September 2008 Number 58

aialFORUM

Australian Institute of Administrative Law Inc.

Editor: Alice Mantel

Contributors are advised that articles published in the AIAL Forum are also reproduced on the AIAL website http://law.anu.edu.au/aial

The ***AIAL Forum*** is published by

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Fax: (02) 6251 6324
www.aial.org.au

This issue of the ***Forum*** should be cited as (2007) 58 ***AIAL Forum.***

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ISSN 1322-9869

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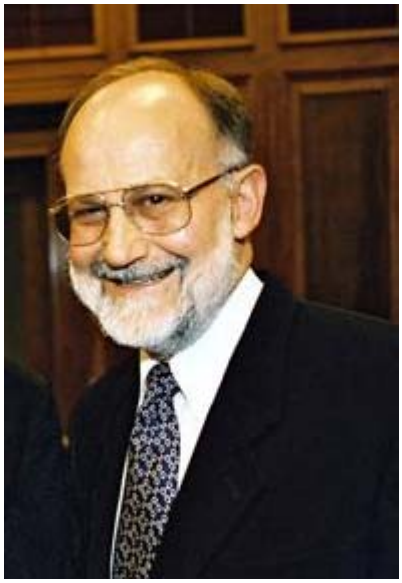
DEFENCE HONOURS AND AWARDS TRIBUNAL MEMBERS APPOINTED

Parliamentary Secretary for Defence Support, the Hon. Dr Mike Kelly AM MP announced the appointment of the inaugural Chair and members of the independent Defence Honours and Awards Tribunal.

Dr Kelly said, 'The establishment of the Tribunal is the fulfilment of a Government election promise, and is an important step in ensuring that Defence Honours and Awards issues are considered independently of both Defence and Government.'

'Professor Pearce is a distinguished Australian academic, lawyer and former Ombudsman and Defence Ombudsman, who will make an outstanding contribution to the role of Chair, and the ongoing establishment and integrity of the Tribunal,' said Dr Kelly.



Emeritus Professor, Dennis Pearce AO, has been appointed Chair of the Tribunal.

The Australian Institute of Administrative Law congratulates Dennis on his appointment. Dennis is an honorary life member of the AIAL, having been President in 1990-1991 and a National Executive Committee member for many years.

Inaugural members of the Defence Honours and Awards Tribunal are:

- Mr Adam Bodzioch, former senior state public servant, SA;
- Brigadier Gary Bornholt AM, CSC (Retd), former senior Army Officer, ACT;
- Vice Admiral Don Chalmers AO (Retd), former Chief of Navy, NSW;
- Dr Jane Harte, psychologist, QLD;
- Ms Christine Heazlewood, lawyer, VIC;
- Ms Sigrid Higgins, barrister, NSW;
- Professor David Horner, Strategic and Defence Studies Centre, Australian National University, ACT;
- Mr John Jones AM, former HR manager, NSW;
- Air Commodore Mark Lax CSM (Retd), former senior Air Force Officer, ACT; and
- Warrant Officer Class 1 Kevin Woods, CSC, OAM, former Regimental Sergeant Major of the Army, ACT.

Dr Kelly said, 'These appointments to the Tribunal ensure a combination of military history, community and professional experience, as well as a balance across the Services, genders and States.'

The priority issues to be considered by the Tribunal are the eligibility criteria for the Australian Defence Medal, and the claims of the Merchant Navy, including recognition for those who served with the United States Army Small Ships Fleet.

Further information on the Tribunal Chair and members is available at: www.defence.gov.au/medals.

LEGAL PROFESSIONAL PRIVILEGE: *FARNABY v MILITARY REHABILITATION AND COMPENSATION COMMISSION*

The Hon Justice Garry Downes AM*

I think that you have all been told that I am going to talk about *Farnaby v Military Rehabilitation and Compensation Commission*[1]. In a sense that is right, but you may be slightly relieved to hear that I am not simply going to talk about what the case is about and what it decided. Apart from that being a very boring way of dealing with cases, you could easily do it in a much shorter time by reading it yourself. So I thought what I would rather do is address some of the issues that arose in *Farnaby* relating to privilege and to throw up some talking points about issues of principle on three topics, two of them associated with privilege and one associated with the Tribunal itself.

The rationale that lies behind the law of privilege is not, of course, confined to legal professional privilege. There is also privilege against self-incrimination and there are still varieties of privilege associated with marital relationships. But the main privilege from the Tribunal's point of view is legal professional privilege. That divides itself into two parts now, but this is comparatively recent. It was not so when the rules relating to legal professional privilege were first being worked out. Legal professional privilege divides itself into two parts which now seem to be called 'advice privilege' and 'litigation privilege'.

The aspect of privilege which arose in *Farnaby's* case, and, importantly, in the Supreme Court of New South Wales case which it considered, *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Market Ltd*[2], is the so-called 'litigation privilege'. As the Tribunal's decision in the case may suggest, however, it may be that the label 'litigation privilege' is not wholly appropriate. This is particularly so if the word 'litigation' is understood to refer only to proceedings in a court. This Tribunal exercises administrative power and courts exercise judicial power. Only the latter may be strictly 'litigation'. I think, although she did not ultimately pin her decision to the label, that some of that kind of thinking perhaps lay behind the decision of Bergin J in *Ingot Capital* in which she held that litigation privilege did not apply in the Tribunal. However, the ultimate basis for her decision was her finding that proceedings in the Tribunal were not sufficiently in the judicial mould, whatever description was applied.

The two important issues thrown up by *Farnaby's* case are, first, what is the rationale of the rule (because that is quite an important base from which to determine whether the rule applies or not) and, secondly, in what circumstances can the rule be availed of.

So far as the rationale is concerned, I mentioned in my decision the judgment of Stone J in the Full Federal Court of Australia in *Pratt Holdings Pty Ltd v Commissioner of Taxation*[3]in which she spent time working through the historic development of the rule. That is really quite an interesting discussion and is worth looking at. It is fair to say that the rule started off

* *Talk delivered at the AAT Members' Professional Development Session, 27 March 2008. Farnaby v Military Rehabilitation and Compensation Commission* [2007] AATA 1792.

with the simple idea that lawyers should keep their clients' secrets and they should not be compelled to disclose them. Modern thinking challenges that sort of approach, which might be thought to be elitist. After all, why is it that if I tell my lawyer something in connection with his representing me he should not be compellable to disclose it, but if I tell someone else the same thing in another confidential context no such rule applies?

There seem now to be two related rationales for the rule. The first idea is that it is associated with the administration of justice. Justice will be better administered if, for example, clients are able to freely make disclosure to lawyers and lawyers are freely able to investigate the case, or seek advice from third parties, without there being liability of disclosure. There is something of the idea that litigation will be longer and more expensive and more complicated if this simple rule does not apply. That is the first rationale that seems to exist.

The second rationale, which was particularly identified by McHugh J in *Carter v Northmore Hale Davy and Leake*[4], is another popular concept. It is associated with a human right, in this case freedom of communication. You ought to be able to speak freely and confidentially to your lawyer without subjecting yourself to the possibility of that confidential communication being disclosed to others.

Neither of those two rationales will work alone because the communication rationale does not protect a range of communications not involving legal advice or representation to which it would be equally applicable. However, the two can work together.

When Deputy President Groom and I were pondering what we should do in *Farnaby's* case, these kinds of considerations were quite important because Bergin J had really engaged in a similar approach. The matters which impressed DP Groom and myself were that if the kind of rights that were dealt with in the Tribunal and the process in which a result was arrived at were sufficiently analogous to the process in court proceedings, and if a rationale of protecting freedom of communication and the administration of justice arose just as much in the Tribunal as it did in a Court, then why should the two be distinguished? We drew on some analogies, or illustrations of problems that might arise, in the course of our reasons.

So, for example, we referred to taxation appeals. It would be odd if, when you were consulting your lawyer about a potential challenge to an assessment issued by the Commissioner of Taxation, you were entitled to privilege while you were thinking about it (because the privilege relating to litigation advice extends to the period of time before the litigation is commenced), and if you decided to take your tax appeal to the Federal Court you would still be protected by the privilege, but if you decided to take your appeal to the Administrative Appeals Tribunal you would not be protected. You would continue to be protected for the time you were thinking about whether you should go to the Tribunal or the Federal Court, but the moment you opted for the Tribunal the privilege would go prospectively. Well it did not seem to us that that was a particularly attractive approach as a matter of policy. We also thought that complicated issues could arise in tribunals like the Victorian Civil and Administrative Tribunal and the Western Australian State Administrative Tribunal, where they are exercising at the one time judicial power and also administrative power.

Although we examined all these issues in *Farnaby's* case, ultimately we did not think we really had to worry about them because it seemed to us that *Waterford v The Commonwealth*[5] in the High Court decided the question directly.

That is a short introduction to the type of policy issues or rationales that potentially lie behind the rule and which are probably quite an important consideration in deciding when the rule might apply and to what tribunals it might apply. I guess there is a question as to whether it would apply in tribunals like the Migration Review Tribunal and the Refugee Review

Tribunal, as well as the Social Security Appeals Tribunal, where generally the Government is not represented and other distinctions can be drawn.

The other aspect of the rule that I thought was worth mentioning, because it arises directly out of *Farnaby*, or more accurately out of *Ingot Capital*, is to look at when the privilege can be availed of as opposed to what are the circumstances that give rise to the privilege. Ordinarily when you are dealing with the litigation privilege limb, as opposed to the advice limb, the place in which the existence of the privilege is going to be tested is the court or tribunal in which the privilege arose. We see this in connection with returns of summonses in the Tribunal; the parties battle over whether documents were or were not brought into existence in connection with representation in the Tribunal in the very same proceedings. But, of course, the privilege is completely general.

So, if the Commissioner of Taxation or someone from the Australian Securities and Investments Commission knocks on your door and wants to see documents pursuant to their coercive investigative powers, you may be entitled to make the same claim for privilege relating to them as you would in a court or tribunal, subject, of course, to abrogation of the right. There are lots of abrogations of the right in legislation but subject to abrogation of the right in legislation, the claim is available.

The Administrative Review Council is presently engaged in a project referred to it by the last Attorney-General on this topic and I think about two days ago there was a front page article relating to it in the *Australian Financial Review*. (The report has now been published: Administrative Review Council, *The Coercive Information Gathering Powers of Government Agencies*, Report No. 48, May 2008). One of the things that arose in that inquiry, and, indeed, in another inquiry that the ARC is about to complete, is the question of what abrogations there should be of rights to privilege in connection with regulatory agencies' powers. Importantly, the report is concerned with achieving consistency between the powers, because they grew up in a haphazard kind of way. That is, however, one circumstance in which privilege can be relied upon and which applies just as much to a document produced in connection with representation in legal proceedings as it does to advice privilege.

The other situation in which privilege can arise, and this is what happened in *Ingot Capital*, is in other legal proceedings. This is how Bergin J came to decide whether litigation privilege applied in the Administrative Appeals Tribunal. Disclosure was sought of documents brought into existence in connection with Tribunal proceedings for their use in completely separate proceedings in the Supreme Court of New South Wales.

The third matter that I was going to talk to you about associated with *Farnaby* is not associated with privilege itself but is associated with the reasoning in *Farnaby*. In a way, *Farnaby* created for me a kind of dilemma because I am sure most of you will know my views about the difference between proceedings in a court and proceedings in a tribunal. I think that if you look at decisions I have written you will find that in a number of them, maybe most of them, I have made reference to the fact that the Tribunal exercises administrative power and not judicial power.

Those of you who were present at the Tribunal's 30th Anniversary in Canberra in 2006 may remember that I said that although I did not like the descriptions 'inquisitorial' and 'adversarial', but rather preferred 'flexibility' as a description of the way the Tribunal dealt with its cases, I nevertheless recognised very clearly that the way the Tribunal proceeded was different to the way courts deal with their cases.

What the Tribunal is doing in making an administrative decision, or arriving at the correct or preferable decision, is very much like what the admiralty lawyers call acting *'in rem'*. It is

making a decision which is not just the resolution of a dispute between two people. If you are making a decision under the *Migration Act 1958* (Cth), I think in a very real sense, your decision relating to who may or may not gain a visa is an aspect of the executive determination of the way in which the Australian people shall be constituted as much as it is resolving a difference of opinion between the Department of Immigration and Citizenship and the applicant. If you are dealing with a tax case you are dealing with revenue raising for the country. At every step, everything we do is much more than simply resolving a dispute.

One of the tests of whether I am right or not is how easy it is for an administrative decision to be remade. It is true that under the *Administrative Appeals Tribunal Act 1975* (Cth), applicants can withdraw at any time, but they cannot simply require us to make a decision agreed upon in place of the decision that is subject to review. The *AAT Act* requires us (s 42C) to consider, first, whether we have got power to do what they are asking us to do and secondly, and more importantly, whether it is appropriate to do so in the circumstances. That is an important part of how the Tribunal operates, which is to be contrasted with a Court in which the parties are king, so to speak. In the Federal Court, and this applies even when someone is seeking judicial review, the parties can go up and say: 'We have settled the case. We have worked out some terms of settlement and that is the end of it.' The Court really does not have any power to qualify what the parties can do.

When I came to the hearing in *Farnaby*, and particularly to the reasoning of Bergin J which was based on the very type of distinction that I have just been drawing, I felt in something of a dilemma because my views about the differences between administrative decision-making and judicial decision-making needed to be given weight. In one paragraph of our reasons we identified the aspects of the work of the Tribunal which were rather court-like. Sir Gerard Brennan and Sir Anthony Mason have both said that the Tribunal goes about much of what it does in a court-like fashion. There are some things about the Tribunal that are referred to in the *AAT Act* which do make us court-like.

Section 30(1) of the *AAT Act* has the consequence that there must be two parties in the Tribunal. The word 'parties' is used so the Tribunal is necessarily dealing with opposed parties. Secondly, s 34J shows that there must be a hearing unless the Tribunal and the parties agree otherwise. If the Tribunal does not agree, or both parties do not agree, then there must be a hearing. Next, the hearing must be in public, pursuant to s 35. That implies that a hearing will have some of the formalities of a court proceeding. Fourthly, the parties have a right to representation. That is quite significant. Fifthly, although we are not bound by the rules of evidence, the *AAT Act* refers both to 'evidence', using that word, and to evidence being 'admitted' (ss 43(2B) and 34E). We do not have rules of evidence but we do have a process in which there is an adjudication as to the admission of oral or written evidence. Sixthly, we have power to take evidence on oath or affirmation and we have power to summons persons to give evidence and produce documents. Finally, we must give reasons for our decisions and the parties can require that those reasons should be in writing.

It may not be that people turn up in hearing rooms in a wig and gown. It may not be that the formality that occurs in the Tribunal is quite the same as the formality in some courts (and I hope it never will be). It may be that we deal with evidential issues in a way that is less rigid than a court does, but when you look at the essence of how we go about our work, I think that it is close enough to the way in which a court goes about its work to be able to say, if I had not been bound by what the High Court had said in *Waterford*, that there is not a sufficient distinction for privilege not to apply.

Endnotes

1 [2007] AATA 1792
2 (2006) 233 ALR 369; 200 FLR 309
3 (2004) 136 FCR 357 at 376-383
4 (1995) 183 CLR 121 at 160-161
5 (1987) 163 CLR 54

CAPACITY TOOLKIT LAUNCHED

Attending the launch of the Kit: left to right (rear): Maureen Tangney (Attorney General's Department [AGD] Acting Director General), Jenna Macnab and Anne Mangan. (Front): Julie McCrossin (hypothetical facilitator) and Julia Haraksin (AGD Manager Diversity Services).

The NSW Attorney General, the Hon John Hatzistergos, MLC launched a *Capacity Toolkit* on 31 March 2008 designed to assist a broad audience in determining a person's decision-making capacity. It will be a valuable point of reference for carers and community organisations as well as others who undertake capacity assessments as part of their professional service, such as doctors, community workers, lawyers and finance staff.

The *Capacity Toolkit* was developed by the Diversity Services branch of the Attorney General's Department of NSW and is the result of extensive community consultation.

The *Toolkit* is intended to be a comprehensive resource and includes:

- information about decision-making capacity
- principles on which the concept of capacity is assessed
- guidance on when a capacity assessment may be needed, and
- information about the different legal tests of capacity , such as making a contract, a will, managing financial matters or making health decisions.

Until now, there have been few local resources to help in capacity assessment. This *Toolkit* will make the process easier, and sets out simple steps to follow in determining capacity. Dementia is one of many illnesses and disabilities that can restrict a person's capacity to make decisions. Around 1000 Australians are diagnosed with dementia each week. By 2050, it is estimated that almost three per cent of the nation's population will be affected by dementia.

For more information, view the Diversity Services website, contact Diversity Services, telephone: 02 8688 7507 or email: diversity.services@agd.nsw.gov.au.

ANTICIPATING LEGISLATION

Dennis Pearce*

When it is known that legislation is about to be made or amended, what, if any, action can be taken by bodies concerned with the operation or enforcement of that law prior to the commencement of the relevant legislation? The issue can be looked at by considering separately the position of the Executive and the courts.

Executive action

Robert Muldoon was elected Prime Minister of New Zealand in 1975. His National Party had a clear majority in New Zealand's single house Parliament. The Party's platform included an undertaking to repeal the New Zealand *Superannuation Act 1974.* This Act required employers and employees to make payments into a State-run superannuation fund.

Three days after being sworn in as Prime Minister, Mr Muldoon issued a press release stating that legislation to give effect to the promise to repeal the Superannuation Act would be introduced in the next Parliamentary session. The legislation would have retrospective effect to the date of the press release. In the meantime, the compulsory requirement for contributions to be made to the superannuation fund would cease.

A public service employee sought a declaration from the NZ Supreme Court that the Prime Minister's press statement was illegal and mandatory injunctions requiring the bodies charged with administering the Superannuation Act to continue to enforce the obligation to make payments as required by that Act.

The applicant asserted that the Prime Minister's action was in breach of s 1 of the Bill of Rights (1688) (Eng) which reads:

> That the pretended power of suspending laws or the execution of laws by regall authority without consent of Parlyament is illegal.

Wild CJ in the Supreme Court accepted this argument and made the declaration sought[1]. However, he declined to grant the other relief sought because the government had indicated its intention to introduce the relevant legislation into the Parliament. He said that 'it would be an altogether unwarranted step to require the machinery of the New Zealand *Superannuation Act 1974* now to be set in motion again, when the high probabilities are that all would have to be undone again within a few months'. Instead he adjourned the injunction applications for 6 months.

The high point of principle on which the decision in the case is based is cited reasonably regularly[2]. However, it tends to be overlooked that the government won the day in that the compulsory payment requirement was not enforced after the date of the Prime Minister's press statement. By the time that judicial intervention was secured, the government was in a position to argue that any mandatory order would be ineffectual. Thus the government

* *Emeritus Professor and Visiting Fellow, ANU College of Law, Australian National University; Special Counsel, DLA Phillips Fox.* *I wish to acknowledge the valuable comments of Gary Rumble, Partner, DLA Phillips Fox on a draft of this article.*

achieved its desired result, albeit at the cost of a slap on the wrist from the Court and effectively a warning not to try the tactic again.

One can speculate whether an Australian court today would adopt such an approach to the grant of remedies. In practical terms it permitted the government to do what the NZ Court said was not permitted. One would hope that the inconvenience that might have resulted in the government having to unpick its illegal action would not be accepted as a basis for not making the order that its action demanded.

It is understandable that, where a government has announced that it intends to change the law on a topic, it can become impatient with the time that it might take to pass or amend the relevant legislation. The proposal may have been part of the policy that it put to electors prior to a general election. The government can thereby claim to have a 'mandate' to change the law in the manner proposed. There is a temptation then for it to administer the law in the way that it wants and secure the passage of retrospective legislation to authorise the action that it has taken.

However, to accept this approach is to deny the most fundamental aspect of the rule of law - that it governs the action of the executive as much as it does citizens and other entities. Section 1 of the Bill of Rights was adopted in 1688 to assert the supremacy of parliament and to negate the tyranny of the executive as then represented by 'regall authority'. In *Fitzgerald's* case, the court said that the Prime Minister was exercising such authority. In directing that superannuation contributions not be made, despite the requirements of the Superannuation Act, the Prime Minister 'was purporting to suspend the law without consent of Parliament. Parliament had made the law. Therefore the law could be amended or suspended only by Parliament or with the authority of Parliament'[3].

A similar approach was taken in Australia in relation to the complementary right claimed by the Crown but revoked by the Bill of Rights – the power to dispense with obedience to the law. Brennan J in *A v Hayden*[4] said in a powerful statement that is relevant to the present context and therefore worth quoting in full:

> The incapacity of the Executive Government to dispense its servants from obedience to laws made by Parliament is the cornerstone of a parliamentary democracy. A prerogative to dispense from the laws was exercised by mediaeval kings, but it was a prerogative "replete with absurdity, and might be converted to the most dangerous purposes" (Chitty Prerogatives of the Crown (1820), p.95). James II was the last King to exercise the prerogative dispensing power … and the reaction to his doing so found expression in the Declaration of Right. It was there declared that "the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal". By the Bill of Rights the power to dispense from any statute was abolished … Whatever vestige of the dispensing power then remained, it is no more. The principle, as expressed in the Act of Settlement, is that all officers and ministers ought to serve the Crown according to the laws. It is expressed more appropriately for the present case by Griffith C.J. in *Clough v. Leahy* (1904) 2 CLR 139, at pp 155-156: " If an act is unlawful - forbidden by law – a person who does it can claim no protection by saying that he acted under the authority of the Crown."
>
> This is no obsolete rule; the principle is fundamental to our law, though it seems sometimes to be forgotten when Executive Governments or their agencies are fettered or frustrated by laws which affect the fulfilment of their policies. Then it seems desirable to the courts that sometimes people be reminded of this and of the fate of James II.

So what can a government do in anticipation of legislation? To answer this it is necessary to consider what a government can do without legislative authorisation.

There are two sources of extra-legislative authority – the common law and the prerogative[5].

1. Common law

In *New South Wales v Bardolph*[6] Evatt J said that 'No doubt the King had special powers, privileges, immunities and prerogatives. But he never seems to have been regarded as being less powerful to enter into contracts than one of his subjects'[7]. The other judges of the court expressed some reservations as to the scope of this general power to contract. Dixon J suggested that the subject matter of the contract must be concerned with a recognised and regular activity of government[8]. This suggested limitation on the scope of the power to contract has been criticised by some commentators and has not been followed in subsequent decisions[9]. Generally, it is taken that a government can exercise the same powers as a citizen within constitutional limits.

In regard to the Commonwealth there is considerable discussion and difference of opinion over the extent to which the Constitution limits the power to contract[10]. Seddon suggests that it is necessary to consider the particular contract and ask, first, what is the subject matter of the contract? And then: is that subject matter within the enumerated or implied powers of the Commonwealth?. Alternatively, he suggests, the issue may be tested by asking whether the Commonwealth could, instead of contracting under the Executive power, legislate to engage in the relevant activity.[11] This seems to be a safe way for a government contractor to approach the issue.

Whatever limitations may be imposed by the Constitution, it is accepted that, subject to those limitations, it is not necessary for there to be legislation empowering the Executive to enter into a contract. Nor is it necessary for there to have been an existing appropriation to support the contract at the time of its making.[12] Nonetheless, there will have to be an appropriation to meet obligations arising under the contract. This will usually be achieved through the general appropriations for the ordinary services of the government departments.

It is thus open to a government wishing to give effect to its policies to enter into contracts without awaiting legislation - provided that there is no existing legislation on the topic that requires a different outcome than the contract. The Executive, like an individual, cannot contract out of its statutory obligations unless the relevant legislation permits it to do so.

However, there are limits to how far a government can execute its policy through contractual arrangements. The most significant is that a contract only applies to the parties to it. It therefore requires the precise identification of the individuals or entities that are to be involved in the activities with which the government is concerned and the entry into a specific arrangement with them. In general, no obligation can be imposed on parties who are not privy to the contract. Legislation, on the other hand, enables the affected parties to be described generally.

Funding for the activity that is the subject of the contract is not a significant issue having regard to the broad view taken by the High Court in the *AAP* case as to the ability to fund government activities through Appropriation Acts.[13] However, a significant limitation on the execution of policy through contract is that it is not possible to impose penalties for non-compliance. Enforcement regimes beyond ordinary contractual remedies have to be supported by legislative authority.

The upshot of this is that, prior to the making of legislation, unless there is a constraint arising from the Constitution or existing legislation, a government can set up much of the machinery that will be necessary for the execution of the new legislation. Employment contracts can be entered into; leasing of premises can occur; equipment can be purchased; publicising the proposed policy can be undertaken. However, nothing that has an element of compulsion such as acquisition of property or requiring persons not parties to the contract to provide information would be possible before the legislation was made.

Prerogative power

The other power that a government can exercise without the need for legislation is the prerogative power.[14] It is well settled that the Executive can exercise powers without legislative authority in regard to a wide array of matters, including foreign relations, treaties, war and peace, award of honours and grant of pardons. Beyond these topics, it is necessary for the existence of a prerogative power to be established by evidence[15]. It is also necessary to show that the claimed power has not been displaced by legislation and has not fallen into desuetude[16].

The leading authority on the issue of displacement of prerogative powers is *Attorney-General v De Keyser's Royal Hotel Ltd*[17]. The most frequently cited of the Law Lords' judgments is that of Lord Parmoor[18]. He said:

> The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject. … In this respect the sovereignty of Parliament is supreme. The principles of construction to be applied in deciding whether the Royal Prerogative has been taken away or abridged are well ascertained. It may be taken away or abridged by express words, by necessary implication…. I am further of opinion that where a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of a Royal Prerogative right, such right can no longer be enforced.

The High Court in *Barton v Commonwealth*[19] seemed to water this approach down a little by saying that 'the rule that the prerogative of the Crown is not displaced except by a clear and unambiguous provision is extremely strong'[20]. Winterton suggests that this statement reflects the nature of the prerogative (request for extradition) involved and is not universally applicable[21]. It certainly does not fit comfortably with *De Keyser's* case itself and the general approach to implied repeals. The safer approach in the present context is to assume that where legislation has already dealt with a prerogative power, the power should not be considered to be available to be used as a means of anticipating legislation.

However, if there has not been a displacement of a prerogative power, it can be invoked to support action by the government even where legislation that is in contemplation may appear to abrogate in whole or in part an existing prerogative.

A recent example of this, together with the power to enter into contracts in anticipation of legislation, is provided by the government's decision to establish the Defence Honours and Awards Tribunal. The award of Honours is an accepted prerogative of the Crown. This has been exercised in relation to the Armed Services by the Queen or the Governor-General acting on the advice of the government of the day. However, in its election policy statement the Labor Party said: 'A Rudd Labor Government will form a permanent independent tribunal arising in the area of Defence Honours and Awards, to take the politics out of medal policy…The tribunal's decisions will be binding upon the Government.'[22]

Since the election, the Government has indicated that it will introduce legislation to establish the tribunal. However, it has acted in anticipation of that legislation by setting up a tribunal and appointing members to it. This has been done by invoking the prerogative power in regard to award of honours and entering into appropriate contracts with the members.

Until legislation is made, the tribunal will have an advisory role only. It will also not have any compulsory powers so it will not be able to require the attendance of witnesses nor the production of papers. The members will have no protection for their actions. All these will have to await the legislation but, provided that the tribunal acts with due circumspection, the

absence of these powers should not cause difficulties to its being able to operate. Of course, until the legislation is made, the decisions will continue to be made in fact and in law by the government. While this limits the concept of the tribunal being an independent decision-maker, the government can at least claim that it is acting on independent advice.

Existing legislation

The attainment of policy goals in advance of legislation through use of the prerogative and contracts is posited on the action not being contrary to existing legislation. This is less likely to present a problem where the proposed legislation relates to a topic not previously the subject of statute. However, where it is proposed to amend existing legislation or to substitute a new scheme for that already in existence, the position may be more complicated.

Action of this kind will expose the issue referred to above in relation to the displacement of prerogative powers -- the extent to which the proposed anticipatory action is prevented by legislation, either directly or by implication. The action taken by Prime Minister Muldoon to suspend the existing obligations under the Superannuation Act is an obvious example of attempting to abrogate the requirements of the legislation. Clearly this cannot be done and it should not be assumed that an Australian court would be as constrained in regard to remedies granted as was the New Zealand court.

However, a recent UK Court of Appeal decision has indicated that it will be necessary to show that the action taken in anticipation of the new legislation does run counter to the existing legislation.

