Human Rights Act.* The decisions discussed above were made before the *Human Rights Act* came into force.

Ultra vires in Australia

Australian administrative law has seen a similar expansion of grounds and influence as the English system. Australian courts have not, however, gone as far as their English counterparts in broadening the scope of judicial review, even before the enactment of the *Human Rights Act* in the United Kingdom. Additionally, in Australia, there is a statutory basis for judicial review. The *Administrative Decisions (Judicial Review) Act*[24](ADJR*)* (and its state counterparts) and the *Judiciary Act* exist alongside the common law of judicial review.

The ADJR Act has been credited with increasing the number of judicial review applications made in Australian courts. Its benefit, according to Aronson, Dyer and Groves, is that while the ADJR Act can generally be seen as simply a restatement of common law grounds of review, the Act 'made the review grounds more accessible by collecting and restating them.'[25] Parliament did not use the enactment of the ADJR Act to clarify any underlying principles of judicial review under the Act.[26] As Aronson points out:

> ADJR's eighteen grounds say nothing about the rule of law, the separation of powers, fundamental rights and freedoms, principles of good government or … good administration, transparency of government, fairness, participation, accountability, consistency of administrative standards, rationality, legality, impartiality, political neutrality or legitimate expectations…ADJR's grounds are totally silent on the relatively recent discovery of universal human rights to autonomy, dignity, respect, status and security. Nowhere does ADJR commit to liberal democratic principles, pluralism, or civic republicanism.[27]

Australian administrative law is faced, therefore, with the same questions of legitimacy of judicial action as those explored by English judges and academics. Until recently, it appeared that the High Court continued to see the basis of judicial review as a question of *ultra vires*, despite the theoretical problems thrown up by the expansion of grounds of judicial review discussed above.

The classic statement of the basis and purpose of common law judicial review in Australia comes from Brennan J in *Attorney-General (NSW) v Quin*[28]:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power…*The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise*[29].

Explaining the expansion of the scope of judicial review, Brennan J went onto state:

> In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.30

Justice Brennan's comments support the proposition that, in Australia, according to the courts at least, judges get the authority for their review powers from implied statutory limitations on the exercise of power by government and its organs. Justice Brennan takes a traditional view of the danger to the separation of powers posed by letting courts stray into merits review:

> If the courts were to assume a jurisdiction to review administrative acts or decisions which are "unfair" in the opinion of the court – not the product of procedural unfairness, but unfair on the merits – the courts would be assuming a jurisdiction to do the very thing which is to be done by the repository of an administrative power, namely, choosing among the course of action upon which reasonable minds might differ.[31]

The opinion of Australian judges like Brennan J seems to be an express disavowal of taking an approach to review based on the effect of decisions on an individual and as such is consonant with traditional views of the role of judicial review. Looking at the effect of a decision on individuals would necessarily mean abandoning the traditional Australian approach to judicial review, as exemplified in *Attorney-General (NSW) v Quin*.

While the stretching of the *ultra vires* principle can be challenged for its threat to the integrity to the theoretical underpinning of judicial review, it retains its status as the orthodox justification for judicial scrutiny of public decision-making and is attractive for its consistency with the foundational principles of Australian law.

The decision in Griffith University v Tang

The recent decision of the High Court in *Griffith University v Tang*[32] seems to mark a departure from the orthodox position set out in *Attorney General (NSW) v Quin*. The case concerned an application for judicial review of a decision made by Griffith University. The University's Appeals Committee upheld an Assessment Board decision to expel Ms Tang from her PhD program at the University on the grounds of academic misconduct. Ms Tang brought proceedings in the Queensland Supreme Court under the *Judicial Review Act 1991* (Qld). She argued that the s 4(a) of the Act applied to the decision in question. Section 4 relevantly provides that:

> (4) In this Act--
>
> decision to which this Act applies means--
>
> (a) a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion); …

Ms Tang contended that the decision taken to expel her was invalid for:

> …breaches of the rules of natural justice, failure to observe procedures required by various clauses of the policy, errors of law, absence of evidence or other material to justify the decision, and the "improper exercise of the power conferred by the enactment" under which the action against her purportedly had been taken...[33]

At first instance[34] and on appeal the Queensland Court of Appeal[35], Ms Tang was successful in arguing that the University's decision was 'a decision under an enactment' for the purposes of s 4(a) of the *Judicial Review Act 1991* (Qld).[36] In the Queensland Supreme Court, Mackenzie J came to the following conclusion:

> [24] It is plainly necessary, as discussion of authority above indicates, that care must be taken not to assume that a generally expressed power in an act provides a sufficient basis for finding that the decision is one "under an enactment". However, as the authorities also indicate, a question of degree is involved in that the connection between the text of the enactment and the decision has to be considered. This involves examination of the legislation to determine whether the enactment gives the operational or substantial source of power to make the decision, or, whether the decision is properly characterised as deriving from an incidental source of power. This involves a judgment concerning the particular act in the context of the legislation and drawing a conclusion whether it can properly be said to be made under the enactment because the statute requires or authorises it or the decision is one for which provision is made by or under it.
>
> [25] I have come to the conclusion that the tightly structured nature of the devolution of authority by delegation in relation to the maintenance of proper standards of scholarship and, consequently, the intrinsic worth of research higher degrees leads to the conclusion that, even though the Council's powers are expressed in a general (but plenary) way, the decision to exclude Ms Tang from the PhD

