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# BUILDING SECURE COMMUNITIES: DELIVERING ADMINISTRATIVE JUSTICE IN PUBLIC HOUSING

***Kathleen McEvoy****

Public housing and housing assistance in Australia is primarily provided by the States and Territories, largely funded by the Commonwealth. Public tenancies do generate some income, but as most tenants of public housing are social security beneficiaries[1] most receive significantly rebated rents, and this income does not address the costs and debts of public housing authorities, which therefore remain heavily dependent on Commonwealth funding. Public housing assistance is, however, not limited to the provision of housing itself. The range of benefits provided by public housing throughout Australia extend to any decisions relating to housing: they include not only the provision of housing but also the determination of general eligibility for public housing, as well as categorisation of housing entitlement, allocation of housing, and the type and location of housing. Public housing services also extend to financial and other support to access private rental, the provision and support for housing services in remote communities, home ownership support, especially for low income earners, and homelessness support.

These decisions are made by public officers in public housing agencies across Australia. Their decisions entail the distribution of and determination of eligibility for resources that are both scarce – and very strictly rationed by eligibility rules – and valuable. Allocation of these assets and resources can have a significant impact on the lives of the recipients. It enables them to obtain housing, avoid homelessness, live together as a family, have consistent access to medical and education services and employment opportunities. These are essential characteristics which create communities and enable the development of social and economic capital for both the present and the future for the whole Australian community. This is an essential and public aspect of the provision of government assistance.

Access to secure and affordable housing is acknowledged and protected as a fundamental human right in a number of international conventions to which Australia is a party.[2] Secure housing is not only important as a matter of security and place but also provides a basis from which an individual can secure employment; a fixed address for the purposes of receiving social security entitlements; a setting for the enjoyment of family and community life and all this entails (including the right to vote); and a basis for the pursuit of education and related activities. Its importance can hardly be overstated as a foundation for the establishment of healthy and productive individuals and civil communities. All or any of the decisions of public housing providers will impact significantly on fundamental aspects of an individual's life and circumstances. The importance of getting these decisions "right" cannot be overstated, and delivering administrative justice in this respect should be a fundamental concern that goes far beyond any narrowly conceived notion of "good administration".

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**Public housing in Australia**

Creyke and McMillan[3] suggest that "a unique feature of Australian history is that the community… came to rely on the government to provide public services and, as a consequence, to be involved in many aspects of communal life". They quote W K Hancock's early history, *Australia* (1930), in which he comments that "the prevailing ideology of Australian democracy features 'the appeal to government as the instrument of self realisation'".[4] They suggest that the extensive nature of government control in Australia "has led to a demand for heightened scrutiny of government, consistent with the democratic ideal that those who elect the government are entitled to call it to account". They conclude, "in short, with power comes responsibility and accountability".

The reliance on government services is as strong and entrenched in relation to the provision of housing benefits as it is in relation to the other services identified (transport, education, income support, allocation of land). It is only very recently that there has been a significant move away from the direct provision of public housing and public housing support by the state. A proposal to "privatise" the provision of a proportion of public housing support, to be managed by and through private agencies (community housing providers) has only found a significant public commitment in the 2009 Commonwealth/State National Affordable Housing Agreement,[5] which "aims to ensure that all Australians have access to affordable, safe and sustainable housing that contributes to social and economic participation".

The provision of public housing, and government support for accessing the private rental market, has been a very important aspect of community services provided by States and Territories in Australia, particularly since the second half of the twentieth century.[6] The widespread development of public housing at that time was an important aspect of State economic development, as well as a response to both returning servicemen requiring housing and to the rapidly expanding immigration program following the Second World War. On both bases it enabled significant settlement and development, especially in areas away from capital cities, and enhanced the establishment and development of regional centres. Subsequently, however, the provision of public housing throughout Australia has been focussed on welfare provision and, more recently, stocks of public housing have been significantly reduced. Now, increasingly, publicly funded housing is managed and made available through private providers such as housing associations.

The widespread provision (and often, expectation) of public housing, expanding more broadly into housing related services, means that many millions of Australians are and have been affected by government decisions about eligibility and availability of public housing services and support. These decisions, no less than those concerning social security benefits or tax assessments or any other form of government decision which impacts on the lives and circumstances of individuals, should be open to scrutiny and review. These are public decisions, with public as well as personal consequences, made according to principles of public policy developed by government. These are the types of decisions which are at the heart of the merits review processes described, promoted, developed and, finally, entrenched, first at Commonwealth level but then throughout Australia in the decades following the Kerr Report of 1971.[7] This process of merits review is not, however, as developed and entrenched in respect of public housing services decisions as it is in relation to most other areas of government decisions, nor, perhaps, is it as effective.

***The imperative for review***

In all Australian States and Territories formal processes for the review of administrative decisions made with respect to the provision of public housing and public housing support have been established, commencing in the early 1990s.[8] This paper considers the extent and nature of the administrative justice in public housing which is provided by these

processes. The provision of "public" and "social" housing and housing support is in a state of flux in Australia and it is questionable whether the existing review processes are appropriate or able to deliver administrative justice in either the present or a new housing provider environment. In considering the nature and operation of review structures throughout Australia, applicable in respect of public housing decisions, and the manner and extent to which they form part of the delivery of administrative justice, the paper considers whether administrative justice is, or can be, delivered through existing structures in the emerging new forms of provision of public housing.[9]

The management of public housing funding from the Commonwealth has been governed through successive Commonwealth State Housing Agreements, from the first in 1945, to the last in that form which expired at the end of 2008. A significant feature of these Agreements, from 1989, was a Commonwealth condition of funding that each State or Territory establish a process to review decisions of the housing provider funded pursuant to the Agreement. Until the end of 2008, all States and Territories were required by successive Commonwealth State Housing Agreements, as a condition of Commonwealth housing funding, to ensure that:

> Arrangements are in place for recognition of consumer rights and responsibilities, details of which are publicly available, and an identified process to action consumer complaints and review decisions. These arrangements will apply equally to State government service providers and to non-government service providers who receive funding under this Agreement.[10]

Terms in previous Agreements had been more explicit: in the 1989 Agreement (which applied from August 1990), Part IX Clause 29 provided as follows:

> A State shall ensure that, by way of user rights and participation:
> (a) Applicants for, and recipients of, housing assistance, shall have access to:
> (i) Information about available housing assistance and its current policies on the assistance, tenancy conditions and appeal mechanisms. In providing this information, a State shall have particular regard to the special needs of people with limited abilities in relation to literacy, comprehension and command of English; and
> (ii) An independent appeal mechanism, agreed by the minister and the state Minister, from decisions as to the provision by the State for housing assistance to be funded under this agreement… .

Following the establishment of this broad principled requirement, a report was commissioned to evaluate various approaches to public housing review and to establish a set of core principles to govern such mechanisms. A very detailed report[11] proposed a three tiered level of review, two internal and the third an independent external review process. The first level was envisaged as very informal, a "counter" review; the second was a formalised decision making level within the agency, removed from the management context of the original decision makers; and the third level was an independent statute based independent review body, essential for "the delivery of real redress". Accessibility, redress and accountability were presented as the three core principles for an effective review system. How the public housing review bodies have addressed these principles has been reconsidered since the Kent Report,[12] and it is clear that these principles have been sought to be realised in different ways in the intervening 20 years.

The requirement for a review process for housing decisions reflected the processes becoming more commonplace at that time in respect of review of administrative decision making (especially Commonwealth),[13] and also recognised the importance of housing as a central factor for both social and economic development, and the impact which decisions concerning housing can have on the lives of individuals. With the expiry of the requirement to have a review process in place as a consequence of receipt of Commonwealth funding, the "requirement" for a review process must be established from some other source.

In all Australian jurisdictions there now exist bodies for the review of public housing assistance. These were all established prior to the change in the terms of the housing funding agreement in 2008, and no doubt rely now on a general governmental commitment to the value of administrative review as an aspect of democratic accountability and established public sector practices. The institutional arrangements of these bodies are various, although they share some features, generally involving a relatively informal internal review process followed by a more formal review, sometimes involving a hearing, by a body which, from jurisdiction to jurisdiction, varies in its powers and degree of independence. Public housing tenancies are, in general, subject to residential tenancies legislation; this governs the landlord tenant relationship but not the housing provider administrative decisions about the distribution of public assets according to public policy or legislative principles. The bodies that review public housing assistance are concerned with administrative decisions about eligibility for and distribution of these benefits, not the application, use and operation of the benefits once received.

"Public" housing is increasingly provided also by "social housing" providers, these are community housing and housing associations which enter into agreements for the delivery and management of housing to disadvantaged groups and individuals. The decisions made by these housing providers are also, essentially, public housing decisions, but the arrangements for the review of those decisions is significantly less developed than the review arrangements for public housing agency decisions, and review of these decisions brings its own difficulties.[14] This paper does not focus on this sector of public housing.[15]

**Review of public housing decisions in Australia**

Delivery of housing services is essentially a State or Territory matter in Australia. It is not entered into directly by the Commonwealth, except in respect of the provision of rent assistance through Centrelink.[16] Accordingly, it is for the States and Territories to establish processes for the review of the administrative decisions made in the course of the delivery of those housing and housing related services. These processes vary considerably between jurisdictions, though there are some common elements, including internal and local review within the decision making agency; generally a lack of formal determinative capacity; and generally no independent external appeal process. Some jurisdictions have hearings where the applicants for review are able to attend and present their case, in others the review is essentially paper based.

In each State and Territory there is specific legislation governing residential tenancy arrangements.[17] This legislation applies to tenancies where the landlord is a State or Territory agency and governs the landlord/tenant relationship, prescribing the rights and responsibilities of landlords and tenants and providing means of resolving disputes concerning those rights and responsibilities. In some jurisdictions this legislation is exercised through a specialised court or tribunal.[18] In each jurisdiction, however, a distinction is clearly made between the regulation of this relationship, based on legislatively or contractually established rights and responsibilities, and the possibility of review of the housing services administrative decisions made by a public agency. The former attracts the application of the relevant legislation and (generally) litigious action before the designated tribunal which will apply legislatively defined principles; the latter involves the considerations of administrative review relating to the application of policy and issues of process. Where there are formalised processes, either in legislation or policy, the review process does not provide either an alternative or a supplement to the determination of rights under residential tenancies (or other) legislation.[19] The administrative review process is clearly presented as separate and different.

***South Australia***

The only legislatively established system for external and independent review of public housing decisions is in South Australia. Amendments to the *South Australian Housing Trust Act 1995* in 2007 established the Housing Appeal Panel[20], which was empowered to decide if a matter under review "is correct and preferable after taking into account any policy that applies in the relevant case and such other matters that appear to the Appeal Panel to be appropriate in the circumstances".[21] The Housing Appeal Panel is also empowered to consider community housing decisions under section 84 of the *South Australian Co-operative and Community Housing Act 1991.*[22]

Section 32B of the *South Australian Housing Trust Act 1995* established the Panel and its general powers and jurisdiction. Section 84(a1) of the *South Australian Co-operative and Community Housing Act 1991* directs that appeals under that Act are to be made to the Panel. Section 32B(13) empowers the Presiding Member of the Panel to establish procedures for hearing appeals, and section 32D(6) requires that the Panel must provide a written statement of its decision and the reasons for it to both the applicant and the housing agency. There is no avenue for appeal from any of the decisions of the Panel other than that it is, of course, subject to judicial review.

The Panel can review any "reviewable decisions", which include any application for housing assistance; for priority housing; for rent or bond assistance or concessions; or "with respect to any matter arising under an agreement where the SAHT [the South Australian Housing Trust] is landlord"; with respect to decisions about housing needs or position; or that "affect a tenant of SAHT".[23] Some decisions are, however, specifically excluded: these include complaints about the content of policy; complaints about staff; complaints concerning matters which are the subject of proceedings before the South Australian Residential Tenancies Tribunal; and disputes between neighbours.[24]

The Panel members are appointed by the Minister for a term not exceeding three years. Members are eligible for reappointment and are entitled to remuneration allowances and expenses. They are removable from office for the usual statute based reasons. Panel members are protected from civil liability in the exercise of their or the Panel's functions.[25]

Hearings before the Housing Appeal Panel are preceded by an internal review of the decision[26] conducted by the housing agency, Housing SA. Housing SA produces a written statement setting out both the background and circumstances of the decision under review, and the outcome of the review and the reasons for it. This is required to be provided to the applicant[27] and this written statement becomes the basis of the housing agency's case, should the matter proceed to a review before the Panel. Housing SA policy has been developed to manage the internal review process, and sets time limits of 28 days within which the review is to be completed and the applicant advised of the outcome. If this time limit is not complied with the matter can proceed directly to the Panel. The administration of the internal review is managed by a body separate from Housing SA, the Public and Community Housing Appeal Unit, which is also the administrative unit for the Panel.

The process for a review of a decision is that the applicant lodges an appeal form, either in person or online with the Unit or at a Housing SA office. Appeal forms are available from Housing SA offices, the Appeal Unit, or from the Housing SA website. The internal review is conducted on paper, by three senior Housing SA officers, who review the appeal form and an "appeal statement" generally prepared by the original decision maker. If the decision under review is upheld (the appeal is unsuccessful) the applicant is invited by the Appeal Unit to proceed to a hearing before the Panel. Matters do not proceed automatically to a further hearing; some applicants choose not to so proceed but, if they do, a hearing is arranged. Relevant material from the Housing SA file is collated by the Appeal Unit with any

materials the applicant has provided; this is provided to the applicant, the Housing SA representative to attend the hearing, and the Panel members. The Housing SA file is available to the Panel at the hearing. The arrangements for the hearing are generally made through discussion with the applicants to assist their attendance and it is rare for an applicant not to attend. Telephone hearings are facilitated where appropriate. One or two representatives from Housing SA will also attend the hearing to present the Housing SA case and discuss the issues with both the applicant and the Panel.

The Housing Appeal Panel sits generally as a Panel of three[28] and provides consensus Panel decisions with written reasons; these are provided within 14 days of the decision being made (and generally on the day of the hearing).[29] Hearings are conducted in private, with both parties given notice of the hearing. Hearings rarely proceed ex parte and applications are almost never determined on the papers alone.[30] An applicant may have legal or other advocates at the hearing, although this is not common. The applicant does not give evidence on oath and, if witnesses attend, arrangements are made concerning their role in the hearing as agreed by the applicant or as seems appropriate to the particular matter. "Witnesses" are commonly brought to hearings as supporters, rather than independent witnesses. Applicants put their cases to the Panel and are questioned by the Panel. Cross questioning and discussion is permitted (indeed encouraged), but the Panel does not encourage or engage in cross examination. It is quite common for a negotiated outcome to be arrived at, either with respect to the specific decision under review, or as to future actions that either the appellant or the housing authority might take.

Decisions of the Panel are determinative. The Panel has the power to "confirm vary or revoke" the decision under review, as well as to make incidental or ancillary orders, or to refer the matter back to Housing SA with suggestions.[31] In making its decision, the Panel is not strictly bound by Trust policy: "the question to be determined by the Appeal Panel in a particular matter is whether the decision that has been made is correct and preferable after taking into account any policy that applies in the relevant case and such other matters that appear to the Appeal Panel to be appropriate in the circumstances'.[32] Capacity to depart from government policy and guidelines in determining on appeal if the impugned decision is "correct and preferable" clearly sets the Panel apart in function from the role of the primary decision maker and makes its independence clear,[33] although clearly the Panel's role is not to disregard policy and guidelines in reviewing a decision but rather, where appropriate, to take "other matters" into account as well in identifying the correct and preferable decision in the particular matter.[34]

***Australian Capital Territory***

The *Housing Assistance Act 2007* (ACT) governs the provision of public housing in the ACT. The Act establishes the position of Commissioner for Social Housing,[35] who administers "programs and funding arrangements for delivering housing assistance in the ACT".[36] The primary program governing the provision of housing assistance is the *Housing Assistance Public Rental Housing Assistance Program 2008*, ('the Program'), established pursuant to section 19(1) of the *Housing Assistance Act 2007.* Decisions for housing assistance (essentially housing rental assistance (the provision of housing) or rent rebate),[37] are formally made by the Commissioner pursuant to that Program. The Program sets out the eligibility criteria for assistance[38] and, generally, prescribes the arrangements for the operation of the housing assistance available, including needs criteria; rent and rent rebates; reassessment of applications; transfers of tenants; and some aspects of the tenancy agreement to be entered into. Clause 31 of the Program addresses review of decisions, which are formal requests for review to the Commissioner.[39]

Appeals are made directly to Housing ACT, with appeal ("request") forms available from the agency or its website.[40] There are two levels of review, both within Housing ACT. Not all

decisions of Housing ACT are subject to appeal, only housing assistance matters and some tenancy matters, including market rent increases,[41] the issue of a notice to remedy or vacate, and tenant maintenance charges. Other tenancy matters are heard by the ACT Residential Tenancies Tribunal. There are time limits for making appeals: 28 days from the receipt of notification of the decision, either of the primary decision (for first level reviews)[42] or from the first review decision (second level appeals).[43] Housing ACT has a discretion to consider appeals lodged outside these time frames; the decision to refuse to extend the time limit is a decision subject to appeal to the ACT Civil and Administrative Appeals Tribunal ('ACAT') (also to be lodged within 28 days of that decision). Where a decision has been confirmed following first level review (i.e. the appeal is unsuccessful), the appellant must decide if the appeal is to be taken to the second level and must lodge another application for review within 28 days, unless appeal relates to a notice to vacate, in which case an unsuccessful first level review will automatically proceed to the second level review.

A first level appeal is considered by a single Housing ACT officer through a review of the decision. Notification of the outcome of the review must be provided in writing within 28 days of the completion of the review.

Second level reviews are conducted by the Housing Assistance and Tenancy Review Panel ('HATRP') (an "advisory committee established by the housing commissioner for this purpose").[44] This is an internal panel comprising senior Housing ACT officers; it meets privately and makes its decisions on the basis of the written information provided by the appellant and the agency. There is no opportunity for oral hearings or appearance before the Panel. The Panel makes a recommendation to the Commissioner for Social Housing who makes the formal decision and notifies the appellant within 28 days of the decision (cl 32(10) program). That notification must also inform the appellant of any further rights of appeal, to ACAT or the ombudsman or elsewhere.[45]

It is possible to appeal further from HATRP to the ACAT.[46] The ACAT can review any decision of Housing ACT under the Public Rental Housing Assistance Program which has proceeded through the first and second level internal review process. However, the ACAT jurisdiction does not include decisions concerning tenancy matters such as eviction, rent arrears, repairs, security, noise and nuisance. None of these matters is subject to the internal review process as they are within the jurisdiction of the Residential Tenancies Tribunal.

An unsuccessful appellant who has been through the two internal review processes of Housing ACT has 28 days to lodge an appeal with the ACAT. Lodgement and exchange of documents is generally followed by a preliminary conference and a directions hearing, and then the hearing of the appeal. A formal Statement of Facts and Contentions, and a Witness List and witness statements are required prior to the hearing. The hearing is relatively informal and generally open to the public. Decisions of the ACAT can be appealed on points of fact or law to the Appeals President under Part 8 of the *ACAT Act* and, in some circumstances, the Appeals President will refer the matter to the Supreme Court. There is a right of appeal to the Supreme Court of the ACT on matters of law from the ACAT.[47]

ACT legislation and administration also operates in the context of the ACT *Human Rights Act 2004*. While this Act does not necessarily override other ACT legislation, all policies and legislation must be interpreted and applied ("so far as is possible to do so consistently with its purpose") in accordance with the human rights principles.[48] This principle applies in respect of all functions of a public nature performed by a public authority,[49] and it is clear from the Act that these roles and functions include the role of the Commissioner, Housing ACT, HATRP, and the provision of services pursuant to the Program.

***Northern Territory***

The Northern Territory Housing Appeals Mechanism ('NTHAM') was established in 2005 to enable adverse Departmental public housing decisions to be reviewed; it oversees internal review of housing decisions, and provides executive support to other aspects of the review process. Three levels of appeal are established. In the first instance (1st Tier Appeal), Departmental housing staff automatically review all adverse decisions prior to notification of the decision. Subsequent to the notification of the adverse decision, an appeal can be lodged seeking review[50] with an internal body, the Northern Territory Housing Internal Review Panel, which consists of three senior staff members not involved in the original decision. The third level of review is conducted by the Northern Territory Housing Appeal Board, a body external to the Department, and comprising three members of the community appointed by the Minister. A further application for this level of review must be made within 28 days of receiving the notification from the Internal Review Panel. The Minister has appointed 14 members to the Board, some in regional areas, who have a broad range of expertise, including law, social work, and in community organisations. Two Board members are public housing tenants. The Board makes recommendations concerning the decision under review to the Executive Director of the Department, who makes the formal and final decision. There is no legislative basis for the Board's establishment or, indeed, for any part of the review process.

The review process as operated by the Board is for the purpose of determining if the relevant Departmental policy has been correctly identified, interpreted and applied. To assist with this process, the Departmental Manager of the Complaints and Appeals Unit attends all meetings of the Board to advise on policy. Face to face hearings are conducted, often with the assistance of an interpreter (provided by the Appeals Mechanism). The Appeals Unit's primary focus is on whether the process has been equitable and the appellant's circumstances have been fairly considered, and if the requirements of procedural fairness were met in making the decision. Decisions of the Board are subject to scrutiny by the NT Ombudsman, this is reported [51] to be largely negative, on the basis of lack of procedural fairness in the review process, and lack of reasons provided by the Board in its recommendations.

The establishment of a new model for review of public housing decisions is currently under consideration in the Northern Territory, in response to perceptions of a number of systemic issues with the present review process. Concerns include those expressed by the Ombudsman; limited departmental review policy and procedures; issues relating to organisational culture within the Department, especially with respect to internal reviews and the implementation of review outcomes; and perceptions of independence in respect of the third tier appeal process. This last concern arises both from possible or apparent conflict of interest of Board Members drawn from small communities (especially in regional areas), where local people are frequently well known to each other, as well as the need to establish appropriate locations for hearings in places which are perceived by the applicants for review to be free of apparent association with the housing agency.

The proposal is for a more streamlined two tier review process, with a first level regional (internal) review, followed by an external review by a Territory Housing Appeals Board. It is expected that the new process will be in place in 2011.

