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Freedom of Information

aialFORUM

Editor: Elizabeth Drynan

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Australian Institute of Administrative Law Incorporated.

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RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Further articles on integrity in administrative decision making

In 2004 Chief Justice Spigelman delivered the AIAL National Lecture Series on the fourth branch of government, the integrity branch. The 2012 National Administrative Law Conference, held in July, revisited this subject. The last issue of the AIAL Forum was devoted to papers from this Conference – the articles by Wheeler and Kinross complete coverage of the Conference.

New privacy protection on the cards

The Australian Government is seeking views on the introduction of mandatory data breach notification laws, which aim to bolster privacy protection for Australians' personal information in digital databases.

Attorney-General Nicola Roxon said that it was timely to hold a public discussion on how legislation might deal with data breaches, such as when private records are obtained by hackers.

'Australians who transact online rightfully expect their personal information will be protected.

'More personal information about Australians than ever before is held online, and several high profile data breaches have shown that this information can be susceptible to hackers.

'The question we are asking is should organisations be required by law to make data breach notifications when they occur?' Ms Roxon said.

In Australia, organisations are already encouraged to disclose data breaches to the Commonwealth Privacy Commissioner. This discussion paper looks at how legislation might strengthen the protection of personal information, as well as minimise any damage when breaches occur.

Mandatory data breach notification schemes are in place or currently being considered in a number of jurisdictions, including the United States, the European Union, the United Kingdom and Ireland.

The discussion paper released notes these developments in other countries and considers whether a legislative approach is needed in relation to issues such as:

- what constitutes a data breach and what should trigger a notification;
- who should be notified eg the Privacy Commissioner and/or affected consumers; and
- what penalties might be appropriate for failing to notify.

'As with other public consultation on privacy issues, the Government expects - and welcomes - a wide range of views about whether this legislation is necessary' Ms Roxon said.

This discussion paper follows new legislation which the Government introduced into the Parliament in May that makes sure Australia's laws keep pace with changing consumer and business practices, particularly in the online environment. The legislation aims to better protect people's personal information, simplify credit reporting arrangements and give new enforcement powers to the Privacy Commissioner.

Further information about the consultation process and a copy of the discussion paper can be accessed on the Attorney-General Department's website at www.ag.gov.au.

http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/Fourth%20Quarter/17October2012-Newprivacyprotectiononthecards.aspx

Independent Reviewer for adverse security assessments

The Federal Government has announced that it will provide an independent review process for those assessed to be a refugee but not granted a permanent visa as a result of an ASIO adverse security assessment (ASA).

The Government has appointed The Hon Margaret Stone as the inaugural Independent Reviewer. Margaret Stone is a former Judge of the Federal Court. Prior to being appointed to the bench she had a distinguished academic career and was also a partner at Freehill Hollingdale & Page. She is an eminent Australian with experience in legal, immigration and national security matters.

Under the terms of reference released, the Reviewer will examine the materials used by ASIO, will provide a recommendation to the Director-General of Security and will report these findings to the Attorney-General, the Minister for Immigration and Citizenship and the Inspector-General of Intelligence and Security.

There will also be a regular 12 month periodic review of adverse security assessments of refugees in immigration detention.

Attorney-General Nicola Roxon said, ‘Refugees in immigration detention who are the subject of an adverse security assessment will have access to this new independent review option.

‘The Government takes both national security and its international obligations to refugees seriously.

‘Independent review will not lower the bar for assessing a refugee’s risk to Australia’s national security, but will provide greater openness and accountability in the security assessment process’.

After the Reviewer completes her work on the initial round of applications, the Government expects the Reviewer to complete each application for review within three months.

Ms Roxon said, ‘ASIO only issues ASAs in a small number of cases. They make up less than one per cent of all irregular maritime arrival visa security assessments undertaken since January 2010.

‘This announcement does not represent the Government’s response to the High Court’s decision in M47 v the Director-General of Security & Others. The Minister for Immigration continues to analyse that case and its implications.

'The Government chose not to announce this review process while the case was before the Court to ensure the review process was consistent with the Court's decision. The Court found in M47 that ASIO's assessment process was procedurally fair. Despite this confirmation from the court, the government believes ASIO and the community will benefit from this new review process adding an additional level of independent scrutiny to ASIO decision making'.

http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/Fourth%20Quarter/16-October-2012---Independent-Reviewer-for-Adverse-Security-Assessments.aspx

Appointment of Commonwealth Ombudsman

Mr Colin Neave AM has been appointed as the Commonwealth Ombudsman.

In making this announcement the Minister for the Public Service and Integrity Gary Gray said 'Mr Neave had an impeccable record in senior leadership roles in the law, consumer affairs and government administration.

'The Office of Ombudsman is a critical part of our system of government accountability. It plays a key role in ensuring that Australians receive the public service that they deserve.

'His experience in public administration and in complaint resolution means he is well placed to ensure the Office of the Ombudsman is held in the highest regard by the Parliament and the community'.

Mr Neave is currently President of the Administrative Review Council, Vice Chair of the Australian Press Council, Chairperson of the Legal Services Board of Victoria and Chairman of the Commonwealth Consumer Affairs Advisory Council. He was appointed a Member of the Order of Australia in June 2005 for service to public administration and to the banking and finance industry, particularly through dispute resolution.

Previously Mr Neave has served as the Chief Ombudsman of the Financial Ombudsman Service and as the Australian Banking Industry Ombudsman. He has held senior management positions in the public sector of several jurisdictions, including as Deputy Secretary of the Commonwealth Attorney-General's Department, Managing Director of the Legal Aid Commission of NSW, Secretary of the Victorian Attorney-General's Department and Director-General of the South Australian Department of Public and Consumer Affairs.

Mr Neave's appointment is for a period of five years, it commenced on 17 September 2012. It fills a vacancy created by the resignation of the former Commonwealth Ombudsman, Mr Allan Asher.

Mr Gray expressed his thanks to Ms Alison Larkins, Deputy Ombudsman, for her leadership while acting as Commonwealth Ombudsman, and to the staff of the Office of the Commonwealth Ombudsman for the important work they do.

Mr Neave's appointment follows an open merit-based selection process, in accordance with the Guidelines established by the Government in 2008.

http://www.ombudsman.gov.au/media-releases/show/211

Review of information awareness within government released—10 September 2012

Queensland's Office of the Information Commissioner has released the *Results of Desktop Audits 2011–12: Review of Publication Schemes, Disclosure Logs and Information Privacy*

Awareness in Departments, Local Governments, Statutory Authorities and Universities Report.

The report reviews the compliance of over 160 Queensland government agencies with the *Right to Information Act 2009* (Qld) (*RTI Act*) and the *Information Privacy Act 2009* (Qld) from the point-of-view of a community member seeking government held information from agency websites.

It identifies 12 key findings to improve the proactive disclosure of government held information and to better protect individuals' privacy.

Key findings include:

- Agency websites could be better used to promote administrative access to ensure formal applications are made only as a last resort.
- More than 80% of the RTI pages reviewed were easily accessible.
- Significant information could be added to publication scheme classes relating to priorities, decisions, lists and finances.
- 67% of agencies reviewed had a publication scheme and these were generally easy to locate and populated with significant and appropriate content.
- Agencies could better populate disclosure logs with information, as currently many are empty or contain few documents.
- Depending upon the agency and sector, it was rare for more than 50% of material released under the *RTI Act* to be published in disclosure logs.
- Online forms, across all agencies, have a high level of compliance with the *Information Privacy Act 2009* (Qld).

Acting Information Commissioner, Ms Jenny Mead said, 'Although good progress has been made, there is still room for improvement across the public sector.

'The continued improvement of a pro-disclosure approach to government held information can deliver efficiencies and strengthen accountability mechanisms across the public sector'.

http://www.oic.qld.gov.au/information-and-resources/documents/review-information-awareness-within-government-released%E2%80%9410

OAIC annual report confirms increase in FOI and privacy activity

The Office of the Australian Information Commissioner (OAIC) Annual Report 2011–12 shows a steady increase in workload across the OAIC's three functions — freedom of information (FOI), privacy and information policy.

The Australian Information Commissioner, Professor John McMillan said it was a busy but rewarding year.

'2011–12 was the first full year of operation since the OAIC was established on 1 November 2010. This was a year of consolidation, but also a year in which the OAIC dealt with a growing workload and a heightened awareness of information management issues in government, business and the community.

'The OAIC enquiries line handled 21,317 telephone calls (a 3% increase on the previous year), and 2,822 written FOI and privacy enquiries (a 47% increase). The office received 1,357 privacy complaints, 126 FOI complaints, 456 applications for Information Commissioner review, 2,237 extension of time notifications and requests, and conducted 37 privacy own motion investigations'.

In FOI, the OAIC conducted a review of FOI charges and a survey to assess agency compliance with the publication requirements under the *Freedom of Information Act 1982* (*FOI Act*).

Reflecting on the *FOI Act* reforms that commenced in November 2010, Professor McMillan commented that they were instrumental in strengthening open government. 'Access to information requests have greater prominence in government. There is a marked increase in FOI requests for policy-related material, more media reporting based on FOI Act disclosures, and greater public awareness of access to information rights'.

Government agencies and ministers covered by the *FOI Act* reported that they received 24,764 FOI requests in 2011–12, an increase of 4.9% on the previous year. The number of FOI requests that agencies had on hand at the end of the year decreased by 14.9%. The reported cost attributable to agency compliance with the *FOI Act* was $41.719 million, an increase of 14.9% on the previous year.

There was also a greater preparedness by applicants to complain about or challenge agency disclosure decisions. 'The OAIC received 126 FOI complaints during 2011–12, and 456 applications for independent merit review of access denial decisions. A theme that emerges strongly in complaints and reviews is that FOI processing can be improved through improved communication between agencies and FOI applicants: focusing the scope of an FOI request so that it can be processed in a timely manner, and keeping the applicant informed of progress'.

Public concern with privacy protection was reflected in complaints, high level data breaches reported in the media, and own motion investigations by the OAIC.

'The OAIC dealt with 1,357 privacy complaints, which was an 11% increase on the previous year. Thirty seven investigations were initiated, including some high profile investigations into data breaches occurring in national corporations. The office handled 8,976 privacy-related telephone enquiries, 1,541 written enquiries and 46 data breach notifications. All this points to an increasing level of community awareness and concern about privacy', Professor McMillan said.

Looking forward, Professor McMillan expected that 2012–13 would be an equally busy year for the OAIC. 'We expect a continuing increase in privacy and FOI enquiries, complaints and review applications. Reforms to the Privacy Act 1988 are expected to be passed by the Parliament, and an independent review of the FOI Act and the Australian Information Commissioner Act 2010 will commence in November 2012. The OAIC will also conduct an active program to promote proactive information and data publication by government agencies'.

http://www.oaic.gov.au/news/media_releases/media_release_121016_annual_report.html

ARC launches Judicial Review report

On 24 September 2012 the Administrative Review Council President, Colin Neave, launched the Council's 50th Report, *Federal Judicial Review in Australia*, at Parliament House.

'Judicial review enables a person affected by a government decision to challenge that decision in a court.

'It is a central feature of Australia's administrative law system, guaranteed by our Constitution.

'This Report makes recommendations to improve the accessibility and efficiency of Australia's judicial review system.

'There have been considerable changes to the government landscape since the administrative law package was introduced in the 1970s.

'In this Report the Council has revisited-and in some cases revised-many of its previous recommendations in relation to judicial review', Mr Neave said.

This report is the culmination of extensive research and consultation by the Administrative Review Council.

The Council released a consultation paper, *Judicial Review in Australia*, for public comment in April 2011, and received 23 submissions.

The Council also met with representatives from key interest groups, including courts and tribunals, government officers, members of the legal profession, public interest organisations, and experts in the field.

The Report was prepared as part of the Council's statutory responsibility to keep the administrative law system under review.

http://www.arc.ag.gov.au/Mediareleases/Pages/September2012ReleaseofReportNo50FederalJudicialReviewinAustralia.aspx

National Security Migration Regulation ruled invalid

Plaintiff M47-2012 v Director General of Security [2012] HCA 46 (5 October 2012)

The plaintiff, a Sri Lankan national, had been held in immigration detention since arriving on Christmas Island in December 2009. While in detention he applied for a protection visa.

A delegate of the Minister for Immigration found that the plaintiff had a well-founded fear of persecution in Sri Lanka on the basis of his race or political opinion attributed to him as a former member of the Liberation Tigers of Tamil Eelam (LTTE).

However, although the plaintiff was found to be a refugee, he was refused a protection visa on the basis that he did not meet cl.866.225. Specifically the delegate found the plaintiff did not satisfy public interest criterion 4002 (PIC 4002) because he was assessed by ASIO to be a risk to security under the *Australian Security Intelligence Organisation Act 1979* (Cth). That decision was subsequently affirmed by the Refugee Review Tribunal, which is unable to look behind the security assessment. In May 2012, following the Tribunal decision, ASIO issued a further negative assessment (the 2012 assessment). As part of this assessment, ASIO officers interviewed the plaintiff.

The plaintiff commenced proceedings in the original jurisdiction of the High Court challenging the validity of the decision to refuse him a protection visa and his continued detention. The plaintiff argued that ASIO had denied him procedural fairness when making the 2012 assessment; that PIC 4002 was invalid; and that the *Migration Act 1958* (Cth) did not authorise the removal and detention of a person found to be a refugee.

A majority of the Court found that the plaintiff was not denied procedural fairness in connection with the issuing of the security assessment. In the interview that was conducted as part of the 2012 assessment, the plaintiff was legally represented, his attention was directed to ASIO's concerns and he was given ample opportunity to address the issues of concern to ASIO.

However, a majority of the Court held that the Migration Regulations could not validly prescribe PIC 4002 as a condition for the grant of a protection visa because it was inconsistent with the scheme in the *Migration Act* for refusing or cancelling visas on national security grounds in conformity with Articles 32 and 33(2) of the Refugee Convention. French CJ held:

> ..the relationship between PIC 4002 and ss.500-503 [of the Migration Act] spells invalidating inconsistency. That is primarily because the condition sufficient to support the assessment referred to in PIC 4002 subsumes the disentitling national security criteria in Article 32 and 33(2) [of the Refugee Convention]. [PIC 4002] is wider in scope and sets no threshold level of threat necessary to enliven its application. It requires the Minister to act upon an assessment which leaves no scope for the Minister to apply the power conferred by the Act to refuse the grant of a visa relying upon Articles 32 and 33(2). It has the result that the effective decision-making power is shifted to ASIO. Further, and inconsistently with the scheme for merits review provided in s.500, no merits review is available in respect of an adverse security assessment under the ASIO Act 1979. Public interest criterion 4002 therefore negates important elements of the statutory scheme relating to decisions concerning protection visas and the application of criteria derived from Articles 32 and 33(2).

Because PIC 4002 was invalid, a majority of the Court held that the decision to refuse the plaintiff a protection visa had not been made according to law. As a result there had been no valid decision on the plaintiff's application for a protection visa. While that application is still pending, the plaintiff can be lawfully detained as an unlawful non-citizen under the *Migration Act*. Given these conclusions, it was unnecessary for the majority to consider the plaintiff's other arguments about the validity of his detention and proposed removal from Australia.

The *Datafin* principle – part of Australian law?

Mickovski v Financial Ombudsman Services Limited & Anor [2012] VSCA (17 August 2012)

This was an appeal from a judgment in the Common Law Division of the Victorian Supreme Court.

The appellant, Mr Mickovski, sought to challenge a Financial Ombudsman Services (FOS) ruling that it lacked jurisdiction to deal with his complaint against MetLife Insurance Limited (MetLife) in relation to entitlements under a salary continuance policy.

Metlife is a member of FOS. On behalf of its members, FOS conducts a superannuation industry alternative dispute resolution scheme approved by ASIC pursuant to s 912A(1)(g) of the *Corporations Act 2001* (Cth).

FOS's ruling was based on a clause in its then terms of reference, which excluded complaints where the complainant knew or should reasonably have known of all the relevant facts more than six years before notifying FOS of the complaint.

At first instance, the Supreme Court rejected Mr Mickovski's request for judicial review of FOS's decision. In doing so the Court held that the *Datafin* principle, that a private organisation is amenable to judicial review on appropriate grounds if its powers have significant public consequences, applies in Victoria but that FOS's decision did not come within that principle.

On appeal, Mr Mickovski contended, among other things, that the judge erred in holding that the *Datafin* principle was not engaged. To find that the *Datafin* principle was not engaged ignored the practical importance of FOS to consumers, the courts (by relieving the pressures of business) and the insurance industry. FOS's significance was manifest in the requirement in s 912A(1)(g) of the *Corporations Act* that a person holding a financial service licence and who services retail clients must have an external dispute resolution procedure approved by ASIC and only three organisations, including FOS, had been so approved.

The Court held that in the face of increasing privatisation of government functions in Australia, there is a need for the availability of judicial review in relation to a wide range of public and administrative functions. The *Datafin* principle offers a logical, if still to be perfected, approach towards the satisfaction of that requirement. However, the clear implication of the High Court's decision in *Neat Domestic Training Pty Ltd v AWB Ltd* [2003] HCA 35 is that courts should avoid making a decision about *Datafin* unless and until it is necessary to do so.

In this case, the Court did not consider it was necessary to do so. The Court found that taken at its widest, it is doubtful that the *Datafin* principle has any application in relation to contractually based decisions. FOS's power over its members is still, despite the *Corporations Act*, solely derived from contract and it simply cannot be said that it exercises government functions. Even if it could be said that it has now been woven into a governmental system, the source of its power is still contractual, its decisions are of an arbitrative nature in private law and those decisions are not, save very remotely, supported by any public law sanction. Further, the public interest in having a mechanism for private dispute resolution of insurance claims was insufficient to sustain the conclusion that FOS was exercising a public duty or a function involving a public element, in circumstances where FOS's jurisdiction was consensually invoked by the parties to a complaint. In the light of all these factors, FOS is not a body susceptible to judicial review.

Recent FOI decisions

Apache NorthWest Pty Ltd v Department of Mines and Petroleum [2012] WASCA 167 (23 August 2012)

This appeal concerned an application by the second respondent (Lander and Rogers Lawyers), pursuant to the *Freedom of Information Act 1992* (WA) (the *FOI Act*), for access to certain documents held by the first respondent (the Department). The relevant documents had been supplied to the first respondent by the appellant (Apache), the operator of the gas facilities on Varanus Island. The documents related to, among other things, an explosion on Varanus Island, which caused the plant to cease operation for approximately two months.

Under the *FOI Act*, where an application is made for access to documents which contain information of commercial value to a third party (in this case Apache), or where an application is made for access to documents which contain information of commercial value to a third party or concerning the business or commercial affairs of a third party, an agency may not give access to an applicant until it has taken such steps as are reasonably practicable to obtain the views of the third party as to whether the documents contain exempt matter: s 33. If the third party objects to a decision of the agency to give access to a document the third party has a right to an internal review of the decision by another officer of

the agency: s 39 - s 43. If the third party is aggrieved by the decision on the internal review it may seek a review of that decision by the WA Information Commissioner (the Commissioner): s 65. An appeal lies to the Supreme Court on a question of law arising out of the decision of the Commissioner: s 85.

The Department initially refused access but, following an internal review of that decision, found that Lander and Rogers was entitled to access to the documents. Apache then sought a review of that decision by the Commissioner. The Commissioner, with certain limited exceptions, upheld the Department's decision. Apache then appealed against the Commissioner's decision. The primary judge dismissed the appeal and Apache sought review of this decision.

On appeal, Apache contended, among other things, that the primarily judge erred in failing to find: first, that the Commissioner had wrongly concluded that Apache was required to satisfy him on 'the balance of probabilities' that the documents were exempt under the *FOI Act*; and secondly, that the Commissioner had applied the wrong test in respect of each clause, applying a test of 'would' have adverse consequences instead of 'could reasonably be expected to' have adverse consequences.

In considering whether the Commissioner considered the correct test the Court held that the reasoning of the Commissioner on this topic lacked the degree of clarity which would have been desirable. It is evident that the Commissioner was at some pains to reconcile the decision in *Police Force of Western Australia v Winterton* (unreported WASC), where the balance of probabilities had been applied, with the decisions in *Manly v the Minister for Premier and Cabinet* (1995) 14 WAR 550, and *Attorney General's Department v Cockroft* (1986)10 FCR 180, where it had been correctly disavowed.

The Court opined that in attempting to reconcile these decisions the Commissioner was attempting the impossible. However, while the Commissioner sought to reconcile the authorities and engaged in some obscure consideration of how that might be done, in the end he did not 'consider it desirable to attempt to quantify the standard of proof'. The approach he ultimately took was to correctly adopt *Manly* as the applicable test. Therefore, having regard to the context as a whole, the Court was satisfied that the primary judge correctly found that the Commissioner did not apply the balance of probabilities test.

With regard to Appache's contention that the Commissioner had applied the wrong test in respect of each clause, applying a test of 'would' have adverse consequences instead of 'could reasonably be expected to' have adverse consequences, in the Court's view, having regard to the context, the Commissioner did not overlook the correct test.

The Court found that while it would have been preferable for the Commissioner to have stated his conclusion in every instance in terms which expressly referred to the statutory test, even at the expense of some repetition, when the relevant passages were read in context, it cannot reasonably be concluded that the explanation for the Commissioner's omission to do so in the passages relied on by Apache lay in an inexplicable oversight of the test he had elsewhere propounded rather than, as the primary judge found, the application of the correct test expressed in infelicitous language.

THE TRANSMISSION OF THE PUBLIC VALUE OF TRANSPARENCY THROUGH EXTERNAL REVIEW

Julie Kinross*

The integrity branch of government

In the 2004 National Lecture Series, the Hon James Spigelman AC, CJ of NSW expressed his views about the function of integrity institutions. This was that their function was, including judicial review by courts, 'to ensure that the community-wide expectation of how governments should operate in practice was realized'. Integrity, in addition to 'legality', encompasses two other characteristics:

- 'maintenance of fidelity to the public purposes for the pursuit of which an institution is created', and
- 'the application of the public values, including procedural values, which the institution is expected to obey'.[1]

The *Right to Information Act 2009* (Qld) and the *Information Privacy Act 2009* (Qld) recognise a number of public values, including open government and transparency. Queensland public sector agencies are expected to obey these public values.

Analysis of the role of the Office of the Information Commissioner (the Office)

The Integrity Commissioners

In Queensland, the Information Commissioner is one of five Integrity Commissioners; the others are the Ombudsman, the Auditor General, the Chair of the Crime and Misconduct Commission and the Integrity Commissioner. The Integrity Commissioners, together with the Queensland Civil and Administrative Tribunal (QCAT) and the courts have the function of ensuring 'that the community-wide expectation of how governments should operate in practice is realized'. While the statutory functions of each integrity commissioner limit each commissioner's ability to the first two of Justice Spigelman's characteristics, all of the integrity commissioners cooperate on the third characteristic, in promoting the public values that support quality public administration, the values which agencies are expected to obey.

Right to Information (RTI) reforms for executive government and the Office

The Independent Freedom of Information (FOI) Review Panel, chaired by Dr David Solomon, found that the implementation of FOI legislation in Queensland over a 16 year period had been ineffective. One of the major barriers to effective implementation was identified as the public sector culture of secrecy. Reform recommendations encompassed changes which would combat the culture and its workings.