> program is an administrative decision made under an enactment for the purposes of the Judicial Review Act. I do not accept that because the processes immediately used for the purpose of making the decisions were provided for in documents described as "policy" precludes this conclusion. …37

Griffith University appealed as far as the High Court, where the majority of judges sitting on the case[38] reversed the Queensland Court of Appeal's decision, finding instead that the decision was not a 'decision under an enactment', thus not open to judicial scrutiny under s 4(a) of the *Judicial Review Act.*

The Court's reasoning

The wide-ranging and dense judgments of the majority in *Tang* are open to a number of different readings.

A conservative reading of Griffith v Tang

It is possible, of course, to take a conservative reading of the *Tang* decision. In his article discussing the case[39], Cassimatis concedes that the majority's approach was a legally consistent progression from the authorities of *Chittick*[40]*, Telstra*[41] and *Lewins*[42]. This decision endorses that limiting approach to the 'under an enactment' limb of the statutory formulation.

In a broader sense it could be argued that the majority in *Tang* were taking an approach that was entirely consistent with Brennan J's characterisation of judicial review in *Attorney-General v Quin* and the analysis in subsequent cases examining the meaning of 'under an enactment'.

In their decision, Gummow, Callinan and Heydon JJ held that the source of a decision's 'capacity to bind'[43] was part of the test that determined whether it was 'made under an enactment'. They used *Lewins* as an explanation of how a decision made within the power conferred by an enactment can be construed as not having been 'made under' that enactment. In *Lewins*, the decision in question was to enter into a contract.

> If the decision derives its capacity to bind from contract or some other private law source, then the decision is not "made under" the enactment in question. The determination of whether a decision is "made … under an enactment" involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment

Their Honours said of *Lewins,* which they purported to follow, that:

> …a statutory grant of a bare capacity to contract does not suffice to endow subsequent contracts with the character of having been made under that enactment. A legislative grant of capacity to contract to a statutory body will not, without more, be sufficient to empower that body unilaterally to affect the rights or liabilities of any other party. The power to affect the other party's rights and obligations will be derived not from the enactment but from such agreement as has been made between the parties. A decision to enter into a contract would have no legal effect without the consent of the other party; the agreement between the parties is the origin of the rights and liabilities as between the parties.44

In *Tang*, the relationship between Ms Tang and the University was, according to the Court 'voluntary' [45], and there was no legal framework around a decision to terminate it. Gleeson CJ saw this as the primary test of whether the decision was 'made under' an enactment:

> The question in the present case turns upon the characterisation of the decision in question, and of its legal force or effect. That question is answered in terms of the termination of the relationship between the appellant and the respondent. That termination occurred under the general law and under the terms and conditions on which the appellant was willing to enter a relationship with the respondent. The power to formulate those terms and conditions, to decide to enter the relationship, and to decide to end it, was conferred in general terms by the Griffith University Act, but the decision to end the relationship was not given legal force or effect by that Act.[46]

While it was conducted in the setting of an empowering act, the relationship was not *governed* by that act. According to this view, judicial review of this decision was not available. This approach is an uncontroversial continuation of the orthodox view espoused in *Attorney-General v Quin* and cases like *Lewins* that as judicial review is about enforcing legal limits, where there is no legal limit, the court has no role.

An alternative reading

On a more detailed examination of the reasoning behind the decision, the conservative approach discussed above is difficult to maintain. Gleeson CJ argued that the question to be asked when determining whether a decision was one under an enactment was whether the decision '…took its legal force or effect from statute…'[47]. The remainder of the majority (Gummow, Callinan and Heydon JJ) formulated a more complete test:

> The determination of whether a decision is made…"under an enactment" involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be made under an enactment if both these criteria are met.[48]

Interestingly, in formulating the test, Gummow, Callinan and Heydon JJ looked, as well as to other considerations, to the justification of granting review. Their Honours asked:

> What is it, in the course of administration, that flows from or arises out of the decision taken so as to give that significance *which has merited the legislative conferral of a right of judicial review upon those aggrieved*…the answer in general terms is the affecting of legal rights and obligations.[49]

The majority's decision, while formally consistent with the relevant authority, appears to be a significant departure from the evolution of the common law of judicial review in Australia, both in scope, and in underlying principle. The majority's focus on legal rights and obligations directly contradicts the traditional common law approach as stated in cases like *Ainsworth v Criminal Justice Commission*[50]. *Ainsworth* was a case decided outside the context of statutory judicial review. In his judgment, Brennan J canvassed the issue of the position of legal rights[51], in relation to the opportunity to be heard where a body acting on statutory authority damaged a reputation (there was no effect on any *legal* right or obligation):