Shrewsbury and Atcham Borough Council v Secretary of State for Local Government (*Shrewsbury*)[23] arose out of the perennial headache of local council amalgamations. The *Local Government Act 1992* (UK) laid down a procedure to deal with such amalgamations. The Government issued a white paper in which it indicated that it proposed to change this procedure. It set out its proposed new procedures and invited councils not only to comment on those proposals but also to make suggestions for possible amalgamations following the procedures set out in the paper. The Government pursued these suggestions in accordance with the new procedure that it proposed but which at that point had no legislative backing. This involved the councils affected in providing information to the Government. The Government noted that it could not oblige the councils so to act but it indicated that it would expect cooperation. (An invitation that it would seem difficult to refuse!)

The procedures were carried through to the point where recommendations for amalgamations were formulated for consideration by the Minister. It was only after this had occurred that the promised legislation was enacted. It validated actions that had been taken previously. Evidence led to the court also asserted that the recommendations made prior to the new legislation had not simply been rubberstamped but had been given due consideration.

Some councils affected by the amalgamation decisions sought review on the basis that the procedure followed did not adhere to that set out in the 1992 Act and that this made the final decisions that had been taken a nullity.

There was no doubt that the procedure adopted did not follow the requirements set out in the 1992 Act. The question that the court had to consider was whether it was permissible for the government to adopt another procedure in anticipation of the authorising legislation. It held that it could do so - or at least that the failure to follow the existing procedure did not invalidate the decisions made in view of the fact that they were taken after the new

legislation and the procedures followed were validated. The failure to follow the legislated procedure did not render the ultimate decision a nullity.

What would have made a more interesting test would have been if the challenge had been brought before the passage of the new legislation. Carnwarth and Waller LJJ expressed the view that the procedures adopted treated the 1992 Act as if it had already been repealed. For the reasons set out above, this did not affect the final decisions. However, the judges indicated that, had the failure to follow the existing statutory procedure affected the rights of the councils involved, a different conclusion could well have been reached. Richards LJ more directly indicated that the processes engaged in did not produce a decision that affected people's rights and therefore could be followed despite the 1992 Act.

This reasoning might be attractive in the Australian context as it reflects the approach taken in the ADJR cases of declining to review the steps taken in the making of a decision. If action is taken that does not follow a prescribed procedure but the ultimate decision does not turn on that action or is validated, the likely ruling of the court would be to decline to hold the decision invalid as having been made contrary to the existing legislation.

The position is different if the prescribed procedure was intended to protect the rights of persons who might be affected by the final decision and the procedure followed in anticipation of amending legislation does not afford that protection. In such a case it would be difficult to claim that the action taken was not in breach of the existing law. A distinction must be drawn between actions by a government that are directed to policy formulation, including the exploration of options for legislation or for decisions under that legislation, and actions that involve the implementation of the existing law. The former permits the pursuit of issues as part of the prerogative and general management of government. The latter requires compliance with the current legislative edict.

Interpretation Acts

The issue of what may be done before legislation commences also arises where an Act or delegated legislation has been made but its commencement is postponed. Provision is made in the Interpretation Acts of all Australian jurisdictions permitting the exercise of certain powers included in the legislation before its commencing date[24]. Were it not for this provision, it would be necessary to include in each Act specific power, for example, to make regulations or appointments that have to be in place when the Act commences operation.

The sections prevent the result of the exercise of the power having effect prior to the Act's commencement but things can be in place to operate on that day. The power is applicable to amending Acts as well as to original Acts. In the absence of express provision to this effect, it was difficult to claim the Interpretation Act section could justify the exercise of powers under a section of the principal Act, as amended, when it was the amending Act and not the principal Act that had the postponed commencement.

Earlier versions of the Interpretation Act provision also limited the exercise of the power to those things necessary to bring an Act into operation, for example a proclamation fixing the commencement date. The present form of the sections is not confined in this way.[25]

The sections only apply to the exercise of powers recognised by the Act in question. It is not a general right to do anything which might be thought to relate to the subject matter of the legislation. However, the power is probably wide enough to cover all activities that will probably need to be engaged in for the purpose of anticipating the operation of the legislation.

It should be noted that in the Commonwealth and New South Wales Acts there is a limitation on the power to act prior to the commencement of legislation. The Interpretation Act provisions only apply to the making of instruments to give effect to a power in the legislation. The Acts of all the other jurisdictions permit the doing of anything for the purpose of enabling the exercise of the power. In practice this may not matter greatly as most pre-commencement actions will involve the making of an instrument (which is not limited to an instrument of a legislative character). The expression 'instrument' is probably sufficient to cover any written document.

It could be argued that the Interpretation Act sections are intended to cover the field of post-making/pre-commencement activity thereby limiting the range of actions that might be taken in reliance on the prerogative or contract. Again it probably matters little as the actions to be taken would generally fall within the powers referred to in the legislation.

Retrospectivity

Where action has been taken in anticipation of legislation, it is common to find that the legislation when made validates the action taken with retrospective effect. This can create some issues additional to those which arise from the application of the general interpretation presumption that legislation is to be construed as not operating retrospectively[26].

The Senate takes a particular interest in retrospective tax legislation. *Odgers Senate Practice* (11th ed)[27] notes that the *Customs Act 1901* (ss 226 and 273EA) and the *Excise Act 1901* (ss 114 and 160B) contain provisions which allow the collection of customs duties and excise duties from the time of the announcement of proposals by the Government, within a period of 12 months before the passage of legislation to validate the duties. The purpose of these provisions is said to be to ensure that windfall profits may not be made between the time of announcement of duties and the enactment of legislation to levy the duties. However, the commentary notes that while the Senate has not declined to pass a Bill validating increases in duties, there have been instances of the Senate acting to limit the effect of a retrospective Bill.

Odgers continues that, in relation to other taxes, the Senate in 1988 passed a declaratory resolution, as part of an amendment to the motion for the second reading of a bill, to the effect that if more than six months elapses between a government announcement of a taxation proposal and the introduction or publication of a bill, the Senate will amend the bill to reduce the period of retrospectivity to the time since the introduction or publication of the bill.

The Scrutiny of Bills Committee has also adopted a role in relation to retrospective legislation. As a matter of course, the Committee draws the attention of the Senate to retrospective legislation, particularly tax legislation.

The Committee has stated its attitude to retrospectivity as follows[28]:

> The Committee endorses the traditional view of retrospective legislation. Its approach is to draw attention to Bills that seek to have an impact on a matter that has occurred prior to their enactment. It will comment adversely where such a Bill has a detrimental effect on people. However, it will not comment adversely if:
>
> - apart from the Commonwealth itself, the Bill is for the benefit of those affected;
> - the Bill does no more than make a technical amendment or correct a drafting error; or
> - the Bill implements a tax or revenue measure in respect of which the relevant Minister has published a date from which the measure is to apply, and the publication took place prior to the date of application.

> In the Committee's view, where proposed legislation is to have retrospective effect, the explanatory memorandum should set out in detail the reasons retrospectivity is sought.

It can thus be seen that, as far as the Commonwealth is concerned, the passage of retrospective legislation validating action taken in anticipation of the legislation is not completely straightforward. The Senate will require the action to be justified.

A greater limitation is imposed on backdating of delegated legislation. A provision is to be found in all jurisdictions except Western Australia that imposes a limitation on the making of such legislation.[29] However, the form of limitation provided in the different jurisdictions varies.[30]

Broadly speaking, delegated legislation either cannot be given retrospective operation or has no effect if the rights of a person would be affected adversely. It is thus not possible to validate action taken in anticipation of delegated legislation if so to do would be to disadvantage a person. If such validation is to occur, it must be done by an Act.

Conclusion

The discussion above indicates that the Executive can take action in anticipation of legislation provided that the action does not contradict existing legislation. The exercise of prerogative powers and the entry into contracts provides a means of enabling a government to set up mechanisms to carry out the legislative mandate once the legislation is passed. The Interpretation Acts give like power once the legislation is passed and is awaiting commencement. What cannot be achieved is the imposition of obligations on persons or the interference with established rights. Legislation is needed for these purposes. Any such legislation will have to contend with the limitations on the use of retrospective legislation that are outlined above.

2. Courts and tribunals

Can a court or tribunal tailor its orders in anticipation of a change to be made to legislation? The short answer is No. Courts and tribunals must apply the law that is relevant to the matter before them. The fact that a change is about to occur in that law is not something that can be taken into account in determining the result that flows from the existing law. 'A Court of law has no power to grant a dispensation from obedience to an Act of Parliament'[31].

The issue seems to have arisen most frequently in relation to a request to adjourn an application before a court because the relevant law is about to be amended. While there have been instances where the court has adhered to such a request, the general approach is to refuse it. McHugh JA in *Sydney City Council v Ke-Su Investments Pty Limited* summarised the position[32]:

> …as a general rule it is not a proper exercise of the discretion to grant an adjournment on the ground that it is believed that the law may or will be changed in the near or remote future. As Dean J pointed out in *R v Whiteway; Ex parte Stevenson* [1961] VR 161 at 171, ´I think it was the duty of the court when the applications came on for hearing to deal with them in accordance with the law as it then stood. It would be a cause of injustice if courts could adjourn cases because they had some real or imagined belief that the law might be amended.'

In *Meggits* case[33] the NSW Court of Appeal rejected an argument that a different approach should be adopted where the proposed change is beneficial to an applicant. It said that this was not relevant to the application of the general principle.

However, the Court acknowledged that an adjournment might be possible in two circumstances. First, where the adjournment is sought to enable a proposition established in

a decided case to be tested in an appeal brought by the parties to that case. The reason given for this was that a pending appeal is different from a proposal for legislative amendment in that there is a level of certainty that the point will be addressed and knowledge that, if and when it is, the decision of the court higher in the appellate chain will declare the law on the relevant topic with retrospective effect.

Second, it was postulated that it may be proper to have regard to imminent legislative changes where the court is dealing with an application for a discretionary remedy such as a prerogative remedy or an injunction or declaration. Such relief may be refused on the ground of futility and a proposed change in legislation may be relevant to that issue.

As these decisions show, the refusal to grant an adjournment may be to the disadvantage of an applicant. The relevant proposals before the court in *Meggitt's* case were to reverse a previous ruling of the court. The proposed changes had been announced by the responsible Minister. It seems that the courts take a sceptical view of promises contained in Ministerial statements and the speed with which they may be executed.

Tribunals that deal with review of the merits of government decisions find themselves in a difficult position when a government has announced an intention to change the law. While it may not be legally correct to do so, where a government proposes to adopt or change a law in a manner *favourable* to a citizen, it will often implement that change in advance by advising agencies to act as if the change had been made. It is unlikely that such action will attract a challenge. However, a tribunal is bound by the law as it stands. It does not have the luxury of being able to act in the way that the executive can choose to proceed. It cannot make the allowance that the agency can.

An example of this position is provided by *Re Waterford and Department of Health (No 2)*[34]. The government had decided to widen the range of documents that were to be available under the *Freedom of Information Act 1982* (Cth) by including documents that had been brought into existence prior to the commencement of the Act. It had introduced a Bill into the Parliament to achieve this purpose. It had instructed agencies to act as if the Bill had been passed. The Administrative Appeals Tribunal nonetheless said that it was bound by the law. Despite the fact that, in reaching a decision it is to exercise all the powers of the decision-maker, it could not consider the applicability of exemption provisions to prior documents as the Act still did not apply to these.

The ruling of courts and tribunals that they are bound to apply the law as it stands seems the only approach open to them to take. To anticipate a change and purport to apply the law in a form that the court or tribunal is told it is about to take would negate the rule of law. This is so even in the case of legislation that has been made but has not yet commenced. The role of the courts is to interpret and apply legislation, not to make it.[35]

However, the approach adopted to applications to adjourn proceedings pending a change in the law seems to take the matter too far. The court is able to avoid abuse of its processes by specifying the length of the adjournment and monitoring subsequent proceedings. *Meggitt's* case stands as an example of when insistence on clearing the appeal lists resulted in unfairness to a party. The appellant had no capacity to control the commencement of the change in the law that was intended to overturn an existing ruling of the court that determined his position adversely. The courts should not adopt a rigid approach. There may well be circumstances where the clear justice of the outcome may warrant the adjournment of proceedings where it is apparent that a change is to be made in legislation.

Endnotes

1 *Fitzgerald v Muldoon* [1976] 2 NZLR 615.
2 See *Meggitt Overseas Limited v Grdovic* (1998) 43 NSWLR 527 and most recently in the High Court *O'Donoghue v Ireland* (2008) 244 ALR 404 at 417[46]. In *Gribbles Pathology (Vic) Pty Ltd v Minister for Human Services & Health* [1996] FCA 478 the Full Federal Court cited *Fitzgerald's* case as authority for rejecting the argument that the Minister could choose which of two Determinations to follow where both were applicable but incompatible. To allow this would be 'tantamount to conferring on the Minister a power to suspend law having statutory force'.
3 Above n 2 at 622.
4 (1984) 156 CLR 532 at 580.
5 There is authority suggesting that the prerogative includes all non-legislative powers of the Crown, ie common law powers are a part of the prerogative: see George Winterton *Parliament, The Executive and the Governor-General*, (MUP, 1983), 112 and authorities cited. Others take a different view and for convenience in the present context the division is maintained.
6 (1934) 52 CLR 455.
7 At 475.
8 At 507.
9 Notably Professor Enid Campbell, see 'Commonwealth Contracts' (1970) 44 *ALJ* 14. For further discussion, including contrary views, see Leslie Zines *The High Court and the Constitution* (4th ed, 1997, Butterworths), 257; Nicholas Seddon *Government Contracts* (3rd ed, 2004, Federation Press), 54; Winterton, op cit n 5, 44.
10 Ibid.
11 Seddon, op cit n 9, 62.
12 *Bardolph's* case, n 6, per Dixon J at 509.
13 *Victoria v Commonwealth* (1975) 134 CLR 338.
14 See Winterton, op cit n 5, ch 6.
15 But cf *Johnson v Kent* (1975) 132 CLR 164 where the High Court seemed to endorse the view that the prerogative authorised the Commonwealth to establish social and recreational facilities on Commonwealth land in the ACT.
16 Winterton, op cit n 5, 113 ff.
17 [1920] AC 508.
18 At 575.
19 (1974) 131 CLR 477.
20 Per Barwick CJ at 488 with the other judges agreeing.
21 Op cit n 5, 115.
22 Labor's Plan for Veterans' Affairs, November 2007, p24.
23 [2008] EWCA Civ 148 (4 March 2008).
24 Cth, s 4; ACT, s 81; NSW, s 26; NT, s 8; Qld, s 17; SA, s 14C; Tas, s 11; Vic, s 13; WA, s 25.
25 See D C Pearce and Robert Geddes *Statutory Interpretation in Australia* (6th ed, 2006, Lexis Nexis) 199 for further detail of the operation of the sections, including judicial decisions.
26 See generally Pearce and Geddes, op cit n 25, ch 10.
27 Chapter 13 Financial Legislation, heading 'Retrospectivity of tax legislation'.
28 Scrutiny of Bills Committee*, Work of the Committee during the 40th Parliament February 2002-August 2004*, 14
29 ACT *Legislation Act 2001* s 76; Cth *Legislative Instruments Act 2003* s 12 (AIA s 48); NSW *Interpretation Act 1987* s 39; NT *Interpretation Act* s 63; Qld *Statutory Instruments Act 1987* ss 32, 34; SA *Subordinate Legislation Act 1978* s 10AA; *Tas Acts Interpretation Act 1931* s 47; Vic *Subordinate Legislation Act 1994* s 16.
30 See Dennis Pearce and Stephen Argument *Delegated Legislation in Australia* (3rd ed, 2005, LexisNexis), 387 for the details.
31 Per Earl Loreburn LC *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board* [1912] AC 788 at 795; cited by Brennan J in *P v P* (1994) 181 CLR 583 at 620 and Mason P in *Meggitt's* case, n 2, at 532.
32 [1985] 1 NSWLR 246 at 258.
33 See n 2.
34 (1983) 5 ALNN197; see also *Re Seale and Repatriation Commission* (2004) 83 ALD 735.
35 This view of the role of the judge in interpretation is not accepted in other jurisdictions: see the discussion by Suzanne Corcoran, 'The Architecture of Interpretation: Dynamic Practice and Constitutional Principles' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005), ch 3, particularly at n 4, citing Basil S Markenis (ed), *Law Making, Law Finding and Law Shaping: The Diverse Influences* (OUP, 1997) 91.

RECENT DEVELOPMENTS

Alice Mantel*

Whole-of-government review of e-security

The Attorney-General Robert McClelland and the Minister for Broadband, Communications and the Digital Economy Senator Stephen Conroy have announced a whole-of-government review of e-security.

Australia's ever-increasing reliance on information and communications technology and the threat of a hostile online environment has prompted the review which will assist the development of a national framework for securing Australia's electronic networks.

'New and networked systems increasingly underpin our business and social interactions, but they also provide fertile ground for exploitation by cyber criminals', Mr McClelland said. 'The e-security review is an opportunity to look at what help the Government can provide to develop a more secure and trusted electronic operating environment for both the public and private sectors. The review will also consider whether Commonwealth programs can be better focused to deal with the ever increasing range of online threats.'

Senator Conroy said that the review of e-security was a vital step towards fostering confidence in using the internet for personal and business activities.

A multi-agency team, led by the Attorney-General's Department, will conduct the review, which will be completed by the end of this year. Details of how the public and industry can contribute to this review are available at: www.ag.gov.au/esecurityreview.

MR 2/7/08

New inquiry into immigration detention

The Minister for Immigration, Senator Chris Evans, has asked the Joint Standing Committee on Migration to inquire into the criteria for immigration detention and alternatives available.

There are currently 461 people in immigration detention across Australia. Some of these are seeking asylum in Australia, others are appealing deportation following criminal offences, and others have breached the conditions of their visa or have entered illegally and are under investigation.

The Chair of the Committee, Michael Danby, said 'A humanitarian approach that treats all people with dignity needs to be integrated into Australian policy on overseas arrivals. This inquiry is an important initiative in setting Australia's immigration detention policies and exploring options for the future. I encourage all those who have had experience of immigration detention to contribute to this inquiry and help shape both a fairer and more efficient system.'

In April 2008 the Committee visited the Villawood Detention Centre in Sydney and spoke to

** AIAL Forum editor*

staff, advocacy workers and ex-detainees. Concerns were raised regarding the length of time in detention, the application and appeal processes and the physical environment of the centres.

The Committee is now setting out to develop a blueprint for Australia's immigration detention policy and centres and will report on issues such as:

- the criteria for detention and length of time in detention;
- the criteria for release from detention;
- accountability and transparency in immigration detention processes;
- the infrastructure and physical environments of detention centres;
- types of detention (including residential housing and community detention) and other alternatives; and
- the administration of the services available to those in detention.

Background information and the full terms of reference can be found at the inquiry website at: http://www.aph.gov.au/house/committee/mig/detention/index.htm

Inquiry into developing whistleblower protection in the public sector announced

A wide-ranging inquiry into protections for public interest disclosures (whistleblowing) within the Australian Government public sector was announced by the House of Representatives Standing Committee on Legal and Constitutional Affairs.

At present there are no uniform laws to protect whistleblowers. Some protections exist at both the federal and at the State and Territory level. At the federal level, the *Public Service Act 1999* provides protection for Australian Public Service (APS) employees making disclosures in a narrow range of circumstances.

The Chair of the Federal parliamentary committee, Mark Dreyfus QC, said, 'This inquiry is an important initiative in that it will consider and report on a preferred model for legislation to protect public interest disclosures within the Australian Government public sector.'

The Attorney-General, the Hon. Robert McClelland MP, on behalf of the Cabinet Secretary, Senator the Hon. John Faulkner, has asked the Committee to inquire into and report on issues such as:

- the categories of people who could make protected disclosures
- the types of disclosures that should be protected
- the conditions that should apply to a person making a disclosure
- the scope of statutory protection that should be available
- procedures in relation to protected disclosures
- the relationship between the Committee's preferred model and existing Commonwealth laws, and
- such other matters as the Committee considers appropriate.

Background information and the full terms of reference can be found at the inquiry website at www.aph.gov.au/laca.

Disability treaty ratified

Australia has ratified the UN Convention on the Rights of Persons with Disabilities, making Australia one of the first Western countries to ratify the Convention.

Australia joins 29 other countries around the world in a move that aims to promote a global community in which all people with disability are equal and active citizens.

Ratifying the Convention clearly demonstrates the Rudd Government's international commitment to ensuring people with disability are treated equally and not as second-class citizens, Attorney-General Robert McClelland said.

Attorney-General Robert McClelland has tabled a national interest analysis, examining the impact on Australia of the United Nations Convention on the Rights of Persons with Disabilities. The analysis, which is the result of wide-ranging consultation, examines the impact of ratification on Australia and Australians living with disability. It says ratification of the treaty is likely to raise awareness of disability issues and foster a more inclusive and cohesive society.

MR 18/7/08

Coercive powers report tabled

Federal Attorney-General, Robert McClelland, announced that the *Coercive Information-gathering Powers of Agencies* report by the Administrative Review Council has been tabled in Parliament.

The report focuses on the powers granted to Government agencies for compelling the provision of information, the production of documents, and the answering of questions.

It considers the use of these powers with specific reference to the legislation and practices of Centrelink, Medicare Australia, the Australian Securities and Investments Commission, the Australian Prudential Regulation Authority, the Australian Taxation Office and the Australian Competition and Consumer Commission.

Examples of recommended best practice include:

- agencies should consider alternative means of obtaining information before using coercive information-gathering powers;
- coercive information-gathering powers should only be delegated to sufficiently senior and experienced officers in an agency;
- coercive information-gathering notices should comply with privacy legislation and inform recipients of their rights in relation to privilege.

Matters covered by the principles include what the 'trigger' threshold for use of the powers should be, which agency officers should exercise the powers, the conduct of hearings, training, privilege, and the exchange of information between agencies.

MR 4/6/08

Inquiry into budget's impact on public sector agencies

The Chair of the Public Accounts Committee Sharon Grierson has announced a new inquiry into the impact of the efficiency dividend on smaller public sector agencies.
The dividend was introduced in 1987-88. Each year, the public funding component of agencies' budgets has usually been trimmed by 1.25 per cent. For the 2008-09 year only, the Government increased the efficiency dividend by an extra 2 per cent. This implemented an election commitment.

'The Committee is concerned that the efficiency dividend may have had a greater effect on small agencies than the larger ones,' Ms Grierson said. 'Small agencies often don't implement new policy, so they don't receive extra funding on a regular basis. It appears that for some agencies the only funding experience may be a constant shaving of their budget. Although they have small budgets, these agencies play a vital part in our system of government. They include the High Court, the Australian National Audit Office, the Ombudsman and the Parliamentary Departments.'

Preliminary statistics of agencies' budgets between 2000-01 and 2008-09 show a noticeable difference in growth between types of agencies. For small agencies (budgets less than $150 million per annum), their budgets grew by 27 per cent on average. For non-security large agencies, budget growth was 57 per cent. In the large security agencies, budget growth was 185 per cent on average. Over this period, the Consumer Price Index increased by 30 per cent.

'Preliminary statistics suggest that the budgets of small agencies are barely keeping up with inflation, and have lagged behind the budgets of larger agencies,' Ms Grierson said. The Committee will examine the impact on smaller agencies' functions, performance and staffing arrangements.

Coastal communities inquiry announced

The House of Representatives Climate Change, Water, Environment and the Arts Committee is to conduct an inquiry into climate change and environmental impacts on Australian coastal communities.

Committee Chair Jennie George welcomed the co-referral of this inquiry by the Minister for the Environment, Heritage and the Arts Peter Garrett MP and the Minister for Climate Change and Water Senator Penny Wong.

The terms of reference provide for the committee to inquire into climate change and environmental pressures experienced by Australian coastal areas. The inquiry will have particular regard to:

- existing policies and programs related to coastal zone management, taking in the catchment-coast-ocean continuum
- the environmental impacts of coastal population growth and mechanisms to promote sustainable use of coastal resources
- the impact of climate change on coastal areas and strategies to deal with climate change adaptation, particularly in response to projected sea level rise
- mechanisms to promote sustainable coastal communities
- governance and institutional arrangements for the coastal zone.

Submissions have now closed and a schedule of public hearings have been held. Further details about the inquiry can be obtained from the committee's website at http://www.aph.gov.au/ccwea.

Meeting the needs of carers

The House of Representatives Family and Community Committee will conduct an inquiry to determine how to better meet the needs of carers who look after those with chronic illness, disability or frailty.

Committee Chair Annette Ellis welcomed the referral of this inquiry from the Federal Community Services Minister Jenny Macklin. A 2003 Australian Bureau of Statistics survey

found there were over 2.5 million carers in Australia, including more than 470,000 primary carers.

The Australian Institute of Health and Welfare anticipates there will be more than 600,000 primary carers by 2013, with 70 per cent likely to be women.

Ms Ellis said 'The Committee embraces this opportunity to hear first-hand through a formal inquiry from carers about their day-to-day experiences and to learn more about the social, economic and physical costs of being a carer.'

The Committee will inquire into and report on:

- the role and contribution of carers in society and how this should be recognised;
- the barriers to social and economic participation for carers, with a particular focus on helping carers to find and/or retain employment;
- the practical measures required to better support carers, including key priorities for action; and
- strategies to assist carers to access the same range of opportunities and choices as the wider community, including strategies to increase the capacity for carers to make choices within their caring roles, transition into and out of caring, and effectively plan for the future

The Committee will report in early 2009.

Financial Ombudsman Service commences

The Financial Ombudsman Service (FOS) has commenced, merging the Banking & Financial Services Ombudsman (BFSO), the Financial Industry Complaints Service and the Insurance Ombudsman Service.

All Terms of Reference, procedures and policies which previously applied at BFSO, FICS and IOS will continue to apply to disputes which come to the Financial Ombudsman Service following the merger of the three schemes this month.

The Banking & Finance division of the Financial Ombudsman Service now provides the dispute resolution service previously conducted by the BFSO.

An intensive consultation period will take place during the next 18 months during which a single Terms of Reference will be created for the FOS. For more information on the new service, visit www.fos.org.au/.

MR 1/7/2008

Permanent HREOC Commissioners appointed

Federal Attorney-General Robert McClelland has announced the appointment of Graeme Innes as permanent Disability Discrimination Commissioner and Tom Calma as permanent Race Discrimination Commissioner.

Mr Innes is the current Human Rights Commissioner and has acted as Disability Discrimination Commissioner since December 2005. Mr Calma is the current Aboriginal and Torres Strait Islander Social Justice Commissioner and has acted as the Race Discrimination Commissioner since July 2004.

MR 2/7/2008

New Federal Discrimination Law publication released

The Human Rights and Equal Opportunity Commission (HREOC) has released a new publication entitled *Federal Discrimination Law*.

Federal Discrimination Law is produced by HREOC's Legal Section and examines the significant issues that have arisen in federal unlawful discrimination cases. It provides a comprehensive coverage of decisions in the jurisdiction as well as highlighting a range of relevant issues of practice and procedure.

FDL Online provides an updated version of *Federal Discrimination Law*, with the date of currency reflected on the title page.

MR 26/6/2008

Search and you may find Google's Privacy Policy?

Federal Australian Privacy Foundation (APF) Board Member, Dan Svantesson, said: 'Google Australia is taking steps to improve its approach to privacy. However, so far it has failed to take the most obvious step of making its Privacy Policy easy to find.'

Mr Svantesson said that unlike most major Internet companies, Google has refused to place a link to its Privacy Policy on the front page of its website. 'This makes it unnecessarily difficult for people to even know that Google has a Privacy Policy, not to mention what is in it and how it applies to Google service users whose data may be captured,' he said.

Search engine company Google has on several occasions been accused of being one of the worst privacy offenders amongst the popular Internet companies and previously, a coalition of privacy advocates in the US suggested that Google may be violating Californian Law which requires privacy policies to be displayed 'conspicuously,' he said.

'While Australian law does not specifically address this issue, one would hope that companies like Google would wish to pursue "best practice". In this case, doing so would mean placing a seven letter (i.e. "privacy") link on the front page,' Mr Svantesson said.

MR 8/6/08

Same-sex equality in superannuation is not achieved

Greens Senator Kerry Nettle welcomed the Government's same-sex superannuation legislation introduced to the Parliament on 27 May, but was disappointed that it did not deliver superannuation equality for all same-sex couples.

'The legislation removes discrimination for same-sex couples in Commonwealth super schemes but it does not remove the discrimination that same-sex couples face in commercial superannuation schemes,' said Senator Nettle. 'The government is relying on commercial superannuation firms to make these decisions. This is not the removal of discrimination that the government promised the public.'