***Queensland***

The *Housing Act 2003* (Qld) provides for the review of certain decisions relating to the provision of public housing assistance. For individuals seeking housing support, decisions concerning eligibility for public housing or the type or location of housing to be provided, are open to review.[52] Where such reviewable decisions are made, they are required to be

provided in writing, with information concerning the right to review and how that review might be sought.[53] The application for review is made to the chief executive (the formal decision maker); it must be made within 28 days of the notification of the decision (the time can be extended) and in an approved form, including "enough information to enable the chief executive to decide the application".[54] Section 67 of the *Housing Act* enables the chief executive to deal personally with the application for review but provides that if this does not occur, the application for review must be not be considered by the person who made the original decision, or by a person less senior than the original decision maker. The review must be completed within 28 days and may result in the original decision being confirmed, amended or substituted with another decision. The applicant for review must "immediately" be advised of the review decision and the reasons for it. These review provisions do not apply in respect of community housing disputes; these are addressed by the Community Housing Standards and Accreditation Unit, which can receive complaints concerning the provision of community housing services where they are provided by a housing provider accredited under the *Housing Act*.

The Queensland Housing and Homelessness Services sits within the Department of Communities. The Complaints and Review Branch[55] includes the Housing Appeals and Review Unit, which administers the review processes established for the purposes of the reviews envisaged by section 67 of the Act. The Branch reports directly to the Director General of the Department (the "chief executive") through recommendations concerning the matter appealed, rather than to the service units within the Department from which the decisions which are the subject of reviews come.

The Housing Appeals and Review Unit administers not only the "legislative appeals", which include the reviewable decisions identified by the *Housing Act*, but also "administrative appeals", which involve most other Departmental decisions concerning housing issues and are subject to review as a matter of Departmental policy rather than due to the legislative requirements of the Act. These matters include decisions penalising applications when an offer of housing has been refused by an applicant; rent assessment, rent arrears or debt review processes; eligibility for bond loans or housing loans; property management issues (such as maintenance); and tenancy management decisions (which can include behaviour and eviction processes). Some housing decisions cannot be appealed to the Unit: matters within the jurisdiction of the Queensland Civil and Administrative Tribunal (including eviction and rent recovery proceedings already commenced); Government policy; disputes with neighbours; and issues relating to community housing providers.

An appeal seeking review of a "legislative" decision is required to be made within 28 days of notification of the decision, on a prescribed Appeal Application form. Where a review is sought of an "administrative" decision, appeals will be considered if received within 12 months of the original decision date (or longer depending on the circumstances). The application is then dealt with, "on the papers", by the Unit. There is no hearing, although there may be some contact with the applicant. The Unit then makes a recommendation concerning the application for review to the chief executive, who formally makes the decision in "legislative" cases. The only applicable external review is through the Ombudsman's Office.

The process of review is that the Unit requests an internal review from the Housing Services Office where the original decision was made, by an officer of a similar or higher level than the original decision maker. Following this review, a recommendation concerning the decision will be provided to the Unit with any supporting documentation. After considering this recommendation, the Unit makes a formal recommendation to the delegate of the chief executive. The same process applies whether the matter is a "legislative" appeal or an "administrative" appeal, except that in the latter case, the recommendation is made to the Manager of the Housing Appeals and Review Unit, who makes the final decision.

The Unit is able to recommend a change of decision (in the case of "legislative" review), and to change decisions directly (in the case of "administrative" review) even where this is not the recommendation of the Housing Services Office. The only possibility of external review for a dissatisfied applicant after the review process has been completed is through the Queensland Ombudsman's Office, but the nature of any further review on this basis is, of course, limited by the Ombudsman's jurisdiction.[56]

There are approximately 65,000 public housing tenancies in Queensland. On average, there are approximately 440 appeals ("legislative" and "administrative") per annum.[57] Since September 2009, a new process introduced by the Housing Services Office[58] has led to a significant increase in applications for review. The Housing Appeals and Review Unit's view is that the process has engendered better decision making by the Housing Services Office, including more detailed and thorough explanations of processes, and decisions being communicated to applicants for service - the "normative effect" of an effective review process.[59]

***Victoria***

In Victoria, reviews of housing services decisions are undertaken by the Housing Appeals, Complaints Management and Home Finance Review Office, based within the Housing and Community Building Division of the Department of Human Services.[60] The function of review was established in 1993. It deals with approximately 115 appeals each month. On average, since the establishment of the office, about 1,500 appeals per annum have been lodged with the Office. Over this time, 59% of the total appeals lodged have resulted in a changed decision, including through the provision of new information enabling new assessments to be made.[61] From 2008, the Office has also dealt with "complaints" as well as appeals and, from 2009, also deals with complaints from tenants of community housing organisations.

Appeals against Office of Housing decisions are made on an appeal form available from the Office or online. Appeals can relate to decisions concerning allocations, including eligibility; rental rebate assessments; "car parking matters"; and requests for special maintenance, but not matters within the jurisdiction of the Victorian Civil and Administrative Tribunal ('VCAT'), including evictions, rent arrears recovery and tenant responsibility charges.

In the first instance (1st level review"), appeals are dealt with at the local decision level by Housing Office staff. If the appeal is not approved (i.e. the decision remains unchanged), the appeal is automatically transferred to 2nd level appeal. This review is conducted by the Housing Appeals Office. The review can be conducted "on the papers" (the information on the website assumes this, advising applicants that "following a thorough investigation of the matters you have raised … you will be sent a letter advising you of the outcome"); in practice, all applicants are contacted directly for a telephone or face to face discussion of the appeal, which may be through a "home visit". All applicants have a right to use an advocate in both the lodgement of the appeal and in any discussions. The Housing Appeals Office will also negotiate with the Housing Office; this may resolve the appeal. If new information has become apparent or available it will make arrangements for further assessments taking that information into account, or the Appeals Office can take it into account directly. If the Appeals Office is of the view that the assessment at 1st level review is incorrect, it can return the matter to the Housing Office for reassessment. If this reassessment still maintains the original decision and this is supported by the Appeals Office, a recommendation supporting the decision (and rejecting the appeal) is made by the Manager of Housing Appeals, the applicant is notified. If the Appeals Office is of the view that the appeal should be successful, a detailed recommendation is prepared for the Director Public Housing and Community Building for endorsement, and the applicant is notified that the appeal has been successful. There is an expectation that the Director will accept the recommendation.

Housing Office decisions can also be reviewed by the Ombudsman's Office or the Equal Opportunities Commission, but such reviews are necessarily limited in their scope by the jurisdiction of those agencies.

Housing Victoria has a waiting list of about 40,000 applications, and in 2008 – 2009 received 15,974 new applications (including transfers). The Housing Appeals Office receives about 1,500 appeals per year.

***New South Wales***

New South Wales has an administratively established Housing Appeals Committee ('HAC'), situated within the housing agency, Housing NSW, since 1995.[62] It has jurisdiction over both public and community housing as its decisions affect both social housing tenants and applicants for housing assistance, with recommendatory powers. The jurisdiction does not overlap that of the Consumer Trader and Tenancy Tribunal (landlord and tenant matters), the NSW Ombudsman (complaints of maladministration) or the Registrar for Community Housing (housing provider operations).

There is no legislative framework for the HAC, which is structured as a Ministerial Advisory Committee with recommendatory powers. There have been several internal reviews recommending a legislative framework for the HAC, provision of determinative powers and a broader jurisdiction but these proposals have not been acted upon. Despite the established and apparently entrenched and effective operation of the HAC, issues periodically arise about its powers and independence.

The HAC operates broadly as an administrative review agency. The HAC comprises an Executive Chairperson and a panel of 15 members appointed by the Minister in Cabinet, with a range of expertise including housing, social welfare, psychology, law and experience with other dispute resolution bodies. Hearings are conducted before the Panel (of two or three members), attended only by the applicant (with an advocate and /or support persons), who speaks with the Committee in person. There is no representative from the housing provider at the hearings. The applicant is not provided with material from the Housing NSW file (which is available to the Committee members), unless the applicant obtains this information through formal Freedom of Information processes. Recommendations can be for full or part change of a decision by the housing provider and are documented in detailed reasons for the decision, which are provided to both the applicant and the housing provider.

Under departmental policy, all original decisions are required to be in writing and to advise of the right to appeal against the decision. The First Level Appeal is activated by the lodgement of a formal appeal form which triggers an internal review within the housing provider by a more senior officer than the original decision maker. The HAC does not manage or oversee this first level review. A report of this internal review is sent to the applicant with advice about the HAC and an appeal form. The applicant has three months to lodge an appeal, but a hearing is likely to be arranged within four weeks and completed within a further two weeks. The applicant is advised in writing of the outcome of the review.

Housing NSW manages about 130,000 tenancies and community housing in NSW has about 13,000 tenancies, expected to grow to 30,000 by 2017. In 2008 – 2009, 511 appeal applications were received by the HAC (a 17% increase on the previous year). In the same period, Housing NSW had 2,615 first level appeals (32% led to a change of decision at this level). 395 appeals were heard by the HAC about Housing NSW decisions, with 20 appeals in respect to community housing applications or tenancies. HAC recommended a change of decision in 46% of appeals.[63] These recommendations are made directly to the housing provider. In 2008 – 2009 housing providers agreed with 94.5% of HAC recommendations, 9 matters in total (one was a community housing matter).

In 2008-2009, 47% of all appellants were born in a non-English speaking country; interpreters were used in 22% of appeal hearings; there were face to face hearings in 85% of cases; 30% of applicants were over 55; 8% over 70; and applicants overall were mainly single people or single parent families. The majority of appeals related to metropolitan applicants (331 of 395 appeals) and were mainly self referred (not through an advocacy or support agency).

***Tasmania***

In Tasmania (with 11,500 public housing properties) there is an administratively established Housing Review Committee which receives applications for review of Housing Tasmania decisions and makes recommendations to the Director on the outcome of the decision appealed. The details of the appeals process are described in the Housing Tasmania Policy "Customer Feedback and Review".[64] This policy deals with complaints as well as appeals.

An applicant for housing services may appeal to the Committee using a Housing Review application form, which is specified in the Policy as only available from the housing provider on request: "the HRC form can only be offered to a client by the operational policy team".[65] It is not available on the website. Decisions that may be appealed include eligibility decisions (for housing and for transfer), housing need assessment categorisation, and vacation maintenance charges. Applications must be made within 12 months of the notification of the decision appealed against, and the Committee process is expected to be completed within 30 working days of the lodgement of the application for review.

The Housing Review Committee consists of three members, one a Senior Housing Analyst from Housing Tasmania, who has management of the Customer Services Hotline and Housing Review Committee, and two community members appointed by the Minister. The Committee was established in September 1990 and is administratively, rather than legislatively, based.

The appeal process has three levels. The first is an informal internal review. The second is through the Customer Services Hotline, which will investigate "a complaint" and report back to the applicant within 48 hours and provide an appeal form. The third level is to the Housing Review Committee. A response to the appeal is sought from the housing agency and this, as well as the application and information from the applicant's Housing Tasmania file, is considered by the Committee. The Committee meets monthly and its meetings are attended by Housing Tasmania officers to advise on policy or any other matters on which the Committee requires advice. The Committee makes its decision on the papers and does not conduct any hearing or inquiry process. The Committee can recommend to the Director of Housing Tasmania that the decision under review be upheld or overturned, on the basis of whether the correct policies and procedures were applied. An applicant who is still unhappy is advised that he/she may contact the Ombudsman.

***Western Australia***

The public housing review process in place in Western Australia is the third incarnation of a process for this purpose. The current process has been in place since November 2009, following a review established in 2008 and an extensive Discussion Paper published in October 2009, prompted in part by recommendations made by the Equal Opportunity Commission to improve the transparency and effectiveness of the appeals system.[66] The Terms of Reference for the Review included an evaluation of the Appeal Mechanism's effectiveness, cost-efficiency, fairness and transparency in resolving appeals; the scope of appealable decisions; achieving accessibility and simplicity of process for the appellant, without prejudicing principles of natural justice and transparency in the appeals process; the adequacy of processes, procedures, policies and guidelines; the adequacy of monitoring

systems to ensure fairness and transparency of process; and ensuring implementation of the Housing Appeal Mechanism's decisions.

The Review considered the operation of the Housing Appeals Mechanism, which had replaced the Homeswest Appeals Mechanism. Both these bodies had been established pursuant to Department of Housing Policy which required that policy be applied in a fair and equitable manner, in a transparent manner, and that officers would be accountable for their decisions. The newly established Housing Appeals Mechanism is administratively established pursuant to these same principles.

The former Housing Appeals Mechanism operated with a three tier process: internal review prior to finalisation of the standard decision making process, prior to the notification of the decision to the applicant for housing assistance; a review by a Regional Appeals Committee, consisting of a senior Departmental officer and an appointed community representative, following the receipt of an appeal request within 12 months of the notification of the original decision; and a third level of review by the Public Housing Review Panel, generated by a further request for review within 60 days of notification of the Regional Appeals Committee. At the second level, the applicant was encouraged to attend a hearing before the Committee, and a Homeswest representative could attend at the discretion of the Committee. At the third level, there was no automatic right of the applicant to attend a hearing.

The Review Panel comprised three members with a rotating Chairperson, and a hearing was within the discretion of the Panel. The Panel was required to make its decision within 30 days of the lodgement of the appeal.

The review of the system concluded that the appeal system operated more as a "second opinion" process than a true review process: the Review's focus was on an appeal system concerned not with merits but rather process review. The Review proceeded on the basis that the proper purpose of the Housing Appeals Mechanism was administrative review, rather than dispute resolution. Dispute resolution was characterised as merely resolving a dispute, rather than identifying errors or failures in the decision making process, thus limiting the value of the appeals process in improving service, and encouraging value based application of policy rather than focussing on sound process. In addition, the Public Housing Review Panel was seen as inefficient and time consuming, contributing both to imposing a significant onus on applicants for review, and in lengthening the period within which appeals were dealt.

In November 2009, a new Housing Appeals Mechanism commenced operation.[67] The Public Housing Appeals Panel, the third level of appeal, was abolished. The first tier of the old appeals process was absorbed into the ordinary decision making process as a normal aspect of good administrative practice rather than as a separate aspect of an appeals process. Notifications of any unfavourable decisions are required to include information about the right to appeal and an appeal form. An application for appeal goes to internal review by a senior departmental officer, who makes a decision concerning the application. The decision can be declined as ineligible for appeal, or can be overturned as incorrect; the applicant is to be advised of the outcome within 30 days of the lodgement of the appeal. If the decision is upheld (i.e. the appeal is unsuccessful), it is automatically referred to an external Regional Appeals Committee.

This Committee comprises one person from the Department of Housing (a senior Departmental officer not involved in the decision) and one or two independent community members. The members are appointed by the Regional Manager following "consultation with local community agencies representative of the Department's customer base. Members will be selected on the basis of demonstrated qualifications, experience, skills and abilities

and/or interest in the fields of community welfare, public housing and/or cultural and Aboriginal affairs."[68] There is no central Housing Appeals Unit but rather a Regional Appeals Coordinator in each region; a Regional Appeals Committee is established in each region across the State. Applicants are able to attend an arranged hearing and bring an advocate or supporters if they wish; hearings are usually held in Departmental premises in the region nearest to the applicant's home (other than appeals against priority decisions, which are heard in the region where the applicant is seeking housing). Telephone hearings are available. The Committee has the power to directly change a decision or substitute a decision. It appears that the Appeals Committee is required to notify its decision to the applicant in writing within one month of the lodgement of the appeal application and to provide information, in the case of an unfavourable decision, concerning further action that might be available to the applicant for review. Applicants are generally referred to the Ombudsman's Office or the Minor Disputes division of the Magistrate's Court but, again, recourse to further "review" is limited by the jurisdiction of those agencies.

In WA, there are approximately 39,000 tenancies, many in regional areas, and many involving aboriginal tenants. The new process does not presently include community housing but it is planned in the future to include this sector. In the period since its inception to March 2010, 638 appeals have been received, the greatest number being with respect to tenant liability, closely followed by priority housing decisions. Of these appeals, 175 decisions were overturned at Level 1 on procedural fairness grounds; at level 2, 49% of appeals have been unsuccessful, with 36 % successful.

It appears[69] that at this early stage there are some teething problems for the new process, including issues of conflicts of interest for Regional Committee Members, timeframes for appeals, and what constitutes appealable matters. Region based appeals can make it difficult to avoid conflicts of interests in small communities and, indeed, to obtain community membership of the Appeal Panels, partly because of the wider general familiarity with community members in regional communities and also because of the transient populations in remote areas. It is often the case that a community member may know a party to the appeal, but that there is no alternative member available to be scheduled for the hearing.

**Delivery of administrative justice in public housing?**

What do the details of these review processes identify about the delivery of administrative justice in public housing in Australia? While there are commonalities among these processes there are also wide variations. It is clear that there is not only one way to deliver administrative justice in this area and, indeed, the variety of circumstances in which public housing assistance is provided across Australia suggests different models and processes may well be appropriate.

However, are there certain fundamentals without which administrative justice cannot be said to be delivered? Any consideration of a base line which effectively enables administrative review must include the following: the independence of the review process; the credibility of both the process and the review body, which must also incorporate a consideration of the expertise of the review participants, so that its decisions are accepted and respected by both the housing agency and the applicant for review; and perhaps, above all, the accessibility of the process.[70]

***Independence***

Most of the review processes do not demonstrate independence from the housing agency whose decisions are reviewed. Since the formalised inception of a system of administrative review in Australia,[71] the "background assumption" is that "merits review tribunals should operate as an external check on the administration, free from the influence and control of

those being checked".[72] Cane and McDonald recognise that although independence is a central concern in considering the effectiveness of merits review bodies, this is not a simple concept and independence may depend on cultural practice and expectations as much as on institutional design.[73] However, they identify two central factors: "one between the making and review of administrative decisions, and the other between internal and external review of decisions. Both of these are striking features of the review bodies described above, which operate in respect to public housing decisions in Australia, which rely heavily on internal reviews as an essential aspect of the review process and all of which refer to the "independence" of an "external" review process.

Clearly government officials who make governmental administrative decisions are not "independent": "[w]hile we might expect that a senior official in the Department who conducts an "internal" review of the decision to exercise "independent" judgment, we would not expect that judgment to be unaffected by governmental policies or roles".[74] On the other hand, where a review is "external", with the implication of being at arms length and independent, the review itself should be independent and not part of or aligned with the agency whose decisions are subject to review. The assumption is that, without arms length review, the review process is not truly credible because it lacks independence, or the perception of independence.

As well as establishing the base for an independent and effective review process, external review has also been invested with the role of generating normative change in decision making bodies: that is, identifying and feeding back to the decision makers systemic issues relating to their decision making, thereby enabling better decision making practices and policies to be developed in the agencies. This is enabled by the monitoring of decisions made through the review process; the giving of reasons for review decisions; and interpreting policy and principles applied as part of the decision making process. This is a valuable aspect of a review process from the point of view of administrative justice in both the broad and the personal sense. Individuals can come to expect a better decision making process and better decisions; decision making bodies improve their accountability through that improved process.

However, it is not just external review which can be used to improve decision making processes. It is reasonable to suggest that internal review processes may also have this normative effect, especially if pursued seriously and consistently. Indeed, this may be a more effective way in which to improve decision making rather than relying on the sporadic effect of appeals proceeding to a hearing and decision. Further, if the purpose is to improve decision making, perhaps better resources, improved recruitment processes and training, and improved management processes by the agencies might have a quicker more effective and lasting impact.[75] So while many of the public housing assistance agencies do not appear to have an independent external review agency, establishing this might not be the only or even the best way to improve their decision making. Certainly they all have internal review processes.

How do the public housing review bodies across Australia measure up in terms of independence? The lack of a legislative basis for the review bodies is a common feature. Most[76] are established on an administrative basis, generally pursuant to policies of the housing agency. South Australia[77], Queensland[78] and the ACT[79] have legislation providing for the review of public housing assistance decisions but only South Australia has a legislatively established review body specifically for this purpose. In the ACT, the ACAT is empowered to hear "housing assistance matters" but in reality this is the least accessible level of review, and the least utilised.

Most of the review bodies do little to even suggest independence from the decision making agency, even in their "independent" or "external" level of review. The ACT model, the

Housing Assistance and Tenancy Review Panel, is established pursuant to delegated legislation[80] and comprises senior Housing ACT officers. In Western Australia and Tasmania, there is a third level of review presented as independent; however, in each case this review panel is presided over by an agency officer and comprises community members selected and appointed by the agency. In Victoria, the only review process is internal, albeit within a separate office; and in New South Wales, the Housing Appeals Committee is situated within the housing agency and is essentially a Ministerial Advisory Committee. In the Northern Territory, there is a separate external review body with members appointed by the Minister, but all meetings of the Board are attended by an agency officer to advise on policy. In South Australia, there is an external and independent body, legislatively secured. Its members are appointed by the Minister and have statutory protections for their appointment.

Those review processes without an external or independent element often refer applicants at the end of the process to other agencies, as providing another level of review or appeal. Most commonly these references are to the local Ombudsman's Office.[81] The Ombudsman's Office generally operates on the basis of a complaint, rather than an application for review, and the role of the ombudsman is not the same as merits review and nor is it accompanied by the same powers to change a decision.[82] Under these circumstances, the Ombudsman's Office does not provide an appropriate "external review" for the purpose of addressing these applications.

Another indication of the independence of the review bodies is revealed by their powers. Few of these review bodies – even those formally part of their departmental structures – have determinative and, therefore, final powers. The South Australian Housing Appeal Panel does. However, in the ACT, Northern Territory, Victoria, New South Wales, Tasmania, and Queensland (with respect to "legislative" reviews, although it can make determinative decisions in relation to "administrative" reviews) the review body can only make recommendations to the housing agency that a decision be changed. In Western Australia, the review body (chaired by a senior executive of the agency) can change decisions.

Legislative security, determinative powers, and external and independent membership, are all significant features of an effective and independent review mechanism upon which the delivery of administrative justice depends. However, it is clear that independence is not found only in formal institutional structures. A culture of independence can be generated even without this institutional structure and protect and promote the delivery of administrative justice. If the practice consistently applies over a period of years, that recommendations of a review body are always accepted and applied by the housing agency, this clearly militates against the weakness of a lack of determinative powers. This appears to be the case in New South Wales, where the Housing Appeal Committee operates within Housing NSW, with recommendatory powers only, but nevertheless is regarded as credible and independent by both the agency and applicants and is well supported to continue operating on this basis. The converse can also be the case: if "independent" appointments are made without reference to merit, or the "independent" review body is not provided with sufficient or appropriate resources to function as such, an independent review process provides neither of those features.