> The report…did not affect the appellants' legal rights or liabilities and it did not subject their rights or liabilities to any new hazard. There has been no exercise of a statutory power the setting aside of which would change the appellants' legal rights or liabilities. The only, though significant, way in which the Report affected the interests of the appellants was by damaging their reputations.…if a statutory authority, in purported performance of its statutory functions, prepares a report damaging to the reputation of Richard Roe without giving him an opportunity to be heard and publishes the report, does Richard Roe have a remedy in judicial review? …The answer to this question depends at base on the principle that any person who purports to exercise an authority conferred by statute must act within the limits and in the manner which the statute prescribes and it is the duty of the court, so far as it can, to enforce the statutory prescription…I see no reason to confine the jurisdiction in judicial review more narrowly than this principle would acknowledge, though the armoury of remedies available to the court in particular cases may impose some limitations and judicial discretion in exercising the jurisdiction may further restrict the use of the available remedies…But the *broad purpose of judicial review is to ensure that statutory authority, which carries with it the weight of State-approved action and the supremacy of the law, is not claimed for or attributed to decisions or acts that lie outside the statute*. … *conduct in which a person or body of persons engages in purported exercise of statutory authority must be amenable to judicial review if effect is to be given to the limits of the authority and the manner of its performance as prescribed by the statute*. It is immaterial that the statute defines a mere function that requires no grant of power to enable its performance: *what is material to jurisdiction in judicial review is that the function is conferred by the statute*.[52]

Brennan J expressly dismissed the idea that the decision under review must affect legal rights or obligations, as it was inconsistent with the traditional principle of *ultra vires*, which looks to the source of the power or function exercised, not the effect. The two limbed approach advocated in *Tang* to determine whether a decision was made under an enactment and thus open to judicial review appears to contradict Brennan J's reluctance to restrict judicial review to decisions affecting legal rights.

Implications

For the moment, the effect of the *Tang* decision is limited to applications for judicial review under the ADJR Act or its state counterparts. However, as Kirby J pointed out in his strong dissent, the statutory judicial review scheme was adopted 'to enhance and supplement the remedies available under the general law, not to cut them back.'[53]

Additionally, and perhaps more importantly for the purposes of this essay, the decision seems to mark a strong indication by the High Court of a change in the theoretical basis of the exercise of judicial review. In *Tang,* the court looked explicitly at the effect of the decision on the applicant. While Ms Tang's academic career had been stopped in its tracks, an undoubtedly serious outcome[54], because there was no legal right or obligation at stake, she was denied the possibility of judicial enforcement of the natural justice, procedural and reasonableness obligations that have otherwise been routinely implied by the courts into statutes conferring public power. As Brennan J pointed out in *Ainsworth,* the purpose of judicial review is to give effect to the (express and implied) limitations on power contained in the statute conferring power. According to that formulation of the principle, the legal status of the decisions in question should not be at issue.

The High Court's approach in *Tang* is interesting for its echoes of the approach taken to British judicial review by common law constitutionalists, as described by Thomas Poole. It will be interesting to see how, and if, *Tang* will be addressed in any proceedings discussing the *ultra vires* basis of judicial review. Has the High Court, like British common law constitutionalists, expressed a preference for delimiting judicial review on the basis of rights? Given that the Federal government has refused to legislate to define a Bill of Rights according to international human rights norms, it appears that such a change in governing principle could substantially narrow the scope of judicial review at common law as well as under State and Commonwealth judicial review legislation.

Conclusion

The decision in *Tang* highlights the weakness of the rights-based approach taken in the UK. In the United Kingdom, the judiciary's willingness to look to rights, particularly human rights, when analysing public decision making has generally worked well for minority rights, and been supported by the public, particularly the political left.[55] Judicial activism in this sphere before the enactment of the Human Rights Act can, as discussed above, be criticised for threatening the separation of powers and increasing the power of an undemocratic and unrepresentative judiciary.[56] It is also an unreliable approach.

Tang shows what a rights-based analysis of the basis of judicial review can produce when used by a cautious court like the Australian High Court, and highlights the importance of maintaining the *ultra vires* 'fiction', at least until Australia's Parliament sees fit to legally entrench a wider range of community sanctioned 'fundamental' or human rights.

In Australia, at least at a Federal level, there has been marked reluctance to enact any bill or charter of individual rights and thus create a legislatively sanctioned recourse to rights as defined by international human rights instruments in the courts system[57]. While English courts were willing to take human rights norms into consideration without legislative sanction

in decisions like *Bugdaycay*, there is no guarantee that Australian courts would do the same. *Tang* illustrates why a shift to a rights-based approach could limit the ability of applicants for judicial review to force accountability in public decision-making. The *ultra vires* principle, while theoretically flawed, is a more reliable and structurally consistent means of justifying judicial review.