By contrast, the Federal Human Rights Commissioner, Graeme Innes, has welcomed the introduction of Same-Sex Relationships (Equal Treatment in Commonwealth Laws - Superannuation) Bill 2008 saying it would provide equal access to superannuation benefits for all same-sex couples and their children. He commented that 'Superannuation is one of

the main ways of saving for retirement. Most people expect that their superannuation entitlements will be inherited by their partner, children or other dependants, but Commonwealth employees in same-sex relationships have never had this right. This Bill, if passed, will ensure that right from 1 July.'

Senator Nettle said the Greens will look at moving amendments to ensure discrimination is removed for same-sex couples in commercial superannuation.

MR 27/5/08

First ACT same-sex commitment ceremony takes place

Mr Kevin Boreham, a university lecturer, and Mr Edwin Ho, a public servant, were the first same-sex couple to become 'partners for life' in a commitment ceremony held under the ACT's new civil partnership laws. A small gathering of friends witnessed the historic event held within view of federal parliament.

The ACT government last month abandoned plans to recognise same-sex relationships through civil union ceremonies after the federal Labor government said it would veto the move. Instead, the Territory's Legislative Assembly passed the civil partnership laws which allow for commitment ceremonies.

Simon Jenkins, AAP Correspondent
2/6/08

FREEDOM OF INFORMATION DEVELOPMENTS

Alice Mantel*

Federal law reform program announced

Cabinet Secretary, Senator John Faulkner has announced the first step in broad-ranging Freedom of Information (FOI) law reform.

'The Government is committed to reforming the Commonwealth FOI Act and to promoting a pro-disclosure culture across the Government', Senator Faulkner said.

Proposed reforms include the abolition of conclusive certificates which removes the power of Ministers to use conclusive certificates to refuse access to documents despite a decision by the AAT that the documents should be released. The AAT will now be able to undertake full merits review of a decision to claim an exemption.

The legislation abolishing conclusive certificates will be introduced into the Parliament this year.

'Abolishing conclusive certificates is a step towards restoring trust and integrity in the handling of Government information, as all decisions refusing access will now be subject to full independent merits review,' Senator Faulkner said.

Other reforms include a plan to release an exposure draft of FOI reform legislation for public comment and consultation later this year which will include the establishment of an FOI Commissioner and measures to improve and streamline the FOI Act.

'The consultation process will allow the Government to seek a range of views on how we should be improving FOI and implementing the 2007 FOI election commitments. This will be the most significant overhaul of the FOI Act since its inception in 1982', Senator Faulkner said. 'The FOI Act is complex and we want to get the new laws right.'

The Attorney-General will ask the Australian Law Reform Commission (ALRC) not to proceed with its inquiry into FOI laws at this time and the ALRC has agreed to review the FOI Act after the Government's reforms have come into operation rather than proceed with its current FOI review.

MR 25/2008, 22 July 2008

FOI developments in NSW and other States

The New South Wales Ombudsman, Mr Bruce Barbour has announced a comprehensive review of the NSW *Freedom of Information Act 1989*. A discussion paper is due to be released in the coming months.

There have been a number of developments in other jurisdictions in recent months.

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* *AIAL Forum editor*

- In Victoria, the Government has introduced a Bill in the Victorian Parliament to make a number of changes to the FOI Act, including the removal of conclusive certificates as well as application fees.

- In Western Australia, a Bill is before Parliament that would amend the WA FOI Act in a number of respects, including giving the WA State Administrative Tribunal power to review agency FOI decision, a power currently exercised by the WA Information Commissioner.

QLD Premier welcomes independent FOI Report

Premier Anna Bligh has welcomed the 400 page report 'The Right to Information: Reviewing Queensland's Freedom of Information Act' which proposes a fundamental shift in Queensland's 15 year old FOI legislation.

Describing the report as 'a bold and comprehensive reform of one of the most important pieces of legislation in our State,' Ms Bligh indicated that the Queensland Cabinet would prepare a response to the report's 141 recommendations and would expect that the community would be able to comment on an exposure bill of the new laws before the end of 2008, with legislation to be debated in the Parliament in the first half of 2009.

MR 10/6/2008

Recent cases

Bienstein and Attorney General (Commonwealth of Australia) and anor **[2008] AATA 7 (4 January 2008)**

This matter came to the Tribunal as a deemed refusal under s 56 of the FOI Act. That provision allows for review of decisions where the agency or, in this case, Minister, does not make a decision within the statutory timeframe. In this case, the failure to make a decision was occasioned when the Federal Court ruled the Ministers' transfers of the requests to the departments were unlawful and therefore invalid (see *Bienstein v Attorney-General (Commonwealth) and Minister for Justice and Customs (Commonwealth)* (2007) 162 FCR 405.

During a directions hearing the applicant sought a directions that the Ministers be directed to make a decision on the requests by a specified date. The issue for the Tribunal was whether it had power to so direct.

Deputy President Forgie found that the Tribunal has no power to require a respondent agency or Minister to make a decision on a deemed refusal. Whilst it is common for the respondent to offer to make a decision, and though this is to be encouraged, a respondent that does not wish to make a decision cannot be compelled to do so. Once the matter is before the Tribunal it is for the Tribunal to make a decision.

The Tribunal's reasons for decision contain a discussion of the principles of delegation and authorisation of FOI decision-making power under s 23 arrangements. The practical effect of this is that delegates are granted a decision-making power which they exercise in their own right and in their own name, rather than merely exercising someone else's power as that other person's alter ego.

Encel & Secretary, Department of Broadband, Communications & the Digital Economy **[2008] AATA 72 (25 January 2008)**

The applicant sought remission of the charge for production of FOI documents on the grounds that the giving of access was in the general public interest or in the interest of a substantial section of the public (FOI s 29(5)). The documents sought concerned the Government's expenditure on supporting digital and analogue television.

The Tribunal had to consider whether the subject matter of the documents related to an important public issue which would facilitate the public's ability to discuss and review valuable material to public debate and whether the benefit from release of the documents to the applicant would flow to the public at large or a substantial section of the public such that the charge ought not be imposed or reduced.

The Tribunal also considered such factors as the work needed to process the request, the complexity of the request, the cost of processing, whether there was a commercial advantage to the applicant and whether the documents were freely available through other means and held that the charge should not be imposed. While the applicant conceded that the charge would not cause him financial hardship, the Tribunal also appeared to consider that the applicant would not gain any commercial advantage in gaining access to the documents. The fact that there were similar documents already in the public domain would not detract from such a claim.

Cianfrano v Department of Premier and Cabinet [2008] **NSWADT 141 (16 May 2008)**

This matter involved an application for the review of a decision of the Director General of the Department of Premier and Cabinet ('the Department') dated 5 October 2007 made under the FOI Act to refuse access to the whole or part of seven documents relating to Sydney markets on the ground that the documents are either wholly or partly 'exempt'.

The Tribunal recognised that the proper administration of the Government required a degree of confidentiality for Cabinet documents, and that the unauthorised and/or premature disclosure of Government documents undermines the process of government but that the policy must be read subject to the legally enforceable public right of access to information held by the Government, 'subject only to such restrictions as are reasonably necessary for the proper administration of the Government' (s 5(2)(b)).

While the decision to sell the Sydney Markets was clearly one of public importance, the Tribunal was not satisfied by Mr Cianfrano's submissions that there were special, overriding or strong reasons sufficient to displace the assumption that the exemptions have become any less sensitive so as to warrant exercise of the residual discretion. The specific limitation of 10 years has been imposed on exemptions claimed for Cabinet and Executive Council documents and the Tribunal was satisfied that the exemption was justified and reasonably necessary for the proper administration of the Government.

RECENT CASES

Alice Mantel*

In-house independence and LPP again questioned

The decision in *Rich v Harrington* [2007] SCA 1987 arose from Federal Court proceedings brought by Ms Rich, a former partner of PricewaterhouseCoopers Australia (PwC), against the partners of PwC for alleged breaches of anti-discrimination legislation. Ms Rich sought access to PwC's legal advice from both its internal and external lawyers regarding her claim.

The case highlighted the difficulty in maintaining a claim for privilege when publicly referring to legal advice and the difficulty for in-house counsel in establishing that they have the necessary independence for privilege to apply. The case found that it was possible to unintentionally 'waive' or destroy privilege over a piece of legal advice by disclosing the 'substance' or gist of that advice to an opposing party or to the public at large. Ms Rich argued that privilege had been waived when PwC's lawyers wrote stating:

> Our client has acted at all times with the benefit of external advice and does not believe there has been any victimisation or other conduct for which compensation could properly be sought

Previous cases have suggested that reference could be made to the fact that legal advice had been obtained without waiving privilege, provided the reference was framed as a statement merely of the client's opinion. In *Ampolex v Perpetual Trustee (Canberra) Limited* (1996) 40 NSWLR 12, the judge found that the following announcement did not waive privilege:

> The views set out below have regard to the pleadings, the evidence available to Ampolex and the advice of barristers and the solicitors engaged by Ampolex... Ampolex considers that... it is likely that Ampolex will be successful

Justice Branson found that the PwC letter had waived privilege, because it inferred that the substance of the advice endorsed PwC's actions in responding to Ms Rich's claim and PwC had thus used the advice for a 'forensic purpose', which was inconsistent with maintaining confidentiality over the advice. Her Honour suggested that it would be imprudent to indicate that advice had been obtained because it gave its effect greater force.

In finding that the independence of in-house counsel had not been made out in this case, her Honour focused on some facts, in particular: the allegations were made by one partner against other partners; the chief in-house lawyer was a partner and likely to be a respondent to the threatened litigation; and the allegations cast aspersions of a personal, rather than a purely professional, nature on partners, including the leadership of the firm. In this case, the in-house lawyer's business interests were closely intertwined with the outcome of the advice and the relationship with the client (PwC) could affect the lawyer's ability to give detached advice.

Notices to produce challenged

The Federal Court has dismissed an application by Korean Air Lines Co Ltd (KAL) which

* *AIAL Forum editor*

challenged a statutory demand for information and documents issued by the Australian Competition & Consumer Commission (ACCC) under the *Trade Practices Act 1974.*

On 31 October 2007 the ACCC issued a notice under s 155 of the Act requiring KAL to provide information and documents to assist the ACCC's air cargo investigation into alleged cartel activity by a number of international airlines.

KAL challenged the ACCC's power to issue the Notice and asserted that because the ACCC had already decided to institute proceedings against KAL, it was no longer permitted to issue such a notice. KAL also asserted that the ACCC was misusing its s 155 powers as it was seeking information to assist in determining the possible penalty against KAL.

Justice Jacobson rejected all KAL's arguments. He found that no decision had been made by the ACCC to commence proceedings against KAL, that the notice had been issued for the performance of the ACCC's administrative function, that the power to issue the notice had not ceased and that it had not been issued for an improper purpose.

In particular he stated: 'The short answer to KAL's submission is that the evidence before me demonstrates that the purpose of the ACCC in deciding to issue the Notice was to obtain evidence of the extent of any contraventions by KCAL and evidence going to the quantum of any penalty. All of this might ultimately be used in the event that the ACCC decides to commence proceedings. This purpose falls squarely within the Act.'

ACCC NR 128/08, 15 May 2008

Compensation for unauthorised breach by Government employee

In *F v Australian Government Agency* [2008] PrivCmrA 6 the complainant, a former employee of an agency, complained that their personal record had been accessed by a current employee who had used the record to locate the complainant's residential address for reasons unrelated to their employment. Fearing for their safety, the complainant had to change their name and place of residence. The agency rejected their claim for monetary compensation and the complainant went to the Privacy Commissioner.

Under the *Privacy Act 1988*, Information Privacy Principle (IPP) 4(a) requires an agency to protect the personal information it holds with such safeguards that are reasonable in the circumstances to protect against unauthorised access, use or disclosure or other misuse.

The Commissioner found that the agency had not taken adequate steps to prevent unauthorised access and that the complainant's personal information had been used for a purpose for which none of the exceptions applied. Following the incident, the agency had taken remedial action including applying additional protection to the complainant's personal record and terminating the employment of the person who accessed and used the complainant's personal record in an unauthorised manner.

The Commissioner conciliated the matter under s 27(1)(a) of the Privacy Act and the complainant accepted a confidential settlement for costs related to their change of name and residence.

27 June 2008

***Hussain v Minister for Foreign Affairs* [2008] FCAFC 128**

The applicant was an Australian citizen who left the country to attend university in Saudi Arabia in 2003. He returned to Australia in 2005 for a holiday and his passport was

cancelled by the Foreign Affairs Minister on the basis of an adverse security assessment by the Australian Security Intelligence Organisation (ASIO) which alleged that there would be 'a significant risk' that he would participate in, or support others involved in, politically motivated violence, thereby compromising national security. Initially the applicant applied for review in the AAT and the then Attorney-General, Mr Ruddock, issued certificates restricting the disclosure of material to Mr Hussain and his lawyers on the basis that the disclosure of such material would prejudice national security and also ordering that the lawyers be excluded from part of the Tribunal hearing. The AAT affirmed the decision to cancel the passport and the applicant appealed to the Full Bench of the Federal Court. The Court acknowledged that a hearing of 'this nature' could not be characterised as fair and that by denying the applicant access to the relevant information, the certificates had denied him 'even the most basic right' to have his case heard. The Court said 'There are circumstances in which the requirements of natural justice can be overridden.'

Thomas v Mowbray* [2007] HCA 33 (2 August 2007*)

Constitutional law (Cth) - Div 104 of the *Criminal Code* (Cth) confers power on Ch III courts to make interim control orders imposing obligations, prohibitions and restrictions upon an individual for the purpose of protecting the public from a terrorist act - The plaintiff is subject to an interim control order made by the first defendant, Mowbray FM, at the application of the second defendant, an officer of the Australian Federal Police - Whether the interim control order validly made against the plaintiff.

Constitutional law (Cth) - Legislative power - Defence - Whether Div 104 is a law with respect to defence - Whether the defence power is limited to defence against external threats - Whether the defence power is limited to defence of the Commonwealth and the several States as bodies politic - Whether the defence power extends to defence against non-state actors - Relevance of purposive power.

Constitutional law (Cth) - Legislative power - External affairs - Whether Div 104 is a law with respect to external affairs - Relevance of relations with foreign countries - Relevance of definition of 'the public' in Div 104 including the public of a foreign country - Whether Div 104 concerns a 'matter or thing' external to Australia - Whether Div 104 implements a treaty obligation.

Constitutional law (Cth) - Legislative power - Matters referred by the Parliament of a State - Whether Div 104 is a law supported by the *Terrorism (Commonwealth Powers) Act 2003* (Vic) - Presumption against alteration of common law rights.

The High Court upheld the validity of the Criminal Code (Cth) (Subdiv B, Div 104), related to the making of interim control orders to protect the public from a terrorist act. The Court held that the provisions were supported by the defence power (s 51(vi) of the Constitution), while some justices referred to the external affairs power (s 51(xxix)) where necessary and the Code did not infringe Chapter III of the Constitution.

***Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* [2007] HCA 23; (2007) 234 ALR 618; 81 ALJR 1155 (24 May 2007)**

Constitutional law (Cth) - Separation of powers - Judicial power - On the application of the Australian Securities and Investments Commission, the Companies Auditors and Liquidators Disciplinary Board ('the Board') suspended the registration of the appellants as liquidators pursuant to s 1292 of the *Corporations Act 2001* (Cth) - Whether s 1292 of the *Corporations Act 2001* (Cth) invalidly confers the judicial power of the Commonwealth upon the Board.

Constitutional law (Cth) - Judicial power - Meaning of judicial power - Whether disciplinary proceedings involve the exercise of judicial power - Whether the determination of wrongdoing or impropriety involves the exercise of judicial power - Whether the capacity to affect the appellants' 'status' as registered liquidators involves the exercise of judicial power.

Insolvency - Liquidators - Suspension of registration as liquidator - Role and function of the Board - Whether the functions performed by the Board involved the ascertainment or enforcement of an 'existing right or liability' - Whether the function performed by the Board involved the imposition of punishment - Relevance of the composition and membership of the Board - Relevance of the exercise of evaluative or discretionary power - Relevance of historical considerations - Relevance of chameleon principle - Whether the Board exercised judicial power. The court upheld the disciplinary powers of the Board and that it was not exercising judicial power contrary to Ch III of the Constitution.

Visnic v Australian Securities and Investments Commission **[2007] HCA 24; (2007) 234 ALR 413; 81 ALJR 1175 (24 May 2007)**

Constitutional law (Cth) - Separation of powers - Whether a power of disqualification can validly be conferred concurrently upon a Chapter III court and an administrative body - Relevance of the existence of curial powers of disqualification alongside those conferred upon ASIC - Relevance of chameleon principle - Whether conferral of power upon an administrative body is an impermissible circumvention of Ch III of the Constitution.

Constitutional law (Cth) - Judicial power - Meaning of judicial power -Whether the maintenance of professional standards involves the exercise of judicial power - Whether the determination of the 'public interest' involves the exercise of judicial power.

The High Court upheld the validity of s 206F of the *Corporations Act 2001* (Cth) which enables ASIC to disqualify a person from managing a corporation and held that ASIC did not exercise judicial power contrary to Chapter III of the Constitution.

White v Director of Military Prosecutions **[2007] HCA 29; 235 ALR 455**

Constitutional law (Cth) - Defence - Offences by defence members - Service offences - The *Defence Force Discipline Act 1982* (Cth) created a range of offences based on offences against the laws of the Australian Capital Territory, and provided for trial and punishment of these offences exclusively by service tribunals. Whether trials for these offences require an exercise of the judicial power of the Commonwealth within the meaning of Ch III of the Constitution - Whether service tribunals can validly exercise jurisdiction over service offences.

The High Court upheld the validity of ss 115 and 129 of the *Defence Force Discipline Act 1982* (Cth). The sections conferred jurisdiction on courts martial and Defence Force magistrates respectively to try defence members charged with service offences, including those based on offences against the laws of the Australian Capital Territory. The Court held that such trials did not involve the exercise of the judicial power of the Commonwealth within the meaning of Ch III of the Constitution.

SZKTI v Minister for Immigration and Citizenship **[2008] FCAFC 83**

Migration — Refugee Review Tribunal telephoned a person to obtain information about appellant — procedures for obtaining such information in ss 424(2), (3) and 424B of the *Migration Act 1958* (Cth) not followed — whether jurisdictional error.

Migration — Refugee Review Tribunal telephoned a person to obtain information about appellant — whether telephone call raised new 'issues arising in relation to the decision under review' under s 425(1) of the *Migration Act 1958* (Cth) — whether Tribunal therefore required to invite appellant to a new hearing.

Geelong Community for Good Life v Environment Protection **Authority [2008] VSC 185**

Administrative law – Natural justice – Procedural fairness – Certiorari – Proprietor of oil refinery applies to Environment Protection Authority to amend conditions of its licence to emit waste – Whether an incorporated environment group was entitled to be heard against the application to amend – Whether group had a legitimate expectation based on an established course of conduct or a specific assurance – Held, that legitimate expectation doctrine not applicable in law or on the facts – Application for certiorari to quash licence amendments refused.

Evans v State of New South Wales **[2008] FCAFC 130**

Administrative law – declarations – delegated legislation – whether ultra vires – approach to construction – Act and Regulation providing for control of conduct of public in connection with major public event – potential restriction on protest activities – construction of regulation making power – presumption against interference with fundamental rights and freedoms – part Regulation beyond power.

Constitutional law – validity of State statute – whether impermissible burden on implied freedom of political communication – prior question of construction of Act and validity of Regulation made under it – undesirability of deciding unnecessary constitutional question.

Human rights – freedom of speech – freedom of religion.

Statutory interpretation – construction – presumption against interference with fundamental common law rights and freedoms – principle of legality – freedom of speech – freedom of religion.

NATURAL JUSTICE – TOO MUCH, TO LITTLE OR JUST RIGHT?

John McMillan*

Natural justice – striking a balance between law and administration

It borders on legal heresy to suggest that there is too much natural justice. On the contrary, the steady expansion of the natural justice hearing obligation in recent years would perhaps suggest that there is not enough.

But, indeed, there can be too much of a good thing. Excess can be as damaging as a deficiency.

The doctrine of natural justice is undeniably an important thread in our legal heritage. The positive impact of the doctrine on public administration is clear for all to see. It has become well-known and commonly practised that decision-making should be free of bias and conflict of interest, and that a person affected adversely and directly by an administrative decision should be given a prior warning and opportunity to comment. This adherence to natural justice goes well beyond administrative practice and is now rooted in many statutory schemes that spell out the hearing or adjudication procedures that must be followed by decision-makers.

Nor, at a doctrinal level, does natural justice impede the government administration from implementing statutory purposes and objectives. An unyielding principle is that natural justice is merely a doctrine of procedural fairness. It does not speak to the merits of an administrative decision. Natural justice has been likened to a last meal before the hanging, but even so it affirms a fundamental principle that procedural integrity is important, whatever the substantive outcome.

Why, then, can there be too much natural justice? The answer given in this paper is that the hearing rule of natural justice has developed in a way that does not strike an appropriate balance between competing considerations – fairness to the individual, as against practical administrative considerations, such as the importance of finality, efficiency and lack of formality in administrative decision-making. Natural justice is a doctrine of law, but it must develop sensibly as a doctrine of administrative law.

A secondary theme in the paper is that natural justice principles have been too heavily influenced by legal and judicial notions of how decisions should be made. One way of explaining this point is to observe that courts face few of the difficulties that dominate recent case law developments on natural justice. By and large, all that a court has to do is to schedule a date for hearing, give sufficient advance notice to the parties so that they can prepare for the hearing, allow sufficient time at the hearing for each party to present its case and to question the case presented by the other side, then retire to prepare a judgment that

* *Commonwealth Ombudsman.* *This paper was presented at the AIAL National Conference, Canberra, June 2007.*

addresses and resolves the issues in dispute between the parties. Difficult issues can arise along the way for a court – for example, whether to shorten the cross-examination of a witness, or allow an adjournment at the request of a party to gather more evidence – but even on those issues there are clearly-established principles to guide the court. Usually, too, the court will have the benefit of argument by legal counsel in clarifying the issues and deciding how to rule on any procedural question. The long-experience of the judge in dealing with similar procedural questions is also a great advantage.

In summary, it is well known what a court has to do to accord natural justice. As a consequence, it is infrequent that a court decision is set aside for a breach of the hearing rule of natural justice.

It is no longer simple in administrative decision-making to decide what is required to comply with natural justice. The guidelines provided by courts are often presented in soothing tones – 'the principles of natural justice do not comprise rigid rules',[1] 'natural justice … requires fairness in all the circumstances',[2] and '[p]rocedural fairness, properly understood, is a question of nothing more than fairness'[3] – but the apparent simplicity and flexibility of that approach can mask the complexity of the administrative setting in which practical answers have to be found.

Administrative decisions evolve from a process that can be hard to script. There is usually no single occasion or hearing when all the issues and competing evidence is brought together. The matters to be resolved in making a decision can change and unfold unpredictably. There can be multiple parties who are have an interest in or might be adversely affected by a single decision, and who want to be heard and to comment on what others have said. The documentation for the decision – letters, submissions, internal briefing papers, case summaries, and other assorted documents – can be received at irregular times. The administrative process may also necessitate that many different officials be consulted or given the file before a decision is made.

Difficulties of those kinds have arisen in many of the recent cases in which courts have ruled that administrative decisions were made in breach of natural justice. There are nowadays few reported instances in which the breach of natural justice consisted of a total failure by the decision-maker to provide a hearing to a person against whom an adverse decision was later made. In nearly every reported case the person was aware that a decision would be made, was given an opportunity to comment, and exercised that right, often at multiple stages in the decision-making process. And yet a lapse of judgment or wrong choice by the decision-maker at a particular stage of the process has resulted in the entire process being declared invalid.

The following discussion looks at some recent cases and issues under three headings. The first heading deals with cases in which the decision-maker was in breach of natural justice by failing to seek comments from a person on an adverse assessment that had been made internally within the agency of the person's case or application. The second and third headings discuss some practical examples of where it can be difficult to comply with natural justice without disregarding other demands upon an agency.

The conclusion drawn from these examples is not that the cases were necessarily wrongly-decided but that they illustrate the need for a broader debate on how to frame the principles of natural justice.

Seeking comments on an internal agency assessment

The hearing rule of natural justice requires that a person be told 'the case to be met' and have an opportunity to comment in reply. That has crystallised into a principle that a person

be given an opportunity to respond to 'adverse information that is credible, relevant and significant'.

The difficulty of applying that principle is illustrated by *Kioa v West*,[4] in which Brennan J first enunciated that standard. Mr Kioa faced deportation after the expiration more than a year earlier of his student visa. He was given two opportunities to present his case – at an interview with a Departmental officer and in a submission from the Legal Aid Commission of Victoria. Following that, an internal paper was prepared within the Department to brief the decision-maker on the case. The internal paper referred to a point made in the Legal Aid submission, that Mr Kioa had been providing pastoral care to other illegal immigrants from Tonga, but added: 'his active involvement with other persons who are seeking to circumvent Australia's immigration laws must be a source of concern'. By majority, the High Court held that this internal remark – described variously as 'extremely prejudicial', 'clearly prejudicial', and 'credible, relevant and damaging' – gave rise to the breach of natural justice.

It is debatable whether that was a reasonable description of the remark in the internal paper. The alternative view put by Gibbs CJ in dissent was that the remark was merely 'the officer's comment on material put before the Department by Mr Kioa and his solicitor' and reflected Government policy.

Putting that debate to one side, the more significant point to emerge from *Kioa* is that natural justice placed an obligation on the decision-maker, before reaching a decision, to notify a person of any adverse comment made by other officers of the agency during their internal discussion and analysis of a case. That obligation existed even if – as in *Kioa* – there was nothing to suggest that the decision-maker had been influenced by the internal comments in reaching a decision.

The difficulty of imposing a rule to that effect on administrative decision-making is that it makes it difficult to know what and when to disclose. It is characteristic of the decision-making process that there will be many documents on file that summarise and analyse the issues, and comment upon points made in letters and submissions received from a person. Nor will it be a simple matter to collect all adverse comments together and provide them to a person for comment. If other documents are subsequently received or prepared, the need may arise for a further round of disclosure and comment. And possibly another round after that.

These difficulties post-*Kioa* are not imagined, but real. It is common now in administrative decision-making for more than one hearing to be given to a person, through abundant caution. It is equally common to hear administrators discuss their uncertainty about what should be disclosed, and to seek legal advice on the matter. This can complicate and lengthen the process of making a decision.

Two examples – from among many[5] – illustrate this difficulty, of what and when to disclose. The first example, *Conyngham v Minister for Immigration and Ethnic Affairs*,[6] concerned a sponsorship application by Mr Conyngham on behalf of an American singing group, Buck Ram's Platters, to visit Australia for a concert tour. Under Government policy, an objection could be lodged by the relevant union representing Australian performing artists. The objection could be considered by a National Disputes Committee, comprising a senior officer of the Department, a union nominee, and a person nominated by sponsor organisations.

The Committee in this case had before it the original and a supplementary objection lodged by Actors Equity, as well as Mr Conyngham's reply to the original objection. The Committee prepared a report for the Minister, unanimously recommending that the application be refused under the Government policy designed to safeguard the employment opportunities of Australian performing artists. The Committee noted that Actors Equity had cast doubt on

the good reputation and standing of Mr Conyngham, but rejected that assertion and concluded that on the material available to the Committee he was a suitable sponsor.

The Federal Court held that there had been a breach of natural justice, because Mr Conyngham had not been told of Actors Equity's supplementary objection, only the original objection. Nor was the Minister shown the supplementary objection, and the Committee in its report had expressly rejected the thrust of that objection. The Court nevertheless ruled that the objection contained an allegation of serious impropriety that should have been put to Mr Conyngham. The Court explained that there was a real risk of unconscious prejudice influencing the Committee's report and flowing through into the decision of the Minister – 'the mere possibility is enough'.[7]

A similar approach was taken by the Court in *NIB Health Funds Ltd v Private Health Insurance Administration Council*.[8] The Council, comprising a Commissioner and four part-time members, administered an insurance fund that assessed and adjusted the liability of private health benefit organisations to make payments to aged and chronically ill patients. At regular intervals the Council would decide how much was owing or payable to the fund by individual insurers, to produce a zero sum calculation. NIB made a detailed submission to the Council that it had miscalculated its liability in a past period, and requested an adjustment, notwithstanding that the decisions for that period had been made and notified to all organisations. The request was the subject of consultation over a few months between NIB and officers of the Council.

