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**Editor:** Alice Mantel



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# THE COLE INQUIRY INTO CERTAIN AUSTRALIAN COMPANIES AND THE UN OIL FOR FOOD PROGRAMME: LESSONS FOR GOVERNMENT

*John Agius SC**

In this paper I propose to deal with lessons for public administrators from the Oil for Food Inquiry (the Inquiry), both in terms of the substance of the matters the Inquiry investigated, the Inquiry processes and the utility of such Inquiries for addressing public policy issues.

## UN Resolutions

Following Iraq's invasion of Kuwait in 1990, the United Nations Security Council imposed restrictions upon member States trading with Iraq. The object of the sanctions imposed by Security Council Resolution 661, was to secure compliance by Iraq with paragraph 2 of Resolution 660, which required Iraq's immediate withdrawal from Kuwait, and to restore the authority of the legitimate Government of Kuwait.[1]

By Resolution 661 the United Nations required that all states prevent their national making available funds to the government of Iraq or to persons or bodies within Iraq. The resolution also required that states prohibit their nationals from trading with Iraq except for the provision of supplies for medical purposes or in humanitarian circumstances, foodstuffs.

Iraq was deprived of hard currency and its gold reserves ran down. It was unable to purchase foodstuffs. Consequently in 1995 the Security Council adopted Resolution 986 which established the Oil for Food Programme (the Programme). This permitted Iraq to sell oil under UN approved contracts. The proceeds of sale were paid into an escrow account controlled by the UN. Iraq was permitted to purchase humanitarian goods including foodstuffs. Contracts for such purposes if approved by the UN were to be funded from the escrow account. Otherwise the Resolution 661 restrictions remained.

By 1999 the Australian Wheat Board (AWB) was selling about 10% of Australia's annual wheat exports to Iraq. AWB dealt with the Iraqi Grain Board (IGB) an Iraq Government body. Sales of wheat were on terms 'CIF Free out Umm Qasr'. In practice this meant that AWB was responsible for delivering wheat to Umm Qasr but was not responsible for the wheat past the ship's rail. Iraq was responsible for unloading and delivery thereafter.

In June 1999, for phase IV of the Programme the IGB introduced a new term as a condition of tender. This was a requirement that the sales of wheat be on terms 'CIF Free on Truck to the silo at all governates. Cost of discharge at Umm Qasr and land transport will be USD12 per metric tonne. To be paid to the Land Transport Co. for more details contact Iraqi Maritin [i.e. Iraqi Maritime Agency] in Basrah'.

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* *Barrister at law, Sixteenth Floor Wardell Chambers presenting to a seminar conducted by the Australian Institute of Administrative Law on 11 September, 2007, Sydney.*

By agreement with AWB made in Iraq in June 1999 the USD$12 per tonne was to be included in the price quoted by AWB and recouped from the escrow account. The money was to be paid into an Iraqi bank account in Jordan. The fee as understood by AWB executives was to go back to the Iraq Government.

If AWB did not agree to the payment there would be no sales. Following the receipt of the tender for phase IV of the Programme there was wide discussion within AWB regarding the terms of the new tender and how they could be met. The Commissioner found that those discussing these terms within understood that:

- the inland transportation fee or trucking fee was fixed by Iraq;
- it was being paid to Iraq;
- it was being paid for the benefit of Iraqis;
- imposition of the inland transport fee was a method of obtaining US dollars from the UN controlled escrow account;
- AWB did not in fact have to arrange for the discharge or delivery of wheat past the ship's rail;
- the Iraqis would continue to organise the discharge, transportation and distribution of wheat in Iraq, as they had done under earlier phases of the Programme;
- AWB's obligation was limited to making the payment as direct by the IGB;
- the Iraqi's had said that they would obtain or had obtained UN approval for the payment of the fee;
- the method of payment had not been approved by the UN;
- it was up to AWB to find a method of payment that was acceptable to the Iraqis;
- one method was the payment into an Iraqi bank in Amman, Jordan;
- AWB was not prepared to raise with the UN the issue of the transportation fee for fear that it might be prohibited by the UN, thus costing AWB its Iraq market.

Suggestions in the tender or contract that AWB was required to discharge wheat and effect delivery to all governates of Iraq were a sham designed to deceive the UN and extract hard currency from the escrow account for payment to Iraq.

Three contracts were entered in July 1999 and two in October 1999. The short form contracts for the first three contracts contained a term as follows:

> The cargo will be discharged Free into Truck to all silos within all Governates of Iraq at the average rate of 3,000 metric tons per weather working day of 24 consecutive hours. The discharge cost will be a maximum of USD12.00 and shall be paid by Sellers to the nominated Maritime Agents in Iraq. This clause is subject to UN approval of the Iraq distribution plan.

The long-form contract expressed the price as being 'CIF F.O.T to silo at all governate of Iraq via Umm Qasr port'. It made no mention of any discharge cost.

To obtain UN approval to export to Iraq and to receive payment from the escrow account it was necessary for there to be submitted to the United Nations a document called a 'Notification or request to ship goods to Iraq'. Apart from the short-form contracts themselves, the documents submitted for those three contracts made no reference to any 'discharge' or transportation cost. That form and the short- and long- form contracts were forwarded through the Department of Foreign Affairs and Trade (DFAT) and the Australian mission to the United Nations to the Office of Iraq Programme for approval. Approval was obtained from the United Nations, its customs inspectors overlooking the reference in the short-form contract to the provision that the US$12.00 'shall be paid by sellers to the nominated maritime agents in Iraq'. Under the UN procedures, the customs experts were to

check all contracts for 'price and value' and to ensure the contracts did not offend the sanctions resolutions.

Subsequent to the granting of approvals by the United Nations, AWB sought and was granted permission to export wheat under these contracts in various shipments. The permission was granted by the delegate of the Minister for Foreign Affairs and Trade, pursuant to the Customs (Prohibited Exports) Regulations.

None of the documents submitted to DFAT or the United Nations, be they the short-form or long-form contracts, the notifications or request to ship goods to Iraq, or the application for export approval, stated the true contractual arrangements between AWB and the IGB. Shortly stated, the true contractual arrangements between AWB and IGB in relation to these contracts involved the supply of wheat on terms 'CIF Free Out Umm Qasr', with AWB to pay a fee of $12.00 per tonne to an Iraqi entity or account nominated by the IGB and, further, that the US$12.00 fee was to be added to the CIF price and therefore effectively paid out of the escrow account. None of those provisions was disclosed in the documents submitted. Additionally, the short-form contract submitted stated AWB was obliged to pay nominated maritime agents in Iraq the cost of discharging the vessels, capped at US$12.00 per tonne, with that agent performing those services on behalf of AWB. There was no such obligation.

The true arrangement was that the IGB would advise AWB of the account into which the US$12.00 fee was to be paid. Nor was AWB responsible for delivery 'Free into Truck to all silos within all Governorates of Iraq', as the short-form contract stated. AWB did not make any contractual arrangements for the discharge of the wheat at Umm Qasr or for its transportation within Iraq after discharge.

The Commissioner found that it followed that AWB had submitted documents to DFAT and the UN which AWB knew did not reflect the true contractual arrangements between it and the IGB for the 3 July contracts.

Of the 2 October contracts, one (in its short form) was in substantially the same form as the July contracts. The long form contract said nothing about any discharge cost. The other October contract was referable to an earlier phase before the arrangement re inland transport fee was reached with the IGB. The contract price was accordingly USD$12 per metric tonne less than in the July and other October contracts.

Payment of the inland transport fee of approximately USD$ 504,000 was made by AWB to a company nominated by IGB, Alia for Transportation and General Trade (Alia). AWB was in no doubt that these funds were to be paid to another Iraqi entity, The Iraqi State Company for Water Transport (ISCWT). AWB knew that Alia was not receiving the money as trucking fees for services provided by it.

**The Canadian complaint**

In January 2000 the UN was advised by Canada of a requirement by the Iraqis that the Canadian Wheat Board deposit USD$700,000 in a Jordanian bank account to cover transport costs of USD$14 per tonne for wheat under a proposed contract. Canada refused to make the deposit and was refused the contract. The Canadians alleged in their complaint that they had been told by the Iraqis that 'similar arrangements had been made with the Australian Wheat Board'.

The UN raised the matter with the Australian mission to the UN, which referred the matter to DFAT. DFAT inquired of AWB about the accuracy of the report. AWB peremptorily denied the matter. The UN checked an AWB contract and overlooked a clause which referred to a

discharge costs of 'a maximum of USD$12' to be paid by 'Sellers to the nominated Maritime Agents in Iraq'.

The contract had also referred to undisclosed 'standard terms and conditions'. This took the UN's attention. It obtained a copy of these and then dropped its investigation. The explanation given to the Cole Inquiry was that although the payment of the discharge cost was contrary to UN 'UN policy to trade with Iraq' because it was contrary to the policy it was assumed that it was not being paid!

**After sales service fee**

In April and May the IGB demanded that AWB pay a 10% after sales service fee in addition to the transportation fee of USD$25. The transportation fee thus became USD$44.50.

***Eloquent solution***

In November 2000 AWB wrote to DFAT:

> Dear Jill,
>
> The purpose of writing is to ensure that DFAT is comfortable with AWB proceeding with the approach outlined below. As previously discussed we are currently experiencing problems managing our Iraq business. The first problem concerns United Nations procedural issues, which we will document in a separate note.
>
> The second issue is, vessels discharging at Umm Qasr suffer long delays and as a consequence AWB incurs substantial demurrage bills. Our recent mission identified that the slow discharge of vessels is caused by a lack of trucks at discharge port.
>
> For your guidance, Jordan based trucking companies are responsible for arranging trucks at discharge port. To rectify the problem, we propose entering into discussions with the Jordan trucking companies with a view to agreeing a commercial arrangement in order to ensure that there are enough trucks to enable the prompt discharge of Australian wheat cargoes.
>
> We believe the proposed solution will eloquently solve our problem and look forward to receiving your response.
>
> Thank you in anticipation.
>
> Best regards,
>
> Charles Stott
> General Manager
> International Marketing

An unexceptional reply came from DFAT:

> Dear Mr Stott,
>
> Thank you for your communication outlining the manner in which you propose to proceed to deal with problems you have encountered in discharging vessels of your wheat exports to Iraq at Umm Qasr port. As you have explained to us the delays in discharge were causing you to incur substantial demurrage costs and affecting the viability of your trade.
>
> We understand that, on your recent visit to Baghdad, you identified the source of the problem as being a lack of trucks at the discharge point. These trucks are supplied by Jordan-based companies. You therefore propose to enter into discussions with the Jordan trucking companies with a view to agreeing to a commercial arrangement in order to ensure that there are enough trucks available to enable the prompt discharge of Australian wheat cargoes when they arrive.

> We have examined, at your request, this proposed course of action and can see no reason from an international legal perspective why you should not proceed. That is, this would not contravene the current sanctions regime on Iraq.
>
> International Legal Division has been consulted in the preparation of this response.
>
> I trust this is of assistance to you. [2]

The letter from AWB was found to be a charade.

**AWB payments to Alia**

Between November 199 and March 2003 AWB paid Alia USD$224,128,189.98. That sum comprised USD$146,101,906.59 in transportation fees and USD$78,026,283.39 in after sales service fees which was paid in breach of US sanctions. Alia deducted a commission of 0.25% the balance was transferred to Iraqi entities. Documents uncovered after the fall of Iraq indicate that approximately two-thirds was paid to the Ministry of Finance and one-third split between 'land' (presumably being for land transportation), 4% to 'ports' and 1% to water. The two-thirds which went to the Ministry of Finance was otherwise not accounted for.

**Lessons for public administrators from the Inquiry**

DFAT was deliberately misled.

It is clear that officers of DFAT regarded DFAT as no more than a post box for the UN. The UN had indicated that it would check all contracts submitted to it for 'price and value'. To this end the UN recruited personnel from around the world. Nevertheless the UN approved AWB/IGB contracts which were clearly on their face outside the sanctions and in breach of resolutions. It turns out that the UN was simply not equipped to undertake the task it had promised to undertake.

The UN has since pointed to the obligation imposed upon member states to ensure that the resolutions were complied with and sanctions were enforced.

Why was DFAT misled and what is the lesson for public administrators?

I believe that DFAT was misled for two reasons:

1. It trusted AWB and its staff. AWB had a long history of trading with Iraq going back to the 1950s. There had been built up a solid trading arrangement. AWB had a lot to lose and it was thought unlikely that AWB would deliberately breach sanctions.
2. DFAT did not have any or at least any adequate system of risk identification or control. By regarding itself as no more than a post box and by checking no more than that wheat, the subject of the contract was a permissible import for Iraq and that the contracts were otherwise on their face compliant in form with the UN regime and by not checking for 'price or value' DFAT denied itself an opportunity to ensure that AWB was acting in breach of sanctions via its trading terms.

I do not believe that DFAT or any officer of DFAT was aware of the breaches being committed by AWB. Indeed all of the evidence is to the contrary. However the risk that this might be the case was not identified by DFAT, nor was there any protection against that risk.

My purpose here is not to criticise DFAT after the event. It is too easy to be an armchair critic and it is impossible to properly appreciate the weight of the trust that had been placed in AWB. My purpose is to highlight the importance of risk identification and control.

The consequences of a serious and pre-meditated breach of sanctions by AWB for Australia's reputation as a fair trading nation and as a responsible member state of the UN were huge.

The temptation for AWB must also have been great. This was perhaps AWB's oldest market. A market which could be relied upon to supply real returns to Australian farmers and to the nation; a market that could be relied upon to absorb 10% of this nation's production; a market where there was little real competition.

The temptation must have been at least as great for the executives whose personal reputations as successful traders were at stake. Could these traders really be expected to risk the sale of 10% of the Australian wheat produce and not comply with the Iraqi ultimatums...after all it was Iraqi money being returned to Iraqis after years of poverty and neglected infrastructure.

The potential for damage and the risks were such that active risk management and the institution of active controls can now be seen as having been necessary.

This is a lesson for all public and indeed private administrators. Appropriate risk management is simply good management. Corporations and government instrumentalities apply risk management practices in dealing with issues of occupational health and safety both as a matter of law and as a matter of good governance these days. Today, as the conduct of AWB has regrettably proved one cannot rely upon another's sense of moral obligation or even common sense when it comes to risk avoidance in the face of temptation, given what we know of human nature.

The tools of risk management are analysis and risk identification and the institution of controls in situations where risks cannot be eliminated.

DFAT and the Australian public were let down by AWB and by the failure by the UN to do that which it had indicated in would through failing to adequately check contracts for price and value. Towards the end of the Programme the cost of inland transport and the 10% after sales service fee was approximately 25% of the value of the wheat or 20% of the contract: wheat at a real value of say $200 a tonne carried an unlawful impost of nearly $50 a tonne. Price and value checking here or at the UN one hopes would have disclosed such an abnormality.

Risk assessment and control will only occur if it is factored in to management as an active component. In other words someone must take responsibility for driving it in the management team. It must always be on the agenda when change is implemented. One cannot rely upon publicised statements of values or singing of the corporation song or the wearing of the instrumentalities logo as an adequate measure of control when corruption is the identified enemy.

The Inquiry's interest in the activities of DFAT extended to identifying the role of DFAT in the contract administration and approval process as it was in fact. It was no part of our scope to investigate the adequacy of the risk controls or risk identification processes within DFAT beyond identifying what DFAT's role was in relation to the relevant AWB contracts.

The Inquiry was also concerned to inquire as to the knowledge of the Commonwealth of the breach of sanctions and UN resolutions by AWB in circumstances where it appeared that deception of the Commonwealth was the offence on the cards and which might best fit AWB's conduct. This was the only reason for calling two Ministers of the Crown and the Prime Minister to give evidence. Some sections of the public and some sections of the

media fail to identify the limitations imposed upon the Inquiry in this regard by its terms of reference. Given that AWB had all along denied any deception, denied that it had taken any Commonwealth officer or Minister (or for that matter the Prime Minister) into any confidence about the true nature of its dealings with Iraq, there was a justifiable view which would have avoided the necessity to call the Minister for Foreign Affairs, the Deputy Prime Minister and Minister for Trade and the Prime Minister to give evidence before the Inquiry.

Nevertheless the calling of those members of the Government served to demonstrate the openness of the Inquiry. Amongst other matters it demonstrated as well the seriousness with which the issues were being treated. The transparency of the Inquiries processes in this regard stood in sharp contrast to the conduct of AWB both during the Programme in and after 1999 and in its approach to the Inquiry itself.

**Lessons for public administration in terms of the Inquiry processes**

The first such lesson is one of accountability. No one is immune from inquiry or accountability.

This is an important aspect of our democratic system of Government. That official and public scrutiny is the ultimate guarantee of our rights as citizens.
In the AWB Inquiry the attendance of the Prime Minister and the other Ministers exemplified that guarantee.

The second lesson is one of co-operation

AWB was always going to pay a price for its conduct during the Programme. Not just for its contumelious disregard of the sanctions and the risks of damage to Australia's reputation during the Programme but also for its failure to recognise that its continued apparent opposition to the Inquiry and its opposition to its processes. This apparent opposition has probably done AWB much more damage than the exposure of its breach of sanctions.

In contrast DFAT co-operated with the Inquiry at every turn. No doubt it saw the benefits in having the entirety of the conduct of its officers and Minister exposed and judged openly. There is credit to be gained in the public mind for this level of co-operation. Opposition brings with it suspicion and risks adding a multiplier effect to any approbation that might flow from adverse findings.

For public administrators co-operation with the Inquiry processes is a must, not just as a matter of law but as a matter of practical reality. The community demands it of its public administrators and increasingly of private administrators. Staff have as much and more to gain from co-operation as the community. Co-operation minimises harm through fallout. It shortens an Inquiry, permits an early remedy and a speedier return to normalcy and appropriate conduct.

Of course administrators will be aware of the possibility of collateral damage even if there has been co-operation and in the end no fault has been found. This damage can be managed and minimised in situations where the body concerned has been diligent in its record keeping and been at pains to ensure that those with whom it has dealt have put their mark of authority upon anything which that body has placed reliance in the course of its work.

There is no doubt that any perceived damage to DFAT would have been much reduced if not entirely negated had it been prudent and required written confirmation from the Board or CEO of AWB that it had undertaken diligent inquiry and that it was not breaching sanctions at the time of the Canadian complaint.

**The utility of public inquiries for addressing public policy issues**

It may be inferred from the above and from my own history of association with public inquiries that I am very much in favour of resort to them when there is a need to establish the facts and the issues are of sufficient gravity. They bring with them a reassurance that 'the system' is one worth believing in if they are transparent and conducted according to the rule of law they can be of great benefit.

There are in my view some provisos. Public Inquiries such as the Oil for Food Inquiry cannot take the place of the administration of justice through the courts.

Great care must be taken with the settlement of terms of reference. Not only is there an imperative that terms of reference be clear and concise, in the broad sense it is important that the terms of reference accurately reflect that which has given rise to the matter of concern.

Consistent with issues of public interest immunity and other matters or over-ridding concern for the due administration of justice and good governance, I believe that such Inquiries should be open and transparent.

Whilst I recognise that Inquiries have a specific utility when dealing with single issues such as the conduct of an individual or body they also have utility when dealing with matters in a broader context. The Royal Commission into the NSW Police Service was one such Inquiry which I believed achieved great success, not only in exposing corruption and injustice but in providing a framework for the reform of the Police Service in every respect.

**Endnotes**

1 This summary draws heavily upon and repeats some passages from the final report of the Cole Inquiry..
2 Ex 650, AWB.0002.0200.

# RECENT DEVELOPMENTS

*Alice Mantel**

## Apology to Australia's Indigenous Peoples

On 13 February 2008, the Prime Minister, the Hon Kevin Rudd MP, moved a motion in the House of Representatives apologising to Australia's Indigenous People. The history of this significant event is founded in the tabling of the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, entitled *Bringing Them Home* in Parliament on 26 May 1997. It received widespread publicity at the Australian Reconciliation Convention in Melbourne and led to continuing public and parliamentary debate about the implementation of its recommendations.

A key recommendation in the report was that reparation be made to indigenous people affected by policies of forced removal. That reparation should include an acknowledgement of responsibility and apology from all Australian parliaments and other agencies which implemented policies of forcible removal as well as monetary compensation.

State and Territory parliaments have apologised specifically to those affected by the policies of separation. Under the previous Howard Government the Commonwealth Parliament did not agree to a full apology but expressed 'deep and sincere regret' for unspecified past injustices as part of a Motion of Reconciliation on 26 August 1999.

As one of the first actions of the new Government, the Prime Minister moved to make a full apology. An extract from Mr Rudd's speech follows:

> I move:
>
> That today we honour the Indigenous peoples of this land, the oldest continuing cultures in human history.
>
> We reflect on their past mistreatment.
>
> We reflect in particular on the mistreatment of those who were Stolen Generations—this blemished chapter in our nation's history.
>
> The time has now come for the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence to the future.
>
> We apologise for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians.
>
> We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country.
>
> For the pain, suffering and hurt of these Stolen Generations, their descendants and for their families left behind, we say sorry.

* *Editor, AIAL Forum*

To the mothers and the fathers, the brothers and the sisters, for the breaking up of families and communities, we say sorry.

And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry.

We the Parliament of Australia respectfully request that this apology be received in the spirit in which it is offered as part of the healing of the nation.

**Recent reports into the situation of indigenous people:**

***Report of Inquiry into Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency (13 August 2007)***

The one-day Senate inquiry into the 5 Bills which facilitated the Howard Government's 'emergency' intervention in the Northern Territory, recommended the Bills be passed. The report highlights issues including the alcohol prohibition, compulsory leasing, child welfare, income quarantining, policing and funding elements of the intervention. The Bills displaced the *Racial Discrimination Act 1975* (Cwth) and gave enormous control over NT Aboriginal communities to the Commonwealth without consultation with an elected Aboriginal consultative body.
http://www.aph.gov.au/senate/Committee/legcon_ctte/nt_emergency/report/index.htm

***Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (June 2007)***

This 350 page report into child assault and abuse made 97 recommendations, covering areas such as government services and intergovernmental cooperation, community governance, relations with police, education, alcohol, family support services and suggests appointing a Commissioner for Children and Young People.
http://www.nt.gov.au/dcm/inquirysaac/pdf/bipacsa_final_report.pdf

***Bringing them Home: A Report on the Economic and Social Characteristics of those Impacted on by Past Policies of Forcible Removal of Children (June 2006)***

This baseline report by the Ministerial Council of Aboriginal and Torres Strait Islander Affairs (MCATSIA) compares the different economic and social situations of Indigenous people who were forcibly removed from their families to whose who were not removed.
http://www.mcatsia.gov.au/cproot/593/4318/Bringing%20Them%20Home%20Baseline%20Report.pdf

**HREOC congratulates Quentin Bryce**

The Human Rights and Equal Opportunity Commission (HREOC) congratulated Ms Quentin Bryce AC on her appointment as the next Governor-General of Australia. REOC said Ms Bryce was a visionary and inclusive leader who achieved much by improving equality of Australian women when she was federal Sex Discrimination Commissioner with HREOC from 1988 - 1993. It hailed her appointment as a historic moment in Australia's history and said she will serve as an excellent model for all Australian women and girls.
*HREOC MR 14/4/08*

**Law Council calls to close Guantanamo facility**

The Law Council of Australia has joined peak legal bodies from around the world in a letter that calls for the closure of the United States prison facility at Guantanamo Bay.

According to Law Council President, Ross Ray, many detainees were literally children at the time of their arrest, more than five years ago and he said there "is now the very real prospect that, after years in secret detention, up to six detainees will be convicted by the US military, based on evidence obtained using torture, and put to death.
The letter was initiated by the Canadian Bar Association, the Law Society of England and Wales and the Paris Bar and was sent to the President of the United States and the Canadian Prime Minister. The letter has been signed by 34 professional bodies, including the Swedish Bar Association, the Law Society of Ireland, the General Council of the Bar of South Africa and the Australian Bar Association and was published on 27 February 2008.

**Review of *Legislative Instruments Act 2003***

Federal Attorney-General Robert McClelland has announced the establishment of a committee to review the *Legislative Instruments Act 2003*, as stipulated by the Act. The *Legislative Instruments Act 2003* established a comprehensive regime for the making, registration, publication, parliamentary scrutiny and sunsetting of Commonwealth legislative instruments.

'The aim of the review is to ensure that the Act is meeting its key objectives, which includes enhancing the accountability of government rule makers,' Mr McClelland said. "We want to make sure that the process of law-making is transparent and that the public has ready access to laws that affect them."

The review will be undertaken by a committee comprised of:

- Mr Anthony Blunn AO, former Secretary to a number of Australian Government Departments;
- Mr Ian Govey, Deputy Secretary of the Attorney-General's Department; and
- Professor John McMillan, the Commonwealth Ombudsman.

The Committee has released an issues paper and has called for submissions from interested persons and organisations Information about the review, including the terms of reference, is available from www.ag.gov.au/lia-review.
*Media release 25/3/08*

**NSW Attorney-General asks for unification of discrimination law**

NSW Attorney-General John Hatzistergos has asked the Commonwealth to consider the harmonisation of respective anti-discrimination laws.

'I am concerned that NSW residents and businesses have to contend with two layers of regulation when making or responding to a discrimination complaint,' said Mr Hatzistergos. He said complaints were made to different bodies; NSW had a cap on compensation while the Commonwealth's was unlimited, and proceedings were conducted in different jurisdictions with accompanying fee and cost differences.

Mr Hatzistergos said the inconsistencies were confusing and forced people to shop for which jurisdiction offered them the best prospect of success. He said differences also existed in the coverage provided by each system. For example, the Commonwealth did not cover discrimination on the grounds of homosexuality or transgender status, which are unlawful in

NSW. NSW also proscribes vilification on the grounds of race, homosexuality, transgender and HIV/AIDS status. These protections are not available in the Federal jurisdiction, where only racial vilification is prohibited.

Mr Hatzistergos proposed a joint project between the Commonwealth and NSW to harmonise and modernise the operation of discrimination law, which could involve adopting uniform legislation. An alternative or interim solution could be joint administration of both existing systems. The proposal was considered at the meeting of the Standing Committee of Attorney Generals in South Australia in March.

*Media release 14/3/08*

**Haneef Judicial Inquiry announced**

Federal Attorney-General, Robert McClelland, has announced that former NSW Supreme Court Judge, the Hon John Clarke QC, will head a judicial inquiry into the case of Dr Mohamed Haneef.

Mr McClelland said the establishment of the Clarke Inquiry is an important step in ensuring public confidence in Australia's counter-terrorism measures, and delivers on the Government's election commitment to establish an independent judicial inquiry into the handling of the Haneef case. The Clarke Inquiry was asked to report by 30 September 2008.

Australian Federal Police (AFP) Commissioner Mick Keelty welcomed the inquiry, stating the AFP would support the process and extend its full cooperation. 'The investigations relating to Dr Haneef and the associated events in the United Kingdom, like all terrorism investigations, are complex and conducted in a fast-paced and dynamic environment,' Commissioner Keelty said.

*Media release 13/3/2008*

**Relationship register celebrates one year anniversary**

Victoria's first Relationship Declaration Register set up to allow same-sex and de-facto couples the opportunity to formally register their relationship, today celebrates its first anniversary. To date 88 couples have registered their relationships since the register was launched by the City of Melbourne.

The anniversary comes as the Victorian Parliament's Legislative Council prepares to debate a bill to allow couples to record their relationships with the Registrar of Births, Deaths and Marriage. Deputy Lord Mayor Gary Singer said it was encouraging to see more couples registering their relationships in the City of Melbourne than similar registers in the City of Sydney and Tasmania.

"It's pleasing to see how this initiative has been welcomed by the community. The register is open to all partnerships, but it provides an avenue for same sex couples to publicly declare their love in a way that has not previously been available in Victoria," the Deputy Lord Mayor said.

Of the 88 couples who have registered their relationship in the past year, 37 were male/male couples, 35 were female/female couples and 16 were male/female couples.
*Media release 2/4/2008*

**Recent cases**

***Attorney-General (Cth) v Alinta Limited [2008] HCA 2 (31 January 2008)***

The Takeovers Panel's powers were confirmed in the High Court's decision in *Alinta*. The Full Federal Court, in a majority decision , determined that the Panel, in deciding whether there was a contravention of Chapters 6, 6A, 6B or 6C of the Constitution , was exercising judicial power and therefore the exercise of power and reliance on any contraventions of these provisions was invalid. .

The High Court unanimously disagreed with this conclusion and found that the Panel's decision did not amount to an exercise of the judicial power of the Commonwealth. Unlike the majority in the Full Federal Court, the High Court took the view that as the Panel had to take into account public interest and policy in deciding applications and creating new rights and obligations rather than adjudicated on present rights in the law, it was not an exercise of judicial power. Gleeson CJ commented:

> The panel was required to take into account considerations and interests to which the judicial process is ill adapted.