Endnotes

1 (2005) 213 ALR 724.
2 Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (2004), 87.
3 Sir William Wade, quoted in Craig Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review'(1996) 55(1) *Cambridge Law Journal* 122, 122.
4 Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action – the Search Continues', (2002) 30(2) *Federal Law Review* 217, 218.
5 (1992) 106 ALR 11.
6 Ibid at 24.
7 Selway, n4 above, 218.
8 *R v President of the Privy Council* [1993] AC 682 per Lord Browne-Wilkinson , quoted in Forsyth, above n3, 123.
9 quoted in Aronson et al, above n2, 103.
10 John Laws, "Law and Democracy" (1995) *Public Law* 72.
11 Ibid, 78.
12 Ibid 79.
13 Ibid 78.
14 Ibid 84.
15 Thomas Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23(3) *Oxford Journal of Legal Studies* 435, 439.
16 Thomas Poole 'Legitimacy, Rights and Judicial Review' (2005) 25(4) *Oxford Journal of Legal Studies* 697, 697.
17 See, for example, Lord Steyn in *Jackson v Attorney General* [2005] UKHL 56 at 102 (obiter).
18 [1987] 1 All ER 940.
19 see Lord Bridge of Harwich at 953, Lord Templeman at 956-7.
20 at 952.
21 at 956.
22 [1996] 1 All ER 257.
23 Per Thorpe LJ at 263.
24 1977 (Cth). Henceforth referred to as the 'ADJR Act'.
25 Aronson et al, above n2, 45.
26 See Mark Aronson, "Is the ADJR Act Hampering the Development of Australian Administrative Law?" (2005) 15 Public Law Review 202.
27 Ibid, 216-7.
28 (1990) 93 ALR 1.
29 Ibid at 25 (emphasis added).
30 at 25.
31 at 26.
32 (2005) 213 ALR 724.
33 at 737 per Gummow, Callinan and Heydon JJ.
34 *Tang v Griffith University* [2003] QSC 22
35 *Tang v Griffith University* [2003] QCA 571
36 Section 4(a) is in the same terms as the *ADJR Act,* and thus the Hight Court's finding will apply to the *ADJR Act's* analogous provision.
37 *Tang v Griffith University* [2003] QSC 22 per Mackenzie J at [24] – [25].
38 Gleeson CJ (sole judgment) and Gummow, Callinan and Heydon JJ (joint judgment).
39 Anthony Cassimatis, 'Statutory Judicial Review and the Requirement of a Statutory Effect on Rights or Obligations' (2004) 13 Australian Journal of Administrative Law 169, 179.
40 *Chittick v Ackland* (1984) 1 FCR 254
41 *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164
42 *Australian National University v Lewins* (1886) 68 FCR 87
43 at 744.
44 at 744.
45 per Gleeson CJ at 729.
46 per Gleeson CJ at 730
47 Per Gleeson CJ at 729.
48 at 745.

49 at 743-4.
50 (1992) 106 ALR 11.
51 Cassimatis, above n35, 181-2.
52 per Brennan J at 22-5 (emphasis added).
53 at 757.
54 see Kirby's discussion at 748.
55 Kate Malleson, *The New Judiciary: the Effects of Expansion and Activism* (1999), 31.
56 Ibid, 30.
57 see, for example, Cheryl Saunders, 'Protecting Rights in the Australian Federation' (2004) 25(2) *Adelaide Law Review* 177, 177.

NATURAL JUSTICE AND PUBLIC SECTOR MISCONDUCT INVESTIGATIONS

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In a paper presented at the AIAL's National Forum on 15 June 2007, the Commonwealth Ombudsman, Professor John McMillan, suggested that there was now too much natural justice, and said:

> It is no longer simple in administrative decision-making to decide what is required to comply with natural justice.

Further, Professor McMillan continued:

> The guidelines provided by courts are often presented in soothing tones – 'the principles of natural justice do not comprise rigid rules', 'natural justice … requires fairness in all the circumstances', and 'procedural fairness, properly understood, is a question of nothing more than fairness' – but the apparent simplicity and flexibility of the approach can mask the complexity of the administrative setting in which practical answers have to be found.

Similarly, Basten J of the NSW Supreme Court, said in his paper at the same AIAL conference:

> More intriguingly, the content of procedural fairness with respect to a single power may vary with circumstances. Thus an element of urgency may diminish procedural requirements. This factor renders the life of the official uncertain, especially if required (without legal training) to second-guess what attitude a court will later take, with all the benefits of hindsight and time for analysis after full argument from lawyers.

Similarly, it is not all plain sailing for someone who believes that he or she has been denied natural justice. For example, decisions about when to commence litigation relying on an alleged breach of natural justice may often be complex, and may well affect the remedy, if any, obtained. This is clear when one considers the widely differing outcomes in *Jarrett v Commissioner of Police for New South Wales* [1]and *Barrett v Howard*.[2]

However, I do not wish to consider problems of that nature in this paper. Rather, I intend to look at the cases and attempt to distil what practical steps decision-makers should take so that hopefully their decisions will not be set aside on the basis of a denial of natural justice.