The Council requested its Chief Executive Officer to prepare a report on NIB's submission. Her report was strongly worded and attributed NIB's predicament to its own management deficiencies. The Court held that the failure of the Council to put those allegations to NIB and seek its response amounted to a breach of procedural fairness. The Council had sought to counter that finding during the trial by having three of its five members (the other two were unavailable) give evidence to the Court that they had not been influenced by the CEO's report. Apart from doubting that the Council was not influenced by a forthright report of that kind, the Court held that the failure to disclose the report created a real risk of prejudice, albeit subconscious. The material in the CEO's report was credible, relevant and significant, and a bona fide disavowal or reliance upon it by the Council members would not suffice to warrant its non-disclosure to NIB.

A criticism that can be made of each of those cases is that they exhibit a tendency to treat the officials who advise the decision-maker as being at arm's length, rather than an integral step in the decision-maker's analysis of the issues. The opinions of the adviser are treated as though they were submissions put by an opposing party, raising new issues that warrant a response from the subject of the decision. Doubtless there will be instances in which an adviser does raise a substantially new and unexpected issue that warrants a response, but to put that gloss on every candid or adverse comment by an adviser is to misconstrue the adviser's role and the way that administrative decisions are made.

A decision-maker is not expected to disclose his or her own preliminary or draft thoughts in advance of reaching a decision.[9] Why, then, should a different rule apply to the preliminary evaluation of the adviser, when to all intents and purposes the adviser is conjoined to the decision-maker by assisting in the deliberation of a matter. To require that a separate hearing be given because the adviser's views are 'credible, relevant and significant' is to misapprehend the administrative process. To go even further and require a hearing if there is 'a real risk of prejudice, albeit subconscious'[10] is to take a step too far.

A useful comparison can again be made with how natural justice applies to courts. After the parties have been given an opportunity to present their case, the court retires to analyse the evidence and submissions and to prepare the reasons for judgment. It is known that judges

discuss cases in chambers with other judges and associates – but there is no suggestion that the parties should be recalled for a further hearing after that internal deliberation. Nor is it uncommon for judgments to deal with issues in a way different to the submissions of the parties, to develop novel principles of law, to cite cases and propositions that were not raised during the hearing, and to comment on the credibility or veracity of witnesses in terms that were not foreshadowed during the hearing.

Those actions, taken too far, can constitute a breach of natural justice, but otherwise they are accepted as being part and parcel of the process by which courts formulate findings and reach decisions. The essential requirement is that a party should know in advance the issues to be decided by the court and be given a fair opportunity to present a case. It seems curious that the hearing rule as applied to executive decision-making should be more demanding.

Practical dilemmas in applying natural justice principles

Another criticism of the doctrine of natural justice as it has developed in recent years is that it fails to accommodate some practical dilemmas in administrative decision-making. Situations arise in which it can be problematic to provide procedural fairness as commonly understood. It is doubtful, however, that the law sufficiently acknowledges this point.

One such situation is personnel selection. When a person is being interviewed for appointment or promotion, the selection committee will usually have a viewpoint already about the applicant's strengths and weaknesses, sometimes based on frank referee comments. There is no doubt that those preliminary views are 'credible, relevant and significant', and pose a conscious and prejudicial risk for an applicant. Yet to put all those matters to the applicant during the course of the interview is likely to leave the applicant feeling shattered and ambushed by the experience. Instead, the preferable course is to rely on the tact, wisdom and good faith of the selection committee. The common practice of requiring that at least three people constitute a committee, including at least one person from outside the organisation, and that the committee prepare a written report, is the better means of ensuring procedural fairness.

Another difficult situation arises in the evaluation of commercial tenders. Those submitting tenders will usually list the personnel who will deliver a project if the tender is successful. The government agency assessing the tenders will sometimes have a prior view about the suitability, competence or integrity of one of the listed personnel, and may be disinclined to have that person work on the project. Otherwise, the tender looks strong and competitive, and the tenderer may be told quietly about the personnel concern. What else should be done? Should there be a separate natural justice hearing for the person whose character is doubted? That person is a third party to the tender process, but with a reputation and career to protect. Yet to provide such a hearing poses a distinct danger of distorting the tender process and sending it down a side alley. It is nevertheless hard to escape the conclusion, on an orthodox analysis, that natural justice would require that a hearing be provided.

A third situation of real difficulty is one commonly faced by Ombudsman offices in finalising investigation reports. A report critical of an agency's administrative performance is, indirectly at least, a criticism of the agency officers who were responsible for the agency action. They may not be named, but their identity will be known at least to other officers in the agency and perhaps to members of the public dealing with the agency. Is it adequate to provide a draft of the report to the agency and rely upon it to consult and protect the interests of its staff? Or should a separate hearing be given to each staff member who is indirectly criticised? And if so, should that hearing be given prior to the draft being shown to the agency, for the reason that the draft may be altered in light of what the person has to say? If that is done, the agency is likely to complain that it was not shown the different drafts that were under

consideration and that impinge on the agency's interest in defending its administrative performance. The situation can become more complex if the person whose complaint gave rise to the investigation insists that natural justice confers an equal right upon them to be a part of the dialogue. To provide multiple hearings will inevitably lengthen the process and fuel one of the most common criticisms of investigations, that they take too long.

It is not to be expected that there is a simple answer to every question concerning the application of natural justice. But nor should it be thought that a principle of 'fairness in all circumstances' will provide a doctrinal answer to all questions. The resolution of this dilemma must be a doctrine that leaves scope for those at the agency level who grapple with these practical problems to develop a response that is measured and defensible in the circumstances.

There is some recognition of that point, in the oft-cited observation of Gleeson CJ in *Lam* that 'the concern of the law is to avoid practical injustice'.[11] Generally, however, it is doubtful that the doctrine of natural justice as it has developed in recent years does allow agencies sufficient scope to shape a code of fairness that is adapted and responsive to the agency's circumstances.

A recent example of this point is the decision of the High Court in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*.[12] The file of documents forwarded by the Department of Immigration to the Refugee Review Tribunal (as required by legislation), contained an unsolicited letter alleging that the applicant for a protection visa worked for a foreign government and had been accused of killing a political opponent. The letter was authored but requested confidentiality. The Tribunal did not disclose the existence or contents of the letter to the applicant during the proceedings, but noted its existence in the reasons for decision affirming the denial of a protection visa. The Tribunal declared that it gave no weight to the letter as the author sought confidentiality and the claim could not be tested.

The High Court held unanimously that the Tribunal had denied procedural fairness to the applicant and that its decision should be set aside. The adverse information in the letter was credible, relevant and significant, and should have been put to the applicant. The Court acknowledged that the Tribunal sought to act fairly, but added that 'the procedure it in fact adopted was not fair'.

The model of procedural fairness imposed by the Court is clearly suited to the formal and ordered setting of a courtroom, where it is unthinkable that a court would receive information that was not disclosed to the parties. Administrative tribunal proceedings can be similar, but not always. Some tribunals principally decide 'on the papers', and may receive departmental files that contain 'dob-in' letters that are often best ignored rather than made a focus of the proceedings (for example, the Social Security Appeals Tribunal). As that suggests, the concept of procedural fairness that is appropriate to a curial setting will not necessarily be as suited to an administrative tribunal, and nor should all tribunals be treated the same. There should accordingly be some scope for those who administer a particular body or program to shape the code of fairness that will govern the proceedings.

Choosing when to make a decision

The difficulty that can be faced by an administrative body in dealing practically but fairly with unexpected problems is illustrated by two recent decisions of the ACT Supreme Court. The issue common to both cases was whether a tribunal could proceed to make a decision when there were unresolved issues of fact, or whether the proceedings should be adjourned to a later date.

The first case, *Singh v Sentence Administration Board (ACT)*,[13] concerned a decision by the Board to revoke the parole of a young woman convicted of manslaughter. She had been released on parole after serving four years of a ten year sentence. A condition of the parole order was that Ms Singh totally abstain from illicit substances. Two years into the parole she received a formal warning from the Board in respect of two admitted breaches of the parole condition. Another eight positive results for cannabis were recorded in the following three months, causing the Board to convene a parole hearing. Additional positive test results for cannabis and one for cocaine were recorded in the following weeks (some of which were made available to relevant parties only at the hearing).

Ms Singh gave evidence and was legally represented at the Board hearing. She admitted to three breaches, but was nonplussed about the other results and speculated about possible causes for an incorrect reading. The parole officer gave evidence that the more recent readings caused her to re-think her written report recommending closer parole supervision rather than a revocation of parole. Ms Singh's counsel sought an adjournment to allow further study of the test results and to obtain a psychiatric report that had been requested but was not available by the date of the Board hearing.

The Board proceeded to make a decision to revoke Ms Singh's parole. This was based on the previous warning about parole breaches, the admitted breaches, and the unsatisfactory explanation for the other test results. On review, the Supreme Court held that there had been a breach of natural justice, by reason of the Board declining to permit an opportunity to further explore the issues that were unresolved at the Board hearing.

The second ACT Supreme Court decision was *Eastman v Commissioner for Housing (ACT)*.[14] Mr Eastman had been sentenced to life imprisonment for murder in 1995. At the time he occupied a government-owned flat that he was allowed to retain on payment of rent while he challenged his conviction. This was confirmed five years later by a Housing Review Committee, which noted that a judicial inquiry was still on foot, and that the stability of Mr Eastman's mental health could depend on his continued tenure of the flat.

The following year he was given a notice that he was required to vacate the premises within six months. Media reports at the time referred to over 2000 applications on the public housing list. Mr Eastman's solicitor wrote a short letter of objection, and foreshadowed that a longer submission would be prepared. The Commissioner for Housing responded by saying that the decision to terminate the tenancy would stand and be referred to the Residential Tenancy Tribunal. That occurred at the six month mark for vacation of the premises.

The Tribunal scheduled a hearing date three weeks later. The notification to Mr Eastman only arrived ten days before the hearing date, because of a mail delay in the prison system (some attachments to the notification arrived a further seven days later). Mr Eastman immediately requested a two week suspension of the hearing date, to seek legal representation. A further request was made on his behalf for an audio or video link to be arranged for the hearing.

The Tribunal proceeded to make a decision on the scheduled day to terminate Mr Eastman's tenancy. The Tribunal noted an undertaking from ACT Housing that upon Mr Eastman's release from prison he would be placed on the priority list and provided with public housing. Mr Eastman was neither represented nor participated in the hearing.

The Supreme Court held that the duty of the Tribunal to accord procedural fairness required it to grant the adjournment that Mr Eastman requested, to enable the possibility to be explored of whether he could participate in the hearing in a meaningful way.[15]

Re-thinking the principles of natural justice

The cases discussed in this paper were not straightforward. In each case the court fastened on an aspect of the administrative process that could have been done differently or better. It was certainly arguable in each case that there was a lapse in procedural fairness. On the other hand, it was known in each case that an adverse decision could be made, the core issues had been identified, and there was an opportunity for a submission to be made. There were also competing public policy considerations in each case, for example, for expedition in decision-making, or for a long-running issue to be resolved.

The point to be drawn from that analysis is that there is a need for healthy debate on whether there is 'too much natural justice'. That debate has not occurred. There is a tendency rather to speak of natural justice only in laudatory terms. As a result, the doctrine of natural justice has become steadily more demanding in its application to administrative decision-making. Indeed, a theme of this paper is that natural justice now imposes greater demands and uncertainty on administrative than on judicial officers.

A range of issues needs to be canvassed in any debate about natural justice. The first is that the principles about what is procedurally fair should be devised in a context that takes account of competing administrative demands. An example is that many tribunals and boards work under either an explicit statutory direction, or an implicit administrative expectation, to be 'fair, just, economical, informal and quick' or to proceed 'with as much expedition as the requirements of the legislation and a proper consideration of the matter to be decided permits'.[16] While much is heard in the cases about the extra steps that could be taken to ensure procedural fairness, rarely is there any mention of the competing pressure for administrative efficiency imposed by statute.

A reason why statutes expect speed and informality is that it produces a more beneficial outcome overall for the clients of government services. As former Ombudsman Professor Dennis Pearce has argued, most persons affected by government decisions expect speed ('a quick decision'), finality ('to know what their position is and not be … subjected to a series of appeals'), cheapness, and accessibility ('to receive a decision with the minimal formality').[17]

The same point was made forcefully by Professor Julian Disney in an earlier Administrative Law Forum:

> When pursued with obsessive legalistic vigour, 'natural justice' is often the enemy of real justice. … [A]doption of complex procedures to comply with traditional principles of 'natural justice' has meant that many people are effectively prevented from getting any form of justice at all. Well-meaning lawyers, and others who are involved in the administrative review system, should be very careful not to encrust the system at the lower levels with a whole range of apparent safeguards which, in practice, will harm many people in great need and may be of largely illusory benefit for many other people.[18]

A criticism along those lines was recently made by the Solicitor-General, Mr David Bennett QC, of the High Court decision in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*.[19] The thrust of the *SAAP* decision was that the Refugee Review Tribunal, in conducting a hearing by videolink had made a jurisdictional error by summarising orally the adverse evidence given minutes earlier by another witness (a daughter), rather than providing that evidence in writing as required (in the view of the Court) by s 424A of the *Migration Act 1958*. The Solicitor-General criticised the Court's approach as 'inflexible', 'calcifying the requirements of natural justice', and a 'bizarre turnaround [that left] fairness and flexibility, the key concerns of natural justice, … to one side'. An example is that the decision could require the Tribunal, when adverse information arose at a hearing, to adjourn the hearing, provide details in writing and await a response, even if the applicant was

represented at the hearing by a lawyer and was able to deal with the adverse information. *SAAP* also led to over 500 consent determinations being set aside by the RRT.

Another issue that should figure in any debate about natural justice is that other procedural safeguards have been built in to most administrative schemes that can result in adverse action against members of the public. These other safeguards can be more effective than principles of law in achieving administrative justice and protecting people. An example from two of the cases discussed earlier, *Conyngham* and *NIB*, is that the decision was to be made or based on advice from a committee that comprised industry peers and other non-government officials. Administrative processes are also more transparent, as a result of freedom of information legislation and the obligation to provide a written statement of reasons. External review of decision-making by the Ombudsman and other review bodies is also a regular feature.

Finally, it is important in any debate about natural justice to reconsider some of the standards and principles that have become accepted doctrine. An example given earlier in this paper is the principle that a person should have a right to be told of any 'credible, relevant and significant' comment made during the internal deliberation on a matter. Two other issues also warrant reconsideration.

One is the issue of whether the obligations imposed by the hearing rule are displaced or minimised where a person has a right of appeal on the merits to an administrative tribunal. In earlier cases the courts gave an affirmative answer to that question. An example is *Twist v Randwick Municipal Council*,[20] decided in 1976, in which the High Court rejected a natural justice challenge to the validity of a Council demolition order of a private house, for the reason that the owner had a right to appeal on issues of fact and law to the District Court. A contrary view was taken by the High Court in 2001 in *Re Minister for Immigration and Multicultural Affairs; ex parte Miah*.[21] A right of appeal on the merits to the Refugee Review Tribunal did not displace the obligation of the primary decision-maker to invite Mr Miah to comment on information relied upon by the decision-maker concerning political changes that had occurred in Bangladesh since Mr Miah had lodged his protection visa application.

As a general comment, it is difficult to see why natural justice should have become more rather than less demanding as applied to primary administration, given the development over the period of a far better system for independent review of primary decisions.

Another settled but questionable principle concerns the exercise of a court's discretion to refuse relief notwithstanding a breach of natural justice. A person is ordinarily entitled to relief, and the court will refuse relief on discretionary grounds only if satisfied that the breach could have had no bearing on the outcome.[22] A couple of examples illustrate the scope for courts to take a more robust view of when to exercise the discretion to refuse relief.

The first example is *Chapman v Minister for Aboriginal and Torres Strait Islander Affairs*.[23] The Federal Court declared invalid the report from a public inquiry into the Aboriginal heritage impact of the proposed Hindmarsh Island Bridge in South Australia. The defect lay in the notice for the public inquiry, which did not delineate precisely the area of land under consideration nor the apprehended injury or desecration (in this case, to the secret folklore of the Ngarrindjeri women). Against that, the inquiry was required by statute to be conducted within 60 days, over 400 submissions were made to the inquiry, and the plaintiffs in the proceedings knew the details not in the notice.

The second example is *Re Refugee Review Tribunal; ex parte Aala*.[24] The High Court declared invalid a decision by the Refugee Review Tribunal to refuse a protection visa to Mr Aala. The Tribunal had indicated in general terms to Mr Aala that it had before it the papers from earlier tribunal and court proceedings, when in fact (through oversight) the Tribunal did

not have four handwritten documents that Mr Aala had provided to the Federal Court. Against that, Mr Aala's application had been rejected twice by the Tribunal, he had presented evidence on both occasions, the four handwritten documents were acknowledged by the Court to be unsworn and of uncertain evidentiary status, and the application to the High Court was made in the original rather than the appellate jurisdiction of the High Court because the time period for appealing had expired.

Conclusion

There are, in summary, three themes in this paper. The first is the need for robust debate about how far the hearing rule of natural justice should be taken. Even fundamental doctrines of public law can give rise to practical problems or face competing considerations. Secondly, natural justice is procedurally focussed, whereas administration for the most part is outcome focussed. Procedure and outcome are both important, and a proper balance needs to be struck. Arguably, the balance has swung too far towards procedural protection. Thirdly, this imbalance may have arisen because natural justice has been too heavily influenced by legal and judicial notions of how decisions should be made. It is odd that, in some instances at least, natural justice now imposes greater procedural burdens and uncertainty on administrative as opposed to judicial decision making.

Endnotes

1 *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 513 per Aickin J.
2 *O'Rourke v Miller* (1985) 156 CLR 342 at 353 per Gibbs CJ.
3 Justice Deirdre O'Connor, 'Is there too much natural justice? (1)' (1994) 1 *AIAL Forum* 82 at 86.
4 (1985) 159 CLR 550.
5 There were numerous examples in the ten years following *Kioa* of Immigration Department decisions being set aside because of a failure to invite comment from a person on an issue noted on the Departmental file. It is now less common for Department decisions to be challenged directly, following the creation in the 1990s of the Migration and Refugee Review Tribunals. See, for example, *Taveli v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 86 ALR 435, 447; aff'd (1990) 23 FCR 162; *Minister for Immigration and Ethnic Affairs v Pashmforoosh* (1989) 18 ALD 77; *Singthong v Minister for Immigration and Ethnic Affairs* (1989) 18 FCR 486; *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 102 ALR 339. See also the discussion in *Bromby v Offenders' Review Board* (1990) 22 ALD 249.
6 (1986) 68 ALR 423; reversed but not on this point (1986) 11 FCR 528.
7 Ibid at 432.
8 (2002) 74 ALD 679.
9 *Sinnathamby v Minister for Immigration and Ethnic Affairs* (1986) 66 ALR 502 at 506.
10 *NIB Health Funds Ltd v Private Health Insurance Administration Council* (2002) 74 ALD 679 at 698 per Allsop J.
11 *Re Minister for Immigration and Multicultural Affairs v Lam* (2003) 214 CLR 1 at 14.
12 (2005) 222 ALR 411.
13 [2004] ACTSC 74.
14 [2006] ACTSC 52.
15 A fresh decision was made by the Residential Tenancies Tribunal in May 2007 ordering that Mr Eastman vacate the flat. That decision was being challenged: 'Eastman back before court', *Canberra Times*, 12 June 2007 at p 8.
16 See the discussion in R Creyke & J McMillan, *Control of Government Action: Text, Cases & Commentary* (2005, LexisNexis) at 157-160.
17 Dennis Pearce, 'Is there too much natural justice? (3)' (1994) 1 *AIAL Forum* 94 at 95.
18 J Disney, 'Access, Equity and the Dominant Paradigm' in J McMillan (ed), *Administrative Law: Does the Public Benefit?* (1992, AIAL Administrative Law Forum) 1 at 7.
19 (2005) 215 ALR 162: see D Bennett, 'Is natural justice becoming more rigid than traditional justice' (2006) *AIAL 3rd National Lecture Series* 5.
20 (1976) 136 CLR 106. See also *R v Marks; Ex parte Australian Building Construction Employees and Builders Labourers' Federation* (1981) 147 CLR 471, and *Marine Hull & Liability Insurance Co Ltd v Hurford* (1986) 10 FCR 476.
21 (2001) 206 CLR 57.
22 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147; and *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82 at 88-89, 116-117, 154-155.
23 (1995) 37 ALD 1.
24 (2000) 204 CLR 82.

INTERPRETING LEGISLATION CONSISTENTLY WITH HUMAN RIGHTS

Simeon Beckett*

Introduction

It is a tremendous relief to be able to give a seminar on the substantive aspects of domestic human rights law in Australia. As someone who has been a proponent of the domestic incorporation of international human rights standards for over ten years it is a delight to not have to argue the case for why such protections should be enacted but instead be able to delve into the actual operation of a domestic human rights statute.

The ACT was, of course, the first Australian jurisdiction to substantially embrace the protection of human rights in its *Human Rights Act 2004*.[1] It will enjoy its third anniversary this year. Victoria last year passed its *Charter of Human Rights and Responsibilities Act 2006* ('the Victorian Charter') which partly commenced on 1 January 2007 and will come into full operation on 1 January 2008.

Both of the enactments require all legislation within their respective jurisdictions to be interpreted consistently with human rights. It is a far reaching and important provision because of the breadth of its operation. As administrative lawyers we know that the effect of a particular interpretation will have ramifications *inter alia* for the exercise of power, the breadth of discretion and the nature of the process.

It is the requirement of consistent interpretation in the *Human Rights Act 2004* and the *Charter of Human Rights and Responsibilities Act 2006* which is the subject of this paper. I have chosen to refer generically to all legislation which adopts legislatively protections of the type typified by the ACT and Victorian acts as a 'human rights statute' rather than use the term human rights act or charter which may tend to confuse.

So what will this paper consider? In order to grasp the operation of the interpretive obligation in human rights statutes one must understand the unique structure and operation of such statutes to appreciate the role of the interpretation obligation. Clearly there will also be a tension between the original purpose of the legislation to be interpreted and the human rights statute, especially where it was enacted prior to the human rights statute. One needs to also establish the limits of the interpretation obligation so as to avoid judicial amendment of the relevant statute. A proper assessment needs to be made of the human right concerned as to its specificity and whether it is justifiably limited. Finally, I attempt to identify a process that may be undertaken to interpret legislation consistently with human rights.

The Australian and comparative context

The ACT and Victorian statutes are unlikely to remain the only Australian jurisdictions with human rights statutes. The Tasmanian Law Reform Institute is shortly to report on a charter of human rights for Tasmania and the WA Attorney-General recently established a

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committee to consider the same question in WA. The former NSW Attorney-General Bob Debus spoke in favour of a charter but the NSW government has yet to revisit the previous Premier's ardent opposition to one. The ALP recently committed to a consultation process for a national charter of human rights if it wins office.

Discussions in Australia about the legislative protection of human rights are generally around the same structure of protections for human rights. The ACT and Victorian models draw heavily on both the UK *Human Rights Act 1998* and before that the New Zealand *Bill of Rights Act 1991*. Both of those enactments require all legislation to be interpreted consistently with human rights and so provide fertile ground for ACT and Victorian lawyers interpreting their respective statutes. The comparative human rights lawyer has much jurisprudence to revel in as long as he or she is willing to undertake the mental gymnastics required to utilise the case law and avoid its pitfalls. Behind the legislative protections available in the UK and New Zealand (and now the ACT and Victoria) are the constitutionally entrenched protection for human rights in the Canadian *Constitution Act 1982,* better known as the *Charter of Fundamental Rights and Freedoms,* and the *Constitution of the Republic of South Africa 1996*. Both the ACT and the Victorian statutes openly encourage the consideration of the jurisprudence of foreign domestic and international courts and tribunals.[2]

The place of an interpretive obligation within a human rights statute

The model for the protection of human rights found in the human rights statutes in the ACT and Victoria is based upon what has become known as the 'dialogic model'. At the centre of this model is a rejection of the constitutional model (found in Canada, the USA and South Africa) which allows a court to invalidate inconsistent legislation.

The model adopted involves a conversation, if you like, between the legislature and the judiciary about the protection of human rights. On the one hand a member introducing a bill is required to indicate to Parliament whether the bill is compatible or not with the human rights set out in the human rights statute. In the ACT the Attorney-General must prepare what is known as a 'compatibility statement' for presentation in the Legislative Assembly.[3] Similarly in Victoria the member of Parliament proposing to introduce a Bill must prepare a 'statement of compatibility' to be laid before a House of Parliament.[4] This allows for human rights issues to be fairly and openly canvassed in Parliament, and therefore publicly. It further provides an indication to a court later interpreting the statute of the intended effect of the bill with respect to human rights.

On the other hand the courts must interpret all legislation in accordance with the same human rights. While a particular interpretation may deliver a substantive and desired outcome for a proponent the court may not stray beyond the legislation itself. If the human right and the enactment under consideration are in direct conflict then the court may only declare that the enactment is inconsistent with the human rights concerned.[5] Such a declaration does not affect the validity of the legislation under consideration.[6]

A truly novel part of both the ACT and Victorian statutes is that a court's declaration of incompatibility must be presented to the Legislative Assembly or to Parliament, as the case may be, together with a response by the government within 6 months.[7] The provision compels the public discussion of a breach of human rights while maintaining the sovereignty of Parliament. There is no requirement for the government to amend the relevant legislation but it, arguably, must provide a justification for legislation which is inconsistent with a human right.

Both the Victorian and the ACT statutes specify the human rights which are protected. Generally the enumerated human rights are drawn from the *International Covenant on Civil*

and Political Rights but there are some important additions.[8] While I do not need to refer to specific rights it is important for the issue of interpretation to understand how the rights are set out.

First, in contrast with the abstraction and generalities of many common law rights in both the ACT *Human Rights Act 2004* and the Victorian Charter each human right is set out with a reasonable degree of specificity. For example, in the Victorian Charter the common law right to 'freedom of expression' becomes instead, at s 15, a right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds orally, in writing, in print, by way of art and in another medium chosen by him or her.[9]

Second, under both statutes all human rights may be reasonably limited if the limit is demonstrably justified in a free and democratic society.[10] The reasonable limitation of human rights is crucial to the operation of human rights protections because it rejects, save perhaps for the right to life and freedom from torture, the idea of absolute human rights. In the case of freedom of expression, to continue the example, reasonable limits have been held to include the prohibition or restriction of pornography and defamation laws. Appreciation of the limits that may be legitimately and lawfully placed on rights is vital to the task of interpreting legislation consistently with human rights for a number of reasons. If rights are considered absolute or are overstated then the inclination of the judicial officer is likely to be to consider the right as a relevant consideration but not to apply it as a right.

The process required in both the ACT *Human Rights Act 2004* and the Victorian Charter is that the judiciary should not be squeamish in saying *prima facie* a human right is infringed because they may then turn their attention to whether the statutory provision or its interpretation is reasonably justified in a free and democratic society. That is where the main game is. An example will assist. A statutory power is used to restrict persons from demonstrating immediately outside an international conference. The exercise of the power prima facie infringes the freedom of peaceful assembly. However, the limit on the right is reasonable in a democratic society because the demonstration can occur in another place proximate to the conference so that both the conference and the demonstration may occur simultaneously.

A proper understanding of this process of assessment of legislative provisions vis-à-vis human rights is important because it allows one to ascertain whether one interpretation should be preferred over another. The job is incomplete if the interpretation contended for is *prima facie* inconsistent with a human right but an assessment of the reasonableness of the limit has not been undertaken. I will return to this issue later in the paper.

Neither the ACT *Human Rights Act 2004* nor the Victorian Charter allow for a person to enforce specific human rights or to seek damages for a breach of such rights. Human rights are only justiciable through other means such as the prerogative writs or established causes of actions such as in tort. Accordingly, the main area in which human rights issues are likely to be fought is within the confines of administrative law. Human rights issues have frequently arisen in criminal matters in the ACT courts where the matter at issue has been the exercise of statutory powers whether by the courts, prosecution authorities or the police. Interpreting such legislation in accordance with human rights is at the centre of the implementation of the two human rights statutes.

Orthodox role for common law rights in the interpretation of statutes

It is useful to remind ourselves at this point of the orthodox position with respect to interpreting legislation when it affects a common law right. It is well established that a statute will not be read so as to infringe upon a civil right unless the words of the legislature are

expressed with irresistible clarity or necessary intendment. [11] The principle has been restated numerous times recently and the decision in *Coco v R* is an excellent example.