The circumstances leading up to this matter began in 2006, when the West Australian energy company Alinta acquired units in the Australian Pipeline Trust (APT) during the course of its asset merger transaction with AGL. APT successfully challenged the unit acquisition before the Panel, on the basis that it breached the 20 per cent takeover threshold in the Corporations Act. The Panel found that 'unacceptable circumstances' existed and ordered the units to be vested in ASIC and sold.

Alinta then sought judicial review by the Federal Courtof the Panel's decision , claiming that the Panel's power to determine on a breach of the law was invalid under the Constitution, as it involved a body that was not a court exercising federal judicial power. Initially the argument was rejected but, on appeal, the Full Federal Court agreed. The matter then went to the High Court that examined the Panel's operation and found that in light of the structure of its legislation, it performed an administrative function. Several judges also commented on the commercial desirability of the Panel's ongoing role in resolving takeover disputes, even though it would remain subject to judicial review.

***Duncan v Chief Executive Officer, Centrelink*** [2008] FCA 56
***Federal Court of Australia Finn J 12/2/2008***

Administrative law – *Freedom of Information Act 1982* (Cth) – s 9 requirement to make documents publicly available for inspection and for purchase and to publish a statement specifying those documents – interaction of ss 9(1), 9(2)(a) and 9(2)(b) Administrative law – *Administrative Decisions (Judicial Review) Act 1977* (Cth) – s 13 obligation to give reasons for a decision – meaning of "decision" – requirement of a deliberative process; standing as a "person aggrieved" – necessity of an interest beyond that of an ordinary member of the public

***Jabbour v Hicks*** [2008] FMCA 178
***Federal Magistrates Court of Australia, Donald FM, 19/2/2008***

Administrative law – *Criminal Code* – application for confirmation of interim control order – preventing terrorist act – training from terrorist organisation – obligations, prohibitions and restrictions – reasonably appropriate and adapted – variation of interim control order – confirmation of interim control order made.

***Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources [2008] FCAFC 3***

Administrative law – jurisdictional fact – whether finding that proposed action has, will have or is likely to have a significant impact is a condition precedent to Minister's exercise of discretion under s 75(1) of *Environmental Protection and Biodiversity Conservation Act 1990* (Cth).

Administrative law – irrelevant considerations – whether consulting descriptions of ecological communities in privately maintained classification is an irrelevant consideration when construing the term 'listed threatened ecological community'.

***Dunstan v von Doussa [2008] FCA 97***

Practice and procedure – *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 18 – Attorney-General's right to intervene in proceedings – joinder of Attorney-General as party to proceeding

**Procedural fairness at the commencement of an investigation considered**

***Ryan v ASIC; Re Allstate Explorations NL [2007] 93 ALD 789***

The recent decision of Gyles J in *Ryan v ASIC; Re Allstate Explorations NL* provides clarification as to whether procedural fairness needs to be afforded at the commencement of the exercise of a statutory power of an investigatory nature. The applicants sought to have the decision which authorised shareholders as being 'eligible applicants' for the purpose of conducting an examination of the actions of the company administrators set aside pursuant to both s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 39B of the *Judiciary Act 1903* (Cth) and raised a ground of review, among others, that they should have been afforded procedural fairness by being notified prior to making the decision to authorise. Justice Gyles considered that the 'initiation' of the exercise of a statutory power of an investigatory nature will not normally 'destroy, defeat or prejudice any relevant right or interest' and accordingly would not require notice to be given prior to the exercise of the power. In this case, the exercise of the power to authorise the shareholders as 'eligible applicants' occurred prior to the exercise of the power in relation to the summons of examination and in those circumstances, there was no requirement to give notice.

***Crown immunity and commercial contracts***

***Australian Competition and Consumer Commission v Baxter Healthcare Pty Limited [2007]***

Crown immunity in relation to private sector business dealings with governments has undergone a significant change as a result of the High Court's decision in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Limited* [2007] HCATrans 60 (9 February 2007). Following this decision, Crown immunity will no longer apply to contracts involving Federal, State and Territory governments and commercial corporations.

Before this decision, the generally held view was that anyone contracting with government was immune from the application of the *Trade Practices Act 1974* (TPA). The circumstances in *Baxter* related to five long-term contracts for the supply of sterile fluid products to public hospitals which were awarded to Baxter through public tenders issued by government purchasing authorities of Western Australia, South Australia, New South Wales, Queensland and the ACT. As each purchasing authority was part of the executive arm of each

State/territory government, it was said they did not themselves carry on a business and the TPA did not apply to them.

Baxter tendered to supply the products, on an item by item basis, at particular prices, and also offered to supply the same items for substantially lower prices, on a sole supply basis. If Crown immunity did not apply, the Baxter tender may have amounted to a misuse of its market power because some of the products in the bundled bid were products that only Baxter could supply.

Relying on an earlier High Court case, *Bradken*, Crown immunity was thought to extend to *Baxter* but the High Court declined to apply its earlier decision. The High Court found that *Baxter* was subject to the provisions of the TPA. Potentially ,now the Act will apply to contracts to which the Federal, State and Territory governments are a party and as a consequence of the *Baxter* decision, it is likely the ACCC will be able apply the misuse of market power and tying provisions of the TPA to government tender processes and the sale of government owned assets.

**Transfer of FOI requests between agencies**

***Bienstein v Attorney-General [2007] FCA 1174***

The Federal Court considered the obligations that must be fulfilled by an agency before it can validly transfer a request for documents under s 16(1)(b) of the *Freedom of Information Act 1982* (FOI Act).

The applicant made requests for access to certain documents to the Attorney-General and the Minister for Justice and Customs. Both the Attorney-General's office and the Justice Minister's office purported to transfer the respective requests to the Attorney-General's Department pursuant to s 16(1)(b).

Section 16(1)(b) provides that where the subject matter of a requested document is more closely connected with the functions of another agency, the agency to which the request is made may, with the agreement of the other agency, transfer the request to the other agency.

These transfers were held to be invalid by the Federal Court, following an assessment by Gray J that the proper construction of s 16(1)(b) did not provide for the transfer of the whole request but only the specific subject matter of each document answering the description in the request, rather than the subject matter of the request itself.

**Administrative announcements**

***Vic: New Public Transport Ombudsman***

Victorian Public Transport Minister, Lynne Kosky, has welcomed lawyer and complaint resolution specialist, Simon Cohen, as the new Public Transport Ombudsman for Victoria - the second Public Transport Ombudsman to be appointed since the office was established in April 2004. Mr Cohen was previously Assistant Ombudsman (Police) with the NSW Ombudsman's Office.

*PTOVC media release 22/1/08*

***Vic: Concerns over Local Council fraud control, developer contributions***

A report by Victorian Auditor-General, Des Pearson, titled *Local Government: Results of the 2006-07 audits*, has found that one-third of councils do not have fraud control plans, or

clearly documented fraud management policies and procedures and that there was a lack of staff training in identifying fraud risks.

Shadow Local Government Minister, Ken Smith, pointed to comments by the Auditor-General, which noted that local government was increasingly reliant on developer contributions to maintain their finances. These contributions grew by $176 million or 36% in just one year. He said the report also showed local government raised its rates by 7.8%, far above the rate of inflation.

*Media release, 6/2/08*

***Privacy Commissioner calls for mandatory reporting of major data security breaches***

The Privacy Commissioner, Karen Curtis, has reiterated her call for compulsory notification of major data security breaches by Australian organisations in the wake of recent significant data breaches in the United Kingdom.

'While reporting would need to be proportional to the severity of the breach, it would provide organisations with a strong market incentive to adequately secure their databases,' Ms Curtis said. 'It would also give people an opportunity to take any necessary steps to protect their personal information,' she said.

Ms Curtis's Office made a submission to the Australian Law Reform Commission in response to its Discussion Paper 72: *Review of Australian Privacy Law.*

Other recommendations included:

- Maintaining a principles-based and technology neutral approach - to provide flexibility and responsiveness to change.
- Creating codes where specific privacy concerns emerge - to apply in addition to the uniform principles.
- Minimising exemptions from the Privacy Act.
- Health sector - the Privacy Act should "cover the field" for the regulation of private sector health service providers.
- Credit reporting - further independent research on comprehensive (or 'positive') credit reporting is required before it is clear whether its introduction will be beneficial.
- Audits - a qualified audit power would allow the Office to conduct privacy performance assessments of private sector organisations for compliance in certain circumstances.

*Media release, 30/11/08*

**Pay equity an issue all the way to the top**

Sex Discrimination Commissioner, Elizabeth Broderick, said the Equal Opportunity for Women in the Workplace Agency (EOWA) research which shows that even women in top earning positions in the Australian Stock Exchange (ASX) top 200 companies earn much less than their male counterparts is deeply concerning.

Commissioner Broderick said the data revealed in the report titled *'Gender Income Distribution of Top Earners'* makes it clear that 'we have to get serious' about closing the gap between female and male earnings.

According to Commissioner Broderick, there were many reasons for this discrepancy, such as occupational segregation, the impact of family responsibilities, and the pervasive influence of gender stereotypes.

*EOWA, Media release, 25/1/08*

**Greenhouse and Energy Reporting Regulations Policy paper released**

The Australian Government has released a Policy Paper outlining its likely approach to the greenhouse and energy reporting regulations to be made under the *National Greenhouse Energy and Reporting Act 2007* (NGER Act).

The paper outlines policy proposals on a number of significant matters that arise under the NGER Act, including:

- definitions of key terms such as '*energy*', *'external auditor'*, *'greenhouse gas'*, *'industry sector'* (for production activities), *'oil or gas extraction activity'*;
- the process for nominating the *'responsible entities'* for '*partnerships*' and *'joint ventures'* that are part of a *'corporate group'*;
- boundary issues in relation to '*facilities*';
- tests for what constitutes *'operational control* ' over certain types of *'facilities'* such as pipelines, electricity networks, commercial properties, contract mining and various types of transport activities;
- proposed new materiality thresholds for reporting;
- details in relation to reporting procedure, treatment of State and Territory data, record keeping, disclosure obligations, administration; and
- reporting issues surrounding recognition of greenhouse gas removal or reduction projects.

This is an important step towards the implementation of mandatory reporting arrangements under the NGER Act, which, from 1 July 2008, will require companies to report if they trigger certain thresholds. The Act is also the first legislative step in the introduction of an Australian emissions trading scheme, which is scheduled to commence in 2010.

# ALRC REPORT 107: CLIENT LEGAL PRIVILEGE IN FEDERAL INVESTIGATIONS

The Australian Law Reform Commission (ALRC) has recommended 45 changes to the handling of claims of client legal privilege over material sought by federal investigatory bodies and royal commissions of inquiry. The ALRC report *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, tabled in Parliament on 13 February 2008, is the culmination of a year-long public inquiry into this controversial area highlighted in the report of the AWB Royal Commission.

'Our inquiry found general support for maintaining privilege as a fundamental right of clients, which only should be abrogated or modified in exceptional circumstances,' said ALRC President, Prof David Weisbrot. 'When properly exercised, privilege encourages compliance with the law, by creating an environment in which clients can make full and frank disclosure and receive accurate legal advice. '

'However, privilege must be balanced with the other public interest in ensuring efficient, effective investigations. Unfortunately, there are cases in which it appears claims of privilege have been used primarily to delay or frustrate investigations—with some disputes taking years to resolve. Many of our recommendations focus on streamlining the process for handling claims of privilege, and deterring or punishing abuses.'

Professor Rosalind Croucher, Commissioner in charge of the Inquiry, said that the central idea behind the ALRC's recommendations is the need for a single federal statute addressing the application of privilege in all federal investigations.

'Our research identified over 40 federal investigatory bodies with coercive information-gathering powers, as well as Royal Commissions. These include: law enforcement agencies, such as the Australian Federal Police; bodies concerned with the collection or administration of public funds—such as the ATO, Medicare and Centrelink; the major corporate regulators, such as ASIC and the ACCC; and a number of smaller, specialised regulators focusing on specific industries, such as the Fisheries Management Authority.

'There are many dozens of federal laws that address the powers of these bodies. However, most of this legislation is silent on the application of client legal privilege, and where it is addressed, there is no consistent approach—creating confusion and cost for clients, lawyers and investigators. A single federal statute would make clear that privilege applies unless expressly modified or abrogated by another statute, as well as establishing a system in which regulators and clients would have to operate in a much more open and transparent manner, according to published policies.'

Other key proposals include:

- extending privilege to advice on tax law provided by accountants, where that advice is sought by the Australian Taxation Office (ATO)—in effect, formalising the ATO 'accountants concession'.
- introducing a model fast-track procedure for resolving disputes about privilege;
- improving lawyers' understanding of their legal and ethical obligations in this complex area, through targeted legal education; and

- clarifying and strengthening the professional disciplinary procedures to apply in cases where the assertion or maintenance of privilege claims may amount to unethical conduct.

The report *Privilege in Perspective: Client Legal Privilege in Federal Investigations* is available electronically from the ALRC website, www.alrc.gov.au.

**Background**

The ALRC was asked to undertake this Inquiry into federal bodies with coercive information-gathering powers in relation to the application of client legal privilege in the context of federal investigations and Royal Commissions of Inquiry.

A number of high profile federal Royal Commissions in recent years, including: the inquiry into the Australian Wheat Board; HIH Insurance; and the building and construction industry have highlighted the need for clarification of the application of privilege in the context of federal investigations. In *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (*Daniels*), concerning the ACCC's coercive power under s 155 of the *Trade Practices Act 1974* (Cth) (TPA), the High Court of Australia held that client legal privilege only could be abrogated expressly or by necessary implication.

Other recommendations included: the enactment of a statute of general application to cover aspects of the law and procedure governing client legal privilege claims in federal investigations; the setting out of procedures with respect to the making and resolution of client legal privilege claims; and the extension of privilege, in defined circumstances, to include tax advice.

The ALRC also recommended certain circumstances where it may be appropriate to abrogate privilege in federal investigations; the safeguards that should apply when privilege is abrogated; and suggestions to lawyers when handling claims of client legal privilege through better education and the disciplinary process.

**When abrogation may be appropriate**

The ALRC considered that federal bodies could achieve greater efficiency and effectiveness in relation to claims of client legal privilege by giving higher priority to the interests of investigatory agencies in accessing information than to the interests served by maintaining privilege—as, for example, in the *James Hardie (Investigations and Proceedings) Act 2004* (Cth), that abrogated client legal privilege in relation to certain material and allowed its use in investigations of the James Hardie Group and any related proceedings; and the *Royal Commissions Act 1923* (NSW).

# THE IMPORTANCE OF BEING LEGISLATIVE: A REPRISE

*Dennis Pearce**

Ten years ago I gave a paper at the 1998 Annual Public Law Weekend entitled 'The Importance of being Legislative'.[1] In that paper I noted that there has long been criticism of the practice of purporting to classify government functions as being legislative on the one hand or administrative/executive on the other. I concluded that 'It is fashionable to assert that a clear distinction between legislative and executive instruments cannot be made. Certainly it is difficult to do so. However ... consequences do flow from the categorisation for requirements as to making, parliamentary oversight and judicial review of the two types of instruments. It therefore seems that the classification of functions doctrine will be around to test us for some time yet.'[2]

If anything, the need to be able to draw a distinction between the two types of activities has become more significant since then because of the enactment of the Legislative Instruments Act 2003 (LIA). This has been demonstrated in the recent decision of the Federal Court in *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (*Roche*)[3], to which I return below.

The LIA requires 'legislative instruments' to be registered on the Federal Register of Legislative Instruments. A failure to register such instruments renders them unenforceable[4].

Section 5 of the LIA defines a legislative instrument as follows:

> (1) a ***legislative instrument*** is an instrument in writing:
>
> (a) that is of a legislative character; and
> (b) that is or was made in the exercise of a power delegated by the Parliament.
>
> (2) Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:
>
> (a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and
> (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

The inclusion of this definition may be contrasted with the position in the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) where the meaning of an 'administrative decision' which may be reviewed is not expanded.

There has been no judicial consideration of the meaning of the definition in the LIA.

However, the courts have been obliged on many occasions to determine whether a decision is of an administrative character for the purposes of the application of the ADJR Act. Some of these cases have involved the issue whether a decision is to be classified as administrative or legislative.

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The two leading decisions are *RG Capital Radio Pty Ltd v Australian Broadcasting Authority*[5] and *Visa International Services Association v Reserve Bank of Australia*[6] *(Visa)*.

Tamberlin J in the *Visa* case[7] conveniently summarised the Full Court's consideration of the legislative/administrative dichotomy in the *RG Capital* case as follows:

> In *RG Capital* ... the Full Court pointed out that there is no simple rule for determining whether a decision is of an administrative or legislative character. The court proceeded to consider some of the matters discussed in the authorities and had regard to those considerations. The court considered the characterisation question taking a cumulative approach to various considerations. The particular matters which the court took into account included the following:
>
> - Whether the decisions determined rules of general application or whether there was an application of rules to particular cases.
> - Whether there was Parliamentary control of the decision.
> - Whether there was public notification of the making of the regulation.
> - Whether there has been public consultation and the extent of any such consultation.
> - Whether there were broad policy considerations imposed.
> - Whether the regulations could be varied.
> - Whether there was power of executive variation or control.
> - Whether provision exists for merits review.
> - Binding effect.
>
> The court considered that it was necessary to take into account all of these considerations and no single one was determinative.

As a general guide, it seems that the more general the application of the decision in question, the greater the parliamentary connection and the broader the issues involved, the more likely it is that the decision will be classified as legislative. Conversely, if few people are directly affected, the executive has continuing oversight of the decision and merits review is available, the decision is likely to be considered to be administrative in nature.

This approach was followed by Branson J in *Roche*[8].

Chapter 3 of the *Therapeutic Goods Act 1989* (Cth) provides for the determination of standards for therapeutic goods for use in humans and the registration and listing of such goods. It is part of a general scheme for the regulation of the availability of therapeutic goods that is supported by complementary Federal, State and Territory legislation. The goods are listed in the Standard for the Uniform Scheduling of Drugs and Poisons commonly referred to as the Poisons Standard.

The National Drugs and Poisons Schedule Committee, the respondent in *Roche*, makes decisions in relation to the classification and scheduling of substances. It had included one of Roche's medicines in a schedule to the Standard that permitted the sale of the medicine to be advertised publicly. Following complaints about the advertising of the substance, the Committee removed its listing from that schedule. This meant that the medicine could no longer be advertised directly to consumers.

Roche brought an application under the ADJR Act and under s 39B of the *Judiciary Act 1903* challenging this decision of the Committee.

Branson J found that the decision was legislative in character, not administrative, and it could not therefore be challenged under the ADJR Act. Her Honour took into account as indicators of the decision being legislative that the listing of the substance in the schedule was applicable to all versions of the substance, not just that manufactured by Roche; public consultation was an important step in the listing process; the listing was part of the national scheme controlling the sale and advertising of the substance; there was no provision for merits review of the listing decision; and the decision was published in the Gazette.

Pointing towards the decision being administrative in character was that the requirements governing the listing were fairly circumscribed and that there was no provision for the listing decision to be tabled in the Parliament. Her Honour considered that these factors were not sufficient to outweigh those that indicated that the decision was legislative.

To this extent, the decision in *Roche* is a straightforward enough application of the existing authorities. However, there are two further aspects of the decision that warrant consideration.

First, having held that the listing decision was not reviewable under the ADJR Act, Branson J then considered whether the decision could be challenged under s 39B of the Judiciary Act. Second, the practical implication of the judgment in relation to the listing decision should be noted: if the decision was legislative, the LIA applied to it.

Section 39B(1)(c) of the Judiciary Act gives the Federal Court 'jurisdiction in any matter...arising under any laws made by the Parliament'. Clearly the Committee's decision to remove the substance from the schedule permitting it to be advertised was such a matter. However, the novelty in Branson J's judgment lies in the manner in which she undertook the review of the decision.

As I discussed in my previous article, a distinction has traditionally been drawn between the grounds available to review decisions of a legislative and of an administrative character. The approach adopted by the courts has been to confine review of legislation to the issue of power. Is the legislation authorised by the empowering provision in the Act providing for its making? This has resulted in the grounds of review being more limited. This has particularly been the case in regard to the bases adopted for making the legislation.

Relevancy and irrelevancy have not been taken up as grounds for review. Motive for making as a ground has required an example of blatant use of the power for an unauthorised purpose. Acting under dictation or inflexible application of policy have never been seen as appropriate grounds for review of legislation, presumably because the content of legislation is almost by definition driven by these factors. Unreasonableness has been rejected as a separate ground of review, although it might come in by the back door of being an abuse of the making power. Natural justice is not required unless the persons affected by the legislation are so circumscribed that the legislation can be seen as really being a decision directed at them.

This differentiation between the bases for reviewing legislation and administrative decisions was strongly influenced by the fact that delegated legislation was, in times past, almost exclusively made by local government bodies, the Crown representatives and Ministers. The courts deemed it inappropriate for them to concern themselves with the issues dealt with in legislation made by these bodies whose primary accountability lay to their electors. Further, the content of much of this legislation was likely to be influenced by political considerations. However, at least at the Commonwealth level, following the passage of the LIA and its broadening of the range of instruments deemed to be legislative, the basis for making the distinction between legislative and administrative decisions for review purposes may be thought to have less relevance. Many legislative instruments will be made by the same persons who make administrative decisions.

Whether this is what underlay Branson J's approach in *Roche* is not made clear. However, her Honour ignored any distinction that might exist between the bases for reviewing the different types of decisions and reviewed the amendment of the Poisons Standard by applying the standard administrative law grounds. So the validity of the Committee's action was considered under the heads of relevancy and irrelevancy, unreasonableness, no evidence, dictation, inflexible application of policy and natural justice. No reference was

made to the older delegated legislation decisions that either reject or qualify the application of these grounds of review to legislative action.

Is this a portent for the future? Does it mean that the reluctance shown in the older cases to subject legislation to the level of scrutiny afforded administrative decisions is to be abandoned? Or is there going to be a differentiation drawn between what might be referred to as upper and lower level legislation? Perhaps those legislative instruments that are made by representative bodies and by the upper echelons of government will continue to be treated with a degree of deference while those that are made by administrators will be given the same oversight as administrative decisions made by those persons.

On the other hand, perhaps *Roche* points the way to the future. It was not long ago that the courts declined to review administrative decisions of Ministers and the Crown representatives on grounds such as motive and natural justice. That self-imposed judicial restraint has been abandoned. Is there any reason why such restraint should still be adopted where legislative decisions are concerned?

There will often be evidentiary problems, particularly where the motive or the bases for decisions have to be established, notably in the case of representative bodies. However, there does not seem to be any inherent reason why persons making legislative decisions should not be required to adhere to the same standards as those who make administrative decisions. The courts have recognised that there is flexibility in applying the grounds of review to administrative decisions both in regard to the decision maker and to the obligations that must be complied with. So it is recognised that Ministers will make decisions in a different way from public servants. The approach to the review of administrative decisions based on the grounds of motive, dictation and policy application has varied with the decision maker. Across the board, procedural fairness requirements are adapted to fit the circumstances.

As noted in my previous paper, Dixon J in *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee* [9]said:

> I do not think that in English law such a question [improper purpose as a ground of invalidity] will be found ever to be solved by ascertaining whether, upon a correct juristic analysis, the power should or should not be described as legislative.

The approach adopted by Branson J in *Roche* recognises the wisdom of this opinion. If followed, it would do much to render the importance of being legislative less significant. And that could not be regarded as other than beneficial.

However, if *Roche* indicates the possibility of an easing in the need to engage in a classification of functions for the purpose of determining the grounds on which a decision may be reviewed, it reveals a major issue that confronts Commonwealth public service decision makers. The effect of the LIA is that the correct classification must be given to a decision or it may be rendered unenforceable and action taken to implement it invalid.

The consequence of the finding in *Roche* that the decision was legislative resolved the application to have the decision set aside under the ADJR Act in favour of the respondent. However, the respondent then found itself in a much worse situation than if it had lost this part of the battle. If the action in removing the product from the schedule to the Poisons Standard was legislative, the instrument effecting the removal was a legislative instrument. It should therefore have been registered under the LIA. As it had not been registered, it had no effect.

Worse, the fact of the amendment of the Poisons Standard being held to be legislative action revealed that the Standard itself was a legislative instrument and as it had not been registered, it had no effect. Still worse, the Standard had been made prior to the commencement of the LIA. It was therefore subject to the back-capturing provisions of the LIA[10]. The failure to register it within the time provided for registration of existing instruments meant that it was deemed to have been repealed[11]. If ever there was a Pyrrhic victory!

The upshot has been the making and registration on 14 December 2007 of a new Poisons Standard. Presumably there will also have to be a validating Act to cover the actions taken over the years that have passed since the original Standard was made.

The lesson in this sorry saga is evident. If a decision is open to be classified as legislative, it must be registered. This may be considered to be problematic in that it then requires the tabling and possible disallowance of the instrument embodying the decision. However, the alternative of the decision being unenforceable is much worse. There is also the worrying thought that some instruments that have been assumed to be administrative and not requiring registration may, if tested, fall the other side of the line. If they are found to be legislative, they will be unenforceable. One can predict a new line of argument being put by counsel in cases that involve challenges to government decisions.

Since writing this article the Trade Practices Amendment (Access Declarations) Bill 2008 has been introduced into the Parliament. It provides that certain declarations made under s 152AL of the Trade Practices Act are not, and are to be taken never to have been, legislative instruments. It is understood that the Bill was prepared following submissions of counsel in an action in which the declarations were relevant suggesting that they might be legislative.

For Commonwealth public servants the importance of whether their decision is 'legislative' still remains.

**Endnotes**

1 Published in 21 *AIAL Forum* 26.
2 Ibid, p 33.
3 (2007) 98 ALD 14.
4 LIA, ss 31, 32.
5 (2001) 113 FCR 185; 185 ALR 573.
6 (2003) 131 FCR 300.
7 At [592].
8 See n 3.
9 (1945) 72 CLR 37 at 80.
10 S 29.
11 S 30.

# PRIVACY LAWS FACE MAJOR OVERHAUL

The Australian Law Reform Commission (ALRC) has released a blueprint with 301 proposals for overhauling Australia's complex privacy laws and practices.

Releasing Discussion Paper 72, *Review of Australian Privacy Law*, ALRC President Professor David Weisbrot said it was the product of the largest public consultation process in ALRC history: 'We have received over 300 submissions and held over 170 meetings to date, including with business, consumers, young people, health officials, technology experts and privacy advocates and regulators.'

'We've been holding a series of youth workshops—and have set up a special 'Talking Privacy' website aimed at young people—to test this theory as part of our comprehensive review of Australia 's federal privacy legislation,' he said.

The youth workshops were held in Sydney, Perth, Brisbane and Hobart and explored a range of privacy issues, experiences and opinions and changes that should be made for the future. Privacy in cyberspace—particularly in online spaces such as YouTube and MySpace— was a major issue raised by young people.

'While sites such as YouTube and MySpace might seem like a 'fad' to older people, for many young people, that has become the normal, everyday way of communicating with friends, relatives, and people they are just meeting for the first time. Laws designed to protect privacy in the outside world struggle to cope with the issues raised by online communities. For example, online publication of photographs—which may be sensitive and revealing—raises new challenges in relation to consent, ' Professor Weisbrot said.

However, Professor Weisbrot said the issue that has raised the most concern in workshops is the way in which personal health information is handled.

'While there is no consensus on the age at which young people are entitled to confidentiality, most of the young people we have spoken to seem clear that at some stage in adolescence, they should have the right to consult a doctor in complete confidence, and expect that this will be kept private, even from well-meaning parents', he said.

**Proposed privacy law changes**

The ALRC is proposing to streamline the existing Federal and State privacy laws and to develop a single set of privacy principles for information-handling across all sectors, and all levels of government to make it easier and less expensive for organisations to comply. These would be known as Unified Privacy Principles (UPP) and are based on the existing National Privacy Principles as a template. Key proposals include recognition that the fastest growth area of information is technology-based and that the legislation should be 'technologically neutral'.

Proposals include protection of personal information stored or processed overseas and a new system of data breach notification. Commissioner in charge of the Inquiry, Professor Les McCrimmon said 'There is currently no requirement to notify individuals when there has been unauthorised access to their information, such as when lists of credit card details are inadvertently published. Where there is a real risk of serious harm to individuals, we say they

must be notified.' In addition he said that the ALRC also proposes the removal of the exemption for political parties from the Privacy Act. 'Political parties and MPs should be required to take the same level of care when handling personal information as any other agency or organisation.'

Other key proposals include:

- introducing a new statutory cause of action where an individual's reasonable expectation of privacy has been breached;
- introducing a more comprehensive system of credit reporting;
- abolishing the fee for 'silent' telephone numbers;
- expanding the enforcement powers of the Privacy Commissioner; and
- imposing civil penalties for serious breaches of the Act.

The ALRC received Terms of Reference from the Federal Attorney-General for an inquiry into the extent to which the *Privacy Act 1988* (Cth) and related laws continue to provide an effective framework for the protection of privacy in Australia in January 2006. The Privacy Inquiry was prompted by a number of considerations, including:

- the rapid advances in information, communication, storage, surveillance and other relevant technologies;
- possible changing community perceptions of privacy and the extent to which it should be protected by legislation;
- the expansion of state and territory legislative activity in relevant areas; and
- emerging areas that may require privacy protection.