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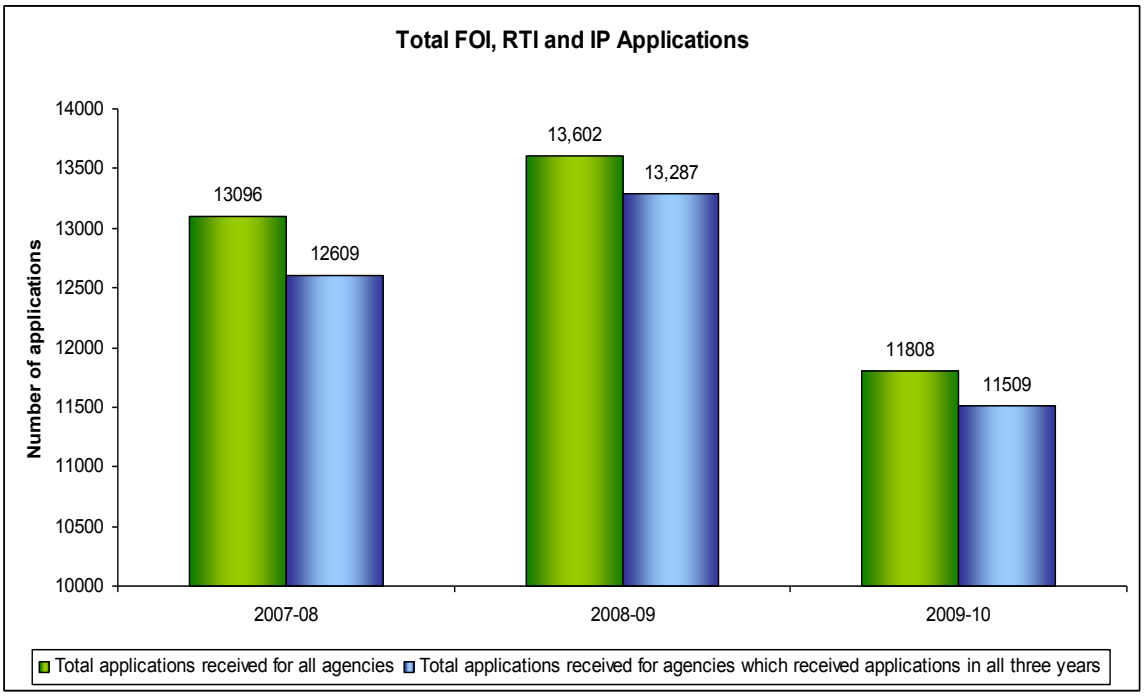
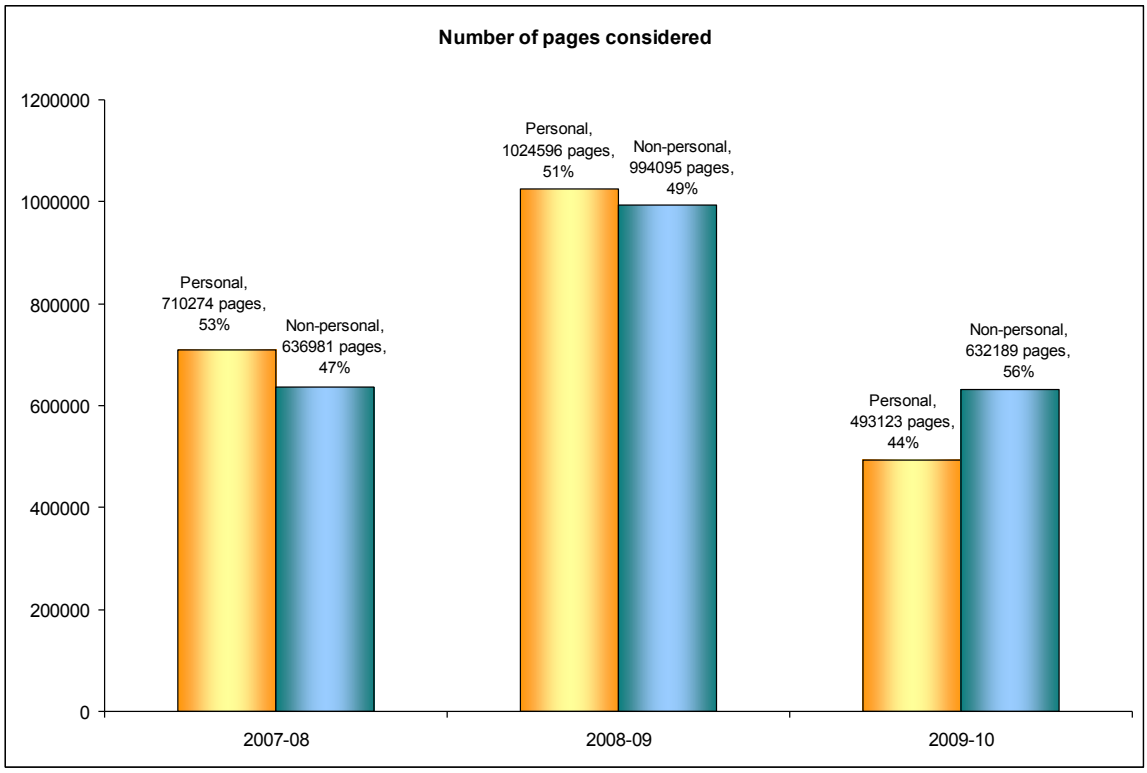
* *Julie Kinross is Queensland Information Commissioner. This paper was presented at the 2012 AIAL National Conference, Adelaide, South Australia, 20 July 2012.*

From 1992 until the Right to Information reforms, the Information Commissioner had the single statutory function of external review. The important lesson to be drawn from the Queensland experience is that external review and supervision by the courts alone are incapable of addressing the public sector cultural norms which worked to defeat the 'community-wide expectation of how governments should operate in practice'.

That is why the Independent FOI Panel recommended significant changes for executive government and several new powers for the Office. The changes recommended for executive government were aimed at making FOI applications a last resort.



The bar graph on the presentation slide shows the numbers of FOI applications received by public sector agencies in the two years before the reforms took effect and for one year under the new legislation. Government sources indicate that the figures for the 2010-2011 year, which are yet to be published are similar to the 09-10 year, suggesting that the decrease is continuing.



Similarly, the number of folios processed under formal access applications has decreased and there has been a change in the pattern of personal v non-personal information being processed. More non-personal information is now being processed under RTI than was previously the case. This suggests that agencies are releasing more personal information administratively than before.

What can be noted overall is a pleasing drop in the number of FOI applications made across the system and the work involved in processing them, particularly when the growth in the population of Queensland and the increase in government service delivery is taken into account. The reduction in the number of formal access applications reduces the cost to government, assuming that administrative release processes are more economical. The reduced numbers are perhaps a measure of the effectiveness of the reform package.

Changes to the role of the Office include new powers to:

- audit agency compliance;
- monitor and review agency practice;
- issue guidelines which are, in effect, binding on agencies; and
- the power to issue guidelines on the interpretation of the legislation in the *Marbury* sense of saying what the law means.

These new statutory functions are aimed squarely at fostering the public value of transparency and a more open public sector culture. They enable the Office to provide clarity around good practice and provide the tools to encourage it. It is of course the Government's and the public sector's responsibility to make it happen and the Office's role to monitor and support.

The external review function

The statutory function which is the subject of this paper is the *quasi judicial* role of external review, also referred to as independent merits review of agency decisions about information access applications. The Information Commissioner is empowered to make any decision an agency can make in the course of handling an application. Information Commissioner decisions can be appealed to QCAT's appeal tribunal, comprising judicial members, or judicially reviewed by the Supreme Court. No statutory restriction on review via ouster clauses was attempted in the RTI legislation.

In accordance with Thomas J's judgment in *Cairns Port Authority v Albietz*, the Information Commissioner submits to the jurisdiction of the appeals tribunal or Court. Participation in those proceedings does not ordinarily go beyond submissions on the proper construction of the Act, the manner in which the powers conferred on it were to be exercised, or supplementary submissions necessary to overcome disadvantage to another party by reason of lack of access to the documents in question.[2]

Both QCAT and the Supreme Court are bound in these proceedings by the approach of the High Court which has recognized that:

> The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[3]

The Office therefore has an important role in delivering certainty and finality to the merits of agency decisions. Through its decision making role, the Office provides guidance on how to apply the various provisions in the legislation but, more particularly, it provides guidance through its decisions on ascribing value or weight to various public interests and the balancing of those interests.

External review and integrity branch characteristics

The role of the Office of the Information Commissioner straddles two of Spigelman's three characteristics. The Office does not have a role in ensuring that public sector agencies deliver on the public purposes usually expressed in their enabling legislation. The Office does have a concern with legality and in the application of public values, particularly open government and transparency.

Legality

Some might think that legality is the sole province of the courts. The Office's concern with 'legality' concerns jurisdictional error. Generally, the Office has a statutory function to provide agencies with guidance on the interpretation of the legislation. The Office in turn is guided by authoritative precedents. Specifically, the legislation enables the Office to determine certain jurisdictional facts.

In his address to the 2010 AGS Administrative Law Symposium on issues arising from the *Kirk* decision, Justice Spigelman referred to a line of authorities which drew a clear distinction between a decision 'under' the Act and a decision 'under or purporting to be under' the Act[4]. He expressed the view that the introduction of the word 'purported' by way of an amendment to the longstanding reference to 'decision' in the legislation under consideration in *Kirk* appeared to be an intention to extend the provision so as to cover jurisdictional error.

Distinct from Queensland's *FOI Act*, which for 16 years empowered the Office to review agencies' decisions, the *Right to Information* and *Information Privacy* legislation includes

'purported' actions and such decisions are reviewable by the Office. For example, a decision that an application purportedly made under the legislation cannot be dealt with because the entity or documents is not one to which the legislation applies, is a reviewable decision. Rather than use 'purported decision' in the sense of the legislation considered in *Kirk* where the legislature sought to restrict review for jurisdictional error, the Queensland legislature has sought to clarify that the Office does have such a power.

Such decision making power concerning jurisdictional error is an avenue for supporting the transmission of the value of transparency. We have found agencies that have such a will to be secretive that they simply assume they are not covered by the legislation and agencies that fiercely contest the idea that the legislation might apply to them. Whether something is in or out of jurisdiction is akin to the fact of being 'on or off the couch' and agencies can be afforded guidance through external review.

In Justice Spigelman's words, the Office has a role in ensuring that the powers under the *Right to Information* and *Information Privacy Acts* are exercised for the purpose, broadly understood, for which they were conferred and in the manner in which they were intended to be exercised.

The Office also has a role in determining an error within the jurisdiction; the reasonableness or appropriateness of the decisions made in the exercise of such powers; and the power to decide whether it would be adverse to the public interest to disclose information. It is through this role that Justice Spigelman's third characteristic, that of the application of the public value of transparency can be illustrated in the Office's review of agency decisions, in particular in the application of the public interest test.

The transmission of the public value of transparency through external review

Many of the leading decisions of the Office were made in the 1990s. Many retain their authority under the *Right to Information* and *Information Privacy* legislation. This demonstrates the consistency and certainty in applying the legislation, which Office decisions have provided to the public sector since 1992. Whether or not the public's conception of the value of transparency has changed is another question.

As the *Right to Information Act* and the *Information Privacy Act* completely re-wrote the FOI legislation to make a resistant bureaucracy obey, it is reasonable to ask whether the new legislation has affected outcomes. Is the public value of transparency being transmitted any differently?

Design features of the RTI Act

The public interest test

The Independent FOI Panel found a number of problems with the public interest test in the old *FOI Act*. One problem was that the way the exemptions in the Act were structured meant that the public interest test was usually not applied or was applied to suit the agency norms concerning transparency. Section 38 of the *FOI Act* reproduced here, illustrates the point.

> **38 Matter affecting relations with other governments**
>
> Matter is exempt matter if its disclosure could reasonably be expected to-
>
> (a) cause damage to relations between the State and another government; or

(b) divulge information of a confidential nature that was communicated in confidence by or on behalf of another government;

unless its disclosure would, on balance, be in the public interest.

The structure of the section leads decision makers through the steps of deciding whether a document could be characterised according to the description. In the case of section 38, the decision maker decides if a document concerns inter-governmental relations, then decides if disclosure could prejudice the relations. If relations could be prejudiced, the decision maker takes the further step of deciding whether its disclosure would be in the public interest. In practice, however, because of the presumption that all documents were closed, it would often be assumed that it would never be in the public interest to release a document concerning inter-governmental relations, whether or not those relations might be prejudiced.

This meant that if a document concerned an audit undertaken by the agency, the document would automatically be deemed exempt without considering whether disclosure of the information would prejudice auditing procedures and without applying a public interest test. There was a generally understood and accepted (by the bureaucracy) consensus that audit documents never had to be released.

Simplicity and certainty

Similarly, if a document concerned the business, commercial or financial affairs of an entity, the document would be deemed to be exempt without considering whether disclosure would prejudice those affairs and without applying a public interest test. These are but two examples of the consensus that had been arrived at by the closed culture of the public sector. Where strong consensus has formed in relation to classes of documents, in part because the public interest test has never been appropriately applied, these classes of documents are more likely to be affected by the proper application of the public interest test and the circumstances in which agencies fight most bitterly to keep the same documents 'exempt'. For them not be held 'exempt' heralds an era of potential complexity and uncertainty.

It had become the accepted custom in agencies and in private entities that all audit documents and all documents concerning business affairs of an entity were exempt from disclosure under FOI. These are examples of when agencies are in breach of the rules.

To ensure the public interest test was applied and applied transparently, a number of devices were employed in the *Right to Information Act 2009* (Qld). Parliament decided that there were twelve categories of documents the disclosure of which would always be contrary to the public interest. These categories became strict exemptions where a public interest test did not apply. These categories include information created for the consideration of the Cabinet or the Executive Council.

The types of disputes that come for determination by the Office concerning the strict exemptions are usually about whether the document is the type of document the exemption intends to capture. The new legislation by and large confirms the accepted customs in agencies around these categories of documents but with the exception of the re-worded Cabinet exemption to make it clear that the wheeling of documents into the Cabinet room would not in and of itself make documents exempt under the Cabinet exemption. These are examples where agencies are allowed on the couch and generally do remain on the couch. The most common disputes are similar to those under the *FOI Act*: being the legal professional privilege exemption, the breach of confidence exemption and the law enforcement or public safety information exemption.

All other exemptions in the old *FOI Act* now appear as factors favouring that non-disclosure be taken into account in applying a public interest test. If it is relevant for an agency to consider whether, on balance, disclosure of information would be contrary to the public interest, the agency must undertake prescribed steps. The starting point for applying the public interest test is that all documents are open to the public. They can only be withheld if it would be contrary to the public interest to disclose them.

Two steps in the public interest test involve identifying irrelevant factors and then consciously disregarding them. Otherwise the test is essentially identifying factors favouring disclosure and factors favouring non-disclosure and weighing those factors.

In my view it is the non-exclusive list of irrelevant factors to be considered in the legislation that is having a powerful effect in changing the practice of decision makers. This list includes:

(i) embarrassment to the government or a loss of confidence in the government;

(ii) the applicant misinterpreting or misunderstanding the document;

(iii) mischievous conduct by the applicant; and

(iv) the seniority of the person who created the document.

These are of course the factors that public servants have long argued should be taken into account and reflect the drivers behind and the potency of the culture of secrecy. I have often heard Secretaries or Directors-General say that they will never do anything to embarrass their Minister; however, this is actually what they can be required to do when such information is requested. The listing of the factors is a compelling statement by the Parliament that these drivers of secrecy are not to influence decisions to release information. It is the Parliament's express view that the public value of transparency overrides the day to day concerns of public servants to protect the government, their Minister and themselves from public criticism.

The irrelevant factors go to the heart of why the FOI legislation did not work in practice. On external review, it is the role of the Office to ensure that the value of transparency, as prescribed by the Parliament, is put into practice by agencies.

We see about 420 requests for external review each year. Among these very few agency decisions list any of the irrelevant factors. While the irrelevant factors are generally not reflected in written decisions, the explicit naming of irrelevant factors in the legislation has had a large normative impact on the thinking of public servants and a direct impact on the quality of the weighing exercise in applying the public interest test. The listing of the factors in legislation arms the Right to Information practitioners with confidence to assert this position to senior executives and senior executives have become increasingly aware that these factors cannot influence whether or not information is disclosed. The naming of the factors also gives RTI practitioners the confidence to identify relevant public interest factors and to weigh the factors unimpeded by the anxiety of what their agency will think or by the unspoken pressure that can be applied. It is, of course, not a complete answer, but that is the purpose of external review, for those who choose to exercise their rights.

Have the legislative devices, including Parliament's working definition of transparency, affected decision outcomes?

In many cases the outcomes for applicants have remained the same. There have been some notable differences where cultural norms had developed around certain categories of documents.

Case study: Courier Mail and Department of Health Qld Info Cmr 22 February 2011 Unreported

The Courier Mail applied to the Department of Health for access to documents relating to particular hospital emergency departments that reviewed deaths in emergency in a specified time period. The applicant did not seek access to any identifying information in the documents, either patient names or doctors' names. The application was made after, in the words of the Courier Mail, 'The department had been damaged for several months by a series of embarrassing revelations based on so-called "clinical incident data", detailing mix-ups with newborn babies, patients being wrongly medicated and "league tables" of errors at hospitals'.

The Department refused access on a number of grounds.

The Courier Mail sought external review. It also RTI'd the processing of its RTI application. By RTI'ing its RTI application the Courier Mail found its emergency death review access application had led to the discussion amongst senior bureaucrats about their concern that clinical incident data could be released under RTI. The senior bureaucrats requested advice on whether certain exemptions under the *RTI Act* could be applied to prevent 'discovery' of such information. In reporting on the documents it received under the RTI of its RTI application, the Courier Mail likened the response of the Department's executive to the wheeling of documents into Cabinet to hide them.

On external review Queensland Health submitted that disclosing any information in the documents would prejudice the confidentiality of the death review process and would reduce the willingness of clinicians to participate meaningfully. The Department had had indications from clinicians that varied between refusing to cooperate with the clinical review to not meaningfully participating, essentially to protect themselves from civil suit. It was a circumstance where the health workforce's cultural norm was, in Spigelman's words, 'different to the community-wide expectation of how governments should operate in practice*'.*

The Right to Information Commissioner decided that as long as the essential interests were protected, that is, the confidentiality of health consumers and the anonymity of individual doctors, then the documents sought could be disclosed. This decision was supported by the AMA but continued to be challenged by Queensland Health.

The Department, possibly to placate an angry workforce, exercised its legal right to seek a stay of the decision pending an appeal. This drew further opprobrium from the Courier Mail and the AMA.

However QCAT refused to grant a stay on the RTI Commissioner's decision and Queensland Health was required to release the documents without the patient and doctor identifying information.

This case illustrates the leadership challenge for senior public servants in applying the *Right to Information Act* as the Act no longer permits the presumption that 'all documents are closed' to apply in circumstances where strong erroneous cultural norms have developed over time about certain categories of documents. In this case it was the clinical incident documents which health practitioners had come to believe were covered by qualified privilege.

It has been recognised for well over a decade that there is a public interest in qualified privilege for medical practitioners, a privilege which encourages health professionals to participate in effective safety and quality programs, by providing for the confidentiality of some information generated by those programs. The Queensland Government decided that

documents covered by qualified privilege would be defined so that doctors could be guaranteed anonymity in return for their full participation in defined quality assurance processes. In so limiting the circumstances in which qualified privilege would apply, the Queensland Government like all other state governments limited the consequential reduction in access to information to defined categories of information. For documents to be exempt under the *Right to Information Act*, they must have been created for and under a committee declared to be an approved quality assurance committee under the *Health Services Act 1991*. This qualified privilege was effectively extended to documents created for a root cause analysis of a prescribed reportable event.

The protection afforded by qualified privilege is a limited one. It is essentially designed to prevent the identification of a health practitioner to protect him/her from any possible legal action. The Parliament has limited it to find an appropriate balance with the community's access rights. In this matter Queensland's health practitioners overlooked the fact that RTI gave them the same protection as qualified privilege by protecting their names and patients' names. They strongly objected to the balance the Parliament had found between qualified privilege and the community's right to information.

Why was feeling so high in Queensland Health despite RTI providing them with the protections they were seeking?

The answer lies in what health practitioners and Queensland Health thought about the accuracy of the Courier Mail's reporting about the health system and the damage it was doing to the public's confidence in the health system. Queensland Health was of the view that the Courier Mail obtained clinical incident data and misreported it, either because the reporters did not understand the meaning of the clinical incident reports or because the reporters were deliberately spinning the information to create negative 'gotcha' stories. Queensland Health was concerned about the impact of such reports on the community's confidence in the health system. Having seen both the documents and the media reports, there is some validity in Queensland Health's concerns. This is why health practitioners continue to call for an amendment to the *Right to Information Act*.

It is the combination of the legislative devices detailed above that now precludes Queensland Health from withholding clinical incident data: the presumption that all documents are open; the restructuring of the exemption provisions; and making explicit that mischievous conduct by an applicant is an irrelevant factor. This case study shows how the new legislative devices can provide a serious challenge to very strongly established norms relating to certain categories of documents. It illustrates the important role that independent merits review can play in challenging long existing cultural norms by objectively applying the law in specific circumstances. The guidance provided to agencies can assist CEOs and the Senior Executive Service in the significant leadership task that they have in shifting workforces from a culture in which all documents are closed to a culture in which all documents are open. The case study also shows how the media plays an active role in influencing agency cultures.

Endnotes

1 JJ Spigelman 'The Integrity Branch of Government '(2004) 78 *Australian Law Journal* 724.
2 *Cairns Port Authority v Albietz* [1995] 2 Qd R 470, 470 per Thomas J.
3 *Corporation of the City of Enfield v Development Assessment Commission and Another* (2000) 199 CLR 135, 153 per Gleeson CJ, Gummow, Kirby and Hayne JJ citing *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1, 36 per Brennan J.
4 *Darling Casino Ltd v NSW Casino Control Authority* 919970 191 CLR 602 at 635; *Ex parte Hebburn Limited; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 267-268; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 144.

TRIBUNALS – 'CARVING OUT THE PHILOSOPHY OF THEIR EXISTENCE': THE CHALLENGE FOR THE 21ST CENTURY

Robin Creyke*

> *In Australian law ... merits review by tribunals is considered to be categorically different from judicial review by courts, at least in procedural and remedial terms. Whereas the characteristic merits review remedy is to vary a decision or make a substitute decision, the characteristic judicial review remedy is to set the decision aside and remit it for reconsideration.*[1]

The theme of this paper is that tribunals need to take up the invitation posed by the High Court in 2011 in *SGUR v Minister for Immigration and Citizenship*[2], to identify and to publicise their distinctive nature. As the High Court put it tribunals' inquisitorial mode of operation was meant 'to distinguish them from adversarial proceedings' and to characterise their statutory functions.[3]

That task requires consideration of the vision of the policy makers when they set up our tribunals' system; how that vision has been realised; and how might tribunals respond to the High Court's invitation to devise a model for themselves which takes the next step in their development.

First the vision

The birth certificate of Australian tribunals is found in the 1971 report known as the *Kerr Committee* report.[4] From that report emerged the major institutions which populate the administrative review arm of government. At the federal level, these comprise in particular the Administrative Appeals Tribunal (AAT) and the federal specialist tribunals; at the state and territory levels, the tribunal systems include the so-called 'super' or multi-purpose tribunals with combined civil and administrative jurisdictions (the CATS).

As the AAT provided the model for tribunal development generally in Australia, it is used in this paper as an exemplar of what was envisaged as the role for tribunals in the justice system in Australia. Since the AAT model, with variations, is progressively being adopted by most States and Territories, its development and potential for change illustrates the tribunal practices more generally. However, the paper also refers to examples drawn from other broad jurisdiction and specialist tribunals. Their mode of operation exemplifies the unique contribution of Australian tribunals to the collective experience of tribunals in the common law world.

AAT model

The most far-reaching and innovative recommendation of the *Kerr Committee* was that the government establish a general jurisdiction tribunal to which people could bring appeals

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against decisions by government. Justification for this recommendation was, as the report noted:

> ...[t]he objective fact, in the modern world, ... that administrators have great power to affect the rights and liberties of citizens and, as well, important duties to perform in the public interest.[5]

As the report went on:

> ... when there is vested in the administration a vast range of powers and discretions the exercise of which may detrimentally affect the citizen in his person, rights or property, justice to the individual may require that he should have more adequate opportunities of challenging the decision against him.[6]

The major deficiency identified by the *Kerr Committee* in the administrative review system was that, outside the limited remedies available from the courts, there was no independent body, which could reverse decisions by government adverse to a person or corporation. In challenging government decisions affecting them, what the person or company wanted was not to be told by the courts that government had made a technical legal error. What they wanted was their licence to work, to import, to operate equipment, recognition of their qualification so they could seek employment commensurate with their skills and/or training, income support, or the start-up grant for their business. Those needs have, if anything, intensified in the intervening years with the growing reach of government. In other words, then and now, 'the more adequate opportunity' to challenge a decision against them was to be an umpire capable of adjudicating on all aspects of the merits of a government's decisions in relation to its citizens.[7]

The Commonwealth's response to that wish with the recommendation to set up a tribunal with a general and broad merits review jurisdiction was ground-breaking. Nowhere in the common law world in the 1970s was there a tribunal the function of which was to review all aspects of decisions by officials, across the whole of government, not just specialist pockets here and there. Indeed, so far-sighted was the suggestion that it is only in this century that other countries which have inherited the same English legal system have begun to replicate the move.

Features of the AAT template

The tribunal recommended by the *Kerr Committee* report was to be an impartial, external, statutory decision-making body. However, the principal feature of the new body was that it could review all aspects of a decision made by government - the merits function - and if appropriate, remake the original decision. To achieve this aim, the body was to have a number of specialist features apart from its ability to review the merits of a decision.

Specialist members

Unlike the courts, the membership of which is confined to judges or registrars, all of whom are lawyers drawn mostly from the bar, the tribunal's members were to have much broader expertise, knowledge and skills, both in the law and in other areas of activity.

Professor Whitmore, a member of the *Kerr Committee*, said 'the objections raised by administrators [to the existing system of judicial review by the courts] is that their decisions should not be reviewed by judges who have had absolutely no experience in the field of public administration'.[8] As Professor Whitmore was the principal author of the *Kerr Committee* report, his insights into the proposed system have particular weight. In the face

of this criticism the AAT was also to have members with equivalent expertise to the public sector agency the decision of which was under review.

At the same time, it was recognised that the body needed those with high level legal skills and that its independence should be assured. Accordingly the recommendation was that the new tribunal was to have a President who would be a judge, and two other members, one of whom would be 'an officer of the Commonwealth department or authority responsible for administering the decision under review', another a member of the agency the decision of which was being reviewed, and a third, lay person 'drawn preferably from a panel of persons chosen for their character and experience in practical affairs'. In other words, one member was to have public sector experience, to ensure as the report said that, 'departmental policies and points of view were known and understood',[9] and the majority were to be drawn from outside the legal fraternity.