The issue was again explored by the High Court in *Al-Kateb v Godwin* Gleeson CJ said that courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms unless such an intention is clearly manifested by unambiguous language which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.[12] Gleeson CJ returned to a 1908 decision of the High Court and the fourth edition of *Maxwell on Statutes* to remind us that it is 'improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness'.[13]

In an oft cited passage[14] of the House of Lords decision in *R v Secretary of State for the Home Department; ex parte Simms*[15] Lord Hoffman restated the position as the principle of legality:

> Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

As we know, in *Al-Kateb* the absence of an ambiguity in the detention provisions of the *Migration Act 1958* meant that the majority in the High Court considered itself constrained by the wording of the statute. Hayne J opined that the wording was intractable[16] and would not yield to an interpretation that protected the applicant's right to liberty.

But human rights do not solely emerge from the common law. The history of international standard setting since the end of World War II is replete with human rights conventions. The best known is the *International Covenant on Civil and Political Rights* and it provides the source of the human rights which appear in both the ACT *Human Rights Act 2004* and the Victorian Charter. The response in Australian law generally to international treaty obligations and their impact upon statutory interpretation is therefore relevant to our consideration of interpretation obligations under human rights statutes.

The established position is that a statute is to be interpreted and applied, so far as its language admits, in a manner which is consistent with the comity of nations or the established rules of international law.[17] We know from *Lim's Case* that where there is ambiguity in an Act which purports to give effect to an international agreement the court will adopt the interpretation which best facilitates the operation of the agreement.[18] Where ambiguity exists in legislation which does not purport to implement an international treaty or convention *Teoh* is authority for the proposition that the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, 'at least' where the legislation post-dates the ratification of the international instrument.[19] While acknowledging that it was probably too late to reject that statement of principle in *Teoh*, McHugh J said that given the sheer number of applicable treaties he doubted that Parliament really considered each of its international obligations before passing legislation.[20] Following this line of reasoning, Gleeson CJ held in *Coleman v Power* that a 1931 Queensland statute should not be interpreted in accordance with the ICCPR because no intention of consistency with the ICCPR could be inferred to Parliament.[21]

The approach is not limited in its application to ambiguous statutory provisions.[22] Rather, wherever the language of a statute is susceptible of a construction which is consistent with the terms of the relevant international instrument and the obligations which it imposes on Australia, that construction must prevail.[23] *Coleman v Power* reaffirms the application of that part of the *Teoh* decision to statutes which post-date the international convention in question.

The new obligation

As is apparent from the wording of the interpretation clauses the obligation in the ACT, Victoria, the United Kingdom and New Zealand is very similar without being identical. I set them out in full.

Section 32(1) *Charter of Human Rights and Responsibilities Act 2006* (Vic):

> (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

Section 30(1) *Human Rights Act 2004* (ACT):

> (1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.
>
> (2) Subsection (1) is subject to the Legislation Act, section 139.
>
> Note Legislation Act, s 139 requires the interpretation that would best achieve the purpose of a law to be preferred to any other interpretation (the purposive test).
>
> (3) In this section:
>
> "working out the meaning of a Territory law" means—
>
> (a) resolving an ambiguous or obscure provision of the law; or
>
> (b) confirming or displacing the apparent meaning of the law; or
>
> (c) finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or
>
> (d) finding the meaning of the law in any other case.

Section 3(1) *Human Rights Act 1998* (UK):

> 3(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.[24]

Section 6 of the *Bill of Rights Act 1991* (NZ):

> **Interpretation consistent with Bill of Rights to be preferred** – Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any other meaning.

Three of the obligations refer to consistency and one to compatibility with human rights. Recourse to standard dictionaries establishes that the terms consistent and compatible are interchangeable. The ACT, Victorian and UK clauses all require that consistency should be sought 'as far as it is possible to do so'. The ACT and Victorian statutes also clarify that the purpose of the legislation being interpreted is to be given primacy. That is, the purpose provides the parameters within which the process of interpretation may occur.

The UK and New Zealand statutes do not specifically consider the purposive question but the case law has revealed that this is, of course, an important constraint on the interpretation process. The *Bill of Rights Act 1991* (NZ) requires a human rights consistent meaning to be given where ever one 'can be given'. The UK legislation is in slightly different form and there may be a reasonable argument to be made that it is different to the other three. It requires all legislation to be 'read and given effect' in a way which is compatible with human rights. Any argument that sought to maintain that the obligation under s 3 of the *Human Rights Act 1998* (UK) was more intrusive than the similar obligations in the ACT and Victoria would have to substantiate that interpretation of legislation is something less than reading and giving effect to legislation.

Parenthetically I note that the ACT *Human Rights Act 1998* utilises the phrase 'in working out the meaning of a Territory law' which is then defined at s 30(3). The sub-section makes clear that the definition is not limited to ambiguity or curing an absurd or unreasonable interpretation but includes both confirming or displacing an apparent meaning of 'finding the meaning of the law in any other case'. The apparent intent of that provision is to avoid a narrow interpretation of the interpretation obligation itself by limiting it operation only to the former cases. Given the wide-reaching nature of the obligation in the relevant UK jurisprudence with respect to s 3 of the UK's *Human Rights Act 1998* it is reasonable to assume that the Legislative Assembly wanted a similarly wide application to the s 30(1) obligation.

Foundation issues

It is still early days in the Australian judicial discussion of human rights statutes of the type considered in this paper. While there are some Court of Appeal decisions from the ACT the *Human Rights Act 2004* has yet to receive High Court attention. This contrasts markedly with the position in the UK where the House of Lords has lustily embraced the *Human Rights Act 1998* and produced a considerable number of decisions exploring the implication of the interpretation provision. The New Zealand Court of Appeal has used the interpretation provision in the *Bill of Rights Act 1991* over a longer period than the House of Lords but perhaps a little less enthusiastically. I turn now to consider some of the foundation issues decided there which have clear ramifications for the implementation of the ACT *Human Rights Act 2004* and the Victorian Charter.[25]

It was not long after the commencement of the *Human Rights Act 1998* (UK) that Lord Woolf sitting in the Court of Appeal opined that the interpretive provision at s 3 was to be treated as having amended all legislation which predated it so as to incorporate the obligation.[26] In some ways that is a statement of the obvious but the ramifications are clearly wide. There is no reason to think the statement does not apply to the ACT and Victorian statutes.

As a consequence of that width the interpretation obligation in both statutes applies to legislation that applies between private parties.[27] That is, the interpretation is not limited to circumstances which involve the interaction between a public authority and an individual. This raises an interesting dilemma when a statutory provision impacts equally on an individual and a company. Both statutes are adamant that it is only individuals who possess human rights[28] yet the implication of the decision in *X v Y* is that where a compatible interpretation is to be given to a statutory provision for an individual then that interpretation is to be preferred in the name of consistency of interpretation even where a corporation does not specifically possess the human right concerned.

This issue was touched upon in the recent ACT decision of *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority* where Higgins J determined that the legislative provision did not infringe the right to a fair hearing of a third party objector, irrespective of whether the objector was an individual or a company.[29]

The next step taken in the UK and New Zealand jurisprudence is that there is no need for there to be an ambiguity in the statute before a court is obliged to interpret a legislative provision compatibly with human rights.[30] The interpretive obligation has been called 'an emphatic abduration by the legislature'.[31] Lord Steyn remarked in *R v A* that,

> [u]nder ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation …Section 3 qualifies this general principle because it requires a court to find an interpretation compatible with Convention rights if it is possible to do so. [32]

This passage gives on flavour of the way in which the UK courts have considered the extent of the interpretation obligation. No doubt this is because of what has been described as the quasi-constitutional status of such human rights statutes.[33] The model used in New Zealand and then in the UK were adapted from the Canadian Charter of Fundamental Rights and Freedoms. The Canadian Charter allows for the invalidation of legislation by the Supreme Court where it unreasonably contravenes a Charter right. In order to avoid invalidation the Court is required to do all that it can to construe a statutory provision in accordance with a Charter right.

Transposing that model to New Zealand and the UK the respective Parliaments rejected granting the courts a power to invalidate a statutory provision which was incompatible with a human right. Instead they adopted the process of a court declaration being laid before Parliament. That has been considered as the ultimate measure and one to be avoided if at all possible while respecting the sovereignty of Parliament. Again Lord Steyn expressed the position succinctly in *Ghaidan v Godin-Mendoza* that the interpretive obligation is regarded as the primary remedial remedy whilst a declaration of incompatibility is regarded as an exceptional course.[34] One can readily understand the rationale behind this proposition. If the effect of legislation on a human right is interpreted in a way similar to the manner in which common law rights have been treated then the courts will need to continually resort to a declaration of incompatibility. The inherent undesirability of frequent and multiple such declarations leads one to the necessary conclusion that the interpretive obligation in a human rights statute must be somewhat greater than the position prior to the enactment of such a human rights statute.

The greater obligation was expressed in both *Ghaidan* and *R v A* as being that even if the legislation 'admits of no doubt' as to the available interpretations, 's 3 may nonetheless require the legislation to be given a different meaning'. [35] This statement raises the reasonable inquiry of just how far the judiciary should go in interpreting manner in this way and at what stage may one say that the judiciary has overstepped the constitutional boundary between it and the legislature. I will consider that next.

Forming a demarcation line

The quotation from Lord Hoffmann in *Simms* provided at the start of this paper is an indication that the House of Lords is deeply concerned with the demarcation between judiciary and legislature and the sovereignty of Parliament. The discussion of *Al-Kateb* and related cases above indicates that the Australian High Court is similarly concerned about the demarcation line. Where that line has been drawn in the UK may not necessarily be replicated in Australia but that assertion is not based on the terms of the interpretive obligation which is as I have said essentially similar.

Amos gives the following summary of the UK position in her new book *Human Rights Law*:[36]

> … It is not possible to use section 3 if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible or provisions which do so

> by necessary implication.[37] Furthermore, it is not possible to do 'violence' to the language or to the object of the provision so as to make it unintelligible or unworkable,[38] or to commit judicial vandalism by giving the provision an effect quite different from that which Parliament intended.[39]

This line is drawn so as to admit of the possibility of the Parliament passing legislation which is incompatible with human rights. Existing legislation may simply not be able to be interpreted so as to be compatible with human rights and proposed legislation may be specifically intended to override human rights.

Perhaps the most concise summary of the position taken in the UK is that the courts cannot judicially insert words into legislation where to do so would contradict the 'essential principle or scope of the legislation'.[40] Within those confines there is a considerable amount of judicial wriggle room which has been utilised relatively freely.

It has been held that it is legitimate to judicially read words into a phrase or into a provision in order to ensure compatibility.[41] Similarly a word may need to be judicially removed to ensure compatibility.[42] Alternatively the effect of a provision may be stated without reading in the word concerned.[43] Even an interpretation which linguistically may be strained can be adopted.[44]

All this appears counterintuitive to the current position taken by the High Court vis-à-vis the interpretation of legislation where it touches upon a common law right. The difficulty with not accepting the position taken by the House of Lords is that more legislation will be held to be incompatible with human rights and returned to the Legislative Assembly or Parliament as a declaration of incompatibility.

It is worth returning to the interpretive section itself and recalling the purpose in s 30(1) of the ACT *Human Rights Act 2004* and s 32(1) of the Victorian Charter. Both require that all legislation be interpreted consistently with human rights subject to the purpose of the legislation being interpreted. There is a clear indication there of the sweeping nature of the legislation and the purpose of the Parliament is impliedly a revision of all legislation. In the same way as the House of Lords considered itself constrained by the essential principle or scope of the legislation both the ACT and Victoria may consider themselves bound by the purpose of the legislation. However, that purpose is not the pre-human rights statute purpose but rather that original purpose *as amended* by the interpretation obligation.

One wonders if the test adopted by McHugh J in *Kingston v Keprose Pty Ltd*[45] for when it is permissible to judicially add words to a statute might be adapted to the purpose. That test is in three parts:

1. The court must know the mischief with which the court was dealing.

2. The court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved.

3. The court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect.[46]

Instead of the inadvertence of Parliament at Part 2 of the test Parliament's newly stated requirement to interpret legislation consistently with human rights could be substituted. The eventuality which McHugh J says has called for the addition or subtraction of words must be the combined effect of the purpose of the statute being interpreted plus the interpretive obligation rather than inadvertence. That is, the legislation must be interpreted in keeping with its original purpose as well as consistently with human rights.

That brings me then to the question of whether there is any difference in the way in the interpretive obligation applies to legislation enacted before as opposed to after the commencement of the human rights statute. The ACT *Human Rights Act 2004* simply applies to a Territory law and the Victorian Charter applies to 'all statutory provisions'. For more abundant caution the Victorian Charter specifies at s 49(1) that the Charter applies to all Acts and subordinate instruments whether made before or after commencement of the Charter. Despite this apparent equality of treatment there is a reasonable distinction to be made between the way in which pre and post commencement legislation is interpreted.

The requirement to lay before the Legislative Assembly or the Parliament a statement of compatibility with a new bill indicates that the member concerned has considered the issue of compatibility. Where a Bill is laid before Parliament with a statement that it is compatible with human rights then it is reasonable to assume that the legislature has turned its mind to the issue of compatibility and passed legislation which not only it says is compatible but also that the judiciary may rightly assume is to be interpreted as compatible. What follows then is that there is likely to be a higher standard applied to words in a post-commencement statute which is said to infringe a human right than a statute passed before commencement. Such an interpretation accords with Gleeson CJ's words in *Coleman v Power* referred to above. For pre-commencement statutes the difficult task of marrying the original purpose with the interpretive obligation must be undertaken.

Examples of the interpretation obligation in practice

In *R v A* the House of Lords considered legislation enacted to prevent the alleged victim of a rape from being cross-examined with respect to her sexual history except in certain closely defined circumstances. The law had been passed after the commencement of the *Human Rights Act 1998*. Although the legislation pursued a legitimate aim of protecting victims and society in general, the defendant's right to a fair trial was unreasonably infringed where denial of the relevant evidence could lead to his unjust conviction. Cross-examination was permitted where the incidents to be cross-examined about concerned were similar to the rape and could not be explained as coincidence. Their Lordships opined that cross-examination of previous sexual history with the complainant could occur where it was so relevant to the issue of consent that to exclude it would endanger the fairness of the trial.[47] Lord Steyn said that it is realistic to proceed on the basis that the legislature would not have wanted to deny to the accused the opportunity of putting a full defence by advancing truly probative material. Where such material was not so probative it should be excluded by the trial judge.[48]

The opposite position was taken to legislation interpreted in the case of *Re S*.[49] The case concerned the making of care plans with respect to children in danger. The Court of Appeal had propounded an entirely new procedure not contained in the legislation which included a starring system which established milestones for the parents to achieve and reviews by the court. The new system was unanimously rejected by the House of Lords because it constituted amendment rather than interpretation. The increased involvement of the courts was against the clearly established scheme of the Act that local authorities rather than the courts were to provide oversight.[50]

There have been a number of cases dealing with the issue of reverse onus provisions in criminal legislation. In *R v Lambert* the defendant was apprehended in the possession of certain controlled substances. The governing legislation shifted the onus to the defendant of proving a lawful reason for the possession once the prosecution had established that the substance was a controlled substance and it was in the actual possession or control of the defendant. The orthodox interpretation of such reverse onus provisions was that the defendant held the persuasive burden of proof. Concerned that the right to the presumption of innocence was contravened by such a provision the House of Lords determined that

instead of a declaration of incompatibility it could interpret the reverse onus provision as only requiring that the defendant bore only an evidential burden.[51]

An interesting contrast may be made between the decisions in *Ghaidan v Godin-Mendoza* and the New Zealand Court of Appeal decision in *Quilter v Attorney-General*.[52] The former concerned legislation which provided security of tenure to a surviving tenant where the two persons were married or living in a long-term bona fide relationship. The House of Lords had to determine whether the legislation applied to homosexual couples in the way that it did for heterosexual couples. The underlying policy was said to be the support of the survivor of a stable relationship. The fact that the legislation had been amended to include de facto heterosexual couples was a reasonable basis upon which to extend the application of the survivorship provisions to a homosexual survivor.[53]

In *Quilter* the Court of Appeal was asked to construe the *Marriage Act 1955* (NZ) consistently with the *Bill of Rights Act 1991.* The legislation did not mention the gender of the partners to a marriage and conceivably the legislation could have been interpreted to allow a marriage between a man and a man or a woman and a woman. Notwithstanding the application of the interpretive obligation in s 6 of the *Bill of Rights Act 1991* the Court preferred an original intent argument that there was an unstated assumption by the legislature that marriage partners would be of opposite sexes.[54] The interpretation contended for was rejected because it was said to be clearly contrary to what Parliament intended.[55]

The ACT cases

The ACT *Human Rights Act 2004* will celebrate its third year of operation next month. As has been the experience in the UK many of the decisions have arisen alongside actions taken for other purposes. It is in criminal cases mostly that we have seen the application of the interpretive principle at s 30(1) of the *Human Rights Act 2004*. The interpretive obligation has been called into play to augment arguments already available with respect to the admissibility of evidence obtained under questionable search warrants or to argue for a permanent stay of charges. While there has been some detailed consideration of the interpretive obligation we have yet to see the closely argued appellate level decisions seen in the UK and New Zealand.

One concern that I have about the application of the interpretive provision is borne out of an absence of discussion of the limitation clause at s 28 of the ACT statute. This is a different issue to those just discussed with respect to the UK jurisprudence but is nonetheless insightful. Unfortunately the section falls in the legislation after all the human rights are set out. This may be a recipe for it to be ignored. In the Victorian statute it falls at s 7 before the human rights are listed. They play the same role of allowing human rights to be limited it the limit is demonstrably justified in a free and democratic society. Wherever a limitation is placed on a right by a statute, an interpretation of a provision or the exercise of the power or discretion the court should ask itself whether that limit is reasonably justified or not. In my reading of the case law this, generally speaking, is being ignored. That is not to say that the wrong conclusion is being reached, rather that the full process is, with respect, being truncated.

Some examples will assist. *In re the Adoption of TL*[56] Connolly J had to determine whether an application for adoption of a child by a step-father should be preferred to an order for guardianship or custody. His Honour held that it was a requirement of the Act to consider the family as the basic unit of society which is entitled to be protected.[57] However, there was no consideration of how or why the default position of guardianship was an unreasonable limit on the right. Respectfully one is left with the impression that the right to family was treated as

a relevant consideration to a wide discretion rather than acting to constrain the particular discretion. The decision in *R v YL* is another example of this occurring.[58]

In *R v Griffin*[59] the ACT Court of Appeal considered an application for a permanent stay of criminal proceedings.[60] At first instance the defendant had achieved a stay by arguing that a crucial piece of evidence had been lost by the police and that he was irretrievably prejudiced. The Court referred to the right a fair trial in the s 21 of the *Human Rights Act 2004* but then went on to apply the discretion with respect to such stay applications according to well established principle. It held that the trial could proceed as long as certain directions were given to the jury.[61] Although the result is unlikely to have been different the court did not consider whether the requirement of standing trial was a demonstrably justifiable limitation on the defendant's right to a fair trial under s 21.

In *R v Upton*[62] Connolly J considered another stay application but in that case carefully identified what the justification for the limitation was before allowing a limited form of stay. His Honour closely followed English authority which applied the UK *Human Rights Act 1998* in a similar case.[63]

A distillation of the process

I have made an attempt to distil the process needed to assess legislation as to its consistency with human rights under either the ACT *Human Rights Act 2004* or the Victorian Charter. In many ways it is very much a work in progress but indicates a distillation of the available comparative jurisprudence considered in this paper.

Human rights jurisprudence provides a process by which a provision of legislation, or an administrative act for that matter, may be considered to determine whether a breach of a human right has occurred. The proportionality principle evident in s 28 of the ACT *Human Rights Act 2004* and s 7 of the Victorian Charter works may be utilised as part of a four part process for the assessment of whether legislation is consistent with human rights. The test below have been adapted from those provided by Paul Rishworth in his book on the *New Zealand Bill of Rights 1991*[64] which he in turn drew from the New Zealand Court of Appeal's decision in *Moonen v Board of Film and Literature Review*.[65]

1. Identify the relevant human right *prima facie* affected and establish the scope of the right;

2. apply the purposive test to the legislation and establish what are the available meanings for the statutory provision;

3. assess whether the interpretation contended for limits the right and, if so, whether the right is demonstrably justified in a free and democratic society;

4. determine the court's disposition:

    a. if the answer to 3 is 'yes' then the legislation is consistent with human rights;

    b. if the answer to 3 is 'no' then reconsider whether words may be judicially added or subtracted to the legislation to achieve consistency without infringing upon the essential principle or scope of the legislation;

    c. if after 4b the answer to 3 is still 'no' then a declaration of incompatibility may be considered.

As mentioned, the crucial part of that exercise is to determine whether the limitation placed on the right is demonstrably justified in a free and democratic society. While that statement

stands alone in the ACT *Human Rights Act 2004* it clearly refers to the principle of proportionality found in the jurisprudence of the European Court of Human Rights and applied with respect to the UK *Human Rights Act 1998*. Largely similar principles are applied by virtue of s.1 of the Canadian Charter of Fundamental Rights and Freedoms and in the decisions of the Human Rights Committee under the ICCPR. In Victoria the drafters chose to specify and elaborate the principle at s.7 of the Victorian Charter so to provide clear guidance. The principle is crucial to the proper operation of either human rights statute.

Conclusion

The interpretive obligation found in both the ACT *Human Rights Act 2004* and the Victorian Charter is likely to have wide ramifications for legislation in both jurisdictions if the jurisprudence from the UK is any guide. The tension between making a declaration of incompatibility and construing legislation consistently with human rights is likely to produce few declarations of incompatibility but some surprisingly substantial revisions of legislation.

A real question arises as to whether the Australian courts will take the obligation on as a new found freedom to interpret legislation more liberally or force inconsistent legislation back to the legislature. That tension may be eased if a proper process is established for the consideration of whether legislation is inconsistent with a human right. That process must necessarily contain a proper assessment of whether the limit placed on the right is demonstrably justified in a free and democratic society. The flexibility of that test and the application of the principle of proportionality is likely to mean that much legislation that at first blush appears to infringe a human right is, in fact, compatible with the human right.

Endnotes

1 While the *Human Rights and Equal Opportunity Commission Act 1986* provides for some important protections for the right against various types of discrimination and allows for complaints where a human right is breached by the Commonwealth it does not have the far-reaching implications of the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
2 Section 32(2) *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 31(1) *Human Rights Act 2004* (ACT).
3 Section 37(2) *Human Rights Act 2004* (ACT).
4 Section 28(1), (2) *Charter of Human Rights and Responsibilities Act 2006* (Vic)
5 Section 36(2) *Charter of Human Rights and Responsibilities Act 2006* (Vic) and known as a 'declaration of inconsistency', s 32(2) *Human Rights Act 2004* (ACT) and known as a 'declaration of incompatibility'.
6 Section 36(5) *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 31(1) of the *Human Rights Act 2004* (ACT).
7 Section 33(2), (3) *Human Rights Act 2004* (ACT), s. 37 *Charter of Human Rights and Responsibilities Act 2006* (Vic)
8 See, for example, cultural rights at s 19 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)
9 Section 15(2) *Charter of Human Rights and Responsibilities Act 2006* (Vic)
10 Section 7(2) *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 28 *Human Rights Act 2004* (ACT)
11 See, for example, *Coco v Queen* (1993) 179 CLR 427 at 437
12 (2004) 219 CLR 562 at [19], also reaffirmed in *Coco v The Queen* (1994) 179 CLR 427 and *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30].
13 *Al-Kateb* at [19] referring to *Potter v Minahan* (1908) 7 CLR 277 at 304.
14 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 30, *Al-Kateb* at [19], and in *Daniels Corporation v ACCC* (2002) 213 CLR 543 at 582 per Kirby Jand Spigelman extra-curially in 'Principle of Legality and the Clear Statement of Principle' (2005) 79 ALJ 769
15 [2000] 2 AC 115 at 131
16 *Al-Kateb* at [241]
17 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ; *Polites c Commonwealth* (1945) 70 CLR 60 at 68-69. *Dietrich v The Queen* (1992) 177 CLR 292 at 306 per Mason CJ and McHugh J. See also Pearce and Geddes *Statutory Interpretation in Australia* (6th ed) at [3.10, 5.16].
18 *Lim* at 38.
19 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J.

20 At 141.
21 (2004) 220 CLR 1 at 28
22 *Brown v Classification Review Board* (1998) 154 ALR 67 at 78 per French J; *Secretary of State, Ex Parte Simms* [2000] 2 AC 115 at 130 per Lord Steyn, 131 per Lord Hoffman.
23 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J, see *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 per Gummow and Hayne JJ, Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141 at 149.
24 The reference to 'Convention Rights' refers to those rights which appear in the schedule to the *Human Rights Act 1998* (UK) which are drawn from the European Convention of Human Rights.
25 In this section I rely on the excellent coverage of these issues in Merris Amos' *Human Rights Law*, Hart Publishing 2006 with respect to the UK at Chapter 5 and Paul Rishworth's Chapter 4 in Rishworth et al *The New Zealand Bill of Rights* OUP 2003.
26 *Donoghue v Poplar Housing* [2001] EWCA 595; [2000] QB 48
27 *X v Y* [2004] EWCA 662 at [66] and see Amos op cit at pp 49-50
28 Section 6(1) Victorian Charter
29 [2006] ACTSC at [25]
30 *R v A* [2002] 1 AC 45 at [44] per Lord Steyn; *Re S* [2002] UKHL 10 at [37] Lord Nicholls; *Attorney-General v Simpson* ('Baigent's Case') [1994] 3 NZLR 667 (CA)
31 *R v DPP; ex parte Kebilene* [2000] 2 AC 326 per Lord Cooke
32 *R v A* at [44]
33 *Winnipeg School Division No. 1 v Craton* [1985] 2 SCR 150 applied with respect to provincial legislation and *Proceedings Commissioner v Air New Zealand* (1988) 7 NZAR 462, Rishworth op cit at 131 and fn 84
34 [2004] UKHL 30; 2AC 557 at [50]
35 *Ghaidan* at [29] per Lord Nicholls and *R v A* at [44] per Lord Steyn
36 At 121
37 *R v A* at [108] per Lord Hope and see fn 55
38 *R v Lambert* [2001] UKHL 37; [2002] 2 AC 545 at [79]
39 *R v Secretary of State for the Home Department; ex parte Anderson* [2002] UKHL 46; [2003] 1 AC 837 at 70] per Lord Bigham
40 *Ghaidan* at [122] per Lord Nicholls
41 *Ghaidan* at [124] per Lord Rodger
42 Ibid
43 *Ghaidan* at [107] per Lord Rodger and *Lambert* at [81] per Lord Hope and see Amos *op cit* generally at 122-123.
44 *R v A* at [44] per Lord Steyn
45 (1987) 11 NSWLR 404
46 At 302. The test is based on Lord Diplock's decision in *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105-106. In *James Hardie & Co Pty Ltd v Seltsam* (1998) 159 ALR 268 at 288 Kirby J stated that this was now the settled position. See Pearce and Geddes *op cit* at [2.29].
47 [2002] 1 AC 45 at [45] per Lord Steyn
48 Ibid.
49 [2002] UKHL 10
50 At [42] per Lord Hope, Amos op cit at 127
51 [2001] UKL 37, [2002] 2 AC 545 at [17] per Lord Slynn. See also *Sheldrake v DPP* [2005] 1 AC 264 and *Attorney-General's Reference (No 4)* [2005] 1 AC 264
52 [1998] 1 NZLR 523
53 *Ghaidan* at [35] per Lord Nicholls
54 Rishworth op cit at 146
55 Per Thomas J at 541
56 [2005] ACTSC 49
57 At [14]
58 [2004] ACTSC 115 Crispin J at [31]
59 [2007] ACTCA 6
60 A power available under s 20 of the *Supreme Court Act 1933* (ACT)
61 At [23-24]
62 [2005] ACTSC 52
63 At [18]
64 At 133-134
65 [2000] 2 NZLR 9 (CA)

THE EFFECTIVENESS AND EFFICIENCY OF ADMINISTRATIVE LAW: THE GOVERNMENTAL PERSPECTIVE

Robert Cornall AO*

Introduction

The proposition that we should measure the effectiveness and efficiency of administrative law immediately brings to my mind ideas about outcomes, outputs, mission statements, corporate plans, key performance indicators, benchmarking and big folders of computer generated statistics.

Bureaucrats are believed to revel in the universal and endless measurement of miscellaneous details in an effort to assess the value of complex government services.

Chief Justice Spigelman of the New South Wales Supreme Court has referred to this approach as *pantometry* in a way that didn't seem to be complimentary.

So I suppose I should ask at the outset whether in fact we really want to measure the effectiveness or the efficiency of administrative law.

In doing so, I won't waste time discussing the difference between *effectiveness* and *efficiency*. For today's purposes, I will simply say that effectiveness means we are achieving the desired outcome and efficiency means we are doing so with a minimum of cost, effort and fuss.