*Review of Australian Privacy Law* is available at no cost from the ALRC website, www.alrc.gov.au. A final report was delivered to the Attorney-General by 31 March 2008 and will be publicly available after its tabling in the Federal Parliament.

# THE IMPLICATIONS OF JURISDICTIONAL FACT REVIEW FOR PLANNING AND ENVIRONMENTAL DECISION-MAKING

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## Introduction

The New South Wales Court of Appeal in *Woolworths Ltd v Pallas Newco Pty Ltd*[1] (*Pallas Newco*) confirmed an emerging trend that jurisdictional facts form an integral part of judicial review of planning and environmental decision-making. A specially convened five-member Court held that the characterisation of a proposed development in a development application under the applicable environmental planning instrument is a jurisdictional fact, which the Land and Environment Court must determine for itself.

Woolworths Ltd applied to Ashfield Council to use an existing building as a drive-through liquor outlet. The issue was whether or not the proposed use was classified as a 'drive-in takeaway establishment' within the terms of the Ashfield Local Environmental Plan 1985 and permissible with consent in the zone. The Council thought it was and granted consent. The uncertainty with respect to the development's classification related to the minor part played by the drive-in component of the development and the predominance and concentration of in-store selling that would occur. Pallas Newco Pty Ltd sought a declaration that the development consent was void and of no effect as well as an injunction. The Land and Environment Court at first instance[2] declared the consent was void and of no effect, a finding that was not disturbed on appeal.

The decision has significant implications for administrative decision-making in the planning and environment context. Evaluating the significance of jurisdictional facts in environmental and planning law 'depends on one's view as to the proper scope of judicial review, and the appropriate relationship between decision-makers and reviewing courts.'[3] Accordingly, this paper commences with an examination of the scope of judicial review and the law's traditional approach to issues of fact and law. It then sets out the approach of Australian courts to jurisdictional fact review in environmental and planning law and concludes with a discussion of the implications of jurisdictional fact review for administrative decision-making in the planning and environment context.

## The scope of judicial review

The purpose of judicial review is to ensure that powers are exercised for the purpose for which they were conferred and in the manner in which they were intended to be exercised.[4] Judicial review is generally confined to review of questions of law and does not permit review of the merits of an administrative decision or a decision-maker's errors of fact. In *Attorney-General (NSW) v Quin*[5] Brennan J stated that the 'merits of administrative action, to the

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extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.'[6] In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*[7] Kirby J said that judicial review does not ordinarily enter into a consideration of the factual merits of a decision and cannot be used as a basis for a re-evaluation of the findings of fact.[8]

There are some exceptions to the law's reluctance to engage in review for errors of fact. Those exceptions are where there was no evidence to sustain the factual finding, or where the fact-finding process was seriously irrational or illogical (as opposed to the finding of fact itself), or where the existence of particular facts was a pre-condition for a decision-maker's having power to enter into an inquiry or make a particular decision (that is, where there was a jurisdictional fact).[9]

The distinction between questions of fact and law is vital in many areas of the law.[10] However, the distinction 'certainly admits a degree of manipulability'.[11] The traditional judicial approach to articulating the differences between errors of fact and errors of law in the judicial review context is to divide the decision-making process into three stages: determining the facts by way of primary findings and inferences, determining the law and applying the law to the facts as found.[12]

***Determining the facts***

When finding the primary facts, there is a preliminary question of law. That is whether there is more than one conclusion available to the decision-maker on the evidence or material before it. If that is the case, then it is for the decision-maker to make findings of fact by choosing between the available conclusions.[13] The decision-maker will commit an error of law if it makes inferences from intermediate facts, or finds ultimate facts, for which there was no evidence.[14] However, there is no error of law simply in making a wrong finding of fact.[15] In *Australian Broadcasting Tribunal v Bond*[16] Mason J stated:

> So long as there is some basis for an inference – in other words, the particular inference is reasonably open – even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.[17]

***Determining the law***

In *Collector of Customs v Pozzolanic Enterprises Pty Ltd*[18] the Full Court of the Federal Court stated five general propositions in attempting to distinguish legal from factual questions:

1. The question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law.
2. The ordinary meaning of a word or its non-legal technical meaning is a question of fact.
3. The meaning of a legal term is a question of law.
4. The effect or construction of a term whose meaning or interpretation is established is a question of law.
5. The question whether facts fully found fall within the provision of a statutory enactment properly construed is a question of law.[19]

The Court qualified the fifth proposition, stating that when a statute uses words according to their ordinary meaning and it is reasonably open to hold that the facts falls within those words, whether they do or not is a question of fact.[20]

It is possible for an error of law to arise in the process of attributing a meaning to a term used in its ordinary English sense. In *Hope v Bathurst City Council*[21] the High Court held that

the term 'carrying on... businesses or industries of grazing' was used in its ordinary sense, but the Land and Valuation Court at first instance had misconstrued its meaning. The term was held to mean 'grazing activities undertaken as a commercial enterprise in the nature of a going concern', and not, as the Land and Valuation Court held, an activity with a significant commercial purpose or character. Mason J held that the Court's error was 'associated with an omission to relate the word to the expression with which it was associated, this being an error in construction and accordingly of law.'[22]

### *Applying the law to the facts as found*

The third stage is where the decision-maker applies the law to the facts as fully found. Glass JA in *Azzopardi v Tasman UEB Industries Ltd*[23] stated that error may also intrude into this process.

> An erroneous conclusion that facts properly determined fail to satisfy a statutory test ... will ordinarily be an erroneous conclusion of fact. It is only in marginal cases that the statutory test is satisfied or not satisfied as a matter of law, because no other application is reasonably open ... Accordingly this Court will not entertain unexplained perversity of result as a ground for intervention although it will correct perverse or unreasonable applications of the law to the facts found.[24]

In other words, a decision-maker will commit an error of law if only one conclusion is open as to whether the facts fall within or outside the description in the rule, and it concludes otherwise. A decision-maker will not commit an error of law if different conclusions are open. In such a case, it is for the decision-maker to decide what is the correct conclusion (subject to review on the basis of judicial review grounds such as *Wednesbury* unreasonableness).[25]

That is no longer the approach to the characterisation of a use under an environmental planning instrument made under the *Environmental Planning and Assessment Act* 1979 (EP&A Act). While land use categories in environmental planning instruments are terms that carry ordinary meanings, and while the characterisation of a proposed development within the meaning of an ordinary English expression is a question of fact, it is also a jurisdictional fact.[26]

## Jurisdictional fact review

### *Identifying jurisdictional facts*

The authoritative statement of the concept of 'jurisdictional fact' in Australia is set out in the majority judgment of the High Court in *Corporation of the City of Enfield v Development Assessment Commission*[27] *(Enfield)*, as follows:

> The term 'jurisdictional fact' (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion. Used here, it identifies a criterion, satisfaction of which mandates a particular outcome.[28]

Ultimately, whether or not a particular finding of fact is jurisdictional is a question of statutory construction.[29] Consideration must be given to the total context of the legislative scheme in which the power in question is conferred, including the scope and nature of the jurisdiction and the fact said to be jurisdictional.[30]

The fact is likely to be jurisdictional if satisfaction of it is extrinsic or preliminary or ancillary to the exercise of a statutory power.[31] The word 'preliminary' in this context refers to a matter that is legally antecedent to the decision-making process, rather than to a matter that must be determined at the outset. In *Pallas Newco* it was established that classification of a use is extrinsic or ancillary to the determination of a development application.[32] Handley JA in that case distinguished between a finding that a development consent *can* be granted, and a

Furthermore, the court was influenced by the notion of 'deference', which the High Court in *Enfield* rejected. Finally – and importantly – Stein JA did not consider the legislative scheme in *Londish*, which was crucial to the conclusion in *Pallas Newco* that classification is a jurisdictional fact.

The Court in *Pallas Newco* also considered *Chambers v Maclean Shire Council*[55] (*Chambers*). In *Chambers*, the Council granted consent to a development application for a prawn and research station on a farm property. The applicant challenged the validity of the consent, contending that the development was prohibited because the subject site did not meet the minimum performance criterion for pond-based aquaculture, that elevation of the site be 'within an area the mean elevation of which is above 1 metre Australian Height Datum (AHD)', as prescribed by State Environmental Planning Policy 62 (SEPP 62). The elevation of 40% of the site was lower than 1 metre AHD.

At first instance, Sheahan J construed 'area' to mean a 'district' or 'region'. His Honour followed *Londish* and held that it was reasonably open to the Council to find that the general area in which the farm is located has a prevailing elevation of approximately 1 metre AHD or more. On appeal, Ipp JA (Sheller and Giles JJA agreeing) held that the question of whether the minimum criterion set out in SEPP 62 were met was a question of construction and law, thus the Council's decision was reviewable.[56] Sheahan J had erred in construing 'area' so broadly, and having regard to the purpose of the provision (to protect the environment from pollution from acid sulphate soils), it was more likely that the provision was intended to apply to specific development sites and not to undefined, general areas.

Ipp JA stated that 'it is not for a council itself to determine, as a matter of its opinion, whether it has power to grant consent to a development application.'[57] In the present case, whether the minimum performance criterion under SEPP 62 was met determined whether the Council had the power to consent to the application. This question was a jurisdictional fact, and must be answered objectively – 'not by reference to the subjective opinion of the Council.'[58] Accordingly, the court held that Sheahan J at first instance erred in adopting the approach in *Londish*.

While the outcome of the decision in *Chambers* was desirable, it needn't have resulted from a conclusion that a jurisdictional fact was involved. That is because there really was only one conclusion open on the facts. Either the site did, or did not, satisfy the minimum performance criterion prescribed by SEPP 62, having regard to the proper construction of the word 'area' in the legislative context. In this case, applying the law properly construed to the facts as fully found, the site did not satisfy the criterion. Accordingly, it is submitted that the Court could have invalidated the Council's decision on error of law grounds without recourse to jurisdictional facts.

**The implications of jurisdictional fact review for planning and environment decision-making**

The consequence of classifying a statutory provision as one of jurisdictional fact is that the reviewing court can decide the factual issue for itself, and, having regard to the evidence before it, substitute its own opinion for that of the original decision-maker.

The rationale for the law's traditional reluctance to engage in a review of the facts relates to the proper scope of judicial review and the relationship between the executive and judicial arms of government. As Mason CJ said in *Australian Broadcasting Tribunal v Bond*[59], to expose all findings of fact to judicial review would radically alter that relationship.[60] While jurisdictional fact review does not necessarily involve a review of all findings of fact (only the jurisdictional ones), it nevertheless raises separation of powers issues. If an Act commits the final decisions on factual issues to the administrative decision-maker rather than the court,

there are no separation of powers issues.[61] Furthermore, '[t]here is nothing about fact-finding or evaluation in themselves which is either uniquely judicial, or more clearly done better by a judge.'[62]

Interestingly, in *Pallas Newco* Sheller JA, while ultimately agreeing with the Chief Justice, expressed similar opinions. His Honour expressed discomfort with the idea that a court can 'correctly' determine whether a proposed use answers a statutory description in a case (such as that one) where reasonable minds may differ. His Honour said:

> There is much to be said, in my opinion, for the approach expressed by Stein JA in *Londish*. I accept... that in part Stein JA's conclusion may have flowed from an acceptance of the doctrine of deference which has now been rejected in the High Court. But the point Stein JA made is particularly true of the description of the development here in question. The decision by a council may not only be reasonably open but one regarded by many as correct. A contrary decision by a Court on review may also be no more than one reasonably open and thought by others to be correct.[63]

In other words, the fact that minds might differ and conclude otherwise than did the Council is no reason to vitiate its decision.[64] In *Bentham*, Stein JA, citing Lord Diplock in *Bromley London Borough v Greater London Council* [65], posed the question in this way: 'is the decision 'looked at objectively,... so devoid of any plausible justification that no reasonable body of persons could have reached [it]'?' [66] Ultimately, however, Sheller JA agreed with Spigelman CJ's orders because he was bound by the High Court's decision in *Enfield*.

The preferable approach to review of administrative decision-making involving the determination of factual issues in the environment and planning context is to intervene only if the decision-maker has made an error of law, in circumstances when only one interpretation of the primary facts was reasonably open to it, and it chose another, which was not. For example, if the proposed development in *Pallas Newco* comprised no drive-in component at all, then obviously the council would be in error by classifying the development as a 'drive-in take-away establishment', and the court should intervene. However, the judicial intervention in such a case should be on the basis of *Wednesbury*[67] unreasonableness, not jurisdictional fact.

When more than one conclusion is reasonably open to the primary decision-maker, that decision-maker should have the ultimate say as to which is the appropriate classification of the development, particularly when there are zone objectives guiding the decision-maker in the exercise of its discretion. In *Enfield*, the majority expressed concern with the 'deference' doctrine on the basis that the decision-maker might 'mould the facts' so as to enliven its jurisdiction. It is (somewhat bravely) submitted that this may not be so undesirable. For example, a site zoned 'General Industrial', might permit development that is classified as 'light industry', but prohibit development that is 'industry'. In a borderline case where the development could be either 'light industry' or 'industry', the consent authority should refer to the objectives of the zone, the environmental planning instrument and the EP&A Act in the exercise of its discretion. If the proposal satisfies all of those objectives, and if the decision-maker has otherwise exercised its power in accordance with all of the statutory requirements, why should the court have the final say as to how the development is 'properly' characterised?

This approach respects the exercise of a decision-maker's discretionary powers[68] and involves application of the fundamental principle of judicial review enunciated by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend*[69]:

> The limited role of a court in reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set the limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.

Jurisdictional fact review is an 'unnecessarily heavy-handed intrusion into executive decision-making'[70] in the context of environment and planning matters, having regard to the unrestricted rights of access to judicial review conferred by s 123 of the EP&A Act and the wide range of judicial review grounds available under the common law.

In planning and environment matters, a conclusion that a legislative provision does not involve a jurisdictional fact does not preclude judicial review of the decision according to the ordinary grounds of judicial review. Pearson notes that decisions made under statutory provisions that turn upon the 'satisfaction' of the decision-maker are reviewable under the principles set out by Gibbs J in *Buck v Bavone*[71]. Clearly, judicial intervention on factual matters 'undermines the legitimacy of the impugned decision-maker.'[72] This is particularly true of the criteria that a jurisdictional fact is one which can be 'objectively' determined, rather than according to the 'opinion' or 'satisfaction' of the decision-maker. The assumption of this theory is that 'a court's fact-finding is bound to be better than an administrator's'.[73] In *Timbarra*, Spigelman CJ said that 'facts, even where they are described as "objective", do not have an existence independent of their identification by some process of human agency.'[74] The consequence is neatly summarised by Aronson *et al*:

> Although his Honour did not state it explicitly, it follows that when courts make findings about jurisdictional facts, they cannot pretend to a factual infallibility, to an ability to connect with the "real" facts out there in a way denied everyone else. Their findings are their opinion, and because most decision-makers have also made their own findings (albeit provisionally), the net effect of jurisdictional fact review is to substitute the court's opinion for the decision-maker's.[75]

In *Australian Heritage Commission v Mt Isa Mines*[76], the High Court, it is respectfully submitted, correctly emphasised the importance of the decision-making function conferred on the relevant decision-maker. The High Court held that there was no jurisdictional fact involved in a decision by the Australian Heritage Commission to enter a place on the Register of the National Estate. Section 4(1) of the Act defined the national estate as follows:

> 4(1) For the purposes of this Act, the national estate consists of those places, being components of the natural environment of Australia or the cultural environment of Australia, that have aesthetic, historic, scientific or social significance or other special value for future generations as well as for the present community.

The question to be answered in this case was whether, on the true construction of the Act, the Commission could make an entry in the Register of any place which the Commission considered should be so recorded, or whether only a particular place which, objectively, answers the description in s 4 of that Act, could be so recorded.

At first instance and on appeal, the Federal Court[77] and then the Full Court[78] held that whether or not a place answered the description in s 4 was a fact upon which the jurisdiction of the Commission depended. On appeal, Black CJ dissented, and said that the task of determining whether a place was part of the National Estate was 'a difficult and complicated one, involving the careful assessment of complex facts and the formation of opinions and value judgments on a potentially wide range of matters.'[79] His Honour stated that the very nature of identification of places on the National Estate suggested a legislative intention that the body established by Parliament with the function of identification is to have the power to make a conclusive determination of that matter. His Honour continued:

> If the conclusion that a place is part of the national estate were to be seen as a jurisdictional fact, one of the commission's most important functions, and a key function in the overall scheme of the Act, would be performed only provisionally... Despite the possible application of the principle that weight is given to the findings of a specialist tribunal concerning a jurisdictional fact, there would be something approaching merits review of the commission's decision since the matter for factual review would be, essentially, the performance of the whole function of identification. The inconvenience of such a result

Spigelman CJ also said that after the expiration of the 3 month period the threefold principle in *R v Hickman; Ex parte Fox & Clinton*[94] continues to apply; that is, where it is manifest that the decision is not a bona fide attempt to exercise the power; where it does not relate to the subject matter of the legislation; or where it is not reasonably capable of reference to the power given to the decision-maker. Accordingly, any remaining uncertainty and inconvenience 'would be in a very narrow compass because of the restricted basis on which the *Hickman* principle applies.'[95]

Notwithstanding the Court of Appeal's findings to the contrary, it may appear that the validity of a consent can still be challenged on the ground of jurisdictional error (in the broader sense) even after the expiration of the 3-month period. Firstly, s 101 does not protect against breach of a requirement 'which is construed as being of such significance in the legislative scheme that it constitutes a limitation or requirement that is variously expressed in the authorities as "essential", "indispensable", "imperative" or "inviolable."'[96] In *Pallas Newco*, Spigelman CJ placed so much emphasis on the task of classification of development under Division 1 of Part 4 of the EP&A Act so as to label it a jurisdictional fact. Wouldn't it follow, then, that because the correct classification of development is 'essential' to the jurisdiction of a consent authority, any error made in classification would be reviewable after the 3-month period?

Secondly, s 101 refers to 'the granting of a consent'. 'Consent' refers to 'development consent'.[97] A consent to a development application which has no legal force or effect (that is, one affected by jurisdictional error) is not a 'consent under Part 4' within the meaning of s 101. Accordingly, applying the reasoning in *Plaintiff S157*, s 101 does not apply to a consent that is marred by jurisdictional error because it is not a consent under Part 4 of the EP&A Act. On this construction, the certainty which s 101 was intended to give to development consents would be significantly undermined.

Fortunately, the Court of Appeal has confirmed that any ability to challenge the validity of a consent after the expiration of the three month period is limited to the *Hickman* provisos and where there is breach of an 'imperative duty' or 'inviolable restraint'.[98] In *Lesnewski v Mosman Council*[99], one issue which arose on appeal was whether s 101 of the EP&A Act acts as a bar to a challenge to the validity of a development consent on the ground of denial of procedural fairness. Tobias JA, with whom Hodgson and Ipp JJA agreed, held that it does not. Their Honours' reasoning was that the provision does not, after the expiration of the 3-month period, extend to protect decisions that do not conform to the *Hickman* principle and does not protect against breach of a requirement which is 'essential', 'indispensable', 'imperative' or 'inviolable'.[100] Following Spigelman CJ's statement in *Vanmeld Pty Limited v Fairfield City Council*[101] that procedural fairness can be described as an 'inviolable limitation or restraint', s 101 does not protect against a breach of procedural fairness.

In *Maitland City Council v Anambah Homes Pty Ltd*[102] Anambah Homes Pty Ltd challenged the validity of a condition of development consent. The Court of Appeal declared it to be invalid because it did not comply with s 94(11) (now s 94B(1)) of the EP&A Act, which allowed consent authorities to impose conditions only if they were of a kind allowed by, or were determined in accordance with, a contributions plan. The proceedings challenging the validity of the condition were brought outside the period specified in s 101. The Court of Appeal held that compliance with s 94(11) was 'essential' to the validity of the condition, since the only source of power authorising the imposition of a condition requiring the dedication of land free of cost or a monetary contribution was (at that time) to be found in s 94 of the EP&A Act.[103] Since the condition did not comply with s 94(11), s 101 did not protect it.

The claim that s 101 did not protect a particular development consent was rejected by the Land and Environment Court in *Currey v Hargraves and Others*[104]. Wyong Shire Council

granted development consent in relation to a property in Noraville. The applicant challenged the validity of that consent, on the bases that, first, the consent was issued by the Council's Director of Health and Development, who did not have delegated authority to do so and secondly, there was no power to grant consent because the preconditions to the power to do so, namely the requirements of cl 36 of the local environmental plan were not met. Clause 36 allowed the council to grant consent to the use of a heritage item even if the use would be prohibited under the LEP if it was satisfied of certain matters.

The applicant conceded the facts did not infringe the *Hickman* principle, but claimed the lack of delegated authority was an inviolable restraint which amounted to an essential, indispensable, imperative duty that s 101 did not protect. Lloyd J rejected this submission; his Honour said the lack of delegated authority was not inviolable because the delegate had apparent or ostensible authority and the consent was one which the council itself could have issued.[105] In regard to cl 36 of the LEP, his Honour said, 'since that clause leaves to the council the question of whether it is satisfied that its provisions have been met, I am again inclined to the view that this discretionary consideration is not one which is inviolable in the relevant sense.'[106]

As Ellis-Jones observes, a more consistent and predictable approach is now being taken by NSW superior courts to the application of s 101 of the EP&A Act.[107] It is now clear that a challenge to the validity of a development consent that is commenced after the expiration of the three-month period is statute-barred, subject to compliance with the threefold *Hickman* principle and any other 'inviolable limitations or restraints'. The highly desirable certainty that this creates lessens concerns with respect to the potential inconvenience of jurisdictional fact review.

**Conclusion**

The consequence of jurisdictional fact review is that a reviewing court can decide the factual issue for itself, and, having regard to the evidence before it, substitute its own opinion for that of the original decision-maker. In situations where only one conclusion was reasonably open to the decision-maker, a reviewing court should intervene only if the decision-maker has made an error of law. Where a number of conclusions are reasonably open on the facts, the courts should not interfere in the consent authority's determination.

This is for a number of reasons: firstly, it is difficult to reconcile the scope of judicial review, which does not permit review of the factual merits of a decision, with jurisdictional fact review, which often does. Secondly, a conclusion that a factual reference does not involve a jurisdictional fact will often not preclude review of the primary decision on the judicial review principles enunciated in *Buck v Bavone*. Thirdly, jurisdictional fact review diminishes respect for and the integrity of primary decision-makers, because the fact-finding process is inherently a function of the executive, not the judiciary. Finally, jurisdictional fact review results in a degree of uncertainty and inconvenience for the primary decision-maker and for developers seeking to rely on a development consent. However, it is conceded that the last issue is mitigated to an extent by the Court of Appeal's construction of s 101 of the EP&A Act.

These conclusions do not arise from a view as to the correctness of the decision in *Pallas Newco*. It is respectfully submitted that the Court of Appeal arrived at the correct conclusion as a matter of law; that is, having regard to the legislative scheme governing the assessment and determination of development applications under the EP&A Act. Rather, these conclusions relate to matters of policy. In the author's view, the implications of jurisdictional fact review in respect of classification of proposed developments (as outlined above) could be avoided if classification was not preliminary or ancillary to the exercise of a decision-

making power. The legislative scheme should be amended so that the decision in *Londish* is regarded as good law in NSW.

**Endnotes**

1 2004) 61 NSWLR 707.
2 *Pallas Newco Pty Ltd v Votraint No 1066 Pty Ltd* (2003) 129 LGERA 234.
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4 Spigelman, J, 'The integrity branch of government' (2004) 78 ALJ 724 at 730.
5 (1990) 170 CLR 1.
6 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at [17].
7 (2003) 198 ALR 59.
8 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20* (2003) 198 ALR 59 at [114].
9 Aronson M, Dyer B and Groves M, *Judicial Review of Administrative Action*, Third Edition, Lawbook Co., 2004 at 179.
10 *Collector of Customs v Agfa Gevaert Ltd* (1996) 186 CLR 389 at 394.
11 Aronson, Dyer and Groves, above n 9, at 184.
12 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 156..
13 Pearson, above n 3, at 455.
14 Aronson, Dyer and Groves, above n 9, at 193.
15 *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77.
16 (1990) 170 CLR 321.
17 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 355-6.
18 (1993) 43 FCR 280.
19 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280, 287.
20 *Pozzolanic Enterprises*, above n 19, at 288, citing *Hope v Bathurst City Council* (1980) 144 CLR 1 at 8.
21 (1980) 144 CLR 1.
22 *Hope v Bathurst City Council*, above n 20, at 10.
23 (1985) 4 NSWLR 139.
24 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, 157.
25 *Australian Gas Light Co Ltd v Valuer-General* (1940) 40 SR(NSW) 126 at 138; *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509 at 512.
26 *Woolworths Ltd v Pallas Newco Pty Ltd & Anor* (2004) 61 NSWLR 707. See also *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55, [28].
27 (2000) 199 CLR 135.
28 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at [28].
29 *Timbarra*, above n 26, at [28]; *Pallas Newco*, above n 26, at [6].
30 *Timbarra*, above n 26, at [37], *Pallas Newco*, above n 26, at [6].
31 *Timbarra*, above n 26, at [44], *Pallas Newco*, above n 26, at [48].
32 *Pallas Newco*, above n 26, at [52].
33 *Pallas Newco*, above n 26, at [141] to [142].
34 *Pallas Newco*, above n 26, at [50].
35 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 195 CLR 355 at 93; *Timbarra*, above n 26, at [37]; *Pallas Newco*, above n 26, at [49];
36 *Timbarra*, above n 26, at [42].
37 *Pallas Newco*, above n 26, at [25].
38 (2005) 138 LGERA 207.
39 *Environmental Planning Legislation Amendment Act* 2006.
40 *Pallas Newco*, above n 26, at [53] to [56].
41 *Pallas Newco*, above n 26, at [62].
42 *Pallas Newco*, above n 26, at [58]. See also *Australian Heritage Commission v Mt Isa Mines* (1997) 187 CLR 297 (examined later in this paper).
43 *Enfield*, above n 28, at [39].
44 See *Chevron USA Inc v Natural Resources Defence Council Inc* (1984) 467 US 837.
45 *Enfield*, above n 28, at [41].
46 *Enfield*, above n 28, at [42].
47 *Enfield*, above n 28, at [44].
48 *Waterford v The Commonwealth* (1987) 163 CLR 54.
49 *Waterford v The Commonwealth*, above n 48, at 77.
50 *Enfield*, above n 28, at [44].
51 (1997) 97 LGERA 1.
52 *Londish v Knox Grammar School* (1997) 97 LGERA 1 at 8.
53 *Minister for Aboriginal Affairs v Peko Wallsend* (1986) 162 CLR 24.
54 *Londish*, above n 52, at 8.

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Superintendent Hamish McCardle, the officer in charge of developing the new Act, described the format as an online 'whiteboard' where the public can post their ideas - an approach which yielded some interesting and often less than serious suggestions, such as:

- opposing ticketing quotas for traffic offences: 'burglaries, car theft, stalkers, intruders, assaults, muggings and any other violent behaviour take priority over ticketing speeding motorists';
- raising the minimum police recruitment age to 25, since the human brain is not fully developed until then; and
- changing the name of police to 'The New Zealand Yum-Yum Teddy Bear Strike Force Z'.

These suggestions caused a stir within the global media, with many reports dismissing the wiki's credibility. But as *Wikipedia* states, the user-generated approach tremendously increases the chances that any particular factual error or misleading statement will be relatively promptly corrected. 'Errors to *Wikipedia* are usually corrected within seconds, rather than within months as it would be for a paper encyclopaedia. If someone sees something wrong within an article, they can simply fix it themselves.'

Despite the negative reports, the Police Act wiki ultimately echoed *Wikipedia's* position, with public suggestions in two key areas incorporated in the final Bill.

**Bill reflects wiki suggestions**

***Governance, organisation and administration***

A majority of submitters supported improved governance and administration of Police, including confirming the legal status and functions of New Zealand Police.

When the Policing Bill was introduced into the New Zealand Parliament on 15 October 2007, its Explanatory Note stated:

> This Bill seeks to confirm and strengthen Police governance, accountability and organisational arrangements in a way which is suitable for a contemporary age; and to improve the Police's effectiveness, especially by updating human resource management provisions, and establishing a clear framework for the exercise of policing powers by particular Police employees.

***Confirmation of the Police mandate***

In 1958, the Police were really the only policing body in New Zealand. However current examples of other policing organisations include Maori and Pasifika warders who assist youth offenders, as well as fisheries, immigration and customs officers. Submissions included support for 'a function statement in new Act, with a broad, rather than a narrow, statement of Police's role' and 'effective information sharing between law enforcement agencies.'

**Australia and the wiki**

In Australia, digital technology has been used to receive feedback on fair trading and planning regulations in NSW and the ACT. However, wikis have not yet been utilised in the legislative process.