### *Credibility*

An effective review process – one that does deliver administrative justice - must have credibility in the eyes both of the applicant seeking review, and the agency whose decisions are subject to review. The issue of credibility is closely tied to that of independence but also goes beyond this. Credibility might be dependent on the expertise of those conducting the review: if they are not knowledgeable, professional or competent, or if they behave in a partial manner, or appear to do so, this undermines the credibility and authority of the

review. Such considerations raise a range of issues: the conduct of hearings; the provision of procedural fairness; the capacity of the reviewer; and the selection and training as well as the ongoing conduct of the members of the review body.

Credibility might also be dependent on the way in which the review body is structured and formally operates. A review body purporting to be independent, yet situated physically within, or co-located with, the agency being reviewed,[83] is not likely to be viewed with confidence as independent. Credibility and, therefore, acceptance of its decisions or recommendations, might be enhanced from the perspective of the agency where the review is internal; the agency might be significantly more accepting of a changed decision, as it remains "in house" and probably is made by a senior officer of the agency who will be accepted as knowledgeable and competent, and the agency might well take any lessons to heart. From the perspective of the applicant, this is less likely to engender confidence. Without this confidence, is the review effective?

No jurisdiction prescribes qualifications for membership of the review panels (except of course where they are internal and departmentally based). Where appointments are made by the Minister, merit should be the basis of the appointment as it is for Ministerial appointments to any body: governments have an interest in the quality and effectiveness of the work done by their appointees. Ideally, an appointment process will be at arms length and on the basis of skills, knowledge, capacity and experience.

The management of the review process is also a central aspect in establishing its credibility and the effective delivery of administrative justice. The central concern here must be that of procedural fairness, without which it is unlikely there can be either actual or perceived administrative justice. A hearing is, of course, not a prerequisite to delivering procedural fairness but without it this can be much more compromised and difficult. Some form of hearing in person, with the support of a friend or advocate, is a central feature of about half of the public housing review processes,[84] but in the other systems the review is conducted "on the papers". Even where there is a hearing there can be significant limitations: in New South Wales, for example, the applicant attends a hearing but is not provided with a copy of the documents available to the HAC, on the basis that these papers will include material from the applicant's Housing NSW file, these are only available to the applicant pursuant to a freedom of information request. Where there is a paper review, the reviewers may seek a response to the application from the agency, but not make that response available to the applicant for comment.[85]

The issue of conflict of interest is a difficult and prevalent one in these review bodies. The conflict is unavoidable where the review is only internal. In one sense this is presented as a strength of the process; a senior and experienced officer brings a fresh eye and independent judgment to bear in reviewing the decision, with enough knowledge of policy and the decision making process and the operational environment in which the decision must apply to make an effective review. If there is no further review level, this, despite its possible value, is insufficient to deliver procedural fairness. In some circumstances however, this apparent bias is exacerbated by the way in which "independent" review bodies are structured or their members selected, where members are appointed, or advised, or the review body chaired, by the agency.[86]

### *Accessibility*

The last and perhaps most difficult issue relevant to the evaluation of the effectiveness of these review processes in delivering administrative justice in public housing is that of access. Institutional structure, the provision of procedural fairness and the credibility of the process all impact on accessibility: a process lacking a structure or practice enabling it to engage in effective review or lacking in credibility will not provide access to administrative

justice, nor is it likely to be used to do so. Far more fundamentally, access is about information, knowledge, capacity, support and culture.

By definition, applicants for public housing assistance are generally from marginalised groups, frequently lacking the educational or social opportunities, or the physical or intellectual capacities, to access services easily. Public housing also is increasingly required to focus its services on significant sub groups of marginalisation: refugees, indigenous people, released prisoners, victims of domestic violence, homeless people and people with multiple disabilities. These are not individuals who are able to easily access information; present a coherent argument; present themselves to a government agency to argue about a decision; or know where to look for the most effective assistance or support. It is likely to be the case that most of the established review agencies (and the housing agencies themselves) deal daily with individuals from these groups, who have been able to access the review process, possibly with other support and assistance they have been able to access. This, however, does not mean that the issue of access for these groups is not an issue for the delivery of administrative justice. A number of the review bodies do not operate by way of a hearing. While, of course, an oral hearing is not a prerequisite to the provision of procedural fairness, it must often be the case that actually telling their story is the only effective way many applicants will have of being heard.

In respect of some review agencies, it is difficult to obtain even basic information concerning the review process or how to make an appeal. Websites can be very difficult to navigate, and then only provide skeletal information and support. Websites are not accessible to everyone – many are excluded by lack of availability, lack of familiarity with technology, or language. Increased reliance on websites often means lack of hard copy information and forms, and reliance on internet based resources often means hard copy material is overlooked in regular updating. In some agencies information concerning the right to appeal is not openly available or promoted.[87] Only a few jurisdictions require that all decisions must be provided in writing and, at the same time, provide information on the right to appeal.[88] Where there is no such formal requirement in legislation or policy, this type of information access can depend very much on an agency culture accepting the review process. This may vary, not only between jurisdictions but also between offices within the same agency. Availability of the details of the policy against which the decision has been made is also variable. Generally, the agency's policies are available only internally[89], and may not be provided with the decision (especially if the decision is not in writing!). While the existence of detailed policy, much of which has developed alongside (and perhaps as a response to) the development and operation of public housing review processes, has assisted both good decision making and greater transparency in decision making. In the absence of information about the details of the policy, it is difficult for most applicants to mount an argument on appeal that is other than a "second opinion" argument and this is generally not the core of the issue a review body needs to consider. All agencies have information, where available, provided in a number of different languages, and all appeal bodies, where a hearing is provided, have provision for interpreters to be available at hearings.

However, information about a service, however extensive and well explained, even where generally available, is not the same as access to that service. To achieve a correlation between the two requires significant priority and administrative commitment and support for the review processes, better embedding it in public housing service culture. It is only by enabling access that administrative justice has any opportunity for real delivery.

One of the fundamental difficulties for administrative review of public housing services is that no matter what the quality of the review process, access to that process is largely regulated by the service provider, the housing agency: this is the case whether the review process is "independent" or not. This can be contrasted with, for example, social security services provided through Centrelink, which are often directed to many of the same beneficiaries as

those applying for housing services. In the case of Centrelink, however, legislation requires formal advice of the review process with every decision and, in addition to a far more formalised and single central agency, there is a dedicated and publicly resourced (however limited the resources might be seen to be) community legal centre for the support of Centrelink applicants seeking review of decisions available through the Welfare Rights Centre.

Tenants of public housing agencies often face restrictions which do not apply to private tenants and home owners, in particular in relation to their conduct. Behaviour is often an issue in their tenancies: disruptive and disturbing behaviour, or conduct not easily understood, is often associated with mental illness, social isolation and exclusion, cultural differences, and disabilities. Often public housing tenants are subject to special arrangements relating to conduct that can make their tenancies more fragile or more likely to be terminated. These particularly marginalised people can face public housing decisions that may not apply to other tenants and which can impact disproportionately on their security of tenure or capacity to obtain or maintain housing. A very low income, coupled with disability, mental illness or social exclusion, can place a tenant at a very high risk of breaching a term of a tenancy agreement, and the circumstances of such a tenant are that they are very likely to be homeless and at severe risk if the tenancy is terminated. In addition, public housing agencies have access to the most personal of details of their applicants. The need for administrative justice, to access an independent and effective review process, is acute for these applicants; the need of the broader community to be confident that the most vulnerable members of the community are being provided with fair and proper decisions is similarly acute. How else do we achieve a civil society?

Support services available to public housing applicants are generally limited. Each jurisdiction has a service providing tenancy advice and advocacy support to public housing tenants and applicants for housing assistance.[90] Some are relatively well funded and supported and provide quite extensive services ranging from training and advocacy to publications and research.[91] The advocacy services do not always extend to appearing at hearings before review bodies (although of course this is not the only context in which advocacy is of value). However, where there is no or a limited hearing process there is correspondingly limited opportunity for an advocate to provide those services.

**Conclusion**

Decisions concerning public housing assistance are government decisions which have the highest order impact on the lives of those to whom they relate. They are also decisions determining the distribution of significant public assets, the consequence of which can have far reaching consequences for the stability and development of communities. They are decisions which are generally made on the basis of developed but not always public, policies and guidelines.

These are the decisions which form the core of those ripe for merits review. This is the process developed in the Australian administrative law system to deliver administrative justice. Merits review enables an accessible means of ensuring accountability of government, monitoring and, perhaps, of improving decision making by government, and getting decisions changed so that they reflect and make operational the governmental policies and principles according to which they should be made.

The review processes for the review of public housing assistance risk falling short of the ideals of independence, credibility and accessibility in every Australian jurisdiction. Their effectiveness depends not on an established institutional process but, in many cases, on the hope of the skill, goodwill and commitment of those providing the review services, and on a culture of support within the agency provider.

These hopes are not a sufficient basis for the delivery of administrative justice, which is why, of course, formalised, external and independent review bodies have been established in respect of most other governmental administrative decisions. How do we build secure communities without such a process in relation to public housing?

**Endnotes**

1 All housing assistance programs throughout Australia have income and asset tests for eligibility for receipt of services, and all now essentially provide services to people who do not have paid employment.
2 See for example, the *Universal Declaration of Human Rights* Art. 25; *Covenant on Economic, Social and Cultural Rights* (ICESCR) Art. 11; and the *Convention on the Rights of the Child* (CRC) Art. 5(e).
3 *Control of Government Action*, Robin Creyke and John McMillan, Butterworths, 2005
4 Above n3, p3
5 See <http://www.facs.gov.au/sa/housing/progserv/affordability/affordablehousing/Pages/default.aspx>, accessed 13 July 2010
6 For a history of the purpose, establishment and operation of public housing in South Australia, see Susan Marsden, *Business, Charity and Sentiment: The South Australian Housing Trust 1936 – 1956*, Wakefield Press, 1986. The South Australian Housing Trust has elements peculiar to South Australia, but many of the concerns and activities which directed its establishment are common to all the public housing providers across Australia. The Trust's operational identity is Housing SA. See also, Dewar M, *Darwin – No Place like Home: A History of Australia's Northern Capital in the 1950s through a study of housing,* National Archives of Australia, 2008, a history of public housing in the Northern Territory; and *Cornerstone of the Capital: a History of Public Housing in Canberra*, Wright B, ACT Housing, 2000. See also Hayward D, *The Reluctant Landlords? A History of Public Housing in Australia,* 1996, Vol 14(1), pp5 – 35, Urban Policy and Research.
7 Commonwealth Administrative Review Committee Report Parliamentary Paper No 144, 1971 ("the Kerr Report"). For brief accounts of the development of the merits review systems in Australia, see Creyke and McMillan, above n 3, and *Principles of Administrative Law: Legal Regulation of Governance*, Peter Cane and Leighton McDonald, OUP 2008.
8 The earliest formal public housing review processes were established in South Australia in 1991 and in Victoria in 1993.
9 See http://www.communityhousing.sa.gov.au/site/page.cfm?u=432#e626 (accessed 11 July 2010) for a Discussion Paper, *A New Vision for Community Housing for South Australia,* which outlines many of these developments and likely changes. In the 2009 Nation Building Economic Stimulus Plan, the Commonwealth Government provided a total of $5.238 billion for the construction of social housing, essentially for housing administered by the not for profit community sector in the period 2008/09 – 2011/12: see http://www.economicstimulusplan.gov.au/housing/pages/housing_social.aspx and http://www.economicstimulusplan.gov.au/housing/pages/default.aspx (accessed 11 July 2010).
10 See clause 2(7) of the 2003 Agreement. Previous Commonwealth State Housing Agreements had included the same provision and it was pursuant to these provisions in successive Agreements that public housing appeal and review processes were established. The 2003 Agreement expired on 31 December 2008 and was replaced by the National Affordable Housing Agreement from 1 January 2009, which does not include any equivalent provision and is a very different type of document. This Agreement sets out a framework for the governments to work to ensure "all Australians have access to affordable, safe and sustainable housing that contributes to social and economic participation".
11 *House Rules: Decision and Appeal Rights in State Housing Authorities*, Colin Kemp and Associates, Mary Perkins and Department of Community Services and Health, 1990, Australian Government Publishing Service, Canberra (the "Kent Report").
12 See *Are we There Yet? Appeal Mechanisms in State Housing Authorities,* National Shelter 1997; and Peter Sutherland, *State Housing appeals: An ACT Perspective*, AIAL 1994.
13 See above n 7.
14 Review processes for these housing providers were required by the terms of the 2008 Agreement: see above n 10.
15 See Kathleen McEvoy and Chris Finn, *Private Rights and Public Responsibilities: the Regulation of Community Housing Providers*, (2010) 17 A J Admin L 159
16 *Social Security Act 1991* (Cth) Part 3.7, payable to most non home owner recipients of social security benefits whose rent is above the threshold rent level, and who do not pay "Government rent" (see section 1070C): that is, it is not available to tenants of public housing, although it is available to tenants in community housing. See also <http://www.centrelink.gov.au/internet/internet.nsf/payments/rent_assistance.htm> accessed 10 July 2010. Decisions concerning rent assistance eligibility, grant and rate are subject to external review through the Social Security Appeals Tribunal and the Commonwealth Administrative Appeals Tribunal.
17 *Residential Tenancies Act 1995 (SA); Residential Tenancies Act 1997 (ACT); Residential Tenancies Act 1987 (NSW); Residential Tenancies Act 1999 (NT); Residential Tenancies and Rooming Accommodation*

*Act 2008 (Qld); Residential Tenancy Act 1997 (Tas); Residential Tenancies Act 1997 (Vic);* and *Residential Tenancies Act 1987 (WA).*

18 In SA, NSW and the ACT this jurisdiction is conferred on a specialist tribunal, in Victoria in the general administrative tribunal VCAT and, elsewhere, it is exercised in small claims jurisdictions.

19 For example. section 32D(3)(b) of the *South Australian Housing Trust Act 1995 (*SA)

20 An earlier Panel (the Public Housing Appeal Panel, to which the Housing Appeal Panel is the direct successor) was administratively established in South Australia, in 1993, to hear appeals concerning decisions of the South Australian Housing Trust and made recommendations concerning these decisions to the Minister of Housing: see Kathleen McEvoy, *Regulation of Public Tenancies: Disputes and Administrative Review*, in *Responsive Jurisdictions for Changing Times*, ed. Terry Burke, Centre for Urban and Social Research, Swinburne University of Technology, 1998. In 2007, the jurisdiction was legislatively established by amendments to the *South Australian Housing Trust Act 1995 (SA),* and the Housing Appeal Panel was established to exercise powers of review with determinative authority.

21 See section 32D(4) of the *South Australian Housing Trust Act 1995 (SA)*.

22 Section 84(1)(ii) *Co-operative and Community Housing Act 1991 (SA).*

23 The South Australian Housing Trust is the "principal property and tenancy manager of public housing in the state", with additional functions relating to access to affordable housing and housing support, as well as the regulation of community housing providers and private rental housing standards. "Housing SA" is the business arm for delivery of social housing functions, situated within the Department of Families and Communities: see *Triennial Review of the South Australian Housing Trust Final Report,* March 2010.

24 See section 32A(1) of the *South Australian Housing Trust Act 1995(SA)*.

25 See section 32B (2) – (10) of the *South Australian Housing Trust Act 1995 (SA)*. Members of the Panel currently include lawyers, public health policy administrators, academics and social workers and, in the past, the Panel has comprised a similar cross section, generally drawn from professional occupations, and often persons with dispute resolution or other review experience. The process of appointment has generally been through advertising for expressions of interest, interviewing shortlisted applicants and recommending appointments to the Minister, who takes the nominations to Cabinet. The Panel members are not appointed to be available on a full time basis and generally the Panel is scheduled to sit about one day per week, hearing both public and community housing appeals.

26 See section 32C of the *South Australian Housing Trust Act 1995(SA)*.

27 ibid

28 The Panel can sit with two members only (see section 32B(12)) but this is not the general practice.

29 See section 32D(6) of the *South Australian Housing Trust Act 1995(SA)*.

30 The only circumstances in which this occurs is where there is a determination that the matter is clearly outside the Panel's jurisdiction and so will not proceed to a hearing, or where an urgent Interim Order is required: see section 84(7) *South Australian Co-operative and Community Housing Act 1991 (SA)*

31 See section 32D(5) of the *South Australian Housing Trust Act 1995(SA)*.

32 Section 32D(4) of the *South Australian Housing Trust Act 1995(SA)*.

33 See Pearson L, "The Impact of External Administrative Law Review: Tribunals" [2007] UNSWLRS 53, 57

34 In South Australia there are approximately 45,000 public housing premises available. As at 30 June 2009, there was a "waiting list" of approximately 27,000: see *Triennial Review of the South Australian Housing Trust Final Report,* March 2010, above n 23. These figures include community housing premises and applicants, and applicants for Aboriginal public housing. In 2009-2010, 438 appeals were lodged with the Appeal Unit, an increase from 363 in the previous 12 month period. Of these, 194 decisions were upheld, and 148 overturned (others were altered or withdrawn or otherwise resolved). 121 matters (about 28%) proceeded to hearing before the Panel, and of those, approximately 40% of the decisions were changed or overturned - that is, the appeals were successful. These external review numbers and outcomes have been relatively consistent for a number of years.

35 *Housing Assistance Act 2007* (ACT) section 9.

36 *Housing Assistance Act 2007* (ACT section 11(1)(a).

37 *Housing Assistance Public Rental Housing Assistance Program 2008*, Cl 5.

38 See cl. 19 of the Program.

39 See cl. 31(1) of the program.

40 These are forms approved by the Commissioner – see cl 31(3) of the program.

41 These decisions are specifically not appealable in South Australia.

42 See cl 31(2) of the Program.

43 See cl 31(6) of the Program.

44 See cl 31(7) of the Program.

45 See cl 31(10) of the Program.

46 See cl 32 of the Program.

47 Housing ACT has nearly 12,000 properties, representing approximately 8% of all housing stock, with more than 11,000 tenancies. Housing ACT received 2,272 applications for housing assistance in the 2008/2009 year. In 2008 -2009, Housing ACT conducted 540 first level reviews; 56 second level reviews; 2 matters appealed to the ACAT; and 1 matter to the ACAT Appeals President. From 2009 - 31 March 2010, there were 384 first level reviews; 22 second level reviews; and 2 matters appealed to the ACAT.

48 See section 30 *Human Rights Act 2004* (ACT).

49 See ss 40 and 40A *Human Rights Act 2004*.

50 The appeal form is not available from the fact sheet on the website nor is there detail concerning the operation or membership of the Appeal Panel << http://www.territoryhousing.nt.gov.au/public_housing>> accessed 10 July 2010
51 National Housing Appeals Conference, Adelaide, April 2010, Northern Territory Presentation
52 See section 63(a) *Housing Act 2003* (Qld)
53 See section 64 *Housing Act 2003* (Qld)
54 See section 65 *Housing Act 2003* (Qld)
55 The Complaints and Review Branch deals with complaints and reviews across the Department and includes, as well as the Housing Appeals and Review Unit; the Disabilities and Communities Complaints Unit; the Child Safety Complaints Unit; the Disabilities and Communities Compliance Investigation Unit; the Case Review Unit (Child Safety); and the Matters of Concern Review Unit.
56 *Ombudsman's Act 2001* (Qld): see in particular section 12(b), which empowers the Ombudsman to make recommendations concerning appropriate ways of addressing the effects of inappropriate administrative actions, or for the improvement of the practices and procedures. Section 7 includes the "making of a recommendation" as an "administrative action" which can be the subject of a complaint under the Act.
57 National Housing Appeals Conference, Adelaide, April 2010, Queensland Presentation
58 The introduction of the "Client Uptake and Assessment Process" was designed to increase consistency in decision making in identifying eligible households; to determine a "point in time" level of needs though a housing needs assessment; and to match eligible households to appropriate housing assistance products, to meet their needs.
59 National Housing Appeals Conference, Adelaide, April 2010, Queensland Presentation
60 See <http://www.housing.vic.gov.au/applying-for-housing/appealing-a-decision/housing-appeals>, accessed 10 July 2010.
61 Housing Appeals, Complaints Management &Home Finance Review Office Annual Report 20008/2009.
62 See website, <<http://www.hac.nsw.gov.au/>>, accessed 10 July 2010. This is an extensive and informative website, providing clear, detailed and easily accessible information about the HAC and its operations. The website stands alone from that of the Department, despite the HAC being part of the Department.
63 Housing Appeals Committee, NSW, *Overview of 2008/09*
64 See << http://www.dhhs.tas.gov.au/__data/assets/pdf_file/0017/25631/FCT_-_HT_Customer_feedback_Nov_09_v1.2.pdf>> accessed 11 July 2010
65 See page 3, policy, <<http://www.dhhs.tas.gov.au/__data/assets/pdf_file/0017/25631/FCT_-_HT_Customer_feedback_Nov_09_v1.2.pdf>> accessed 11 July 2010.
66 See << http://www.dhw.wa.gov.au/Files/AppealsMechanism_Discussion_Paper.pdf>> accessed 10 July 2010
67 See << http://www.dhw.wa.gov.au/404_444.asp>> accessed 10 July 2010
68 Department of Housing Appeals Mechanism Policy, Guidelines and Practice cl.8.2
69 National Housing Appeals Conference, Adelaide, April 2010, Western Australian Presentation
70 See Kerr Committee Report 1971, n 7; Administrative Review Council *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39, 1995. See also discussion by Pearson L, *The Impact of External Administrative Law Review: Tribunals*, n 33.
71 Merits review tribunals have been in existence in Australia since the 1920s, but it was the Kerr Report of 1971 that focussed on the distinction between judicial and merits review: see *Principles of Administrative Law: Legal Regulation of Governance*, Peter Cane and Leighton McDonald, above n 7, at 217.
72 Above n 7, at p217.
73 Above n 7, at pp223-224
74 Above n 7, at pp223-4
75 See above n 7 at p248.
76 Victoria, New South Wales, Western Australia, Tasmania and Northern Territory
77 Part 3A *South Australian Housing Trust Act 1995* (SA).
78 See section 63(a) *Housing Act 2003* (Qld), although this applies to only a limited number and type of housing decisions. Review of other housing assistance decisions is administratively based.
79 Cl 31 of the *Housing Assistance Public Rental Housing Assistance Program 2008*, established pursuant to section 19(1) of the *Housing Assistance Act 2007* (ACT)
80 See cl 31(7) of the *Housing Assistance Public Rental Housing Assistance Program 2008*
81 Queensland, Victoria and Western Australia all specifically refer applicants to a possibility of some form of further review by the Ombudsman's Office. The actions of the review body in the Northern Territory are open to scrutiny by the Ombudsman's Office. For issues of maladministration, the actions of the housing providers throughout the States and Territories would all come within the jurisdiction of the Ombudsman, but this is rarely the basis for applications for review.
82 See the discussion of the Ombudsman as a process of accountability and its limitations in *Principles of Administrative Law: Legal Regulation of Governance*, Peter Cane and Leighton McDonald, above n 7 at pp258 – 271; and Creyke and McMillan, above n 3, at pp181-210.
83 In WA, hearings to review Homeswest decisions are conducted in the Homeswest premises. In the NT, finding neutral locations for appeals hearings has been a significant issue in regional areas.
84 South Australia, New South Wales, Western Australia, the Northern Territory and, in practice, Victoria.
85 This occurs in Tasmania
86 Western Australia, Tasmania and the Northern Territory

87 The Tasmanian process is perhaps the least well set out in its literature or on its website, and its appeal forms (on which an application for review is required to be made) are specified as only to be provided directly by an agency officer.