Two preliminary points

I want to make two more preliminary points.

The first is that this address is directed to *administrative law*. It is not limited to *administrative review*. The great bulk of the huge number of administrative decisions made in Australia each year are accepted - or corrected on internal reassessment - without merits or judicial review.

In fact, merits or judicial review of administrative decisions is just the tip of the administrative law iceberg. So any consideration of the effectiveness or efficiency of administrative law has to take the totality of the system into account.

The second point is governments undertake this consideration from a different point of view to the tribunal members and other stakeholders more closely enmeshed in the process of administrative review.

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Governments have to find ways to assess the effectiveness and efficiency of policies and services directed at achieving complicated and sometimes intangible objectives. They have to form judgments about the administrative law system as a whole.

However, people directly involved in the provision of services in these difficult areas tend to form judgments on the basis of individual cases.

Why do we want to measure effectiveness and efficiency?

So why do we want to measure the effectiveness and efficiency of administrative law?

The answer is straightforward from a governmental perspective.

Governments are accountable to the parliament and the people for providing institutions and services that meet the needs of the community in a financially responsible manner. Put another way, politicians are responsive to pressure from constituents and Treasurers decide between competing claims on the Budget on the basis of the perceived benefits that will be achieved with the requested funding. Claims for additional or even continuing levels of public funds are determined on the basis of the extent to which an agency is seen to be meeting its agreed objectives and the benefits that will result from that Budget allocation.

These principles can be found in the origins of the Administrative Appeals Tribunal.

In his second reading speech on the Administrative Appeals Tribunal Bill on 6 March 1975, the Attorney-General said:

> An inevitable development of modern government has been the vesting of extensive discretionary powers in Ministers and officials in matters that affect a wide spectrum of business and personal life. Unfortunately, this development has not been accompanied by a parallel development of comprehensive machinery to provide for an independent review of the way these discretions are exercised…..The intention of the present Bill is to establish a single independent tribunal with the purpose of dealing with appeals against administrative decisions on as wide a basis as possible.[1]

However, even at this earliest time, the Attorney recognised that some form of measurement of the likely workload was necessary in establishing the AAT. A little later in the same speech, Mr Enderby said:

> It is not clear at this stage how many presidential members will be required for the work of the Tribunal and accordingly the Bill does not propose any limit. It may be expected, however, that there would be a sufficient workload in Canberra, Sydney and Melbourne for there to be a full-time presidential member in each of those cities.[2]

The Opposition supported the proposal to establish *an effective system of review of decisions made by Ministers and officials which affect the ordinary citizens of this country in their daily, personal and business lives.* [3]

The Government still adheres to the same objectives over 30 years later, as was illustrated by a recent government policy decision which mandated robust merit review including a compulsory internal review and external merits review by the AAT. In developing that policy proposal, the responsible minister sought assurances that the AAT would be able to deal with appeals quickly with a minimum of formality.

And the Government still looks at workload statistics, amongst other things, to determine whether to appoint a judge or a federal magistrate to replace a retiring judge of the Federal or Family Courts.

Court and tribunal perspective

From the point of view of a court or tribunal, there are probably two main factors at work.

The first is the recognition that the body has to operate within the government framework.

Secondly, it is a natural inclination for the office holders and staff in any publicly funded organisation to want their agency to do a good job in discharging its functions in the best interests of the community.

So it's not surprising that the objectives of effectiveness and efficiency are entrenched in the vision statement for the Administrative Appeals Tribunal.

The AAT aims *to be a leader in administrative review, providing fair, just, economical, informal and quick merits review*[4].

Realistically, that can only be established if you know what the organisation is doing and it can be demonstrated by some form of measurement.

How do we measure it?

That brings us to the nub of the issue: how do we measure effectiveness and efficiency?

A lot has been written about the difficulty of making these assessments in relation to courts and tribunals. At a government level, the Productivity Commission provides some statistics in relation to court administration in its annual *Report on Government Services*.

The Commission identifies four objectives for court administration. They are:

- to be open and accessible;
- to process matters in an expeditious and timely manner;
- to provide due process and equal protection before the law, and
- to be independent and yet publicly accountable for performance.

In addition, all governments aim to provide court administration services in an efficient manner.[5]

These objectives sit quite comfortably with the objectives courts and tribunals have set for themselves.

The objectives of the Federal Court are to decide disputes according to law – promptly, courteously and effectively; to provide an effective registry service to the community; and to manage the resources allotted by Parliament efficiently. [6]

The AAT has expressed its goals in these terms:

- to provide a national high quality merits review process that contributes to community confidence in a system of open and accountable government;
- to maintain professional standards, a positive, safe and productive workplace that values diversity;

- to be an organisation with systems and processes that maximise effective and efficient use of Tribunal resources, and

- to co-operate with government, other tribunals, the legal profession and other interested groups.[7]

Performance indicators

The Productivity Commission applies six performance indicators to courts administration:

- fees paid by applicants – an indicator of access;

- backlog indicator – a measure of timeliness;

- judicial officers – both a measure of resources and an indicator of access to the judicial system;

- attendance indicator – a measure of efficiency that records the number of attendances by the parties or their representatives for each finalised matter;

- clearance rate – a measure of whether the court is keeping up with its workload, and

- cost per finalisation – a measure of efficiency that shows the average net recurrent expenditure per finalisation.[8]

These indicators do, to my mind, give some reasonable indications about workload and the timeliness and disposition of a court or tribunal's business. That is particularly so if we track those statistics over time to detect trends in, for example, the volume of work, the type of cases being heard or the length of the delay in hearing.

The Productivity Commission quite properly stays away from any attempt at assessment of the quality of judgments in individual cases.

Governments recognise the importance of the independence of the judiciary and independent decision makers while acknowledging that the executive has to be able to make assessments of the effectiveness and efficiency of our judicial and tribunal systems as a whole.

Annual reports

Tribunals provide these sorts of statistics in their annual reports.

The AAT publishes details of applications, finalisations, resources by output, completed reviews of decisions and percentage of applications finalised within twelve months. It also usefully provides comparative data for the two preceding financial years so any significant changes or trends can be identified.[9]

Courts also provide workload statistics. The last Federal Court annual report contains details of filings, dispositions, judgments, incoming work, matters transferred to and from the court, matters completed, matters on hand and the age of the pending workload. [10]

Quantitative and qualitative assessments

Now I have to say straight away that my views about the usefulness of this information do not meet with universal agreement. A lot has been written about the difficulty and even the desirability of measuring judicial effectiveness and efficiency. The debate tends to be framed more in the terminology of quantitative and qualitative measurements rather than effectiveness and efficiency, but the essential issues are the same.

While courts and tribunals provide the government and the public with a considerable amount of information about their activities, it basically comprises data about things that are easily counted or assertions of less tangible outcomes that can't easily be tested. In part, this is because judges and tribunal members are to be clearly separated from and not accountable to the Executive government for their decisions. That is one of the vital foundation stones of Australian democracy. It explains why the single outcome agreed between the Government and the Federal Court is expressed simply as *Federal Court Business*.[11]

But it is also because, in any event, broad and sometimes aspirational outcomes aren't susceptible to quantitative measurement. In the Attorney-General's Department, we have exactly the same problem in trying to establish measures that show we have achieved *an equitable system of federal civil justice* (which is our first outcome) and *a coordinated federal criminal justice, security and emergency management activity, for a safer Australia* (our second outcome).

Once we move away from solid quantitative measures like the volume of ministerial correspondence and submissions or the dollar value and number of grants made, the Department is forced to rely on more subjective measures such as *Extent of satisfaction of Ministers as measured by periodic feedback from Ministers and their offices.*

Nonetheless, we have to try to resolve these difficulties.

Quantitative measurement

I will deal with quantitative measurements first.

There's a well-known management maxim that *what gets measured gets done*. I agree with that general sentiment. Monitoring tasks or activities and reporting on them is one of the oldest and most effective ways of understanding what an organisation does and ensuring it achieves its stated objectives. But when you come to apply that simple principle in a particular situation, a number of subsidiary questions require careful thought.

- What do you measure?
- What do you do with the data when you have it?
- What does that information tell you about the organisation?
- If the data changes over time, what caused the change?
- What about the things that can't be measured accurately or at all – intangible things like quality of outcomes? Do we get a skewed result if we leave them out?

I could go on, but these few fundamental questions demonstrate the complexity of the problem.

I want to break these considerations about quantitative measurement into three parts:

- what do you measure?
- understanding the data, and
- how do you use it?

What do you measure?

Obviously organisations tend to measure whatever is readily available. In my view, those details are useful. Statistics like delays in hearing cases and the number of appearances before finalisation are clearly relevant to the cost and inconvenience of litigation to the parties. If, over time, they can be reduced, there will be a clear benefit to the community and possibly a reduction in the cost of resolution of those disputes both for the users and for the court or tribunal. The judgment about what quantitative measures are useful is clearly a matter for the court or tribunal to decide.

Understanding the data

Understanding the data is more difficult. Ultimately, data is just a bunch of statistics. It's a bit like being spoken to in a foreign language – it means something but you have to have it translated. Translating data so it gives you a clear understanding about its relevance to your organisation or business often requires considerable insight and skill. If the delay in hearings is shortened, that sounds superficially like a good result. But what if it is brought about by a 50% reduction in new lodgements?

Take another example. An increase in the reports of sexual assaults may at first seem like a bad outcome. However, it could be a positive sign indicating, not that more assaults are taking place, but that more victims have enough confidence in the criminal justice system to report it.

Here's a further illustration. A reduction in the number of young people or drug users coming before the criminal courts may not mean there are less offences being committed. It may indicate that more offenders are being processed through diversionary programs, hopefully with more positive results than a criminal conviction and a prison term.

How do you use the data?

Then we have to decide how to use the data. I think the most essential point is to recognise that data is not a divine law of management. It doesn't prescribe inescapable conclusions. Data usually only tells part of the story because you can't collect comprehensive and accurate data about every aspect of an organisation's activities. Even if you could, data is just an historical record or a snapshot at a particular point in time. It doesn't necessarily predict the future.

Data is an aid to decision making. Judgment, common sense and a breadth of vision have a role to play – usually the major role – in putting the data into its proper perspective. You have to treat data with caution, be aware of its limitations and ensure it doesn't create perverse incentives.

Chief Justice Spigelman has been relentless in his search for bizarre examples that illustrate the danger of misapplied quantitative measures.

Here are a few of them:

- A United States job training scheme allocated funds on the basis of results in finding jobs. Agencies maximised their funds by refusing to accept for training people who were unlikely to get jobs, that is, the people who needed help most.

- When comparative success rates for cardiac surgeons began to be published in New York and Pennsylvania, mortality rates in both States declined significantly because heart surgeons refused to operate on risky cases which were referred to adjoining States.

- Police stations in Paris who were assessed on crime levels in their districts refused to make a formal record of crime reported to them; and

- English hospitals are judged on whether they admitted 90 percent of emergency patients within four hours. Whenever the annual measurement was due, hospitals cancelled operations and flooded their emergency departments with doctors and nurses.

The Chief Justice has concluded:

> Distortions arise because the things that can be measured are not the only things that matter. Insofar as external judgments are made on an information base which is too narrow, then the incentives created by performance indicators will operate perversely. The more significant the consequences of the measured results, the greater the perversity. [12]

I agree with the Chief Justice's concerns. So does Professor, now Justice, Marcia Neave.

Before her appointment to the Victorian Court of Appeal last year, Professor Neave delivered a paper to the National Administrative Law Forum here in Canberra in 1999.

In that presentation, she said:

> …achieving administrative justice requires value judgments to be made about the trade-offs which should be made between competing objectives, for example speed versus accuracy of decision-making. Performance measurement may result in such choices being made covertly, instead of being clearly articulated. Targets for the performance of some objectives (for example cost objectives) may prevent the achievement of others.

A little later in the same speech, Professor Neave argued that prescriptive performance measures posed a greater risk to the independence of decision-makers than descriptive ones. She said:

> Prescriptive performance measures could undermine the goals of administrative justice by imposing a significant degree of political or bureaucratic control over the decision-makers. Their inappropriate use could destroy the substance of independent merits review, while maintaining its illusion. For example, imposition of stringent timelines could result in Tribunal members being forced to rubber-stamp departmental decisions. My argument is not that delay should not be measured, but rather that we need to be careful about the purpose for which this information is used.[13]

As far as I am aware, none of the quantitative measures used by courts and tribunals are prescriptive. They do not pose any risk of political or bureaucratic control.

The final point I want to make about quantitative indicators relates to benchmarking performance against other courts or tribunals. It is obvious that comparisons are only of any use if they are comparing like with like. If they are not doing that, they can be highly dangerous. Flawed comparisons can lead to all of the sorts of bad decisions.

I personally came across this problem in trying to compare statistics between legal aid commissions when I was managing director of Victoria Legal Aid. We couldn't understand why our criminal case grants appeared to be so expensive when compared to those made by the New South Wales Commission. Eventually we realised that, while VLA treated a hearing and an appeal as one grant, New South Wales counted them as two. But I am not singling out legal aid commissions. Across the whole Commonwealth – State spectrum, the data equivalent of the standard rail gauge mismatch is alive and well.

Qualitative measurement

Now let's move on to the even more difficult topic of qualitative measurement.

Professor Neave pointed out the difficulty in trying to assess quality in ….*administrative justice, which has intangible objectives such as encouraging compliance with the rule of law, contributing to government accountability by enabling individuals to challenge decisions which affect them, and enhancing participatory democracy.*[14]

She then referred to the Productivity Commission's use of the concept of quality meaning *fitness for purpose* and the Commission's 1999 statement that: *A comprehensive assessment of this requires a range of indicators. Ideally such indicators directly capture the quality of outcomes – that is, whether the service achieves the outcomes of the government. Assessment may also involve seeking the views of clients and others with a legitimate interest in service quality.*

But Professor Neave concluded, rightly I think, that this statement provides little assistance on how to measure administrative justice.[15] Some measures which have been proposed include auditing the accuracy of primary decision making, examining appeal rates and surveying stakeholders for client satisfaction. Other measures that come to mind are peer pressure (in the sense of establishing a collegiate level of acceptable behaviour) and the leadership of the head of jurisdiction in setting standards for that court or tribunal. None of these seem to overcome the obvious difficulties of trying to measure the quality of justice. Most of them – such as success rates on appeal - have been the subject of firm rebuttals.

Chief Justice Spigelman has noted that *Appeals are allowed for a wide range of reasons which have nothing to do with the quality of the decision.*[16]

Client satisfaction

I want to come back to the issue of client satisfaction and look at it in a little more detail because it is a valid yardstick for many organisations. The question is whether it is of any assistance to courts and tribunals. A starting point is to look at what litigants think about the administrative review process.

Robin Creyke and John McMillan undertook an informative survey of the final outcomes where a court had overturned a government decision and the case was remitted to the agency to be reconsidered according to law. Their research found that in a surprisingly high proportion of cases the ultimate decision of the agency was favourable to the applicant.

But that didn't mean the applicants were happy.

The Creyke and McMillan empirical study revealed that:

> The majority of applicant comments were critical of the relevant agency and in some cases of the administrative reconsideration process generally. Some stated that the favourable decision only

> occurred because the court left the agency with no choice….A frequent complaint was the length of time taken to get a result, both initially from the review body and then from the agency following the review.[17]

My view is that the concept of clients and client satisfaction is inappropriate for courts and tribunals which decide adversarial contests. The same can be said for regulators like the Australian Securities and Investments Commission and law enforcement agencies.

A former policeman called Malcolm Sparrow has written a text entitled *The Regulatory Craft*[18] that grapples with the problems facing regulators and how to define their role. The way he analyses the situation seems to me to have some application to courts and tribunals.

Mr Sparrow argues:

> When people are arrested or fined or have their license revoked or their property seized, most often they are not pleased. Government does not seek to serve them in that instant. In many cases government creates an experience for them that is by design unpleasant.
>
> Of course, those being arrested, fined or forced into compliance are entitled to be treated fairly and with human dignity. But when law is put into action against them, they receive treatment they did not request, did not pay for directly, will not enjoy, and will not want to repeat.
>
> In this context, the notions of quality governance in widest circulation simply fall short. The notion of customer falls short. Regulators need a broader vocabulary, so they can think in terms not only of customers but of stakeholders, citizens, obligatees, objects or targets of enforcement, beneficiaries, taxpayers and society.[19]

These observations resonate with the following comments by Spigelman CJ:

> I have no doubt that the courts serve the people. However, they do not provide services to the people. This distinction is not merely semantic; it is fundamental. The courts do not deliver a 'service'. Courts administer justice in accordance with the law.[20]

It is only marginally reassuring to note that trying to define and measure the quality of judgment or professional advice is posing problems in other areas as well.

For example, lawyers are often criticised for time costed fees which reward inefficiency. But while they talk about an alternative of *value billing*, that seems to me not to amount to much more than charging an even higher fee if the client is satisfied with the outcome.

Here's another illustration. Dr Brendan Nelson, the then Minister for Education, Science and Training, endorsed the release of a paper directed at the development of a Research Quality Framework. In his Foreword, he said:

> The Australian Government regards the development of an RQF as a high priority, and a unified and consistent approach to assess the quality of research undertaken in this country will continue to inspire community confidence.[21]

However, the paper's starting point was that:

> the Expert Advisory group recognises that there are no agreed-upon major consistent quality measures of the outputs of research training which could be readily included in an RQF at this stage.[22]

I am afraid that this discussion has done no more than highlight the problems inherent in seeking to measure the quality of administrative review decisions. In the end, I don't think bureaucrats can solve this issue. The best result would be for courts and tribunals to define quality measures that are acceptable to them. But that task does need to be attempted because, to quote Spigelman CJ one last time:

> Quality is hard to assess. But if we ignore it, we do so at the peril of perverting the decision-making processes which we are seeking to improve.[23]

The broader picture

Now let's move on to look at the broader picture of administrative law, not just administrative review – that is, the iceberg, not the tip.

Robin Creyke and John McMillan remarked that their study showed:

> the diversity of ways in which judicial review proceedings impact on government administration and define the relationship between government and the community. Individual rulings are frequently followed by other governmental action to amend legislation, change policy, rewrite manuals or alter decision-making procedures and practices.[24]

I am sure there are countless examples where that has happened, that is, the overall quality of administrative decision-making across an agency or possibly the whole of government has been improved in response to an adverse finding by a court or tribunal.

Similarly, there are examples of governments introducing improvements in the administrative decision making process in response to public concern or because it simply comes to the view that the system can be improved.

Let me give you four instances of this happening.

A few years ago, the Victorian Government decided that one major administrative review tribunal would produce better outcomes than a collection of smaller tribunals with separate procedures, forms and processes. As far as I know, the decision was not in response to any specific concern or criticism of the existing tribunals. The Government simply came to the view that an amalgamated tribunal would be more efficient and effective.

In her second reading speech, Attorney-General Jan Wade said:

> The Bill contains a range of measures that will assist VCAT to minimise costs and resolve applications quickly and informally. They will assist VCAT to make the most efficient and effective use of its resources.
>
> While many of these measures are, in varying degrees, now in use by tribunals, common procedures and the consistent approach to them will produce far more beneficial results.[25]

Mrs Wade concluded:

> VCAT will be the most comprehensive reform in Australia in this area to date. The creation of VCAT demonstrates the government's commitment to improving the tribunal system in Victoria.[26]

Here is another example. The Minister for Justice and Customs announced an extensive review of the *Extradition Act* on 22 February this year. The review was prompted in part by the fact that the current extradition process involves too many decisions which may be subject to review.

The Minister, Senator Ellison, said in his media release:

> Current extradition … arrangements are characterised by lengthy delays and limitations of the assistance Australia can provide to our foreign partners….Some cases have taken up to seven years to resolve. Even when a person consents to extradition, they can still spend a lengthy time in prison while the process runs its course.

In other words, the Government recognised that this system as a whole was not producing good quality and fair results and decided to change it.

Another illustration is the increasing introduction of automated decision-making processes.

But perhaps the most dramatic example can be seen in the changes in the Immigration Department following the inquiries in to the cases of Cornelia Rau and Vivian Alvarez. You will all know the details of these cases so I won't go into them now. I simply refer to them as showing the Government taking positive and drastic action to improve administrative decision-making in immigration matters from the ground up.

The Secretary of the restructured Department of Immigration and Citizenship, Andrew Metcalfe, takes the need for quality decision-making extremely seriously.

He has commissioned the Administrative Review Council to produce a series of instruction manuals on good decision-making processes for his officers under the general heading of *Making Better Decisions*. The scope and purpose of the five initial brochures were explained to senior public servants by Jillian Segal, the President of the ARC, and Dr Peter Shergold at the Department of the Prime Minister and Cabinet. The guides are available for use by other agencies in consultation with the ARC in an effort to improve administrative decision-making across the Australian Government.

Conclusion

So, in conclusion, let me try to draw these comments together.

The Government and, I am sure, the community expect courts and tribunals reviewing administrative decisions to be able to demonstrate that they are using public funds efficiently and effectively. Courts and tribunals no doubt have a similar objective. Well designed and carefully used quantitative measures of performance will assist in meeting that expectation.

Qualitative measures would help even more but are hard to define and will continue to be so. Ultimately, I think the best solution will be for acceptable qualitative measures to be developed by the courts and tribunals themselves. At the executive level, governments will continue to make decisions to improve our administrative decision making and merits and judicial review processes wherever they see a need for whole-of-government or systemic improvements.

But, as for administrative law as a whole, we don't need to measures its effectiveness or efficiency to be satisfied about the value of its contribution to Australian democracy. It influences the development of government policy. It guides government action at many levels. It sets the framework for millions of fair and accepted government decisions every year. Administrative law is now permanently entrenched in our system of law and government because it responds to every Australian's expectation of a fair go.

Endnotes

1 Hansard, House of Representatives, 6 March 1975, page 1186
2 Hansard, page 1187
3 John Howard MP, Hansard, House of Representatives, 14 May 1975, page 2,278
4 AAT Annual Report 2005 – 2006, page 6. These words are also used in the legislation relating to the Migration Review Tribunal, the Refugee Review Tribunal, the Social Security Appeals Tribunal and the Native Title Tribunal.
5 *Report on Government Services 2006*, page 6.19

6 Federal Court *Annual Report 2005 -2006*, page 3
7 AAT *Annual Report 2005 – 2006*, pages 6 - 9
8 *Report on Government Services 2006*, page 6.19
9 See, for example, AAT *Annual Report 2005 - 2006*
10 Federal Court of Australia, *Annual Report 2005 – 2006* pp 30 - 33
11 ibid, p 61
12 JJ Spigleman AC, *Measuring Court Performance*, AIJA Annual Conference, Adelaide, 16 September 2006
13 Professor Marcia Neave, *In the Eye of the Beholder – Measuring Administrative Justice, 30 April 1999, Canberra*
14 Ibid, page 5
15 Ibid, page 5
16 JJ Spigelman, *Measuring Court Performance,* Address to the AIJA Annual Conference, 16 September 2006, page 7
17 Robin Creyke and John McMillan, *Judicial Review Outcomes – An empirical study* (2004) 11 A J Admin L page 89
18 Malcolm K Sparrow, *The Regulatory Craft,* Brookings Institution Press, 2000
19 Ibid, pages 2 - 3
20 Ibid, page 5
21 *Research Quality Framework: Assessing the quality and impact of research in Australia – Advanced Approaches Paper,* endorsed for discussion at the National Stakeholder Forum, Canberra, 2 June 2005
22 Ibid, p 11
23 J Spigelman, *Quality in an Age of Measurement*, Quadrant Magazine *Law*, March 2002, Volume XLVI Number 3
24 Ibid, p 98
25 VicHansard, 9 April 1998, p 973
26 Ibid, p 975

THE EFFECTIVENESS AND EFFICIENCY OF ADMINISTRATIVE LAW: THE TRIBUNAL PERSPECTIVE

Kay Ransome*

The aspect of the topic I am focussing on today is about how we measure the effectiveness and efficiency of tribunals. My remarks are not confined to administrative review tribunals but are relevant to all tribunals which make decisions, including tribunals at the State level exercising civil or disciplinary jurisdiction.

Recently my Tribunal, the Consumer, Trader and Tenancy Tribunal in NSW, was the subject of choice for one of Sydney's morning radio announcers. It began with a call to the program from a landlord who complained about how the Tribunal was dealing with her case against her tenant. Over the next week several other people who had had matters before the Tribunal appeared on air – only one was complimentary in part; part of a tape recording of a hearing was played on air – illustrative of the perils of using humour in the hearing room. By the end of the week the Tribunal was described by the announcer as dysfunctional and all members were toffee-nosed private school educated idiots.

The Minister appeared on air three times to answer questions about the Tribunal and to defend its reputation. We were able to supply the Minister with facts and figures about our performance: 61,000 applications last year, 70% finalised within 35 days, 77% finalised at or before the first hearing. These statistics showed that we are efficient but what did they really say about the effectiveness of the Tribunal? How could the Minister convince listeners that the Tribunal is a valuable institution? What could she say about the quality of the work that we do?

Since tribunals by and large are publicly funded, taxpayers and governments are legitimately entitled to raise questions about whether funds allocated to tribunals are expended efficiently and effectively.

Tribunals today are part of the justice system in this country and elsewhere. In Australia many tribunals were established at a time when there was general dissatisfaction with the justice system, and in particular, the courts. Especially in the 1970s and 1980s the inadequacies of courts as providers of 'justice' were articulated and criticised. At that time the efficiency with which government programs were delivered, including those in the justice system, was examined and new methods were devised.

While there were no Dickensian *Jarndyce v Jarndyce* cases in the Australian courts, they were seen as too slow, too expensive, too formal and too complicated. Case management was introduced to overcome some of the perceived shortcomings of the courts. Many people went off to the United States to study it and courses were developed in Australia. Government also began to look at alternative ways to deal with disputes.

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The emphasis was all about reducing the delay and cost of the court system. Courts began to talk about trial date certainty and to measure such things as time to finalisation. That trend has continued. Key performance indicators were established for all courts in New South Wales in 2000[1]. There are four measures:

Backlog: the number of cases where the court is not meeting its time standards i.e. the number of "old" cases.

Overload: the number of cases on hand in excess of the number the court can be expected to process within time.

Clearance ratio: the ratio of new filings to finalisations.

Attendance index: measures the number of trips to the courthouse.

As we can see the measures are all about the numbers.

While courts were trying to reduce delay and cost to parties, at the State level in particular, areas of jurisdiction formerly exercised by the courts were given to newly created tribunals. New areas of jurisdiction, such as merits review, were exercised in newly formed tribunals. These tribunals, it was said, would be cheaper, quicker and more accessible than the courts. This expectation is reflected in the objectives of most tribunals which are variations on the 'fair, just, economical, informal and quick' mantra.

Today the annual reports of tribunals are replete with statistics, tables and graphs showing how many applications were received, how many matters were finalised and how quickly they were finalised. Some tribunals report on the cost per case as a measure of efficiency. At the Commonwealth level the work of the tribunal is referable to inputs, outputs and outcomes. The funding of some tribunals is directly linked to productivity. The emphasis in reporting is on how quickly and efficiently the tribunal deals with its caseload – not much different to the key indicators for the courts as set out above.

As Chief Justice Spigelman of NSW[2] has pointed out, statistics relating to matters such as cost and time to finalisation are matters which are both capable of assessment in quantitative terms and which provide information that is useful and the publication of which serves to enhance accountability. Our systems are geared to gather the numbers and arrange them in different ways to show how we are performing. Indeed, efficiency as embodied in matters such as timeliness has become the primary criterion by which a tribunal's performance is assessed. In a recent annual report one tribunal stated: 'Providing a high quality and expeditious appeal process is regarded as most important by (the tribunal) and this is reflected by a reduction in the time taken to finalise matters.'[3]

The emphasis upon quantitative measures is understandable. As has been stated by the Principal Member of the Refugee Review Tribunal and Migration Review Tribunal, 'There is a natural tendency to place greatest emphasis on quantitative measures…. not least because of the desire to be seen to be measuring performance using data that is capable of objective benchmarking.'[4]

It is also true that reporting upon such statistics is relatively easy to do. But are tribunals taking the easy way out and, indeed, are they stuck in a bit of a time warp? Do tribunals continue to measure their performance primarily according to those factors which were influential in their establishment? That is, tribunals were established, in part, because courts were too slow and too costly and tribunals, some 30 years later, still measure themselves according to those criteria. Success is seen through the prism of efficiency measured primarily in terms of timeliness. But is this enough?

As I said earlier, when faced with a sustained attack from a radio shock jock, examples of efficiency were not enough to sway the detractors. What could we say about our effectiveness? What is meant by 'effectiveness' in any event?