Flexible modes of operation

A third feature of the tribunal was to be its flexibility. This had several facets. The rules of evidence were not to apply.[10] The formal rules of evidence were seen as time-consuming, expensive, a barrier for self-represented litigants, and inappropriate for the accessible, cheap and informal mode of operations envisaged for the Tribunal. As the *Kerr Committee* noted: 'Lawyers should be prepared to reconcile themselves to techniques of analysis and investigation which are different from those in the common law courts'.[11] The minimum requirement was that the Tribunal 'shall inform itself as to the issues involved in such manner as it thinks fit, but procedures should be adopted to ensure that all material facts and matters of expert opinion are brought to the attention of the parties before a final decision is reached'.[12]

In other words, there was an obligation on tribunals to develop procedures tailored to the matters they had to decide. As Graeme Taylor, first Director of Research of the Administrative Review Council, said, the Tribunal should adopt 'procedures adapted to be exercised by individuals acting for themselves and by an interventionist tribunal'.[13]

Accessibility

Tribunals were also to be more accessible than courts. As Taylor pointed out, accessibility would be enhanced by 'easy access to review in a geographical sense'.[14] So it was envisaged that tribunal members would travel to regional areas to provide review, provided the circuit was cost-effective, and that in turn was dependent on the volume of matters arising in a particular country town or region.

Accessibility included simpler remedies.[15] In the 1970s in Australia, the predominant method of complaint about administrative injustice was through the arcane and technically complicated prerogative writs or the petition of right.[16] These were barriers to people seeking review. By contrast, the tribunal, in having a remarkably easy application-for-review process and in being able to order that a decision be remade, was to make it easier for people to apply to it, and its variable remedies were capable of giving the person or corporation what they wanted by way of redress.

The formality of hearings processes before the courts also inhibited access. Accordingly, the tribunal was to develop friendly, applicant-appropriate processes which would encourage people to take steps to challenge government decisions.

Efficiency

Unlike courts tribunals were intended to be cheaper means of accessing one's rights. At a broad level it was envisaged that there would be a cost benefit from having one tribunal with jurisdiction across government, rather than a number of tribunals each with its own infrastructure to support. In addition, the cost of applying to the tribunal was to be much less than for an application within the court process.

A recommendation which was not adopted was the minimisation of the costs of the proposed tribunal through having a registry in common with other institutions in the administrative law package. As the report noted, cost-saving could be achieved by appointing the Registrar of the proposed Administrative Court (now the Federal Court) to be the registrar for the Tribunal.[17] In other words, there was to be one registry and one set of staff. This did not happen. In addition it was proposed that there be a small administrative and research staff for the Administrative Review Council, to be shared between the court, the tribunal, and the General Counsel on Grievances (now the Ombudsman).[18] This too did not happen.

Normative impact

The *Kerr Committee* was cognisant of the need for a system to improve public administration. The Committee conceded, without doing empirical work to substantiate the facts, that errors within public administration do occur, and that this possibility 'demonstrates the need for review'.[19] However, as the report said: 'The existence of institutions of the kind we have suggested should tend to minimise the amount of administrative error.[20] And further: 'If as a result citizens look more critically at and have the right to challenge administrative decisions, this should stimulate administrative efficiency'.[21] As Taylor noted too, 'Obtaining justice by the review of decisions finds its ultimate justification by improvement in primary decision-making'.[22] So although there was limited focus on this issue in the initial *Kerr Committee* report, largely because examination of the extent of wrong-doing was outside its terms of reference,[23] some, but minimal, attention was given to this issue.

Summarising the vision

In summary, the *Kerr Committee* contemplated a new body, a tribunal with the same powers as the initial decision-maker, that was to have government-wide jurisdiction. The body was also to have expert, independent members, and was to work quickly, informally, efficiently and cheaply, with procedures attuned to the particular jurisdiction and free of the restrictions inherent in the adversary process. A notable feature was the emphasis on the hearing as the vehicle for resolving disputes. Ultimately, the intention was that its decisions were intended to improve primary decision-making.

Have those features been realised?

At a conference in 1981, five years after the establishment of the AAT, Whitmore gave the innovations a mixed report card. Overall he said the objectives had not been met. He did identify some positive features. These included use of preliminary conferences as effective dispute solving methods; there was evidence that the Tribunal was shaping its procedures so that unrepresented applicants could be heard in an informal way and were being assisted by the Tribunal; and there was some tailoring of procedures to fit particular problems.[24]

However, his criticisms were that there was a tendency for the Tribunal to revert to adversarial techniques rather than take a more active inquisitorial role and that, in general, the Tribunal had failed to develop different processes from the judicial model. As he said the Tribunal had not developed procedures 'which are ... cheap, quick and more suitable than the adversary process'. He was also concerned about the regular use of counsel at tribunal hearings, a feature he believed imposed on the Tribunal 'formality in curial terms', and he

noted the absence of adequate administrative support to carry out the Tribunal's investigative functions.[25]

Developments since the 1970s

In the intervening period, despite the intentions of the *Kerr Committee* report to minimise the expansion of specialist tribunals by rolling their functions into the AAT, other specialist tribunals have been set up at the Commonwealth level, their existence often being sanctioned by the need to filter the volume of applications intended for the AAT.

There has until relatively recently also been a proliferation of tribunals in the states and territories. Nonetheless, as the *Gotjamanos and Merton* report[26] noted in 1996, despite the ad hoc manner in which tribunal development occurred, 'there is a surprising degree of similarity' between the diverse bodies. The report attributed this to the fact that legal practitioners generally headed these bodies and they 'adopt essentially similar practices in their approach to preliminary hearings and procedures in substantive hearings'.[27] In addition, the legislation establishing them 'exhibit(s) a degree of consistency in describing the manner in which the respective tribunals are to operate'.[28]

Those consistent features were:

- a more flexible approach to the receipt of evidence than would be permitted in a court;
- a merits based approach;[29]
- an informal method of operation - although this varies considerably, often depending on the degree to which the hearing room resembles a court;[30]
- administrative support systems - meaning physical premises, information technology, records management, financial systems, organisational structure and administrative and clerical staff;[31] and
- an increasing use of ADR.[32]

A common deficiency in the tribunals noted by the report was that there were:

- poor levels of information and public education available regarding tribunals and their operations, which makes it particularly difficult for self-represented applicants.[33]

Since then further developments have occurred, three of which have been significant. The first is the setting up of the civil and administrative tribunals as the general purpose model of tribunal in the states and territories; the second has been 'creeping legalism'; and the third is the switch from a hearing model for resolving disputes to a pre-hearing model of dispute settlement.

Proliferation and flexibility of the general jurisdiction model

The success of the general-jurisdiction tribunal model is demonstrated by its replication elsewhere in Australia and beyond our shores.[34] In particular, the flexibility of the model is indicated by its adaptation to create the multi-purpose CATS model in the states and territories.[35]

All but the Northern Territory, Tasmania, and South Australia have followed this path. In NSW there is a current inquiry about the possibility of further consolidation of its tribunals along these lines,[36] and South Australia is actively progressing the introduction of a

combined civil and administrative tribunal.[37] So despite the predominance of the CATS model, there is not yet a nationwide system of CATS in Australia, but this could emerge in time.

The flexibility of the multi-purpose model is demonstrated by its widespread adoption within Australia and more tentatively elsewhere.[38] That flexibility is necessary because the combined civil and administrative jurisdiction of these tribunals is considerably more complex than the jurisdiction of the federal tribunals and requires more detailed and sensitive rules for their operation. Nonetheless, the statutory framework, even of these tribunals, permits them to operate in a reasonably flexible manner.

Creeping legalism

There has long been explicit criticism of the formality of the processes adopted by tribunals. This was first observed in 1981 by Whitmore, who blamed lawyers' familiarity with judicial procedures. As he said, 'counsel prefer to play adversarial tactics. This means that the basic objectives of the Tribunal are ... being subverted to some degree by the legal profession'. As he explained: 'It is so difficult to persuade lawyers to get out of ingrown habits. The result is inevitable - extended hearings, delays and much higher costs, and of course these are the very things that the tribunal was set up to avoid'.[39]

Although Whitmore attributed the problem to lawyers, equal blame could be attributed to the procedural models which are found in the legislation. Perhaps understandably given the time of the innovation, the *Kerr Committee* proposals for tribunal procedure were overly influenced by the judicial model. The evidentiary elements of the legislation for the AAT included provisions for:

- notice;
- exchange of documents;
- representation;
- evidence given on oath or affirmation;
- receipt of oral and documentary evidence; and
- references to examination and cross-examination of 'parties'. [40]

These court-like processes pointed towards a level of formality and court-like process which undermined the stated objectives for the Tribunal. So although the statutory objectives shared by most of the major tribunals in Australia, are that the Tribunal, when carrying out its functions, 'must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick',[41] these have not been sufficient on their own to counteract the adherence by lawyers to models of process with which they are familiar.

Concerns about the judicialised model of tribunal which had eventuated at the Commonwealth level was echoed by NSW in developing its model for the Administrative Decisions Tribunal (ADT) in NSW in 1997, and by Victoria when it established the Victorian Civil and Administrative Tribunal (VCAT) in 1998. Despite this concern and the intention to avoid going down that path, the formality-of-process problem within tribunals has continued.[42]

The ten year review of VCAT in 2009 described the problem as 'creeping legalism'.[43] As the report noted in its summary:

> Within the community sector, there was a sense that the tribunal needed to get back to its roots. It was intended to provide quick, cheap and efficient justice for the general public. Yet many people think it had become too formal, with lawyers, expert witnesses and advocates dominating proceedings. It was often said the tribunal had allowed 'creeping legalism' to occur.[44]

A recommendation to combat this problem by some who made submissions to the review was to introduce 'much stronger rules against legal representation in the tribunal'.[45] The newest of the 'CATS' the Queensland Civil and Administrative Tribunal (QCAT), has done that and has provided that, with limited exceptions, a person may only be represented by a legal practitioner with leave.[46] Significantly, this has been the most litigated procedural provision in the Act since it was introduced,[47] illustrating that the support of the legal profession for the millenia long rules of evidence is hard to displace.

Whether these moves have been or will be effective to combat legalism is hard to assess. Experience of tribunals such as the Social Security Appeals Tribunal, in which lawyers appear in only a minority of cases, would suggest that it should be. What the moves do signify, however, is the recognition that legal representation is one of the factors that has tended to 'judicialise' tribunal proceedings.

Pre-hearing dispute resolution

The next most significant development has been the growing interest in avoiding the formal hearing as the principal process within a tribunal for resolving disputes. There has been a growing tendency to favour instead reliance on pre-hearing settlement processes, described compendiously as ADR process models.

Tribunals have generally been quicker than courts to embrace ADR processes. However, this is a relatively recent development. There was little attention in the *Kerr Committee* report to pre-hearing disputes. Nonetheless, Professor Whitmore noted that the Committee envisaged that there would be 'some research work coupled with a [proposed procedure whereby parties to a dispute would be encouraged to exchange written statements and to confer with a view to settlement] prior to a hearing.'[48] This was the genesis of the preliminary conference, which has become a mainstay of the AAT's process model. It is used to encourage parties to exchange written statements, to identify and narrow the issues, and to confer with a view to settlement prior to a hearing.

Many more procedures for pre-hearing dispute settlement have been devised and introduced since then. Such procedures are often standard in tribunals. Conciliation, mediation, case appraisal, and neutral evaluations have entered the lexicon. Their use has been encouraged at the Commonwealth level by successive recent Attorneys-General and is enjoined by the Model Litigant Principles under the *Legal Services Directions 2005* (Cth), backed up by costs orders, as well as by injunction in the legislation of some tribunals. For example, it is the default position in the compensation jurisdiction of the AAT,[49] and 'where appropriate' in applications to QCAT.[50]

The AAT introduced mediation in 1991 initially as a pilot program but from 1993 it was underpinned by legislation and has been available in all matters before the Tribunal. Conciliation conferences in its compensation jurisdiction were introduced on 1 July 1998 and are the norm unless they are unlikely to be useful.[51] The remaining ADR processes – neutral evaluation, case appraisal and conciliation for all jurisdictions – were introduced in amendments to the *AAT Act* in 2005.[52]

The significance of this move has not been publicised sufficiently. Of over 10,000 dispute resolution processes conducted by the AAT in 2010-2011 – only 20 per cent of these were hearings. Between 53 and 60 per cent of these matters which did not go to a hearing were settled using ADR.[53] The AAT is not alone. In QCAT 53 per cent of civil matters were

finalised through mediation in 2010-2011.[54] In VCAT no figures are available for 2010-2011 as the Tribunal is currently revising its data collection and developing a new framework.[55] However, 57 per cent of all matters were finalised through mediation in 2009-2010.[56] WA's State Administrative Tribunal in 2010-2011 resolved 57 per cent of contested matters using 'facilitative measures', of which 78 per cent of mediations had a successful outcome.[57]

So rather than hearings being the locus for dispute settlement, the preponderance of applications to tribunals are finalised following consensual settlement processes. These figures indicate that it is the pre-hearing, not the hearing processes of tribunals that are the engine rooms of their processes for settling disputes. In an era when the virtues of cheaper, personalised, and more accessible and speedy justice are being exhorted by governments, that is a notable change.

Back to the future: how should tribunals be presenting themselves? What is it that makes them distinctive?

Merits

The most precious of its attributes and the one tribunals should not underestimate is their central merits review function. Tribunals can be an independent arbiter of all aspects of a person's claim. That is a signal advantage over the courts. Being outside government also means that tribunals, although respectful of, are not bound by the policies affecting officials and are able as a consequence to look more closely at the merits of the individual case.[58]

Importantly, any tribunal which is at the apex of the hierarchy, such as the CATS and the AAT, can say to an applicant that this tribunal is the final tier of the merit review dispute resolution system. In addition the tribunal is able, if relevant, to consider evidence up to the date of the hearing, a role which courts, on appeal or review, are generally not able to perform.[59] That means that the person or corporation does not need to return to the agency with their information about a worsened medical condition or financial exigency, with consequential savings in time and avoidance of litigation fatigue. As Mr Lindsay Curtis, then President of the AAT (ACT), said in 1996, contrasting the role of tribunals with courts exercising judicial review:

> The tribunal['s] role ... is the more comprehensive one of deciding what ought to have been the correct or preferable decision. ... In this respect at least, review by the tribunal can be a more potent force in support of good administration than the exercise of judicial review by the courts.[60]

Diverse membership

A distinct advantage of tribunals is that their members have diverse backgrounds. Tribunals often have available to them members with a spectrum of knowledge, skills and experience. As a consequence, tribunals are better able to understand the niceties of the context in which the decisions under review are made.

Expert members give decisions of tribunals authority both within government and among those applicants affected by their decisions. Specialist, usually non-legally trained, members provide greater legitimacy to the tribunals' decision-making in areas which are technical, often complex or which have policy or other features which make particular understanding of the context important.

Justice Garry Downes, as President of the AAT, was assiduous in adding specialist members commensurate with new and active areas of the tribunal's jurisdiction. The AAT currently has actuaries, environmental scientists, aviation experts, psychiatrists, doctors, pharmacologists, as well as those with experience in the Tribunal's principal areas of

jurisdiction, such as compensation, tax, social security, veterans' affairs and freedom of information. Members with public sector experience, are also commonly found in the tribunal. These features of the AAT are replicated in other Australian tribunals with variation of specialities according to their jurisdiction.

Vindication of this feature of tribunals is evident from the *Moorhead* study in the UK. That study undertook a review of the literature on drivers of satisfaction about courts and tribunals for the public and participants for the period 2000-2008. One of the key results of the study, based on literature from the United Kingdom and internationally, was that there was a lower rate of satisfaction with courts than with tribunals.[61] One of the reasons, as found in a Scottish study included in the survey, was that 'a significant majority of respondents (about 70 per cent) felt judges were out of touch with ordinary people's lives'.[62] That claim cannot be made against tribunals, membership of which is designed to replicate the expertise of the original decision-makers in the particular areas of activity under review.

Flexibility of process

The intention that tribunals be flexible was designed to distinguish tribunals from courts. This is illustrated by the statutory objectives to offer processes which are 'fair, just, informal, economical and quick';[63] to conduct their proceedings 'with as little formality and technicality, and with as much expedition', as the statutes and the matters before them permit; and that the tribunal 'is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate'.[64]

These injunctions are not mere verbiage. The Victorian Court of Appeal in *Weinstein v Medical Practitioners Board of Victoria* confirmed that the words 'may inform itself' have work to do.[65] As Maxwell P (with whom Neave and Weinberg JJA agreed) said:

> The words 'may inform itself ...' were plainly intended to have work to do. They have a meaning and a purpose quite distinct from the meaning and purpose of the words 'not bound by rules of evidence'. Far from the phrase 'may inform itself' being negated or neutralised by other provisions, these words play a necessary part in defining the character of the formal hearing which the panel conducts. For the purposes of 'determining the matter before it', the panel is authorised to 'inform itself in any way it thinks fit' subject always to the overriding obligation to accord procedural fairness.

These objectives provide considerable scope for offering procedures tailored to the applicant and the type of matter. If a matter is urgent, preliminary steps can be curtailed or bypassed; if the matter raises limited issues of fact or law, the applicant can be encouraged to rely on pre-hearing processes such as case appraisal or a neutral evaluation. At the hearing, proceedings can be formal or less formal depending on the nature of the matter; a highly contested security or compensation matter with political or financial implications is aided by having competent counsel or legal practitioners and operating with a degree of solemnity commensurate with the matters at stake. By contrast, where the Tribunal has before it an unrepresented applicant seeking a percentage of shared care in relation to the children of a former relationship, or a denial of Newstart allowance for a failure to seek work, the procedures may need to be less formal. That is designed to encourage witnesses, who may be intimidated by having to appear in the tribunal setting, to relax sufficiently to provide appropriate evidence for the tribunal to reach the 'correct or preferable' decision. Attentiveness to the interests of applicants contributes to users' and the public's perception of the fairness and appropriateness of tribunal processes.

The importance of taking advantage of this opportunity for flexible processes is supported by the Moorhead study which found that parties are satisfied if they feel they have had a fair hearing, even if they did not achieve the outcome they wished.

> Judgments about the fairness of courts' or tribunals' process are, the evidence suggests, central to satisfaction with those courts and tribunals. Where rigorous comparison is made it is suggested that the influence of respondent views on process is stronger that the influence of their views on outcomes.[66]

As the earlier discussion indicates, procedural flexibility encompasses use of a range of dispute resolution tools with an increasing emphasis on process models other than the formal hearing. Use of such processes produces savings in financial and human terms, and reduction in the time taken.[67] At the same time, not all matters are suitable for resolution by non-adjudicative means. Where a significant objective of an applicant is to establish formal recognition of maladministration or wrongdoing by an employer, employees have less satisfaction with a mediated outcome.[68] Equally when an employer is keen to obtain a non-determinative outcome to enable it to continue a practice or sustain an interpretation of legislation which is of questionable legality, the motivation to avoid the publication of a precedent detracts from the overall value of an outcome obtained by non-adjudicative means. In other words the use of such forms of dispute resolution is a complex issue. Nonetheless, the success of these forms of resolving people's disputes is illustrated by the increasing use being made of them throughout tribunals in Australia.

Accessibility

A common rationale for the establishment of tribunals is that they should be accessible. The notion refers to a number of facets of tribunals processes: the visibility and availability of tribunal premises or location of hearings; prosaic customer service elements of the processes such as the physical environment, general service, information provided by staff, waiting times, catering and other facilities; [69] and the ability of the tribunal to accommodate a range of applicants.

The diversity of jurisdictions has required tailored processes. In practice this has meant that procedures can be set up so that a self-represented litigant in a recovery of a debt matter is treated differently to a pharmaceutical company seeking review of a decision denying it a patent which had the potential to earn millions of dollars for the company. Accessibility incorporates the ease of finding and using tribunal processes for the self-represented person.

Geographical accessibility has meant that tribunal members go on circuits from metropolitan headquarters; VCAT has begun to set up regional hubs which are staffed to serve populations outside capital cities;[70] and hearings can and do take place in locations of convenience for witnesses, particularly busy professionals, and for applicants such as those in nursing homes and hospitals. I ran a hearing, complete with barristers, recording equipment, and support staff in an Intensive Care Unit of a local hospital. VCAT has raised the possibility of use of large mobile vehicles, akin to library or Red Cross services, or co-locating with community organisations as other ways to heighten the access of people to their administrative justice bodies.[71]

Accessibility has also been enhanced by increased co-location of tribunals, where sharing of services and facilities can occur. The emergence of civil justice/dispute resolution centres in major centres to rival court-houses as the locus for all the dispute resolution services for users is occurring. This enhances users' perception of tribunals' impartiality, objectivity and independence from government. The establishment of recognisable facilities in which tribunals are located facilitates recognition of the importance of tribunals. Their greater visibility is also an effective means of encouraging people to take advantage of tribunals' services. Evidence supporting these features of tribunal developments was provided by QCAT's 2011 *Annual Report* which recorded that the tribunal had received 37 per cent more applications in that financial year than the combined tribunals it had absorbed.[72]

IT developments are also facilitating access. Increasingly tribunals are offering secure online portals for lodgement, uploading, exchange and sharing of documents, with consequential saving of applicants' and practitioners' time and money. Tribunals have adapted to use of SMS and other information technology communication tools, and use social media. Flexible processes also lead to increased accessibility. For example tribunals can offer hearings, formal and informal, on the papers, by telephone, video, at all times of day and night. These features of the adaptability and innovative procedures within tribunals are leading to increasing satisfaction of users.

Cost-effectiveness

Tribunals have long out-performed courts as the locus of adjudicated settlements of legal disputes. Volume alone, however, is insufficient as a noteworthy feature of the tribunal model. Are tribunals cost-effective? The answer is it depends. Some clearly are; others are more costly. All are cheaper than courts. Many factors impact on the cost of tribunal operations. The higher the volume the less expensive are individual cases; the smaller the volume, the higher the cost. But matters such as the nature of the dispute and whether it involves extensive evidence, multiple witnesses, and requires senior legal practitioners, can significantly increase the cost of the procedures. The length of the matter is also a factor and whether it goes to hearing or settles during a pre-hearing process can dramatically affect costs. No straight line comparison per cost of hearing is feasible.

Nonetheless, it is worth noting that the report on VCAT by the Hon Justice Kevin Bell[73] recorded that in its ten years of operation VCAT had finalised about 872,000 civil and administrative disputes, that is, roughly 87,200 per year, at an average cost of $274 per case.[74] Figures from 2010-2011 annual reports indicate: a VCAT hearing averaged $440 per matter;[75] the QCAT cost per finalised hearing was $685;[76] and the SAT's cost per case was $3,244.[77]

For the financial year ending 2011, a VRB cost per finalised hearing was $1,544;[78] for SSAT the cost was $2239.[79] The AAT average cost of a hearing was $15,754 but only $3,362 without a hearing.[80] Since the cost of a hearing at the Federal Court was $19,074 per case in 2007-2008,[81] and undoubtedly more than that in the following financial year, it is clear that most tribunals are significantly cheaper, and all cost less, than a court hearing.

As the information provided earlier indicates tribunals provide a generally cost effective dispute resolution process. Tribunals can further minimise transaction costs for parties by reducing the number of times parties need to attend the tribunal, and by setting out these requirements in standard directions.[82] Continued or increased use of pre-hearing dispute resolution mechanisms also reduces costs. A UK study - the *Annual Pledge Report for 2008/09* which records the results of the policy of UK Government Departments of using ADR where appropriate, reported that ADR had been used in 314 cases with 259 being settled (a success rate of 82 per cent) and the cost savings was estimated to be £90,200,000.[83]

So tribunals are largely fulfilling their intended cost-minimisation objective and they do so in ways the courts either cannot, like merits review, or can only do so to a modest extent such as through use of ADR.

Where next?

In summary, there is room for improvement by tribunals on fronts such as improved communication strategies, including publicising their advantages. Challenges are present on both cost and technical grounds but use of the latest communication facilities will increasingly combat this problem. For example, online portals have been introduced in some

tribunals and will become more generally available over time. Achieving consistent outcomes is another area of criticism of tribunals given that strict doctrines of precedent do not apply in tribunals. For the CATS, the challenges are also due to the disparate nature of their combined jurisdictions; and for federal tribunals, from the geographical spread and disparities in size of registries. Again improvements are possible through, for example, introduction and use of tribunal appeal panels. There is limited circuit involvement of staff in non-hearing processes but this will emerge with a recognition of the centrality of these forms of dispute resolution services within tribunal. Such innovations could see tribunals become even more accessible to the public they serve.