88 Decisions that attract a "legislative appeal" in Queensland are required to be given in writing; in NSW all decisions are required to be provided in writing with information about review; and in Western Australia all unfavourable decisions must be provided in writing with information concerning review.

89 In NSW, the policies are published on the HAC website, but this is not commonly the case. Tasmanian policies are also available online, but not easily accessible. In SA, Housing SA policies are not publicly available on line, and in practice not easily available outside the agency.

90 See general discussion on these issues in *A Better Lease on Life – Improving Australian Tenancy Law*, National Shelter Inc, April 2010

91 In Victoria, NSW, Queensland, Tasmania and the ACT these are Tenants' Unions. In South Australia, the support service is Tenant Information and Advocacy Service, operated through Anglicare, and in WA and NT, a Tenants' Advice Service. Other than in SA, these services are funded from the interest on private rental bonds held during the course of a tenancy. Throughout Australia, State and Territory Fair Trading or Consumer Affairs Departments provide advice to private tenants on tenancy matters. This advice is not generally available to public tenants who, essentially, need to rely on Tenants' Unions or the equivalent, or on the service provider.

# PERSPECTIVES ON AGENCY DECISION-MAKING

***Josephine Kelly****

## Modern executive government

The importance of good administrative decision-making has increased as government has become more and more involved in the activities undertaken by Australians in their personal and working lives, and in business activities. The development and impact of environmental and planning law, wide-ranging social security laws and prudential regulation are but three examples of the growth in such governmental involvement since the 1950s.

It is in response to this increasing significance of administrative decision-making in Australia that the current administrative law system has evolved, following the first report by the Kerr Committee presented to the Commonwealth government in 1971[1]. Since the creation of the Administrative Appeals Tribunal ('the AAT') in 1976, a significant aspect of the development of administrative law in Australia, numerous merits review tribunals have been established at the Commonwealth and State levels, some specialist tribunals and some generalist tribunals like the AAT.

The following observations of former Chief Justice Gleeson are apposite to modern administrative decision-making:

> One of the characteristic features of the context in which modern administrative law functions is a change in emphasis from the duties of public officials to the rights of citizens.

and

> The development in the Australian community of a cultural expectation that those in authority are able and willing to justify the exercise of power is one of the most important aspects of modern public life.[2]

This paper examines how legal professionals and members of merits-review tribunals can contribute to the enhancement of primary administrative decision-making, and hence good government.

## The process and the outcome

In the same paper quoted above, Chief Justice Gleeson said:

> It is (a) sound principle of the exercise of judicial power that the most important person in any courtroom is the party who is going to lose. Similarly, administrative review, in both process and outcome, should appear rational and fair, not least to the person whose decision is being reviewed.[3]

The implication for reviewers of decisions and, to a lesser extent, legal representatives, is that the two most important people to be considered when an administrative decision is being reviewed are the person or body who made the decision and the losing party. The process and outcome of review should appear rational and fair to every person who is involved, but in particular to the losing party and the person or body whose decision is being reviewed.

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* *Josephine Kelly is a NSW barrister. This paper was presented at the 2010 Australian Institute of Administrative Law Forum, Sydney, 22 July 2010.*

**What is the decision being reviewed?**

On review, the first task of a legal representative of a party, and of the reviewer, is to identify the decision or decisions the subject of review because that is the basis of the jurisdiction of the tribunal. If the decision is not reviewable, the tribunal has no jurisdiction.

Identifying the reviewable decision sounds obvious and straightforward; however, it is sometimes quite difficult to do. The reviewable decision may have been expressed in different ways in the document setting it out. There may be several decisions under review, for example, in a worker's compensation case. There may have been claims and determinations in respect of a number of different injuries over a number of years of employment, various periods of incapacity, a number of impairments, internal reviews of decisions, redeterminations and tribunal decisions.

Often the original claim or application will have been made by an individual without assistance, legal or otherwise. Later, a legal adviser may be involved. For example, in a worker's compensation case there will be a notice of an accident and later a claim for compensation submitted by the worker. If the application for compensation is refused, a legal adviser may be engaged. Correspondence between the worker, and the worker's legal adviser and the relevant department or agency and its legal representative, may address various aspects of various claims, not always clearly identifying the subject matter. Incorrect dates or references may have appeared inadvertently and be repeated in subsequent correspondence. There may be letters of the same date dealing with different aspects of a claim. Correspondence may cross in the mail. The result, quite often, is voluminous and confusing correspondence.

Consequently, the reviewable decision may not correctly identify the date of injury or the nature of the injury, or the nature or time-frame of the claim.

Another aspect which can cause difficulty is where an expert is requested to give an opinion. If the information on which the opinion is based is incorrect or inaccurate, the expert's opinion will not be useful.

**Avoiding confusion**

As a file in a matter grows larger, it may be easier to copy the details about a case from the most recent piece of correspondence on the top of the file than to refer to the primary or originating document.

I suggest that the more familiar a legal representative or decision-maker is with a matter, the more likely it is that that person will tend to rely on a recollection or perception of the matter which may be incorrect.

For a decision-maker at whatever level, or a legal representative, it is always wise to check the primary or initiating document to ensure that critical information is accurate.

Succinct and clearly expressed correspondence is the most useful and cost effective kind of correspondence. The heat of battle can sometimes result in correspondence that is unnecessary, verbose, inflammatory, and even contrary to the best interests of the client.

Accurate information and clarity of communications, both written and oral , will facilitate clear analysis of issues and proper consideration by decision-makers at all levels, and by legal representatives. This, in turn will contribute to higher quality decision-making that is timely, and lead to correct or preferable decisions.

**What is the source of power and what are the questions to be answered?**

Administrative decisions are initiated in two ways. The first is initiation by an individual or a corporation. For example, a person suffering from osteoarthritis claims a disability support pension, a Telstra employee claims incapacity payments for a work injury or an aircraft owner applies for a permit to land on the waters of the Great Barrier Reef. The other kind of administrative decision is initiated by the executive, for example, to cancel a passport or a visa, or registration of a migration agent, or an auditor.

The first question for the decision-maker to answer in each case is: what is the legislative source of the power to be exercised?

The second question is: am I authorised, or do I have the jurisdiction, to exercise the power? Associated with the question of jurisdiction are procedural issues including time limits, service, and proper delegation.

The third question is: what are the criteria that the legislation requires to be satisfied for the exercise of the power? For example, in the case of a worker's compensation claim for incapacity payments, questions would include the following: has there been an injury? Is the person incapacitated as a result of the injury? To what extent is the person incapacitated?

In *Australian Postal Corporation v Barry,* Branson J in the Federal Court considered a decision of the Administrative Appeals Tribunal. Her Honour said:

> I observe incidentally that it is a salutary discipline for every statutory decision-maker to refer to the terms of the relevant statutory provisions and to identify each element of the statutory cause of action. Had the Tribunal in this case set out or paraphrased in its reasons for decision the terms of s 16 and s 19 [of the *Safety, Rehabilitation and Compensation Act 1988* (Cth)] it is unlikely that it would have overlooked their critical elements.[4]

The High Court made similar observations in *Shi v Migration Agents Registration Authority*:

> As this Court has so often emphasised in recent years, questions presented by the application of legislation can be answered only by first giving close attention to the relevant provisions. Reference to decided cases or other secondary material must not be permitted to distract attention from the language of the applicable statute or statutes. Expressions used in decided cases to explain the operation of commonly encountered statutory provisions and their application to the facts and circumstances of a particular case may serve only to mask the nature of the task that is presented when those provisions must be applied in another case. That masking effect occurs because attention is focused upon the expression used in the decided cases, not upon the relevant statutory provisions.[5]

Legal practitioners and decision-makers who work in a particular area of law day in, day out, may operate on the basis of their understanding or perception of the relevant legislative provisions, which may not be complete or accurate. Exercising the discipline Branson J commends and going to the provisions of the statute will result in a list of the questions or issues that the legislation requires to be considered and determined. They may be questions of fact, questions of law, or mixed questions of fact and law, and may be numerous and complex.

Those questions or issues provide a framework for the consideration and determination of the case for the legal representative and the decision-maker. They determine what evidence will be relevant, and what must be obtained by the parties, and considered by the decision-maker. They also determine the legal arguments that will be made, and will provide the framework for the reasons for decision.

Fewer legal errors will be made if the correct legislation and the correct legislative criteria are addressed by the decision-maker. It is, therefore, in the interests of legal representatives

and the decision-maker to get this right. Sometimes difficulties are not directly addressed by legal representatives, either intentionally or unintentionally. A successful appeal because a matter was not addressed at all or not addressed properly, is not in the interests of a client. Difficult issues should be addressed directly. As in a court, a legal representative should be prepared to answer the difficult question or questions in the case.

**A reviewer of a decision should not accept the issues agreed by the parties uncritically**

In many cases, not all issues raised by the legislative criteria will be in dispute in a proceeding. However, there is a danger for a reviewer of a decision in accepting uncritically the issues as framed by the parties and, more importantly, where a party is unrepresented. As has already been suggested above, it is possible that a legal representative has prepared a case on the basis of an incorrect assumption or perception of the facts or the law.

Sometimes a matter that is not raised as an issue by the parties will be the issue on appeal. For example, a matter going to jurisdiction, such as whether a notice cancelling a visa was validly served. Provided the parties are given an opportunity to address the issue, raising a relevant issue will not lead to error but rather prevent such an error being made.

**Legal representation**

A tribunal reviewing a decision usually has several advantages not shared by the primary decision-maker. One such advantage is if one or both parties is represented by a competent legal professional who addresses the issues, the evidence, and legal argument, comprehensively and clearly. Such representation would be expected to result in a higher quality decision than otherwise.

At the Commonwealth level, and in state jurisdictions including New South Wales and Victoria, model litigant guidelines or policies apply to government which if followed should also contribute to a higher quality of decision-making at the merits review level.

The Commonwealth and its agencies have a statutory obligation to assist the AAT[6]. The President of the Tribunal, Downes J, has said of that obligation:

> I think it imposes an obligation which has parallels to the obligation of counsel assisting an enquiry. The ultimate object must never be the defence, for the sake of it, of the decision under review. It must always be seeking to procure the best decision on the evidence available at the time of the decision. I think it imposes an obligation on agencies to constantly address the question of whether the decision under review is the best decision. Further, the evidence adduced should be evidence which will assist, in whatever direction it points, and not simply evidence to support the decision under review ...
>
> Where applicants are unrepresented the importance of the principle is clearer. The obligation to ensure that all relevant material and arguments are before the Tribunal, so that the best decision is arrived at, becomes even more important. .[7]

Legal representation should assist the decision-maker to arrive at the correct or preferable decision and, where necessary, to give reasons for decision of a higher quality than would have been given in the absence of that representation.

**The correct or preferable decision**

The phrase “correct or preferable decision” was first used to describe the decision-making function of the AAT in *Drake v Minister for Immigration and Ethnic Affairs*[8]. It is a phrase that distinguishes two circumstances - when there is only one decision that is possible, the “correct decision”, and where a discretion is to be exercised and a number of decisions are possible, in which case the “preferable decision” is to be made. This phrase is applicable

to decisions that may be made at all levels of administrative decision-making. One aspect of decision-making which presents some difficulty is where governmental policy is a relevant consideration. What is the correct or preferable decision in this situation?

**Policy**

As administrative decision-making has become more complex, more government policies have been developed to give guidance to decision-makers. An important objective of a policy is to ensure consistency of decision-making, which suggests that the application of policy should have only one outcome, a "correct" decision. However, a policy cannot alter the effect, operation and application of legislation. Reviewing tribunals are not bound by policy, but will be reluctant to depart from policy without good reason. This principle was established in *Drake v Minister for Immigration and Ethnic Affairs.*[9]

The following remarks made by Sir Gerard Brennan apply to merits review tribunals other than the AAT:

> The primary benefit of AAT review is, of course, the doing of individual justice. It is to secure administrative justice for those affected by the exercise of power and for those for whose benefit power is conferred on a repository. Administrative justice is, of course, justice according to law but it is also justice according to lawful and reasonable policy.
>
> The secondary benefit which the AAT confers is the exposing of policy to critical review. The AAT ensures that policy conforms with the law and that it is reasonable in its application to concrete situations. The requirement to state reasons for decisions, both at the primary and at the review level, ensures openness and legitimacy in the exercise of executive power. These are tremendous benefits in a modern complex democracy - benefits that would not be available but for an institution vested with power to review decisions on their merits.[10]

Consistency of decision-making is desirable; however, in a particular situation, the question may arise as to whether it is reasonable to apply the policy. In a 2002 report of a study carried out of executive perceptions of administrative law, the AAT was seen as more prone than other review bodies to undermine governmental policy and give too much emphasis to individual rights in its decisions .[11] It is interesting to reflect on the observation of Gleeson CJ made in 2006 and quoted earlier, that there has been a change in emphasis in modern administrative law functions from the duties of public officials to the rights of citizens. This prompts the question of whether the executive is more accepting in 2010 of tribunal decisions which do not conform to government policy.

While the question of the application of policy may arise more often on review and be subject to criticism by the executive, whether or not a policy should be applied in the particular circumstances of a case is a relevant consideration at the level of primary decision-making, and failure to give proper consideration to that possibility may lead to legal error.
When a legal representative is seeking to avoid the application of a policy, and when a reviewer of a decision decides not to apply a policy, he/she must give a clear reasoned explanation of why it is reasonable in the particular circumstances not to apply it. In the case of a reviewer's reasons for decision, this will not only avoid legal error, but also assist the primary decision-maker to understand why the decision was made.

**The decision on review and reasons for decision**

Whatever the decision on review, to affirm, set-aside, substitute or vary the decision being reviewed, it is essential to clearly identify the terms of that decision. For example, stating "the decision under review is affirmed" requires that the terms of that decision be referred to.

Further, the decision on review becomes the decision of the agency and is enforced or carried into effect by it[12]. Making a decision easily comprehensible facilitates that process.

Apart from satisfying the legal requirements including referring to relevant evidence and making necessary findings of fact and law required by the legislative provisions, when giving reasons for a decision, if a reviewer of a decision decides not to agree with the decision under review, but to vary or substitute a decision, the principle stated by Gleeson CJ and quoted earlier in this paper should be in the reviewer's mind: "*administrative review, in both process and outcome, should appear rational and fair, not least to the person whose decision is being reviewed."*[13]

**Getting it right the first time**

Considering how decision-makers can be assisted to get it right first time, I conclude that apart from legal error, I cannot recall an occasion when as a reviewer of a decision on the merits, I have thought that the primary decision-maker made the "wrong" decision. That is because in the merits review process, the reviewer of a decision is not deciding the matter on the same material or in the same circumstances as the maker of the reviewable decision.

The reviewer of a decision is making the decision again and may have several advantages in coming to that decision, including legal representation of the parties, additional factual material and legal arguments, the benefit of hearing from witnesses, including experts such as medical practitioners, and their being subjected to cross-examination. The reviewer may also have the assistance of other members, including experts, in making the decision. The case may take days to hear, and then some further time to write, whereas the primary decision-maker may have had only a few hours in which to consider the material and make the decision.

Consequently, the case before the reviewer, both factually and legally, is often very different from the one considered by the primary decision-maker. Setting aside a decision is not making a decision that the primary decision was "wrong". It is a different decision made on the basis of different information.

As a member of the AAT, I was impressed by the quality of decisions made at the primary and internal review levels, and by other tribunals from which appeals came to the AAT. For example, the Social Security Appeals Tribunal and Veteran's Review Tribunal, did not have the advantages of a higher level merits review tribunal.

If a reviewer of a decision thinks it necessary to comment critically on some aspect of the decision being reviewed, the observations of Mason J (in the context of an appellate court overturning a judgment of a lower court) should be borne in mind:

> But when a judge's reasons are published they speak to the world at large. With the internet they pass instantaneously across the city and across the globe without hope of retraction.
>
> The more strident a rebuke in a judgment the more likely it is to be picked up by the legal public, reported by the media (usually out of context) and viewed as a slight on the reputation of the person rebuked. The substance of the decision may be ignored.[14]

**Conclusion**

After referring to the value and influence the High Court has even when not directly resorted to, Gleeson CJ has said:

> Similarly, within the executive branch, the capacity of citizens to invoke the (AAT's) Tribunal's jurisdiction must have an effect on the atmosphere in which decisions are made. The influence may be indirect, and in some cases even fairly remote. Yet, even then, it promotes good governance.[15]

The same principle applies to all merits review tribunals. The fact that they exist and may review decisions has an effect. However, the effect his Honour refers to will be the greater if the processes and decisions of merits review tribunals are well regarded and respected by the administrators whose decisions are the subject of review.

It follows that the privilege of serving as a member of a merits review tribunal or appearing as a legal representative before such a tribunal, carries with it an obligation to contribute to the enhancing of administrative decision-making and hence promote good governance, which is in everyone's best interest.

The most important contribution legal representatives can make is through correspondence that addresses issues, facts and law accurately, clearly and concisely. Unnecessary and confusing correspondence makes decision-making more difficult and more time consuming.

Members of merit review tribunals must ensure a fair and rational process and provide clear and well-reasoned correct or preferable decisions. The legislative criteria provide the framework for the consideration of the facts and the decision to be made. The need for clear explanation for findings is particularly important where questions of applying policy are dealt with.

For legal representatives and tribunal members, it is wise never to assume that a recollection of the issues, facts or law is accurate. In particular, go to the legislation and the criteria on which the case turns. In summary, never assume, and go back to basics.

**Endnotes**

1 The Commonwealth Administrative Review Committee established on 29 October 1968.
2 Chief Justice Murray Gleeson AC*, "Outcome, Process and the Rule of Law",* Address delivered to the AAT 30th Anniversary Dinner, Canberra, 2 August 2006
3 Ibid.
4 (2006) 44 AAR 186 at 190; [2006] FCA 1751 at [25])
5 [2008] HCA 31; 235 CLR 286 Hayne and Heydon JJ at [92]
6 *Administrative Appeals Tribunal Act 1975,* s 33.
7 The Hon. Justice Garry Downes AM, *Introduction: The Obligation to Assist"*, Address delivered to The Obligation to Assist Model Litigants in Administrative Appeals Tribunal Proceedings Seminar, Canberra, 26 August 2009.
8 (1979) 24 ALR 577 at 591, per Bowen CJ and Deane J.
9 (1979) 24 ALR 577; 2 ALD 60.
10 Speech delivered to the Administrative Appeals Tribunal's 30th Anniversary Dinner, Canberra 2 August 2006 by the Honourable Sir Gerard Brennan AC KBE, First President of the Administrative Appeals Tribunal and former Chief Justice, High Court of Australia.
11 R Creyke and J McMillan, *Executive Perceptions of Administrative Law – An Empirical Study*, Australian Journal of Administrative Law, Volume 9, August 2002, p 163 at 183.
12 The Honourable Justice Garry Downes, AM, *Introduction: The Obligation to Assist",* welcome address delivered to The Obligation to Assist; Model Litigants in Administrative Appeals Tribunal Proceedings Seminar, Canberra 26 August 2009.
13 Ibid.
14 *Throwing stones: Cost/benefit analysis of judges being offensive to each other* (2008) 82 ALJ 260
15 Chief Justice Murray Gleeson AC*, "Outcome, Process and the Rule of Law",* Address delivered to the AAT 30th Anniversary Dinner, Canberra, 2 August 2006

# FREEDOM OF INFORMATION REFORM – THE AUSTRALIAN GOVERNMENT

***John McMillan****

In this paper I discuss five prominent features of the role of the new Office of the Australian Information Commissioner. These features highlight the significance of the legal, governmental and cultural change that is occurring.

**Integration of Privacy and FOI**

The enactment of the *Freedom of Information Act 1982* (Cth) ('*FOI Act*') was not accompanied by the creation of a new agency to administer the Act. Instead, administration of the Act was assigned to the Attorney-General's Department; complaints about FOI administration would be handled by the Ombudsman; and review of access denials would be undertaken by the Administrative Appeals Tribunal. By contrast, the enactment of the Privacy Act in 1988 was accompanied by the appointment of a Privacy Commissioner, initially as a member of the Human Rights and Equal Opportunity Commission and, from 2000, as head of an independent statutory Office of the Privacy Commissioner.

The new Office of the Australian Information Commissioner will be headed by three Commissioners – the Information Commissioner, the Freedom of Information Commissioner and the Privacy Commissioner. The projected staff number for the Office is about 90 positions, 60 of whom will come from the Privacy Commission; 30 others are to be newly created.

The integration of FOI, privacy and information policy in a single office is an exciting development, but one that presents many challenges. The objective is to create an office that is integrated at all levels – one website, one telephone number, one case management system, one certified agreement, one training and education section, a uniform suite of publications, a compliance section that handles both FOI and privacy complaints and reviews, and a policy section that handles all dimensions of information policy. As to FOI and information policy matters, none of those systems currently exist and must be newly created by 1 November. As to privacy matters, there are well-developed systems that have been developed over more than 20 years and must now be modified to operate in a different office. The fact that the Privacy Commission is based in Sydney, whereas the Information and FOI Commissioners will be based in Canberra, adds another logistical dimension to the integration challenge.