In this paper, I will:

(a) briefly overview the relevant legislation;

(b) discuss what needs to be disclosed to an employee to meet the requirements of natural justice;

(c) discuss what constitutes a proper opportunity to respond;

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(d) consider what the cases say about unbiased decision-making; and

(e) lastly, consider the consequences flowing from a failure to provide natural justice.

The legislation

The starting point of any discussion about whether natural justice applies and, if so, what it requires, must be the relevant statute.[3]

It is clear that natural justice applies to disciplinary processes undertaken under either the Commonwealth or Queensland public service statutes.

Section 15(3) of the *Public Service Act 1999* (Cth) provides that Agency Heads must establish procedures for determining whether there has been a breach of the APS Code of Conduct, and further that these procedures 'must have due regard for procedural fairness.'[4]

Section 90 of the *Public Service Act 1996* (Qld) provides that, with the exemption of decisions suspending an officer on full pay, in 'disciplining or suspending an officer, the employing agency must comply with this Act, any relevant directive of the commissioner, and the principles of natural justice.'[5]

However, as with most statutes, both the Commonwealth and Queensland Acts do not spell out what natural justice requires. The content of natural justice depends again upon the statutory context and upon the circumstances of the particular case.

As the Full Federal Court said in *Barratt*:

> Its content depends upon the statutory framework. It also depends upon the particular circumstances of the case which fall for decision.[6]

Or, as Brennan J, said in *Kioa v West*[7]:

> The principles of natural justice have a flexible quality which, chameleon-like, evokes a different response from the repository of a statutory power according to the circumstances in which the repository is to exercise the power.

What does natural justice require in investigations of purported misconduct?

In *Ridge v Baldwin* [1964] AC 40 at 132, Lord Hodson explained the features of natural justice as follows:

> (1) the right to be heard by an unbiased tribunal;
> (2) the right to have notice of charges of misconduct;
> (3) the right to be heard in answer to those charges.'

How have these features of natural justice been applied in the context of investigations into alleged misconduct by public servants? Bearing in mind, of course, what Kirby J said in *Miah*: 'Those requirements [of natural justice] are neither absolute nor rigid. They adapt to all the circumstances of a particular case.'[8]

Having said that, natural justice does not require a public servant suspected of engaging in misconduct to be given an opportunity to respond *before* a decision is made to commence an investigation into that alleged misconduct. This is because such a decision is likely to be of a preliminary nature.[9]

Notice of allegations

Once a decision has been made to commence an investigation, the employee suspected of misconduct must be given notice of the allegations in sufficient detail to allow him, or her, to respond in a meaningful way.[10] What constitutes sufficient detail is not, however, always readily apparent and may well vary from case to case.

What is not sufficient was discussed in *Etherton v Public Service Board of NSW*.[11]

The charge against Mr Etherton was expressed in the following way:

> It has been alleged that you are guilty of a breach of discipline within the meaning of par (e) of s 85 of the Public Service Act, 1979, namely negligence, carelessness, inefficiency and incompetence in the discharge of your duties.
>
> The particulars of this breach are that you failed to carry out your duties as a senior district officer, Bondi Junction Community Welfare Office, Department of Youth and Community Services, in a satisfactory manner.[12]

Mr Etherton was required to admit or deny the charge – in writing – within three days.

Mr Etherton sought particulars of the charge against him.

The Board refused that request but advised that the case against Mr Etherton would be based the following matters:

> - Mr Etherton's performance in the case work relating to G, N, B, L, N, J, C, H, and S families; and
>
> - Mr Etherton's handling of an application for a license by Ms JHW.
>
> This should not be regarded as an exhaustive list of the matters to be raised.
>
> Mr Etherton or his representative is welcome to inspect the Board's file on this matter at any time.[13]

The Board submitted that it was not obliged to identify the precise acts or omissions of Mr Etherton that it relied on to establish the charge against him. Further, the Board submitted that, given Mr Etherton's access to the Board's file, he should 'be able to work out for himself the case which he had to meet.'[14]

Not surprisingly, Hunt J was unimpressed with the Board's 'somewhat cavalier attitude'.[15]

Natural justice required that Mr Etherton be provided with 'particulars of the specific acts or omissions relied upon to establish the charge against him and to have identified for him specifically whether he is alleged in relation to each such act or omission to have been negligent, careless, inefficient or incompetent.'[16]

The requirements of natural justice were not met simply by providing Mr Etherton with the file and leaving it to him to work out the case he had to meet.[17]

The seriousness of the charge against the employee will also affect how precisely the allegations and particulars will need to be framed.