Steps to improve primary decision-making are also occurring. Tribunals have a strategic role in ensuring that information arising from their decisions is effectively disseminated to government and a strategic advantage in the information they glean about deficiencies in government. They can then advise agencies of serious systemic problems which can be addressed by the primary decision-maker.[84] This can be done through the Annual Report, which can include recommendations that the Attorney-General seek rectification from the relevant public body as appropriate,[85] or by other structured means. Both VCAT and QCAT have provisions imposing duties on their Presidents to inform relevant Ministers of issues they perceive, as well as improvements to the tribunal service which could be made.[86]

Less formal processes such as ad hoc liaison meetings with government have been adopted by other tribunals, including the AAT, to achieve the same ends. A missing link in the package of administrative law reforms introduced by the *Kerr Committee* was a body to monitor the implementation within government of decisions or recommendations by the accountability agencies. With the increasing development of interest in integrity issues and implementation of monitoring processes to ensure lawful, ethical and effective outcomes, that may come. These strategies also have the potential to contribute to the general improvement of public administration, to the benefit of the public at large.

Conclusion

A leading Canadian commentator and judge once said whimsically of tribunals:

> Although [tribunals] have become entrenched and assert competence – no one seriously questions our right to exist – we have become, with our strength, increasingly confused over what our role is and how to play it. Picture the stage. Hovering around it are complementary players. We have the roaming courts, exercising parental supervision over their adolescent offspring and hesitating very little to curb perceived excesses. We have, too, the peripatetic bureaucrats, entering and exiting as the impulse moves them, regardless of what the script says. In the wings are the elected politicians, waiting for their cue to jump in and admonish, but not quite sure what their cue is. In the audience sits a restless public who had thought we had the starring role but sees us forcefully and regularly upstaged by what was supposed to be a supporting cast. And there we stand on centre stage, scratching our heads, with an incomplete script, too many directors, and endless rehearsals. No one wants to close us down, but we are very nervous about the reviews.[87]

I do not suggest that this is the collective and current position of Australian tribunals. Nonetheless, in my view, her words do echo the challenge of the High Court in *SZGUR*. It is time for tribunals 'to carve out a philosophy of their own existence'.[88] It is time as a leading UK academic said recently of their investigative role: 'Tribunals have yet to articulate a fuller vision of what type of active approach they aspire to undertake'.[89]

Other warnings have been given. The UK Judicial College said recently that it is of paramount importance that the distinctive features of tribunals are understood and protected.[90] The Hon Michael Black said in a speech to the AAT in March this year, that it was critical to remember the principles on which the AAT, the body which provided the blueprint for tribunals in Australia, was founded, to renew the commitment to its foundation

principles, and to 'maintain the rage' with respect to innovation. It was too easy, he said, to slip back into old ways. These are the challenges that lie ahead.

There are distinct benefits for tribunals in better publicising of their advantages and greater self-promotion. The benefits and the challenges ahead for tribunals were aptly summed up in these words in the *Leggatt Report*:

> Only so will tribunals acquire a collective standing to match that of the Court System and a collective power to fulfil the needs of users in the way that was originally intended'.[91]

As the Report went on, there needs to be a:

> renewed sense amongst tribunals and their staff that they are there to do different things from the courts, and in different ways, but with equal independence. In many respects, it is a more difficult task'.[92]

Endnotes

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9 Id at [293].
10 Id at [295(g)].
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12 Id at [[295(h)].
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18 Id at [292].
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27 Id at 95.
28 Ibid.
29 Ibid.
30 Id at 96.
31 Id at 97.
32 Id at 103-4.
33 Id at 98, 99.
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45 Ibid.
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REVIEW OF ADMINISTRATIVE CONDUCT AND DECISIONS IN NSW SINCE 1974 – AN AD HOC AND INCREMENTAL APPROACH TO RADICAL CHANGE

Chris Wheeler*

This paper is in part a 'folk history' of the NSW Ombudsman and key changes in its operating environment since the *Ombudsman Act 1974* was passed by the NSW Parliament. The focus of the paper is the traditional administrative review role of the Ombudsman and changes in the administrative review environment in NSW.

The history of the development of the functions and powers of the Ombudsman mirrors the changes that occurred in the same period in the overall administrative review framework in NSW. These changes have been ad hoc and incremental, generally in response to: scandals; Royal Commissions or inquiries by Parliamentary Committees; amendments to legislation introduced by the Opposition, independents or minority party MPs holding the balance of power during Parliamentary debates on Bills; or initiatives that can be traced directly to the personal views, philosophies or enthusiasms of a Minister for Justice,[1] an Attorney General[2] and a Premier.[3] An alternative title for this part of the paper could be 'More By Good Luck Than Good Planning'.

The paper also considers changes in the public sector's attitude to issues such as oversight by the Ombudsman, customer service, complaints, whistleblowers and so on.

The final section of the paper looks to the future, considering whether it is time to recognise an integrity branch of government, whether it is time to review the jurisdictions, structures and approaches of administrative review type bodies, whether access to administrative review complaint mechanisms should be made more customer friendly, where the courts might take procedural fairness and how the Ombudsman's complaint handling approach could change to reflect changes in the capacity of agencies to deal with complaints.

The NSW Ombudsman

Creation of the Ombudsman

The present system of administrative law in NSW is largely a result of growing concern across Australia in the 1960s about the growth in bureaucratic discretionary decision making. In response, a number of reviews were conducted in the early 1970s which resulted in recommendations which constituted the basis for what became known as the *New Administrative Law.* In the Commonwealth sphere the most important of these reports was the *Kerr Report*, which recommended the establishment of a general administrative tribunal to review administrative decisions on the merits, codification and procedural reform of the system of judicial review, and the creation of an office of Ombudsman.

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The establishment of the Ombudsman in NSW arose out of a 1973 report by the NSW Law Reform Commission (NSWLRC) entitled *Appeals and Administration.* In that report the NSWLRC recommended a three tier system for reviewing administrative decisions:

- tier 1 – an Ombudsman – to handle complaints about administrative conduct;
- tier 2 – a Public Administration Tribunal – to be an appeal body, but also to hold enquiries into official actions; and
- tier 3 – a Commissioner for Public Administration assisted by an Advisory Council – to examine powers exercised by public authorities and recommend changes.

In response to the NSWLRC's report, the then NSW government was initially only prepared to create an Ombudsman. It was lukewarm about even going that far and apparently the then Minister for Justice, The Hon John Maddison, who had been talking about an Ombudsman since 1964,[4] had to threaten to resign over the issue to get the government to agree to proceed. The *Ombudsman Act 1974* commenced on 12 May 1975.

While the creation of an Ombudsman in 1974 may have been an idea whose time had come, it was not an idea that originally had strong support across government. As one commentator noted: 'The Ombudsman has toiled long and hard in a hostile environment where it has been treated as an interloper by the courts, as an alien by agencies, has been unfamiliar to lawyers and has been largely abandoned by its natural protector and ally (Parliament)'.[5]

Interestingly, it took 22 years before anything equivalent to the proposed Public Administrative Tribunal was established in NSW, the Administrative Decisions Tribunal, in 1997. Today, 38 years later, there is still no Commissioner for Public Administration or an Advisory Council as recommended by the NSWLRC.

Another driver for the establishment of an Ombudsman in NSW was the fact that such a position had already been established in most other Australasian jurisdictions (New Zealand in 1962, Western Australia in 1971, South Australia in 1972, Victoria in 1973 and Queensland earlier in 1974).

Expanding jurisdiction of the Ombudsman

The other significant change over time has been the gradual expansion of the Ombudsman's jurisdiction. Starting with a jurisdiction that was solely public sector (but not all of the public sector), over the years the Ombudsman's jurisdiction has been expanded by successive governments, to include a large private sector component. As can be seen in the Annexure to this paper, over time the Ombudsman's role has been expanded by Parliament to cover:

- oversight of police investigation of complaints about police officers (a role that has changed significantly from a very hands-off external review to the ability to directly monitor and investigate);
- Freedom of Information complaints (a role transferred to the new Information Commissioner in 2009);
- auditing of records of bodies authorised to intercept telecommunications;
- complaints about the provision of community services (by both public and private organisations);

- coordinating the work of the Official Community Visitors,[6]

- oversight of the system that deals with allegations against people who work with children (in both public and private organisations) that they have behaved inappropriately;

- notification of employment related child protection allegations (by both public and private organisations);

- convening the NSW Child Death Review Team and providing support and assistance to that Team;

- reviewing the causes and patterns of the deaths of children in care, those who died as a result of abuse or neglect or in suspicious circumstances and those who died in detention, and reviewing the causes and patterns of the deaths of people with disabilities who died in care (the purpose of these reviews is to identify trends and make recommendations to prevent or reduce the risk of similar deaths in the future);

- reviewing the implementation of legislation giving greater powers to police[7] (since 1998 the Parliament has required the Ombudsman independently and impartially to analyse the exercise of new powers given to police in approximately 30 new laws);

- determination of Witness Protection appeals[8] (the Ombudsman's only determinative role);

- oversight of controlled operations;

- oversight of compliance by law enforcement agencies under the *Surveillance Devices Act 2007;*

- oversight of powers to conduct covert searches (under the *Law Enforcement (Powers and Responsibilities) Act 2008*); and

- oversight of the implementation of whistleblowing legislation, including auditing, monitoring, investigating, training and guidelines.

The NSW Ombudsman's very broad jurisdiction covers what appears at first to be a range of disparate functions. However, there is a common thread running through the Ombudsman's functions – all involve an 'independent review' role given to the Ombudsman by the Parliament. This independent review role can be divided into four distinct categories of functions:

- administrative reviews – including handling complaints about individual administrative conduct and decisions of public sector agencies and officials, and of equivalent bodies and persons, and witness protection appeals;

- compliance reviews, these include:

    - reviewing compliance with the law and good practice (eg compliance with procedural fairness and good practice in investigations, use of police powers, controlled operations, auditing of telecommunication interception records);

    - reviewing compliance with the law and good practice in the handling of and response to allegations/complaints (eg about police, inappropriate conduct towards children, and community services); and

- reviewing compliance with appropriate standards of service provision (eg provision of community services);

- death reviews – reviewing the courses and patterns of the deaths of certain children and people with disabilities; and

- legislative reviews – reviewing the implementation of certain legislation that expands the powers of police.

To ensure that each of the functions of the Ombudsman is given due attention and is performed efficiently and effectively, the office is currently structured around jurisdictions. The three operational branches of the office, each with its own budget and staff and headed by a Deputy Ombudsman,[9] are:

- the Public Administration Branch – covering all aspects of the traditional role of the Ombudsman to deal with complaints about government;

- the Police and Compliance Branch – covering the police, secure monitoring and legislative review roles; and

- the Human Services Branch – covering community services, employment related child protection roles and death review roles.

There is also a Special Projects Division that focuses on major projects, particularly involving issues that cross the jurisdictional boundaries of one or more branches, and also a Corporate Branch.

Changing focus of the Ombudsman

The focus of the work of the Ombudsman has changed since 1975. In many jurisdictions, when an Ombudsman was established, it was said in support of the concept that the Ombudsman would be the 'citizen's defender'. Over time, the NSW Ombudsman has shifted from focussing solely on individual complaints to looking at systemic issues brought to light by complaints and an oversight of complaint handling systems. Although the Ombudsman can still be called the 'citizens' defender', the apostrophe has been moved!

Over time there has been a fundamental change to the work of the Ombudsman, from a reactive formal approach focussing on identifying problems, to a more pro-active informal approach where the focus is on adding value. Part of this change was described by Rick Snell, Senior Lecturer in Administrative Law, University of Tasmania, as a move away from a 'complaint-focused incident-based approach to problem solving' to a more 'institution-focused and performance-based approach'.[10]

The ways in which the Ombudsman has gone about implementing this change have included 'own motion' investigations focussing on systemic issues, audits of complaint handling systems, and offering training and guidance to agencies on complaint handling. A side effect of the change has been the Ombudsman moving from being perceived by agencies within its jurisdiction as a threat, opponent or nuisance to being seen in a more positive light.

There has also been a change in the subject matter of Ombudsman investigations and inquiries. Originally these focused solely on the substantive issues raised in complaints. Over time this focus broadened to include consideration of how these substantive issues were dealt with by the organisation concerned. This is particularly so in the areas of jurisdiction where the Ombudsman primarily oversights how agencies deal with complaints ie

in the police and employment-related child protection jurisdictions. In these areas, where the Ombudsman conducts investigations, they are usually into how the agency investigated the substantive issue, not of the substantive issue itself.

Another significant change in the work and approach of the Ombudsman has been the development and publication of detailed guidance for agencies on expected standards of conduct and administrative practice. Starting in 1995 with the *Guidelines for Effective Complaint Management* that were published as part of the Ombudsman's Complaint Handling in the Public Sector (CHIPS) program and the *Good Conduct and Administrative Practice Guidelines for Public Authorities and Officials*, the Ombudsman has published (and often re-published) a large number of guidelines for the public sector.[11] The contents of these guidelines can be categorised as: guidance on good conduct and administrative practice; guidance on good complaint handling; and guidance on rights (for example in relation to local councils, covering rates and charges, and proposed developments).

The guidelines have been warmly received across the NSW public sector and many have been copied (with consent and acknowledgement) by numerous watchdog bodies and line agencies across a wide range of jurisdictions, in Australia, the UK and Canada.

Growing out of these guidelines and also as a result of new statutory training roles in the Ombudsman's community services and public interest disclosures jurisdictions, the Ombudsman has implemented a major move into the field of training and education. The Ombudsman now runs a significant training and education function providing workshops and other activities for public sector agencies, non-government organisations, and consumers of community services across NSW (and across Australia).[12]

Greater independence of the Ombudsman

Central to the effectiveness of an Ombudsman is the position's actual and perceived degree of independence from executive government.

The level of independence of the NSW Ombudsman was a significant issue for many years, and a regular topic discussed in most *Ombudsman Annual Reports* until the mid 1990s. As the then Ombudsman said in a special report to Parliament in 1990:

> The concept of the Ombudsman's independence from the executive is no mere issue of academic principle; rather, such independence is a practical necessity for an organisation whose task is to investigate citizens' complaints about maladministration by public authorities. Ministers are ultimately responsible for public authorities and governments have a tendency to view even constructive criticism of authorities under their control as criticism of their political administration.

For the first 10 – 15 years or so of its operation there were significant limitations on the Ombudsman's independence:

- for the first nine years the Ombudsman's staff were all employees of the Premier's Department – it was only in 1984 that the office of the Ombudsman became a separate 'administrative office' with the Ombudsman given departmental head status;

- for the first 15 years the Ombudsman could only delegate the exercise of his functions to a 'special officer' of the Ombudsman, but needed the concurrence of the Premier to appoint an officer of the Ombudsman as a 'special officer'; and

- for the first 16 years the appointment of a Deputy or Assistant Ombudsman could only be made by the Governor on the recommendation of the Premier – around 1990 the Act was amended to provide that the Ombudsman could make such appointments directly.

Other significant changes that increased the Ombudsman's independence were:

- the establishment in 1990 of a Joint Parliamentary Committee to oversee the operations of the office; and

- the amendment to the *Ombudsman Act 1974* in 1993 permitting the Ombudsman to present default,[13] special[14] and annual reports directly to the Presiding Officers of Parliament rather than through the relevant Minister.

Today the Ombudsman is generally seen by both the Executive and the Judiciary to be more an officer of the Parliament than of the Executive.[15] This reflects the fact that the Ombudsman can only be removed from office by the Governor upon the address of both Houses of Parliament, and the Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission has a veto power over the appointment of the Ombudsman.[16]

Changes in the mechanisms available for the external review of administrative decisions and/or administrative conduct and integrity

The *Ombudsman Act 1974* was originally the only legislation in NSW that established oversight bodies or other avenues of appeal or review of administrative decisions or conduct, laid down procedures and practices for the receipt, assessment, investigation or other handling of complaints, and set up oversight mechanisms in relation to integrity. Apart from a small number of ad hoc tribunals with limited jurisdiction and the Auditor General (whose focus at the time was financial compliance), the NSW Ombudsman was the first body established in NSW with jurisdiction to review the administrative decisions, administrative conduct or general integrity of public sector bodies.

The *Ombudsman Act 1974* was followed closely by the *Privacy Committee Act 1975* and four years later by the *Police Regulation (Allegations of Misconduct) Act 1979.* Apart from the *Judicial Officers Act 1986* that created the Judicial Commission, there was little further legislative action until the next change of government. This saw the passing of the *Independent Commission Against Corruption Act 1988* (ICAC) and the passing of the *Freedom of Information Act 1989* (FOI Act)

The establishment of the ICAC in 1989 filled a gap that none of the Australian Parliamentary Ombudsman were intended to address, that is, serious corrupt conduct which could only be discovered or investigated effectively through the use of covert powers of surveillance, such as listening devices and telecommunications interception. While the jurisdiction of the ICAC overlaps the jurisdiction of the Ombudsman in his administrative review role, the focus of the work of each body is different. The focus of the Ombudsman in this area is to ensure that public officials and agencies perform their public duties appropriately. The focus of the ICAC is on public officials who act in ways that are fundamentally opposed to their public duties, that is, corrupt conduct. It could be said that the nature of the role of corruption fighting bodies is in many respects more akin to law enforcement than to administrative review. Differences or distinctions between corruption fighting and complaint handling are listed in Annexure A.

In the 1990s, a number of bodies were established whose roles included reviewing aspects of administrative decisions or conduct and integrity in the NSW public sector, for example, the Community Services Commission and the Health Care Complaints Commission in 1993, the Police Integrity Commission in 1996 (established in response to the recommendations of the NSW Police Royal Commission), the Administrative Decisions Tribunal in 1997 and the Privacy Commissioner in 1998 (both established under legislation championed by the then Attorney General, the Hon Jeff Shaw).

A timeline of the establishment of bodies with administrative review roles and the conferring of administrative review jurisdictions is set out in Annexure B.

In the 38 years since the passing of the *Ombudsman Act 1974* there has been a proliferation of legislation and organisations that provide for the external review of administrative decisions, administrative conduct and integrity.[17] Today, there are over 17 Acts of Parliament that provide for the handling of complaints about public sector decisions or actions.[18]

Bodies and their functions in the review of administrative decisions and conduct in NSW are the:

- NSW Ombudsman (often referred to as the State's 'general jurisdiction' watchdog body) – complaints about administrative decisions, administrative conduct and integrity; complaints about the provision of community services (public and private sectors); oversight of complaints about police'; and, oversight of complaints about child protection related reportable conduct in the context of employment (public and private sectors);

- Administrative Decisions Tribunal – reviews of certain administrative decisions;

- Information Commissioner – complaints about breaches of the *Government Information (Public Access) Act 2009*;

- Privacy Commissioner – complaints about breaches of the *Privacy and Personal Information Protection Act 1998*;

- ICAC – complaints about corrupt conduct;

- Police Integrity Commission (PIC)– complaints about serious misconduct by police officers;

- Judicial Commission – complaints about the conduct of judicial officers; and

- Audit Office – public interest disclosures about serious and substantial waste in the state government agencies.

Changes in public sector attitudes to oversight, customer service, transparency and complaints

Government attitude to the Ombudsman

When the Act was introduced, the jurisdiction of the Ombudsman in relation to the public sector was significantly limited – both local government organisations and police had successfully argued that they should not be within the jurisdiction of the Ombudsman. Jurisdiction was extended to local government councils in 1976 and to individual councillors and council staff in 1986. From 1979 the Ombudsman only had powers to review police investigations into complaints about police; this was expanded in 1984 to allow the Ombudsman personally to re-investigate complaints but the Ombudsman could only be assisted by seconded police officers.[19] The limitations on the jurisdiction of the Ombudsman to investigate complaints about the conduct of police were not fully addressed until 1993[20] in response to the recommendations made by the Parliamentary Committee on the Ombudsman following its inquiry into the handling of police complaints.

The initial negative reaction to the establishment of the Ombudsman persisted for many years, waxing and waning with both the electoral cycle and the length of time that a particular party was in government. The longer a government was in office, the more

negative the attitude of that government to the Ombudsman was likely to be. The NSW experience reflects the experience of many other Ombudsmen. The pattern was identified in the early 1980s by the then Saskatchewan Ombudsman, David Tickell, who made the following comments in his *1984/85 Annual Report*:

> To some extent, it may be inevitable that an Ombudsman who works up to his mandate will have something other than a smooth working relationship with the executive branch of government…Sooner or later there is a tendency to shoot the messenger when governments don't like the message…
>
> Having observed the approaches and experiences of a dozen or so provincial Ombudsmen, I can say with some certainty that every new Ombudsman enjoys a honeymoon period of variable duration with his or her government. From my own experience, I can also say with certainty that a change of government also brings with it a period of 'calm' and an exceptional opportunity to produce good results for his complainants…The honeymoon can last for months or even years, if the Ombudsman is adept, and the government is genuinely committed to working with a representative of the public.
>
> Issues rather than personalities usually end the honeymoon and this is perhaps as it should be.

The Saskatchewan Ombudsman went on to list a number of what he referred to as 'realities' about the relationship between the Ombudsman and the government of the day, including:

> Governments, for reasons that escape me, have a desire to appear infallible, or as nearly infallible as possible, and tend to view even constructive criticism as 'political' criticism.
>
> Governments dearly hope that the Ombudsman will keep his issues internal to government systems and not make them the subject of public discussion and debate.
>
> In Saskatchewan, governments will oppose structural moves to firm up the Ombudsman's accountability to the legislature and to reduce his dependence on the executive branch. This occurs, I assume, because the executive branch fears some loss of control over the Ombudsman's activities.
>
> Unless an Ombudsman operates on the premise that a satisfied government overrides his other responsibilities, his working relationship with government will never be entirely harmonious. Where a government is displeased, an Ombudsman can anticipate paying some kind of price for its displeasure…

The relationship between the NSW Ombudsman and governments of NSW closely followed this pattern over the first 20 years of its operation in particular. In those years the standard response was for Ministers to defend their agencies or officials and attack the credibility of the Ombudsman's report or decry the interference of the Ombudsman in the running of an agency or function.[21] As a former Ombudsman David Landa noted in a Special Report to Parliament in 1990 entitled: *Independence and Accountability of the Ombudsman*:

> Ministers are ultimately responsible for public authorities and governments have a tendency to view even constructive criticism of authorities under their control as criticism of their political administration…
>
> …governments dislike and react against public discussion and debate of issues of public administration, such as often occurs where the Ombudsman decides to report to Parliament.

An indication of the waxing and waning, but largely negative, attitude of governments to the Ombudsman in the early years can be seen in the first edition of the *NSW Public Sector Code of Conduct: Policy and Guidelines* of June 1991. While the code referred to a range of integrity related legislation and organisations (for example the ICAC, *ICAC Act 1989*, *FOI Act 1989*, *Crimes Act 1914*, and the *Public Finance and Audit Act 1983)*, it contained no mention of the *Ombudsman Act 1974* or the Ombudsman. Anecdotally, it was indicated to me by a highly credible source within the Premier's Department that this was intentional and reflected certain strongly held views of the then Premier about the then Ombudsman. The failure to acknowledge the existence of the Ombudsman was unchanged in November 1993 when the then government issued its *Code of Conduct for Special Purpose Bodies* and was only rectified in 1996 with the publication of the *Code of Conduct for NSW Public Agencies: Policy and Guidelines* and the *Code of Conduct and Ethics for Public Sector Executives*.

This anecdote highlights an important variable in the attitudes of governments to the Ombudsman, ie the personal relationship and interaction between each of the five NSW Ombudsman and the governments of the day. Although all were lawyers, each had a different background, personality, and approach to problems and priorities. Each faced a different attitude to the office, or personally, on the part of the government of the day; in practice this was primarily reflected in the attitude of the Premier. Both the second and third Ombudsman had often problematic relationships with their Premiers and their interactions were on occasion quite robust. These interactions were primarily triggered by disputes over resourcing, limitations on the jurisdiction and protecting the independence of the office.

The relationship between the governments and the Ombudsman was also impacted by specific events, for example, particular reports of the office that became public and caused embarrassment. On one occasion in the mid 1980s, a newspaper headline which stated that the Ombudsman was seen as being the only opposition in the state had particularly disastrous consequences for the office for some years. This was because it led to a perception by the government that the Ombudsman was a political player and should be treated as such. It took many years for the government and the NSW public sector generally to realise that the Ombudsman was actually impartial and not a political player.

From my experience and from what I have seen of the role of the Ombudsman in other jurisdictions, a significant downside of a negative government perception of the Ombudsman is that there appears to be an almost direct correlation between the effectiveness of the office and the government's perception of the role being performed by the office. Effectiveness is at a minimum when an Ombudsman is viewed by the government of the day as the de facto opposition or a 'thorn in the side' of government. Effectiveness improves markedly when there is a realisation by government that the Ombudsman is actually there to help it do its job better by being a mechanism for alerting it to serious problems experienced by the public and suggesting sensible and practical ways to address those problems.

Thankfully, over the past 15 or so years fluctuations in the relationship appear to have become less severe. The turning point seems to have coincided with a marked change in the reaction of Ministers to Ombudsman reports that were critical of agencies or individuals within their portfolios.