The Howard Government stated that the 'effective use of technology transforms government into a more efficient and client-oriented sector of the economy'. This position is likely to be

echoed by the Rudd Government, following the then opposition leader's successful *Kevin07* online campaign.

There is no doubt that the New Zealand wiki illustrates how new technology can be utilised as a means to encourage public participation in democracy and law-making. The possibility of a Commonwealth Human Rights Charter, a new referendum on the Republic and the appointment of a new Governor-General are all opportunities for the technology to be embraced by the Rudd Government.

The Policing Bill wiki is no longer accepting submissions. However the wiki can be viewed as a "document of record" : see http://wiki.policeact.govt.nz.

***Postscript:***

On 1 October 2007, the Bill was assented to and is now known as the *Wiki Policing Act 2008* and forms part of the review of the Police Act. The wiki Act has some unusual provisions, for example:

> By serving the Crown (or in the event of New Zealand becoming a republic 'the people') the role of the police is that of serving all people of New Zealand not just the elected government who may only represent half of the people.

# NATURAL JUSTICE: IS THERE TOO MUCH, TOO LITTLE OR JUST THE RIGHT AMOUNT?

*Justice John Basten QC**

Justin Cartwright's recent book, *The Song before it is Sung* is a fictional account of the relationship between Isaiah Berlin and a German nationalist, and attempted assassin of Hitler, Adam von Trott. The author's literary device is that the fictional Berlin bequeaths to a protégé, the protagonist of the story, all his files of correspondence. The story is the life-consuming struggle of the protégé to make something of the legacy.

I felt a little as Berlin's protégé did, as I confronted today's topic. A plea for more particularity was rejected unequivocally by an enigmatic Robin Creyke: clearly she wanted me to do some thinking.

Because the question is clearly unanswerable without criteria, the first step must be to identify the standard against which the current obligations in relation to natural justice must be judged.

I would invite you to consider the issues, obliquely, from two perspectives. First, if you read anything of the contending writings about the desirability of a bill of rights for Australia, you will know that a principal argument of the nay-sayers is that it will tilt the balance of power away from the elected representatives of the people, who make the law, in favour of appointed judges, whose primary function is (or should be) to apply the law; to mould, perhaps, but not create the law.

The cause of that anticipated shift lies in the imprecision of the standards inevitably adopted in bills of rights. Broad discretionary powers invite creative lawyering and judicial activism. Because the legislature is subject to constitutional constraints diminishes the authority of the legislature. I need not rehearse the usual responses, but two should be briefly noted. One is that if human rights principles contained in international instruments, which attract almost universal support from democratic states, are to be meaningful, we should accept the constraints they impose on our legislature,. A second response is that a grundnorm of parliamentary democracy is the 'rule of law'. When Blackburn J said of Yolngu law in *Milirrpum v Nabalco Pty Ltd*[1]:

> If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me.

He was seeking to articulate the deepest level at which Yolngu society conformed to our notions of the rule of law. But inherent in the principle that the executive arm of government, the officers and agents of the government, are bound by the law they administer are some basic principles of 'due process'.

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* *NSW Supreme Court. This paper was presented at the 2007 AIAL National Administrative Law Forum.*

Powers are conferred for a purpose and must be used to effectuate that purpose. The laws are to be applied appropriately and fairly, not arbitrarily, unreasonably, corruptly or capriciously. In the context of a criminal prosecution Deane J once remarked in *Jago v District Court (NSW)*[2]:

> The general notion of fairness which has inspired much of the traditional criminal law of this country defies analytical definition. Nor is it possible to catalogue in the abstract the occurrences outside or within the actual trial which will or may affect the overall trial to an extent that it can no longer properly be regarded as a fair one. Putting to one side cases of actual or ostensible bias, the identification of what does and what does not remove the quality of fairness from an overall trial must proceed on a case by case basis and involve an undesirably, but unavoidably, large content of essentially intuitive judgment.

You will see my point: basic elements of the rule of law, which underlies our polity reflect the concept of 'due process of law', to use the language of section I of the 14th Amendment to the US Constitution, which is reflected in Art 14 of the International Covenant on Civil and Political Rights. The courts already apply these principles. To an extent they are constitutionally entrenched by Chapter III of the Constitution and particularly s 75(v): Plaintiff S157/2002 v The Commonwealth[3]. Even where they are not, attempts by legislators to oust judicial review by use of jurisdictional facts based on an opinion, privative clauses, and exhaustive codes of procedure tend not to be given the scope and effect their drafters intended. And these are concepts of indeterminate application and involve imprecise standards. Concepts of rationality and fairness are by no means the exclusive concern of the legally trained: nevertheless judges apply them and hence define their proper scope of operation. In so doing, the courts have the power, in a very real sense, to chart the boundaries of their own powers.

That brings me to the second perspective I would invite you to consider. We have all read – some of us probably know by rote – the canonical description of the role of judicial review expressed by Brennan J in *Quin v NSW* [4]. I will repeat it:

> 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 and, subject to political control, for the repository alone.

I raise it, not to state the obvious, nor to doubt its truth, but rather because we need to bear in mind its justification. It is true because it reflects the doctrine of separation of powers, which forms part of the rule of law. We have been told that the separation of powers is entrenched in our Commonwealth Constitution, but does not operate to invalidate a law at the state level: *Clyne v East*[5]; *Building Construction Employees and Builders' Labourers Federation (NSW) v Minister for Industrial Relations* [6]. However, those cases uphold the legislative supremacy of the Parliament; they do not address limitations on judicial power arising from the doctrine. To apply more generally the dictum that there is no separation of powers at the State level would be to remove the constraints which have always been fundamental to the limited scope of judicial review. The separation of powers doctrine is not only fundamental to judicial independence; it is also fundamental to limiting the proper role of the courts. The courts should not legislate, nor administer the laws, except to the extent necessary to control excesses of power, or failures to use powers properly.

It follows, I think, that (at least in the context of administrative law) if someone says there is 'too much natural justice' they mean that the courts, by way of judicial review, have overstepped the proper limits of their powers, by manipulating the imprecise concepts such as 'fairness' and 'reasonableness' to impose on officers of the executive standards of behaviour which were not mandated by the laws, properly understood.

Such a statement is itself imprecise: it is not an allegation of rule-breaking nor (usually) impropriety; rather it is saying that the existing adjustment of the tension between the three arms of government is inappropriate. The charge so understood is as hard to substantiate as it is to dismiss. Despite that, it should always be taken seriously, for two main reasons. The first is that we are all inclined to arrogate power to ourselves, if we can properly do so. Nor is that always bad: we do not wish to be ruled by officials like the mythical subordinate who, when asked by his superior, critically, 'Are you ignorant or just apathetic?', replied 'I don't know and I don't care'.

Secondly, responsible judicial officers are not necessarily power hungry, but they may exercise power to achieve justice between the parties, as it appears to them. It is understood that judicial review achieves administrative justice only incidentally, but it takes a disciplined mind to resist the natural inclination to achieve justice for the individual litigant. In judicial review cases, we see an individual pitted against the organisational authority of the government. Some judges instinctively seek to uphold government authority, from which their own positions derive. Others may feel more strongly attracted to the appearance of injustice suffered by the individual. To maintain a remorseless focus on legalities is not always easy.

But there is a more fundamental problem which underlies the question. From the point of view of a judicial officer, the task can be unduly challenging. In effect, the laws tend to give very little guidance in answering specific questions. Generally speaking, a statute (and we are almost always dealing with statutory powers) confers a power in terms which operate at a high level of generality. The court is required to assess the legality of the exercise at a level of particularity. The circumstances of its exercise may vary greatly and the legislature is, perhaps understandably, often silent as to mandatory procedures: what is appropriate in one situation may not be in another. But who is to judge – the repository of the power, as it is exercised, or the court after the event? It is common for the availability of a power to be conditional on an officer's satisfaction as to relevant circumstances; it is less usual to find a provision stating that the necessary procedural steps are those thought fair and reasonable by the officer in the circumstances.

Opinions can be reviewed for error, but we know that the scope of the available grounds is constrained: *R v Connell; Ex parte Hetton Bellbird Collieries Ltd*[7]; *Buck v Bavone*[8]; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[9]. But when it comes to procedural fairness, the procedures adopted are assessed objectively by the court. The fact that a decision-maker did not invite the affected party to comment on particular material, is assessed by asking whether the material was adverse to the interests of the applicant and should therefore have been put to the applicant for comment: *Kioa v West*[10], *Minister for Immigration and Multicultural Affairs; Ex parte Miah*[11].

The 'satisfaction' criterion has the effect of converting the criterion of engagement of power from an objective fact to the officer's assessment thereof: as Gummow J put it in *Minister for Immigration and Multicultural Affairs v Eshetu*[12], a properly formed opinion becomes the relevant jurisdictional fact. This approach is assumed in relation to an exercise of judicial power: *Parisienne Basket Shoes Pty Ltd v Whyte*[13]; *Timbarra Protection Coalition Inc v Ross Mining NL*[14]. The alternative view would, as Dixon J noted, be so inconvenient as to the unlikely to have been intended. But it is at least arguable that a similar approach could be adopted in relation to administrative procedures. In relation to tribunals, standard provisions state:

> For the purposes of any inquiry, the Tribunal –
>
> (a) shall not be found by the rules of evidence and may inform itself of any matter it thinks fit;
> (b) shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms; and

(c) may give directions relating to procedure that, in its opinion, will enable costs or delay to be reduced and will help to achieve a prompt hearing of the matters at issue between the parties

These have been treated as freeing the tribunal of any legal obligation to apply the rules of evidence: *Qantas Airways Ltd v Gubbins*[15] (Gleeson CJ and Handley JA). Might they not be read as a 'satisfaction' clause, governing procedures? And if that were correct in relation to tribunals, might not a similar approach be adopted in relation to decision-makers who are not, either by their office, or by the nature of the power or other aspects of the statutory context, compelled to follow particular procedures? In other words, absent an indication to the contrary, and although it should be assumed that a decision-maker must accord procedural fairness, his or her own view of what is procedurally fair in particular circumstances should be treated as sufficient, unless it can be shown that the failure to take a particular step was reviewable in accordance with principles established in *Buck v Bavone*.

There are objections to this approach. First, it will be very difficult, especially in cases where no procedures are specified, to know whether the decision-maker even gave attention to something of which all we know is that it did not happen. The practical effect of that approach may be to remove any basis for a challenge based on lack of procedural fairness in many cases. Because reasons are not available in relation to procedural steps, the affected party will need to rely on inferences drawn from the known facts, as in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*[16]. In effect, the 'satisfaction' test bears similarities to the 'deference' doctrine to administrative decision-making, adopted in North America, although this is not the place to analyse the differences: *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984), discussed in *Corporation of the City of Enfield v Development Assessment Commission*[17].

**Consequences not prescribed**

The previous discussion related to the difficulty in identifying mandatory procedural requirements, where the legislature is silent. The second area of difficulty is where standards are prescribed, or may be implied, but the consequences of breach are not. The question is whether breach carries automatically the invalidity of the exercise of power, some other consequence, or no consequence at all.

Generally, the consequence of procedural unfairness is invalidity, and relief will usually follow: *Re Refugee Review Tribunal; Ex parte Aala*[18]. The same consequence is likely to follow for other forms of judicial error: the label reflects the consequence. Sometimes, as we know, the legislature seeks to avoid that result by removing the power to grant relief – by use of a privative clause. Such clauses have always caused difficulties because the statute must be seen to impose a mandatory requirement (were it not mandatory relief would not lie for breach) and to deny the availability of a remedy for breach. In some cases the High Court has described the result as an expansion of the valid operation of the power: *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*[19].

In other cases, the Court has focussed on the process by which a result is achieved, namely the reconciliation, by an exercise in construction, of two apparently irreconcilable provisions: *Plaintiff S157*. In *R v Hickman; Ex parte Fox and Clinton*[20] Dixon J identified either the process (or the result – views have differed) as removing all constraints on the exercise of the power, except the need for the repository to make a decision which is 'a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body': p 615. That language, though expressed in positive, rather than negative, terms is not dissimilar to that found in the judgment of Latham CJ in *Hetton Bellbird*. In other words, a privative clause may be a means of saying that it is for the decision-maker to be satisfied that the pre-conditions to the exercise of power exist.

At an intellectual level that result is reasonably satisfying. The decision-maker has not been freed from legal constraints, but has been invested with powers, subject to conditional constraints, to determine what in the circumstances, is sufficient to satisfy the obligation to act fairly and when those steps have been taken. If the officer appears to have acted capriciously or grossly unfairly, it may be inferred that the correct test was not understood, not applied, or not applied in good faith.

The privative clause is an awkward, counter-intuitive way of achieving that result. If the legislature wishes to achieve such a result it should do so more directly, in the interests of transparency and greater certainty.

But there will remain cases, the norm rather than the exception, where the legislature will not seek to identify the consequences of procedural breaches. There are two reasons for this. One is that administrative procedural requirements are rarely specified or if specified, not comprehensively. Secondly, as already noted, statutes tend to speak at a level of generality, whereas the effect of a breach must be evaluated at the level of the particular. That is not to say that trivial breaches of procedural fairness will not invalidate a decision, but that serious breaches of procedural fairness will: see *Ex parte Aala* [21](Gaudron and Gummow JJ) and Aronson, Dyer and Groves, *Judicial Review of Administrative Action*[22]. On the other hand, what procedural fairness requires in a particular case may not be the same as that which a generally applicable statutory procedure provides.

Whether rules of procedural fairness derive from the general law or by implication from a particular statutory scheme, it is clear that in most cases the scope and content of procedural fairness will turn on the effect of a statute. It follows that the question for discussion can only be answered by reference to trends or tendencies. Further, one would wish to deal discretely with different categories both of legal requirements and areas of operation.

In relation to the former, natural justice can be divided, for example, into procedural fairness, disinterest and the decision process. In each case courts undertaking judicial review are likely to have a subconscious tendency to adopt standards which are close to those under which they operate. The High Court has warned against this tendency more than once: see *Minister for Immigration and Multicultural Affairs v Jia Legeng*[23] and *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*[24]. Nevertheless, judgments tend to be replete with references to 'evidence', 'onus of proof' and other trappings of the judicial process: such language may not reveal error, but one could be more confident that judicial decision-making is not being used as the paradigm if such terminology were eschewed.

In relation to areas of operation, much restatement of the law has derived from the migration decision-makers. The modern jurisprudence commenced, on one view, with the departure, in *Kioa v West*[25], from *Salemi v Mackellar (No. 2)*[26] and *The Queen v Mackellar; Ex parte Ratu*[27]. An earlier generation of cases arose in the industrial arena: see, eg, *Hickman, Hetton Bellbird*. Thus, attention has focused on tribunals and decision-makers who act on submissions (with or without a hearing) in matters initiated by an individual seeking a benefit. Far fewer cases deal with natural justice in relation to other forms of decision-making: cf *National Companies and Securities Commission v News Corporation Ltd*[28]. And when such cases do arise, often they are seen as turning on statutory construction, with little attention to principles of natural justice. In the other class, there is a continuing reluctance to accord proper emphasis to statutory context in addressing the engagement of natural justice principles and their content.

This raises issues which cannot be addressed today, but I would like to finish with a question. One finds too many statements that interference with rights or interests (leaving aside legitimate expectations) engages natural justice provisions to be allowed to suggest

otherwise. The issue is thus usually posed as going to the 'content' of the requirements and a debate as to whether these can diminish in particular circumstances to zero. However, this discussion is often unhelpful: what needs to be decided is whether a particular regime admits of a particular requirement, for example to give notice of intention to act, and an opportunity to respond. Sometimes even that element is missing, as with the power to arrest or issue a search warrant, although, of course, statutory preconditions must be exercised for a proper purpose.

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. Of course, the difficulties can be addressed by appropriate guidelines and policies for the official. But guidelines will be ignored by the court if thought not to be consistent with the law.

To conclude, I do not know if we have the balance right, because there are many distinct operations to be balanced. Are there tendencies revealed by the case-law which can be assessed? Even that I find hard to judge. But what is clearly important is for judges to have in the forefront of their minds the need to assess decisions according to the administrative context and not against a paradigm drawn from the exercise of judicial power. Secondly, they must be conscious of the constitutional principles which both justify and constrain judicial review.

**Endnotes**

1 (1970) 17 FLR 141 at 267
2 (1989) 168 CLR 23 at 56-57
3 (2003) 211 CLR 476
4 (1990) 170 CLR 1
5 (1967) 68 SR(NSW) 385
6 (1986) 7 NSWLR 372.
7 (1944) 69 CLR 407 at 430 and 432
8 (1976) 135 CLR 110 at 118-119
9 (1996) 185 CLR 259 at 274-276
10 (1985) 159 CLR 550
11 (2001) 206 CLR 57
12 (1999) 197 CLR 611 at [130
13 (1938) 59 CLR 369
14 (1999) 46 NSWLR 55
15 (1992) 28 NSWLR 26, 29-30
16 (1971) 124 CLR 97
17 (2000) 199 CLR 135 at [39]-[48].
18 (2000) 204 CLR 82
19 (1995) 183 CLR 168
20 (1945) 70 CLR 598
21 204 CLR 82 at [59]-[60]
22 (3rd ed, 2004) p 457-46
23 (2001) 205 CLR 507
24 (2005) 79 ALJR 1009
25 (1985) 159 CLR 550
26 (1977) 137 CLR 396
27 (1977) 137 CLR 461
28 (1984) 156 CLR 296

# THE IMPACT OF EXTERNAL ADMINISTRATIVE LAW REVIEW: COURTS, TRIBUNALS AND OMBUDSMAN

*Bruce Barbour**

External administrative law review is largely undertaken by three bodies – courts, tribunals and the Ombudsman. We are focusing on each of these today and not surprisingly, I will be talking about the impact of the Ombudsman.

Before doing so, let me say at the outset that I take a very broad view as to what constitutes administrative review – essentially administrative law review is aimed at regulating government decision-making, ensuring accountability of the executive and thereby helping to ensure community confidence in the administration of government.

I do not intend to spend much time discussing courts and tribunals. I shall however discuss some of the obvious differences in what they do and how they do it as compared to an Ombudsman. Not surprisingly, I will rely primarily on references to my own Office.

Firstly, a little about my Office. Over the past few years I have spoken repeatedly about the need to challenge traditional notions about what a public Ombudsman is and does as well as the need to develop more sophisticated and pro-active means of ensuring that agencies within our jurisdiction administer services effectively and fairly. I think it essential that the role performed by my Office reflects and responds to changes in society as well as community expectations. These factors should drive us to constantly review and improve our business.

The number of matters we handle continues to grow. In 2005/06, we received 33,315 matters. Of those, over 23,000 were finalised informally, usually through advice or initial contact with the relevant agency. Over 10,000 were dealt with more formally.

The large number of matters we handle is partially due to the fact that we are no longer dealing with only 'public authorities' but with a broad range of government and non-government bodies, as well as private individuals.

My Office has also moved from solely handling complaints involving administrative 'action' as it did 30 years ago, to dealing with:

- the conduct of police officers, whether on or off duty;
- the review of deaths of certain children and people with a disability;
- inspecting visitable services where children, young people or people with a disability or residents of licensed boarding houses live;
- the way in which allegations of child abuse are handled, and
- the new operation of certain legislation ensuring the powers provided are being exercised fairly and effectively.

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* *NSW Ombudsman. This paper was presented at the 2007 AIAL National Administrative Law Forum.*

With such a broad jurisdiction or responsibility, it is essential that my Office operates as more than just a reactive complaints handling body. In order to meet the expectation of those receiving a variety of services, as diverse for example as policing, community services, education and local government, we now:

- audit systems and inspect records;
- conduct own motion inquiries and investigations;
- review investigations conducted by agencies;
- undertake research and project work;
- provide organisation with the opportunity for their staff to undergo training, and
- prepare a range of publications and guidelines on topics such as good administrative practice and complaint handling.

The range of our functions and how we go about them contrasts quite clearly with those of courts and tribunals.

**So how are courts and tribunals different from Ombudsman?**

Courts are limited in the issues they can address, given their role to adjudicate between disputing parties. Courts operate in an extremely formal manner prescribed by rules and orders and they are not called upon to address systemic issues. They deal only with those matters that are specifically brought to them and in an administrative law context, generally will deal only with specific appeals against individual decisions. Courts are primarily focused on the 'legality' of conduct or the decision the subject of review.

A significant impediment to the impact of courts and litigation for almost all of the community is cost. In August last year, his Honour Wayne Martin, Chief Justice of the Western Australian Supreme Court commented that Australia's legal system –

> ... is the Rolls Royce of justice systems, but there is not much point of having a Rolls Royce in the garage if you can't afford the fuel to drive it anywhere. You can sit in it, polish it, admire it, boast about it, lend it out to rich friends or hire it out to people who can afford to drive it, but you can't use it for its basic purpose, which is to get you from A to B[1].

Coming to the Ombudsman on the other hand, costs complainants nothing.

Tribunals of course, were initially established to overcome some of the difficulties experienced by those using the court system, to offer the public a quicker, cheaper and more accessible form of administrative law review.

They more so than courts will focus on the merits of a decision, and to some extent similarly to how an Ombudsman might approach an issue. They of course are charged with determining that the correct or preferable decision is reached in the further hope of ensuring that such decisions will translate into better decision-making practice and procedure by the relevant government agency.

However, even with relaxed procedures and a more accessible process, tribunal members and tribunal practice is still criticised for being too legalistic. John McMillan has suggested that tribunals often present 'reasons statements that have been prepared on the assumption that the primary audience for the reasons is an appellate court rather than the parties before the tribunal. A result is that the reasons may take an inordinately long time to prepare and obscure rather than illuminate the tribunal's chain of reasoning.'[2] Although meant to offer a less formal mechanism for resolving administrative disputes, tribunals are far from lawyer free and often still have a distinctly adversarial feel. And, of course, like courts, tribunals are primarily concerned with individual decisions and disputes.

I think the work performed by an Ombudsman is best described as *complimenting* rather than *competing* with that of courts and tribunals.

Recent research regarding the outcomes expected by complainants has suggested that, for many people, merely obtaining a solution to their problem is not enough. They are seeking an explanation of why the problem arose and what is being done to prevent it happening again. Courts and tribunals may be in a position to provide a remedy, but our Office can reassure individuals that we are seeking to correct the cause of the problem before it affects others.

This is certainly evidenced by the number of people seeking our assistance as opposed to courts and tribunals. In 2005-2006, the Federal Court, Administrative Appeals Tribunal and Administrative Decisions Tribunal combined received 15, 744 new matters.[3] In the same period, as I noted earlier, we received over 33,000 matters, as well as conducting additional proactive work.

In thinking about this topic, it seemed to me that the best way to demonstrate the difference in how an Ombudsman Office operates and what impact can be achieved was by way of example. So, what I propose to do is provide some brief examples of our work.

**Audit of the NSW Police Force's Implementation of the *Aboriginal Strategic Direction***

Where courts and tribunals are largely restricted to making decisions based upon the information before them, we are able to audit the records of an agency in order to assess their practices and procedures.

Our ongoing audit of the implementation of the NSW Police Force's *Aboriginal Strategic Direction* is a good example of this. The *Aboriginal Strategic Direction* stemmed from the Royal Commission into Aboriginal Deaths in Custody. It was aimed at encouraging consultative, outcome-driven approaches to building better relationships with Aboriginal communities, with the aim of reducing crime and contact with the criminal justice system.

My Office's initial audit took place in 2003 and 2004, and involved:

- reviewing existing projects or initiatives in police local commands aimed at assisting police to work more effectively with local Aboriginal communities;
- meeting with local service providers, key community members, local police commanders and other police officers to discuss practical issues affecting the relationship between police and Aboriginal people;
- giving each command a report card and rating it against the six key objectives contained in the *Aboriginal Strategic Direction*, with recommendations on how the command could perform better, and
- monitoring each command's compliance with our recommendations and the implementation of the *Aboriginal Strategic Direction*.

Each police command was provided with a detailed report, outlining ways in which they could improve their relations with the Aboriginal community. In the special report to Parliament outlining the results of our initial audit, my Office noted that our preliminary recommendations had already yielded some positive results. Local police commanders had become more aware of their responsibilities under the *Aboriginal Strategic Direction*, and had taken steps to implement a number of my office's recommendations.

We are continuing to collect information about the various communities visited as part of our initial audit. This allows us to not only assess the relevance of our recommendations, but

also the effectiveness of the police response. During a follow up visit to one of the rural communities in 2006, we were pleased to find that a number of our recommendations had been adopted, and were having a positive impact upon relations between police and the local Aboriginal community.

In addition to police's interaction with the Aboriginal community, many of the other situations we deal with involve a diverse range of agencies. My Office oversees the work of a large number of these agencies, many of which have overlapping jurisdiction. Good examples of this are cases involving domestic violence. These can often involve the NSW Police Force, Department of Community Services, Department of Housing, and the Department of Education. Unlike other administrative review bodies, we are able to look at the work of all of these groups in a coordinated manner.

In order to best assess situations with multiple agency involvement, I have recently created a Cross Agency Team within the office. The main functions of this team are to:

- direct, coordinate and manage the work undertaken by the Aboriginal Unit and Youth Liaison Officer, both of which take part in direct contact with the community;
- provide other areas of the office with advice and information about significant Aboriginal and youth issues and initiatives;
- conduct projects which cross both agencies and groups within the office;
- provide a 'project management service' to our office in relation to particular cross-jurisdiction or cross-office projects where appropriate, and
- provide advice and information to our office about whole of government initiatives

We have now identified the following priority areas of work for the team, focussing on the needs of vulnerable groups within the community:

- the State-wide response to Homelessness;
- the adequacy of housing and support for people with high needs;
- the impacts of fines on young people; and
- service provision in vulnerable communities, with particular emphasis on how lead agencies are implementing interagency practices

**Own motion investigation into the handling of complaints about transit officers by Rail Corporation.**

It is not necessary for someone to come to us with a complaint. Frequently my Office utilises its own motion investigative powers.

Our investigation into RailCorp transit officers is an excellent example of this. We became aware of public concerns relating to the conduct of RailCorp transit officers through media reports, discussions with youth advocacy groups, information received through our Aboriginal Complaints Unit's audits, as well as a number of complaints received from members of the public alleging assault and the excessive use of force by transit officers. There are in excess of 600 of these officers, making them a substantial law enforcement entity. To put this in perspective, the ACT only has 620 sworn police officers.

As a result of this information, my Office decided that a broad investigation should be conducted. Making use of our powers under s 18 of the *Ombudsman Act 1974,* RailCorp was provided with a request for information regarding:

- specific powers, duties and roles performed by transit officers;
- recruitment and training of transit officers;

- the procedures for handling complaints about transit officers;
- procedures in relation to records and case management systems; and
- information about complaints received in the period from 1 July 2003 to 20 June 2004

After reviewing the material provided by RailCorp, my Office issued a final report, which outlined a number of recommendations in relation to RailCorp's:

- complaint handling policy,
- discipline policy,
- complaint information system,
- recruitment processes, and
- the use of force and exercise of powers of arrest

We also highlighted the advantages that would stem from the effective and ongoing external oversight of RailCorp's complaint handling procedures.

The response received in relation to most of these recommendations has been positive. Since receiving our report in August 2005, RailCorp have:

- introduced a Complaint Management System;
- established a Transit Officer Professional Standards Unit; and
- drafted Standard Operating Procedures for Transit Officers

We have maintained productive contact with RailCorp throughout this process, and have continued to provide advice and guidance regarding improvements to their systems.

**Review of the *Police Powers (Drug Detection Dogs) Act 2001***

A new and very significant function for my Office is the review of certain pieces of new legislation. It is an interesting example of the ever-changing nature of our work and yet another example highlighting the differences between our work and that of courts and tribunals. My Office has been asked to conduct 17 legislative reviews, six of which are ongoing, into a wide range of legislation that provides police with additional, and often potentially intrusive, powers.

My Office recently completed a review of the *Police Powers (Drug Detection Dogs) Act 2001*. This has been a contentious piece of legislation, with both vocal support and criticism. Reverend Ray Richmond, pastor of the Wayside Chapel in Kings Cross, summed up much of the criticism levelled at the Act when he stated that he had 'formed the opinion that the practice [of using drug detection dogs] is intrusive, offensive and ineffective in prosecuting drug dealers above street-level couriers.'[4]

When the legislation was first tabled, the then Police Minister Michael Costa commented that it was 'aimed primarily at detecting and prosecuting persons committing offences relating to the supply of prohibited drugs and plants.' He went on to state that it would allow police to 'target well-known drug dealing areas and break up the trade in prohibited drugs.'[5]

After analysing data collected during a two-year period following the enactment of the legislation, my office found that prohibited drugs were only located in 26% of the searches conducted following a drug dog's indication, calling into question the accuracy of drug detection dogs, as well as the cost-effectiveness of their use. Within this group, the most commonly detected drug (84%) was cannabis. Only one amount of cannabis seized exceeded the prescribed quantity of 300 grams required for a 'deem supply' charge. These

findings clearly brought into question the effectiveness of using drug dogs to target drug suppliers.