In preparing this paper I went to the Oxford English Dictionary to find out. It wasn't really much help: effectiveness = the quality of being effective. Effective has a variety of meanings, the most attractive of which is 'having an effect or result; actually usable'. It was this last phrase that set me thinking. If we were to say that what we should be measuring is whether tribunals are actually usable, what factors or attributes would be looking at?

We need to recognise the complexity of trying to assess whether tribunals are actually usable. The criteria are complex and different interests will articulate them differently. As we've seen, for some the speed of the proceedings and the prompt delivery of the decision are fundamental qualities. Others say that the most important thing is that the outcomes must be correct - that decisions must be legally sound and understandable. Many consider that treating people with dignity and respect is a priority, as is the independence of the tribunal. Some people say that a tribunal cannot be actually usable unless the tribunal is accessible to all those who may need its services.

Chief Justice Beverley McLachlin in speaking of the role of tribunals in Canada notes that: 'Fair procedures, equitable treatment, and responsiveness to the public are the cornerstones of a system of administrative tribunals built according to the Rule of Law.'[5]

The Council on Tribunals in the United Kingdom has established standards for tribunals which aim, among other things, to provide a tool for government and tribunals to assist in reviewing the performance of tribunals.[6] The standards include matters such as:

- providing open, fair and impartial hearings;
- being accessible to users;
- focussing on the needs of users; and
- offering cost effective procedures.

In order to assess whether tribunals are actually usable or effective we need to be able to 'measure' these aspects of a tribunal's performance. Therein lies the difficulty. As Spigelman CJ says, '…not everything that counts can be counted. Some matters can only be judged – that is to say, they can only be assessed in a qualitative way.'[7] That is, not everything can be reduced to statistics and graphs.

I will look briefly at three aspects by which tribunals might be able to judged as effective – correct outcomes, fair procedures and accessibility.

There appears to be a general prohibition on attempting to assess whether the outcomes produced in tribunals, that is the decisions themselves, are correct. There seems to be a belief that the notion of independence means that such an assessment should not be undertaken. In discussing the desirability of a performance appraisal system for members of tribunals, the Leggatt Review in the United Kingdom was at pains to stress:[8]

> Assessments are not concerned with the rightness or wrongness of decisions or with any aspect of them (like consistency) which depends on qualitative judgements of the decisions themselves or of other decisions with which they could be compared.

While I agree that tribunals should be independent and should be perceived to be independent and that decisions should be made without undue pressure from government, parties or anyone else, I do not think that the decisions themselves should be free from

scrutiny. If a tribunal's decisions cannot stand up to scrutiny then that must be an indicator that the tribunal is not being effective and that the quality of its work is below par.

I am not referring to the decisions of tribunals which may involve fine legal points about which great minds may differ. There is always room for error in those situations and, ultimately, the courts will advise on what is correct. I am really talking about the vast bulk of tribunals' work which is applying settled law to the facts. If a tribunal regularly gets that law wrong, clearly there is a problem. I hasten to add that this is not a common occurrence.

One of the greatest criticisms about tribunal decisions is that they are inconsistent. The response is usually that each case will turn on its own facts and there can be subtle degrees of difference in the evidence which lead to different outcomes in individual cases. That may be so, but we should not shy away from making assessments in this area. I agree with one of my Canadian colleagues when he says:[9]

> …consistency and coherency are attributes of decisions that become important only when we stop assessing decisions as individual events and begin judging them instead, or as well, as components of a body of work.

Consistency in decisions between one tribunal member and another is important because fairness dictates that parties in like situations should receive like results. Furthermore, as my Canadian colleague points out,[10] the tribunal's credibility, its own self-confidence and its effectiveness are all undermined by inconsistent decisions.

There will always be shades of grey where the exercise of discretion is involved and members of tribunals will have a range of views on significant issues, but glaring inconsistency is not a hallmark of quality.

A matter closely aligned with whether decisions of a tribunal are legally correct and consistent is whether those decisions are understandable. This is so whether the reasons for decision are given orally or in writing. A number of tribunals have a statutory duty to give reasons and for others we are moving ever closer to there being a common law duty to give reasons, particularly where the powers exercised by the tribunal can be classified as 'judicial' rather than 'administrative'.[11]

Those reasons must be able to be understood by the parties, particularly the losing party. It is therefore incumbent upon tribunals to produce cogent and understandable reasons for decisions. None of us wants to be the subject of a comment such as this:[12]

> I hope it is not unduly critical to say that the judge's summing up on this part of the case was not a model of lucidity.

These assessments, by and large, must be conducted in-house and a culture engendered within the tribunal that promotes consistency as a desirable principle and which encourages good practice in decision writing.

I was interested to read in the last Annual Report of the Social Security Appeals Tribunal that a particular project had been undertaken examining the standard, coherence and consistency among disability support pension decisions.[13] What was interesting was not so much that the project had been undertaken, but that it was reported upon.

Another aspect of assessing whether a tribunal is effective is whether or not the proceedings have been conducted fairly. Indeed, as well as consistency in outcomes, consistency in treatment between like cases is highly desirable. There are, of course, certain practical matters that tribunals can deal with procedurally to ensure that the principles of procedural fairness are adhered to. But what of the parties' perception of fairness?

The process by which the outcome is reached has a value which is separate from the outcome itself. It has often been stated that participants are well able to distinguish between the process and the outcome. If the process is not fair, then there is little reason why citizens should use the service of tribunals, regardless of how efficient they are.

A number of courts and tribunals conduct client satisfaction surveys in order to determine whether they are meeting needs of users. Chief Justice Spigelman has been scathing about such surveys and their application to the courts.[14] In his view client satisfaction surveys, if they are used at all, should be limited to matters of administration such as signage and facilities – here they 'may do some good and will do no harm'. They should, however, go no further and should not touch upon judicial administration, including case management.

That may be well and good for courts such as the Supreme Court of NSW, but for tribunals which deal with large number of self-represented parties, such surveys must have a focus on practice and procedure. How to deal with Supreme Court procedure is part of a lawyer's training; most applicants in the tribunal system are one-off players with no legal training. For a tribunal to be actually usable its procedures must be transparent and capable of being understood by the average party.

For tribunals, factors such as the anxiety engendered by being in a tribunal must be taken into account in the design of procedures. Hence, in tribunals, there is significant emphasis upon the information provided to parties prior to their arrival at the hearing room. Of equal importance are the skills and conduct of tribunal members who must ensure that proceedings are conducted fairly.

Client satisfaction surveys are a useful tool for assessing whether the practices and procedures of the tribunal, as well as administrative matters associated with the design of premises, helpfulness of informational material etc, are perceived to be fair by users of the system.

In 2006 the Victorian Civil and Administrative Tribunal published the results of a user survey in its Civil Claims List and has stated that the results of the survey will be used to develop initiatives to improve the hearing process in that list.[15]

Measuring the effectiveness of practices and procedures should not be confined to the hearing process. Many tribunals use various ADR processes to settle disputes. I have commented elsewhere on what may be the dangers of 'institutionalised' ADR used as a case management tool.[16] The fairness of these processes for the parties must also be assessed and modified where necessary

One of the hallmarks of tribunals is that they are more accessible than the courts. This is perhaps one of the most difficult aspects to measure. Through surveys we may be able to obtain some information about who does apply, but it is very difficult to extrapolate that information to ascertain who does not apply and what are the barriers to access. Certainly, further work needs to be done in this area.

Tribunals are in the early stages of grappling with how to measure the quality of the work they do and how to assess their effectiveness in qualitative terms. It is not sufficient for tribunals to rely on economic and efficiency indicators as measures of performance. Indicators of quality must be developed and articulated. Most importantly, these measures must be communicated to those with an interest in the work of tribunals. As Professor Neave, as she then was, has said:

> Measuring administrative justice should not be seen as a mechanistic process of identifying inputs, outputs and outcomes, but as an ongoing dialogue between the stakeholders in the system, including politicians, administrators, tribunals, lawyers and members of the public.[17]

For tribunals to be effective they must not only be efficient but must be actually usable by the people they have been set up to serve.

Endnotes

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3 Social Security Appeals Tribunal, *Annual Report 2005-06*, p3
4 Steve Karas, 'Should tribunals be required to meet performance criteria and, if so, how would they be defined and enforced?' Council of Australasian Tribunals Queensland Chapter seminar 14 February 2003, www.coat.gov.au
5 Chief Justice Beverley McLachlin, 'The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law' (1997) 12 *Canadian Journal of Administrative Law and Practice* 171
6 Council on Tribunals, *Framework of Standards for Tribunals* November 2002 (updated February 2006) www.council-on-tribunals.gov.uk
7 Spigelman, p70
8 Sir Andrew Leggatt, *Tribunals for Users One System, One Service – Report of the Review of Tribunals* March 2001, para 7.42.
9 S Ronald Ellis, 'Misconceiving Tribunal Members: Memorandum to Québec' 18 *Canadian Journal of Administrative Law and Practice* 189 at 200
10 at 201
11 See *Campbelltown City Council v Vegan & Ors* [2006] NSWCA 284
12 *R v Tao* [1977] 1 QB 141 at 143
13 Social Security Appeals Tribunal, *Annual Report 2005-06*, p 34
14 Spigelman, p77
15 Victorian Civil and Administrative Tribunal, *Annual Report 2005-06* p 9
16 Kay Ransome, 'The role of consensual dispute resolution in tribunals' (2004) 14 *Journal of Judicial Administration* 45
17 Marcia Neave, 'In the Eye of the Beholder – Measuring Administrative Justice' in R Creyke & J McMillan (eds) *Administrative Justice – the core and the fringe,* Australian Institute of Administrative Law Inc 2000 p 137.

ADMINISTRATIVE REVIEW OF MEDICAL ISSUES: SAY 'OUCH' WHEN IT HURTS

Lorraine Walker*

Introduction

> *In the curial interface between medicine and the law, science is moulded into an uneasy and unnatural use within a system of intellectual combat alien to the scientific method. Enmeshed in this process are expert witnesses.*[1]

The last decade or so has seen significant review of issues relating to the giving of expert testimony before Courts and Tribunals.[1] There has been a great deal of legislative change to accommodate various recommendations and a range of judicial pronouncements on the issue both in and out of Courts. In the meantime, the AAT has been conducting its own experiment, the Concurrent Evidence Trial. There remain hugely divergent views, though, on what, if any are the problems associated with expert evidence and how any perceived problems can best be addressed.

It is my belief that the problems are to some extent magnified in the context of Tribunal proceedings in which the rights, and sometimes, basic needs, of the citizen are subjected to review in a context in which there is very limited challenge if the decision-maker 'gets it wrong' because of what in a court review context might be regarded as 'an unsafe and unsatisfactory' conclusion on the evidence and therefore appellable. This paper aims to highlight some of those problems from the perspective of a regular practitioner in the context of medical evidence before the AAT and to provide some modest suggestions for consideration.

The perceived problems

A quick review of the myriad of speeches and publications available on the subject of expert evidence in recent years highlights some main areas of concern. Views as to which of the factors identified below are not universal; some are merely my own observations, or at least my perspective on them.

Qualifying the witness

I will come back later in this paper to the issue of how the law of evidence is or ought to be regarded in dealing with medical issues before the AAT. In the meantime, I will assume that at least the spirit of the *Evidence Act 1995* (Cth)(EA) has relevance to the matters being canvassed herein[2]. On that assumption, I note the following provisions of the EA:

> Section 76(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

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However,

> Section 79 If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

One of the difficulties that arises in this respect now is identifying just what area of expertise is relevant to a particular issue. This can be made difficult by the subject matter, for example in determining issues relating to birth trauma, is it a neonatologist, a pediatric neurologist, a pediatric neuroradiologist or whatever, that might be required? Generally speaking, most medical issues before the AAT are not so difficult but it is not uncommon to have three or four 'specialists' called upon from different fields, some recognised as specialists through the Medical College regime, some self-proclaimed specialists. As to the latter, one only has to reflect upon RSI and CFS 'specialists' of the 1980's and 1990's respectively. However, challenging specialisation can be time-consuming, may be seen as time-wasting by others present and may require a level of expertise that the challenger lacks.

Generally speaking, it is recognised that as well as identifying the training or experiential basis, in qualifying the expert it is necessary to ensure that the opinion expressed arises from that identified expertise. *HG v R*[1] and *Makita (Australia) Pty Ltd v Sprowles*[2]. Sadly, as was identified in *HG,* it is not uncommon to find, on scratching, that 'on the contrary, a reading of his report, and his evidence at the committal, reveals that it was based on a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise (of a psychologist)'.

Separating the wheat from the chaff in this respect falls to the competent advocate. Whilst some errors may be obvious on the face of the report (as appeared to be the case in *HG*, in many instances, the report will be worded sufficiently obscurely or technically, or its author will be attended by such apparent eminence, that the flaws are less than apparent. Even an inquisitorial Tribunal is unlikely to delve into evidence so deeply of its own initiative as to dislodge many flaws.

There may be disagreement though as to how specific that expertise needs be to fall within the definition. Having accepted that 'functional overlay' consequent upon but having superseded a physical illness was in fact an injury, Einfeld J in *Hairis v Commission for the Safety and Rehabilitation of Commonwealth Employees*[3] went on to say (having indicated that if expertise were to be challenged the time to do so had passed):

> 18. In any event, there is no rule of law that the evidence of an experienced orthopaedic or general surgeon about functional overlays must be rejected by a tribunal of fact in favour of the evidence of a psychiatrist on the same subject. That is a matter for the tribunal of fact to weigh up for itself, taking into account the condition in question, the experience of the respective practitioners, their application to the task in hand, how much time they have spent with the patient to assess the condition, the tribunal's own assessment of the injured worker and the doctors in the witness box, the content of the cross examination, and many other factors. It is a matter of weight if the tribunal of fact, upon undertaking that task, prefers the evidence of one expert with considerable experience in the field to a psychiatrist, however talented. A question of law will rarely arise to set aside an assessment of evidence in such circumstances.

It is the very fact that challenges as to the weight attached by Tribunals to particular pieces of evidence through either the 'error of law' appeal within various enabling statutes or on ADJR appeal that such potential errors must be identified and addressed firmly at hearing level.

Perceptions of bias

In the Australian discussion of bias and expert evidence, the predominant concern appears to be bias resulting from the receipt of payment. It was certainly a concern underlying both the Woolf and Ipp recommendations geared towards single expert evidence. It must be recognised by anyone who has participated in litigation whether strictly so in Courts or less formally in the administrative arena, that advisors gravitate to those experts whose opinions generally conform to their perspective on issues, and that such experts, even those seeking to genuinely express an *honestly held opinion*, nevertheless do so with an understanding, subliminal or otherwise, that they are defending a position. If nothing else, they do not wish to look silly in altering the views expressed in their written reports (which are now invariably before at least the other party before the evidence is given). Add to that that willing experts are called upon more frequently, and then often find themselves in the same 'battle lines', often against repeat 'foes', it must be recognisable that bias, in the sense of an inclination to express a certain type of opinion, will emerge.

Justice Downes[4] has expressed the opinion that 'with very few exceptions, they (expert witnesses) do not deliberately mould their evidence to suit the case of the party retaining them. When they do, it is obvious.' He said this in the context of expressing support for 'the great values of the traditional approach to expert evidence', a somewhat rare vote in favour of the adversarial approach to eliciting evidence in the AAT from its head honcho! With respect, I agree with his view with the exception that the 'moulding' need not be deliberate in order to render it capable of distorting the search for truth[5]. Although it may well be an unavoidable consequence of the requirement to pay expert witnesses to give evidence, the reality of this problem is widely recognised. Although Lord Woolf may have popularised the 'hired guns expression' he is not alone in his adoption of the notion[6].

Apart from any lack of objectivity which may be associated with the fact of receipt of payment for the report, there is a quite different type of bias which attaches, to some extent I suggest almost invariably, in the context of the treater/patient relationship.

Although there appears to be little discussion of this notion in the Australian context, I propose the view that treating medical practitioners ought never be qualified as expert witnesses for the purposes of a contested hearing. Recognising that this raises issues about what use should be made of treater's report at initial decision-making and how the likely cost of requiring to obtain independent medical evidence can be met, nonetheless, I consider that it is unrealistic and unreasonable to require a treating medical practitioner (particularly in psychiatric or psychological medicine) to put above their obligation to their patient the required obligation to the Court. This is not to suggest that such people could not give evidence of their records and their observations but beyond that to require them to give 'independent evidence' would be akin to asking counsel to give a truly unbiased summing up. Despite all best efforts, the perspective would be skewed by prior knowledge and belief.

I was comforted on checking the website of the Royal Australian and New Zealand College of Psychiatrists in preparing a case for hearing this week, that the College officially takes a similar view. I have attached as Appendix A copies of the College's *Guide to Ethical Principles On Medico-Legal Reports* and *Ethical Guidelines for Independent Medical Examination and Report Preparation by Psychiatrists* in this respect. I invite you to consider this document in conjunction with the Federal Court's guidelines on expert witnesses. An even more fascinating exercise might be to consider the College Code alongside the next 'independent medicolegal' report you receive. I am sure that it is not only in the Australian Capital Territory that one might identify a 'medicolegal', briefed as such, converted to a treater, purporting to give 'independent' expert evidence. The situation may be compounded, as in my recent experience, by a retrospective request to a GP for a referral to cover the

HIC's requirements for a genuine medical referral. Such a conflation of roles must be of concern to tribunals receiving evidence.

The experts' discomfort

Concerns about the taking of expert evidence do not belong solely to the parties or tribunal; the experts themselves often express angst or frustration over the process by which their evidence is adduced or tested. It has been said that 'there is wide concern in the medical community with regards to the adversarial process involved in obtaining our opinions. There is a wide perception in the medical profession that important medical principles and reasoning often does not seem to be understood by the Courts'.[7] Other than in the most phlegmatic of witnesses, this can produce evidence which comes across as defensive, argumentative, arrogant, confused, or otherwise distracting from its content.

The complexity of evidence and the medical controversy

In most cases, medical issues can be understood by legal representatives who have conferred with their experts and at least crudely conveyed to the Tribunal receiving the evidence. Despite the ability of witnesses and their representatives to convey a position, though, if this position forms part of a medical controversy, it is highly likely that in cross-examining, any clarity is soon obfuscated by the very issues which are the source of the controversy, frequently exacerbated by the bristling of egos on the line. If a whole medical community is unable to be generally satisfied on an issue, how is the decision-maker to deal with the conflict?

Inconsistency between the scientific and legal concepts of proof: a case in point 'Chronic Pain Syndrome'

Former Justice Gordon Samuels wrote on distinguishing between scientific and legal proof:

> The procedure adopted in our courts tends to exacerbate fundamental differences in approach between doctors and lawyers. Medicine is a science and law is not. Developments in medicine are made by experiment and observation; in law they are made by the decisions of legislatures and judges. A medical fact is one which cane be empirically supported or clinically determined; a legal fact is one which is more probable than other countervailing facts.[8]

It has been recognised both in the common law and the administrative law contexts that actual medical diagnosis is not an absolute prerequisite to finding 'damage' in the former case or 'injury' in the latter. In *Australian Postal Corporation v Lucas (now Owen)*[9] Burchett J said at page 272:

> *Re Musumeci* was a rare case, and the point made in it was a very special one. I do not wish to cast any doubt upon the conclusion that, given an incapacitating condition is satisfactorily shown, the mere fact that the diagnosis of its medical nature may not be able to be made precisely, though obviously a fact which might militate against a finding of a causal link with employment, will not necessarily present an insuperable obstacle to such a finding. It must depend on the evidence. Nor is it to be doubted that proof of incapacitating pain may be relevant to show an aggravation: cf *Commonwealth of Australia v Beattie* (1981) 35 ALR 369 at 378, per Evatt and Sheppard JJ.

In 1990, DP Todd of the Tribunal said in *Re Beer and Australian Telecommunications Commission*[10]:

> 56. Putting aside then the false case, the unproven case and the clearly diagnosed case, we can then be left with the case of the greatest difficulty, namely the case of allegedly persisting pain in the upper extremities accompanied by a range of medical and/or para-medical evidence supporting the claims of the employee but without specific medical diagnosis of a recognised disease entity. As to this there is not only no unanimity amongst the medical profession, there is instead quite bitter division, with polarised attitudes and sometimes express or implied condemnation of those who hold other views.

> Some of the evidence can be disquieting and bordering on the demeaning. I have to say that the least toleration of opposing or alternative views tends to come from some of those at the pole which represents the view that unless a well-recognised disease entity, such as one of those referred to above, can be diagnosed, or a specific lesion in the medical sense identified, the claimant's allegations of pain must be rejected and the claimant inferentially dismissed as a `malingerer'. He went on to state, "What I am saying is that proven pain may in some circumstances fall within the statutory definition of disease notwithstanding that medical science is unable to agree on the 'label' that is to be attached to the condition that gives rise to the production of non-transient symptoms that constitute the pain."
>
> This approach was adopted by DP Forgie in *Re Beer and Telstra Corporation Limited [1994] AATA 9838* and has found favour since.

Chronic pain syndrome is a non-diagnosis that appears to be incapable of definition other than by reference to itself; that is chronic pain syndrome is a symptom of pain which is chronic. As a syndrome (and I distinguish this from the readily understandable notion of 'chronic pain'), its aetiology is ephemeral. Simplistically, the 'physical' doctors say it's not physical, the psychiatric fraternity say that alone, it's not a psychiatric phenomenon. The 'new breed' of pain specialists say it's both but they cannot tell you what came first, the physical or the psychological, or indeed where one ends and the other begins.

All of the experts are prepared to use the term yet few are able to prescribe any substantive meaning to it. It will not be constrained by the recognised phenomenon of Chronic Regional Pain Syndromes Types 1 and 11, with their clearly delineated diagnostic criteria. It will not be constrained within the DSM 'Pain Syndrome' model. So what is it? What is its aetiology? And, significantly, from the perspective of this paper, who can be relied up in giving evidence about it? Is it appropriate to throw up the epidemiological evidence which indicates that the syndrome is far more common in relation to work injuries than to any other class of injury? Is it appropriate to link it to the debunked 1980's RSI phenomenon? In practical terms, this syndrome creates a huge challenge to the Tribunal. The issue is far too large for serious consideration in this paper. And chronic pain syndrome is not the only beast of its type. It is, however, a very interesting controversy against which to test views regarding expert evidence: qualifying it, clarifying it and assessing it.

Use of epidemiological evidence

Epidemiological evidence is a specific example of evidence which by its very nature creates a challenge to the legal approach to proof. Such evidence addresses scientific probability (in a manner somewhat challenging to many mortals!). It is potentially valuable evidence in determining questions of causation, yet introducing and dealing with such evidence in a way that does not derogate from its scientific validity is fraught with difficulty for the almost invariably non-expert counsel. Such evidence is a most obvious example by which the artificial legal test of 'proof' is compounded by factoring in an expert assessment based on the notion of possibilities and probabilities in a manner more scientific to the law but by its very nature not directly applicable to the individual case.

The first issue is what qualifies as 'epidemiological evidence'? Is it enough, for example, to summons all the personnel records of all staff in a particular role in an organisation in order to prove that there was a high level of a particular type of injury occurring?

The issue was comprehensively addressed in *Seltsam Pty Limited v McGuiness; James Hardie & Coy Pty Limited v McGuiness*[11], a case dealing with the connection between exposure to asbestos and kidney disease, by Spiegelman CJ, Stein JA, Davies AJA. Their Honours concluded:

> 79 Evidence of possibility, including expert evidence of possibility expressed in opinion form and evidence of possibility from epidemiological research or other statistical indicators, is admissible and

must be weighed in the balance with other factors, when determining whether or not, on the balance of probabilities, an inference of causation in a specific case could or should be drawn. Where, however, the whole of the evidence does not rise above the level of possibility, either alone or cumulatively, such an inference is not open to be drawn….

119 There is a tension between the suggestion that any increased risk is sufficient to constitute a "material contribution", and the clear line of authority that a mere possibility is not sufficient to establish causation for legal purposes. The latter is too well established to be qualified by the former. The reconciliation between the two kinds of references is to be found in the fact that, as in Chappel v Hart and in the cases that suggest the former, the actual risk had materialised. The "possibility" or "risk" that X might cause Y had in fact eventuated, not in the sense that X happened and Y had also happened, but that it was undisputed that Y had happened because of X.

120 The epidemiological evidence in the present case can be expressed in terms of "increased risk". However, in its application to determining causation in the specific case of the Respondent that evidence never rises above the level of a possibility. Whether or not the increased risk "eventuated", is the issue which must be determined. The Respondent's reliance on the passage from McHugh J was, in my opinion, misplaced."

The dilemma is that such evidence is highly likely to be apposite to the types of medical issues that arise before Tribunal's. However, the cost of calling experts to introduce and explain it is likely to be prohibitive to the parties. Is it appropriate then to go the Clayton's line, "the Internet research"?

The Internet is, of course, an amazing and valuable tool, one to which parties and Tribunal's alike have reference to varying degrees in attempts to understand everything from the anatomy of the knee to the relationship of stress to shingles in the adult population. Almost any position one wishes to argue appears to find some support somewhere on the Net. In a Tribunal not bound by the rules of evidence, just what freedom should be allowed to introduce material available on the Internet? Should all such material be introduced via an expert, even if not sourced or relied upon by that expert? In the famous words of Janis Joplin, in this respect could it be that "freedom's just another word for nothing left to lose"?[12]

How the broader Court system has addressed these issues

The Courts have partly through legislation and partly through internal initiative in developing their own rules, sought to redress concerns associated with receipt of expert evidence in a number of ways. It is beyond the scope of this paper to specify each jurisdiction specific response. Thus the following is a general summation.

Codes of conduct for witnesses[13]

I have appended the Federal Court Guidelines for Expert Witnesses. Of note is the requirement that the expert's duty to the Court is described as both overriding and paramount. The conflict that this creates in relation to a treating expert has been touched upon above. What the Guidelines usefully do is indicate the basic requirements of an expert report. However, in my respectful submission, the Code does not go nearly far enough in providing clear prescription of what might be truly helpful for those needing to interpret the medical report. In noting this, the fact that the Guidelines apply to all manner of experts should be taken into account. A more specific document may not be appropriate across the board but it may be that some types of expert evidence lend themselves to a more prescriptive approach.

Introduction of single expert rules

The push towards the 'single expert' was sold to the legislature on the basis both of simplifying complex technical issues and reducing court time expended. It has had supporters and detractors in Australia.[14] McClennan J points to the efficiency of the system in his experience (which commenced with the Land and Environment Court and therefore a different type of expert). He does note the benefit in a single expert collating factual material. Again in the context of medical examinations, this may not be appropriate, particularly if an

individual is being assessed from the perspective of a different specialisation. He notes that cost may be less as written reports may not be required. However, there are many potential problems with the single expert approach in medical matters, not least of which in a small jurisdiction would be sourcing them. There is a real danger that one 'side' or the other may come to feel that a particular court-appointed expert or cadre of experts supports a particular approach on issues. Even if that is a 'moderate' view, it will still only be one view. What material will be available to test the views of the single expert if no other opinion has been obtained? If one has, does the cost simply become a hidden cost?

If a single expert approach is appropriate, consideration could be given in the Commonwealth to the use of internal experts in say, the workers' compensation jurisdiction, in order to head off at least some medical controversies at the pass. This would of course be the subject of criticism by many disaffected claimants but even so, such an approach might see some sensible questions being asked at an early stage which, even if not finally determinative of issues, might assist in delineation of them down the track.

One further question which arises is would a treater to be deemed an expert for the purpose of such rules? Would the treater's records be admissible in such circumstances or would this offend the single expert provision. The scope of this paper prevents detailed consideration of this issue. However, I do note that it has been considered in the context of the ACT Supreme Court Rules and general practitioner notes in *Pappas v Noble*[15], a decision of Master Harper.

Concurrent evidence

This approach has been trialled increasingly. There appears to be some consensus of its value amongst tribunals and experts. Counsel and solicitors appear on occasions less inclined to engage with this process. The overwhelming advantage of it is, though, that parties can ensure that all relevant evidence is provided to all expert witnesses with at least some time to consider it. This is not always realistically achievable throughout a hearing, particularly where evidence is being given remotely.

How the AAT experience is akin to the Court experience

The AAT is, of course, in the enviable position of being able to determine its own procedure[16] and is not bound by the rules of evidence, subject to acting within the law. The primary consideration is therefore the provision of procedural fairness to the parties. Whilst this provides for desirable procedural flexibility, one might consider that the converse is the potential for the testing of expert evidence to be less rigorous. In practice, I have found the opposite to be the case. Whilst the stricter application of the rules relating to service of reports and not calling evidence outside of those reports appears to operate as a limit to examination by advocates in the general Courts, that does not, in my experience, appear to be the case in the Tribunal. The result may be a broader ranging inquiry, which is beneficial to ascertaining the truth in so far as it is possible, provided that inquiry is restricted sensibly by the rules relating to relevance, proof of assumptions and operating within expertise.