This change occurred around 1995 when Ministers started routinely to embrace the Ombudsman's recommendations. At least initially, however, this did not necessarily extend to ensuring that the recommendations were actually implemented. In my opinion, this change was due to a realisation by Ministers that the previous approach, which often saw them rejecting the recommendations and attacking the Ombudsman, created controversy and bad press, while the new approach did not. Ministers may also have been sensitive to the likely reaction of the media and the public where they had to choose between believing an apolitical Ombudsman and a political Minister. The new approach may also have been influenced by an amendment to s 27 of the *Ombudsman Act 1974* in 1993, which provides that where the Ombudsman is not satisfied that sufficient steps have been taken in due time in consequence of a s 26 ('wrong conduct') report, the Ombudsman can make a report directly to the Parliament (not to the Minister as was previously the case). The responsible Minister is then obliged to make a statement to the relevant House within 12 sitting days after the report is made by the Ombudsman to the Presiding Officer of that House.[22] Because of the high rate of subsequent compliance with Ombudsman recommendations, this power has needed to be used on few occasions.

On the positive side, governments have also come to realise that successive Ombudsman have seen their role as trying to assist the public sector to do a better job, not just to criticise with the benefit of hindsight or to oppose government for the sake of it. The change in

approach by Ministers can be seen as a sign of a maturing relationship between the Ombudsman and the executive government.

Public sector attitude to the Ombudsman

For a number of years after its establishment, the Ombudsman faced significant opposition from across the NSW public sector. This was particularly unfortunate given that, as the then Minister for Justice assured the Parliament in his second reading speech on the Ombudsman Bill in 1974,:

> …the creation of this office is not to be seen as an attack on the integrity or efficiency of public officials. It recognises the complexity of administration and … the varying qualities in decision-making as exist in all human beings.[23]

The attitude of the NSW public sector to the Ombudsman was a reflection of the wider public sector attitude to Ombudsmen across Australia. In an article entitled 'Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma', Rick Snell, then Senior Lecturer in Administrative Law, University of Tasmania,[24] referred to submissions made to a 1991 Senate Committee Review in the following terms:

> The tenor and tone of many of the agencies' submissions to the 1991 Senate Review highlighted that even after 15 years on the scene, the Ombudsman [in this case the Commonwealth Ombudsman], toothless or otherwise, was still regarded as an intruder.

An extreme manifestation of the negative attitude of some agencies to oversight by the Ombudsman was highlighted in the following article that appeared in *The Sun-Herald* of 13 February 1983:

> P**olice spying claims shock**
>
> Allegations that NSW police have compiled dossiers on senior members of the State Ombudsman's Office have shocked political circles. According to the allegations, police put the Assistant Ombudsman, Miss Susan Armstrong, a prominent legal academic, under surveillance and compiled a list of meetings and activities she attended.
>
> The storm broke when Miss Armstrong was told by the Ombudsman, Mr George Masterman, QC, that Mr Rex Jackson, Corrective Services Minister, claimed to have a record of her activities compiled by police. Miss Armstrong was asked to provide Mr Masterman with a list of meetings and activities she had attended for the past year.
>
> Other members of the Ombudsman's staff have discovered that a senior policeman admitted to having investigated the private life of one of their colleagues.
>
> The allegations have been strongly denied by the Commissioner of Police, Mr Cec Abbott who said: 'Such a thing would be completely against our ethics. We have far more important things to do than following Miss Armstrong around'.

I can personally confirm the claim in the second last paragraph (which from my recollection occurred prior to the Ombudsman's reported conversation with Rex Jackson) as I was present when a senior officer of the then Police Internal Affairs Branch informed the Assistant Ombudsman that the police had both of us under surveillance.[25]

The context in which this conversation took place is illustrative of the earlier attitude of the NSW Police to oversight by the Ombudsman. In the first three to four years of the Ombudsman's police oversight role, all telephone contact with police in relation to that role was required to be with certain senior officers of the Police Internal Affairs Branch (PIAB), and all correspondence was directed to the Commissioner of Police. Prior to 1993, the staff of the Ombudsman responsible for oversighting the handling of police complaints had not even met those senior officers of the PIAB to whom they talked regularly over the phone. It

was finally decided that this situation needed to change and a meeting occurred, which was followed by several more over the next 12 months. CHECK.[26]

In his *1988/89 Annual Report* the then NSW Ombudsman, George Masterman QC, noted that:

> Some public authorities seem to regard the Ombudsman's Office as aggressive and obstructive. It is understandable that the Ombudsman may come into conflict with some public administrators and their political masters, and that he will sometimes be regarded as a 'disturbing element' in the system.
>
> Traditionally, government departments have operated away from the public eye. To have their operations examined by outside investigators may, indeed, be disturbing to some officials and may even be perceived as an attack on the government of the day. Being questioned about administrative procedures and times and dates, and being exposed to close scrutiny, has at times caused disquiet within public authorities.[27]
>
> The fact that not all public authorities respond to this Office in a positive way stems partly from the past secretiveness of public administrators; officials have certainly not been accustomed to having their everyday files pored over by outside investigators. Some resent being asked to respond to enquiries by a fixed date and, in the few cases where it is necessary, to produce documents on demand. (This usually only happens when there has been no useful response to a series of requests.)[28]

The view in some quarters of the public sector that the Ombudsman was 'aggressive' may well have stemmed from the number of investigations undertaken by the then Ombudsman using his Royal Commission powers.[29] Another reason for the view may have been a number of 'raids' carried out in the 1980s. At that time there were occasions where an agency either failed or refused to provide documents required to be produced by formal notices issued by the Ombudsman. In those circumstances staff of the Ombudsman would attend the office of the CEO of the agency, without notice, and take immediate possession of the documents. Thankfully, the need for such unannounced visits is now very rare as it is now unheard of for an agency to refuse to comply with a formal notice issued by the office.

Another indicator of the negative attitude of the public sector to the Ombudsman in the early years was the inability of Ombudsman staff to gain employment in any other government agencies. For at least the first 10 to 15 years, employment in the Office of the Ombudsman had particularly negative consequences for public servant career prospects. This changed radically by the early 1990s to a situation where staff of the office are positively sought out by a number of agencies because of much improved perceptions about the quality of the work of the office and because the skills learned in this office are seen as being beneficial in other public sector contexts.

The changing attitude of the NSW public sector to the Ombudsman is also reflected in the legal actions instituted by public sector agencies or officials challenging the Ombudsman's jurisdiction. Such challenges started in the early 1980s and reached a peak in the first half of the 1990s, with only two Supreme Court challenges occurring in the last 16 years (one of which was discontinued).[30] A possible reason for the decline in legal challenges is that all challenges to the jurisdiction of the Ombudsman by public authorities and public officials have been unsuccessful. In fact, these cases generally resulted in strong statements by the courts in favour of a very broad interpretation of the role and powers of the Ombudsman. An example of this is the statement made by the then President of the NSW Court of Appeal, Kirby P, who said:

> Those powers, as the *Ombudsman Act 1974* reveals, are, as they ought to be, extremely wide. They are not powers which this Court should read down. They are beneficial provisions designed in the public interest for the important object of improving public administration and increasing its accountability, including to ordinary citizens…[31]

In another case, it was noted that the Ombudsman has '…a unique role to play in scrutinising the conduct of government agencies, reporting to Parliament on the results of investigations and proposing such remedial action as may be required'.[32]

By the mid 1990s there were other signs that a more positive attitude to the Ombudsman was developing in the NSW public sector. The results of a 1994 AGM McNair survey of NSW public authorities found that 90 per cent of respondents (most of whom were CEOs) saw the Ombudsman's office as a necessary part of public sector accountability.[33]

This more positive attitude is also reflected in a speech made in 1995 by the then Premier, the Hon RJ Carr, in which he stated that public officials should not fear scrutiny by the Ombudsman and pointed out the positive impacts that flow from such scrutiny. The speech, given at a function at Parliament House to mark the 20th anniversary of the creation of the Office of the Ombudsman in NSW, was reported in *The Sydney Morning Herald* in the following terms:

> The Premier, Bob Carr has called on his Ministers to ignore the self-interest of overly protective bureaucrats and open their departmental books to scrutiny by the NSW Ombudsman. In a major departure from the approach adopted by his predecessor, the new Premier said that Cabinet members had nothing to fear from the prying eyes of the State's watchdog organisation…
>
> 'Don't ever be drawn into antagonism towards the office by the defensiveness of public servants who have got worries about any outside supervisional monitoring.
>
> 'Those Ministers who have regarded the Ombudsman as an ally have always emerged better'.

The newspaper went on to note:

> Previous state leader John Fahey was in constant battle with Ms Moss's [the then Ombudsman] predecessor, David Landa – an animosity which manifested itself in the state budget last September when the office's funding was cut in real terms.

Since at least 1995, the role of the Ombudsman has enjoyed consistent public support from all Premiers.

Public sector attitude to customer service

Over the past 38 years there has been a fundamental change in the attitude of the public sector to customer service and the rights of the public.

In 1974, while good customer service may have been given 'lip service' the general attitude across the public sector was that the public should accept what they were given, that is, that they had no 'right' to good customer service. In 1974, the prevailing view across the public sector was that public servants were there to serve the government of the day (or council), not the public; good customer service was not seen as a priority or a 'right' which members of the public were entitled to expect. As Professor John Goldring[34] described it, the '…needs of the individual citizen received general lip service, and genuine attention in the hands of a proportion of officers' (by which I take him to have meant a 'small' proportion of officers!). Absent the humour, the portrait of the UK public service in '*Yes Minister*' was very close to the reality of the NSW public sector of the 1970s and early 1980s. This was confirmed by Gerry Gleeson, the Secretary of the NSW Premier's Department from 1977 to 1988, who in 2010 said: 'The *"Yes Minister"* television series was close to capturing the culture of the times'.[35]

March 1992 marked a turning point in the attitude of the public sector to customer service, when the government issued a 'Guarantee of Service' to the public in its statement, *NSW – Facing the World*. Soon after, the Premier issued a Memorandum to Ministers[36] asking them

to communicate to their CEOs the importance the Premier attached to the government's customer service policy initiative, including the development and publication by service agencies of a guarantee or charter of service. This was followed by a further Premier's Memorandum[37] in 1993 which raised concerns about the failure of a number of direct service agencies to respond to the Premier's 1992 directive. The Premier specified that final drafts of 'Guarantees of Service' were to be forwarded to the Office of Public Management by May of that year. The Premier asked Ministers to ensure that the cultural change process in relation to customer service was being driven by a sufficiently senior person in their agencies to enable total organisational commitment.

In 1994, the Premier issued a further Memorandum[38] launching sector wide guarantees of service (GOS) and directing that new and refined GOS be prepared by agencies. This was in turn followed by another Memorandum[39] requiring departments and agencies to include in their GOS a commitment to process licence applications or grant approvals within stated maximum periods.

The next step in the government's program to improve customer service was a requirement that each agency undertake management strategies to bring about quality customer service. In this regard, the government published the *NSW Quality Customer Service Statement* to provide a framework to assist agencies to implement quality customer service.[40]

In 1995, the Premier issued a Memorandum on *Frontline Complaint Handling*[41] which acknowledged that complaint handling systems are an important element of quality customer service. Agencies were instructed to review their complaint handling systems to ensure that complaint handling and resolution were given frontline emphasis. The Memorandum noted that the NSW Ombudsman and the Office on the Cost of Government were jointly publishing guidance developed by the Ombudsman on effective complaint management.[42] This was to be used by agencies as a resource to assist them in the review of their complaint handling systems. All agencies were required by the Premier to publish a revised *Guarantee of Service* which incorporated frontline complaint handling procedures.

In her first *Annual Report* in 1995, the then Ombudsman, Irene Moss, noted that over the past 20 years '…we have noticed a marked improvement in the way various public authorities respond to complaints'.[43] She also noted that 'public authorities are now generally implementing better internal complaint handling procedures to deal with citizen grievances'.[44]

The emphasis on customer service was again reinforced in regulations made in 2000 under the annual reporting legislation which obliged agencies to report on: 'If appropriate, the standard for providing services, together with comment on any variance from the standard or changes made to the standard'.

The growing support by consecutive NSW governments for improved customer service, guarantees of service and good complaint handling policies followed international public sector reform movements in the UK, USA and Canada. There was an element of reciprocity in that the Treasury Board of Canada went on to copy the *Guidelines for Effective Complaint Management* to support its own reforms in this area.

In his first *Annual Report* in 2001, the Ombudsman, Bruce Barbour, wrote:

> Over the last decade there have been several initiatives in the area of customer service. Each has been introduced or developed in isolation, with varying levels of government and public sector support. We have therefore suggested to the government that the elements of good customer service should be brought together into a comprehensive customer service framework. This would:
>
> - demonstrate the government's commitment to good customer service,

- help the public sector to understand the various elements of good customer service and how they interrelate,
- encourage the public sector to provide a high standard of customer service,
- help members of the public to understand their rights and the standard of service to which they are entitled,
- assist the Ombudsman to promote good customer service throughout the public sector.

We believe that the proposal would be best implemented by legislation, as this is the only way that full coverage of the public sector can be achieved.

A 'Customer Service Act' could address a range of issues such as ethics, guarantees of service, internal complaint handling, reasons for certain decisions, internal review of decisions, information available to the public and protection from liability…

While no response was received from government to this proposal, the importance of good customer service is now recognised as vitally important by the executive and the public sector generally. A good example of the government's commitment to customer service is the establishment of a Customer Service Commissioner in NSW. The role of the Commissioner will be to work to ensure that government interactions with the citizens of NSW meet the needs of citizens. The Premier has stated that the purpose of this Commission will be, in part, to:

- bring the interest of public service customers and the defence of public value and public interest right to the heart of decision-making
- develop practical and sustainable ways to give Government's customers the value and results they deserve, and
- ensure customer-centred services are a strategic priority for government, with Ministers to be the champions of the 'customer' within their portfolios.[45]

In a 2010 address, the current Premier '…identified five Customer Service Principles that provide a framework for implementing this new direction:

- making customer focus a leadership issue
- simplifying government
- redesigning public service delivery to suit people, not bureaucracies
- devolving authority to people, communities and frontline staff, and
- measuring results and ensuring accountability.'[46]

In 2012, the NSW government intends to establish a new entity, *Service NSW*, as part of its *Simpler Government Service Plan*. The objective of this Plan is to simplify customer access to government services and to design services to meet customer needs.[47] It is planned that Service NSW will provide a single 24/7 government phone service, a customer friendly government web portal, one-stop-shops where multiple transactions are carried out for customers, and mobile applications that provide real-time information as customers need it.

Public sector attitude to openness and transparency

An example of the public sector's attitude to the public can be seen in the public sector's approach to openness and transparency, particularly in relation to access to government information. In my experience the idea that government held information 'in trust' for the

people of NSW and that the public had a right to that information (other than where this would clearly not be in the public interest), was completely alien to the NSW public official of 1974. The prevailing view reflected the assertion in '*Yes Minister*'[48] that: 'You can be open – or you can have government.'

This appears to have been the universal view in public sectors across Australia. For example, the attitude to FOI in the Victorian context was recently described by former Victorian Premier, John Cain, in the following terms.[49]

> I always understood many people around government were, and remain, opposed to it. Many bureaucrats believe it is essential they keep control of public documents. In other words, they need to be able to manage the consultative mechanisms to ensure issues do not get out of hand, and that the overall direction of policymaking is maintained.
>
> So, many people inevitably see FOI as cutting across much of what is seen as holy writ. Senior bureaucrats regard all the information that government holds as being confidential. Knowledge is power, as they say. To them, FOI is capable of undermining the authority and integrity of the processes undertaken and ultimately the result they want to get.
>
> In the past, in the best Sir Humphrey tradition, many believed that government should be the custodian of all information that mattered, and should be miserly and obstructive in providing access to that information.

An explanation for the delay in the introduction of FOI into NSW, and a good indication as to the widespread attitude of the public sector to FOI at the time, can be found in a comment made by Gerry Gleeson, who was the then Secretary of the NSW Premier's Department from 1977-1988, in an interview in 2004:

> …It was recommended in about 1977 that we have freedom of information laws in New South Wales and we did not introduce them until after I had left in 1988 so I've got to take some blame for that, in fact I do take responsibility for holding it back.[50]

He went on to say: 'Now that we have it, I think it is a good move and has helped public administration.'

In the 1970s and 1980s, when the view was put to public officials by Ombudsman staff that the public had a right to know (subject to certain essential limitations) and that government held information 'in trust' for the people of NSW, it was rejected out of hand. This widely-held view only started to change with the introduction of the *FOI Act* in 1989. However, change was slow as the new Act was met by an almost uniform approach by agencies and their legal advisors to read down its scope by the adoption of a very narrow and pedantic interpretation of its provisions.

The view that official information was held by government in trust for the people of NSW only achieved general acceptance across the NSW public sector (although still not universally) when it was effectively given statutory force in the *Government Information (Public Access) Act 2009*.[51] What assisted immeasurably in bringing about this change in attitude was a series of public statements made by the then Premier in support of greater openness. These statements were backed up by several Premier's Memoranda[52] and press releases, even before the new Act came into force. Staff in the Ombudsman's office noticed the change in approach almost immediately as FOI complaint numbers went down significantly, with the proportion of FOI complaints from third parties objecting to release increasing.

Public sector attitude to complaints and the people who make them

It is fair to say that in 1974 the public sector generally had a negative perception of complainants and their complaints. In the absence of strong evidence to the contrary in the complaint, the general starting position across the public sector (and particularly in the Police

Force in relation to complaints about the conduct of police) was that the agency and its staff would have acted correctly and the complaint was without substance. In these circumstances it was not surprising that agencies made little or no information available to the public about how to make a complaint.

As part of a NSW Ombudsman project to foster better complaint handling, *Complaint Handling In the Public Sector* (the CHIPS project), research undertaken by the NSW Ombudsman, in 1994 found that only 15 per cent of agencies had a complaint handling manual, only 20 per cent had a unit set up specifically for complaint handling and only 20 per cent had useful records or reporting systems.[53] Following the 1995 Premier's Memorandum on *Frontline Complaint Handling*, a similar survey conducted by the Ombudsman in 1999 found that approximately 50 per cent of agencies had a formal instruction manual for complaint procedures for their staff and approximately 90 per cent had specific complaint policies.[54]

It is of serious concern that when the survey was repeated in 2007, the Ombudsman found a notable reduction in the number of state government agencies with documented complaint handling systems. He also found a reduction in the number of state agencies that had clear and well understood procedures for handling complaints. For example, only approximately 80 per cent of state agency respondents said they had a documented complaint handling policy compared to approximately 90 per cent in 1999 and only 75 per cent said they had a clear and well understood procedure for people to make complaints compared to approximately 82 per cent in 1999. There was also a marked fall in the number of state agencies with customer service/guarantee of service policies (down from approximately 81 per cent in 1999 to 66 per cent). The reason for this decline is not immediately apparent.

In a report on the outcome of this survey the Ombudsman said:

> The decrease in the number of agencies with guarantees of service and documented complaint handling policies is concerning. However, the survey results also suggest there has been an increase in the sophistication of individual complaint handling systems. This is indicated in particular by the increase in the use of internal reviews and an increase in the level of information provided about external avenues of review, as well as the increased number of agencies which have performance standards for how they deal with complaints.[55]

Should the government proceed with its proposal to establish a Customer Service Commission, this is an issue that might best be addressed by the Ombudsman and that body as a joint project.

Improved resourcing and professionalism of agency complaint handling and investigations

In 1974 agencies that dealt with the public rarely had dedicated staff whose primary responsibility was complaint handling and there was no training available to learn how better to deal with complaints. Few agencies had access to suitably experienced investigators, and little or no attempt was made to ensure that people given complaint handling responsibilities had an appropriate mental attitude/personality/aptitude for the role. What this meant was that a low standard of complaint handling and investigative practice was the norm. This standard has been improving over time, assisted by detailed investigation guidelines published by the Ombudsman and the ICAC, improved practices and procedures brought about by the oversight of a number of agency investigations by one or other of those bodies, and a range of courses that have been introduced offering training for complaint handlers and investigators.

It is now common for agencies that deal with the public to have specific staff who are suitably trained and/or experienced in complaint handling and most agencies have reasonable access to suitably trained and/or experienced complaint handlers and investigators, either in-house or contractors.

Complaints are now more likely to be seen by the management of agencies as helpful in identifying problems in the management of the agency or customer service that need to be addressed.

Public sector attitude to whistleblowers

The public sector's attitude to whistleblowers in 1974 was very negative. They were universally seen either as disaffected trouble makers, 'rats under the house'[56] or people with mental health issues. Reprisal action against whistleblowers was the norm, including referring them to HealthQuest for an assessment of their mental health.

As an example, in 1971 Detective Sergeant Philip Arantz raised concerns that the NSW Police Force had been systematically under reporting crime statistics for many years. When those concerns were dismissed out of hand by his superiors, he gave the information to a journalist. He was almost immediately identified as the source of the leak and certified as mentally sick by the Police Medical Officer. Even though this diagnosis was found to be wrong when he was taken to a psychiatric hospital, and his version of the crime statistics was demonstrated to be correct, he was dismissed from the Police Force with no pension. It was not until 1985 that he received any compensation, and he was only finally cleared in 1989 by special legislation that allowed him notional reinstatement.

As recently as 1986 the then Ombudsman referred in his annual report to the harassment of police officers who made complaints about their colleagues because they were seen as 'betraying the Force'.[57] This negative attitude to whistleblowers is reflected in a reported statement made in the early 1990s by the former NSW Police Commissioner, Tony Lauer, that: 'Nobody in Australia much likes whistleblowers, particularly in an organisation with the police or the government.'[58]

In 1974 there were no policies and/or procedures in place in any NSW public sector agency for staff to make internal reports/disclosures. It was over 20 years before such policies/procedures became commonplace. The *Protected Disclosures Act 1994*, the first attempt at whistleblower legislation in NSW, was effectively forced on the government of the day as part of a deal (the *Charter of Reform*) in return for the support of the three independent members of the NSW lower house who held the balance of power.

Unfortunately there were significant deficiencies in that Act that rendered it largely ineffective, for example' it imposed no obligations on agencies or management to facilitate the making of disclosures or to protect whistleblowers, and no official or agency was responsible to ensure the Act was implemented effectively. It was only in 2011, after a number of reviews of the Act by Parliamentary Committees, that significant amendments were made to what is now called the *Public Interest Disclosures Act 1974* to make it more effective.

Today, the vast majority of agencies have an internal reporting policy, which is now a statutory obligation.

Changes to policies, procedures and practice

Documentation of expected standards of conduct

In 1974 there were no documented (or for that matter even, agreed) standards of conduct for the public sector and it was virtually unheard of for an agency to have a code of conduct for its staff. The first well publicised attempt at establishing principles to guide standards of conduct in public life was the 1995 report of the *Nolan Committee* (the UK *Committee on Standards in Public Life*) that set out *'*Seven Principles of Public Life', and called on all public bodies in the UK to draw up codes of conduct.

From 1982[59] the NSW Ombudsman advocated the adoption of a code of conduct for local councillors (drawing on the UK experience). Following discussion between the Ombudsman and the Local Government and Shires Associations,[60] a code was circulated to Councils by the Associations in 1984, and adopted by many.

To the best of my knowledge the first comprehensive code of conduct in NSW, comprising a set of principles and an associated guidance manual was the *NSW Local Government Code of Conduct and Manual,* published in 1990 by the Minister for Local Government. The development of this code and manual was a joint exercise of the Department of Local Government, the NSW Ombudsman and the ICAC, and the Code was endorsed by the Presidents of the Local Government and Shires Associations.

In 1991, the *NSW Public Sector Code of Conduct* (referred to earlier) was published; this was not in itself a code, but a guide for agencies on the drafting and implementation of their own codes.

The obligation on agencies to have a code of conduct was reinforced by regulations made under the annual reporting legislation passed in 2000. The regulations required departments and statutory bodies to include a copy of their code of conduct in their annual reports, and amendments to those codes were to be reported in subsequent years.[61] Today all agencies in NSW are obliged to have a code of conduct.

Over time, the Ombudsman and the ICAC have published comprehensive guidance on expected standards of conduct and ethics for public officials and public sector agencies.[62]

Apart from certain legislatively based codes of conduct for local government, the Senior Executive Service and MPs (each different to the others), there is currently also a 'model' code that provides guidance to agencies in the development of their own codes (again leading to the situation that many are different in key respects). There have been at least two unsuccessful attempts to develop a public sector wide code of conduct in NSW. The first attempt failed due to a lack of central agency commitment to the project. The second attempt also failed due to a dispute between the representatives of the three primary NSW integrity agencies (ie the Ombudsman, ICAC and Audit Office) and the representatives of the Premier's Department as to: whether there should be a sector wide code or two separate (and different) codes – one for the SES and another for all other state public servants; and the relative importance of Parliament and whether the code should emphasise the central place of Parliament in our system of government. [63]

The passing of the *Public Sector Employment and Management Amendment (Ethics and Public Service Commission) Act 2011* established a Public Service Commission for NSW. The amendment Act also established a set of core values (integrity, trust, service and accountability) for the public sector and principles to guide their implementation. Hopefully these changes may lead to the development and promulgation of a single jurisdiction wide code of conduct in the near future, bringing NSW into line with other Australian jurisdictions.