As well as examining the strengths and weaknesses of the legislative framework, the report also assessed possible wider impacts of the legislation on the community:

- As one drug educator commented, there is a fear that 'recreational drug users, concerned about being detected carrying drugs, might resort to taking a larger amount of drugs in one dose rather than staggering their consumption over a longer period.' There is also some concern that, when confronted with drug detection dogs and large numbers of police, young people may panic and swallow any drugs they may be carrying. During one of our focus groups, a police officer acknowledged this risk, stating that 'we've actually had an ambulance on standby in the area in case there's an OD which is caused by us going through.'
- The report recognised the possible impact of drug detection dog operations on existing health services for drug users, such as Medically Supervised Injecting Centres, needle and syringe exchange programs, and methadone clinics.
- My Office suggested that the Attorney General's Department consult with the NSW Police Force and NSW Health to consider the formation of a steering committee to formulate a trial of a pre-court diversion program for those found in possession of small amounts of drugs other than cannabis. This proposal met with initial support, and my office is awaiting advice from the involved parties regarding its implementation.

**Alternative methods**

As well as audits, investigations and legislative reviews, our office also makes use of many less formal methods to encourage changes to administrative practice. This is yet another area where our work stands apart from that of courts and tribunals

***Meetings***

This can be as simple as holding meetings.

I often meet with the heads of the various agencies within our jurisdiction to discuss possible problem areas. This can lead to quick and effective procedural change. It is my experience that very few organisations will resist suggestions designed to help them operate more effectively. I also hope that agencies recognise the benefit of changing their approach in order to head off future problems, complaints and possible litigation.

In addition to these informal, ad hoc meetings, myself, my Deputies and Assistant Ombudsman also take part in regular stakeholder meetings with peak agencies falling within our jurisdiction. These allow the opportunity to canvas issues at an early stage. The meetings also help to develop effective working relationships. As we do not have the ability to require agencies to adopt our recommendations, continued contact can assist in persuading agencies that implementation is in their best interests.

In December last year, a roundtable discussion took place involving representatives of 11 peak bodies involved in providing disability services. Some of the key issues discussed were:

- criminal justice issues,
- service access,
- service monitoring; and
- vacancy management

In the same month, my Office also met with various groups involved in out-of-home care. As well as discussing topical issues, the representatives provided outlines of their recent action, as well as highlighting issues affecting them and their clients.

As part of our ongoing review of several increases in police powers, representatives of my Office have met with a wide range of relevant community organisations in order to gauge their response to the changes. This allowed those effected by the legislative changes to voice their concerns, as well as have some of their questions answered in an informal setting.

***'Mystery shopper' audits***

As well as formal systems audits, my Office also conducts informal and unannounced 'mystery shopper' customer service audits. These allow us to monitor the everyday performance of various agencies, and are aimed at:

- assessing the standard of frontline customer service within organisations whose core business involves a high level of contact with the public;
- highlighting any deficiencies in the level of customer service provided;
- making recommendations for improvement of customer service;
- providing general feedback to the relevant organisation, and
- motivating public sector staff to provide high levels of customer service

Where possible, we make use of existing customer service standards for the agency to provide a customer service benchmark for the relevant agency. These are taken from publications such as guarantees of service, annual reports and codes of conduct.

***Training***

As I mentioned briefly in my introduction, my Office offers organisations the opportunity to take part in training in order to improve their service provision and complaint handling. In 2006, our staff delivered over 70 training sessions in areas such as:

- best practice in complaints management;
- complaint handling for frontline staff;
- dealing with difficult complainants;
- the art of negotiation, and
- risk management, to name but a few.

I have mentioned these various informal methods of impacting upon administrative decision-making, because their importance and value is not adequately recognised. All are aimed at addressing issues to improve practice and decision-making before problems can progress to complaints. This is clearly beneficial to the community, as well as the agency involved.

**Conclusion**

Having discussed some of the very positive aspects of the work of my Office, I would like to discuss an area in which I believe we may be failing: public perception and understanding of our role, and the impact we make.

As part of the National Integrity Systems Assessment completed by Griffith University and Transparency International in 2005, public sector agencies in NSW were asked to rank the relative importance of the State's integrity agencies. Our Office was ranked first out of 23 listed organisations. Courts were ranked sixth, and the Administrative Decisions Tribunal

eighth. Despite this level of public sector recognition, many within the community still think of my Office as merely a complaints hotline, if they have any knowledge of us at all! As John McMillan noted in 2003, 'the stature and public profile of an organisation does not necessarily correspond with knowledge of its existence.'[6]

While it is encouraging that the public sector recognise our impact, the same level of understanding does not seem to have passed into the general community. I find this frustrating, as a greater level of public understanding of the scope of our work would lead to increased public confidence and an even greater opportunity to bring about change.

I would like to leave you today with several possible explanations for this lack of knowledge, as well as some tentative solutions.

It may be that a lack of public understanding of our role is due to our success in working quietly to bring about change. I believe that we are at our most effective when we do not have to force an organisation into a corner. The challenge we face is to successfully publicise our achievements while maintaining effective working relationships with the organisations with which we do business.

One way to correct this problem without damaging good working relationships may be to publicise positive changes alongside the agency making them. All too often our public profile seems to be based on negative findings and significant investigations. Whilst these are important and must be brought to public attention, our involvement should not always been seen to be a black mark against an organisation. This form of publicity could improve the public profiles of both our office and the agency involved. The positive outcomes of the RailCorp investigation, which I have already discussed, were outlined in RailCorp's staff magazine *On Track* at the end of last year under the heading *Transits: Embracing Cultural Change.* In order to improve the level of public understanding of our work, this type of positive comment by relevant agencies needs to extend beyond employee-only magazines.

I also hope that our continuing effort in maintaining and diversifying our contact with the public will raise greater awareness of the extent of our impact. In the last few months, members of our Cross Agency Team have:

- given a presentation on creating positive change within communities to youth workers at their national conference
- spoken at the Legal Studies Association Conference, hoping to provide legal educators with a better understanding of our work
- taken part in two separate Aboriginal Men's Group meetings, discussing our role and the complaints process
- given presentations at Good Service Forums in Cowra, Condobolin and Bankstown.

However, even if we are able to effectively publicise our achievements, it is very difficult to 'sell' the role of bodies such as mine when there are so many different organisations operating under the Ombudsman moniker.

Although there seems to be a lack of knowledge surrounding much of our work, there is a general understanding of what the title 'Ombudsman' symbolises. This has meant that the title is often applied to provide oversight bodies with an independent and fair 'feel' or 'look'. A recent example of this is the Federal Government's creation of the Workplace Ombudsman. A release from the Prime Minister's Office announcing the change would seem to suggest that it is merely the Office of Workplace Services renamed.[7] Although the press release stresses the independence of this body, it is not clear how impartial it would be when government interests are likely to be involved.

Unlike organisations bearing the name Ombudsman, courts and tribunals have a strong level of jurisdictional certainty and public recognition of their role. In recent years, there has been a move to amalgamate tribunals in some jurisdictions, in order to avoid confusion and overlapping functions. This seems in most cases to have strengthened their role and reputation.

When I spoke at this Forum in 2001, I floated the notion of controlling the use of the name 'Ombudsman' through a system of accreditation. I suggested that this in turn could mean that the term Ombudsman could become a 'brand' to signify systemic integrity. However, I ended by recognising that it did not matter what an organisation was called. What is important is how those of us who promote high quality decision-making perform our functions and improve the way agencies within our jurisdiction perform their various roles.

Historically I think most would say that over the past few decades both courts and tribunals have been seen to be and thought of as the pre-eminent external agencies in terms of administrative law review. They are very secure in their practice and procedure. They have built reputations of good standing. They are able to bring to finality issues through determinations, decisions or orders. However, I think it is now time to look at whether in real terms they are making as significant an impact in administrative law as Ombudsman.

I have only briefly touched the surface of what Ombudsman offices are currently involved with. It is, however, very clear that we have a much broader role and mandate than courts and tribunals. We deal with far more individual matters than courts and tribunals. We can work more flexibly and informally, focussing our resources more strategically. We deal with systemic issues, can initiate investigations and review the effectiveness and implementation of legislation. We can also find conduct to be wrong, even if it is in accordance with the law.[8] In my view, Ombudsman have a more far reaching influence and impact on government agencies, government decision-making, practice and procedure than courts or tribunals.

**Endnotes**

1 The Hon Wayne Martin, CJ, *Bridging the Gap*, address to the National Access to Justice and Pro Bono Conference, 12 August 2006.
2 John McMillan, 'Judicial Review of the work of Administrative Tribunals – How Much is too Much?' (2003) *AIAL Forum 39*, p.28.
3 Federal Court of Australia, *Annual Report 2005-06*, p.114. Administrative Appeals Tribunal, *Annual Report 2005-06*, p.126. Administrative Decisions Tribunal New South Wales, *Annual Report 2005-06*, p.51.
4 Quoted by Ms Clover Moore MP, NSWPD, Legislative Assembly, 6 December 2001, p.19879
5 The Honourable Michael Costa MP, Second Reading Speech for *Police Powers (Drug Detection Dogs) Bill*, Legislative Assembly, 6 December 2001, p.19745
6 Address by Professor John McMillan, *Future Directions for Australian Administrative Law*, National Administrative Law Forum, 3-4 July 2003.
7 Office of the Prime Minister, *A Stronger Safety Net for Working Australians*, 4 May 2007, http://www.pm.gov.au/docs/20070504_safety_net.pdf (last accessed 25/05/07).
8 Section 26(1)(c) of the *Ombudsman Act* 1974 (NSW)

# EFFECTIVENESS OF ADMINISTRATIVE LAW IN THE AUSTRALIAN PUBLIC SERVICE

*Michael D'Ascenzo**

## Credit, where credit is due

At the core of the Westminster style of government is a professional, apolitical and effective public service:

> as matters now stand, the Government of the country could not be carried on without the aid of an efficient body of permanent officers, occupying a position duly subordinate to that of Ministers who are directly responsible to the Crown and to Parliament, yet possessing sufficient independence, character, ability and experience to be able to advise, and to some extent influence those who are from time to time set over them...[1]

So at the outset, I confess my bias that Australia's public service has been a strong force underpinning Australia's democracy and overall has contributed positively to our nation's social and economic development. It continues to do so.

## The advent of a framework of administrative law

Nevertheless, to gain profile, the fledgling office of the Commonwealth Ombudsman in 1977 invited people to contact them 'if they were being "trampled underfoot by officialdom", "strangled by bureaucratic red tape", or were having their problems "'swept under the carpet"...These stereotypes of government are still with us'.[2]

So it was that the 1970s and early 1980s were heady early days of the modern framework of Australian administrative law. There was a level of excitement. After all the changes reflected a certain set of values concerning public administration which was 'a change in emphasis from the duties of public officials to the rights of citizens...That form of climate change powerfully affects the environment in which modern managers of the business of government operate.'[3]

The scope of the changes were significant, 'directed at reforming government processes so as to improve citizens access to government information and to establish a system of review of administrative decisions.'[4] The suite of legislation included an integrated general jurisdiction tribunal, the Administrative Appeals Tribunal, a controversial novelty in the common law world because it reviewed decisions 'on the merits of questions and law'[5]; the *Ombudsman's Act 1976*, 'to ensure that administrative action by Australian Government agencies is fair and accountable'[6]; the *Administrative Decisions (Judicial Review) Act 1977*, which simplified procedures for challenging the lawfulness of government decisions through the Federal Court; and the *Freedom of Information Act 1982*. The latter was described as 'the first time any country with a Westminster style of government had moved to incorporate

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* *Commissioner, Australian Taxation Office.* *The author wishes to acknowledge the substantial input of Professor Robin Creyke to this paper which was presented at the 2007 AIAL National Administrative Law Forum.*

the elements of freedom of information into its legislative framework. The move reflected the recognition that the capacity of citizens to access official information held by governments and its agencies is consistent with the concept of open and transparent government and fundamental to the notion on democracy.'[7]

Nevertheless, skeptics abounded, and the skepticism was not unwarranted. Before this time, administrative law had not been prominent in public sector discourse. This is illustrated by recollections of a senior public service manager and an academic[8]:

- The public service up to the 1970s had been accustomed to 'play God' and were 'not used to having their decisions open to scrutiny'.[9]
- Many primary decision-makers did not have copies of, much less consult, the legislation or even the manuals. Decisions were based on the material on file and the personal judgment of the officer, perhaps advised by a more senior officer.[10]
- The prevailing attitude to information sharing by government was that 'public servants preferred to work surrounded by a wall of silence, which most of them accepted for the security that it brought. Their attitude was that that the Service had received enough bad publicity in its time without adding to it'.[11]
- 'Files were often messy and hard to follow ... File notes were vague and often unsigned. There was a reluctance to change decisions. Ministerial replies were drafted along the lines, "The decision notified to you was correct but, in the light of ..." when clearly the original decision was wrong.'[12]

If one were to be defensive, one could argue that these descriptions are dramatised stereotypes and not necessarily representative of the workings of all of the public sector. For example, under income tax legislation Taxation Boards of Review existed to provide merits review to taxpayers in relation to tax disputes, although this did not cover all administrative decisions.[13] In the Australian Taxation Office (ATO), copies of tax legislation were available to individual officers in areas such as Legislation, Interpretations and Appeals. While the personal availability of copies was not ubiquitous for all tax officers, they were supported by assessing guidelines and internal guidance materials.[14]

There is some truth that, as with other public sector agencies, the internal workings of the ATO would have been somewhat opaque to many[15]. While the Commissioner of Taxation has always been required to provide an annual report to Parliament, publicity was not generally seen as a normal incident of the work. However, internal record keeping standards, in our national office at least, were generally good. Ministerial replies were limited to 'this is a matter for the Commissioner of Taxation' given the independent position of the Commissioner and a cautious approach to the operation of the secrecy provisions in our law.

Be that as it may, the attitudes conveyed in the recollection of others undoubtedly had a degree of resonance across the whole of the public sector including the ATO. For example, 'Frustration, and more than a small measure of anger, pervaded the ATO, not least because promoters of taxation schemes made use, perhaps even abused, every possible administrative avenue including the appeal and objection procedures.'[16]

Given these attitudes, it is not surprising that there was resistance to the reforms from within the Australian public sector. The requirements for public administration to be subjected to standards set by courts, tribunals and the Ombudsman, for unprecedented access to information through freedom of information laws, and, from the end of the 1980s for controls on the use of personal information by government, were not universally welcomed.[17] Indeed, in the initial stages 'there were strident campaigns of opposition by some public servants to the proposed changes'.[18]

Complaints were voiced about the costs,[19] that decision-making had become 'time-consuming and cumbersome',[20] that the increased powers of courts and tribunals led to judicial and tribunal imperialism,[21] that, as a consequence, primary decision-makers were taking the 'soft' option rather than produce a decision which might face review,[22] and that policy-making was being undertaken, not by government, but by bodies which were outside the chain of accountability.[23]

Behind these complaints were a number of concerns:

- that courts and tribunals would impede policy-making and implementation;
- the adjudicative bodies would set standards which took little account of the reality of decision-making in agencies;
- that costs in supporting the new administrative law bodies and in accommodating decisions which provided for unanticipated entitlements to citizens could be unpredictable making it difficult for agency budgets and financial planning;
- that extra resources would for needed for training and responding to challenges to decisions including litigation over the application of the provisions, that a pro-disclosure approach would inhibit full and frank advice to government, or otherwise reduce the documentation of that advice, and
- that administrative processes could be abused to delay decision-making and frustrate due process.

Such attitudes persisted until at least the late 1980s[24] and even today there is the perennial issue about the proper interplay of administrative law and government policy[25], and concerns also linger about vexations claims and the abuse of the framework to frustrate due process. However, even by 1987, many senior officials were prepared to concede that the administrative law reforms had produced benefits. It was observable that primary decision-making had improved, decisions were better reasoned, government was more responsive, and there was better guidance to primary decision-makers through manuals, guidelines and instructions. Administrative law's impact was being felt.

These were not the only benefits. Courts and tribunals had clarified legislative provisions and policies, agencies had invested in better training for staff, internal review mechanisms within agencies were introduced, complaints mechanisms were set up within departments, there was an emphasis on achieving consistency across all offices of an agency, and review outcomes were being monitored and, as appropriate, fed into decision-making.

By the beginning of the 1990s it could be said that most managers accepted that administrative law was part of the normal processes of administration[26] and the quality of public administration had benefited from the reforms.[27]

That perception was confirmed by an extensive survey of decision-makers in the public sector in the late 1990s which resulted in overwhelming support for the core objectives of administrative law, namely, a more legally conscious, accessible and accountable public sector.[28] The 1970s and 1980s saw the imposition of an administrative law framework. With hindsight this was the sunrise period for administrative law, [29] although there were some, less charitably, who dubbed it as the period of 'lawyers' rampant'.[30]

**Changes to the public sector**

If this was the report card at the end of last century can it be said, thirty years from the birth of modern Australian administrative law, that administrative law still sets best practice in public administration? In my experience, this is no longer the case. Rather in many respects administrative law standards are becoming the base level, not the ultimate benchmarks for

the Australian public service. Superimposed on these standards are now a host of public demands, policy and operational imperatives which have raised the bar to require an even more accountable, responsive and professional public sector.

What has led to these developments? In some cases they were due to deficiencies in the administrative law system itself. Decisions of external scrutineer bodies sometimes were not filtered down to line officers, thus preventing them from having an impact on the public sector as a whole. Nor was it appreciated that there were limits on the ability of administrative law standards to change, at a fundamental level, the behaviour of decision-makers.

Another failure of the system was to anticipate the next major change of direction for the public sector. I refer to the 1980s and 1990s privatisation and corporatisation movements which placed many activities affecting the interests of citizens outside the scope of the legislative scheme conceived in the 1970s.

This embrace by the public sector of a more managerialist philosophy[31] also heralded the view that the values and methods of private sector ordering were to be emulated and economic rationality was to become the prevailing ethos.[32] 'Efficiency and effectiveness' became the mantra. Since efficiency was largely a matter of saving money, this move also heralded the era of 'economists rampant'[33] and micro-economic reform in terms of cost efficiencies for business and public service organisations alike.[34]

An unintentional by-product was that administrative law took a back seat. Efficiency dividends, accrual budgets, devolution of government functions to the private sector and introduction of fees for service were all to have their impact.

For example, by 1995 the Australian Law Reform Commission reported that the freedom of information legislation had had a 'marked impact' on the culture of the public sector but concluded that more needed to be done to give full effect to the right to access government-held information.[35] Similarly the Senate Legal and Constitutional Legislation Committee remained concerned in 2001 "about evidence that suggests that some agencies have a poor attitude to FOI."[36]

In the new era of 'user pays' principles and accelerating costs within the community, fees for applications under freedom of information laws and for access to the Administrative Appeals Tribunal were increased.

Some public sector activities such as particular migration, security intelligence and defence decisions were removed from review. The growing list of Schedule 1 exclusions from the jurisdiction of the *Administrative Decisions (Judicial Review) Act 1977* illustrated this trend, or a reflection of lingering concerns. Whatever the cause this trend highlighted the potential tension created between the legislative/executive and the judiciary, with the suggestion that '...the courts usually respond to legislative attempts to limit or completely exclude the scope of judicial review of administrative action with a mixture of incredulity, disingenuous disobedience and down right hostility.'[37] Others saw the executive as becoming adept at fashioning legislation so as to minimise or remove options for challenge.[38]

**Other harbingers of change**

Despite these developments, there were countervailing pressures. For example, there has been an exponential increase in the volume of legislation in the last 50 or so years. In 1955 the Commonwealth Parliament passed a single volume of legislation of 580 pages; in 2005, it passed seven volumes of legislation in excess of 4000 pages. Tax law, migration law, income support law and the Corporations Law are clear examples.[39] For the ordinary citizen

may be the complexity of the law rather than its volume that is of greater concern.[40] Paradoxically that complexity reflects the increased sophistication of government and growing demands from the community, for example the carve outs and choices contained in tax statutes on equity grounds.

The task of helping citizens understand their rights and obligations becomes more difficult as the law becomes more complex.[41] The Joint Committee of Public Accounts highlighted the importance of this function in the tax arena in the early 1990s:

> the Committee sees an urgent need for a review of the responsibilities and practical implications of the system [of self assessment] for taxpayers and their agents. Increased support to assist taxpayers to satisfy their obligations is also required.[42]

The Committee recognised however that the ATO had already sowed the seeds of change.[43] Indeed, the Committee referred to the amendments introduced into the law in 1992 via the *Taxation Laws Amendment (Self Assessment) Act 1992* as having 'contributed significantly to an improvement in the level of equity and fairness in the taxation system.'[44] The Committee and others also noted other harbingers of change:

- 'No doubt picking up on the mood of the times the ATO, apparently largely on its own initiative, began to consult more widely in the community.'[45] This included the establishment of the National Tax Liaison Group in 1985 which included representatives from tax professional associations.
- The establishment of a Taxpayer Service Group in 1986-87 to provide information, assistance and advice to taxpayers to enable them to understand their rights and responsibilities under the law and provide the support necessary for them to discharge their obligations.
- The establishment of a Problem Resolution Program in 1987-88 which provided an internal mechanism for the resolution of administrative disputes.

Subsequent to the Joint Committee of Public Accounts' Report 326, the Government established a Small Taxation Claims Tribunal within the AAT to enable small taxation matters to be decided in a less expensive and less formal manner and with emphasis on mediation. The Government also established a Special Adviser on Taxation within the Commonwealth Ombudsman's office. These changes constituted two of the three recent administrative review initiatives referred to in the 1995 *Justice Statement*.[46]

Other developments have also demanded a new approach. Since 1996 there has been an increasing emphasis on reforming the appropriate role of Government, and on improved service delivery. The *Financial Management and Accountability Act 1997*, the *Commonwealth Authorities and Companies Act* and the *Auditor General Act 1997* set out the responsibilities of agency heads and CEOs in a more devolved environment and gave the Auditor-General more independence.

More recently, there has been a particular focus on the structure of the public sector. The *Review of the Corporate Governance of Statutory Authorities and Office Holders* (the 2003 Uhrig Report) has led to changes in the composition of the Australian Public Service (e.g. inclusion of Medicare Australia and Austrade staff) and changes on how agencies operate from a governance perspectives (eg. executive management replacing the board in Centrelink).[47]

There has also been increasing focus on whole of government approaches across the APS and general government sector, with agencies working across portfolios to provide integrated responses to a broad range of challenges such as indigenous health, the environment and security.[48]

Whole-of-government approaches are desirable, and of special interest to an organisation such as the ATO that has a separate and distinct role as custodian of the Australian Business Register.[49]

**The new millennium**

How have these developments affected administrative law standards? In the first place, there has been a need for more responsive and sophisticated mechanisms to manage the complexity. In the second, new approaches to ensuring internal conformance have emerged. Thirdly the rise in a culture of justification means that: 'Arbitrary decisions and rules are seen as illegitimate. Rule by fiat is unaccepted.'[50] Together these developments have ushered in a third wave of change within public sector thinking.

Inevitably this century has seen a return swing of the pendulum, or perhaps some closer alignment or maturing of different perspectives. While a focus remains on lawfulness, effectiveness and efficiency, talk is now also on the ethical obligations on the public and private sector as well. [51] The rhetoric is now 'effectiveness, efficiency and ethicality. At a structural level, compliance is to be managed through a fourth, integrity branch of government.'[52]

For the ATO the change started to crystallise in a series of reforms 'built on the premise that although legislation is one of the building blocks for compliance, it is far from sufficient...At the heart of the reform strategies of the late 1990s was the building of a relationship with the Australian community in which the Tax Office was to be (a) professional, responsive, fair, open, and accountable.'[53]

An important initiative towards building this relationship was the Taxpayers' Charter. This year is the 10th anniversary of the Taxpayers' Charter and the ATO is taking the opportunity of re-affirming its principles and ATO values more generally.[54] The Charter recognises that, 'As tax systems are adjusted, the community needs to be educated, persuaded and encouraged to cooperate, long after the vote is cast at the ballot box.'[55] Recent research confirmed that the ATO is following the Charter and has improved on all elements over the last few years. Treating taxpayers fairly and reasonably, and with courtesy and respect, continues to be one of our strengths.[56]

The dispute resolution process established under our Taxpayers' Charter follows the broad requirements of effective dispute systems, and supports wider principles of good governance and integrity. For example, the Commonwealth Ombudsman concluded in his *Annual Report 2005-06*:

> The ATO's positive response to that report [2003 ATO Complaints] has resulted in a system that reflects best practice complaint management principles and that maintains a consistent approach across the ATO...The ATO's responsiveness suggests a cultural commitment to complain resolution within the agency. This commitment perhaps offers taxpayers better remedial options than externally imposed rules.[57]

The change for others in the public sector may have been heralded by the introduction in the final years of the twentieth century of the *APS Code of Conduct* and the *APS Values*. What they required was more than lawfulness and efficiency. '[E]thical behaviour ... goes beyond the requirements of lawful behaviour. It requires employees to merit the respect of the public in their official dealings. This is ... a requirement [of] professionalism'.[58]

The significance of these moves is twofold. Many of the institutions within this fourth branch are also within the administrative law fold. They include:

Defining values, including the value of professionalism, and developing mechanisms to embed these values in individual officers is more likely to be effective in ensuring compliance. Behind these moves is the need to instil in the community a confidence that the system is operating effectively. As the Foreword to the Tax Office *Integrity Framework* states: 'These perceptions are more likely to be positive when we are seen to be delivering our commitments through acting ethically and with integrity'.[64]

**How is integrity, including ethical behaviour, achieved?**

To illustrate, the ATO has put in place a framework giving practical and objective content to the concept of integrity.

That framework includes setting standards which underpin a selection of assurance processes – selected integrity indicators and Certificates of Assurance which are representative of all the ATO's business processes. They enable the ATO 'to identify and address instances where the standards have not been met'.

Considerable work has been undertaken to identify the legal and policy obligations on the ATO and, more significantly, to identify what evidence is required to ensure these obligations are being met. These standards are monitored on a regular basis by committees such as the Integrity Advisory Committee and the Audit Committee, and by an independent Integrity Adviser, whose role is to assess across the organisation how well its processes are working.

This governance framework, including as it does an *Employees' Handbook* and a further publication *Safeguarding the Taxation Office Integrity Program 2006-07* are part of the 'soft law' governing the ATO and reinforce employees' responsibilities under the governance framework. These practices and policies are externally recognised as better practice in the Australian Public Service and among State governments.

However, this framework is not unique. The Department of Immigration and Citizenship also has an Audit and Evaluation Committee with an independent Chair and a second external member to oversee its enhanced internal audit program, to make sure that its decisions are in line with legislation and instructions. In addition the Department has established a 'Values and Standards Committee which includes four external members ... to ensure that [DIAC] is meeting the expectations of the wider community'.[65]

In other words, these processes, coupled with the requirements of the Code of Conduct and Values have put content into the higher standards that ethical and professional behaviour require.

**Conclusion**

The public sector has moved into a new era. 'The development in the Australian community of a cultural expectation that those in authority are able and willing to justify the exercise of power is one of the most important aspects of public life.'[66] It is an era in which the expectations of the public sector are even higher than they were in the new dawn of the 1970s and 1980s. That is not to underestimate the achievements or the effectiveness of administrative law. It remains a significant element of the bedrock of the public sector's work, 'the values on which it is based have taken deep root.'[67]

What is does signify is that having embraced the administrative law standards of transparency and accountability, compliance with the law, attention to the impact of decisions on individuals and justification for those decisions, public administration has had to go further. The public sector is now requiring of itself not just a lawful, efficient and effective approach to its core business, but an ethical compass as well. Indeed the former is

dependent on the latter. In other words officers need to embed values of professionalism and ethicality into their day-to-day interactions with each other and with the public in order to be efficient and effective.