The new Office must also define a philosophy that reflects that integration. Hitherto the core privacy message has focussed on protection of personal information, whereas the FOI message is focussed on promoting open government. Those contrasting themes must be distilled into a simple but compelling vision statement that defines and guides the work of the Office. A unifying theme is that FOI and privacy are both concerned with responsible information management by government agencies[1], premised upon a recognition of the information rights that belong to members of the public.

* *Professor John McMillan is the Australian Information Commissioner. This paper was presented at the 2010 Australian Institute of Administrative Law Forum, Sydney, 23 July 2010.*

**Comprehensive range of functions and powers**

In its FOI work, the Office of the Information Commissioner will exercise a comprehensive range of functions. They include: investigating complaints about FOI administration; reviewing the correctness of agency decisions on access, charges, and amendment of personal records; promoting the pro-disclosure objectives of the FOI Act, within and outside government; publishing guidelines on the Act that agencies are required to have regard to; providing training for agencies; providing advice and assistance to members of the public; monitoring and reporting on the FOI performance of individual agencies; reviewing the operation of the FOI Act and providing advice to government on legislative change; advising government agencies on the development of the Information Publication Scheme and on measuring the economic and social utility of proactive disclosure of public sector information; and advising government on information policy and practice.

Each of those functions is an essential function that must be performed from time to time. This means that each function must be resourced and handled by staff with an appropriate diversity of expertise. This, too, will be a challenge for a relatively small office. A particular challenge for the Information and FOI Commissioners is that they cannot delegate the function of making a decision on an application for review of an agency decision about access to a document. Moreover, the Act requires the Commissioners (subject to limited exceptions) to conclude a review by making a formal decision setting aside, affirming or varying the agency decision. If the Commissioners receive – as could be expected – more than the 140 review applications currently received each year by the AAT, the workload could be considerable, especially alongside the other functions that will require the personal attention of the Commissioners.

Some of the specialist powers of the Office are also novel in a scheme of this kind. One such power is the ability to make a vexatious applicant declaration, either upon application by an agency or upon the Information Commissioner's own motion. The development and exercise of this power is sure to arouse great interest within agencies! Another power is the ability to extend the time period for an agency to process an FOI request. This is likely to be a regular function of the Office, since an agency that fails to comply with the statutory time limits cannot impose an access charge if it has not obtained an extension of time from the Information Commissioner. A third power that can be exercised following investigation of an FOI complaint is the ability to issue an implementation notice requiring an agency to specify the action it will take to implement a recommendation of the Commissioner. This adds extra strength to the accustomed power of ombudsman offices to make a recommendation to an agency following an investigation that has found defective administration.

**Combination of differing roles in the one office**

As noted earlier, some of the functions of the Information Commissioner have hitherto been discharged separately by other agencies. The complaint investigation function has been performed by the Commonwealth Ombudsman; merit review of access denials has been undertaken by the Administrative Appeals Tribunal; policy advice to government on information issues has been provided by the Department of the Prime Minister and Cabinet; and training and advice on FOI legislation has largely been undertaken by the Australian Government Solicitor.

Bringing those and other functions together in a single office is an atypical if not unique step. A new model of administrative oversight and dispute resolution is being implemented. Difficult questions are sure to arise. In particular, it will be expected of the staff involved in merit review of agency decisions that they bring an independent and objective mind to the task, and resolve each case on the basis of the evidence and submissions that have been presented. Alongside that function, the Office will be interacting with agencies and the

community in encouraging greater disclosure by agencies, assisting people to make requests, and providing advice and training on FOI issues. It may not be practicable or sensible to have those functions discharged discretely within the Office. Moreover, it is expected that the Commissioners – who formally make each review decision – will be actively engaged in every function of the Office.

The conduct of hearings will also pose difficult practical and legal choices. The intention is that hearings will mostly be held on the papers. This will include inspection by the FOI or Information Commissioner of documents for which an exemption claim is made. As a practical matter, it may be easier at times for the Office or the Commissioner to have a face-to-face meeting with the representatives of an agency to elaborate on a claim of exemption. That is likely to be more efficient than requiring detailed written submissions on every issue. There are distinct constraints on how much an applicant can be told about submissions on exemption claims passing between an agency and the Commissioner, and yet natural justice requires that the applicant be given a proper opportunity to participate in the proceedings.

It is not uncommon for courts and tribunals to receive confidential evidence and submissions, including in FOI cases. However, it can be easier for a court or tribunal to strike the right balance if that occurs as an exception to the normal practice of receiving all material in a public hearing where there is full participation by the adversaries in a dispute. Different pressures and cross-currents could arise for the Office of the Information Commissioner in developing a suitable practice for receiving confidential evidence.

**Role of the Office in developing government information policy**

For thirty years, FOI scheme architecture has followed what is dubbed the 'reactive' or 'pull' model of information disclosure. Disclosure of documents by agencies under the Act occurs in response to requests received from members of the public, who are entitled to be given access to non-exempt documents, and who can challenge access denials in an independent tribunal. That model was devised in an age when the prevailing tradition was that information held by government had been assembled by it for its own purposes and government ostensibly owned the information. It was an age too in which administrative decision making and official communication between government and the community mostly occurred on paper.

It is now a different world. We talk in terms of e-government, e-citizens, web 2.0 and Gov 2.0. This unstoppable revolution in information technology has transformed not only the way that government and the community interact, but the cultural attitude within government. There is now a strong conviction within government that policy development, decision making and service delivery can be undertaken more successfully if there is greater online engagement and sharing of government information with the community. This is reflected in the heavy and innovative reliance placed by nearly every government agency on its web presence. It is reflected too in the fact that over seventy per cent – heading for ninety per cent – of transactions between government and the community occur online.

This trend has been picked up in the FOI Act in two ways. The first is in a new objects clause, which declares that 'information held by the Government is to be managed for public purposes, and is a national resource' (s 3). The second is in an expanded Information Publication Scheme, which requires agencies to publish a greater range of information, including 'operational information' and a disclosure log of documents released in response to other FOI requests. Agencies are encouraged to publish other categories of information with a view to shifting to a 'proactive' or 'push' model of information disclosure.

The Office of the Australian Information Commissioner is to play a central role in furthering this new and different approach to open government. That explains the chosen model of

three Commissioners – an Information, FOI and Privacy Commissioner. They are to be joined by an Information Advisory Council which is to assist the Information Commissioner in providing advice to government on information policy and practice. The Information Commissioner has also been appointed to the Steering Group that is to implement the 2009 report of the Government 2.0 Taskforce, *Engage: Getting on with Government 2.0.* More generally, there is an expectation that the Office of the Australian Information Commissioner will play a strategic role in the development of a national information policy.

**Cooperation between information commissioners and other integrity bodies**

Another major development is the formation of a national network of information commissioners. Officers with the title of Information Commissioner now exist in five jurisdictions – the Commonwealth, New South Wales, Northern Territory, Western Australia and Queensland. The Ombudsman in Tasmania has also been given much the same role and functions by the *Right to Information Act 2009* (Tas).

This trend is all the more significant because of the links that are fast developing between these different offices. The National Administrative Law Forum is the first Australian conference in which four information commissioners have appeared on the same panel. There is talk underway of a regular annual or bi-annual conference being staged jointly by the information commissioners. Close cooperation between the different offices is also being established. This will have an important impact on the development of government information policy and practice in Australia. Unquestionably, this will result in the adoption of national best practice standards arising from the work of each of the offices, which in turn will result in more open government in Australia.

A related development occurring within each jurisdiction is the emergence of a recognisable integrity branch structure. At the national level I foresee that the Office of the Information Commissioner will associate with other integrity bodies (ombudsman, commissioners and inspectors-general) to establish links, share experiences and develop shared objectives on government accountability and integrity. Notably, the Information Commissioner and the President of the Australian Human Rights Commission are to be appointed as ex-officio members of the Administrative Review Council, joining the Commonwealth Ombudsman, the President of the Administrative Appeals Tribunal and the President of the Australian Law Reform Commission.

A more advanced integrity system structure has recently been introduced in Tasmania. The *Integrity Commission Act 2009* establishes a Commission to be headed by a Chief Commissioner, and a Board of seven members that includes the Auditor-General, Ombudsman and State Service Commissioner. The principal functions of the Commission are to develop codes of conduct, educate public officers, and investigate complaints of misconduct or refer them to other investigatory bodies. The Act also establishes a Parliamentary Joint Standing Committee on Integrity. Victoria looks poised to follow the same path. In June 2010 the Government announced that it had accepted the recommendations of an independent report to government, *Review of Victoria's Integrity and Anti-Corruption System*. The Government has agreed to establish an Integrity Coordination Board, comprising the Auditor-General, Ombudsman, Public Sector Standards Commissioner, Public Sector Integrity Commissioner and Director of Police Integrity.

**The future**

Australia is currently undergoing the most active and far-reaching phase of open government reform to have occurred in nearly thirty years. This is not the first open government reform wave in Australia, but it augers well as the most effective and lasting reform wave.

There is a stronger government commitment to reform than we have witnessed before. That commitment has been made nationally and in some States. Information technology changes are also driving reform, as they place pressure on governments to manage information better, to use the web more dynamically to publish information, and to engage the community online in policy formulation and review of government performance. The appointment around Australia of independent information commissioners with strong enforcement powers is another key change that will make it harder for governments to backslide in their commitment to change.

Transparency in government is shaping as both the ideal and the reality.

**Endnotes**

1 Again, however, it must be recognised that a substantial part of Privacy Commission work deals with the application of the National Privacy Principles to private sector organisations.

# FREEDOM OF INFORMATION: LESSONS AND CHALLENGES IN WESTERN AUSTRALIA

***Sven Bluemmel****

Freedom of information is now considered an essential element of most robust democracies. This is certainly the case in Western Australia, where the *Freedom of Information Act 1992* (WA) ('*the FOI Act*') has been in operation since November 1993; during this time much information has been disclosed to individuals, the media, Parliament and organisations as a result of over 100,000 access requests.

This paper provides a brief overview of the Western Australian FOI legislation and the role of the Information Commissioner. It also highlights some of the current challenges.

**The Western Australian legislation**

On 28 November 1991, as part of his second reading speech to the Western Australian Parliament, the then Minister for Justice said:

> Freedom of Information legislation represents a fundamental reform of the relationship between state and local governments and the communities they serve. It enshrines in legislation rights which are at the heart of the democratic processes... FOI strengthens democracy, promotes open discussion of public affairs, ensures the community is kept informed of the operations of government and opens government performance to informed and rational debate.

Those statements are reflected in the *FOI Act*, which has as its objects:

- to enable the public to participate more effectively in governing the State; and
- to make the persons and bodies that are responsible for State and local government more accountable to the public.

In Western Australia, these objects are given effect in three ways. The first is by providing a general right of access to government documents, with some exceptions, and a corresponding duty to provide detailed reasons when access is denied. The second is a requirement that agencies proactively publish certain information about their structure, functions, operations, policies and practices. Finally, the *FOI Act* provides a means for members of the public to access and, where appropriate, amend personal information about themselves which is held by government agencies.

The right of access under the *FOI Act* applies to documents of agencies, including Ministers, public bodies and offices. The latter two are broadly defined and include State government departments, local governments, boards and commissions, public universities and colleges, public hospitals and certain types of contractors. A small number of agencies are exempt from the Act, including Parliament, the Corruption and Crime Commission, the Auditor General and the Prisoners Review Board.

The *FOI Act* also provides limited exemptions for certain types of documents.

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* *Sven Bluemmel is Western Australian Information Commissioner. This paper was presented at the 2010 Australian Institute of Administrative Law Forum, Sydney, 23 July 2010.*

In order to apply for information under the *FOI Act*, a person need only put his/her request in writing and lodge that request with the agency that they believe holds the information they want. In most cases people will easily be able to identify which agency holds that information. However, even if they approach the wrong agency, the agency which receives the application has a duty to try to identify the correct one and transfer the application to that agency either in whole or in part.

Having received the application, the agency must deal with it as soon as practicable, but in any event within 45 days. This means that the agency must locate the documents and make a decision as to access. If the agency decides to claim an exemption for any part of the document, it must provide a detailed written explanation to the applicant as to the reasons for this decision. The onus is on the agency to justify the exemption claim. The applicant does not need to give reasons for seeking access.

If the applicant does not accept the agency's decision, he/she has, in most cases, the right to request an internal review. This means that someone who is not subordinate to the original decision maker goes through the process again. The reviewer may decide that the first decision was appropriate, or may vary or overturn it. The agency has 15 days to complete the internal review and provide a decision and reasons for the decision to the applicant.

**Exemptions for certain types of information**

Certain types of information are exempt from the general right of access. These exemptions are outlined in Schedule 1 of the *FOI Act*. The most frequently applied exemptions are outlined below.

***Personal information***

The *FOI Act* aims to strike a balance between access to information on the one hand, and the protection of personal information on the other. To this end, information is exempt if its disclosure would reveal personal information about an individual other than the applicant, unless disclosure is in the public interest or the individual consents. Certain prescribed information about government officers and contractors is not exempt from disclosure under this exemption.

Personal information is defined broadly in the Glossary of the *FOI Act* and includes information such as a person's name, address and telephone number (see, *Re Cumming and City of Stirling* [2001] WAICmr 3).

A recent case which explored the issue of the public interest involved a person who was undergoing mental health treatment in a public hospital. After leaving the hospital, she travelled overseas and committed suicide. The Chief Psychiatrist of Western Australia undertook an investigation into her treatment and prepared a report. The deceased patient's family applied to the Department of Health for a copy of this report but was refused. On appeal, the Commissioner found that disclosure of the report to the family would certainly disclose personal information about the deceased. However in this case it was clear that there was some concern about the operation of public health services. The Commissioner considered that it was in the public interest that there should be public awareness of those matters to facilitate the accountability of the public sector for what occurred; to keep the community informed; and to promote discussion of public affairs. As a result, the Commissioner ordered disclosure of the report (see, *Re "U" and Department of Health* [2010] WAICmr 3).

***Commercial or business information***

The *FOI Act* also contains exemptions for commercial or business information. This exemption is much narrower than is sometimes believed; it is certainly not sufficient to show that information is commercial in nature in order to show that it falls under this exemption. In addition, this exemption does not apply to commercial or business information of an agency; however, such information may be exempt under other provisions of the *FOI Act*.

In the first instance, matter is exempt if its disclosure would reveal trade secrets of a person. Mere assertion that certain information is a trade secret is insufficient, some probative material needs to be provided (see, *Re Greg Rowe and Associates and Minister for Planning and Anor* [2001] WAICmr 4). Historically this exemption is rarely claimed or made out.

Matter is also exempt if its disclosure would reveal information (other than trade secrets) that has a commercial value, which value can reasonably be expected to be diminished by disclosure. However the mere fact that money has been expended in creating or collating information does not mean that the information has commercial value (see, *Re Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation and Department of Indigenous Affairs and Mineralogy P/L* [2008] WAICmr 53). Owen J of the Supreme Court of Western Australia noted that an argument that matter is exempt must be "based on real and substantial grounds and must commend itself as the opinion of a reasonable decision maker" (see, *Manly v Ministry of the Premier and Cabinet* (1995) 14 WAR 550).

Disclosure to an access applicant under the *FOI Act* is, in effect, disclosure to the whole world, including the business competitors of the third party: see the comments of Woodward J in *News Corporation v National Companies and Securities Commission* (1984) 57 ALR 350 at 559. This needs to be taken into account in determining whether any commercial value in information could reasonably be expected to be destroyed or diminished by disclosure.

Finally, matter is exempt if its disclosure would reveal information (other than trade secrets or information referred to in the preceding paragraphs) about the business, professional, commercial or financial affairs of a person, and disclosure could reasonably be expected to have an adverse effect on those affairs or prejudice the future supply of information of that kind to the Government or to an agency. This last instance of exemption does not apply if disclosure would be in the public interest.

***Cabinet and Executive Council***

Matter is exempt if its disclosure would reveal the deliberations or decisions of an Executive body, defined as Cabinet and its committees, as well as the Executive Council. The exemption is limited and does not protect purely factual, statistical, scientific or technical information, unless disclosure of such information would reveal any deliberation or decision of an Executive body which has not yet been published. Information is also not protected from disclosure merely because it was *submitted* to an Executive body, unless it was originally brought into existence for the *purpose* of such a submission.

***Deliberative processes***

Under the *FOI Act*, matter is exempt if its disclosure would reveal certain information, consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency. However, this exemption is also subject to a public interest test. In the case of this exemption, the onus is on the party seeking to resist disclosure to show that disclosure would be *contrary* to the public interest.

***Confidential communications***

Information is exempt if its disclosure would be a breach of confidence for which a legal remedy could be obtained. The previous Information Commissioner was of the view that this exemption extends only to disclosure which would give rise to a cause of action for breach of a common law obligation of confidence, such as a contractual obligation of confidence, and not to disclosure which would give rise to a cause of action for breach of an *equitable* duty of confidence only (see *Re Speno Rail Maintenance Australia Pty Ltd and The Western Australia Government Railways Commission and Rail Technology International Pty Ltd* [1997] WAICmr 29).

In addition, matter is exempt matter if its disclosure would reveal information of a confidential nature obtained in confidence and could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. However this second exemption for confidential communications is subject to a public interest test.

**The role of the Information Commissioner**

A person aggrieved by a decision of an agency has the right to appeal to the Information Commissioner for external review of the agency's decision. This is a full merits review and is usually only available following internal review by the agency. The Commissioner can confirm, vary or set aside the agency's decision, the Commissioner's decisions are legally binding. There is a limited right of appeal to the Supreme Court on questions of law arising out of the Commissioner's decisions. To ensure the integrity of the external review process, the Information Commissioner is appointed by the Governor and reports directly to Parliament.

In dealing with a complaint, the Information Commissioner will call for the documents and review the agency's decision. This may often involve requesting the agency to provide supporting evidence.

The Commissioner has the power to obtain information and documents from, and compel attendance by, any person the Commissioner believes has information relevant to a complaint. The Commissioner may administer an oath or affirmation to a person who is so required to attend before the Commissioner, and may examine such a person on oath or affirmation. Failure to comply with a requirement of the Commissioner in this context is an offence which attracts a penalty.

The Commissioner's decisions are published at http://www.foi.wa.gov.au and at http://www.austlii.edu.au/au/cases/wa/WAICmr/.

**Offences and protections under the *Freedom of Information Act***

The *FOI Act* creates a number of offences. Under section 109 a person who, in order to gain access to a document containing third party information, knowingly misleads or deceives, commits an offence. Under section 110, a person who conceals, destroys or disposes of a document, or part of a document, to prevent an agency being able to give access to that document, commits an offence. Each of these offences carries a penalty.

To prevent officers of agencies from unduly avoiding disclosure of documents for fear of prosecution, the FOI Act also provides a number of protections. If a person acting in good faith decides to grant access to a document, believing that the *FOI Act* permits or requires the decision to be made, then an action for defamation or breach of confidence does not lie against the Crown, an agency or an officer of an agency merely because of the making of the decision or the giving of access - s.104(1)(a). In similar circumstances, an action for

defamation or breach of confidence in respect of any publication involved in, or resulting from, the giving of access does not lie against the author of the document or any other person by reason of the author or other person having supplied the document to an agency - s.104(1)(b).

If access to a document is given under a decision under the *FOI Act*, and the person who makes the decision believes in good faith when making the decision that the *FOI Act* permits or requires the decision to be made, neither the person who makes the decision nor any other person concerned in giving access to the document is guilty of an offence merely because of the making of the decision or the giving of access – s.105.

Officers also enjoy certain protections against personal liability. Section 106 provides that a matter or thing done by the principal officer of an agency or a person acting under the direction of an agency or the principal officer does not subject the principal officer or any person so acting personally to any action, liability, claim or demand so long as the matter or thing was done in good faith for the purposes of giving effect to the *FOI Act*. Further, section 107 specifically provides that an action does not lie against the Crown, an agency or an officer of an agency merely because of a failure to comply with an obligation to consult with a third party prior to releasing documents about them unless the person responsible for the failure is shown to have acted with malice and without reasonable cause.

**Challenges and lessons learnt**

The *FOI Act* has been in force in Western Australia for 17 years and is now considered an important safeguard of democracy. In its first full year of operation 2,128 applications for documents were made under the Act. This annual figure has risen steadily to 12,336 applications in 2008/09. Each year there are approximately 100 appeals to the Information Commissioner, a figure which has remained relatively stable except for two notable spikes following elections which resulted in a change of government.

The single biggest current challenge to ensuring administrative justice under the *FOI Act* is the time taken to resolve disputes before the Commissioner. In the financial year 2008/09, 181 appeals were received by the Commissioner. This was an increase of around 80% on the previous year, which was entirely due to appeals from Members of Parliament in relation to FOI decisions made by Ministers. These appeals increased from 4 in 2007/08 to 80 in 2008-09. An increase of this magnitude predictably resulted in an enormous backlog of appeals which will take some years to clear. Already the average time of matters before the Commissioner has increased from about 50 days to over 200 days, since the last election.

Other aspects of freedom of information in Western Australia are generally considered to work well. In this author's opinion, this is due to a number of reasons. The primary reason is that the legislation provides that all documents are accessible unless they are exempt, and this is backed up by strong enforcement mechanisms, which include the Information Commissioner's powers to obtain information and make legally binding decisions. It is very likely that if the Commissioner's decisions were not binding or could be appealed further, complex disputes would take longer to be resolved. A counterbalance to this is that the Information Commissioner is expected to confine himself to making legally correct decisions on appeal and should not on his own initiative get involved in broader issues of commenting on policy or general government administration unless they specifically relate to his statutory duties.

A key lesson learnt is that it is important for officers in government agencies to receive training in the administration of the *FOI Act*. In Western Australia this responsibility is given to the Information Commissioner. This has the considerable advantage of allowing the Commissioner to target training at those agencies and to those topics which he considers

require the most attention. It also allows him to ensure that his most current decisions on appeal are reflected in the training content. A disadvantage is that it sometimes places the Commissioner in a situation of conflict where his office has previously provided advice to an agency on a particular matter which then comes before the Commissioner on appeal. This situation is currently managed by maintaining a clear division between the Commissioner's advisory staff and his investigations staff, and also by aiming to limit the advice to matters of general interpretation of the *FOI Act*, rather than providing a definitive opinion on whether a particular document is exempt or not.