The matters which come before the Tribunal for determination, at least in part, of medical issues, are frequently run in a very court-like manner, albeit with less formality. The calling and order of expert witnesses is largely left to the discretion of the parties; the form of examination follows the usual order (albeit with perhaps greater flexibility to recall or reopen issues than in a Court); although the rules of evidence are far from strictly applied to questions asked, the AAT will rule of 'objectionable' questions, albeit that the criterion for assessing the objectionability of them is more likely to be relevance and weight than strict admissibility. Tribunal members vary as to the level of questioning they might undertake but on the whole that is reserved for the end of the parties questioning with the opportunity to

question further if the need arises. Therefore the calling of expert evidence operates in largely the same way in the AAT as it does in most Courts.

So, given the clear flexibility given to it by the AAT Act, why is the Tribunal so traditional in its approach?

Is it because cases are frequently conducted by counsel who are used to doing so in the traditional manner?

Is it because little thought is given to varying the norm?

Is it because there is a fear of being challenged, particularly on the basis of denial of procedural fairness, if a different approach is taken?

Or is it because, on the whole, this approach works reasonably well in identifying the issues and assisting the Tribunal's deliberations?

I do not know the answer to that. What I do know is that shoddy, superficial reports prepared upon unknown assumptions and providing unsupported conclusions are common place. I do know that attempting to rectify that through cross-examination can be difficult and, in all honesty, at times not in one's client's interest. Despite the generally indulgent attitude of the Tribunal to legal representatives, attempting to properly redress these problems, in cases in which there is as a matter of course voluminous material, is time consuming and, at times, no doubt downright irritating to those obliged to observe the process.

The function of the Tribunal is assessing expert evidence is largely coextensive with task of judicial officers carrying out the same function, although in truth the task can be made more difficult by the legislative paradigm in which that task must be carried out.

Important differences between the AAT functions

Different legal tests being applied

Is it significant in terms of how expert evidence is treated that the legal tests being applied by the AAT arise under specific statutory provision which may or may not have overlap with the tests applied in the Courts? I submit that it is. The reasons for this view is that there are a series of very specific tests which the AAT has to apply which impact upon the way in which experts might be required to consider a matter, that is statutory parameters are put around. One example is the application of the 'reasonable hypothesis' in Veterans' Review matters; another is application of the Impairment Tables under the Social Security Act. These are two very obvious instances of situations in which the expert's evidence will be curtailed by an absolute requirement. Taking the latter of these the following is an excerpt form the Introduction to the Schedule 1B–Tables for the assessment of work-related impairment for disability support pension:

> 4. A rating is only to be assigned after a comprehensive history and examination. For a rating to be assigned the condition must be a fully documented, diagnosed condition which has been investigated, treated and stabilised. The first step is thus to establish a working diagnosis based on the best available evidence. Arrangements should be made for investigation of poorly defined conditions before considering assigning an impairment rating. In particular where the nature or severity of a psychiatric (or intellectual) disorder is unclear appropriate investigation should be arranged.
>
> 5. The condition must be considered to be permanent. Once a condition has been diagnosed, treated and stabilised, it is accepted as being permanent if in the light of available evidence it is more likely than not that it will persist for the foreseeable future. This will be taken as lasting for more than

two years. A condition may be considered fully stabilised if it is unlikely that there will be any significant functional improvement, with or without reasonable treatment, within the next 2 years.

6. In order to assess whether a condition is fully diagnosed, treated and stabilised, one must consider:

- what treatment or rehabilitation has occurred;
- whether treatment is still continuing or is planned in the near future;
- whether any further reasonable medical treatment is likely to lead to significant functional improvement within the next 2 years.

In this context, reasonable treatment is taken to be:

- treatment that is feasible and accessible ie, available locally at a reasonable cost;
- where a substantial improvement can reliably be expected and where the treatment or procedure is of a type regularly undertaken or performed, with a high success rate and low risk to the patient.

It is assumed that a person will generally wish to pursue any reasonable treatment that will improve or alleviate an impairment, unless that treatment has associated risks or side effects which are unacceptable to the person. In those cases where significant functional improvement is not expected or where there is a medical or other compelling reason for a person not undertaking further treatment, it may be reasonable to consider the condition stabilised.

In exceptional circumstances, where a condition was considered not stabilised and a permanent impairment rating not assigned because reasonable treatment for a specific condition has not been undertaken, the medical officer should:

- evaluate and document the probable outcome of treatment and the main risks and or side effects of the treatment; and
- indicate why this treatment is reasonable; and
- note the reasons why the person has chosen not to have treatment.

Clearly this is a highly prescriptive mode of ascertaining whether or not an individual potentially qualifies for a particular payment. Review of this example highlights that in assessing medical evidence in the administrative review context, the type of evidence which must be extracted from the expert can be quite explicit. It is highly likely that there will be some reluctance in the witness to fit his or her evidence to the word pictures required, particularly in the case of a treating practitioner whose primary concern generally is the running of a medical practice and restoring of patients to well-being rather than completion of forms or reports addressing notions which to them may seem artificial or at times even nonsensical.

On the other hand, for a competent practitioner, what this and similar frameworks provide is the opportunity to elicit from the expert very specific information to assist the Tribunal's deliberations.

Another feature of administrative review, is that the conclusion reached is not a 'once and for all' outcome in some cases. The Tribunal having made its decision, the administrator is then often required to 'live with' that decision in terms of implementing payments on the basis of it, or utilising it as a basis for future management of a claim. In that regard, any pronouncements that the Tribunal make as to the expert evidence may well resound down the years. If the expert evidence presented to the Tribunal is unclear, the Tribunal must still do its best to address it. However, the resulting decision may obfuscate rather than clarify matters for future management if the Tribunal has been unable to arrive at clear and convincing conclusions.

This leads also to a consideration of the form of appeal that is available. As appeals are limited to appeals on questions of law (albeit there is limited power now in the Federal Court to make findings of fact[17]) except in extreme circumstances of perverse reasoning[18], what might otherwise be seen as 'errors' in the Tribunal's assessment of expert evidence will go

unchallenged. Thus the obligation to have that evidence presented clearly is, if anything, even greater than in a civil court.

What steps have been taken

Noting that the AAT has wide power to determine its own procedure, what steps has it taken regarding efficient and effective use of expert evidence?

The Tribunal has fairly standard rules regarding the exchange of expert reports, in order to narrow, where possible, the issue between the parties. These have recently been reiterated in the long-awaited *Guide to the Workers Compensation System* (March 2007):

> The Tribunal expects that, in general, all evidence to be relied on at the hearing will have been identified during the pre-hearing process. Parties must comply with any directions issued or timetables set for giving documents or other material to the Tribunal and the other party prior to the hearing. If a party anticipates or experiences any difficulty in meeting these obligations, this must be brought to the attention of the Tribunal as soon as possible.
>
> Applicants should be aware that, if they wish to present any matter in evidence and that matter was not disclosed to the Tribunal at least 28 days before the hearing date, that matter is not admissible as evidence without the leave of the Tribunal: see subsection 66(1) of the *Safety, Rehabilitation and Compensation Act 1988* and subsection 90(1) of the *Seafarers Rehabilitation and Compensation Act 1992*.

The Concurrent Evidence Trial was reported on in November 2005, now over 18 months ago.[19] The executive summary indicates that the members were keen on the process and that in most cases Tribunal time spent in receiving the evidence was the same, or less than, when other forms of evidence were used. It is important to note that for individual doctors, though, this can be a more time-consuming process (and therefore more costly for the parties). I anticipate that this may be less so if the procedure was more widely used and medical experts were briefed by agreement earlier on in the process, that is, if the possibility of concurrent evidence was identified early and doctors briefed with fuller materials earlier in the process. The process does not appear to have universally flourished, despite the positive trial. I suspect that a significant reason for that is late consideration of it as an option, anticipated cost and some reluctance from uninitiated legal representatives. If the process is not to lapse, proactive case identification by Registrars and Members will be required.

The AAT in Canberra in particular makes extensive use of telephone evidence although I understand from experience that this might not be so common elsewhere. It remains a matter for the Tribunal's discretion as to whether they feel the need to 'eyeball' expert witnesses. I suspect, however, that if reports were better prepared this may be less of an imperative, with an associated cost saving.

What further steps might be considered

The AAT may be underutilising its great flexibility procedurally. For example in some cases, it might be appropriate to have mixed concurrent and traditional evidence, to have expert witnesses sit in on the applicant's evidence or, where credit is identified as a primary issue, to separate in time the lay from the medical evidence, in order to possibly avoid medical costs.

I consider that it is highly desirable that the AAT expedite the introduction of expert and particularly a medical expert Code of Conduct. Various Codes are often seen appended to reports and may or may not be acknowledged. I consider that a Code which also provides a report template and provision for confirmation of the content of the Code would be helpful, as would some sort of sanction for obvious breach of it. Statements that an expert intends to abide by the Code are frequently made but perhaps not compelling. A structured report

would provide a practical way of ensuring not so much objectivity as one extra tool in the process of measuring the coherence and reliability of reports. This approach is supported by the following extract from *HG v R* per Gleeson CJ at [39]:

> The opinions of Mr McCombie were never expressed in admissible form. An expert whose opinion is sought to be tendered should differentiate between the assumed facts upon which the opinion is based, and the opinion in question.[9] Argument in this Court proceeded upon the basis that it was possible to identify from Mr McCombie's written report some facts which he either observed or accepted, and which could be distinguished from his expressions of expert opinion. Even so, the provisions of s 79 will often have the practical effect of emphasising the need for attention to requirements of form. By directing attention to whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience, the section requires that the opinion is presented in a form which makes it possible to answer that question.

In dealing with non-legally qualified witnesses, whilst it would not replace proper briefing practices, addressing issues of form in a document may go some way to filling the lacuna left by sloppy briefing or refusal, intended or otherwise, of the expert to address the issues raised by the briefing.

In brief, here are a series of other initiatives which might be considered by the Tribunal is addressing expert evidence:

In light of the apparent benefits, there may be some utility in the Tribunal actively encouraging concurrent evidence in appropriate cases.

I suggest that it would be helpful if Tribunals openly and proactively engaged with parties as to issues of concern regarding the evidence before them, if views have been formulated. This occurs to a degree but there does appear to be some reticence in some members about doing this at a time when it might influence the extraction of evidence. This is probably a function of the fact that many members come from a traditional legal background in which too interventionist an approach is frowned upon.

I suggest that there is a role for the censuring inappropriate behaviour by experts. Those that frequent the Tribunal on a regular basis would no doubt benefit, as would the interests of justice in due course, from moderate comment as to the helpfulness or otherwise of certain forms of evidence given.

I query whether there is scope for greater and more open use of specialist tribunals. There appear to be somewhat mixed messages from the judiciary as to just what role a specialist member might perform, although conducting an actual assessment in the hearing has been frowned upon. Varying comment has been made by the Federal Court as to the significance of having a specialist member in a hearing. My point is that open reference to the input of a specialist member may be helpful to the process.

Finally, it may be that the Federal Court will in future require a more proactive approach from the Tribunal in exercising its powers or in harnessing the assistance of the Respondent when the Tribunal forms the view that further expert evidence is required before it can reach the decision required of it. Comment to this effect was made by Gyles J in *Harris v Secretary, Department of Employment and Workplace Relations*[20]:

> 19 The AAT stands in the shoes of the Department and is in precisely the same situation as the decision maker. The fact that, as a practical matter, it chooses to conduct quasi-adversarial proceedings and does not have available direct access to medical specialists for the purposes of investigation, does not change the nature of the function being performed by it. The provisions of *s 33* of the AAT Act give ample scope for the AAT to arrange investigation of a claim. The decision maker is bound to use his or her best endeavours to assist the AAT to make its decision (s 33(1AA)). The AAT

> has inquisitorial powers and may exercise them where appropriate. (See, generally, *McDonald v Director-General of Social Security* (1984) 1 FCR 354.) It is not, of course, every case that will require such measures. In general, an applicant for a benefit must satisfy the decision maker of the necessary criteria. However, cases such as this may demand such an approach (cf *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169–170; *Luu v Renevier* (1989) 91 ALR 39 at 49–50). The AAT did not arrange investigations to test the validity of the speculation about each condition. It should have made a decision made on the material before it without taking account of hypothetical third party investigations.

Conclusion

The challenges relating to expert evidence are no less great in the Tribunal system than in the Court system as a whole. What complicates the issue is further is the overarching requirement that 'in carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick'.[21] Citizens who come before the Tribunal, markedly more so that those going to Court, frequently cannot expect a large bucket of money at the conclusion of a successful case. What they might get is their pension back, or incapacity payments that they have struggled without for frequently well in excess of a year. Although costs are awarded in some of the Tribunal's jurisdictions, even where that is so, they not infrequently leave a 'gap' to be met by the successful applicant. On the other side of the coin, the Commonwealth, constrained by the legislative framework in place, is often obliged to run cases the legal cost of which far outweighs what might be required to be paid if the case was not run. Thus any provision which increases efficiency must also address its cost implications. Along with this, the integrity of the system must be maintained such that those who participate in it can conclude that, although they may not like the outcome, they are content that the process was appropriate.

THE ROYAL AUSTRALIAN AND NEW ZEALAND COLLEGE OF PSYCHIATRISTS

Ethical Guideline #1

GUIDE TO ETHICAL PRINCIPLES ON MEDICO-LEGAL REPORTS

1. All psychiatrists should exercise the greatest care to observe the relevant Australian and New Zealand laws and regulations concerning medico-legal assessments and reports.
2. No matter what the referral, it is a breach of the Australian National Health Services Act to knowingly itemise an account for the purpose of payments of medical benefits for a service performed for medico-legal purposes.
3. Any psychiatrist who has any doubt as to the *bona fides* of a referral should go no further with the assessment until the matter has been clarified with the patient and/or referring doctor.
4. The psychiatrist should avoid being placed in a situation in which there are both therapeutic and medico-legal aspects to an assessment. The psychiatrist should advise the patient/lawyer/referring doctor that these two aspects of management should be carried out by different psychiatrists. This does not preclude a psychiatrist from providing a treating doctor's report for a patient already under his/her care
5. Psychiatrists undertaking medico-legal assessments and preparing reports for use by the Court should familiarise themselves with the "Expert Witness Code of Conduct" relevant to the jurisdiction in which the report will be used, and ensure that the assessment and report are in accordance with any such Code that is applicable.
6. Psychiatrists preparing medico-legal or similar reports must not make disparaging or unprofessional comments about colleagues. While it might be appropriate to indicate disagreement in relation to diagnosis, treatment or management of a particular patient, such comments must be expressed in acceptable and respectful language and should not be a personal attack on a colleague, or their professionalism.
7. In expressing a professional opinion in the context of a medico-legal report, psychiatrists should not offer opinions outside their specific field of expertise; all such opinions must be within the bounds of reasonable medical certainty and the generally accepted knowledge-base of the profession.
8. It is unethical to prepare medico-legal reports about a person with whom the psychiatrist has a current, or has had a previous, personal relationship of whatever nature.
9. Psychiatrists must never amend a medico-legal report at the request of any party. If additional documentation is provided or a clarification is requested, that should be dealt with by way of a supplementary report.

Adopted: October 1980
Amended: GC2005/3 R.24
Currency: until withdrawn

THE ROYAL AUSTRALIAN AND NEW ZEALAND COLLEGE OF PSYCHIATRISTS

Ethical Guideline #9

ETHICAL GUIDELINES FOR INDEPENDENT MEDICAL EXAMINATION[1] AND REPORT PREPARATION BY PSYCHIATRISTS.

1. PREAMBLE

1.1 The RANZCP is dedicated to the highest standards of practice in the provision of independent medical examination and report preparation by psychiatrists. The College code provides the broad ethical framework for these Guidelines; the Guidelines must be read in conjunction with the RANZCP Code of Ethics. Relevant College Guidelines may also require attention.

1.2 Independent medical examination and report preparation by psychiatrists requires adherence to the discipline of psychiatry in which scientific and clinical expertise is applied to psychiatric issues in legal contexts. Independent medical examination and report writing by psychiatrists should be practised in accordance with guidelines and ethical principles enunciated by the profession of psychiatry.

1.3 These guidelines establish a basic standard of ethical practice in the preparation of independent medical examination and reports but they are not relevant in all medicolegal circumstances. The RANZCP recognises that in a number of circumstances treating psychiatrists will be required to report in medicolegal settings, especially psychiatrists working in rural and remote districts and criminal jurisdictions when statutory requirements apply to the treating psychiatrist. This does not constitute an independent medical examination and report by a psychiatrist. In this circumstance the psychiatrist must state his or her role as a past or present treating practitioner.

2 CONSENT

Consent is one of the core values of ethical practice of medicine and psychiatry. It reflects respect for the person, a fundamental principle in the practices of medicine, psychiatry and forensic psychiatry. Obtaining informed consent is an expression of this respect. Obtaining informed consent is not possible in special circumstances.

3 PRIVACY

Psychiatrists should inform the examinee of the arrangements made for their privacy and that limited confidentiality will apply to the preparation of the report.

4 EXPERTISE

Psychiatrists must present their qualifications accurately and precisely.

5 DISCLOSURE OF INFORMATION SOURCES

Psychiatrists must disclose all sources of information provided by the agency requesting evaluation and any other parties.

6 MAINTENANCE OF PROFESSIONAL STANDARDS

Continuing medical education is a fundamental responsibility of all psychiatrists. Opinions in independent medical reports provided by psychiatrists should be based on contemporary scientific standards.

7 PROFESSIONAL BOUNDARIES

Any comment concerning difference of opinion with a colleague should be confined to matters of substance and expressed in professional terms.

Psychiatrists must use their best endeavours to identify and disclose actual and potential conflicts of interest.

A psychiatrist seeing a person referred for an independent medical examination and report should not provide routine treatment for that person. Emergency treatment should only be provided where no reasonable alternative exists and immediate referral is then made to a treating agency for ongoing care.

Fee agreements dependent upon a particular outcome are unethical.

Adopted: May 2003 (GC2003/1.R31)
Currency: Until withdrawn

Federal Court of Australia

Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia

This replaces the Practice Direction on Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia issued on 19 March 2004.

Practitioners should give a copy of the following guidelines to any witness they propose to retain for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based on the specialised knowledge of the witness (see **- Part 3.3 - Opinion** of the *Evidence Act 1995* (Cth)).

M.E.J. BLACK
Chief Justice
11 April 2007

Explanatory Memorandum

The guidelines are not intended to address all aspects of an expert witness's duties, but are intended to facilitate the admission of opinion evidence (footnote #1), and to assist experts to understand in general terms what the Court expects of them. Additionally, it is hoped that the guidelines will assist individual expert witnesses to avoid the criticism that is sometimes made (whether rightly or wrongly) that expert witnesses lack objectivity, or have coloured their evidence in favour of the party calling them.

Ways by which an expert witness giving opinion evidence may avoid criticism of partiality include ensuring that the report, or other statement of evidence:

(a) is clearly expressed and not argumentative in tone;

(b) is centrally concerned to express an opinion, upon a clearly defined question or questions, based on the expert's specialised knowledge;

(c) identifies with precision the factual premises upon which the opinion is based;

(d) explains the process of reasoning by which the expert reached the opinion expressed in the report;

(e) is confined to the area or areas of the expert's specialised knowledge; and

(f) identifies any pre-existing relationship (such as that of treating medical practitioner or a firm's accountant) between the author of the report, or his or her firm, company etc, and a party to the litigation.

An expert is not disqualified from giving evidence by reason only of a pre-existing relationship with the party that proffers the expert as a witness, but the nature of the pre-existing relationship should be disclosed. Where an expert has such a relationship the expert may need to pay particular attention to the identification of the factual premises upon which the expert's opinion is based. The expert should make it clear whether, and to what extent, the opinion is based on the personal knowledge of the expert (the factual basis for which might be required to be established by admissible evidence of the expert or another witness) derived from the ongoing relationship rather than on factual premises or assumptions provided to the expert by way of instructions.

All experts need to be aware that if they participate to a significant degree in the process of formulating and preparing the case of a party, they may find it difficult to maintain objectivity.

An expert witness does not compromise objectivity by defending, forcefully if necessary, an opinion based on the expert's specialised knowledge which is genuinely held but may do so if the expert is, for example, unwilling to give consideration to alternative factual premises or is unwilling, where appropriate, to acknowledge recognised differences of opinion or approach between experts in the relevant discipline.

Some expert evidence is necessarily evaluative in character and, to an extent, argumentative. Some evidence by economists about the definition of the relevant market in competition law cases and evidence by anthropologists about the identification of a traditional society for the purposes of native title applications may be of such a character. The Court has a discretion to treat essentially argumentative evidence as submission, see Order 10 paragraph 1(2)(j).

The guidelines are, as their title indicates, no more than guidelines. Attempts to apply them literally in every case may prove unhelpful. In some areas of specialised knowledge and in some circumstances (eg some aspects of economic "evidence" in competition law cases) their literal interpretation may prove unworkable. The Court expects legal practitioners and experts to work together to ensure that the guidelines are implemented in a practically sensible way which ensures that they achieve their intended purpose.

Guidelines

1. General Duty to the Court (footnote #2)

1.1 An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.

1.2 An expert witness is not an advocate for a party even when giving testimony that is necessarily evaluative rather than inferential (footnote #3).

1.3 An expert witness's paramount duty is to the Court and not to the person retaining the expert.

2. The Form of the Expert Evidence (footnote #4)

2.1 An expert's written report must give details of the expert's qualifications and of the literature or other material used in making the report.

2.2 All assumptions of fact made by the expert should be clearly and fully stated.

2.3 The report should identify, and state the qualifications, of each person who carried out any tests or experiments upon which the expert relied in compiling the report, and state the qualifications of the person who carried out any such test or experiment.

2.4 Where several opinions are provided in the report, the expert should summarise them.

2.5 The expert should give the reasons for each opinion.

2.6 At the end of the report the expert should declare that "[the expert] has *made all the inquiries that* [the expert] *believes are desirable and appropriate and that no matters of significance that* [the expert] *regards as relevant have, to* [the expert's] *knowledge, been withheld from the Court*."

2.7 There should be included in or attached to the report; (i) a statement of the questions or issues that the expert was asked to address; (ii) the factual premises upon which the report proceeds; and (iii) the documents and other materials that the expert has been instructed to consider.

2.8 If, after exchange of reports or at any other stage, an expert witness changes a material opinion, having read another expert's report or for any other reason, the change should be communicated in a timely manner (through legal representatives) to each party to whom the expert witness's report has been provided and, when appropriate, to the Court (footnote #5).

2.9 If an expert's opinion is not fully researched because the expert considers that insufficient data are available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report (footnote #5).

2.10 The expert should make it clear when a particular question or issue falls outside the relevant field of expertise.

2.11 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports (footnote #6).

3. Experts' Conference

3.1 If experts retained by the parties meet at the direction of the Court, it would be improper for an expert to be given, or to accept, instructions not to reach agreement. If, at a meeting directed by the Court, the experts cannot reach agreement about matters of expert opinion, they should specify their reasons for being unable to do so.

footnote #1
As to the distinction between expert opinion evidence and expert assistance see *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 per Allsop J at [676].

footnote #2
See rule 35.3 Civil Procedure Rules (UK); see also Lord Woolf "Medics, Lawyers and the Courts" [1997] 16 CJQ 302 at 313.

footnote #3
See *Sampi v State of Western Australia* [2005] FCA 777 at [792]-[793], and *ACCC v Liquorland and Woolworths* [2006] FCA 826 at [836]-[842]

footnote #4
See rule 35.10 Civil Procedure Rules (UK) and Practice Direction 35 – Experts and Assessors (UK); *HG v the Queen* (1999) 197 CLR 414 per Gleeson CJ at [39]-[43]; *Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd* [2000] FCA 1463 (FC) at [17]-[23]

footnote #5
The *"Ikarian Reefer"* [1993] 20 FSR 563 at 565

footnote #6
The *"Ikarian Reefer"* [1993] 20 FSR 563 at 565-566. See also Ormrod 'Scientific Evidence in Court' [1968] Crim LR 240.

Endnotes

1 Access to Justice – Final Report Lord Woolf 1996, the Ipp Report 2002

2 *Rodrigues v Telstra Corporation Ltd* [200] FCA 30 per Keifel J: '25 The Tribunal is not bound by the rules of evidence (s *33 Administrative Appeals Tribunal Act 1975* (Cth)) and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force: *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482, 492, referring to *Consolidated Edison Co v National Labour Relations Board* (1938) 305 US 197, 229; *The King v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, 256. The drawing of an inference without evidence is an error of law: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 31, 355-356; *Repatriation Commission v Maley* (1991) 24 ALD 43 (Full Court). Similarly such error is shown when the Tribunal bases its conclusion on its own view of a matter which requires evidence. In *Collector of Customs (Tasmania) v Flinders Island Community Association* (1985) 60 ALR 717, 722 a Full Court of this Court held that it was unjustifiable, and therefore legally erroneous, for a Tribunal to base its conclusion upon its own understanding of traditional aboriginal concepts of community ownership and interests, in the absence of any evidence on the matter.

26 It may be said that expert evidence is sometimes over-utilised and is called in situations where an arbiter of fact is in a position to determine the matter for itself. Sometimes all that is necessary is for a method or process to be explained, so that the Court or Tribunal can then apply it to the facts it finds. On the other hand, there are cases where a whole question is, in effect, relegated to experts to give evidence upon it. This was such a case. The Tribunal was not put in a position where it could simply draw its own inferences. In an area which required an understanding of a disorder it could only receive the opinions, have the bases for them explained if they differed and apply logic to determine which were to be accepted.

1 (1999) 197 CLR 414
2 (2001) 52 NSWLR 705
3 (Unreported, N395 of 1991)
4 Federal Court Judge and current President of the Administrative Appeals Tribunal
5 For an interesting treatise on the fluid concept of 'objectivity', see Gary Edmond *After Objectivity: Expert Evidence and Procedural Reform* [2003] SydLRev 8
6 See McCellan J *Expert Evidence – Aces up your Sleeve?* Presented to the Annual Conference of the Industrial Relations Commission of NSW 20 October 2006
7 M Nothling, *Expert Medical Evidence: The Australian Medical Association's Position* http://www.aija.or.au/info/expert/nothling.pdf undated
8 Gordon Samuels, *Medical Truth and Legal Proof: Changing Expectations of the Expert Witness,* MJA 1998 168
9 (1991) 25 ALD 266
10 AAT 5979, 20 June 1990
11 [2000] NSWCA 29
12 Ballad of Bobby McGee
13 Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia, 11 April 2007
14 McClennan ibid page 7, Downes J *The value of Single or Court-Appointed Experts* Paper delivered to the Australian Institute of Judicial Administration Expert Evidence Seminar, Melbourne 11 November 2005
15 [2006] ACTSC 39
16 s33(1) *Administrative Appeals Tribunal Act 1975* (Cth)
17 Section 44 now relevantly states:

(7) If a party to a proceeding before the Tribunal appeals to the Federal Court of Australia under subsection (1), the Court may make findings of fact if:

(a) the findings of fact are not inconsistent with findings of fact made by the Tribunal (other than findings made by the Tribunal as the result of an error of law); and

(b) it appears to the Court that it is convenient for the Court to make the findings of fact, having regard to:

(i) the extent (if any) to which it is necessary for facts to be found; and

(ii) the means by which those facts might be established; and

(iii) the expeditious and efficient resolution of the whole of the matter to which the proceeding before the

Tribunal relates; and

(iv) the relative expense to the parties of the Court, rather than the Tribunal, making the findings of fact; and

(v) the relative delay to the parties of the Court, rather than the Tribunal, making the findings of fact; and

(vi) whether any of the parties considers that it is appropriate for the Court, rather than the Tribunal, to make the findings of fact; and

(vii) such other matters (if any) as the Court considers relevant.

(8) For the purposes of making findings of fact under subsection (7), the Federal Court of Australia may:

(a) have regard to the evidence given in the proceeding before the Tribunal; and

(b) receive further evidence.

18 *Military Rehabilitation & Compensation Commission v SRGGGG* [2005] FCA 342 'Except in unusual cases, none of these remedies is actuated by factual errors. Thus,the purposes for the requisite giving of reasons do not include the correction of alleged factual error."' Per Madgwick J

19 And can be accessed via the AAT's website under the sub-heading Research

20 [2007] FCA 404 currently on appeal

21 AAT Act s2A