For example, as Valerie Braithwaite observes in relation to taxation:

> Failure to administer the tax system in a way that demonstrates basic respect for democratic principles of participation and accountability is a dangerous game. A tax authority that de-legitimises itself in the eyes of citizens limits its effectiveness and short-changes citizens in terms of what they can expect from democracy.[68]

**Endnotes**

1 Report on the Organisation of the Permanent Civil Service (1854), *The Northcote – Trevelyan Report.*
2 *Commonwealth Ombudsman Annual Report 2005-2006*, p1.
3 Chief Justice Murray Gleeson, 'Outcome, Process and The Rule of Law', Administrative Appeals Tribunal 30th Anniversary, 2 August 2006, p.16.
4 Senate Legal and Constitutional Legislative Committee, Inquiry into the Freedom on Information Amendment (Open Government) Bill 2000, April 2001, p.2.
5 Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989), 18 *Fed L Rev 122*, pp.126-127.
6 *Commonwealth Ombudsman's Annual Report 2005-2006*, p.1.
7 Senate Legal and Constitutional Legislation Committee, 'Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000, April 2001, p.2.
8 See articles in (2001) 8 *Australian Journal of Administrative Law* No 4 129-221, guest editor Professor Peter Cane.
9 D Volker 'Just do it – How the Public Service Made it Work' (2001) 8 *Australian Journal of Administrative Law* 204.
10 D Volker 'Just do it – How the Public Service Made it Work' (2001) 8 *Australian Journal of Administrative Law* 204.
11 Dr G Caiden *Career Service – an introduction to the history of personnel administration in the Commonwealth Public Service of Australia 1901-1961* (Melbourne University Press, and Cambridge University Press, 1965) 435, quoted in P Kennedy 'Reflections of a Line Manager (2001) 8 *Australian Journal of Administrative Law* 192.
12 D Volker 'Just do it – How the Public Service Made it Work' (2001) 8 *Australian Journal of Administrative Law*204.
13 The Administrative Appeals Tribunal was vested with the power to review tax decisions in 1986 by the enactment of the *Taxation Boards of Review (Transfer of Jurisdiction) Act 1986.*
14 For example, Canberra Income Tax Circular Memoranda and Income Tax Rulings. With the introduction of the *Freedom on Information Act 1982*, the ATO was conscious of the Act's implications for the 'method of publishing and disseminating decisions relevant to the interpretation and application of taxation laws' (*Commissioner of Taxation, 1983 Annual Report*, p.7).
15 Some say it still is, notwithstanding 'a history of being open and transparent' (*Commissioner of Taxation 2005-06 Annual Report*, p.10). See also Joint Committee of Public Accounts, 'Report 326: An Assessment of Tax', November 1993, p.3 where the Committee acknowledges that 'many aspects of the Australian Taxation Office (ATO) are regularly reviewed by the Parliament.' The ATO's *Strategic Statement 2006-2010* reinforces our philosophy of being 'open and accountable'. Our surveys suggest that the vast majority of taxpayers believe we are 'professional' and 'doing a good job' (see *Commissioner of Taxation 2005-06 Annual Report*, pp.46-47). Nevertheless, while we should strive to further improve public perceptions, vocal support from others in the public domain would be of assistance in this regard.
16 Joint Committee of Public Accounts, 'Report 326: An Assessment of Tax', November 1993, p.17.
17 In 1987 a conference - *Administrative Law: Retrospect & Prospect* published in 1989 in 58 *Canberra Bulletin of Public Administration* - reflected on ten years' of the 'new administrative law' (*Retrospect and Prospect* collection). A number of paper-givers reflected on the reluctance to embrace these developments: D Pearce 'The Fading of the Vision Splendid? Administrative Law: Retrospect and Prospect' 21, 24; Pat Brazil '1987 Administrative Law Seminar' 13; P Bayne 'Administrative Law and the New Managerialism in Public Administration' 39, 41; L Curtis 'Crossing the Frontier Between Law and Administration' 55; D Volker 'The Effect of Administrative Law Reforms: Primary Level Decision-Making' 112, 113; A Rose 'Judicial Review and Public Policy: A Comment' 75.
18 D Volker 'Just do it – How the Public Service Made it Work' (2001) 8 *Australian Journal of Administrative Law* 203.
19 *Retrospect & Prospect* collection: Sir Anthony Mason 'That Twentieth Century Growth Industry, Judicial or Tribunal Review' 26, 27; Senator P Walsh 'Equities and Inequities in Administrative Law' 29 and infra; J Griffiths 'The Price of Administrative Justice' 35; P Bayne 'The Commonwealth System of Non-judicial

Review' 49, 54; A Rose 'Judicial Review and Public Policy: A Comment' 76-77; P Cashman 'The Price of Administrative Justice' 104 and infra.

20 *Retrospect & Prospect* collection: Senator P Walsh 'Equities and Inequities in Administrative Law' 30; J Griffiths 'The Price of Administrative Justice' 35; P Bayne 'Administrative Law and the New Managerialism in Public Administration' 41.

21 *Retrospect & Prospect* collection: D Pearce 'The Fading of the Vision Splendid? Administrative Law: Retrospect and Prospect' 20; Senator P Walsh 'Equities and Inequities in Administrative Law' 29; L Curtis 'Crossing the Frontier Between Law and Administration' 58-64, 66-67; A Rose 'Judicial Review and Public Policy: A Comment' 75.

22 *Retrospect & Prospect* collection: D Volker 'The Effect of Administrative Law Reforms: Primary Level Decision-Making' 112.

23 *Retrospect & Prospect* collection: Senator P Walsh 'Equities and Inequities in Administrative Law' 29; A Rose 'Judicial Review and Public Policy: A Comment' 75.

24 P Kennedy 'Recollections of a Line Manager (2001) 8 *Australian Journal of Administrative Law* 201; E Willheim 'Recollections of an Attorney-General's Department Lawyer' (2001) 8 *Australian Journal of Administrative Law* 154.

25 Chief Justice Murray Gleeson, 'Outcome, Process and The Rule of Law', Administrative Appeals Tribunal 30th Anniversary, 2 August 2006, p.2 referred to the "perennial question of how the Tribunal is to undertake merits review of decisions governed or influenced by policy". See also *McKinnon v Secretary, Department of the Treasury [2006] HCA 45*; and footnote 17 above.

26 P Kennedy 'Recollections of a Line Manager' (2001) 8 *Australian Journal of Administrative Law* 200.

27 D Volker 'The Effect of Administrative Law Reforms: Primary Level Decision-Making' 113.

28 R Creyke & J McMillan 'Executive Perceptions of Administrative Law - An Empirical Study (2002) 9 *Australian Journal of Administrative Law*, 167-168.

29 E Kyrou 'Administrative Law: A Sunrise Industry for the Legal Profession?' in (1989) 58 *Canberra Bulletin of Public Administration* 98; C Finn (ed) *Sunrise or Sunset? Administrative Law for the New Millennium* (AIAL, 2000)

30 The description is taken from a quote from a Minister, the Hon John Button, cited in P Kennedy 'Recollections of a Line Manager' (2001) 8 *Australian Journal of Administrative Law* 198.

31 P Bayne 'Administrative Law and the New Managerialism in Public Administration' (1989) 58 *Canberra Bulletin of Public Administration* 39.

32 Id at 41.

33 P Kennedy 'Recollections of a Line Manager' (2001) 8 *Australian Journal of Administrative Law* 198 citing M Pusey *Economic Rationalism in Canberra – a Nation Building State changes its Mind* (Cambridge University Press, 1991).

34 M D'Ascenzo, 'Future Developments in the Role of the Tax Office: Towards a Community Based Tax System', Institute of Chartered Accountants North Queensland Congress, 1991.

35 Australian Law Report Commission, Report 77, *Open Government*, (1995), pp 15-16.

36 Senate Legal and Constitutional Legislation Committee, Inquiry into the Freedom on Information Amendment (Open Government) Bill 2000, April 2001, p 57. However, 'evidence' provided to committees or scrutineers by those that perceive themselves to be aggrieved is not necessarily indicative of a systemic issue.

37 M Aronson, B Dyer (2000) *Judicial review of administrative action* (2nd ed) Law Book Company, p.675.

38 Administrative Review Council *The Scope of Judicial Review* Report No 47 (2006) Ch 3; and see also *The Scope of Judicial Review Discussion Paper* (2003) Appendix 2.

39 C Hull 'Judiciary struggles under volume of laws with moot benefits' *The Canberra Times*, 31 March 2007.

40 M D'Ascenzo 'Simplifying Tax Administration in a Complex World: The Challenge of Infinite Variety, speech given to the Australasian Tax Teachers Association Conference *The Pursuit of Simplicity – Simply Impossible*, University of Queensland, Brisbane, 22-24 January 2007; and Letters to the Editor, 'Misquoted remarks', *Australian Financial Review* 3/2/06, and 'Balancing simplicity, neutrality and equality is behind taxation complexity', *Age* 2/2/06.

41 P Moss, 'Towards Community Ownership of the Tax System: The Taxation Ombudsman's Perspective', p.21, in Fisher R and Walpole M (eds), *Global Challenges in Tax Administration*, Fiscal Publications, Birmingham, 2005: 'I have to say that in recent years the ATO appears to have made very effective use of modern communications to disseminate information to taxpayers'.

42 Joint Committee of Public Accounts, 'Report 326: An Assessment of Tax', November 1993, p.xix.

43 See for example Joint Committee of Public Accounts,' Report 326: An Assessment of Tax', November 1993, pp.15, 19, 20 and 66.

44 Joint Committee of Public Accounts, 'Report 326: An Assessment of Tax', November 1993, p.71.

45 P Moss, 'Towards Community Ownership of the Tax System: The Taxation Ombudsman's Perspective', p.21, in Fisher R and Walpole M (eds), *Global Challenges in Tax Administration*, Fiscal Publications, Birmingham, 2005.

46 Attorney-General's Department, 'The Justice Statement', May 1995, pp.33-34. The third was to provide discretion to the AAT to award costs against a party whose conduct had deliberately caused extra costs to the other party.

47 It is worth noting that the Uhrig Report commented: 'It could be argued that of all statutory authorities, the ATO has the most significant and wide-ranging relationship with the community, involving people both as

individuals and also where they may be participants in business or non-profit organisations or as tax professionals. To assist the community in that relationship, the ATO has established a wide range of consultative arrangements', p.50.

48 See for example, the Management Advisory Committee report on 'Connecting Government: Whole of Government Responses to Australia's Priority Challenges' and its statement on 'Working Together'.

49 The ATO's draft Corporate Plan 2007-08 sees the ATO 'taking a leading role to assist the Government deliver whole-of-government strategies including the use of the ABN, standard business reporting and projects such as Project Wickenby.'

50 McLachlin (Chief Justice of Canada), 'The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law', 12 C.J.A.L.P. 171 at 174 cited by Chief Justice Gleeson, 'Outcome, Process and The Rule of Law', Administrative Appeals Tribunal 30th Anniversary, 2 August 2006, at p18.

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54 Australian Taxation Office, *Taxpayers' Charter 2007*, *Strategic Statement 2006-10*, *Commissioner of Taxation 2005-06 Annual Report* (pp.5, 6, 14, and 40-63), and draft 'Corporate Plan 2007-08'.

55 V Braithwaite, 'Dancing with Tax Authorities: Motivational Postures and Non-compliant Actions', in V Braithwaite (ed), *Taxing Democracy*, Ashgate, 2005, p.18.

56 *Commissioner of Taxation, Annual Report 2005-06*, p.42.

57 *Commonwealth Ombudsman Annual Report 2005-06*, p.62.

58 N Hosking 'The APS Values and Code of Conduct: their practical application to Government Lawyers' paper presented at the Australian Corporate Lawyers Association Conference *Government Lawyers: Your Role in Governance* 2 June 2006, Canberra, 3.

59 J McMillan 'The Ombudsman and the Rule of Law' (2005) 44 *AIAL Forum* 11-12.

60 The paper relies on work by L Senden 'Soft Law, Self-Regulation and Co-Regulation in European law: Where do They Meet' (2001) 9 *Electronic Journal of Comparative Law* 23; L Sossin and CW Smith 'Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government' (2003) 40 *Alberta Law Review* 867; L Sossin 'How Judicial Decisions Influence Bureaucracy in Canada' in S Halliday & M Hertogh (eds) *Judicial Review and Bureaucratic Impact: International and Inter-Disciplinary Perspectives* (Cambridge University Press, 2004) 129.

61 Administrative Review Council 'Soft Law', Attachment E to paper 22306 *Complex Business Regulation Project*, 18 May 2007.

62 *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (the Palmer Report) (July 2005) Principle 10, x.

63 J McMillan 'Accountability of Government', keynote address at the *AboveBoard Accountability Forum*, Australian National University, Canberra, 12 May 2007.

64 An indication of the community's confidence in the integrity of the tax system is found in the annual Professionalism Survey (DBM Consultants *Australian Taxation Office Professionalism Survey Executive Report*, (November 2006) which concluded that 79% of clients were satisfied or very satisfied with the level of professionalism from their interaction with the Tax Office, pp.16-17.

65 A Metcalfe 'An Overview of Organisational change, and the provision of legal services, within the Department of Immigration [and Citizenship], a paper delivered at the Australian Corporate Lawyers Association Conference, Canberra, 2 June 2006, 5.

66 Chief Justice Murray Gleeson, 'Outcome, Process and The Rule of Law', Administrative Appeals Tribunal 30th Anniversary, 2 August 2006, p.19.

67 ibid, p.2.

68 V Braithwaite, 'Tax System Integrity and Compliance: The Democratic Management of the Tax System', in V Braithwaite (ed), *Taxing Democracy*, Ashgate, 2005, p 287

# THE ROLE OF THE COURTS

*Robert Beech-Jones SC**

The papers in this session are concerned with three forms of 'external review' of administrative decisions namely tribunals, the Ombudsman and the courts. In considering the role of the courts I will briefly describe the nature and foundations of the review function undertaken by courts, that is judicial review, identify a number of features of judicial review and compare and contrast them with review undertaken by the Ombudsman and tribunals. I will then consider a particular criticism of judicial review which I consider throws some light on the features I identify. For reasons of both space and time I will concentrate exclusively on the Federal sphere although some of what is discussed is applicable to judicial review at a State level.[1]

## Nature of judicial review

In *Attorney-General v Quinn*[2] Brennan J described the function of courts undertaking judicial review in the following terms[3]:

> The duty and jurisdiction of the Court to review administrative action do not go beyond the declaration and enforcement of the law which determines the limits and governs the exercise of the repository's power, if, in doing so, the court avoids administrative injustice or error, so be it, but the court has no jurisdiction to simply cure administrative injustice or error. The merits of administrative action, to the extent to which they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

Thus the court's only function is said to be determining the limits of the power of the decision maker or the legality or validity of the decision in question. What is the source and rationale for this function?

At a Federal level the question of source of the power of courts to engage in judicial review invites further questions as to the jurisdiction of the court in question and the source of the legal obligation or limit on power that is alleged to have been transgressed. With the High Court its power as a court of first instance to review the legality of administrative decision-making is conferred by the Constitution itself.[4] It cannot be removed and any attempt to regulate it will be closely scrutinised.[5]. The High Court also reviews the decisions of lower courts in the exercise of its appellate jurisdiction.[6] The judicial review functions of the Federal Court and the Federal Magistrates Court are conferred and limited by various pieces of federal legislation principally the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act), s 39B of the *Judiciary Act 1903* (Cth) and ss 476 to 476B of the *Migration Act 1958* (Cth).[7]

However this does not answer all the relevant questions about how one ascertains whether or not in a given case the relevant legal obligation has been performed or a limit on power has been transgressed. With the High Court's original jurisdiction under s 75(v) and the Federal Court's jurisdiction under s 39B of the *Judiciary Act* 1903 (Cth) there has to be identified a 'jurisdictional error'.[8] With the Federal Court's jurisdiction under the ADJR Act there has to be made out one of the grounds in ss 5 or 6 of the ADJR Act which in turn presupposes that there was some form of obligation to take or not take the step referred to in those provisions; eg to take into account a particular consideration or afford procedural fairness. The courts undertake the inquiry into the existence of the limit on power by applying

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legal technique but the source of the obligation on the decision matter or the limit on their power is a much debated question. The two competing schools are the common law (except as expressly displaced by statute) or the legislation itself.[9] There is also a deeper question as to whether the Constitution embodies some minimum content of judicial review and, if so, what?[10] However for present purposes I need only identify the debate before moving on.

What is the rationale for judicial review, if any? The existence of a power in the High Court to undertake judicial review in Australia has never been questioned and, given the terms of the Constitution it is difficult to see how it could be questioned. For that reason I suppose there has been little reason for the courts to debate its utility. (Parliament on the other hand appears from time to time to comment upon it in either expanding its availability or curtailing it.) To the extent that it has been mentioned in the cases the underlying rationale has been stated as the rule of law[11] being that part of the rule of law which is concerned with government under law.
Balanced against this is what is described as the need for judicial restraint in interfering with government decisions. Both Gleeson CJ and Spigelman CJ have commented upon the balance that courts need to undertake to preserve 'judicial legitimacy'.[12] The point I make is that the rule of law and judicial legitimacy being the measures applied to courts are a very different set of yardsticks than those applied to Ombudsman and tribunals.[13] As I will discuss, it can be difficult to evaluate the criticisms of the courts for failing to preserve their 'legitimacy'.

**Some features of judicial review**

I would like to now identify four (by no means exclusive) features of judicial review relevant to this topic and compare and contrast them with the position of tribunals and the Ombudsman.

First, there is the constitutional independence of Federal courts in conducting review. As I have already stated, the High Court's judicial review function is constitutionally entrenched. While that is not the case for other Federal courts,[14] to the extent they are given a judicial review function they cannot be the subject of interference or direction in its exercise.[15] In terms of 'external review' the courts are the most external of all in that they are a separate and independent arm of government. There are, of course, a number of provisions in various pieces of legislation which offer a degree of institutional independence to tribunal members[16] and the Ombudsman.[17] However they do have offer life tenure, they are often required to comply with or take into account some form of Ministerial or Departmental direction or policy[18] and their tenure and terms can be altered by Parliament.

However, at another level, the tenure of the court's judicial review function can be fragile. If one of the measures applied to the court's performance is the maintenance of 'judicial legitimacy' then it can be a harsh standard when their decision or processes frustrate others especially the Executive. The charge they have gone too far can be easily made. The courts cannot defend themselves against the charge and there is no one that can do it on their behalf. If criticisms are made of the Ombudsman then he or she can put their case both to the public, the Executive and to Parliament. The position is not quite so clear with tribunals but I cannot see any reason why the head of a tribunal cannot defend either the institution or an individual decision if he or she chooses.

Second, there is the point made by Brennan J in the quote from *Quinn* namely that the role of the court is not to consider the merits of the decision but the legal limits on the person or body who made it. The distinction between merits and legality is at the heart of judicial review however it can be hard to draw. Justice Brennan did not state that courts were unconcerned with the merits of an administrative decision *per se* only that they were immaterial if they could be distinguished from a consideration of its legality. In my experience

when there is room for argument about what is the relevant legal obligation imposed on a decision-maker, an analysis of some aspect of the 'merits' of that decision inevitably intrudes.

Conversely those bodies that examine the merits of administrative decisions, i.e. the Ombudsman and tribunals, will often consider the legality of the decisions or practices they are examining. Professor McMillan has described how his role as Ombudsman often requires him to review and advise upon the legality of administrative action. He describes this role as enhancing the rule of law.[19] Equally, one often sees how tribunals tasked with determining the correct and preferable decision have to first ask themselves what decisions are legally permissible? However, allowing for the performance of those functions by others, the task of determining conclusively the limits of the power of an administrative decision-maker is for the courts alone to perform.[20]

Third, as the court's function is solely concerned with determining the legal validity of the decision and, as that is to be ascertained in accordance with legal method, there is minimal room for considering the type of issues that might arise if one was analysing the decision from a perspective of ensuring good or efficient administration. In construing statutory provisions consideration is sometimes given as to what might be involved in terms of convenience or potential cost in future cases if one construction or another is adopted.[21] However there is never any empirical analysis of this nor any consideration of the effect of invalidating a particular decision on past decisions or on other cases (nor am I saying there should be). Once a determination is made that the relevant legal limitation has been transgressed the court will not consider such matters as the cost or effect of compliance or the effect on other decisions. To a large extent this observation is probably true of tribunals but in my limited experience of Ombudsman these are the type of considerations that they will or might consider in their dealings with Departments.

Fourth, the role of the courts is fundamentally a passive one. They do not initiate or invite judicial review. Their function is limited to hearing and determining applications made to them. Tribunals are also limited to hearing and determining the applications before them but many of them have an ability to inquire beyond the arguments and materials presented to them.[22] In contrast, the Ombudsman may initiate inquiries into administrative action on his or her own initiative and has a discretion not to investigate a complaint.[23] The courts cannot close their doors and have to listen to everyone who comes in. I will discuss this constraint on courts further. I think it is often overlooked.

Against this background I wanted to spend a little time revisiting an influential criticism of the Federal Court's role in reviewing immigration decisions and, in particular, the allegation that as an institution it systematically traversed the merits/legality divide.

**Criticism of the Federal Court**

In 1999 the *AIAL Forum* published an article by Professor McMillan critical of the Federal Court's role in conducting judicial review of immigration decisions. It was entitled 'Federal Court v Minister for Immigration'.[24] A number of articles to similar effect followed.[25] The article received a great deal of publicity at the time that the events involving the 'Tampa' were unfolding[26] and its conclusions were discussed in the print and electronic media.[27] As far as I can know it is the only time that a discussion of a court's role in judicial review has 'cut through' to the mainstream of political debate in the last 25 years.

In 'Federal Court v Minister for Immigration' Professor McMillan reviewed a number of decisions of the Federal Court which were later found either by the High Court or a Full Court of the Federal Court itself to have crossed the merits/legality divide. The article rejected the suggestion that this was merely the operation of the 'appellate process at work

in the correction of legal error at the trial level'. Instead it suggested that there was a 'deeper' problem with the Federal Court:

> ...During the last decade of judicial review by the Federal Court, there appears at any time in that period to be a principle or theme that predominates in the explanations given by the Court as to why immigration decisions are invalid. As each such theme is, in turn, annulled either by legislative action or by appellate court review, it is replaced by another theme that delivers the similar result of invalidity.[28]

The article then traced the rise and fall of various grounds of judicial review noting that the ground then in vogue in the Federal Court was the complaint that the relevant immigration tribunal had not properly complied with its obligation to set out the reasons for its decision.[29] At a later point the article summed up its central thesis as follows:

> ... the present system of administrative review of refugee determinations is inappropriate. The distortions that are caused by judicial overreach are inimical not only to immigration adjudication, but to administrative law generally and no doubt in the mind of some, to public policy in the operation of government and the relationships between the branches of government. *(emphasis added)*

The article then repeats the proposition stated earlier:

> The pattern of judicial overreach has been continuous, changing only to shift ground from one legal principle to another... this pattern has continued despite the contrary directions of the High Court and the Parliament.[30] *(emphasis added)*

What 'distortions' were said by the article to be caused by 'judicial overreach'? The relevant footnote cross-refers to two other footnotes.[31] One stated that there had been a rise in the number of migration cases filed in the Federal Court from 84 in 1987/1988 to 871 in 1998/1999.[32] The other stated that, despite the success rate for applications for judicial review of immigration decisions remaining at around 10%[33], 'judicial merits review [had] arguably been a factor in the increase' in other elements of the litigation process namely the number of filings, the delay in dealing with cases and the cost to the Department of defending them. However the latter two matters are generally a function of the first and so the identified 'distortion' from 'judicial merits review' appears to be a greater number of litigants chancing their arm and filing applications.

I remember reading that article and having some personal views on these conclusions given that I spent a little bit of time in the system that was being scrutinised. As I read the article, I understood that it was not merely taking issue with the particular decisions of particular judges but was instead making a claim against the Federal Court as an institution as a whole ('Federal Court v Minister for Immigration'; 'pattern of judicial overreach' etc). This was what was conveyed in media reports.[34]

With the benefit of hindsight the article's two critical conclusions namely that the existence of an institutional agenda on the part of the Federal Court and the 'distorting effect' of that agenda can be revisited.

The notion of the Federal Court having an agenda to invalidate immigration decisions and then being corrected by High Court has had an interesting time since. If you accept the article's premise, and you may have guessed that I do not, then the High Court has turned from gamekeeper to poacher.

The criticism of the Federal Court for reviewing decisions based on the inadequacy of the written reasons had a good start in May 2001 when the High Court decided *Yusuf*[35] and swept away that ground of review. However, *Yusuf* also interpreted the former Part 8 of the *Migration Act 1958* (Cth) as allowing judicial review for an extended concept of jurisdictional error that was very much to the same effect.[36] In October 2001 a *Hickman*[37] style privative

clause was inserted into the *Migration Act*.[38] In August 2002 a five member Full Court of the Federal Court decided *NAAV*.[39] In doing so they construed the privative clause fairly widely leaving very little scope for judicial review. However six months later the High Court decided *Plaintiff S157*[40] holding that it did not protect immigration decisions from 'jurisdictional error'. A number of cases have confirmed that most forms of legal error on the part of an administrative tribunal are 'jurisdictional'[41]. A non-jurisdictional error of law on the part of an administrative tribunal is a very rare species.[42]

*Plaintiff S157* radically altered the perceptions of many as to the form of judicial review that was thought to be available after the enactment of the privative clause. It all but destroyed the practical effect of a number of time limits imposed on applications for judicial review of immigration decisions at the same time.[43] Since *Plaintiff S157* there has been what I might call the usual ebb and flow between the Federal Court and the High Court. The Federal Court has been grappling with the proper interpretation of statutory provisions codifying the rules of procedural fairness.[44] The High Court has been strongly protective of what is required by procedural fairness[45] and insistent on complete compliance with its statutory equivalents.[46]

From the time the High Court decided *Eshetu*[47] in 1999 until its decision in *Plaintiff S157* in 2003 there were no changes in its composition.[48] The five member Full Court that decided *NAAV* had been with the Federal Court throughout the entire period identified in Professor McMillan's article.[49]

The only conclusions that I would form from this are negative ones. In the years after 1999 there has not been any trend of decisions suggesting an agenda in the Federal Court to invalidate immigration decisions and, if anything, it has been less inclined to find invalidating error than the High Court. I also think this throws light on the prior period considered in Professor McMillan's article. In 1994 Parliament ceased to apply the ADJR Act to immigration decisions and instead created a truncated judicial review scheme for the Federal Court. The High Court's original jurisdiction was untouched.[50] When this change was combined with a large increase in the number of cases and numerous changes to other parts of the *Migration Act* it meant that the Federal Court was adapting to a very different judicial review environment at the same time as it received a heavy increase in its workload.

In my view the period from 1994 up to *Plaintiff S157* should not be seen as involving systemic blasphemy by the Federal Court, but was a reconsideration of the underlying principles of judicial review by the courts generally. If you walked into an administrative law pet shop in 1995 the local galah was talking about 'grounds of review'. If you walked in to the same shop in 2004 the same bird was squawking 'jurisdictional error'. There was and is always scope for criticism of individual judgments, individual judges, judicial delay and particular doctrine but the 'agenda claim' against the Federal Court as an institution was, and is not, supportable. The Federal Court bore the brunt of changes on a number of fronts: substantive, procedural and quantity. It worked through them as best it could.

What can the subsequent years tell us about the alleged 'distortions' resulting from the Federal Courts so called 'judicial overreach'? As a matter of principle I had difficulty seeing why an increase in filings was necessarily seen to be a 'distortion'. An increase in filings especially among a group who were generally under-resourced might be seen as the courts ensuring access to justice and enhancing the rule of law. At a factual level I was always dubious that the scores of unrepresented litigants who rolled in to the Federal Court were poring over the fate of the ground of review that was flavour of the month. I suspected that they were often litigants with little to lose from undertaking the last roll of the dice. If there was an avenue of review open, they would take it.

Overall, it seemed to me that no solid conclusions could be formed unless the data was interrogated further to find out why the applications were being filed and whether the increases were related to any underlying policy or legislative changes. Were there higher refusals of on shore applicants in this time? Were the criteria for making the decisions radically changed or tightened? I had not done that analysis and none was mentioned in the article.

In any event, if the number of filings is said to be the guide then the Federal Courts' alleged 'judicial overreach' did not have the causal affect that was suggested in Professor McMillan's article. The article noted that there were 871 filings in the Federal Court in 1998/1999.[51] According to the Federal Court's annual reports there were 967 in 1999/2000 and 1343 in 2000/2001. In October 2001 the Federal Magistrates Court acquired a jurisdiction to review immigration decisions. The combined figure for the Federal Court and the Federal Magistrates Court in 2001/2002 was 1563, the combined figure for 2002/2003 was 3231 and the combined figure for 2003/2004 was 5637.[52] Those latter two figures are boosted by a large number of remittals from the High Court to the Federal Court and I suspect that combining both Court's figures might involve some doubling up because of referrals from the Federal Court to the Federal Magistrates Court.

I do not suggest that these figures can be taken very far. I suspect but do not know that the increase in filings that followed *Plaintiff S157* may have been because of the effect of the case on time limits or it may have been because a wider scope of review became available or both. However the figures for the number of filings in the period prior to *Plaintiff S157* are revealing. The figures for the years 2001/2002 to 2002/2003 include the period from October 2001 to February 2003 when there was in force a privative clause that was understood by many to oust almost all judicial review. Those figures are significantly higher than the figures for the number of filings in the latter part of the 1990's which were the subject of Professor McMillan's article. This is inconsistent with his assertion that any agenda on the part of the Federal Court to invalidate decisions was leading to 'distortions' in the sense of an increase in court filings. The available evidence suggests that in the period from October 2001 to February 2003 the number of filings kept increasing despite the attempt to dramatically narrow the scope of judicial review.

This brings me back to the fourth aspect of the role of courts and judicial review that I identified earlier. The duty of the Federal Court is to decide cases that are brought to it to determine. The nature of its function in determining the law is adversarial in that it must adjudicate on the issues raised by the parties before it. The fact that over the last twenty years various grounds of review have risen and then fallen only to be superseded by new ones is not surprising. One would expect that to occur as one avenue of argument is closed off by a higher court decision or legislative change or corrective action by decision-makers.