One of the challenges faced in delivering training and advice to agencies is the geographical size of Western Australia. The Commissioner's staff often travel great distances to provide training to agencies, ensuring that frontline staff are able to help members of the public who wish to access government documents. Those staff are the first gatekeepers of government information and their level of skill and knowledge makes an enormous difference to the effectiveness of the freedom of information process.

The Information Commissioner is currently developing a communications plan which will make much greater use of technology to deliver training and advice remotely - through the Internet and by the use of teleconferencing.

Another positive aspect of the *FOI Act* is the requirement for all agencies (there are over 300 in Western Australia) to provide detailed information to the Information Commissioner every year by way of an online survey. Agencies need to report on the number of FOI applications received, whether information was given out in full, in part or not at all, which exemption clauses were used to justify withholding of information, and the amount of fees and charges which were collected. The Information Commissioner then reports the full detail of this survey to Parliament. This allows the Commissioner and Parliament to identify trends. For example, in 2008-2009, 63% of applications resulted in full disclosure, 29% resulted in limited (edited) disclosure and 8% resulted in no disclosure.

While the current Commissioner has not found any evidence of deliberate breaches of the *FOI Act* by agencies, there is a culture among many (perhaps most) agencies that it is "safer" not to disclose information, especially if there is any doubt as to whether it is exempt. The *FOI Act* was intended to be a last resort, to be used in those cases where an agency would not make information available in response to an informal request. However, since the introduction of the *FOI Act*, some agencies will not disclose any information without a formal FOI request. This is disappointing.

Another area in which improvement is needed is in agency interaction with the applicant. Some agencies, on receiving an application, will immediately enter "process mode" and undertake searches and assess the resultant documents. This may be appropriate for simple applications. For larger or more complex applications, it is often better for agencies to talk to the access applicant to find out exactly what they are seeking. This is particularly important where an application is very broad or poorly defined, and where some documents are likely to be exempt. Early discussion with the applicant can result in finding a solution which gets the applicant the documents they want much more quickly; for example, by agreeing to deal with certain documents first, or agreeing to delete some part of documents to avoid lengthy consultation processes.

**Potential future developments in Western Australia**

Western Australia was one of the last Australian jurisdictions to pass freedom of information legislation and benefited from earlier experience in Queensland and federally. The *FOI Act* already requires agencies to publish annual Information Statements. Section 3(3) of the Act expressly notes that nothing in the *FOI Act* is intended to prevent or discourage the

publication of information outside the Act, if that can lawfully be done. This indicates a lesser degree of urgency of significant legislative reform than may have been the case in some other Australian jurisdictions.

An area where legislative reform is more likely in the short to medium term is in information privacy. Currently Western Australia does not have a legislative framework for the handling of personal information by State government agencies; however, administrative instructions encourage agencies to handle personal information in accordance with the Commonwealth Information Privacy Principles. One major factor to consider in this regard is that the Commonwealth has proposed a significant overhaul of its privacy regime in response to a detailed report by the Australian Law Reform Commission.

**Conclusion**

The legislative right of access to government information remains a cornerstone of Australia's robust democracy. The *Freedom of Information Act 1992* has served Western Australians well in this regard.

# STATE OF PLAY – ADMINISTRATIVE LAW IN REVIEW – STATE AND TERRITORY PERSPECTIVES

***Mark Robinson****

In this article, I identify some of the developments that have occurred recently in judicial review at the state and territory levels.

**Life after *Kirk***

The first development worthy of note is not a judgment but an extra-judicial paper given by the Chief Justice of New South Wales, Hon JJ Spigelman AC, on 25 March 2010 in Sydney. It was called "*The centrality of jurisdictional error*" and has been published in the Public Law Review at (2010) 21 PLR 77.

The focus of the Chief Justice's paper relates to *Kirk v Industrial Relations Commission* (NSW) (2010) 239 CLR 531 ('*Kirk*') and he confesses in it that as the Chief Justice of an appellate court, he was never so happy to be overturned as he was to be overturned in *Kirk*. The reason for his "*unmitigated admiration*" for the High Court's decision is in the finding that State Supreme Courts in Australia are protected by fundamental constitutional concepts and any attempt to limit their supervisory jurisdiction, in relation to judicial review of inferior courts and tribunals and in relation to administrative action, is likely to be invalid by virtue of being unconstitutional.

Accordingly, by reason of *Kirk*, there is now by operation of section 73 of the Commonwealth *Constitution* an entrenched minimum provision of judicial review at the state level, probably of the same character as exists in relation to the Commonwealth and as was discussed in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 and which is derived from section 75(v) of the *Constitution*.

In addition, in his paper the Chief Justice declared that the *Hickman* principle is effectively dead in that it now has little work to do at state level and it had already been killed at the Commonwealth level (*R v Hickman; Ex parte Fox* (1945) 70 CLR 598 esp at 614-619; see also Chris Finn "*Constitutionalising supervisory review at State level: The end of Hickman?*" (2010) 21 PLR 92). Just three days before giving this speech, the Chief Justice had formally killed the *Hickman* principle in NSW in a Court of Appeal decision in *Director General, NSW Department of Health v Industrial Relations Commission of NSW* [2010] NSWCA 47 at [15] (per Spigelman CJ, with Tobias JA and Handley AJA agreeing) where it was held that in the post-*Kirk* world, it is no longer necessary for an applicant to come within the *Hickman* principle. In supervisory jurisdiction matters, the issue for determination is whether or not the impugned decision manifests a jurisdictional error or an error of law on the face of the record. This is a much "*lower level test*" (*ibid* at [15]) which must now be applied. Previously, the mother of all privative clauses, section 179 of the *Industrial Relations Act 1996* (NSW) (see Keith Mason's paper "*The New South Wales Landscape: Judicial Review at State Level*" in AIAL 3rd National Lecture Series (Australian Institute of Administrative Law, Canberra, 2006) p 79) operated to require that not merely jurisdictional or other error needs to be established, but some other more onerous concept such as a breach of an

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"*inviolable restriction*" or breaches of "*essential*" or "*imperative*" provisions before setting them aside (see e.g. *Powercoal Pty Ltd v Industrial Relations Commission (NSW)* (2005) 145 IR 327 at [56]–[57]; *Mitchforce Pty Ltd v Industrial Relations Commission (NSW)* (2003) 57 NSWLR 212; *Uniting Church in Australia Property Trust (NSW) v Industrial Relations Commission* (NSW) (2004) 60 NSWLR 602, and *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 66 NSWLR 151 at [42]–[44]; cf *Tsimpinos v Allianz (Aust) Workers' Compensation (SA) Pty Ltd* (2004) 88 SASR 311).

The Chief Justice also spoke in his paper about the impact of the *Kirk* decision on the doctrine of jurisdictional error and on the doctrine of jurisdictional fact. While the High Court in *Kirk* discussed long established notions of jurisdictional error, the Court made it clear that additional developments might arise with the march of the French court. In my view, for the present, it is still the case that one needs an administrative law lawyer solely so that an administrative law issue can be properly identified and articulated.

**The void/voidable distinction**

The void/voidable distinction in administrative law was the subject of much discussion in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597. Not much has been said on it since. In *Downey v Acting District Court Judge Boulton (No 3)* [2010] NSWCA 50 (Beazley, Basten and Macfarlan JJA) the Court dealt with a matter that had come from the NSW District Court. Before that Court there had been a part-heard statutory appeal from a woman's criminal conviction for her failure to provide proper and sufficient food for her cattle and for aggravated cruelty in keeping animals in poor nutrition and in an emaciated condition. Her appeal was being heard by Acting Judge Boulton. It was alleged in the Court of Appeal that his commission as an acting judge expired on 13 November 2009 and the proceedings had not then been finally heard by him for the purposes of s 18(3A) of the *District Court Act 1973* (NSW). Under the provision, there was a need for his appointment to be driven by a "*pressing necessity*" and it was said this was said to be absent. It was also said that he resided in Queensland and therefore he could not sit as a NSW judge. An injunction was sought to prevent him from completing the hearing.

The Court of Appeal rejected the arguments relied upon and said (at [24]-[25]):

> A further argument in favour of an order prohibiting the District Court from proceeding to hear and determine the matter was based on the proposition that anything which his Honour undertook would be a nullity. Reliance was placed on the decision of the High Court in *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; 209 CLR 597.
>
> Reliance on that authority was misconceived. *Bhardwaj* was concerned with a decision by an administrative tribunal, the Refugee Review Tribunal, not a decision of a court of record. The District Court undoubtedly has jurisdiction to determine whether it is properly constituted to hear a particular matter, whether the matter itself falls within the scope of its jurisdiction and whether the relief sought is within the scope of its powers: *District Court Ac*t, s 8. A decision by the District Court that it has jurisdiction will be valid until set aside. Any order made by the Court in the exercise of a jurisdiction which it does not have will also be valid until set aside: *Cameron v Cole* [1944] HCA 5; 68 CLR 571 at 590 (Rich J, Latham CJ agreeing); *Re Macks; Ex parte Saint* [2000] HCA 62; 204 CLR 158 at [20] (Gleeson CJ), [49] (Gaudron J, the orders not being made in the exercise of federal jurisdiction), [135] (McHugh J, on the same basis), [232] (Gummow J), [255]-[256] (Kirby J) and [328] (Hayne and Callinan JJ).

**Statutory appeals "on a question of law"**

In *HIA Insurance Service Pty Ltd v Kostas* [2009] NSWCA 292 (Spigelman CJ, Allsop P, Basten JA) ('*Kostas*') the NSW Court of Appeal handed down a significant decision as to the nature of a statutory appeal from the NSW Consumer, Trader and Tenancy Tribunal to the Supreme Court pursuant to section 67 of the *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW). Such appeals must now be commenced in the District Court of NSW. It was

held in *Kostas* (at [103]) that section 67 appeals are limited to "*any decision of a question with respect to a matter of law which affects the ultimate outcome*". Accordingly, it is now imperative that in commencing such appeals to the District Court, practitioners identify in the proceedings "***with a degree of precision*** *the decision with respect to a matter of law which is sought to be challenged on the appeal*" (*ibid* at [104]).

In the case, Basten JA (at [84] to [86]) set out his survey of statutory appeal provisions that were restricted in some way to legal error. He found that there were (at least) three broad categories that can be identified by reference to different forms of statutory language. He said:

> The first and broadest category of appeal arises where the right of appeal is given from a decision that "*involves a question of law*", being language which permits "the whole case, and not merely the question of law" to be the subject of the appeal: see *Brown v The Repatriation Commission* (1985) 7 FCR 302 at 303 (referring to *Ruhamah Property Co Ltd v Federal Commissioner of Taxation* [1928] HCA 22; 41 CLR 148 and subsequent authorities).
>
> The second category is exemplified by provisions which permit an appeal "*on a question of law from a decision of*" a tribunal. In such cases, it is the appeal which must be on a question of law, that question being not merely a qualifying condition to ground an appeal but the sole subject matter of the appeal, to which the ambit of the appeal is confined: *Brown v The Repatriation Commission* at 304; *TNT Skypak International (Aust) Pty Ltd v Commissioner of Taxation* (1988) 82 ALR 175 at 178.
>
> The third and narrowest category is one restricted to "*a decision of a Tribunal on a question of law*", in which case it is not sufficient to identify some legal error attending the judgment or order of the Tribunal; rather it is necessary to identify a decision by the Tribunal on a question of law, that decision constituting the subject matter of the appeal.

Statutory appeals from the CTTT under section 67 are in that third category. Accordingly, no appeal lies with respect to a matter of fact (at [16] per Spigelman CJ). Such appeals are liable to be the subject of continued scrutiny by the Court of Appeal.

For those who consider that the Court of Appeal was drawing unnecessary distinctions in the *Kostas* case, identification of an appealable "question of law" or "point of law" will become increasingly important in NSW.

At the Commonwealth level, for an interesting consideration of the need for an appellant to find specifically a "question of law" on an appeal to the Federal Court from a decision of the AAT (see the judgment of Perram J in *Civil Aviation Safety Authority v Central Aviation Pty Ltd* (2009) 253 ALR 263 (which was overturned by the Full Court in *Civil Aviation Safety Authority v Central Aviation Pty Limited* (2009) 179 FCR 554).

In *SAS Trustee Corporation v Pearce* [2009] NSWCA 302 (Beazley, Giles & Basten JJA) (24 September 2009) a member of the police force who was hurt on duty and also sustained a psychological injury, claimed a lump sum compensation payment under the *Workers Compensation Act 1987* (NSW) styled as a "gratuity" under the *Police Regulation (Superannuation) Act 1906* (NSW). His case in the District Court was to seek a ruling that he had suffered a 17% whole person impairment as a result of his psychological injuries. This was part of the "*residual jurisdiction*" of the District Court which was conferred by the *Compensation Court Repeal Act 2002* (NSW). The District Court (Hughes DCJ) found that the police officer suffered whole body impairment of only 15.3%. The "employer" appealed to the Court of Appeal by section 142N of the *District Court Act 1973* (NSW) whereby one can appeal if "*aggrieved by an award of the Court in point of law*". "*Award*" is defined in s 142M to include "*interim award, order, decision, determination, ruling and direction*".

The Court held, *inter alia*, that where on a statutory appeal a decision of the Court below in point of law is said to be erroneous, a ground alleging failure to give reasons must be identified as a decision in point of law (at [121] per Basten JA, Beazley JA agreeing).

Accordingly, this ground of appeal (that the reasons given by the trial judge were inadequate and constituted an error of law) failed because it was not correctly described on the appeal in accordance with the terms of the statutory appeal provision.

In *Osland v Secretary to the Department of Justice* [2010] HCA 24 at [18] to [20] the High Court of Australia determined the case of an unsuccessful Freedom of Information ('FOI') applicant who applied to the Victorian Court of Appeal, under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('the *VCAT Act*') for leave to appeal on questions of law from the order of the Tribunal refusing access to the particular FOI documents. Section 148 provides for an appeal from the Tribunal on a question of law and it was modelled in part on section 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (which deals with appeals from the AAT to the Federal Court of Australia on a question of law). The High Court said (at [18]):

> Section 148 confers "judicial power to examine for legal error what has been done in an administrative tribunal" [Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict) (2001) 207 CLR 72 at 79 [15] per Gaudron, Gummow, Hayne and Callinan JJ]. Despite the description of proceedings under the section as an "appeal", it confers original not appellate jurisdiction; the proceedings are "in the nature of judicial review"(ibid).

Importantly, the High Court said (at [19]) that section 148(7) of the *VCAT Act*, which grants the Supreme Court its powers on the appeal did "*not enlarge that jurisdiction. It confers powers on the court in aid of its exercise*". The Court pointed out that one must appreciate the distinction between jurisdiction and power (at footnote 42 and the cases cited there).

Even though these appeal powers may be wide, the High Court said (at [19]) that the Court "*should not usurp the fact-finding function of the [tribunal]*" (see the cases at footnote 43).

The Federal Court of Australia agrees; in *Hood v Secretary, Department of Education, Employment and Workplace Relations* [2010] FCA 555 (Ryan J) the Court stated that (at [1]):

> Section 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the *AAT Act*") provides a mechanism by which an appeal may be brought from a decision of the Administrative Appeals Tribunal ("the Tribunal"), "*on a question of law*". The "*appeal*" for which that section provides is an application in the original jurisdiction of this Court on an extremely limited basis. All that s 44 contemplates is the resolution by this Court of a question "*stated with precision as a pure question of law*": *Birdseye v Australian Securities and Investments Commission* (2003) 76 ALD 321, per Branson and Stone JJ, at 325. A so-called appeal is therefore quite distinct from an appeal by way of re-hearing (as to which see, for example, *Minister for Immigration & Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, at 533), or an appeal *stricto sensu* as exemplified by *Mickelberg v The Queen* (1989) 167 CLR 259, per Mason CJ, at 267ff. The distinction is not merely one of form; it exists; as the High Court pointed out in *Repatriation Commission v Owens* (1996) 70 ALJR 904, at 904 because s 44(1) is concerned to ensure that the merits of the case are dealt with, not by this Court, but by the AAT, a "*distribution of function [which] is critical to the correct operation of the administrative review process*" *MacDonald v Secretary, Department of Family and Health and Community Services and Indigenous Affairs* (2009) 180 FCR 378, at 382 [14].

To sum up, the State appellate courts, the Federal Court of Australia and the High Court of Australia are unanimous in trying to improve the drafting skills of all administrative law lawyers so that appeals on questions of law can be properly determined.

Recently, the NSW Court of Appeal has sounded a related and familiar warning to Supreme Court judges hearing judicial review matters (not appeals in the nature of a re-hearing, such as are heard in the Court of Appeal itself). In *Sydney Ferries v Morton* [2010] NSWCA 156 (Allsop P, Basten and Campbell JJA) the Court considered the case of a physical fight between the Master of a government owned ferry and his engineer. The Master was sacked and his appeal to the Transport Appeals Board was dismissed. He successfully applied to

the Supreme Court which quashed the decision and the matter was remitted to the Board. It refused to allow a further appeal. In the Supreme Court for a second time, the Master won again and the State appealed to the Court of Appeal. The appeal was dismissed with costs. One of the matters NSW complained of on the appeal was that the trial judge made findings of fact that he was not permitted to make and that he conducted the second judicial review hearing as if it were a "*rehearing*" or an appeal to which s 75A of the *Supreme Court Act 1970* (NSW) was applicable. Basten JA (not in dissent on this point) said (at [72]):

> Such an approach would not be consistent with the limited scope of judicial review which required the identification of jurisdictional error or error of law on the face of the record. It may be difficult, and indeed undesirable, to seek a bright line distinction between errors of fact and errors of law in identifying the permissible grounds of judicial review (see McHugh and Gummow JJ in *Applicant S20/2002* at [54]). Nevertheless, there is an uncontroversial distinction to be drawn between the powers of a court on a rehearing and the powers of the court exercising jurisdiction under s 69 of the *Supreme Court Ac*t. To the extent that the primary judge appears to have made findings of fact with respect to matters which fell squarely within the purview and jurisdiction of the Board, the complaint is justified. Nevertheless, it is important for present purposes to identify findings which were material to his Honour's conclusion. Otherwise, it is sufficient to note that the Board which conducts the rehearing will be entitled to form its own view as to the relevant facts on the material before it.

One matter that is yet to be resolved in the states and which may take on a different light or significance after *Kirk's* case is the extent to which one may seek to commence a statutory appeal and <u>also</u> seek to invoke (constitutionally protected) judicial review - perhaps in the same pleading or summons.

It is not uncommon to do this in the Federal Court, where applicants appealing from the AAT "*on a question of law*" routinely seek to invoke three jurisdictions:

(a) s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth);
(b) ss 5 & 6 of the *Administrative Decisions (Judicial Review) Act 1975* (Cth); and,
(c) s 39B(1A) of the *Judiciary Act 1903* (Cth).

See, for example, *Comcare v Etheridge* (2006) 149 FCR 522 at [29]-[31] (Spender, Branson and Nicholson JJ).

**The "proper, genuine and realistic consideration" ground of judicial review**

The popularity of some grounds of judicial review ebbs and flows. This ground of review first came to attention as a separate ground in *Khan v Minister for Immigration & Ethnic Affairs* (1987) 14 ALD 291 (Gummow J). It was given further definition in *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 1 (at 11-15) (Sheppard J).

While it is appropriate to consider it as a proper and separate ground of judicial review, it was soundly criticised in the Federal Court in *Minister for Immigration & Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at 441-442 and in the NSW Court of Appeal in *Anderson v Director General of the Department of Environmental and Climate Change* (2008) 163 LGERA 400; [2008] NSWCA 337 at [51]-[60] (Tobias JA, with Spigelman CJ and Macfarlan JA agreeing) ('*Anderson*').

The criticisms of the ground relate to its vague or imprecise nature and that it is often used as the platform for an impermissible merits-based attack under the guise of judicial review. Notwithstanding, the ground has been accepted and applied in NSW since 1987. The arguments are set out in detail in *Anderson*.

The same criticisms may be made of the *Wednesbury* unreasonableness ground and other grounds. The Court is always vigilant to keep the parties to the question of legality in judicial review proceedings. Review on the merits is not permissible in such proceedings.

In *The Village McEvoy Pty Ltd v Council of the City of Sydney (No 2)*, [2010] NSWLEC 17 at [74]-[81] (Pepper J), the Land and Environment Court of NSW considered the application of this ground of judicial review and set out the history of the ground in some detail. While the ground was not established on the facts of the case, there is a very useful discussion and summary of the legal position.

In *Zentai v Honourable Brendan O'Connor (No 3)* [2010] FCA 691 at [396] (McKerracher J), the Federal Court set out many of the federal cases that applied the principle in setting aside the decision of a federal Minister to effect the deportation of the applicant. The Court said, at [398]:

> In the present unusual situation the advice to the Minister did not inform him adequately or at all as to the alternative steps open to him to comply with [Article 3 paragraph] 2(a) of the [Extradition Treaty Between Australia and Hungary] by refusing surrender but complying with any request from Hungary to submit Mr Zentai for prosecution in Australia. The advice to the Minister did not give genuine, realistic and proper consideration to the [Article 3 paragraph] 2(a) option when considering the [Article 3 paragraph] 2(f) argument as to humanitarian considerations. The more humane solution, still within the bounds of the Treaty was dismissed on the basis of 'longstanding' policy.

The Article 3 paragraph 2(f) option provided that extradition may be refused in particular circumstances including the age, health or other personal circumstances of the person whose extradition is sought, if the extradition of that person would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment.

Another (at times related) ground or formulation of a judicial review point is that a decision-maker might be said to have failed to "*have regard to*" a number of listed statutory matters as required by the terms of the section. The statutory requirement that a decision maker should "*have regard to*" listed matters is a serious one. The legal requirements were set out in *Commissioner of Police for New South Wales v Industrial Relations Commission of New South Wales & Raymond Sewell* (2009) 185 IR 458; [2009] NSWCA 198 at [73] (per Spigelman CJ) in the following terms:

> A statutory requirement to "*have regard to*" a specific matter, requires the Court to give the matter weight as a fundamental element in the decision-making process. (*R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329; *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 333, 337-338; *Zhang v Canterbury City Council* [2001] NSWCA 167; (2001) 51 NSWLR 589 at [71]-[73]). An equivalent formulation is that the matter so identified must be the focal point of the decision-making process. (See *Evans v Marmont* (1997) 42 NSWLR 70 at 79-80; *Zhang* supra at [73].)