Improved understanding and implementation of procedural fairness

While the nature and scope of the principles of procedural fairness were still being developed and clarified by the courts in the early 1970s, case studies in Ombudsman *Annual Reports* indicate that agencies regularly demonstrated little or no understanding of either the existence of, or the requirements for, what was then referred to as natural justice (now procedural fairness).[64]

While the courts have broadened the scope of the rules of procedural fairness over time, and their application has been interpreted quite flexibly, by the early 1980s the basic principles of procedural fairness had been clarified by the High Court.[65] These were further clarified by the Court in a series of decisions including: *South Australia v O'Shea* in 1987,[66] *Annetts v McCann* in 1990,[67] and *Ainsworth v Criminal Justice Commission* in 1991.[68]

Since 1995, the Ombudsman has been publishing guidelines that have provided detailed guidance for agencies on the requirements of procedural fairness,[69] and today there appears to be a widespread understanding and implementation of the relevant requirements across the public sector.

Greater willingness of public officials and agencies to apologise for mistakes

Worldwide there has been a growing recognition of the power of an appropriate apology to resolve complaints and disputes, fix damaged relationships, and restore trust.

Traditionally, the attitude of the NSW public sector, similar I suspect to public sectors everywhere, was a strong aversion to apologising. This was a reflection of the public sector's reluctance to accept responsibility for problems and mistakes. It was reinforced by the almost universal advice from lawyers advising public sector agencies and officials that any apology which included an admission of responsibility or fault would open the public official or public sector agency to legal liability.

It was recognised in the Ombudsman's office that a key impediment to agencies accepting responsibility and making a full apology was the involvement of lawyers, (who invariably gave advice from the perspective of protecting the agency and minimising risk). Consideration was therefore given as to how lawyers could be removed from that process.

In early 2001 the NSW Ombudsman suggested to the government that statutory protection be introduced for public officials making apologies to help resolve complaints. The government decided that not only was this a good idea, but that such protection should apply generally across the whole community.

A broad statutory protection for apologies was introduced through amendments to the *Civil Liability Act 2002* which came into operation in late 2002. NSW became the first jurisdiction in the common law world to legislate to give legal protection for a full apology (that is, an apology that includes an admission or acceptance of fault or responsibility) made by any member of the community.[70] Similar protections have since been adopted in the Australian Capital Territory and Queensland in Australia and in eight Canadian provinces.[71]

As the NSW Ombudsman has written in his apology guidelines (*Apologies – a Practical Guide*):[72]

> An apology shows an agency taking moral, if not legal, responsibility for its actions and the research shows that many people will be satisfied with that. The introduction of the protections for apologies over time should therefore lead to a change in culture and have a very beneficial effect.

While the existence of the statutory protection for apologies is not widely known across the NSW community, key senior public officials are aware of it, and the perception of the office is that the propensity of public officials to give a full apology, in appropriate circumstances, has been improving since 2002.

Where to from here?

Is it time to recognise an 'Integrity Branch' of Government?[73]

Where are integrity bodies currently seen to sit in the structure of government?

The growth in the complexity of regulation, in the discretionary powers of public officials and in the size of Executive government, particularly in the 20th century, led to a growing realisation by the Executive and Legislative Branches that new structures and powers were needed to ensure the integrity of government.

The Executive Branch could no longer remain largely self regulating. In many Westminster systems a series of independent bodies has been established to join Auditors General in ensuring the integrity of government. This started with the appointment of Ombudsmen in most Westminster systems between 1975 and 2000. In various jurisdictions Ombudsmen were then joined by anti-corruption bodies, public sector standards or ethics commissioners, and information commissioners.

As various integrity type bodies were designed and intended to operate independently of Executive government, several did not think it appropriate that they be seen as part of the Executive Branch. In many Westminster systems Ombudsmen in particular have been seen as 'officers of the Parliament' – either explicitly through statute[74] or the *Constitution*,[75] or implicitly by the recognition of the close relationship between the Ombudsman and the Parliament.[76] This is seen as enhancing the ability of the Parliament to keep the executive accountable.

There has, however, been considerable confusion as to where integrity bodies fit within the structure of government – are they part of the Executive, the Legislature or the Judiciary? For example, are the Ombudsman, Auditor General and ICAC Commissioner and PIC Commissioner officers of the Executive or of the Legislature? Is the Judicial Commission part of the Executive or the Judiciary? Some bodies with integrity/watchdog roles are almost business units of government departments.

The 'officers of Parliament' approach might be difficult for integrity type bodies that have jurisdiction over the Parliament and/or MPs (eg in NSW the ICAC and Auditor General) and similarly if they have jurisdiction over the courts and/or judicial officers (for example, in NSW the ICAC, Auditor General and Judicial Commission).

This has led to concern about ways to ensure integrity bodies have sufficient guarantees of independence to ensure they are adequately able to perform their functions, which in turn has led to consideration of the place of integrity bodies in the structure of government.

Is the number of the 'branches' of government fixed and immutable?

In Westminster systems, the powers of government are commonly described as being separated into three branches: the Legislative branch (which makes laws); the Executive branch (which puts laws into operation); and the Judicial branch (which interprets the law).

When first established, most Ombudsmen were seen as part of the Executive Branch. This has changed over time in many jurisdictions, either explicitly or implicitly, to a perception that

the Ombudsman is an Officer of the Parliament. In NSW this is now a generally accepted view held by both the Executive and the Legislature, particularly since the establishment of a Parliamentary Committee to oversight the work of the Ombudsman. Given that the Parliamentary Committee has a veto over the appointment of the Ombudsman, and that the Ombudsman can only be dismissed on the address of both houses of Parliament to the Governor, this reinforces the view that the Ombudsman is more an officer of the Legislature than of the Executive. In Victoria, this has been made explicit. The State's *Constitution* was amended to specify that the Ombudsman is an officer of the Parliament.

It has been argued by various commentators in recent years, for example Chief Justice Spigelman of the NSW Supreme Court,[77] the Commonwealth[78] and the Victorian[79] Ombudsman and others,[80] that consideration should be given to the concept that there is, or should be, another branch of government – the Integrity branch of government. Chief Justice Spigelman's idea is that an Integrity branch of government would incorporate the various agencies that have been established to ensure the integrity of government, possibly including such agencies as the Auditor General, Independent Director for the Public Prosecutions, Corruption Commissions, Ombudsmen, Statutory Integrity Commissioners and ad hoc commissions of inquiry. He went further to suggest that possibly such a branch of government could be seen as incorporating the integrity functions of the Judiciary.

What is meant by separation of powers?

What is being described by reference to various 'branches' of government is a way of thinking about the structure of government – referred to as the 'separation of powers'. This can also be described as a 'sharing of powers'. For example, law is made by each Branch; laws are interpreted by each Branch; rights are determined by each Branch; integrity issues are reviewed and/or enforced by each Branch.

Other overlap or sharing of powers are that: the funding of each branch is through the budget, which is prepared by the Executive and approved by the Parliament; the Executive appoints all judicial officers, who can only be dismissed on the address of both Houses of Parliament to the Governor/Governor-General; the Governor-General is the head of the Executive government and also is part of the Parliament (per ss 1 and 61 of the Commonwealth *Constitution*); in NSW the Chief Justice of the Supreme Court is the Lieutenant Governor and acts in that role when the Governor is absent; and Ministers of the Executive branch are all members of the Legislative Branch.

In practice, each Branch performs at least some functions of other Branches and is generally reliant on at least one other Branch to exercise its powers or to achieve its objectives or, conversely, has some form of veto over the actions of one or both of the other Branches. It could be argued that each branch performs a gatekeeper role in relation to one or both of the other Branches.

This does not mean that the idea of separation of powers is irrelevant. The purpose of the concept of separation of powers is the establishment of a system of checks and balances on the exercise of government power. The objective is to prevent the abuse or misuse of power by the Crown – in practice primarily by the Executive – with prevention of abuse or misuse of power by the Judiciary and the Legislature a secondary objective.

It is probably more accurate to describe the system as the sharing of powers (described by one commentator as 'separate institutions sharing powers').[81] However, within this system each branch of government has an overriding or paramount power in relation to its primary role: the Legislature is the paramount body for the making law; the Judiciary is the paramount body in interpreting the law; and the Executive is the paramount body in the implementation of the law.

What are the central concepts of the separation of powers doctrine?

The central concepts of the separation of powers doctrine include, firstly, *independence*, which is ensured by such measures as: judges can only be dismissed on the address of the Parliament to the Governor (or equivalent); discussions in Parliament cannot be impugned or questioned in any other forum; what is said in court and in Parliament has absolute privilege in defamation; a member of Parliament cannot hold any office of profit under the Crown (other than Ministers); and during each term of Parliament (that is, between elections) members of Parliament may only be removed from office by the courts (or the Parliament), in circumstances prescribed by law (including the relevant Constitution).

The second central concept is *interdependence*, in the sense that each branch is reliant on at least one other branch to be able to exercise its powers or to achieve its objectives. Examples of this interdependence are that: the Executive can only exercise powers given to it by the Legislature (statutes) or the courts (common law); the Legislature can only achieve the objectives of its legislation through the Executive (and most Bills are introduced into the Parliament by the Executive); and the judgments of the Judiciary are enforced, in most cases, by the Executive.

In the Australian context, and in particular in NSW, we have separation of powers in the sense that the powers of each 'branch' are supposed to be implemented independently, not in the sense that each branch is completely separate from and independent of the others or that the core powers of each branch can only be exercised by that branch. The term 'separation of powers' refers to a doctrine or concept, not necessarily to any particular physical or legal structures.[82]

What should be the criteria for inclusion in an 'Integrity Branch' of government?

A number of integrity bodies or officers have been created in nearly all Westminster systems which meet the core requirements of each of the recognised branches of government, ie independence and interdependence. So, whether or not these officers or bodies are generally recognised as a fourth branch, they already meet the key criteria. Referring to them as an Integrity Branch of government would, therefore, merely be a recognition of this.

If an Integrity Branch of government were to be recognised, the criteria to determine which public bodies or offices form part of that Branch might include:

- a significant *integrity* related function, with a significant jurisdiction over at least one Branch of government;

- a need to be *independent* of Executive government, which could be demonstrated by measures such as:

    - the head of the body or the holder of the public office only being dismissible on the address of both Houses of Parliament to the Governor/Governor General;

    - a Parliamentary Committee having a veto over the appointment of the head of the body or the holder of the public office;

    - the body or public office not being subject to direction by a Minister or Executive government as to the exercise of its discretionary powers; and

    - the body or public office having a discretionary power to make a report to Parliament on any matter within its jurisdiction;

- a need to be *independent* of the Parliament and Judiciary if their role includes investigating MPs or judicial officers; and

- *interdependence* with at least one other Branch (each Branch of government should be reliant on at least one other Branch of government in the achievement of its objectives), that is, the body or official does not have determinative or enforcement powers, and possibly not prosecutorial powers.

Other criteria that might be desirable could include, for example, a statutory Parliamentary Committee to oversight the body or public office.

What is required for the recognition of an 'Integrity Branch' of government?

In referring to an 'Integrity Branch' of government, this is not something that needs to be brought about by legislation or by the creation of some 'super' integrity body incorporating the integrity functions of existing bodies. After all, the other Branches of government were not 'established' as such by statute (although the Commonwealth and State Constitutions do embody, to one degree or another, the concept of separation of powers), and the Executive and Judicial Branches consist of numerous separate bodies.

A minimum requirement is a change in our perception of the structure of government, to recognise that there are several agencies that do not sit comfortably within one of the established Branches of government but have sufficient similarities in their role to be seen as a separate Branch in their own right.

The most significant impact of seeing the structure of government in terms of four branches would be to give some clarity to the requirements for a body to be considered part of the Integrity Branch.

Is it time to review the jurisdictions, structures and approaches of administrative review type bodies in NSW?

Review of existing bodies that have a role in the review of administrative conduct and decisions

The various bodies in NSW that have a role in the review of the administrative conduct and decisions of NSW public sector agencies and officials were established in a piecemeal fashion over the past 38 years. This has resulted in a numerous variations in their design, powers, responsibilities, approaches, and procedures.

From the perspective of the general public who might wish to complain about administrative conduct (including integrity issues) or apply for review of an administrative decision, the jurisdictions (which often overlap), roles and powers of these bodies must be bewildering.

The former Ombudsman, Irene Moss, drew attention to the issue of the proliferation of 'watchdogs' in 1996, in the following terms:

> I fully accept that certain problems are clearly best addressed by the establishment of separate specialised agencies, and I support the establishment of specific purpose watchdog/accountability bodies where this is clearly the best option.
>
> A major difficulty with the further proliferation of watchdog/accountability bodies arises out of the fact that jurisdictions are seldom clear cut and discreet. The overlap in jurisdiction that results can lead to problems of duplication, conflict, matters 'falling between the cracks', not to mention over complexity and confusion for the public.

Where the establishment of a new body is not essential for the effective implementation of the required watchdog/accountability role, the better approach would be to use existing bodies by, for example:

- expanding jurisdiction (and funding) to cover the new role (for example, the proposed Privacy Commissioner); or

- clarifying jurisdiction so as to redirect or better focus efforts (for example, the proposed Inspector General of the Department of Corrective Services); or

- restructuring so that a body is better able to perform its intended role (for example, the new Department of Fair Trading).

Additional benefits of empowering, refocusing or restructuring existing bodies over the establishment of new bodies include:

- reduced establishment costs due to the use of existing infrastructure; and

- reduced operating costs due to economies of scale and maximising use of existing corporate service resources.[83]

Since 1996 few new bodies have been created in NSW, with most new oversight roles being given to existing bodies. The only new bodies created were the Privacy Commission in 1998, which was then combined with the new Information Commission in 2011, and the short lived Inspector General of Corrections.

Even though the rate of establishment of new bodies has diminished significantly, there is still a need for a comprehensive review of existing bodies to address the difficulties that arise in the current situation such as potential duplication, matters falling between the cracks, inconsistency in approaches to similar issues, and so on.

Review of legislation, structures and mechanisms that have a role in encouraging or enforcing ethical conduct

If there was to be a review of administrative review type bodies, it would make sense that it was undertaken in conjunction with a review of the overall adequacy of the legislation, structures and mechanisms in place in NSW for the encouragement and enforcement of integrity, good conduct and administrative practice.

To encourage and enforce good conduct and administrative practice, legislation, structures and mechanisms are required that are both proactive and reactive, and comprehensively address culture and behaviour, guidance and enforcement and process and outcome. The focus of any review should be to ensure that the following measures are adequately addressed:

- *standard setting* – for example, offence provisions, legal obligations, legislated statements of values, jurisdiction wide codes of conduct, agency codes of conduct;

- *expectation setting* – for example, establishing and maintaining an organisational culture that articulates the norms and values of the organisation and the standards of administrative practice and good conduct expected of staff;

- *prevention strategies* – for example, removal of opportunities through fraud prevention measures, internal disclosure policies, disclosure of interests registers, gifts and benefits registers, merit based selection, records management legislation, internal and external audit, proper supervision, ethics training, etc;

- *enforcement mechanisms* – for example offence provisions in law, whistleblowing legislation, internal disclosure policies, complaint policies, obligations to report corruption

to the ICAC, investigation capacity, FOI/GIPA, records management legislation and policies, merit reviews of administrative decisions; and

- *deterrence mechanisms* – for example, watchdog bodies, internal and external audit, disciplinary action, prosecutions.[84]

Will access to administrative review complaint mechanisms be made more customer friendly?

Whether or not there is a review and rationalisation of administrative review type bodies, and particularly if this is not done, there is a clear need to improve accessibility to such review mechanisms for the general public.

The jurisdictions, roles, approaches and procedures of the various mechanisms available for the review of administrative conduct and decisions are overwhelmingly complex. It is unrealistic to expect members of the general public to know which agency they should approach for assistance. The fact that consistently around a fifth of people who approach the Ombudsman have come to the wrong place is testimony to this fact.

Although the Ombudsman gives those people advice about where they should take their concerns, it is to be expected that there will be a significant drop-out rate of people who decide it is all too difficult or too much work to keep going.

Apart from amalgamation of certain review bodies, the current complex situation could be simplified by, for example, the establishment of a single well publicised avenue for the making of complaints or raising of concerns. This would involve a single phone number, fax number, email address, website, mailbox, and, possibly, a single office where people could discuss their concerns in person. Behind this single portal would be a call centre to take inquiries and answer simpler questions immediately by phone, email or letter, and make arrangements to assess and triage all complaints and more complex requests for information to the appropriate agency, which would then respond to the complainant directly.[85]

In addition, there could be the co-location of administrative review bodies that have complaint handling functions (for example, in NSW the Ombudsman, Information Commissioner (including Privacy Commissioner), Anti Discrimination Board, and the Energy and Water Ombudsman NSW (EWON) – even though it is a non-government agency). Such bodies could share a switchboard, call centre, reception, interview rooms, etc[86] (such an arrangement is in place for administrative review bodies in Queensland).

As a minimum it is vital that the various bodies that have administrative review roles involving the handling of complaints have the legal authority to exchange information and directly refer complaints between themselves to ensure efficiency, consistency and minimise the number of matters that fall through the cracks. The bodies that should be authorised to share information and exchange complainants should include the: NSW Ombudsman, Information Commissioner/Privacy Commissioner, Audit Office, ICAC; PIC, Division of Local Government of the Department of Premier and Cabinet; Health Care Complaints Commissioner; Legal Services Commissioner, EWON and Anti-Discrimination Board (ADB).[87]

Consideration might also be given to the establishment of a committee of the heads of integrity agencies whose role would be to facilitate coordination of their activities in ways that do not impinge on the independence of each (this is an arrangement that has been in place for some time in Western Australia, it is called the Integrity Co-ordinating Group).

Where might the courts take procedural fairness?

There seems to be a move by the courts to expand the obligation on investigators to provide material to people who are the subject of investigation. No longer can it be said safely that (in the absence of a clear statutory authorisation) the hearing rule is satisfied if the person who is the subject of investigation is given the 'substance' of the grounds of proposed adverse comment.

While there are strong arguments in favour of an obligation to disclose '…adverse information that is credible, relevant and significant to the decision to be made',[88] there are also strong arguments against a broad interpretation of such an obligation.

In *Lohse v Arthur (No 3)* [2009] FCA 1118, the judge said that if '…adverse information that was credible, relevant and significant to the determination to be made by the decision-maker was placed before the decision-maker it would be unfair to deny a person … an opportunity to deal with it where there was a real risk of prejudice, albeit **subconscious,** arising from the decision-maker's possession of the relevant information' (at 47) (emphasis added).

In my opinion, from a practical and operational perspective this is a problematic approach. Firstly, it appears to assume that the decision-maker is an outsider whose only knowledge of the circumstances or individuals involved is derived from information obtained as part of the investigation. In practice this is often not the case, for example, when investigations are undertaken by a line manager or other officer of the organisation who may have relevant experience or knowledge. Further, decisions made arising out of such investigations are generally made by line managers who would have some relevant knowledge, views or opinions. Should such an investigator or decision-maker be obliged to inform any person under investigation of all information in their possession, views, opinions, and prejudices, that may potentially have a bearing on the case?

Secondly, it appears to assume that there is little or no downside to the disclosure of information that was not explicitly taken into account by the decision-maker. Often information not explicitly taken into account might disclose sensitive personal information about third parties or the identity of confidential witnesses and/or whistleblowers, or information whose value as intelligence would be diminished if its existence became known. This disclosure will build an unnecessary delay into the process. Thirdly, it appears to assume that decision-makers are unable to assess rationally available facts and circumstances and give due weight to relevant considerations (and not vice versa). If this was the case, it casts doubt upon the competence and professionalism of investigators and administrative decision-makers generally.

In my view such an approach is in effect an attempt, possibly 'subconscious', to get around the accepted limitation on the appropriateness of a court scrutinising investigation reports for error or the weight given to particular matters. The approach advocated in *Lohse* does just that – it makes assumptions about the possibility of subconscious prejudice and in that way focuses on the weight given to particular matters.

In a recent case addressing the procedural fairness issue the NSW Supreme Court[89] referred to the need for the person who was the subject of an investigation '…to be given a fair account of the factual material uncovered in the investigation so that he could respond to the allegations' (at para 147). The court questioned the findings of the investigation on the basis that the investigator had '…failed to adequately inform [the subject of the investigation] of the substance of the adverse information he had obtained during the course of his enquiry…as the rules of procedural fairness required' (at para 174).

It appears to me that the court's main concern was grounded on the fact that the investigator's report did not disclose a serious failing in the conduct of the investigation and gave no reasons for the adverse findings he had made (paras 166, 173-174). From my reading of the judgment the issues appear to be, firstly, not about the content of the information in question but its credibility, and secondly about a failure to give reasons for adverse findings. It did not appear to me that the primary concern of the court was necessarily about whether all credible, relevant and significant adverse information had been disclosed, but that the source of certain information, the weight given to it by the investigator and the explanations given for his findings, were questionable. These were issues going to the procedures used by and the approach of the investigator – to the investigator's competence and professionalism.

While the court noted that the investigator's '…report ought not to be over zealously scrutinised for error, or the weight [the investigator] gave particular matters which he considered…' (at para 160), this case illustrates that the courts are in fact prepared to consider the more serious examples of procedural incompetence or lack of professionalism by an investigator.

Far too often we see people the subject of investigation who have been denied fairness because of incompetence on the part of the investigator, for example failing to follow obvious lines of inquiry, (such as failing to interview clearly relevant parties, failing to obtain and consider obviously relevant documents), accepting one person's version of events over another's for no good reason, and failing to complete an investigation within a reasonable time frame (broadly interpreted).

Any expansion of the obligation to disclose information to the subject of an investigation as a way to address procedural competence and professionalism failings of an investigator is likely to create significant operational and practical problems for investigators and agencies. For example, it is not uncommon that certain information unearthed in an investigation is of important intelligence value provided it remains confidential, and may be relevant to any subsequent investigation into the conduct of a subject of the initial investigation, or a third party. It is also not uncommon that releasing all factual material uncovered in an investigation will result in breaches of the privacy of third parties, or the identity of confidential sources or whistleblowers.

Another relevant factor is that it appears to me that there has been a gradual but noticeable increase in the level of professionalism of investigators. The significant improvement that has occurred over time in the availability of training and guidance to assist people who conduct investigations, and in the expectations of public sector agencies as to the general quality of investigations undertaken by or for them, has not been reflected in changes to the principles of procedural fairness.

A procedural competence rule?

Instead of attempting to address investigator competence or professionalism issues in the context of one of the existing four rules of procedural fairness, maybe it is time for the courts to consider a possible fifth rule – a procedural 'competence' rule.

The implications of such a competence rule would be a need for investigators to be able to demonstrate that (within reason and subject to the particular circumstances of the individual case) they had made adequate inquiries to obtain relevant information and interview relevant witnesses and parties, and ensured that the information on which they based any report, findings or recommendations was factually correct.

Hopefully, investigators would also see the need to:

- specify in their draft and final reports the witnesses interviewed and the other sources of information that were explored (whether or not the information was relied upon in drawing conclusions); and

- establish that any applicable procedural preconditions had been met before finalising a report or making findings or recommendations.

Will the Ombudsman's complaint handling approach change to reflect changes in the capacity of agencies to deal with complaints?

The current position

Over the years the Ombudsman has moved from a focus on individual complaints to a role that includes the scrutiny and monitoring of agency complaint handling and investigation policies, procedures and practices.

The Ombudsman now has scrutiny and monitoring powers in relation to three of the Ombudsman's four primary areas of jurisdiction (the exception being the Ombudsman's general or 'traditional' administrative review role under the *Ombudsman Act 1974*).

It is now generally accepted across the public sector that agencies have primary responsibility for appropriately dealing with and responding to complaints about their policies, procedures or practices, or the conduct of their staff.

The new powers that would be required to facilitate this approach

To facilitate implementation of a scrutiny and monitoring approach in relation to the Ombudsman's administrative review role, the *Ombudsman Act 1974* could be amended to give the Ombudsman the power to:

- refer a matter back to the agency concerned requiring the matter to be dealt with appropriately (either through investigation, conciliation or other appropriate action), with the Ombudsman being able to either supervise or monitor the investigation, or scrutinise the adequacy and outcome of the agency investigation; and

- refer a matter to a third party with a supervisory/regulatory/complaint handling role in relation to the agency concerned, either for information or appropriate action, and report back as to the outcome.

To assist agencies and help ensure that they deal appropriately with complaints about administrative conduct, the *Ombudsman Act 1974* could be amended to authorise the Ombudsman to:

- audit/review/scrutinise the systems within an agency for dealing with/handling complaints from the public and disclosures by staff;

- inspect agency complaint handling records; and

- audit compliance with key legal obligations and requirements for good administrative practice.

Online interconnectedness

Over the past 15 years there has been a gradual move towards greater online connectedness between the Ombudsman's office and certain agencies. The process started with the NSW Police Service to facilitate the Ombudsman's oversight role in relation to complaints about police. This was followed by arrangements with certain agencies designed to facilitate the Ombudsman's complaint handling role, while minimising the impact of that role on the agencies concerned. There has also been a move to online reporting to the Ombudsman in relation to statutory reporting obligations in the areas of employment related child protection (by one agency so far) and public interest disclosures (by all agencies).