For example, in *Palmer v Austrac,* Mr Palmer, a technical adviser, was accused of submitting a report that was intentionally false and misleading – a very serious matter for someone in his position. A Full Bench of the Australian Industrial Relations Commission (the Commission) said:

> Where an employee is accused of deliberate dishonesty of this sort, basic precepts of fairness will ordinarily require that the employee be informed precisely what statements or information are alleged to be deliberately false and misleading and how they are said to be false and misleading.[18]

What is essential is that the complaint or allegation against the employee be disclosed adequately and with sufficient particularity so that the employee may respond to it.[19]

As the investigation proceeds the employee must be notified of any variation of the allegations. Also, the employee must be notified of any fresh material received by the decision-maker that is 'credible, relevant and significant'. As Brennan J said in *Kioa v West*:

> … in the ordinary course where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made. It is not sufficient for the repository of the power to endeavour to shut information of that kind out of his mind and to reach a decision without reference to it.[20]

The failure to put information that is credible, relevant and significant to the employee is clearly illustrated in *Eaton v Overland*[21].

In that case, Mr Eaton, an officer of the Australian Federal Police (the AFP) was alleged to have made inappropriate use of the AFP's email system. The allegation was investigated and a report was prepared for Mr Overland, a senior member of the AFP, who was tasked with deciding whether the allegation was substantiated. Mr Overland wrote to Mr Eaton advising him of the results of the investigation and asking him whether he wished to put anything before him as to why he should not accept the recommendation of the investigator that the allegation was substantiated.

Importantly, Mr Overland did not disclose to Mr Eaton that Mr Palmer, the then AFP Commissioner, had already expressed to him in clear terms that the allegation was substantiated.

His Honour, Allsop J, said:

> Whilst I accept that there was ample material available from Mr Eaton's own submission that the allegation was substantiated nevertheless with Mr Palmer's views disclosed, Mr Eaton would have been put on notice that not only did an investigating officer have a view about substantiation, but so did the head of the organization and moreover he had a view which threatened Mr Eaton's very employment. It is not for the Court to say nothing much could have been done. Mr Eaton was entitled to a procedure unsullied by important material not being shown to him.[22]

However, this does not mean that each new document received by the decision-maker during the course of the investigation must be provided to the employee for his or her comment. Whether the employee needs to be given an opportunity to respond depends on the content of what is being put before the decision-maker,[23] that is, whether it is 'credible, relevant and significant'.

In practice this might involve difficult questions of judgment and degree, involving balancing the importance of concluding the investigation in a timely manner while ensuring the employee is given a proper opportunity to respond to matters adverse to him or her.

In *Rana v Chief of Army Staff*, for example, Mr Rana sought to challenge the basis for his discharge from the Army. The decision-maker relied on three reports from a Dr Miller in making his decision. Mr Rana had been provided with only Dr Miller's first report. Mr Rana claimed he was denied procedural fairness in not being provided with Dr Miller's second and third reports.

A Full Federal Court rejected that claim.

It did soon the basis that Dr Miller, after considering further information provided by Mr Rana, merely reaffirmed his original opinion in his second and third reports. Dr Miller's second and third reports 'contained a restatement of his earlier opinion. … his commentary on the evidence did not raise any new issue or matter.'[24]

Arguably, *Rana's* case is inconsistent with the principle stated by Lord Denning in *Kanda v Government of Malaysia*:

> … the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of another.[25]

On one view, *Rana's* case also sits uneasily with the majority judgment in *Kioa v West*, and is more consistent with the dissenting judgment in that case – that of Gibbs CJ.

In *Kioa v West*, Gibbs CJ held that the decision-maker, having received material which Mr Kioa wished to be put before him was not required to give Mr Kioa an opportunity to respond to the Department's adverse comments on that material. The majority, of course, held otherwise. Is it too long a bow to suggest in *Rana's* case that the re-affirmation of his original report by Dr Miller on two separate occasions was information that was 'credible, relevant and significant' such that Dr Miller's second and third reports should have been shown to Mr Rana.

Indeed, the Full Court acknowledged in *Rana* that in a sense 'any reaffirmation of opinion … may be of significance to a decision-maker',[26] but nevertheless denied any breach of the requirements of natural justice.

Mr Rana applied to the High Court to set aside the decision of the Full Federal Court. His application was dismissed.[27] In dismissing Mr Rana's application, Crennan J noted that the Full Federal Court had 'observed that the doctrine of procedural fairness does not necessarily require that each and every new document received by a decision-maker must be provided to the person affected by the decision.'

The problem for decision-makers when deciding whether to provide a new document to an employee is identifying when the failure to do so will result in a denial of natural justice. Not an easy task. Despite *Rana*, one might still expect decision makers to err on the side of caution and disclose any new significant document or information to the employee being investigated.

Opportunity to respond

The employee, after being given notice of the allegations against him or her, must be given an opportunity to respond.[28] This must be a genuine opportunity and not a mere formality.[29] The employee must be given an adequate opportunity to respond, including a reasonable time in which to respond. Of course, what is an adequate opportunity or a reasonable time depends on the circumstances.