However it is not the court but the remaining litigants who then seek to argue new grounds or focus attention on existing grounds that have not been considered in much detail. For example, the ground of review that was based on the inadequacy of the written reasons that was criticised in Professor McMillan's article had its origins in decisions that had nothing to do with immigration.[53] What was different about the late 1990's to the prior period was that instead of the ground only being argued a couple of times a year under the ADJR Act it was being argued a couple of times a day under the former Part 8 of the *Migration Act*. When this process of focusing attention on new grounds is mixed with an explosion in the number of cases in one area before the Court then it might appear to some that the Court, in responding to the cases before it and the arguments made, is somehow endorsing that process. It is not. It is merely performing its duty within the constraints imposed on it.

With the benefit of another eight years since the publication of Professor McMillan's article the large volume of largely unsuccessful migration litigation looks more like the playing out of

an interaction between underlying social forces and various policy and legislative changes with some of the latter being unsuccessful in achieving their aims. The changing fortunes of the Federal Court's various doctrines and its fundamentally passive role in determining the cases brought to it by others appears to be a bit of sideshow in that interplay. I think we should all bear that in mind as we contemplate the impact of external administrative review by the courts on immigration decisions and, if the events are repeated elsewhere, on other administrative decisions.

**Endnotes**

1 See Spigelman, '*The Integrity Branch of Government*' (AIAL National Lecture Series - Administrative Law No. 2) at pp. 9-10
2 (1990) 170 CLR 1
3 *Quinn* supra at 35 – 36
4 ss 75(iii) and 75(v)
5 See *Bodruzza v MIMIA* [2007] HCA 14 at [53]
6 S 73 of the Constitution
7 See also s 44(1) of the *Administrative Appeals Act 1975* (Cth), by way of example, s 44ZR(1) of the *Trade Practices Act* 1975 (Cth).
8 See *Re RRT; ex parte Aala* (2001) 201, CLR 81 esp at [51] to [52] (per Gaudron & Gummow JJ); *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [76];
9 See Spigelman, 'The Integrity Branch of Government' (2004) 22 AIAL 1 at p.8 and footnotes 21 to 24.
10 See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513; Kirk, 'The entrenched minimum provision of Judicial Review' (2004) 12 AJ Admin Law 64
11 *Plaintiff S157/2006 v* Commonwealth (2003) 211 CLR 476 at 513 to 514; See *Re MIMA; ex parte Lam* (2003) 214 CLR 1 at [72], per McHugh and Gummow JJ
12 Gleeson AM, 'Judicial Legitimacy' (2000) 20 Aust Bar Rev 4; Spigelman, "The Integrity Branch of Government" AIAL National Lecture Series on Administrative Law No 2 at p.13.
13 An empirical analysis of the practical effects of judicial review outcomes is to be found in McMillan and Creyke 'Judicial Review Outcomes – An empirical study' (2004) 11 AJ Admin L82.
14 See *Abebe v The Commonwealth* (1999) 197 CLR 510.
15 *Chu Keng Lim v Minister for Immigration* (1992) 176 CLR 1 at 36.
16 See for example ss 7 and 13 of the *Administrative Appeals Tribunal Act 1975* (Cth)
17 See ss 22 and 28 of the *Ombudsman Act* 1976 (Cth).
18 See for example s. 499 of the *Migration Act 1958* (Cth) and *Drake and Minister for Immigration* (No 2) (1979) 2 ALD 634.
19 McMillan, 'The Ombudsman and the Rule of Law' (2005) 44 AIAL 1.
20 *Plaintiff S157* at [75]
21 See Pearce and Geddes, *Statutory Interpretation in Australia* (5th edition) at pp 45 – 48; and by way of example *Muin v RRT* (2002) 76 ALJR 966 at [106] to [112] (per Gummow J).
22 See for example the description of the Refugee Review Tribunal as "inquisitorial" in *Abebe supra* at [187] (per Gummow and Hayne JJ.)
23 Sub-section 8(1) of the *Ombudsman Act* 1976 (Cth); S.8 of the *Ombudsman Act* 1976 (Cth) deals with investigation and does not require a "complaint".
24 (1999) 22 AIAL 1.
25 e.g. McMillan, Commentary; *Recent Developments in Refugee Law*, (2000) 26 AIAL 26 and McMillan, *The Role of Judicial Review in Australian Administrative Law*, (2001) 30 AIAL 47
26 See Kelly, 'Defiant Court Provoking Political Wrath' in *The Australian* 5 September 2001
27 Kelly supra; ABC Radio National 'Asylum Seekers and the Courts: Our man in Kabul' 25/11/01; ABC 7.30 Report, 05/09/01.]
28 McMillan, 'Federal Court v Minister for Immigration' at p 4.
29 *McMillan supra* at pp 5 to 7
30 *McMillian supra* at p.14
31 Footnotes 1 and 30
32 Footnote 1
33 Footnote 30; a figure that I suspect did not include conceded cases.
34 Kelly's article commenced: 'The Federal Court does not come to today's decision over the Tampa with clean hands...'.
35 *MIMA v Yusuf* (2001) 206 CLR 323
36 Whereas prior to *Yusuf* decisions were reviewed for failing to record in the reasons a finding on a 'material question of fact' after *Yusuf* the failure to record the finding was a basis for inferring that it was not made and therefore the relevant tribunal did not compete its exercise of jurisdiction:
37 *R v Hickman*; *ex parte Fox* (1945) 70 CLR 598

38 By Act 134 of 2001.
39 *NAAV v MIMA* (2001) 123 FCR 298
40 *Plaintiff S157/2002 v the Commonwealth* (2002) 211 CLR 476
41 *Yusuf supra* (which was decided prior to *Plaintiff S157*); see *SAAP v MIMA* (2005) 79 ALJR 1009; *MIMA v SGLB* (2004) 207 ALR 12 at [35] to [57] (per Gummow and Hayne JJ).
42 An example being a contravention of sub-section 418(3) of the *Migration Act 1958* (Cth) is to be found in *Muin supra* at [21] (per Gleeson CJ) and at [46] (per Gaudron J)
43 *Plaintiff S157/2002 supra* at 509-510.
44 See the debate as summarised in *SZEEU v MIMA* (2006) 150 FCR 214

45 See for example *SZBEL v MIMA* (2006 81 ALJR 515 and *Applicant Veal of 2002 v MIMIA* (2005) 225 CLR 88.
46 *SAAP v MIMA* (2005) 79 ALJR 1009
47 *MIEA v Esheteu* (1999) 197 CLR 611
48 Between *S157* and *SZBEL*, Gaudron J retired in 2003 and McHugh J in 2005 and were replaced by Heydon J and Crennan J respectively.
49 Black CJ (appointed 1 January 1991), Beaumont J (appointed 30 May 1983), Wilcox J (appointed 11 May 1984), French J (appointed 25 November 1986) and Von Doussa J (appointed 1 December 1988).
50 See *Abebe supra* and an article by the author, (2000) 24 AIAL 32.
51 *McMillan* supra at footnote 1. The Federal Court's annual report for 2003 states that the number for that year was 941.
52 With effect from October 2001 the Federal Magistrates Court acquired a jurisdiction to undertake judicial review of migration decisions. According to its annual reports the number of such applications filed in that year and following years were: 2001/2002 : 182; 2002/2003 : 1397 (Annual Report for 2002/2003 at p. 20); 2003/2004: 3046; 2004/2005 2445; 2005/2006: 2429 (Annual report for 2005/2006 at p. 22).
For the Federal Court the number of applications filed was: 1997/98: 659; 1998/99: 941; 1999/2000: 967; 2000/2001: 1343; 2001/2002: 1381; (Federal Court annual report for 2002/2003; Appendix 7, figure 5.8); 2002/2003: 1836; (boosted by 637 remittals from the High Court); 2003/2004 : 2591; (boosted by 1716 remittals from the High Court); (Federal Court annual report for 2003/2004; Appendix 5, figure 5.8).
The combined totals for these years are: 1997/1998: 659; 1998/1999: 941; 1999/2000: 967; 2000/2001: 1343; 2001/2002: 1563; 2002/2003: 3233; 2003/2004: 5637;
53 See *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465; *Dornan v Riordan* (1990) 24 FCR 564; *Rich Rivers Radio Pty Ltd v Australian Broadcasting Tribunal* (1989) 22 FCR 437 *Commonwealth v Pharmacy Guild of Australia* (1989) 91 ALR 65, cited in *Muralidharan v MIEA* (1996) 62 FCR 402.

# NATIONAL SECURITY AND NATURAL JUSTICE

*Caroline Bush**

## Introduction

The difficulty with national security as a subject of discussion is that it provokes a powerful response in most commentators. This is certainly true of discussion amongst lawyers. As his Honour Keith Mason (President of the New South Wales Court of Appeal) commented late last year[1], lawyers are well placed to understand the extent to which new laws depart from the fundamentals of our inherited rights and freedoms and to assess the impact of these new laws.

New powers for detention and questioning, increased secrecy provisions, the power to issue control orders for unconvicted citizens and a variety of other law enforcement measures introduced in recent times have seen a commentary from within the legal fraternity about the reaction and alleged over-reaction of western governments to the threat of terrorism.

Debate has also arisen as to the appropriate response of the judiciary to new national security measures. That debate has often been polarised between natural lawyers on one side calling for an end to judicial deference in relation to executive action concerning national security issues (and increased activism to counter unjust laws); and positivists on the other, who strongly assert that the exercise of judicial power in the service of abstract moral values is unacceptable in a democracy characterised by the rule of law[2].

This debate is broad ranging and accordingly, in the limited time allowed in this forum to consider administrative law issues I intend to look at the way in which national security considerations are impacting upon the administrative law landscape in Australia today. In particular, I want to address three issues:

- How the courts deal with cases that come before them which give rise to national security concerns. Are natural justice obligations owed in relation to decisions concerning national security and, if so, what is the impact upon the content of natural justice when national security considerations are at stake in Australia;
- How do national security considerations impact upon the way in which administrative law proceedings are conducted? Access to information in relation to national security matters is a constant theme in all cases in relation to which national security is a relevant consideration, not just in administrative law matters. There are issues as to what information has been used by a decision maker, whether applicants and/or their representatives can access that information and the ways in which government seeks to protect that information which it sees as critical to national security; and

A brief review of two recent cases in the United Kingdom dealing with, in part, the issue

- of whether substantive issues in relation to national security are justiciable.

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**The traditional approach to judicial review**

The traditional Anglo Australian approach to cases that involve national security considerations is that an agency involved in a national security function does not have a licence to act unlawfully or ultra vires and that the legal principles that limit ordinarily decision-making functions apply equally across government.

The case ordinarily cited in support of the principle that national security agencies are subject to judicial review is *Church of Scientology v Woodward*[3].

That case concerned an action brought by the Church of Scientology against the Director-General of ASIO on the basis that the Director-General had unlawfully caused or permitted ASIO to obtain and communicate intelligence concerning the Church and to characterise the Church as a security risk. The Church sought an injunction preventing ASIO from continuing and a declaration stating that the activities were unlawful. The Church's Statement of Claim was struck out and the Church of Scientology appealed to the High Court arguing that certain provisions of the ASIO Act prohibited ASIO from dealing with intelligence unless it was relevant to security and that intelligence was not relevant to security if it related to a person who was not a risk to security. The Church's appeal was dismissed.

While the Court was satisfied that ASIO was not authorised to exceed its statutory functions, the Court was not so entirely consistent about the issue of whether the Court could determine if ASIO was obtaining intelligence that was not relevant to security. Gibbs CJ, in dismissing the appeal, found that the construction of the Act which the Church sought to rely on was unduly narrow and unworkable and that intelligence which fell short of establishing that a person was a risk to security may still be relevant to security if used in conjunction with other information. Furthermore, his Honour considered that the ASIO Act did not entrust to the courts the power to decide that ASIO may not obtain particular intelligence on the grounds that it is not relevant to security.[4]

Mason J determined that it was beyond question that the doctrine of ultra vires applied to ASIO's activities to the extent to which ASIO's activities exceed it power. His position was that if a violation of the law by ASIO was proved, then ASIO and its officers were amenable to legal process and to the remedies available under the Constitution and that if a case came before the courts where it was claimed that ASIO had misused its powers, it was to be expected that the courts would be astute to ensure that the misuse of power was not cloaked by claims of national security[5].

Mason J considered that while it was fair to say that security intelligence was not readily susceptible to judicial evaluation it was quite another to say that court cannot determine whether intelligence was relevant to security. However, his Honour did note that it was obvious that the Director General's opinion of what information is relevant would, if given, constitute important evidence in the decision of the question whether ASIO was acting ultra vires.[6]

Brennan J also noted the difficulty faced by an applicant in relation to a challenge against ASIO's activities. Brennan J found it was for the Court to determine whether a particular activity was within the functions of the Act stating that:

> The issue for curial determination is whether the activity of which the plaintiff complains is either an assembly of intelligence which is not relevant to security, or a dissemination of intelligence for a purpose which is not relevant to security... To prove either the plaintiff must be able to show that allowing for any deficiency in the court's ability to quantify the security risk precisely, the intelligence or purpose in question is not relevant to security. Although it is not essential that the court be able to quantify the security risk, its inability to do so will affect its finding as to whether the limit upon the

> functions of the Organisation has been exceeded. The evidentiary burden may be difficult to discharge, but the issue of excess of function is nevertheless justiciable.[7]

Brennan J then noted the other real problem faced by an applicant in relation to an action against ASIO, namely that discovery would not be given against the Director-General save in the most exceptional case. However, his Honour stated that the veil of secrecy was not absolutely impenetrable and that the public interest in litigation to enforce the limitations on function prescribed in legislation is never entirely excluded from consideration. In other words, in the appropriate case, where the public interest warrants it, the court can order discovery against ASIO.

In summary then, it is correct that ASIO (and any agency like it) is subject to judicial review and that it must act in accordance with its legislative functions and the courts do have a power to provide a remedy should a misuse of power be demonstrated. However, the reality is that it will be extremely difficult to obtain the information necessary to prove that an intelligence agency is acting outside its powers in any given situation and that the courts regard themselves as incapable of quantifying or assessing security risks.

The impact of national security considerations on natural justice obligations arose in a House of Lords decision from around the same time, *Council of Civil Service Unions v Minister for the Civil Service*[8]. That case involved a determination of the Minister for the Civil Service (Prime Minister Thatcher) for the immediate variation of the terms and conditions of the staff of Government Communications Headquarters (whose responsibilities were to ensure the security of military and official communications and provide Government with signals intelligence) to the effect that staff would no longer be permitted to belong to national trade unions.

The House of Lords found that the applicants (a union and a number of individual employees) would, apart from considerations of national security, have had a legitimate expectation that unions and employees would be consulted before the Minister issued the determination.[9] However, it was considered that where national security considerations arose, the Courts could not decide whether, in any particular case, the requirements of national security outweighed those of fairness. It was considered that this was a matter that fell to the executive for determination and that as the evidence established that the Minister had considered, with reason, that prior consultation about her determination would have involved a risk of disruption, and had shown that her decision had been based on her opinion that considerations of national security outweighed the applicants' legitimate expectation of prior consultation, the Court would not intervene.

Lord Fraser stated that[10]:

> The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the Government and not for the courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security. But if the decision is successfully challenged, on the ground that it has been reached by a process which is unfair, then the Government is under an obligation to produce evidence that the decision was in fact based on grounds of national security.

Lord Scarman stated that[11]:

> ... where a question as to the interest of national security arises in judicial proceedings the court has to act on the evidence..... Once the factual basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the Crown or its responsible officer as to what is required to meet it, unless it is possible to show that the opinion was one which no reasonable minister advising the Crown would in the circumstances reasonably have held.

These comments are indicative of what may be regarded as traditional judicial deference to the executive in relation to issues concerning national security. The idea is that courts are not well placed to determine what action is in the interests of national security and that once it is established that national security considerations are relevant to a decision in issue and that the executive has considered that the relevant decision is in the best interests of national security, then unless that decision can be demonstrated to be patently ridiculous a challenge to its legality will be difficult to make out.

This approach is neatly reflected in a postscript to a judgment written by Lord Hoffman shortly after September 11. Lord Hoffman's judgment (which was itself written several months before September 11) had dismissed an appeal from a decision of the Secretary of State refusing leave to remain in the UK on the basis that the deportation of the applicant would be conducive to the public good and in the interests of national security. With reference to September 11, Lord Hoffman stated that the events in New York and Washington:

> ... are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need of the judicial arm of government to respect the decisions of Ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.[12]

His comments have been described as 'remarkable'[13], but they could be regarded as a restatement of conventional judicial wisdom on national security in the face of recent events.

What then is to become of the modern law of judicial review in the national security context? Is democracy to be the only remedy for those adversely affected by decisions involving national security considerations?[14]

There is no doubt that in the present legal environment, national security concerns have taken on heightened significance. In that context, I want now to turn to look at two recent Australian decisions concerning national security for the purpose of considering how courts are dealing with judicial review applications concerning Australia's security agency and to take a closer look at what applicants are doing to get access to information in order to challenge the decisions and activities of that agency. The decisions that I am addressing have often been covered by the media and accordingly the facts might be familiar.

**The recent approach to judicial review and national security in Australia**

The case of Sheikh Mansour Leghaei has attracted quite some media attention in the last year. The decision of the Federal Court concerning Sheikh Leghaei, being the decision of Madgwick J in *Leghaei v Director General of Security*[15], arose in the immigration context. Leghaei had made an application pursuant to s 39B of the *Judiciary Act 1913* (Cwlth) in relation to an adverse security assessment made by ASIO in relation to him, pursuant to s 37 of the *Australian Security and Intelligence Organisation Act 1979* (Cwlth) ('ASIO Act'). On the furnishing of the adverse assessment to the Minister for Immigration, the Minister was obliged to cancel the applicant's visa. Madgwick J's decision outlines the complex of legislative provisions that create this obligation.

In essence, the Minister for Immigration was compelled to cancel the visa because Leghaei had been assessed to be directly or indirectly a risk to Australian national security. Accordingly a question arose as to the legitimacy of the adverse security assessment made by ASIO in relation to Sheikh Leghaei.

By virtue of various provisions in the ASIO Act there is no requirement to provide a statement of the grounds for assessment in cases where the person who is the subject of the security assessment is not an Australian citizen, permanent resident or holder of a special category of visa. Furthermore there is no obligation for such a person to be notified that an assessment has even taken place in situations where the assessment is furnished to a Commonwealth agency. In this case however, Leghaei was presumably not ignorant of the fact that he was under investigation by ASIO as he was interviewed by ASIO officers on a number of occasions.

Leghaei claimed that the adverse security assessment that had been made in relation to him was void and inoperative for jurisdictional error constituted by denial of procedural fairness. In particular, it was contended on Leghaei's behalf that ASIO had failed to provide to him:

(a) any notice of the particular grounds on which it proposed to make the assessment;
(b) any specific issues to address as to why Leghaei was believed to be a risk to Australian national security; or
(c) any response to Leghaei's request for specific issues to which he might respond.

Leghaei also claimed that the assessment was void and inoperative by reason of other jurisdictional error, in that:

(d) ASIO had failed to consider and form an opinion on the essential question on which the assessment depended (namely whether the alleged acts and conduct that were the subject of the assessment meant that it was consistent with the requirements of security for administrative action to be taken and whether those alleged acts and conduct supported the making of an adverse security assessment);
(e) ASIO had misconstrued the definition of "security" in a relevant respect and consequently took irrelevant considerations into account.

Accordingly, the application itself was a fairly broad-ranging application seeking review of functions undertaken by ASIO that go to the very heart of national security. The first question that needed to be addressed was whether the applicant had any right to procedural fairness at the primary decision-making stage and secondly if the applicant had a right to natural justice, whether the national security context of ASIO's decision-making meant that such a right was devoid of any practical content.

Leghaei's case for procedural fairness depended upon four contentions. The first was the simple proposition that, in accordance with general principles, the process of furnishing an adverse security assessment to a Commonwealth agency was subject to a requirement to accord procedural fairness to a person who would be affected because of the potential for serious adverse consequences for the person who is the subject of the adverse security assessment[16].

The second contention was that the ASIO Act did not exclude procedural fairness because the necessary intention to do so is not apparent from the terms of the ASIO Act. It was submitted that while the ASIO Act expressly provides a degree of procedural fairness for some persons (in particular Australian citizens) that did not exclude a requirement for the basic elements of procedural fairness to be afforded to any other person who is the subject of a possibly adverse security assessment.

Third, it was contended that as the ASIO Act had not excluded procedural fairness, the minimum content of procedural fairness required that the attention of the affected person be brought to the critical issue or factor on which the decision was likely to turn. Fourth and finally it was asserted that the public interest in the maintenance of national security did not prevent ASIO from notifying the applicant of the nature of the allegations, even if only in

summary form as it was necessary that there must be credible evidence, rather than mere assertion, to establish that national security interests are involved.

It was said that national security interests did not effectively reduce the content of the procedural fairness obligation owed to Leghaei to such an extent that ASIO was not required, before making an adverse security assessment, to give the applicant sufficient information about the objections raised against him to enable him to answer them. While the applicant conceded that the content and procedural fairness may be 'adjusted downwards' to protect the public interest, the countervailing interest in ensuring natural justice was such that ASIO should not be released from the minimum requirement that the person whose interests are at stake be alerted to the critical issue or issues.[17]

The primary submission for ASIO was simply that the public interest in protecting national security precluded the applicant being given any notice of the particular grounds on which ASIO proposed to make the assessment. The respondents said that any requirement for procedural fairness had been excluded by necessary implication in the ASIO Act. It was said that it would be inconsistent with the statutory purposes of the ASIO Act to impose a free-standing, but unstated obligation to accord procedural fairness at the original decision-making stage.[18]

ASIO also maintained that no part of summary of the grounds for the assessment could have been provided to the applicant. In this context, ASIO sought to rely on what ASIO contended were two exceptions in relation to the obligations of procedural fairness. The first was that procedural fairness does not require disclosure of confidential information if to do so would harm the public interest or national security. ASIO relied on a number of authorities for this proposition, the most relevant of which where *Salemi* and *Amer*.[19]

*Salemi* was a 1977 High Court decision concerning immigration in which national security did not feature as an element of the case in issue, but some relevant obiter comments were made in relation to security, by Gibbs CJ in particular[20]. *Amer* did involve an adverse security assessment, but the decision available dealt with a 'no evidence' ground of review. However Lockhart J did decline to provide a copy of the assessment to the applicant noting national security as the basis of the order declining access.

The second exception that ASIO sought to rely on was that procedural fairness does not require the giving of notice, provision of information or a right to be heard where to do so would frustrate the purpose for which a particular power had been conferred. ASIO relied on comments of Mason J in *Kioa* and Finn J in *Slipper*[21].

Ultimately, the Court concluded that ASIO did owe the applicant an obligation of natural justice and that that obligation was not excluded by the terms of the ASIO Act as it was not unmistakably clear from the terms of the ASIO Act that is should be denied. His Honour stated that while the starting point created by the ASIO Act was that an Australian citizen who is the subject of an adverse assessment is ordinarily entitled to notification of that fact and to a statement of reasons, the existence of a discretion to exclude those requirements does not necessarily require the exclusion of procedural fairness at an earlier stage in the assessment process for non-citizens. In fact, his Honour flagged the possibility that the absence of these procedural fairness mechanisms for non-citizens arguably underscored the need for a right to be heard at the primary decision- making stage.[22]

As to whether natural justice obligations could arise in the context of national security considerations, Madgwick J noted that the capacity of avoiding error might be thought to grow in the sunlight of the opportunity for correction and to wither where unreviewability reigned. His Honour stated that while the nature of the subject matter was important:

> decision-makers in Australian agencies concerned with national security are unlikely to be less prone to mistakes than those decision makers...in our larger and longer practised allies, or in non-security agencies of many kinds[23]

He also thought it relevant that not all adverse security assessments will be based on material that demands confidentiality. While Madgwick J recognised that there was a degree of risk in requiring primary-decision makers to estimate what a court may later regard as being insufficient disclosure, an obligation to accord natural justice had not clearly been excluded by necessary statutory implication.[24]

Given the nature of the assessments that ASIO undertakes, his Honour concluded that the minimum level of procedural fairness that was necessary to ensure a fair decision-making process was an obligation to **positively consider** what concerns and how much detail might be disclosed to the visa holder to permit him/her to respond, without unduly detracting from Australia's national security.[25]

The all important rider however was that the court will, in practice, be very dependant on the Director-General's views about how release might prejudice national security. In the case before him Madgwick J concluded that having read and had debated before him the confidential material, he considered that the Director-General had given consideration to the possibility of disclosure but that the potential prejudice to the interests of national security appeared to be such that the content of procedural fairness in relation to Leghaei's case was reduced to nothingness. His Honour noted that without the benefit of countervailing expert evidence, he was not in a position to form a view contrary to that expressed in the confidential evidence in relation to disclosure. Again, it came back to the idea that it is the Executive, as the elected arm of government that must bear the burden of protecting the country and decide what steps are necessary to do so.[26]

Madgwick J briefly dealt with the other grounds of review noting that he had formed the view that the decision makers approach to the definition of 'security' was not infected by jurisdictional error and that there was no jurisdictional error in relation to whether the applicant acts and conduct meet the requirements of being 'acts of foreign interference'. The Court's reasoning in relation to these matters was set out in confidential reasons that can only be reviewed by a number of specific individuals in relation to whom access orders have been made. [27]

Leghaei did appeal to the Full Federal Court [28] and that appeal was dismissed in April 2007 by the Full Federal Court constituted by Tamberlin, Stone and Jacobson JJ. The Court originally ordered that the reasons for the judgment were confidential, until submissions could be considered from the parties as to what portions could be released, but a redacted version of the Full Federal Court decision has recently been made publicly available.

The redacted version of the judgment does not allow any real light to be shed on the question of whether ASIO misinterpreted the phrase 'acts of foreign interference', except to say that ASIO made no error. However, the judgment does allow an understanding of the Court's reasoning on the natural justice point. The appeal proceeded on the basis that there was no challenge to the primary judge's finding that the rules of procedural fairness were not excluded. The argument on appeal concerned the extent and content of those rules.[29]

The Full Court recognised that national security may make it impossible to disclose the grounds on which the executive proposes to act and concluded that Madgwick J was not in error in saying that the content of procedural fairness was in some circumstances reduced to nothingness to avoid a risk to national security. The Full Court found that in Leghaei's case, Madgwick J was plainly right to strike the balance in favour of the protection of the public

interest in national security and to give the weight he did to the unchallenged evidence of the Director-General on this point. [30]

The Full Court made reference to Madgwick J comments about courts being an inappropriate forum in which to evaluate national security risks and also to the prospects of an intelligence agency getting it wrong but stated that:

> ...his Honour correctly recognised that without the benefit of countervailing expert evidence he was not in a position to form an opinion contrary to that stated by the Director General..
>
> In coming to this view, the primary judge did not simply rubberstamp the opinion expressed by the Director General. He satisfied himself that the Director-General had given personal consideration to the question of whether disclosure would be contrary to the national interest.[31]

A special leave application has been filed in the High Court and on 14 June 2007 the High Court is conducting a hearing to determine the manner in which that special leave application will be conducted.

Madgwick J's approach to natural justice, approved by the Full Federal Court, of balancing the need to protect national security and the need to ensure the substance of allegations is disclosed to people whose interests may be affected, is in accordance with the current approach of the High Court in relation to natural justice issues.

In *Applicant VEAL of 2002 v Minister for Immigration and Multicultural Affairs*[32] the High Court was dealing with an applicant whose application for review had been refused by the Refugee Review Tribunal after it had received information in a letter accusing the applicant of serious criminal conduct. The author of the letter asked that the letter be kept secret. The Tribunal did not disclose the letter or the substance of the allegations in the letter to the applicant and in deciding against his application the Tribunal expressly stated that it placed no reliance on the letter.

The High Court determined that the applicant had been denied natural justice. The letter was relevant and credible and could not have been ignored. However that did not mean the applicant should have been given the letter. The Court acknowledged that the confidential nature of the document would affect the way in which the applicant was afforded natural justice in relation to the information in the letter i.e. he could not have expected to have been given a copy of the letter but rather should have been told the substance of the allegations contained in the letter and asked to respond to those allegations. The Court stated that:

> ... in identifying what the tribunal has to do in order to give the appellant procedural fairness, it is necessary to recognise that there is a public interest in ensuring that information that has been or may later be supplied by an informer is not denied to the executive government when making its decisions[33].

The Court's point is that if you disclose the identity of all your sources, you will not have many sources left.

In simple terms the Court resolved that the confidentiality of certain information did not necessarily mean that natural justice could not be afforded and that natural justice should be moulded to take into account the public interest in maintaining the confidentiality of certain material.[34]

**Information - what applicants and others are doing in the Courts to try to get it.**

One of the interesting aspects of *Leghaei's case* is the way in which information sensitive to national security was dealt with. While Leghaei himself was unable to review his adverse

security assessment, the Director-General of ASIO permitted counsel for the applicant and the applicant's instructing solicitor, after giving appropriate undertakings as to confidentiality, to undergo a process of obtaining a security clearance in order that they might obtain access to the confidential material put before the Court. This would have allowed counsel for the applicant to actually know what information was used by the Director-General in compiling the adverse security assessment, and in theory this would help counsel for the applicant to make out a case that the negative security assessment was void for jurisdictional error constituted by denial of procedural fairness or any other error for that matter.