In *Lafu v Minister for Immigration and Citizenship* (2009) 112 ALD 1; [2009] FCAFC 140, the Full Federal Court held that a decision of the Commonwealth Administrative Appeals Tribunal had not given genuine consideration to a prescribed factor of "*general deterrence*" in a deportation decision. This was so notwithstanding that the tribunal made express reference to general deterrence and its meaning in its reasons for decision. The Court said (at [47]) that jurisdictional error would be established if the AAT did not genuinely take into account the question of general deterrence, citing the discussion by Rares J in *Telstra Corporation Ltd v Australian Competition and Consumer Commission* (2008) 176 FCR 153 at 181–182 [105]-[107], and by the Full Court in *Telstra Corporation Ltd v Australian Competition Tribunal* (2009) 175 FCR 201 at 242 [267]. The tribunal's decision was set aside because (at [49]) it "*did not show an active intellectual engagement with the question how the factor or consideration of general deterrence was taken into account, and therefore whether it was taken into account at all, in the exercise of a discretion to cancel. Mr Lafu*

*would be left to guess what role, if any, the issue of general deterrence had played*". The Full Court further stated (at [54]):

> Apart from reciting the requirement that that factor be taken into account, the AAT's reasons do not indicate whether the AAT was influenced, and if so by what process of reasoning, by the factor of general deterrence, in deciding that Mr Lafu's visa was to be cancelled. We conclude that the AAT did not give real consideration to the factor of general deterrence as it related to the individual circumstances of Mr Lafu's case.

**Victorian developments - statutory interpretation and the *Charter***

In *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 (Maxwell P, Ashley & Neave JJA) the Victorian Court of Appeal considered the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*the Charter*') and how it sat with a deeming provision in s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ('*the Drugs Act*').

Methamphetamine was found in the applicant's apartment. Under the Act it was a trafficable amount with a maximum penalty of 15 years imprisonment. The applicant's partner Mr Markovski, admitted that he was involved in drug trafficking and that the drugs were in his possession. He denied that the applicant knew anything about it. Notwithstanding this, section 5 of the Drugs Act provided that the applicant was deemed to be in possession of the drugs unless she "satisfied the court to the contrary" - a reverse onus. After some significant exercises in statutory construction taking into account the human rights charter, the Court of Appeal held that section 5 imposed a legal burden, rather than an evidentiary burden upon the accused to establish that he or she was not in possession of the impugned substance.

The Court also made significant rulings on the correct methodology of making statutory interpretations involving the Charter. Accordingly, the Court held that section 5 of the Drugs Act could not be interpreted consistently with the presumption of innocence set out in section 25(1) of the Charter. Notwithstanding this inconsistent interpretation, it did not affect the validity of section 5. Accordingly, the Court did not quash the applicant's conviction that it could reduce her sentence significantly.

The matter is likely to go to the High Court. That court would be interested in both the statutory interpretation challenges and in considering an Australian human rights act.

**Reviewing inadequate statements of reasons as a ground of judicial review - the new Victorian position**

There have been some radical changes to the common law in Victoria recently. Prior to these changes, the majority of single instance decisions in the Supreme Court of Victoria favoured the view that a failure of a decision maker to provide adequate reasons constituted an error of law on the face of the record and rendered the decision amenable to prerogative relief.

In *Sherlock v Lloyd* [2008] VSC 450, Kyrou J considered a worker's compensation case where a County Court judge had made an order pursuant to s 45(1)(b) of the *Accident Compensation Act 1985* (Vic) referring a number of medical questions to a medical panel constituted under the Act. It was a psychiatric case and the medical panel held, *inter alia*, that her employment was in fact a significant contributing factor to the development of her psychiatric injury. Unfortunately for the plaintiff worker, the panel also found that she could now work as a book-keeper or as an administrative assistant with another employer and the panel asserted from its own knowledge that these jobs existed near her place of residence. The panel handed down reasons for its decision.

The plaintiff commenced proceedings in the Supreme Court of Victoria seeking prerogative relief and claiming, *inter-alia*, that the reasons for the panel's opinion were inadequate and that this, in and of itself, constituted an error of law.

The Court considered the underlying principles as to reasons starting with *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656. Medical panels were not required to provide reasons under any statute. However, they were required to provide reasons if asked or ordered to do so pursuant to section 8 of the *Administrative Law Act 1978* (Vic) ('*ALA*') (which applies to tribunals generally). The Court held (at [25]) that the *ALA* reformed the procedures for seeking judicial review but it did not expand or alter the common law grounds of review. The Court then proceeded to distinguish a number of authorities that had held that the provision of inadequate reasons was capable of constituting a ground of judicial review. The Court also considered the many judgments for and against the proposition in other States and in the Commonwealth (at [34] esp footnote 27), including *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372, 377 [31] (Handley JA), 377 [33] (McColl JA, agreeing with Basten and Handley JJA), 399 [130] (Basten JA); and *Dornan v Riordan* (1990) 95 ALR 451, 460.

The Court analysed the panel's statement of reasons and held that as a matter of fact they were inadequate. In many important places, the panel simply stated its conclusions without any reasoning whatsoever. The Court held that the plaintiff could seek the provision of further reasons if she wanted but nothing more.

On appeal in *Sherlock v Lloyd* [2010] VSCA 122 (Maxwell P, Ashley JA, Byrne AJA) the Court of Appeal of Victoria affirmed the decision of Kyrou J and it held that there was no such ground of judicial review as the provision of inadequate reasons. The Court of Appeal said (at [54]) that the ALA "*was not enacted to create new grounds of review or to make substantive changes to the general law. Instead, it was machinery legislation, intended to facilitate the prosecution of conventional judicial review proceedings on conventional grounds*."

The Court of Appeal formally overruled (at [6]) the contrary line of decisions listed by the trial judge. At the appeal stage, the worker attempted to argue that the requirement for reasons was implied from the "*judicial nature of the task undertaken by the medical panel*" (at [9]). Reliance was placed on *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 esp at [109] (per Basten JA) to establish the proposition that because the medical panel was undertaking a judicial task in making a decision that involved a statutory test that determined legal rights, it was the case that *Osmond's case* did not apply. The Court of Appeal flatly rejected this contention and refused to follow the New South Wales position saying (at [22]):

> With respect to Basten JA, we are not convinced that it is correct to describe as the hallmark of the judicial function '*the application of a statutory test, by which legal rights are determined*'. We accept, of course, that this is an important aspect of the judicial function. But judges are not the only decision-makers who perform this task. We would have thought that this criterion would apply to decisions of a variety of public officials whose functions would not ordinarily be thought of as judicial.

Another adequacy of reasons case was handed down by the Court of Appeal of Victoria recently in *Byrne v Legal Services Commissioner* [2010] VSCA 162 (Ashley JA, Hansen and Emerton AJJA). That Court also held that an administrative decision maker, in this case, the Legal Services Commissioner, was "*not a person exercising a function which could be described as quasi-judicial*" and it cited *Vegan*'s case in contradistinction. The court analysed in some detail the common law position in relation to error of law for sufficiency of reasons (at [51] on). The Court of Appeal held that in this particular case the written reasons that were provided by the Commissioner to the solicitor involved were inadequate. However, inadequate reasons do not provide an affected party with a right to prerogative relief and accordingly the Commissioner's decision was not amenable to *certiorari* (at [86]). The case

concerned a dispute between solicitors and some correspondence that the Commissioner considered might have breached rule 21 of the *Professional Conduct Rules (Vic)*, which requires that practitioners' dealings with other practitioners must involve the maintenance of integrity and good repute and practitioners must ensure such communications are courteous and that offensive or provocative language or conduct is avoided. In considering as a matter of its discretion what the Court of Appeal would do with the matter (it ultimately dismissed it) the Court said (at [96]):

> [T]his whole matter has taken on a life of its own, unrelated to what might be thought to be the relative lack of seriousness of the allegations raised by the complaint. It appears to me that no participant – the Commissioner included, but particularly the appellant – has distinguished himself or herself by signs of balance.

As a result of these cases, in Victoria the only possible consequence of a deficiency in a statement of reasons is to make a claim for a further and better statement of reasons pursuant to section 8(4) of the *ALA* - if this is permitted out of time (see *Chubb Security Pty Ltd v Kotzman* [2010] VSC 242 at [51] (Cavanough J) and the narrow interpretation given to that subsection in *Chubb Security Pty Ltd v Kotzman (No 2)* [2010] VSC 281 (Cavanough J).

A month or two after *Sherlock* was handed down, the NSW Court of Appeal had cause to reconsider aspects of *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372. In *Sydney Ferries v Morton* [2010] NSWCA 156 (Allsop P, Basten and Campbell JJA), discussed earlier, the State agency conceded before the Court of Appeal that the Transport Appeals Board had a common law duty to provide reasons (as there was no statutory duty) in part relying on *Vegan's* case. An issue on the appeal was the adequacy of the reasons of the Board.

In his (partly dissenting) judgment, Basten JA expressed the view that perhaps it is not a good idea to rely on notions of judicial or quasi-judicial power when identifying whether a decision-maker has a common law duty to provide reasons. This had been the primary basis for him deciding there was such a duty in *Vegan's case* at [109]. Instead, he said (at [78]-[79]):

> Apart from express statutory direction, to the extent that administrative decision-makers are required to give reasons, the obligation derives from the requirements of procedural fairness. Like other elements of procedural fairness, the content of the obligation may vary depending on the nature of the power and the circumstances in which it is exercised. However, unlike other elements of procedural fairness, there is no general law assumption that there is any obligation for an administrative decision-maker to give reasons. It follows that authorities dealing with an exercise of judicial power provide little assistance.
>
> Although the exercise of classifying the nature of the power was one which I adopted in *Vegan*, distinguishing *Osmond* at [105]–[109], there are risks in approaching this question by an a priori classification of a power as judicial, quasi-judicial or administrative. This would reflect the language of an earlier age conditioning the availability of certiorari on the existence of a duty to act "judicially": see *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171 (Atkin LJ). This approach can deflect attention from the analysis necessary by allowing the appropriate answer to follow, as a matter of apparent logic, from the label. The better course is to consider the specific issue, namely the obligation to give reasons, by reference to the characteristics of the power and the circumstances of its exercise.

Allsop P (with Campbell JA agreeing) was of the view that (at [4]):

> As to any obligation to give reasons, I would leave to an appropriate occasion, should it arise, the question whether a tribunal of the character of the Board was obliged to give reasons. I agree with Basten JA that there may be a tension between *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 and *Public Service Board of NSW v Osmond* (1986) 159 CLR 656. Implicit in this reservation of the question as to the duty to give reasons is the source or sources of that obligation. The extent to which the principles of procedural fairness play a role in that analysis may depend on, amongst other things, the statutory context: see for example *Minister for Immigration and Multicultural*

*Affairs v W157/00A* (2002) 125 FCR 433 at 456-457 [90]-[93]; and *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212.

**Justiciability, politics and the "governor's pleasure"**

In *Stewart v Ronalds* (2009) 232 FLR 331, (2009) 259 ALR 86, [2009] NSWCA 277 (Allsop P, Hodgson JA, Handley AJA) the plaintiff, Mr Tony Stewart, was a member of the Legislative Assembly of the Parliament of the State of New South Wales. In November 2008, the plaintiff was removed from his offices by the NSW Governor as a member of the Executive Council of the State of New South Wales and a Minister with a number of portfolios. In short, an allegation of harassment had been made against him by a staff member. It was investigated by a Senior Counsel at the request of the Department of the Premier and Cabinet. The factual findings went against the Minister and he was dismissed by the Governor's representative (the Lieutenant-Governor). The Court of Appeal held, *inter alia*, a decision by the Governor of NSW or the Premier to terminate or revoke the appointment of a Minister and a member of the Executive Council (pursuant to sections 35C and 35E of the *Constitution Act 1902* (NSW)) for any reason, was not amenable to judicial review (and was therefore not justiciable) (at [41]-[47]). In *Stewart's case*, the Court of Appeal held (at [42]) that the touchstone for determining the justiciability of such decisions was the political aspect of it. It was determined by reference to "*the suitability of the subject for judicial assessment and ... whether the assessment of the legitimacy or otherwise of the decision depends on legal standards or by reference to political considerations*";

The decision raised as many interesting issues as it determined. The Court of Appeal addressed topics such as:

1. The source and nature of "*responsible government*" in New South Wales (*Stewart's case* at [34]-[36]). The Court considered that the notion of responsible government (which is not spelled out in terms in the State Constitution) is not amenable to precise definition. It is a concept based on a combination of law, convention and political practice and is not immutable. It is only alluded to and is obliquely referred to in the NSW *Constitution* documents made in 1855 and 1902. An essential attribute of it is set out in the current Act, namely, the responsibility of the Executive to Parliament and "*save for reserve powers, no executive power could be exercised without receiving the advice of the government responsible to the legislature ... and by convention recognised by the Courts*" (*ibid* at [36]);

2. The true meaning of the "*Governor's pleasure*" is determined in the case (*Stewart's case* at [38], [46] and [63]) – it was held to be very wide. The Court held that (at [46]) "*the phrase in this context means that the Minister has no right to be heard before he or she is dismissed; no reasons are needed; the office is terminable for good or bad or no reasons*". It means that Ministers must subject their fate to "*the ebb and flow of politics*" (at [63]);

3. Whether a decision by the Governor of NSW or the Premier to terminate or revoke the appointment of a Minister and a member of the Executive Council (pursuant to sections 35C and 35E of the *Constitution Act 1902* (NSW)) was, for any reason, amenable to judicial review (i.e. was it justiciable)? – The Court held unanimously that it ***was*** immune from such review and therefore not justiciable (*Stewart's* case at [41]-[47]). Until 1981, the prevailing view was that the exercise of any power by the Governor (as representative of the Crown) was not justiciable. However, after 1981 courts held that in some cases, the court could examine the exercise of the Governor's statutory and non-statutory (prerogative) powers (see *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; *FAI Insurances Limited v Winneke* [1982] HCA 26; 151 CLR 342; and *Council of Civil Service Unions v Minister for the*

*Civil Service* [1985] AC 374). In *Stewart's* case, the Court of Appeal held (at [42]) that the touchstone for determining the justiciability of such decisions was the political aspect of it. It was determined by reference to "*the suitability of the subject for judicial assessment and ... whether the assessment of the legitimacy or otherwise of the decision depends on legal standards or by reference to political considerations*";

4. Whether the rules of procedural fairness or natural justice were "*sourced*" or found in statute or in the common law? There is high authority going either way. On this occasion, the Court held it was sourced in the common law (*Stewart's* case at [67]-[70]). However, the Court regarded it as "*relevant and important*" (*ibid* at [70] & [78]);

5. Whether the rules of procedural fairness or natural justice applied to the Governor or the Premier or the Senior Counsel in the circumstances – the Court held unanimously that the rules of procedural fairness did not apply to the Governor or the Premier in making such determinations but that it might apply to the Senior Counsel. Allsop P (at [73]-[74]) inclined towards the tentative view that procedural fairness might be capable of applying to the Senior Counsel, since she was engaged as an independent and skilled practitioner (and not as a Labor party elder) and review of her work was "*well suited to a court*" in judicial review. Hodgson JA also held that it might apply (at [108]-[114]) and that "... *the existence of the duty can arise from the nature of the decision and its potential to affect rights, without the necessity to imply the existence of the duty by some exercise of interpretation of the statutory provisions or rules pursuant to which the decision is made*" (at [113]). Handley AJA (at [131]-[137]) had "*serious doubts*" as to "*the existence of any freestanding legal duty to accord procedural fairness where a person has been given the task of investigation and report under a bilateral retainer without any authority in statute, prerogative, or consensual compact and without any legally recognised power*".

6. Whether public law (procedural fairness) principles could apply to a private individual (the Senior Counsel) conducting an investigation on a retainer in the absence of any public power or statute or contractual obligation to or relationship with the person whose reputation could be harmed? Was the law of defamation sufficient?

7. Whether the plaintiff's claims impermissibly seek to call into question the contents of the report of the first defendant in a manner inconsistent with parliamentary privilege and Article 9 of the *Bill of Rights 1688*, 1 Wm & M Sess 2 c 2. The Court did not answer this question. However, Hodgson JA explored the notion of parliamentary privilege and (at [121] and [124]) considered that it was arguable to him that "*this role of Parliament is not itself business of Parliament or a committee of Parliament, and that the tabling of a report prepared at the request of the Executive and provided to the Executive for the purposes of the Executive is not itself Parliamentary business that makes the report itself immune to criticism in the courts*"; Allsop P and Handley AJA agreed with this tentative view.

The Court threw out the case against the Governor and the Premier. It remitted the remaining tort/public law matters against the Senior Counsel to the Court and it was later dismissed or discontinued by consent.

**Natural justice and tennis**

In *Calardu Penrith Pty Ltd v Penrith City Council* [2010] NSWLEC 50 (Biscoe J), the New South Wales Land and Environment Court (in its judicial review jurisdiction) considered the case where an applicant, a business that was next door to a "*bulky goods retail centre*" at Penrith in Sydney, challenged the validity of a development consent granted by the Council to the retail centre for alterations and additions to the centre. The applicant argued that the

Council acted *ultra vires* in determining the development application because under the State Environmental Planning Policy the power to determine the application was vested solely in a regional planning panel by reason of the capital investment value of the development being more than $10 million. It was held that on the proper construction of the policy, a capital investment value of a development that exceeds $10 million is a criterion the satisfaction of which enlivens the exercise of a regional panel's function of determining the development application. Accordingly, while it might be said to be able to be resolved by reference to the concept of "*jurisdictional fact*" (at [38]-[47]), it was held to be simply the case that the council or the panel's power is not enlivened until the capital investment value amount is achieved. If the criterion is satisfied, then the Council's determination of the consent was made without the necessary statutory authority. In this case, the capital investment value did not exceed $10 million, or at least it was not proved that it did. Therefore, the council was the correct decision-maker and not the panel.

The applicant also contended (at [162]) that the council denied it procedural fairness in processing the development application by failing to provide it with the opportunity to consider and comment upon amended plans lodged by the developer after the close of the formal objection period. The Court found that the amended plans were made *in response to* the applicant's formal submissions and objections and under the planning statute, the council had determined there was no need to re-advertise as there was no prejudice to anyone. The Court held at [180]:

> The logical consequence of Calardu's argument is that the council had to keep providing it with the responses to all Calardu's submissions indefinitely. This is "*an infinite regression of counter-disputation*" that has been criticised as "*making a statutory scheme unworkable*": *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 at [267]; *Harvey and Tubbo v Minister Administering the Water Management Act 2000* (2008) 160 LGERA 50 at [84]. Procedural fairness is not like a potentially endless game of tennis where every submission or ball Calardu hit over the net had to be returned with the proponent's response until Calardu stopped – even if Calardu hit a winner, as it did when its submission was met. Nor is procedural fairness to be equated with a duty of unlimited discovery to an objector. No new issue had arisen. On receipt of the final material, the council was entitled to evaluate it and make a determination.

For my part, I do not see anything wrong with an endless game of tennis. One can never get enough procedural fairness.

# INDIVIDUAL RIGHTS AND PROTECTION OF THE PUBLIC – THE CORPORATE REGULATOR, THE AAT AND BALANCING THE COMPETING INTERESTS

***Sam Rosewarne****

The decision of the Full Court of the Federal Court of Australia in *Australian Securities and Investments Commission v Administrative Appeals Tribunal* (2009) 181 FCR 130; [2009] FCAFC 185 ('*ASIC v AAT*') has clarified the scope of the power of the Administrative Appeals Tribunal ('the AAT') to issue stay and confidentiality orders. In doing so, the Full Court also provided a salient reminder as to the proper role of the AAT as part of the continuum of administrative decision making. Where the exercise of power by the AAT requires the resolution of competing interests, due regard must be paid to the objects of the statutory scheme under which the primary decision was made. While public awareness of the primary decision may have damaging consequences for the individual seeking review before the AAT, the purposes served by the underlying statutory scheme are of fundamental importance and are likely to prevail in the majority of cases.

This paper looks at the reasoning of the Full Court in *ASIC v AAT,* and considers the implications of the decision for the processes and decision making of administrative tribunals. The paper also comments on how the decision in *ASIC v AAT* impacts on those seeking review of decisions made by regulatory bodies.

**The AAT's powers to make stay and confidentiality orders**

The AAT's power to grant a stay pending the hearing and determination of an application for review derives from s 41(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) ('*the AAT Act*') which relevantly provides that:

> The Tribunal may, … if the Tribunal is of the opinion that it is desirable to do so after taking into account the interests of any persons who may be affected by the review, make such order or orders staying or otherwise affecting the operation or implementation of the decision to which the relevant proceeding relates or a part of that decision as the Tribunal considers appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review.

Section 35 of the *AAT Act* concerns the hearing of a proceeding by the AAT, and has been relied on by the AAT to make certain orders about confidentiality. The provision, which is titled 'Hearings to be in public except in special circumstances' relevantly provides:

> (1) Subject to this section, the hearing of a proceeding before the Tribunal shall be in public.
> ……..
> (2) Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may, by order:
> (a) direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present; and
> (aa) give directions prohibiting or restricting the publication of the names and addresses of witnesses appearing before the Tribunal; and
> (b) give directions prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal; and

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(c) give directions prohibiting or restricting the disclosure to some or all of the parties to a proceeding of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceeding.

(3) In considering:

(a) whether the hearing of a proceeding should be held in private; or

(b) whether publication, or disclosure to some or all of the parties, of evidence given before the Tribunal, or of a matter contained in a document lodged with the Tribunal or received in evidence by the Tribunal, should be prohibited or restricted;

the Tribunal shall take as the basis of its consideration the principle that it is desirable that hearings of proceedings before the Tribunal should be held in public and that evidence given before the Tribunal and the contents of documents lodged with the Tribunal or received in evidence by the Tribunal should be made available to the public and to all the parties, but shall pay due regard to any reasons given to the Tribunal why the hearing should be held in private or why publication or disclosure of the evidence or the matter contained in the document should be prohibited or restricted.