An example of an employee not being given an adequate opportunity to respond is Mr Gaisford in *Fisher v Gaisford*.[30] At the relevant time, Mr Gaisford was an employee of the Department of Foreign Affairs and Trade (DFAT). Mr Fisher, a senior DFAT officer, sought to raise a wide range of matters with Mr Gaisford ranging from Mr Gaisford's suspected involvement in leaking information to the press to his involvement in making false allegations of fraud against certain DFAT officers as well as his making false allegations of paedophile activity by DFAT officers.

Drummond J said:

> There mere description in summary form of the diverse range of matters Mr Fisher said he intended to raise with Mr Gaisford and to give Mr Gaisford an opportunity to answer, in order to decide whether Mr Fisher should temporarily suspend Mr Gaisford's security clearance, is sufficient, in my opinion, to show that if Mr Fisher had thought about it for a moment, he could not have expected Mr Gaisford to be in a position, when confronted with this litany of concerns at 4.45pm on the Friday afternoon, to marshal his thoughts on the spot, to consider whether he needed to gather information to put before Mr Fisher …, to gather any such information and, finally, to formulate his answers to Mr Fisher's concerns.

Natural justice does not require that an employee be legally represented during the course of a disciplinary investigation.[31] Nor is an employee entitled to cross-examine witnesses.[32] This is because, in the usual case, an investigator has no power to compel witnesses to give oral testimony and submit to cross-examination.

Further, in the circumstances involved in *Eaton v Overland*, Allsop J considered that there was no denial of natural justice in Mr Eaton being interviewed by telephone.[33] However this may not always be the case.[34]

The privilege against self-incrimination may also bear upon the question of whether an employee has been given a proper opportunity to respond. This issue was considered recently by the NSW Court of Appeal in *Murray Irrigation Ltd v Balsdon*.[35] In that case Mr Balsdon was charged with a number of offences under the *Crimes Act*. In essence it was alleged that during the course of his employment with the appellant, Mr Balsdon had accepted bribes in return for favouring certain contractors. Soon after the charges were laid by the police, Mr Warne, the appellant's General Manager, wrote to Mr Balsdon, notifying him of various matters and stating that if he was not satisfied with Mr Balson's response, his employment could be in jeopardy. Through his solicitors, Mr Balsdon responded that he would not be responding to Mr Warne until the criminal charges were dealt with. Mr Warne then proceeded to make a decision terminating Mr Balsdon's employment. The trial judge held that in these circumstances Mr Balsdon was denied procedural fairness as he was not given an opportunity to respond to Mr Warne at an appropriate time.[36]

Unbiased decision-maker

The person entrusted with determining whether there has been misconduct on the part of an employee must be both free from actual bias and from a reasonable apprehension of bias.[37] 'The test for apprehended bias … is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question to be decided.'[38] A reasonable apprehension of bias has been found to have arisen for a wide variety of reasons.

In *Phillips v Secretary, Department of Immigration and Ethnic Affairs*[39], apprehended bias arose where the decision-maker's superior published within the department material highly critical of the employee's conduct.

Mongan v Woodward[40] is another such example. In that case Mr Woodward was the then CEO of the Australian Customs Service (ACS) and Ms Godwin was his delegate in making a determination whether Mr Mongan had breached the APS Code of Conduct. At some point Ms Godwin was provided with a minute from Mr Drury, the then Deputy CEO of ACS, in which he made strong comments about Mr Mongan's guilt and what would be the appropriate penalty.

Although Ms Godwin did not report to Mr Drury, Finn J held that a reasonable apprehension of bias arose in the circumstances:

> A fair minded observer might reasonably conclude that, in a bureaucratic structure such as is evidenced in this matter, their respective positions provided a sufficient relationship of influence as

> could make Ms Godwin susceptible to influence for impermissible reasons. I acknowledge that it might be the ideal of the APS that public servants will act fearlessly in discharging their functions. Nevertheless, it is necessary also to acknowledge that human nature is as it is.[41]

In *Scott v Centrelink*[42], a Centrelink officer issued a direction to Mr Scott. He then investigated whether Mr Scott was in breach of that direction. Duncan SDP considered there was 'a reasonable apprehension of bias in that.'[43]

Consequences of failure to provide natural justice

Generally, a decision made in breach of the rules of natural justice is invalid,[44] and will be set aside as from the date on which it was made.[45] Consequently, any sanction imposed relying on such a decision cannot stand.

Where the flawed decision results in the termination of employment, the employee may apply to the relevant Industrial Relations Commission for relief. A failure to accord a public sector employee natural justice is one factor that may be taken into account when determining whether the termination was harsh, unjust or unreasonable.[46] Where there has been a full review on the merits by the Commission, and the Commission has found the termination justified, only rarely will a failure to accord procedural fairness during the disciplinary process, result in a finding that the termination was harsh, unjust or unreasonable.[47]