Madgwick J acknowledged that the situation was less than perfect but noted that at least a judge had actually seen the relevant information and formed a view that procedural fairness was satisfied in the circumstances of the case. In this context he stated that

> the degree of comfort the applicant and interested members of the public may take from the fact of a judge having carefully and, so far as possible, critically read the relevant material before coming to the decisions I have, is regrettably limited.[35]

The reality is that access to relevant information is a significant problem for applicants looking to challenge decisions in relation to matters concerning national security and I wanted to turn now to look at recent developments on that very issue.

It is trite to say that when seeking to challenge the validity of a decision on natural justice grounds it is important for the applicant to know the information that was relied upon in making the decision.

The lack of a universally consistent approach to information concerning national security to date seems to have had the consequence that, in each new case in which national security concerns arise, individual applications, disputes and arrangements arise. The applications and arrangements are a consequence of the nature of the proceedings, the different kinds of information at issue and presumably from the different individuals conducting the cases on both sides.

There is no doubt that some of the information that the Commonwealth is seeking to protect in these cases is highly sensitive to national security. The only question is to what extent such information should be made available to the courts, applicants and their representatives, and under what conditions, in order to maintain the confidentiality of such information.[36]

There are a number of means by which the Commonwealth's can protect sensitive information.[37] Putting to one side the a new legislative regime applicable to civil proceedings, the *National Security Information (Criminal and Civil Proceedings)* Act 2004 (Cwlth) (referred to below), the courts have, as a matter of practice, jurisdiction to admit material into evidence without providing that material to the party adversely affected, if that evidence is of importance in the proceedings and the public interest in preserving its secrecy or confidentiality outweighs the public interest in making it available. Indeed, this power can be said to derive from the court's inherent jurisdiction to control its own process.[38]

There is also the doctrine of public interest privilege which, in essence, protects information the disclosure of which would be injurious to an identified public interest, including the interests of national security[39]. The public interest privilege has been included in the *Evidence Act 1995* (Cwlth) at s 130 which provides that:

> If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or documents not be adduced in evidence.

**The National Security Information (Criminal and Civil Proceedings) Act 2004**

Finally, there is the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cwlth) ('NSI Act') which originally only applied to criminal proceedings but was amended in 2005 to cover civil proceedings. A civil proceeding is defined in the NSI Act to mean any proceeding in a court of the Commonwealth, a State or Territory, other than a criminal proceeding. For the avoidance of doubt subsection 15(2) provides that each of the following is part of a 'civil proceeding':

(a) any proceeding on an ex parte application (including an application made before pleadings are filed in a court);
(b) the discovery, exchange, production, inspection or disclosure of intended evidence, documents and reports of persons intended to be called by a party to give evidence;
(c) an appeal proceeding;
(d) any interlocutory or other proceeding prescribed by regulations.

The Act applies to a civil proceeding if the Attorney General gives the parties and the court notice in writing that the Act applies to the civil proceedings (s 6A). Notice can be given at any time in the proceedings.

The processes set out in the Act are complicated but, at the risk of oversimplifying, in essence, they works something like this:

(a) if a party to a proceeding knows or believes that he or she will disclose information that relates to national security, they have to give the Attorney General Notice in writing (as well as the court and the other parties) (section 38D of the NSI Act);
(b) if the Attorney-General is so notified or if the Attorney of his/her own volition thinks such information may be disclosed the Attorney-General may give a certificate in relation to the information (section 38F of the NSI Act);
(c) in summary, the certificate issued by the Attorney-General is issued to the potential discloser and can:
    (i) remove or redact relevant information from attached source documents and prescribe the circumstances in which the information can be disclosed; or
    (ii) describe information and prescribe the circumstances in which the information can be disclosed;
    (section 38F)
(d) the Attorney-General must give a copy of the certificate to the court (subsection 38F(5));
(e) if the Attorney General gives a certificate then the court must either delay the commencement of the proceeding or adjourn the proceeding to hold a hearing to decide what orders to make in relation to the certificate (section 38G);
(f) only certain people are allowed to attend the hearing and a party and/or their legal representative may be excluded from this hearing if the party or their representative has not been given a security clearance and there is a risk to national security (section 38I);
(g) after conducting a hearing the court has to make an order about the disclosure of the relevant information. Those orders would relate to the further disclosure of the information (section 38L);
(h) In making its decision the court must consider:
    (i) whether, having regard to the Attorney General's certificate, there would be a risk of prejudice to national security if the information were disclosed in contravention of the certificate;
    (ii) whether any such order would have a substantial adverse effect on the substantive hearing in the proceeding; and
    (iii) any other matter the court considers relevant.
    (subsection 38L(7))
(i) In making its decision, the court must give greatest weight to the risk to prejudice to national security (subsection 38L(8)).

**Constitutionality of the NSI Act**

Notwithstanding that the NSI Act comprises a considerable imposition on the ordinary processes of the courts, the current iteration of the NSI Act withstood a challenge to it constitutional validity in 2006 based partly on a separation of powers type argument i.e. the legislative unlawfully interfering in the judiciary's processes.[40] The relevant application was launched by media interests in 2006 in relation to the effect of the NSI Act in the criminal trial of Feheem Lodhi, who was convicted in 2007 of various terrorism related offences. Mr Lodhi was the architect who had been collecting plans of electricity grids and military installations.

The media interests seeking to challenge the validity of the legislation, who had been excluded from hearings at various times during which the court decided what information would be disclosed, argued three points, namely that the relevant part of the NSI Act:

(a) had the effect of altering the character or nature of the Supreme Court of New South Wales, in that its effect was to obliterate an essential attribute of the Supreme Court of New South Wales namely its power to discharge, without interference, its fundamental object of determining guilt or innocence (this effect was said to arise because the consequence of the legislation was to deprive the court of its powers to retain control of criminal proceedings so as to bring them to an orderly conclusion - by imposing processes such as mandatory adjournments, interference with court personnel etc and because of the way in which the court was required to exercise it discretion under the NSI Act, which was not a real discretion but a "sham" discretion - intended to ensure that the interests of the accused in securing a fair trial were to be disregarded.)[41];
(b) purports to confer on the Supreme Court of New South Wales, in the exercise of the judicial power of the Commonwealth, a discretion which is incompatible with the exercise of that power (for the reasons referred to in (a) above);
(c) was inconsistent with the implied freedom of speech in relation to the discussion of political matters, which arises under the Constitution (in that the effect of the legislation was that it effectively burdened freedom of communication about government or political matters and was not reasonably appropriate to serve a legitimate end compatible with the maintenance of representative government).[42]

Whealy J disagreed. He considered that while the processes prescribed in the NSI Act, including mandatory adjournments plainly gave rise to the potential for a degree of disruption in ordinary court processes, the level of the disruption was not so great as to render the legislation unconstitutional.

In considering the fact that the NSI Act provided that, when considering what order to make in relation to the Attorney General's certificate, the court was to give the greatest weight in the exercise of its discretion to the risk of national security, Whealy J noted that the court was not directed to have regard to this matter alone and nor was it precluded from determining, even after giving that matter 'greatest weight' that the defendant's right to receive a fair trial required the making of orders which had the effect of overriding a certificate.[43]

As to the issue of political communication, while he assumed, without deciding, that the law burdened political communication His Honour concluded that the object of the NSI Act, namely the protection of Australia's national security and thus its system of representative government was plainly compatible with the maintenance of representative government. Whealy J was also satisfied that the manner by which the Act sought to achieve that objective was also relevantly compatible and in this context His Honour noted that it is well established that courts may make appropriate orders, where authorised in relation to the suppression of evidence during a court hearing, to balance the competing interests of justice.[44]

Ultimately Whealy J concluded that closed hearings during which orders were made about the disclosure of information dealt only with a 'limited topic' and was satisfied that the constitutional challenge to their validity on the ground of political communication should fail.[45]

In finding in favour of the Commonwealth in relation to the challenge, Whealy J quoted Brennan CJ in *Nicholas v R*[46] when his Honour stated that:

> It is for the Parliament to prescribe the law to be applied by the court and if the law is otherwise valid, the court's opinion as to the justice, proprietary or utility of the law is immaterial. Integrity is the fidelity to legal duty, not a refusal to accept as binding a law which the court takes to be contrary to its opinion as to the proper balance to be struck between competing interests.

Time will tell if courts will, into the future, be satisfied that similar laws are valid. What cannot be in doubt is that the challenges are sure to continue.

**Use of special counsel**

Interestingly, none of this has dissuaded applicants from seeking to obtain relevant information by whatever means they can. For example, in the *Leghaei* case the applicant's counsel obtained clearance and reviewed the relevant information. In addition, counsel in at least two Australian cases involving national security information (both in the criminal context) have sought orders allowing the use of special counsel.[47]

Both Canada and the United Kingdom have developed the use of special counsel as a means of overcoming difficulties associated with the disclosure of information sensitive to national security. The use of special counsel was referred to with approval by the European Court of Human Rights in the decision of *Chahal v United Kingdom*[48]. It is a procedure which is described as a process in which a judge:

> holds an in camera hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the Court, who cross-examines the witnesses and generally assists the Court to test the strength of the state's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant.[49]

While the regime is less than completely ideal because a party to proceedings does not have access to all the material to be relied upon by the court in the determination of the case, at least all of the relevant information is before the court and the strength of the state's case has been tested by the security-cleared counsel. The security of the information is protected but the applicant is given some opportunity to put the state to proof.

**Discovery**

Applicants are also not dissuaded from making more traditional applications. For example, the Federal Court is currently grappling with an application for discovery in judicial review proceedings concerning a negative security assessment.

The relevant proceedings were commenced in the Federal Court by Mr Scott Parkin, an American who was deported from Australia in September 2005 after arriving in Australia earlier that year. Mr Parkin was a self-confessed political activist and engaged in political activism upon arrival in Australia. In early September 2005 ASIO rang Mr Parkin and invited him to speak to them. Mr Parkin declined this invitation and ASIO staff subsequently prepared a security assessment concerning him. The security assessment was adverse for the purposes of the ASIO Act and was ultimately provided to the Minister for Immigration.

The security assessment recommended that Mr Parkin's visa be revoked in accordance with s 116 of the Migration Act (the same section pursuant to which Mr Leghaei's visa was revoked).

High profile complaints were made in the media and in Federal Parliament concerning Mr Parkin's adverse security assessment and his subsequent removal from Australia.

Mr Parkin commenced proceedings in the Federal Court and, together with two asylum seekers who had been similarly assessed as security risks (Mr Sagar and Mr Faisal ) (together the 'applicants'), sought orders quashing the decision to make the adverse security assessments and to provide the adverse security assessments to the Department of Immigration and Citizenship. They also sought declaratory relief that the adverse security assessments were not made in accordance with law, that the Director-General contravened s 20 of the ASIO Act (which requires that ASIO act free from irrelevant considerations) by failing to make a lawful security assessment and that the Director-General had contravened s 20 of the ASIO Act in providing security assessments to the Department of Immigration and Citizenship.

Mr Parkin alleged that the adverse security assessment was not validly made because:

(d) it was not based on facts justifying an adverse assessment;
(e) it was not based on reasoning from which it could properly be inferred that he represented a risk to Australia's national security interests;
(f) it was not based on facts or reasoning justifying the making of an adverse security assessment;
(g) it contravened his rights under s17A of the ASIO Act ; and
(h) it was not authorised by law.

Mr Parkin did not deny that he engaged in political activism while in Australia. He claimed, however, that he did not engage in 'politically motivated violence' as that term is defined in the ASIO Act. Mr Parkin also asserted that his political activities while in Australia were protected by s 17A of the ASIO Act, which provides that the ASIO Act:

> shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organisation shall be construed accordingly.

Mr Parkin sought discovery in the proceedings and wanted to see, at least, his adverse security assessment. It was his contention that without discovery, it would be difficult, if not impossible, for him to make out his claim that the assessment was not in accordance with law.

Sundberg J noted [50] that discovery in the Federal Court is discretionary (see Order 15 of the Federal Court Rules) and that various factors are relevant in determining whether or not the discretion should be exercised including the burden on the discovering party, the benefits of discovery and policy reasons not to order discovery.

The Director-General asserted that the ASIO Act evinced a legislative intent that had bearing on whether the Court should exercise its discretion to order discovery. Sundberg J examined whether discovery would circumvent the ASIO Act and therefore constitute an abuse of process. Further, the Director-General argued that 'the intention of the Act is to preclude a non-citizen who is the subject of an adverse security assessment from receiving a copy of the assessment or the material relied on in preparing it, or having that assessment reviewed by the AAT' [51]. The Director-General argued that this was a consideration in determining whether the Court should exercise its discretion to order discovery.

Sundberg J concluded that the 'ASIO Act does not, on its face, prohibit a Court from ordering discovery of an adverse security assessment' [52]. Further, Sundberg J noted that s 38 of the ASIO Act, which is a provision about notification of Australian citizens in relation to negative security assessments, does not actually **prohibit** the provision of the assessment to a non-citizen; it just does not require an agency to furnish a notice in relation to a security assessment where the Attorney-General certifies that withholding a security assessment is essential to the security of the nation. Accordingly, Sundberg J found that:

> it goes too far to imply into the ASIO Act an intention not to allow discovery of such a document if the justice of the case otherwise requires [53].

ASIO argued that discovery in Mr Parkin's case would be a fishing expedition but Sundberg J was unimpressed with that submission. His Honour acknowledged that the application constituted a fishing expedition but concluded it was not impermissible. Sundberg J concluded that Mr Parkin's case was that he had done nothing to constitute a threat to national security and that such a finding must therefore have been made in error. The purpose of discovery was to determine the nature of the error, not its existence. Furthermore the classes of documents sought were not overly broad and could be simply stated.[54].

Sundberg J also considered that it was also relevant that discovery and production were not the same thing and that an applicant is entitled to know the documents in dispute, by virtue of a list produced through the discovery process, even though the applicant may not then be able to compel production of the relevant documents. His Honour stated that if he were satisfied that under no circumstances could the documents sought by the applicants be produced, he would be inclined against ordering discovery on the grounds of futility. However, in the present case he was not satisfied that the documents sought would be immune from production. Sundberg J, commenting on Brennan J's comments in the Scientology case noted that the Scientology case may have 'critical implications for the parties at the production stage, but it is not determinative of the discovery question'[55].

The Director-General also submitted that there was no live issue between the parties and that discovery should therefore not be ordered. He submitted that for the applicants to succeed, they would need to demonstrate that there was no evidence on which ASIO could have formed the opinion that the applicants were security threats and that given the extreme difficulty of this task, the Court should be not satisfied that the applicants have a case which would be assisted by discovery.

Sundberg J found the argument to be circular and preferred the view that the applicants simply contended that that they had done nothing to justify their security assessments and that as such the assessments were wrong and that to demonstrate this the applicants needed to understand how ASIO had formed its view.[56]

Sundberg J found that in the present circumstances:

> ...it is not possible to say whether the applicants do or do not have any chance of making out a good case and it would be premature to say that there is no live issue between the parties[57].

Sundberg J then exercised his discretion to allow discovery and ordered that the parties confer as to the appropriate orders for discovery. The Director-General of Security sought leave to appeal Sundberg J's decision.

Heerey J granted leave to appeal for four reasons [58]:

(a) Sundberg J arguably 'did not correctly apply authorities binding on him which say that the bare assertion of a claim without any factual foundation will not justify an order for discovery'. Heerey J notes that it was argued before him that this approach was more justified in a case concerning national security issues[59];

(b) Sundberg J arguably did not give sufficient weight to the risk that identification of documents, in and of itself, may give rise to national security risks when stressing the distinction between discovery and production;

(c) the Director-General will be required to swear and file an affidavit of documents if leave is not granted, which of itself may reveal matters prejudicial to the national interest; and

(d) the balance to be struck between the exercise of normal litigation processes and the interests of national security raise issues of great public importance which favour judicial consideration at the appellate level.

The Full Federal Court was due to hear the appeal against the discovery orders on 22 May 2007. However, when the parties appeared before the Full Federal Court, the Court noted that there were no final orders from which an appeal could be made. In fact, the orders that were made by Sundberg J were that he would exercise his discretion to allow discovery and that the parties should confer as to the appropriate orders for discovery. If the parties were unable to agree by a particular date then each should file written submissions as to the orders that should be made. In fact, following Sundberg J's decision, the parties had not determined that they were unable to agree as to appropriate orders and accordingly no final orders had been made. In the absence of final orders, the Full Court ordered that the leave granted to appeal be revoked and that the matter be remitted to the primary judge.

It is reasonable to assume however that at some point it will be clear that the parties will not reach agreement, orders will be made and the Full Court will be called upon again to resolve the issue of discovery in Mr Parkin's case[60].

Of course, it is possible that if the Full Court resolves the issue in Mr Parkin's favour, then the Attorney General could issue a certificate under the NSI Act.

Interestingly, in a media interview given after Sundberg J's decision[61] Mr Parkin stated that he was not surprised by the decision ordering discovery as it seemed to him that Australia was more 'progressive' in relation to these issues than America and that he hoped that the Attorney General would not issue a certificate to prevent access to the relevant information. What Mr Parkin intends to instruct his lawyers to do if a certificate is ultimately issued is not known.

**The experience in the United Kingdom**

Finally, it is worth reflecting on the approach that jurisdictions which have similar common law traditions to Australia are taking in relation to review of decisions concerning natural security issues. Not only does it inform discussion about the approach taken in Australia but it may also provide some guidance as to future developments.

After September 11, some English judges were accused of deferring unnecessarily to executive assessments in relation to matters of national security. The most often cited case in this context is the House of Lords decision in *Secretary of State for the Home Department v Rehman*.[62] The issue in *Rehman's* case concerned an order of the Secretary of State that Rehman, who was a Pakistani national, be deported from the United Kingdom. The relevant provision of the Immigration Act had the effect that Rehman had no right of appeal in relation to the relevant order because the ground of the decision was that his deportation is conducive to public good as being in the interest of national security. However, Mr Rehman

had a right of appeal to the Special Immigrations Appeals Commission ('Commission) and he also had a further appeal to the Court of Appeal on questions of law.

The Commission had been set up in response to the decision of the European Court of Human Rights in *Chahal v United Kingdom*[63]. In that case the Court had decided that the existing form of review for deportation orders on the basis of risk to national security, being a non-statutory review process, was insufficient to meet the standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which relevantly provides that everyone deprived of his or her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detentions shall be decided. The Commission was set up to bring the United Kingdom into compliance with its obligations with the European Convention to provide greater protection for individuals who it intended to deport on national security grounds.

The Commission has the jurisdiction to allow an appeal if a decision is not in accordance with the law and/or the decision involved the exercise of discretion by the Secretary of State that should have been exercised differently.

In *Rehman's* case, the Commission determined that the definition of national security was a question of law in relation to which it had jurisdiction to decide.[64] It then found that the Secretary of State had interpreted the term "national security" too broadly because Mr Rehman's alleged activities did not, in its view, affect the United Kingdom's national security (it seemed unlikely that Mr Rehman was going to commit a terrorist act in the United Kingdom but rather that he was involved in terrorist activities outside of the United Kingdom).

The House of Lords rejected the Commission's reasoning. The Court agreed that the meaning of the term 'national security' was a question of law within the jurisdiction of the Commission but that the Commission had incorrectly given too narrow an interpretation to the concept of national security. In a climate of international cooperation on security issues it was simplistic to consider that the security interests of one's own country stopped at one's borders.

In addition, Lord Hoffman concluded that the function of the Commission was essentially that of a court as a member of the judicial branch of government. In his view, questions as to what was in the interests of national security where not questions that could be determined by a Court and accordingly, where not questions for the Commission to decide. He stated that the question of whether something was:

> ... in the interest of national security is not a question of law. It is a matter of judgment and policy. Under the Constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interest of national security are not a matter for judicial decision. They are entrusted to the executive.[65]

Lord Hoffmann therefore concluded that the Commission was not entitled to differ from the opinion of the Secretary of State on the question of whether, for example, the promotion of terrorism in a foreign country by the United Kingdom resident would be contrary to the interests of national security.

Lord Hoffman did not think that this defeated the purpose for which the Commission had been set up. Referring back to *CCSU v Minister for Civil Service*, Lord Hoffman saw that the commission had three important functions, namely[66]:

> (e) first, the Commission will have to verify that the decision of the Minister is in fact based on an assessment of the interests of national security and the Commission retains the power to conclude that there is no factual basis for the relevant conclusion;

(f) secondly, the Commission can reject the Minister's decision on the basis that the Minister's opinion is so unreasonable that no Minister advising the Crown could reasonably have held it; and

(g) third, the Commission's decision may turn on issues unassociated with national security issues, such as the likelihood that the applicant will be tortured.

This approach to national security issues in the United Kingdom seems to have changed somewhat recently. In 2004, the Court of Appeal handed down a decision which upheld a decision of the Commission overturing a deportation order made by the Minister.[67] In *Secretary of State for the Home Department v M*, the Court of Appeal noted that while the Commission's job is not to second guess the Secretary's decisions, it is to come to its own judgment as to whether reasonable grounds exist for the Secretary of States' belief or suspicion. In this case the Commission found that the Secretary's view:

> is in our judgement not reasonable and, as we have said, we are concerned that too often assessments have been based on material which does not on analysis support them. We have thought long and hard before deciding on this appeal since we are conscious of the heavy responsibility that is placed upon us where safety of the citizens of this country is at stake. [68]

The Court of Appeal could find no legal error with the Commission's decision although it went to some length to stress that the Commission was not overruling a decision of the Secretary of State but rather was coming to its own decision on material that was tested in a way which could not be tested before the Secretary of State. However, the effect of the Commission's decision, which is a superior court of record, is clearly that the Secretary's decision cannot stand.

This general trend has continued with the decision of the House of Lords decision in *A v Secretary of State for the Home Department*.[69]

**Where to now?**

The simple reality is that it is becoming harder for people adversely affected by decisions in relation to which national security considerations exist to challenge those decisions. The introduction of the new *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cwlth) and its extension to civil proceedings may make access to relevant information more difficult. However, the resilience of applicants and the preparedness of those who advocate on their behalf, and who presumably regard the work as of legal significance, means that they are unlikely to be deterred.

It is reasonable to think that at some point in the future, depending upon what applications come before the court, what further legislative changes emerge and the way in which current legislative provisions are used that further constitutional challenges based upon the doctrine of separation of powers will be launched.

While an assessment of the prospects of any such challenge is clearly beyond the scope of this paper, if it can be demonstrated that if, by legislation, Parliament is purporting to direct the courts as to the manner and outcome of the exercise of their jurisdiction, good grounds for a challenge to the validity of the relevant legislation would exist.

**Endnotes**

1 National Security Law Course, Opening Remarks, Justice Keith Mason 13 September 2006, University of Sydney.
2 Tom Campbell, 'Blaming Legal Positivism', (2003) 28 Australian Journal of Legal Philosophy, p 32.
3 (1982) 43 ALR 587.
4 Ibid at 594-595

5 Ibid at 599
6 Ibid at 603
7 Ibid at 614
8 [1985] AC 374.
9 Ibid at 401
Ibid at 402.
11 Ibid at 406
12 *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 at 195. The alternative, 'let's not panic' approach is equally succinctly encapsulated by Kirby J. In a speech delivered to the National Security Law Conference in March 2005, titled 'National Security: Proportionality, Restraint and Common Sense', his Honour stated that:

> ... In the past, the Australian people and their highest court have been more temperate and prudent than others in evaluating their real risks to national security and judging the needs of draconian laws to respond to those risks. The United States of America, great a national as it is, sometimes gets swept up in the tides of nationalistic passion that Australians tend to avoid or keep firmly under control. We should keep this story of our country before us as we embark upon responses to contemporary problems of terrorism and risks to our national security.

13 David Dyzenhaus, 'Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security', Australian Journal of Legal Philosophy, (2003) 28 at p 7.
14 see Dyzenhaus above, n 13 in which it is observed, at p 21, that:
It was precisely because judges came to realize both that most of the legal action in society - the place where the citizen bumped against the law - happened in citizen's interactions with administrative officials rather than with courts, and that accountability of these officials to Parliament was largely a myth, that they began to craft the modern common law of judicial review.
15 *Leghaei v Director General of Security* [2005] FCA 1576 ('Leghaei')
16 *Kioa v West* and (1985) 159 CLR 550 (*'Kioa'*) and *Annetts v McCann* (1990) 170 CLR 596
17 Leghaei at [41]
18 Ibid at [49]
19 *Salemi v McKellar [No.2]* (1977) 137 CLR 396; *Amer v Minister for Immigration, Local Government and Ethnic Affairs (Nos 1 and 2)*, unreported per Lockhart J, 18 and 19 December 1989; *State of South Australia v Slipper* [2004] FCAFC 164 (*'Slipper'*); *Fernando v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 975 and *Rigopoulos v Commissioner for Corrective Services* [2004] NSWSC 562.
20 (1977) 137 CLR 396 at 421 per Gibbs CJ who stated that:
Reasons of security may make it impossible to disclose the grounds on which the executive proposes to act. If the Minister cannot reveal why he intends to make a deportation order, it will be difficult to afford the prohibited immigrant a full opportunity to state his case, for he may not know what it is that he has to answer.
21 *Kioa* per Mason J at 586 and *Slipper* per Finn J at 113(ii).
22 *Leghaei* at [78]
23 Ibid at [80]
24 Ibid at [82]
25 Ibid at [82]
26 Ibid at [88]
27 Ibid at [93] - [97]
28 *Leghaei v Director General of Security* [2007] FCAFC 37 and [2007] FCAFC 56
29 *Leghaei v Director General of Security* [2007] FCAFC 37 at [43]
30 Ibid at [53]
31 Ibid at [60] -[61]
32 (2005) 222 ALR 411
33 Ibid at 418
34 Ibid
35 Leghaei at [90]
36 It is useful to have an idea of the kind of information that is actually at issue. This point was dealt with by Whealy J in relation to an interlocutory application in a criminal law matter (*R v Khazaal* [2006] NSWSC 1061) in which the accused made an application seeking access to affidavits filed by the Commonwealth in the relevant proceedings. Referring to the material contained within relevant affidavits before him, Whealy J made reference to Justice Brennan's comments in *Church of Scientology v Woodward* and gave a brief description of the information contained within the subject affidavits. The material was said to relate to sensitive sources of intelligence and to counter-terrorism strategies and activities. In His Honour's view:

> The protection of sensitive sources, the suppression of details relating to the police and the security agency's ongoing strategy to defeat and frustrate terrorist activities in this country must be of paramount importance to national security.

37 Particular legislation may also contain relevant provisions in relation to the use of confidential information. For example, see s 503A of the *Migration Act 1958* (Cth), which provides that if information is communicated by a gazetted agency, on the condition that it be treated as confidential, then it cannot be communicated to any person, including a court or tribunal.
38 *Amer v Minister for Immigration, Local Government and Ethnic Affairs (Nos 1 and 2)*, Unreported per Lockhart J, 18 and 19 December 1989 and *Nicopoulos v Commissioner for Corrective Services* [2004] NSWSC 562 at [82] - [92].
39 *Alister v R* 51 ALR 480
40 *R v Lodhi* [2006] NSWSC 571
41 Ibid at [56]
42 Ibid at [59]
43 Ibid at [107]- [108]
44 ibid at [120] -
45 Ibid at [122] - [125].
46 (1998) 151 ALR 312 at 326
47 See *R v Khazaal* [2006] NSWSC 106 and *R v Lodhi* Unreported 21 February 2006.
48 (1997) 23 EHRR 413.
49 Ibid at [144]
50 *O'Sullivan v Parkin* [2006] FCA 1654 at [19-20] (*'Parkin'*)
51 Ibid at [31]
52 Ibid at [31]
53 Ibid at [32]
54 Ibid at [37]
55 Ibid at [44]
56 Ibid at [46]
57 Ibid.
58 *O'Sullivan v Parkin* [2006] FCA 1654 at [11] - [15]
59 These authorities being noted as Scientology, *Lloyd and Costigan* (1983) 82 FLR 104 at 113-114, *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175 at 181, *Minister for Immigration v Wong* [2002] FCAFC 327 at [30] and *Jilani v Wilhelm* (2005) 148 FCR 225 at 273-274.
60 *Editor's note*: The Federal Court permitted discovery in *Parkin v O'Sullivan* [2007] FCA 1647
61 Interview between Ronan Sharkey and Steven Parkin on Triple J, broadcast on 3 November 2006
62 *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 ('Rehman')
63 (1997) 23 EHRR 413.
64 *Rehman* at [43]
65 Ibid at [50]
66 Ibid at [54]
67 *The Secretary of State for the Home Department v M* [2004] HRLR 22.
68 Ibid at [28]
69 [2005] HRLR 1.