I see this trend continuing and expanding over time, particularly as more and more agencies go down the paperless office path and see the efficiency and information security benefits of electronic transfer of information to the Ombudsman.

Do the search powers of administrative review bodies need to be updated to address the changing circumstances of the electronic age?

To be an effective administrative review watchdog body, be it an integrity or regulatory agency, a prerequisite is effective powers to obtain information. An essential element of these powers is the ability to obtain entry to relevant premises, to conduct appropriate searches, to make copies of relevant information, and to be able to take possession of relevant materials.

An informal review of the search powers of state and federal administrative review bodies indicates that a number were designed with a paper-based environment in mind, and where attempts have been made to address issues that arise in the electronic age, these have been ad hoc and piecemeal.

Particularly where the powers of watchdog bodies were formulated 20 or more years ago, these search and seizure powers were not drafted to address such issues as electronic security systems, key card door accesses, log-on passwords, encryption, the 'paperless' office, and electronic recordkeeping and document management systems.

It is not enough that an Act might say that staff of a body within jurisdiction must assist people conducting a search. Would such a generalised provision be sufficient to convince them to breach their agency's policies about divulging passwords or allowing unauthorised access to the system. Would this be enough to convince a system administrator actively to assist an investigator to find information in the system that could be prejudicial to the person's employer or colleagues? Would this be enough to convince an agency's lawyers that the agency is obliged to comply?

What is needed are new search provisions designed for the electronic age: that provide the investigator with an effective 'key', 'roadmap' and 'guide' – a way in, a description of the system and its holdings, and assistance to find what the investigator is looking for.

Conclusions

The NSW Ombudsman, and the environment in which it operates, has changed radically since the *Ombudsman Act 1974* was passed by the NSW Parliament in 1974. The Ombudsman has gone from being a body:

- with jurisdiction limited to most (but certainly not all) of the public sector, to a body with jurisdiction across the whole public sector as well as several thousand private sector organisations.

- whose only role was complaint handling, to a body with a wide range of review functions including: administrative, compliance, legislative and death reviews;

- that was almost exclusively reactive and individual complaint driven, to a body that emphasises a pro-active approach with a focus on systemic issues; and

- that was in many respects effectively a business unit of the Premier's Department, to a separate administrative unit oversighted by a Parliamentary Committee.

The environment in which the Ombudsman operates has gone from having a single administrative review type body to a range of bodies, often with jurisdictions that overlap. The attitudes of the government of the day and the public sector to oversight in general and the Ombudsman in particular have improved immeasurably:

- the public sector now accepts that the public is entitled to expect high standards of customer services as a right, not a privilege;

- complaints are now generally seen by the public sector to be an entirely valid source of feedback from the public, and a valuable management tool, which has also led to a much more positive attitude to complainants; and

- the attitude of the NSW public officials to whistleblowers is also changing for the better, although there is still a long way to go.

The speed of change in the operating environment of the Ombudsman shows no sign of abating. I hope, however, that the very ad hoc and incremental changes that have characterised developments to date give way to some rationalisation and simplification. The starting point for this should be a comprehensive review of the existing environment. I also foresee a gradual recognition of an Integrity Branch of government and the resulting greater level of actual and perceived independence for 'integrity' bodies.

Finally, in the area of procedural fairness, I am hopeful that the courts will come to accept the need for a fifth rule – a procedural competence rule. I see this as a way that would avoid the need for further broadening of the obligations under the hearing rule which can have unintended detrimental consequences for the effectiveness of the complaint handling, corruption prevention and misconduct investigation activities of agencies.

Annexure A

Distinction between corruption fighting and complaint handling

There are good reasons for establishing corruption fighting bodies in each jurisdiction to complement the work of the Ombudsman. While adequate to deal with maladministration, the traditional powers and approaches of Ombudsman are not well suited to fighting serious systemic corruption.

In designing mechanisms to deal with issues relating to administrative conduct and decisions on the one hand and corrupt conduct on the other, it is important to recognise that there are a large number of significant differences between complaint handling and corruption fighting:

Complaint handling	Corruption fighting
Focus: • Public sector officials • Public sector agencies	 • Public sector officials • Public sector agencies (particularly in relation to corruption prevention functions) • Private individuals
Subject matter: • Administrative conduct • Administrative decisions • Improving public administration • Dealing with complaints from the public • Customer service issues • Exposing misconduct	 • Corrupt conduct • Exposing and dealing with corrupt conduct • Preventing corrupt conduct
Relevance of intention: • Intention not required for unreasonable conduct or 'maladministration'	 • Intention required for corrupt conduct (which would include actual or constructive knowledge that the conduct was wrong and conduct arising out of clear moral failings)
Sources of information: • Complaints (primarily)	 • Intelligence from various sources (including complaints)
Accessibility to the public: • Regular communication with complainants, including details of final decisions/reports • Complainants have certain legal rights to be informed of action taken • Relative openness (ie communication with people the subject of investigation, the relevant agency and complainants, as and where appropriate) • Prior notification of persons or bodies the subject of investigation (ie procedural fairness)	 • Any complaints received are primarily a source of information. Unlikely to be continuing contact with complainants • Any complainants, persons the subject of investigation and relevant agencies would have no automatic right to information (other than whistleblowers who have certain statutory rights to certain information) • Strict secrecy • No prior notification of persons or bodies the subject of investigation
Investigative approach: • Generally relatively open investigation techniques and informal procedures	 • Generally more covert investigation techniques and formal hearing

Complaint handling	Corruption fighting
• Hearings in private using an inquisitorial approach	procedures • Hearings in public using both adversarial and inquisitorial approaches
Volumes of work: • Large numbers of mainly small scale investigations	• Small numbers of large scale investigations
Procedural fairness: • Must inform the subjects of an investigation at the commencement of an investigation • Must inform people of proposed adverse comment and give them a chance to respond	• Need not inform the subjects of an investigation until the investigation is largely completed
Outcome where allegation sustained: • Rectification, management action, changes to policies or the law, or other resolution	• Prosecution, disciplinary action or dismissal. At times, organisational changes are recommended • Management action to address problems/improve systems
Resource implications: • Relatively inexpensive	• Resource intensive

The differences between complaint handling and corruption fighting are likely to give rise to conflict between the two roles if both were performed by the same agency or if either agency was subject to the control and direction of the other.

As a matter of principle, the avoidance of such conflict makes separation of the roles of fundamental importance. Additionally, as a practical matter, if the two roles were combined in one organisation it is likely that complaint handling (reactive, demand driven/complaint-driven and high volume) will be given priority in resource allocation primarily over corruption fighting (proactive, discretionary, intelligence-based and low volume).

Annexure B

Timeline for establishment of bodies with administrative review type roles, and conferring of jurisdictions

1975	Ombudsman Office
1976	Privacy Committee
	Ombudsman jurisdiction re local councils
Election	
1977	
1978	
1979	Ombudsman jurisdiction re police [a limited oversight role]
1980	
1981	
1982	
1983	
1984	Ombudsman jurisdiction to reinvestigate complaints about Police [using only seconded officers]
1985	
1986	Judicial Commission
	Ombudsman jurisdiction re elected members and staff of councils
1987	Ombudsman jurisdiction re inspection of records of authorities that intercept telecommunications
1988	
Election	
1989	ICAC
	Ombudsman & District Court jurisdictions re complaints under the *FOI Act*
1990	
1991	
1992	
1993	Community Services Commission [amalgamated into the Ombudsman in 2002]
	Ombudsman jurisdiction to directly investigate or monitor complaints against police
1994	Investigating authorities designated under the *Protected Disclosures Act 1994*
Election	
1995	Ombudsman jurisdiction re witness protection appeals
1996	Police Integrity Commission [arising out of the Police Royal Commission]
1997	Administrative Decisions Tribunal
	Ombudsman jurisdiction re employment related child protection allegations [arising out of the Police Royal Commission]
	Ombudsman jurisdiction re controlled operations
1998	Privacy Commissioner [combined with the Information Commissioner in 2011]
1999	Inspector General of Corrections [position expired in 2003]
2000	
2001	
2002	Ombudsman jurisdiction re community services
	Ombudsman jurisdiction re reviewing the causes and patterns of deaths of certain children
	Ombudsman jurisdiction re reviewing the causes and patterns of deaths of disabled people in care
2003	
2004	
2005	
2006	

2007
2008 Police Integrity Commission jurisdiction over NSW Crime Commission
2009 Information Commissioner [arising out of the Ombudsman's review of the FOI Act]
2010
Election
2011 Public Service Commission
2012

Endnotes

1 The Hon John Maddison – the Ombudsman.
2 The Hon Jeff Shaw – the ADT and Privacy Commissioner.
3 The Hon Nick Greiner – the ICAC.
4 Hansard, Legislative Assembly, 27 August 1974 (at p.667).
5 '*Towards an Understanding of a Constitutional Might: Four Snapshots of the Ombudsman Enigma*', by Rick Snell, in '*Sunrise or Sunset? Administrative Law in the New Millennium*', (Papers presented at the 2000 National Administrative Law Forum, edited by Chris Finn).
6 There are currently 31 Official Community Visitors (who are independent statutory appointees) and approximately 1550 visitable services across NSW.
7 Roles initially introduced into review legislation arising out of negotiations with the cross-benches.
8 A role incorporated into the Act through amendments introduced by the Opposition in the Legislative Council on 12 December 1995.
9 Deputy Ombudsman are appointed by the Ombudsman and may only be removed from office by the Ombudsman or by the Governor on the address of both Houses of Parliament – s.8(2) and s.6(5), *Ombudsman Act*.
10 See Endnote No. 5.
11 The guidelines include: *Ombudsman's Administrative Good Conduct*, and *Principles of Administrative Good Conduct*, January 1997; *The Complaint Handlers Toolkit* (2nd edition); *Public Sector Agencies Fact Sheets A – Z*; *Enforcement Guidelines for Councils*; *Practice Note No. 9 – Complaints Handling in Councils* (a joint publication with the Division of Local Government of the Department of Premier and Cabinet); *Better Service and Communication – Guidelines for Local Government*; *Apologies – a Practical Guide* (2nd edition); *Managing Unreasonable Complaint Conduct Practice Manual* (2nd edition); *Complaint Handling at Universities: Best Practice Guidelines*; *Protected Disclosure Guidelines* (now superseded); *Public Interest Disclosure Guidelines*; *Options for Redress*; *Investigating Complaints – A Manual for Investigators*; *Guidelines for Dealing With Youth Complaints*.
12 Since 2011 the office has delivered close to 200 workshops to over 5,000 participants.
13 Under s.27, *Ombudsman Act 1974*.
14 Under s.31, *Ombudsman Act 1974*.
15 See for example the comment by Enderby J in *Ainsworth v The Ombudsman* (1988) 17 NSWLR 276: '*An Ombudsman is a creature of Parliament',* the comment by Whealy J in *K v NSW Ombudsman and Anor* [2000] NSWSC 771: '*The Ombudsman is an independent officer of the New South Wales Parliament…*' (at para 25), and the then-Premier's statement in the Legislative Assembly on 24 May 1990: *'It would be clearly undesirable if the Ombudsman were accountable to me as Premier or to the Executive Government'*.
16 Under s.6A, *Ombudsman Act 1974*.
17 A number of these mechanisms provide review options for complaints about both public and private sector individuals and organisations, eg the HCCC, LSC and the Ombudsman in his community services and employment related child protection jurisdictions.
18 *Ombudsman Act 1974*; *Ombudsman (Amendment) Act 1976* [brought local government within jurisdiction of Ombudsman]; *Judicial Officers Act 1986* [created the Judicial Commission]; ICAC Act 1989 [created the ICAC]; *Local Government Act 1990* [particularly Chapters 13 & 14 – replaced the Local Government Act 1919]; *Community Services (Complaints, Reviews and Monitoring) Act 1993* [created the Community Services Commission (CSC), which was amalgamated into the Ombudsman in 2002]; *Health Care Complaints Act 1993* [created the Health Care Complaints Commission (HCCC)]; *Public Interest Disclosures Act 1994* [originally titled the *Protected Disclosures Act 1994*]; *Police Integrity Commission Act 1996* [created the Police Integrity Commission]; *Administrative Decisions Tribunal Act 1997* [created the Administrative Decisions Tribunal (ADT)]; *Ombudsman Amendment (Child Protection and Community Services) Act 1998* [inserted Part 3A 'Child Protection' into the Ombudsman Act]; *Local Government Amendment (Ombudsman Recommendations) Act 1998*; *Police Service Amendment (Complaints and Management Reform) Act 1998* [inserted Part 8A, 'Complaints about the conduct of Police Officers', into the *Police Act 1990*]; *Privacy and Personal Information Protection Act 1998* [created the Privacy Commissioner and replaced the *Privacy Committee Act 1975*]; *Health Records and Information Privacy Act 2002*; *Community Services Legislation Amendment Act 2002* [amalgamated the CSD into the Ombudsman]; *Civil Liability Amendment (Personal Responsibility) Act 2002* [inserted Part 10 'Apologies', into the *Civil Liability*

Act 2002]; *Government Information (Public Access) Act 2009 [replaced the FOI Act 1989]; Government Information (Information Commissioner) Act 2009* [created the Information Commissioner]; *Protected Disclosures Amendment (Public Interest Disclosures) Act 2010* [made major amendments to the *Protected Disclosures Act 1994*]; *Public Sector Employment and Management (Ethics and Public Service Commissioner) Act 2011* [created the Public Service Commissioner and set out the core values of the public sector].

19 In 1987 legislative amendments enabled the re-investigation of complaints by civilian investigators of the Ombudsman. In 1989 the Ombudsman Act and Police Regulation (Allegations of Misconduct) Act were amended to enable the Ombudsman to delegate his Royal Commission powers and reporting powers to Deputy and Assistant Ombudsman.

20 With the passing of the *Police Service (Complaints, Discipline & Appeals) Amendment Act 1993*.

21 See for example the 1985/86 Annual Report of the Ombudsman at pp.5-9 & 30-32.

22 Amendment – 1993 No. 37, Sch 1(5).

23 Second reading speech by Mr Maddison, Minister for Justice in the Legislative Assembly on 29 August 2974 (at p.774).

24 Published in: *Administrative Law for the New Millennium*, (Papers presented at the 2000 National Administrative Law Forum, AIAL).

25 At the time I was the Senior Investigations Officer (Police) of the Ombudsman.

26 This situation is very different today. Officers of the Ombudsman now have direct dealings with police at all levels of the Force in the performance of their oversight role.

27 Annual Report, 1988/89, pp 41-42.

28 Annual Report, 1988/89, pp 43-44.

29 Due to improved levels of cooperation by public officials, and the creation of the ICAC in 1989, there has been far less need to resort to the use of those powers, although they are still used several times each year.

30 See for example: *Boyd v The Ombudsman* [1981] 2 NSWLR 308; *Moroney v The Ombudsman* [1982] 2 NSWLR 591; *The Ombudsman v Moroney* [1983] 1 NSWLR 317; *Commissioner of Police v Deputy Ombudsman* (1990) unreported; *The Commissioner of Police v The Ombudsman* (1994) unreported, 30044/94; *Botany Council v The Ombudsman* (1995) unreported, 30071/94; *Botany Council v The Ombudsman* (1995) 37 NSWLR 357; *Ku-ring-gai Council v The Ombudsman* (1995) unreported, 30035/94; *K v NSW Ombudsman & Anor* [2000] NSWSC 771; *Ingleson v The Ombudsman* (discontinued March 2007).

31 Per Kirby P (with Sheller and Powell JJA agreeing) in *Botany Council v Ombudsman (1995)* 37 NSWLR 359.

32 Per Sackville AJ in *The Commissioner of Police v The Ombudsman (1994)*, unreported decision of the Supreme Court, 9 September 1994.

33 NSW Ombudsman, Annual Report 1994-95, pages 147-148.

34 Professor and Head of School of Law, Macquarie University, in an article entitled 'The Ombudsman and the New Administrative Law', *Canberra Bulletin of Public Administration*, Summer 1985, at p.288.

35 Gerry Gleeson, 'If I were Premier of NSW in 2011', The 2010 Spann Oration, *Public Administration Today*, January-March 2011.

36 M 1992-31 *Customer Service in the Public Sector*.

37 M 1993-11 *Customer Service in the Public Sector – Finalisation of Guarantees of Service*.

38 M 1994-03 *Development of Guarantee of Service by Agencies for 1994*.

39 M 1994-44 *Guarantee of Prompt Service*.

40 M 1994-45 *Quality Customer Service*'; & C 1995-25 '*Implementation of Total Quality*.

41 M 1995-29 *Frontline Complaint Handling.*

42 *Guidelines for Effective Complaint Management*, 1995, since revised and republished in 2000 as *Effective Complaint Handling*.

43 Annual Report, 1994/95, p.50.

44 Annual Report, 1994/95, p.3.

45 Address by the then Opposition Leader to CEDA in November 2010, entitled: 'Starting the Change – Transforming Customer Services in NSW'.

46 Source: Speech to ANZOG Conference on 28 July 2011 by Mr Chris Eccles, Director General, Department of Premier and Cabinet, entitled 'Restoring Trust in Government'.

47 The objectives of the *Simpler Government Service Plan* are set out within goals 30, 31 and 32 of the *State Plan NSW 2012*.

48 '*Yes Minister*', BBC Television series (program entitled '*Open Government'*).

49 John Cain, 'Public's Right to Know Falls Victim to Political Infighting', *The Age*, 11 February 2012.

50 'In-Profile – Private Values in Public – Good Business Talks to Gerry Gleeson, Recently Retired Chief of the Sydney Foreshore Authority', Edmund Rice Business Ethics Initiative – *Good Business Newsletter* No. 10, 2004.

51 This Act implemented the majority of the recommendations made by the Ombudsman in his 2009 report to Parliament, *Opening up Government,* following his review of the *FOI Act*.

52 See: Memorandum No: 2009-18: *Agency Responsibility for FOI Determinations*; and Memorandum No. 2008-19: *Proactive Release of Information by Government Agencies*.

53 Annual Report 1991/92, at p.15.

54 Annual Report 1998/99, at p.58.

55 *Complaint Handling Systems Survey 2007, Report – Departments and Authorities*, NSW Ombudsman, Dec 2007.
56 Annual Report 1995/96, at p.142.
57 The then Ombudsman also noted that police complaining about police was a recent development that had only commenced the year before: Annual Report, 1985/86, p.178.
58 Interestingly the number of internal reports in the NSW Police Service (ie whistleblowers) went from less than 200 per year in the late 1980s to consistently over 1,000 per year since 2004-05 – the figure in 2010-11 being 1,208.
59 Annual Reports:1982-83, p.62-63; 1983-84, p.72-73; 1984-85, p.74; 1988-89, p.145, p.150; 1989-90, p.75-76.
60 Annual Report: 1982-83, p.62-63.
61 *Annual Reports (Departments) Regulation 2000*, cl.5 and *Annual Reports (Statutory Bodies) Regulation 2000*, cl.8. This obligation was not continued in the revised regulations made in 2010.
62 For example, the Ombudsman's *Good Conduct and Administrative Practice Guidelines* first published in 1995 and the ICAC's *A Practical Guide to Corruption Prevention* of June 1995, *Ethics: The Key to Good Management* of December 1998 and *Code of Conduct – The Next Stage* of March 2002.
63 Paper delivered by Deputy Ombudsman, Chris Wheeler, to the Ethical Excellence Conference in Canberra on 19 & 20 February 2009. Copy downloadable at: http://www.ombo.nsw.gov.au/publication/PDF/speeches/Ethics%20-%20Ethical%20Excellence%20Conference%20_19%20&%2020%20February%202009_.pdf
64 See for example *In re Pergamon Press Ltd* [1971] 1Ch 388 and *Stollery v The Greyhound Racing Control Board* [1972] HCA 53; (1972) 128 CLR 509.
65 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *Kioa v West* (1985) 195 CLR 550.
66 *South Australia v O'Shea* (1987) 163 CLR 378.
67 *Annetts v McCann* (1990) 170 CLR 596.
68 *Ainsworth v Criminal Justice Commission* (1991) 175 CLR 564.
69 For example: *Good Conduct and Administrative Practice: Guidelines for Public Authorities and Officials*, 1995; *Ombudsman's Administrative Good Conduct Guidelines*, 1997; *Investigation of Complaints – A Manual for Investigators*, 2000; Public Sector Fact Sheet No. 14, *Natural Justice/Procedural Fairness*, 2005; Information Sheet: *Reporting on Progress and Results of Investigations*, February 2012; PID Guideline C1: *People the Subject of a Report*; and PID Guideline C5: *Investigating Public Interest Disclosures*.
70 Four states in the USA had previously provided certain protections for apologies, but these were limited to mere expressions of sorrow (ie that did not include any acceptance or admission of fault or responsibility).
71 Including British Columbia, Manitoba, Saskatchewan, Alberta, Nova Scotia, Ontario, Newfoundland and Nunavut.
72 *Apologies – a Practical Guide,* first printed in 2007, with the second edition published in March 2009.
73 This section of the paper is based on a paper presented by me to the Ethical Leadership & Governance in the Public Sector Forum in Canberra on 20 June 2010.
74 Eg s.11(2), *Ombudsman Act 2001* (Queensland).
75 Eg s.94E, *Constitution Act 1974* (Victoria).
76 Eg the formal title of the WA Ombudsman is 'Parliamentary Commissioner for Administrative Investigations'.
77 *Judicial Review and the Integrity Branch of Government*, address by the Hon JJ Spigelman AC, Chief Justice of NSW to the World Jurist Association Congress, Shanghai, 8 September 2004; JJ Spigelman, 'The Integrity Branch of Government', *Quadrant*, July 2004, Vol. XLVIII Number 7-8.
78 Commonwealth Ombudsman Annual Report, 2006-07 (at Ch 8); John McMillan, *Future Directors – The Ombudsman*, Address to AIAL National Administrative Law Forum, Canberra, July 2005.
79 Victorian Ombudsman Annual Report, 2005 (at p 8); Transcript of Public Accounts and Estimates Committee Inquiry into a Legislative Framework for Victorian Statutory Officers of Parliament, 8 February 2006.
80 Eg Stuhmcke and Tran, 'The Commonwealth Ombudsman – An Integrity Branch of Government', *Alternative Law Journal*, Vol 32:4 December 2007 (at p.233).
81 Richard E Neustadt, *Presidential Power*, (Signet, New York, 1964) p.42.
82 Note, in contrast, the Commonwealth constitution rigidly applies the separation of powers concept, eg:
'*1 The **legislative power** of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives.*'
'*61 The **executive power** of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.*'
'*The **judicial power** of the Commonwealth shall be vested in … the High Court of Australia…*' (emphasis added)
83 Annual Report, 1995/96, p.9.
84 Discussed in more detail in *Ethics in the Public Sector – Clearly Important, but …*, a paper delivered by the author at the Ethical Excellence Conference in Sydney, 19-20 February 2009. The paper can be downloaded at: http://www.ombo.nsw.gov.au/publication/PDF/speeches/Ethics%20%20Ethical%20Excellence%20Conference%20_19%20&%2020%20February%202009.pdf.
85 This was attempted in NSW in the 1990s. Even though funding was approved by the government, agreement had been reached by all participating bodies, and an enabling Bill prepared for submission to

Parliament, the project did not go forward because Treasury informed the Ombudsman that the capital funding that had been approved could not actually be spent as it was above the Ombudsman's capital spending limit!

86 This was attempted in NSW in the 1990s. Even though all relevant agencies had agreed to co-locate, and suitable premises had been found, the project did not go forward as the then Government Accommodation Management Committee refused to endorse it.

87 The current arrangements for the sharing of information between these organisations are inconsistent and ad hoc. Further, while Part 6 of the *Ombudsman Act* attempts to address this issue for a number of those agencies, it is subject to certain limitations that in practice do not appear to serve any good purpose (eg s.43(6) of the *Ombudsman Act*).

88 *Kioa v West* (1985) 159 CLR 550 at 629 per Brennan J. and *Lohse v Arthur (No. 3)* [2009] FCA 1118 (at p. 8) per Graham J.

89 Schmidt J in *Nichols v Singleton Council* [2011] NSWSC 1517.

THE FUTURE OF UNIVERSITY TRIBUNALS

Bruce Lindsay*

The notion of a 'university tribunal' might provoke in lawyers a sense of curiosity and in university administrators a sense of unease. Lawyers may not immediately equate university bodies with the ordinary quasi-judicial environment of tribunals. Administrators might not be entirely comfortable with the obvious legal connotations of the term 'tribunal'. Tribunals, however, have existed in these institutions for centuries. In the chartered English universities, the Visitor functioned as an inherent 'judicial arm' of the corporation's government[1] and, until recently, that office typically had jurisdiction in Australian universities.[2] Until the end of the 19th century, Oxford and Cambridge Universities had criminal jurisdiction over the towns as well as the universities.[3] English and Australian courts have recognised the quasi-judicial character of various circumstances of university decision-making since at least the early 1960s.[4]

The term 'tribunal' is not only apposite to certain classes of university decision but university tribunals should be placed on a comparable practical footing with other statutory administrative tribunals, albeit having regard to the 'peculiar'[5] nature of their academic setting and universities' self-governing character.