Endnotes

1 (2005) 79 ALJR 1581
2 See discussion: M Will 'From Barratt to Jarratt: Public Sector Employment, Natural Justice, and Breach of Contract' 49 *AIAL Forum* 9. *Barrett* (2000) 96 FCR 428
3 See, for example: *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 571 at [53], per Gleeson CJ and Hayne J; *Barratt v Howard* (2000) 96 FCR 428 at [43]; *Salemi v Mackellar (No 2)* (1977) 137 CLR 396.
4 *Public Service Act 1999* (Cth), s 15(3)(b). Under the Commonwealth statutory scheme, a failure to follow agency procedures or guidelines does not necessarily result in a denial of natural justice but may 'create a presumption or at least a strong question as to whether there had been a denial of procedural fairness': see *Henzell v Centrelink* [2006] FCA 1844 at [31]. The result may well be different where the relevant procedures have effect has 'binding directives issued under a delegated power': *Ivers v McCubbin* [2005] QCA 200 at [24].
5 Under reg 3.10(7) of the Commonwealth Pubic Service Regulations 1999 an Agency Head may decide that procedural fairness requirements do not apply to suspension decisions (whether paid or unpaid). And, see: *Fisher v Gaisford* (1997) 48 ALD 200 and *Re Dixon* (1981) 55 FLR 34.
6 ibid at [54]. See also: *Rana v Chief of Army Staff* [2006] FCAFC 63 at [11].
7 (1985) 159 CLR 550 at 612
8 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 571 at [190], per Kirby J.
9 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 571 at [146], per McHugh J. And see also: *Ivanovic v Australian Customs Service* [2007] FMCA 503 at [11].
10 And see paragraph 5.2 of the Australian Public Service Commissioner's Directions.
11 Upheld on appeal: *Public Service Board of NSW v Etherton* (1985) NSWLR 430. And, see also: *Panagopoulos v Secretary, Department of Veteran Affairs* (FCA, 14 November 1995, Tamberlin J).
12 *Etherton v Public Service Board of NSW* (1983) 3 NSWLR 297 at 299.
13 Ibid, at 300.
14 Ibid, at 301. See also 305-306.
15 Ibid, at 306.
16 Ibid, at 307.
17 Ibid.
18 *Palmer v Austrac* [2007] AIRCFB 265, PR976711 at [37].
19 See, for example: *Henzell v Centrelink* [2006] FCA 1844 at [34]. *Henzell* also sets out (at [29]) an example of how an allegation should be framed drawn from Centrelink's guidelines.
20 *Kioa v West* (1985) 159 CLR 550 at 629.
21 [2001] FCA 1834
22 *Eaton v Overland* [2001] FCA 1834 at [161].

23 See: *Rana v Chief of Army Staff* [2006] FCAFC 63 at [27].
24 Ibid, at [34]. See also *Cawley v Casey* [2007] QSC 5.
25 [1962] AC 332 at 337. See also *Keating v Morris* [2005] QSC 243 at [156].
26 ibid at [36].
27 *Rana v Kiefel, Kenny & Graham JJ* [2007] HCATrans 190.
28 See also paragraph 5.2 of the Australian Public Service Commissioner's Directions.
29 *Ambrey v Oswin* [2005] QCA 112.
30 *Fisher v Gaisford* [1997] 590 FCA (26 June 1997), per Drummond J (with whom O'Loughlin and Goldberg JJ agreed).
31 See: *McGibbon v Linkenbagh* (1996) 41 ALD 219; *ASIC v Reid* (No 1) [2006] FCA 699.
32 *Rose v Bridges* (1997) 79 FCR 378 at 386-388; *Simjanoski v La Trobe University* [2004] VSC 180 at [45]-46]; *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007] NSWSC 104 at [149].
33 ibid at [147].
34 See *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007] NSWSC 104 at [164].
35 *Murray Irrigation Ltd v Balsdon* [2006] NSWCA 253.
36 Ibid, cited at [26]. The trial judge's decision was upheld, with the Court of Appeal holding that the failure to respect Mr Balsdon's privilege against self-incrimination meant that the termination of his employment was harsh, unjust or unreasonable: at [39]-[40].
37 See, for example, *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 at [27]-[28]; *Eaton v Overland* [2001] FCA 1834 at [229]; *Mongan v Woodward* [2003] FCA 66 at [11].
38 Ibid, at [27].
39 (1994) 48 FCR 57
40 *Mongan v Woodward* [2003] FCA 66.
41 Ibid, at [19].
42 *Scott v Centrelink*, AIRC, PR907822, per Duncan SDP.
43 Ibid, at [108].
44 See: *Calvin v Carr* [1979] 1 NSWLR 1 at 8.
45 See: *Walworth v Merit Protection Commission (No 2)* [2007] FMCA 530 at [7].
46 *Byrne v Australian Airlines* (1995) 185 CLR 410; *Palmer v Austrac* [2007] AIRCFB 265, PR976711 at [33]; *Farquharson v Qantas Airways* [2006] AIRC 488, PR971685 at [41].
47 *Farquharson v Qantas Airways* [2006] AIRC 488, PR971685 at [41]. See also: *Banditt v Department of Corrective Services* [2005] QIC 47; 180 QGIG 97; and *Gray v Griffith University* [2007] QIRComm 7; 184 QGIG 63.