**Review of ASIC banning/disqualification decisions by the AAT**

Prior to the decision in *ASIC v AAT*, it had become common for the AAT to make stay and confidentiality orders where review was sought of decisions by the Australian Securities and Investments Commission ('ASIC') to disqualify a person from managing corporations under s 206F of the *Corporations Act 2001* (Cth) ('*the Corporations Act*') or ban a person from providing financial services under s 920A of the *Corporations Act*.[1]

This tendency is demonstrated by the history of the proceedings in *Australian Securities and Investments Commission v PTLZ* (2008) 48 AAR 559; [2008] FCAFC 164. In this case, a 2 year banning order was made by ASIC on 23 November 2007 and the person who was the subject of that order was notified of the decision on 29 November 2007. On the day of notification, an application for review of the substantive decision and an interlocutory application seeking orders under s 41(2) and s 35(2) of the *AAT Act* were filed with the AAT. Stay and confidentiality orders were initially made by Deputy President Forgie on the afternoon of 29 November 2007. These orders were subsequently extended until the hearing of the interlocutory application, which took place on 11 December 2007. As the decision was reserved at the conclusion of the hearing, the orders were again extended. On 11 February 2008, Deputy President Forgie continued the stay and confidentiality orders and published her reasons for the making of the orders. ASIC then appealed this decision. On 16 September 2008, the Full Court of the Federal Court upheld the decision and orders of the AAT.

The stay and confidentially orders that were made in *Re PTLZ* were broad in operation.[2] Firstly, the orders prohibited ASIC from publishing its decision under s 920E(2) and s 915F(2) of the Corporations Act, or from entering the decision in the Register that ASIC is required to maintain under s 922A of the *Corporations Act* and associated provisions of the Corporations Regulations. Secondly, it was ordered that the applicant be described by way of pseudonym. Thirdly, publication of the name of the applicant, of any material tending to identify the applicant and of any matters contained in the documents lodged with the AAT, was restricted to the staff and members of the AAT and to the parties and legal representatives. Further, by reason of the terms of the initial orders that were made by Deputy President Forgie, ASIC was required to alter or withdraw a media release that had already been issued in relation to its decision.[3]

The terms of the orders that were made in *Re PTLZ* also provide a useful insight into the particular issues that arise when review is sought of an ASIC banning or disqualification decision. If ASIC makes a banning order under s 920A of the *Corporations Act*, it is required by s 920E(2) to publish a notice in the Commonwealth *Government Gazette* as soon as practicable thereafter. Further, s 922A of the *Corporations Act* and reg 7.6.06 of the Corporations Regulations require ASIC to maintain a register relating to financial services which includes certain information about banning orders.[4] How are the AAT's powers to

make stay and confidentiality orders to be reconciled with these specific statutory obligations? Further, does the general requirement that ASIC must strive to ensure that information is available as soon as practicable for access by the public impact on the issue?[5]

## The decision in *ASIC v AAT*

### *The background and orders*

*ASIC v AAT* involved an ASIC s 920A banning order. Before ASIC had published notice of the banning order or made entries in the register, the second respondent applied to the AAT for review of the banning decision. The second respondent also filed an interlocutory application seeking stay and confidentiality orders.

After hearing from the parties, on 4 September 2009 Deputy President Handley granted stay and confidentiality orders and published his reasons for doing so.[6] The orders provided that:

> 1 Pursuant to s 41(2) of the Administrative Appeals Tribunal Act 1975 (Cth), the Tribunal stays the operation and implementation of the decision under review, including entry of the decision in any register maintained by the respondent, publication of the decision in the Gazette, and disclosure of the decision in any media releases issued by the respondent; and
> 2 Pursuant to s 35(2) of the Administrative Appeals Tribunal Act 1975 (Cth), pending the ultimate determination of the substantive application or any further order of the Tribunal, that:
> (a) XQZT be described by a pseudonym for the purpose of protecting his identity; and
> (b) the hearing shall take place in private and that only the parties and their representatives and witnesses, the Tribunal and its staff may be present; and
> (c) the publication or disclosure of evidence or the contents of documents lodged with or received in evidence by the Tribunal is restricted to the parties and their representatives and witnesses, the Tribunal and its staff and the staff of Auscript.

ASIC immediately filed an application in the Federal Court relying on s 39B of the *Judiciary Act 1903* (Cth) and s 1337B(1) of the *Corporations Act*, seeking orders that the AAT's orders be quashed and related declarations in relation to the nature of ASIC's duties under s 920E(2) and s 922A of the *Corporations Act*. It was subsequently determined by the Acting Chief Justice that the matter was of sufficient importance to be referred to the Full Court for determination.[7]

### *ASIC's submissions*

The submissions that were made on behalf of ASIC are outlined in detail in the joint judgment of Downes and Jagot JJ.[8]

As explained by their Honours, ASIC did not challenge the exercise of power by the AAT on the basis of the usual grounds of judicial review.[9] Rather, ASIC's principal case was that the AAT had no power to make the stay and confidentiality orders. Framing the argument in this way imposed a heavy burden, as it required the Full Court to accept that the AAT could never make an order affecting ASIC's duties to publish notice of the making of a banning order irrespective of the circumstances of the particular proceeding.[10]

ASIC's position and the general arguments in support of this position are summarised at paragraph [17] of the joint judgment as follows:

> (1) ASIC must comply with ss 920E(2) and 922A of the Corporations Act by reason of the mere fact of the making of the banning order. It is immaterial whether the banning order is affirmed or set aside by the AAT or is valid or invalid.
> (2) Once the statutory regimes are properly analysed it is apparent that the AAT's purported orders under s 41(2) of the AAT Act cannot have been made "for the purpose of securing the effectiveness of the hearing and determination of the application for review". This is because the

AAT's powers under s 41(2) cannot extend to interfering with the carrying out of ASIC's duties under ss 920E(2) and 922A of the Corporations Act.

(3) The AAT's purported orders under s 41(2) of the AAT Act relating to ASIC's obligations under ss 920E(2) and 922A(1) of the Corporations Act and ASIC's issue of any media release do not stay or otherwise affect the "operation or implementation of the decision to which the relevant proceeding relates".

(4) The AAT's errors in respect of s 41(2) of the AAT Act affected its approach to its exercise of its powers pursuant to s 35(2).

(5) Section 35(2) of the AAT Act does not empower the AAT to order parties or persons to describe an applicant in a particular way.

(6) The terms of the AAT's purported pseudonym order are defective and thus the order is ineffective.

### *The joint judgment of Downes and Jagot JJ*

At the outset of their reasons, Downes and Jagot JJ stated that resolution of the issues raised by the case rested on the proper construction of the statutory provisions vesting functions in the AAT and ASIC. This required general principles of statutory interpretation to be understood and then applied to the two statutory schemes relevant to the exercise of the AAT's powers. Their Honours' noted that courts do not lightly infer that, in enacting statutes, a parliament intended to contradict itself.[11] Further, in undertaking the interpretative task it was important not to focus on any provision in isolation. It is the legislative context that is critical.[12]

Downes and Jagot JJ considered that ASIC's arguments concerning the lack of power of the AAT were misplaced. More persuasive would have been a case that focussed on the AAT's actual decision. This was because the AAT's power under s 41(2) of the *AAT Act* is contingent on the AAT having formed the opinion that the making of an order under the subsection "is desirable... taking into account the interests of any persons who may be affected by the review". This requires that the AAT identify and then consider the relevant interests. These interests must be identified by reference to the statutory scheme under which the decision under review was made. Given the nature of a banning order, the 'persons who may be affected by the review' are not only the subject of the banning order and his or her dependents, but also include the banned individual's existing and potential clients and the public at large.

Their Honours then continued:

> Determining whether the making of an order under s 41(2) of the AAT Act is desirable requires resolving these potentially competing interests. In this process of resolution the scheme embodied by the legislation under which the banning order is made is central. The context set by that scheme is a "fundamental element" in the formation of the opinion according to law: R v Hunt; Ex parte Sean Investments Pty Ltd (1979) 180 CLR 322 at 329; 25 ALR 497 at 504. The scheme discloses that a banning order protects the public. It is intended to protect the public from obtaining financial services from a person who (among other things) has not, or ASIC reasonably believes has not, complied with a financial services law or has had their Australian financial services licence suspended or cancelled: s 920A(1).[13]

Also important to the AAT's task was recognising the key role that the flow of information plays in ensuring that markets operate effectively and fairly. At [54], the following rhetorical questions were posed:

> Is not an investor who is about to deposit funds with a person providing financial services entitled to know that a banning order has been made against the person? If the order has been stayed on substantial grounds the person is also entitled to know that. The informed investor may continue with the proposal. If the investor does not, then that is just an example of the operation of the market place. The critical matter is that the market is fully informed. If the banning order is not disclosed, but subsequently upheld, is not the investor entitled to complain that all the circumstances should have been made public?

Following these observations, the AAT's reasons for making the stay and confidentiality orders were analysed. Downes and Jagot JJ expressed that view that these reasons did not appear to grapple with the context set by the Corporations Act, or the importance of the availability of information to the market generally and to existing and potential customers, as a critical element in the public interest.

ASIC's argument that the duty to publish a notice is irrevocably enlivened by the fact of a banning order having been made was dismissed by their Honours, for three principal reasons. First, the contention was inconsistent with the reasoning in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 in which it was relevantly held by the High Court that in cases of jurisdictional error an administrative decision will be entitled to treat its own decision as "no decision at all" without the need for a court to make orders or declarations to this effect. If a decision to ban a person from providing financial services was made either without jurisdiction or in excess of jurisdiction, ASIC would therefore be entitled to treat the purported banning order as not enlivening its obligations to publish and enter details of the decision in the register. In the case of merits review which resulted in the decision being set aside, by reason of s 43(6) of the *AAT Act,* the decision of the AAT would be deemed to be the decision of ASIC and would take effect from the date of the purported banning order. In both of these circumstances, there would be no duty imposed on ASIC by s 920E(2) or s 922A(1) of the *Corporations Act*. Second, the contention was said to ignore the operation of the *AAT Act*. Contrary to ASIC's view, the statutory provisions were not inconsistent and were capable of working together. Finally and linked to the second reason, ASIC's argument was inconsistent with the principle that each statute emanating from a single legislature is, if possible, to be construed as having full force and effect according to its terms.

Also rejected was the argument that an exercise of power under s 41(2) of the *AAT Act* purporting to prevent ASIC from performing its statutory duties can never be "for the purpose of securing the effectiveness of the hearing and the determination of the application for review" given that ASIC was bound to exercise its statutory duties irrespective of the outcome of review. Again, this submission was not reconcilable with the terms of s 43(6) of the *AAT Act*. Further, the ordinary meaning of the terms 'operation' or 'implementation' made it clear that these concepts were wide enough to encompass the banning order's publication both by notice and entry in the register.

At [71], Downes and Jagot JJ then summarised their findings in relation to the power of ASIC to make an order under s 41(2) as follows:

> For these reasons we do not accept that the AAT has no power to make an order under s 41(2) of the AAT Act staying or otherwise affecting ASIC's actions under ss 920E(2) and 922A(1) of the Corporations Act. We consider that the matters exposed by ASIC's arguments do not indicate a lack of power to make such orders. Rather, they indicate the careful consideration which must be given by the AAT in any exercise of power under s 41(2) of the AAT Act to the balance of competing rights and interests struck by parliament as embodied in the terms of the Corporations Act, particularly the balance between the rights and interests of the recipient of the banning order and of the public including existing and potential future clients of the recipient of the banning order. As we have said the scheme which the provisions of the Corporations Act embody — with the potential making of a banning order to remain private unless and until ASIC decides to make such an order after having given the recipient an opportunity to be heard — is not mere statutory background or a neutral factor in the process of the formation of the required opinion about what is desirable under s 41(2) of the AAT Act. **The scheme which parliament has established in the Corporations Act, and the public interest in the right of the market to know relevant information as soon as practicable, must be treated as a fundamental element in the decision-making process required under s 41(2) of the AAT Act.** (emphasis added)

ASIC's contentions in relation to the operation of s 35(2) were also rejected. In this regard, Downes and Jagot JJ noted the importance of the norm established by s 35(1) which requires that proceedings before the AAT be conducted in public.[14] When deciding whether it

is satisfied that it was desirable to exercise its powers under s 35(2), the AAT must therefore reach a state of satisfaction which recognises the existence of the norm and the values that it is intended to protect. The existence of the norm means that the power to depart from the norm is only to be exercised sparingly.[15] The consequences of this were noted to be:

> When measured against the existence of the norm of a public hearing and the scheme established by the Corporations Act with respect to banning orders, it is apparent that the AAT would need some cogent reason by reference to the particular case to depart from the ordinary requirement of a public hearing. It is difficult to accept that harm (even serious harm) to the recipient's reputation resulting from public awareness of the banning order will be a sufficiently cogent reason to justify the grant of a stay in most cases. This is because the risk of harm of this type is inherent in the nature of a banning order.[16]

Finally, Downes and Jagot JJ dismissed ASIC's argument that because s 35(2) of the *AAT Act* does not refer to the name of parties (in contrast to the names of the witnesses), the AAT had no power to suppress the names of parties to a proceeding.[17] It was held that s 35(2)(b) was of sufficient scope to empower the AAT to give directions to restrict the publication of both names and the addresses of the parties. The provision would also permit the allocation of pseudonyms as a method of identification in the rare case that such action was required.

### *The judgment of Moore J and the AAT's power to restrain ASIC media releases*

In a separate judgment, Moore J expressed general agreement with the reasons of Downes and Jagot JJ. In particular, his Honour agreed with the observations concerning the failure of the AAT to pay sufficient regard to the bias in the statutory scheme in the *Corporations Act* favouring timely disclosure of the identity of a person who is the subject of a banning order and the significance of the norm established by s 35(1) that proceedings before the AAT shall be in public.

The point of departure between the two judgments related to the issue of whether the AAT has power to make orders concerning ASIC media releases. In the view of Moore J, such an act was of a general administrative character and therefore did not concern either the operation or implementation of the decision to make the banning order. This was in contrast to the reasoning of Downes and Jagot JJ, who stated that it would be an odd result if ASIC could be restrained from a mandated publication (i.e. in the *Gazette*) but not from an informal publication (i.e. in a media release).[18]

### The likely consequences for Tribunal decision making and those seeking review

The immediate lessons from *ASIC v AAT* are clear. Where the AAT is exercising a general power, the values and norms that are protected by surrounding and relevant statutory provisions must be given due weight. Of particular importance will be the legislative scheme under which the primary decision was made. This scheme does not play a neutral role. Rather, it is fundamental and must be taken into account by the AAT when forming the requisite opinion as to whether stay and confidentiality orders are appropriate. For this reason the public interests embodied by the *Corporations Act* which are directed at protecting the public through the provision of information, and the presumption that AAT hearings shall take place in public, work heavily against the making of stay or confidentiality orders. In circumstances where the AAT fails to attach adequate weight to the importance of these factors, any orders made will be liable to be set aside by way of application for judicial review.[19]

The question then arises – how are the interests of the individual seeking review to be protected? The answer seems to come from the Full Court's earlier judgment in *Re PTLZ*:

> Where a stay is granted it should ordinarily be accompanied by directions for the expedition of the matter, with the earliest possible hearing and decision, so as to limit any adverse effect of the stay of the decision if the stay under review is ultimately denied. **The same is true if a stay is denied – to limit the adverse effect of a decision which may be set aside**.[20] (emphasis added)

Even prior to the decision in *ASIC v AAT* being handed down, the need for expedited hearings in this context was already influencing the AAT. For example, in refusing to grant stay orders in *Re Scott and Australian Securities and Investments Commission* [2009] AATA 798 the President of the AAT noted that a speedy hearing was the preferable option rather than the granting of a stay.[21] Following *ASIC v AAT*, such treatment of interlocutory applications for stay and confidentiality applications can only be expected to continue.

For advisers of clients who are the subject of a disqualification decision or banning order, the message is clear. The bias towards information disclosure that is reflected in the statutory scheme established by the *Corporations Act* is a significant hurdle that will be difficult to overcome in most cases. Further, any application for stay and confidentiality orders will need to be made promptly. An exercise of power under s 41(2) of the *AAT Act* may have little utility if ASIC has already published notice of a banning order, and the utility of an order is always a relevant consideration when considering exercise of the power.[22] The strength of any application will therefore be greater the earlier it is made, and a poorly informed recipient of a banning order may lose his or her opportunity.[23]

The influence of *ASIC v AAT* has already been seen. In *Catena v Australian Securities and Investments Commission* [2010] FCA 598, the applicant had applied for a stay order under s 44A of the *AAT Act* pending an appeal from a decision of the AAT (which had affirmed the decision of ASIC). After discussing *ASIC v AAT*, Barker J continued:

> It seems to me that the administrative decision-making processes having been completed, in this appeal a range of different considerations apply to the applications made. I think it is reasonable to say in these circumstances that the public right generally to know what the decision of the AAT is, is compelling.[24]

Barker J also refused to make an order suppressing the applicant's name under s 50 of the *Federal Court of Australia Act 1976* (Cth), noting that the mere embarrassment or unfortunate financial effects on an appellant or their dependents (or other persons) are usually not adequate reasons.[25] Nor were the applicant's concerns about the effect publication may have on his future prospects in his industry a sufficient reason to grant the order sought.

While it does not make reference to *ASIC v AAT,* the recent decision of Deputy President Forgie in *Re JTMJ v Australian Securities and Investments Commission* [2010] AATA 471 also bears the stamp of the Full Court's reasoning and concerns.[26] In this regard, it was relevantly noted in *Re JTMJ* that:

> Publication of the background facts to the banning order at this time is also consistent with the Tribunal's place in administrative decision-making. As explained by Davies J in Jebb v Repatriation Commission, that "... the general approach of the tribunal has been to regard the administrative decision making process as a continuum and look upon the tribunal's function as part of that continuum..." **It has played its role in the process as ASIC did before it and as the Federal Court would have done after it had JTMJ lodged an appeal under s 44 of the AAT Act. That role must be to complement the others who play their part in the continuum. On this occasion, it is to complement ASIC's role in fulfilling its statutory duties under the Corporations Act**.[27] (emphasis added)

It is perhaps by reference to the above passage that the decision in *ASIC v AAT* is best explained and understood. The decision represents an important reminder of the proper role to be played by the AAT as part of the administrative decision making process.

**Endnotes**

1 See, for example, *Re XTWK and Australian Securities and Investments Commission* (2007) 98 ALD 131; *Re PTLZ and Australian Securities and Investments Commission* (2008) 100 ALD 648 ('*Re PTLZ*'); *Re PYVM and Australian Securities and Investments Commission* (2008) 106 ALD 578; *Re YFFM and Australian Securities and Investments Commission* [2009] AATA 409; *Re XQZT and Australian Securities and Investments Commission* [2009] AATA 669. Stay and confidentiality orders have also been made by the AAT in other regulatory contexts, including the insurance, superannuation and taxation sectors: see, for example, *Re VBJ and Australian Prudential Regulation Authority* (2005) 87 ALD 747.
2 See generally *Re PTLZ and Australian Securities and Investments Commission* (2008) 100 ALD 648 and *Australian Securities and Investments Commission v PTLZ* (2008) 48 AAR 559; [2008] FCAFC 164 at [26].
3 These orders were made on 29 November 2007: see *Re PTLZ and Australian Securities and Investments Commission* (2008) 100 ALD 648, DP Forgie at [2], [90]-[99].
4 Section 1274 of the Corporation Act imposes a general obligation on ASIC to keep registers, which are to be made available (subject to certain exceptions) for inspection by the public. Further, 1274AA of the Corporations Act specifically requires that ASIC keep a register of company directors who have been disqualified from managing corporations.
5 See s 1(2)(f) of the *Australian Securities and Investments Commission Act 1989* (Cth).
6 *Re XQZT and Australian Securities and Investments Commission* [2009] AATA 669.
7 Under s 20(1A) of the *Federal Court of Australia Act 1976* (Cth).
8 *Australian Securities and Investments Commission v Administrative Appeals Tribunal* (2009) 181 FCR 130; [2009] FCAFC 185, Downes and Jagot JJ at [17]-[18], [39]-[47], [73], [77], [80]-[81].
9 At [18].
10 At [58], [83].
11 Pearce and Geddes, *Statutory Interpretation in Australia* (Sydney, LexisNexis Butterworths, 2006, 6th ed) at [7.10].
12 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.
13 At [52].
14 As reinforced by the requirements of s 35(3) of the *AAT Act*.
15 Referring to *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33, Brennan J at 55.
16 At [76].
17 This argument relied on the decision of DP Walker in *Re Graeber and Australian Prudential Regulatory Authority* (2007) 46 AAR 115; [2007] AATA 1966.
18 While it was not necessary to decide the issue, at [82] Downes and Jagot JJ expressed the view that orders made by the AAT requiring ASIC to withdraw a media release would be within the AAT's power.
19 As noted by the Full Court of the Federal Court in *Australian Securities and Investments Commission v PTLZ* (2008) 48 AAR 559; [2008] FCAFC 164 at [56]-[57], the Federal Court would have jurisdiction under s 39B of the *Judiciary Act 1903* (Cth) (by which it is conferred jurisdiction with respect to any matter in which a writ of mandamus of prohibition or an injunction is sought against an officer or officers of the Commonwealth). In *Re PTLZ,* the Full Court did not express a view on whether there would also be jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). However, it was held that an appeal would not lie under s 44(1) of the AAT Act.
20 *Australian Securities and Investments Commission v PTLZ* (2008) 48 AAR 559; [2008] FCAFC 164, North and Downes JJ at [29].
21 *Re Scott and Australian Securities and Investments Commission* [2009] AATA 798, Downes J at [14].
22 *Australian Securities and Investments Commission v Administrative Appeals Tribunal* (2009) 181 FCR 130; [2009] FCAFC 185, Downes and Jagot JJ at [64].
23 Ibid. See also *Re Scott and Australian Securities and Investments Commission* [2009] AATA 798, Downes J at [14].
24 *Catena v Australian Securities and Investments Commission* [2010] FCA 598, Barker J at [20].
25 Ibid at [24].
26 The decision is also interesting for its discussion of the potential impact of the *Privacy Act 1988* (Cth) on the making of orders under s 35 of the AAT Act: see *Re JTMJ v Australian Securities and Investments Commission* [2010] AATA 471, DP Forgie at [27]-[46].
27 Ibid at [25].