Such change is desirable due to the intensifying subjection of academic life to public policy and control since at least the 1980s, including the student as a subject of policy and administration. Consistent with this perspective, it has been noted that the relationship of the student and the university has 'changed irrevocably'[6] from so-called 'elite' higher education to 'mass' higher education. This 'irrevocable' shift is as much political-economic as juridical: the circumstances of university decision-making have arguably not kept pace with the emergence of the institution as 'provider' and the student subject as purported 'consumer' of intellectual training, user of services, or procurer of knowledge. It is difficult, if not impossible, anymore to conceive of the relationship of student and university as 'akin to membership of a social body, a club with perhaps something more than mere social status attached to it.'[7]

The sector

In 2010, over 1.19 million students were enrolled in the higher education system, comprising just over 1.11 million students (93.2%) in the public university system (in 38 institutions), and a further 81,000 (6.8%) in the private providers (in 87 providers).[8] The university might be now understood as an institutional expression of a multi-billion dollar industry, based substantially on 'educational services' as well as research and other activities (eg consulting). International higher education revenues, achieved largely in the form of international students' fees, have consistently been lauded as one of the top sources of foreign income and presently education services as a whole are Australia's largest services export ($16.3 billion). Revenues in 2010-2011 in higher education were $9.4 billion.[9]

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Regulatory developments in the sector have historically had a major impact on the nature and trajectory of the university system and have generally been 'deregulatory' in two main waves: from 1988 with passage of the *Higher Education Funding Act 1988* (Cth), introduction of HECS and subsequently deregulation of fee-charging for international and postgraduate students; and from 2003 onwards, with passage of the *Higher Education Support Act 2003* (Cth), which introduced further 'marketization' measures and deepened the commercial (provider-consumer) model of internal relations. In addition, the *Education Services for Overseas Students Act 2000* (Cth) expressly included strong 'consumer protection' measures for that cohort of students.

Decision-making: the legal terrain

The legal categories governing the student-university relationship, and decision-making in respect thereof, have remained relatively stable through the course of this long-term, broad-based revolution in policy and practice.

It is now well-established that the student-university relationship can arise both under statute (a status of membership conferred under an institution's governing enactment)[10] and contract, and that these bodies of law can co-exist in the same relationship.[11] Where institutions are not established by statute but underpinned by statute, the founding relationship will be entirely contractual.[12]

It was once held that the relationship was exclusively founded on the student's status under the governing instrument,[13] although this position was progressively[14] and then definitively[15] departed from.

The relationship of administrative law to Australian public universities, where their dealings with students are concerned, is a difficult and messy one, made more problematic by the High Court's 2005 decision in *Griffith University v Tang*.[16] Post-*Tang*, the precise scope of the public law relationship, at least for the purposes of judicial review, will be influenced by jurisdiction, the nature of the institutional decision, and the status of institutional rules.[17]

As to the private law relationship, this has been described as a 'contract of membership',[18] analogous to trade unions or other private bodies, reflective of the dual domestic (corporate) and consensual character of the relationship. Where the student is not a 'corporator',[19] the contract will ordinarily still contain mechanisms for dealing with matters such as discipline, academic progress and disputes. The distinction might be made, however, between those bodies where there is some form of statutory underpinning to the institution (where it is not founded by statute) and so-called 'private providers' (where no statutory support for their corporate structure exists). Arguably, any semblance of a 'domestic' relationship in respect of the latter falls away. Focusing on the 'public university' sector, it is generally sufficient to say the relationship mixes public and private law, including administrative law standards and forms, in relation to decision-making. That is the point at which the question of 'tribunals' becomes significant. At what point is it appropriate or correct to talk of 'university tribunals' as distinct from other modes of decision-making? And what does that mean for the methods and character of those entities we understand as 'university tribunals'?

It has been said that the term 'tribunal' is not a term of art.[20] In Victoria, it has been reduced to statutory form.[21] In the university, I would suggest, the term is applicable to those persons or entities whose decisions are adjudicative and attract, to greater or lesser degree, the rules of procedural fairness. The distinction may be made, as in Denis Galligan's typology of procedure,[22] between adjudicative decisions and those which are an exercise of policy-based discretion or decisions that are a form of 'routine administration'. In this adjudicative space, Galligan would have it, a 'great mass of administrative process'[23] lies. It is here that the basic principle is that a decision is made 'by an enquiry into the facts and a judgment

applying authoritative standards to them',[24] including the normative standards of 'fair treatment' and (to greater or lesser degree) participation by those affected by the decision.[25]

By the end of the 1960s, it had become clear that natural justice applied to university disciplinary decisions[26] and actions pertaining to a student's academic progress.[27] A truncated form (of natural justice) also applies to complaints.[28]

Leaving aside the precise procedural content required in any case, at least three general forms of decision-making are susceptible to hearings before a tribunal of some description: disciplinary, academic progress, and complaints/appeals.

It has been said that these are 'hybrid' bodies,[29] exercising domestic and statutory jurisdiction over students. However, in my view, they should be considered primarily as objects of public policy and public administration, as indeed the universities and students have an objective foundation in public policy and administration.

Some reference can be made to the role and function of the University Visitor in this context.[30] That office provided a form of 'anomalous, indeed unique'[31] tribunal, competent to deal with all matters within its 'exclusive' domestic jurisdiction.[32] It was, however, as Sadler expressed it, a 'tribunal of last resort'.[33] The Visitor was competent to act on individual petitions, as well as what might be called 'own motion' visitations. In many Australian public universities that officer was (and remains) a statutory appointment under the governing enactment, held e*x officio* by the State Governor. It was a classic 'hybrid' tribunal.[34] Although it provided a form of quasi-judicial[35] recourse capable of some authority and transparency,[36] it must be conceded that it was practically unwieldy and, arguably, an instrument of an earlier, less bureaucratic and 'industrialised' institution.[37] A 1996 Western Australian Parliamentary inquiry, for instance, found the Visitor's role to be 'inefficient' and 'inappropriate, outdated and unnecessary',[38] recommending the abolition of this jurisdiction. The circumstances in which contemporary internal tribunals operate (include appeal bodies) are substantially different to those of three or four decades ago, let alone further back. The quasi-judicial landscape of universities has moved far beyond a dichotomy of the Vice-Chancellor's *magisterium*[39] and *ad hoc* and/or 'anomalous' quasi-courts (including the Visitor). We are now dealing with high-volume, specialist tribunals, operating under a range of regular procedural obligations of greater or lesser formality.

Decision-making: the practical terrain

It is likely that the greatest volume of quasi-judicial or tribunal decisions affecting students are hearings for misconduct (discipline) and for unsatisfactory academic performance ('show cause'). There is little publicly-available data on those volumes. Federal government data shows that, in 2010, 15 per cent of commencing undergraduates did not pass at least one unit of study.[40] The proportion of students required to 'show cause' for unsatisfactory performance would be much narrower than this, as the Federal data includes student withdrawals and the trigger for some kind of administrative action would commonly be failure of a majority of units across two periods of study. However, where even a small fraction of the Federally-reported failure rates crystallises into formal internal action, it is arguable that this translates into a substantial volume of proceedings.

In their 2009 study of student grievances and discipline, Jim Jackson, Sally Varnham and Helen Fleming found that nearly 80 per cent of students had complained or needed assistance with a problem and around 10 per cent had reported that the university had raised a 'problem' with them.[41] The latter may fall into the academic progress or disciplinary category.

In a study of seven Australian public universities,[42] the average level of hearings was put at around 1 per cent of the total student body. The proportion per institution ranged from 0.4 per cent to 2.7 per cent of students. Just over 1,600 students at those 7 universities were subject to disciplinary hearings in 2006. These figures suggest a substantial volume of work for decision-makers in the higher education sector, the single largest proportion are for academic misconduct and, in particular, for plagiarism.

Disciplinary hearings in universities might generally be said to be a form of adjudicative inquiry with an accusatorial character. Academic progress and complaints hearings, by contrast, might be said to be inquisitorial, without the accusatorial element, and often with more of an academic (or even pastoral) focus. The combination of inquisitorial and accusatorial factors in disciplinary hearings potentially lends to confusion or complexity in respect of procedure. The tendency to accusation implies a prospect of wrongdoing and/or transgression, as distinct from mere intellectual shortcoming or failure of academic capacity or effort, and lends itself, for example, to imposition of the legal burden on the authority or person bringing the accusation.[43] Additionally, quasi-criminal language (eg reference to 'offence') may be used in relevant rules and has been used in judicial decisions.[44] There is clearly an adversarial dimension in accusation, yet it is entirely appropriate and typically the case that such proceedings are inquisitorial[45] and eschew legal technicalities and formalities. In that case, it may be necessary to strike a careful balance between a generally inquisitorial method and the operation of adversarial techniques and modes as appropriate to the circumstances.

Quality of decision-making

One ground for proposing reform to the system and operation of university tribunals is the problematic standards of decision-making. Documented evidence as to the quality of decision-making of this type in the sector is scarce.

Three sources of information as to decision-making quality were considered in the doctoral study noted above: university rules, internal cases, and experience of student advocates in hearings.[46] 'Qualitative' standards were measured against basic administrative law standards, primarily procedural fairness.[47]

In respect of procedural standards, the study concluded: 'In respect of the 'bedrock' of procedural safeguards, as well as more arguable legal entitlements, universities generally are not exemplary decision-makers.'[48]

Base standards, such as the right to a hearing, are typically accorded. In respect of more diverse, subtle or complex procedural questions, as may arise from time to time, the situation is more mixed. Among the problem areas were:

- provision of adequate notice, especially sufficient particularisation of charges or allegations of rule breaches;
- provision of adequate disclosure of information that may be adverse to the student;
- entitlement to, and guidance of, witness examination, especially cross-examination;
- provision of written reasons, notably in practice rather than under institutional rules;
- inflexibility in relation to a right to representation (whether legal or otherwise);
- reversal of onus of proof or failure to apply the legal burden correctly;

- the making of necessary inquiries; and

- impartiality, both in respect of actual and apprehended bias.

The study found there were identifiable problems and/or shortcomings in the present handling of these quasi-judicial roles.

The study also found that there were problems associated with the organisation of disciplinary action, especially the distinction between investigative and adjudicative functions and how and by whom these might be carried out. This issue relates, in part, to the scope and extent of the inquisitorial function of tribunals themselves. It is noteworthy that, in relation to professional discipline for instance, the statutory model has tended to operate with a clear, institutional separation of investigatory and adjudicative bodies (eg investigations by regulators and adjudication by statutory tribunals). While not advocating replication of this approach in the universities, the issue of operational separation of 'investigators' from tribunals ought seriously to be contemplated and may parallel or be coordinated with the now well-established complaint-handling operations of higher education institutions.[49]

The post-institutional student

Critique of university tribunals is not solely founded upon practical problems. Long-term historic changes in the university sector are also significant. These changes have been substantially affected by public policy.

First, the paradigm of the university has changed, toward commercialisation and market-based subjects. Concepts of educational services and educational 'industries' suggest the following key lines of sectoral development:

- the emerging dominance of economic (commercial or market) paradigms in sectoral organisation;[50]

- an analogy between intellectual capacities and forms (eg knowledge, skill) and raw materials ('human resources'), mobilised in service of the economy;[51]

- the service-provider function of the institution as consistent with 'supply chains' of (post) industrial production (eg skilled labour-power, 'knowledge industries');[52] and

- the individual (student) as a type of 'micro-entrepreneur', investing in themselves and their cognitive capacities, in pursuit of 'positional advantages'.[53]

Under these general conditions, it has been argued that the university has come to be reconstituted as an 'enterprise university',[54] a particular type of commercial corporation.

Secondly, with respect to the principal subject of internal decision-making, the realities of being a student have fundamentally changed. This is manifest, among other things, in the

- diversification of backgrounds, ages, motivations, expectations of the student population;

- so-called disengagement of students from the institution;

- integration of education with (paid) work and other forms of work (eg family responsibilities), or in other words the decline of the student as a discrete subject, distinct from other spheres of life (eg labour force, home); and

- economic character of the student, ie as 'consumer', and also the substantial costs associated with studying.

In this general context, it is correct in my opinion to view the contemporary university as an administrative entity in a cultural as well as legal sense. The language of 'service delivery' is tailored to that end.

Bill Readings[55] grasped this trajectory when he talked of the present marginalisation of the 'idea' of the university and its national-cultural function, eclipsed by the 'empty notion of excellence'[56] – that is, the content-less and fluid indicia of 'performance' in academic operations.

The university is now about the administration of knowledge and the deployment of academic judgment and expertise to that end. The paradigm of higher education is founded on its *performative* or *operative* qualities with respect to knowledge, such as optimising value.[57]

This is quite a different phenomenon from the *raison d'etre* of the institution at least from the Enlightenment to the second half of the twentieth century, which was posed in the concept of *Bildung* or moral development of the self, especially the character and competence of an elite.[58]

The difference may be grasped in the historic concept of the student *in statu pupillari*,[59] or the student-as-pupil in the course of moral, emotional and social development as well as intellectual development, and the present condition of the student as consumer, client or economic acquirer of human capital. From the perspective of the institution, the domestic sphere – the analogy of the institution to 'household' (*domus*) or internal 'society' – which continues to be prominent in the law applicable to this relationship, is surely now 'emptied' as well. It is not, at a formal level at least, abolished: the student often remains a member of the corporation. The *domus* of the university, not quite capitulating to contract and the cold realities of commercial relations, is retained somewhere in the proliferation of 'support services' and scholarly authority. The *in statu pupillari* model was framed within a master-pupil relationship, a form of social and intellectual apprenticeship, situated in the web of informal, familiar, hierarchical and quasi-private relationships.[60]

It is reasonable to posit that such a set of arrangements no longer exists, or is generally marginal to the actual conditions of university life. 'Educational services' operate generally in a web of legal, administrative and regulatory relations, with academic discretion playing its part, as reflected in the density and complexity of administrative rules, policies, guidelines and procedures, now prolific in a space that was at one time, it is submitted, generally governed by informality and unwritten rules.[61]

It is not correct to assert that the relationship now is wholly or even primarily commercial (student-as-consumer). Rather, it is, first and foremost, administrative, or a particular mix of administrative, academic and economic characteristics. Materially, the student is a particular type of administrative subject,[62] one with economic and social qualities, and one that is a figure of public policy and administration. Juridically, the student exists in the interplay of contract and status, as both consumer and corporator,[63] albeit without the residues of 'pupilage', and functioning on a ground of (at least) formal equality with the institution.[64]

That is the context in which quasi-judicial decision-making now operates and it is the context in which the status of university tribunals ought properly to be reconsidered.

University tribunals as public-administrative tribunals

The foregoing analysis suggests that the proper benchmark for university tribunals is the system of public-administrative tribunals: tribunals as an instrument of public policy and administration. Disciplinary tribunals, in this context, generally administer integrity, order and 'good governance' in the sector. Progress committees administer academic standards. Complaints or disputes committees administer the orderly resolution of disputes. That such bodies are administrative tribunals merely takes the long-term tendency of governmental intervention in academic relations to a logical conclusion: why should governance of the student-university relationship in individualised cases differ from the application of administrative (or indeed consumer) justice in other circumstances?

What I suggest is not that 'domestic features' and a semblance of self-regulating societies be entirely abolished; rather, that they ought not to be considered exceptional to the general 'tribunal system'. The professions, as self-regulating entities, have long since been subject to control under the ordinary administrative tribunal system in the interests of public policy; universities, if they ever were, are not 'little Alsatias' outside public law.[65]

Legislated procedural standards

It is paradigmatic that tribunals balance the judicial model and the exercise of discretion. In the present case, the discretion may include academic judgment or evaluations as to the 'good order' or integrity of the institution. Judicialisation of disciplinary and other university decisions is well-established, and many standards of statutory tribunals already apply to university decision-makers.[66] There is greater judicialisation of disciplinary decisions than other forms of decision-making. The process is characteristic of the 'tribunal system' generally,[67] as it sustains court-like features but is distinguishable from the judicial system and also from Executive government, forming part of the distinct 'integrity' branch of government.[68] Tribunals, it might be said, are 'hybrid', stand-alone entities in the sphere of formal decision-making.[69] University disciplinary decisions are, of course, first-instance, not review, decisions.

Judicialisation of university bodies means application of the judicial model of fairness, impartiality and rationality to decision-making in the academic context. Hitherto this development has occurred in an *ad hoc* fashion, according to cases before the courts and universities' own interpretation and development of rules. Obviously, as the doctrine strongly emphasises, flexibility is essential. With a view to the quality of decision-making and a policy of comparable standing of university tribunals to other statutory tribunals, there should be legislative minimum procedural standards. These might be instituted in a code of procedure, or, perhaps better, in the form of model default rules forming a base standard. Such a mechanism might be legislated pursuant to the so-called 'fairness requirements' under Subdivision 19D of the *Higher Education Support Act 2003* (Cth), and incorporated into *Higher Education Provider Guidelines 2007* (Cth) pursuant to that part of the Act.

The content of such a code ought to include, in primary legislation, requirements for procedural fairness, provision of written reasons, right of internal appeal, the duty to undertake inquiries, the right to call and/or question witnesses, the place of the rules of evidence, and right to representation. Such a framework is not substantially dissimilar to that operating in many institutions. The objective of a legislated framework is to provide clear base standards and guidance under Parliamentary and/or Executive authority.

Tribunals generally are distinguishable by their inquisitorial nature and, in this respect, legislative guidance ought also to be provided as to the inquisitorial nature of university tribunals, especially the balance to be struck in disciplinary action between adversarial (accusatorial) features and duties of inquiry. This balance might be struck in requirements for

institutions to have distinct organisational areas that receive disciplinary complaints, handle preliminary investigations and/or file[70] allegations of breaches of disciplinary rules, and the tribunals themselves. The guidance might also expressly relate to the scope of inquiries a tribunal might make and the application of the tribunal's own expertise in decision-making.

Openness and accountability

Generally tribunals are considered a cornerstone of accountable administration and hence openness and transparency are viewed as important and desirable attributes. These are more relevant for merit review tribunals than first-instance tribunals but the quasi-judicial character suggests a presumption of openness and accountability.

Openness is qualified or undesirable in some tribunals, eg guardianship, Ombudsman and social security jurisdictions. Public, administrative justice in university cases may be problematic, due to the sensitivity of accusations of misconduct, the regulatory character of universities, and the lack of privilege accompanying statements or utterances made.[71] There is no clear dividing line between public and private hearings, and 'privacy' is not to be equated with isolation or secrecy.[72] If university hearings are to be 'in private' hearings, this does not necessarily mean that every aspect of their conduct and outcome is to be inaccessible to the public. However, it would mean that members of the public generally cannot access the proceedings.

It is appropriate that universities retain power to handle 'internal' matters. However, this mode of 'privacy' is not inconsistent with, for instance, allowing an affected student to be accompanied by a person assisting them or invited by them to attend a hearing; nor would it be inconsistent for decisions and reasons to be published where a student's personal information is redacted. Alternatively, case summaries could be prepared, as occurs in the UK Office of the Independent Adjudicator for Higher Education.[73] The mix of public and private elements in university tribunal decision-making is clearly not unique, nor especially problematic, as for instance consumer dispute resolution jurisdictions attest.[74] Indeed, tertiary student-provider disputes have been resolved in those jurisdictions and publicly reported in full. Published reasons would also facilitate the consistency of decision-making and the development of 'guidance' cases, such as may occur in the ordinary statutory tribunal system and have been held to be 'generally desirable'.[75]

Review

Universities uniformly have some form of internal appeal or review of disciplinary (or other) decisions. They are required to have a means of external review.[76] In the case of overseas students, where external review leads to a beneficial outcome to the student, the institution is required to implement it.[77] There is limited structure and regulation of external review arrangements. It is possible, as many institutions do, to refer request for review to the relevant Ombudsman, although this may not be the most appropriate course of action. For example, complaints may be forthcoming beyond the statutory time-bar, and the Ombudsman's role is arguably more focused on proper administration rather than administrative justice in individual cases. No data on external review cases or decisions across the sector seem to exist. It appears likely that this is an entitlement that few students are aware of,[78] and the system of external review seems generally opaque and inaccessible. External review is a cornerstone of responsive and accountable decision-making, which is one reason the Office of the Independent Adjudicator for Higher Education was established in the UK. The approach to external review in Australia leaves much to be desired and revisiting this issue, with clear policy and procedural objectives in mind, is appropriate.

Professionalisation

Finally, greater professionalisation of tribunal members is necessary. In universities, this does not necessarily mean development of an entirely independent occupation or strata of officials within the university. Rather, it might be met in requirements for training decision-makers, providing satisfactory recognition and remuneration of staff in these roles and/or staff deployments, supported by appropriate professional and administrative support. The issue of adequate training has been raised in respect of statutory tribunal members generally,[79] and in relation to complaints handling in universities.[80] The Administrative Review Council has produced useful materials in relation to tribunal member conduct that may be instructive in the issue of professionalisation in the university context.[81] Clearly, the issue of training (and experience) is central to the quality of decision-making. It is noteworthy that in some circumstances universities presently second senior staff into, for example, internal Ombudsman roles. A disciplinary tribunal chair might, likewise, be a seconded appointment, preferably on a full-time basis. Consideration might also be given to appointment of Chairs or senior members with legal training. Robin Creyke has made the important point that 'Tribunal members are expected not just to have specialist skills but also to be able to operate effectively in a legal environment'.[82]

Professionalisation and efficiency in the operation of tribunals might also be achieved in establishing a single disciplinary tribunal at the institutional level, as distinct from the present common practice of establishing student disciplinary bodies at Faculty or School level. The tribunal would function under the authority of a single chair and with access to a wide pool of tribunal members (at greater or lesser fractions of appointment), thus enhancing the perception of its independence. It is acknowledged that among the major practical constraints on university tribunals are the volume of hearings and the typically short period of time in which a large volume of matters need to be heard (influenced by the academic semester system). In these circumstances, it seems reasonable to 'pool' human and administrative resources in such a way, for instance, that hearings can be held concurrently in relatively large numbers, as single-, 2-member or at most 3-member panels.

Conclusion

There are no compelling policy or principled reasons that university tribunals (and student disciplinary tribunals in particular) ought not to be brought within the practical scope of the ordinary statutory 'tribunal system'. There are, indeed, good reasons, such as 'quality assurance', greater independence, and promotion of good practice in first-instance decision-making, for regulatory and practical steps to be taken to, as far as practicable, bring them into line with the general standards applicable to the wider administrative tribunal system. Students are no longer an anomaly within the sphere of public policy and administration, best left to the supervision and tutelage of academic self-government. Legislative and judicial regulation of the student-university relationship has been proceeding apace for decades. It is appropriate that attention now turn to the standards and practices of their internal tribunals.

Endnotes

1 *Page v Hull University Visitor* (1993) 1 All ER 97, 106d (Lord Browne-Wilkinson): 'This special status of a visitor springs from the common law recognising the right of the founder to lay down such a special [internal] law subject to adjudication only by a special judge, the visitor'. See generally, Robert Sadler 'The University Visitor: Visitatorial Precedent and Procedure in Australia' (1982) *University of Tasmania Law Review* 2. The office of Visitor has been abolished or reduced to a mere ceremonial role in most Australian jurisdictions. In Victoria, the jurisdiction was abolished by the *University Acts (Amendment) Act 2003* (Vic). The jurisdiction to deal with student complaints was also abolished in relevant UK universities by the *Higher Education Act 2004* (UK), s 20.

2 There was something of a revival of its exercise in the 1980s-1990s: see eg *Re University of Melbourne; Ex parte De Simone* (1981) VR 378; *Re La Trobe University; ex parte Hazan* (1993) 1 VR 7; *University of Melbourne; Ex parte McGurk* (1987) VR 586; *Re La Trobe University; Ex parte Wild* [1987] VR 447.
3 James Williams, 'The Law of Universities' (1908-1909) 34 *Law Magazine and Review* 1 136; Francis Cripps-Day, 'Cambridge University Jurisdiction' (1894) 19 *Law Magazine and Law Review* 4 271.
4 *University of Ceylon v Fernando* (1960) 1 All ER 631.
5 See *Griffith University v Tang* (2005) 221 CLR 99, [165] (Kirby J).
6 D J Farrington *The Law of Higher Education* (Butterworths, 1994), 319.
7 *R v Aston University Senate; Ex parte Roffey* (1969) 2 QB 538, 556.
8 Department of Education, Employment and Workplace Relations, *Students 2010 Full Year: Selected Higher Education Statistics* (2011), http://www.deewr.gov.au/HigherEducation/Publications/HEStatistics/Publications/Pages/2010StudentFullYear.aspx (accessed 14 May 2012).
9 Australian Education International, *Export Income to Australia from Education Services in 2010-2011* (Research Snapshot, 2011), at https://aei.gov.au/research/Research-Snapshots/Documents/Export%20Income%202010-11.pdf (accessed 11 April 2012).
10 See eg *University of Melbourne Act 2009* (Vic), s 4; *University of Sydney Act 1989* (NSW), s 4; *University of Tasmania Act 1992*(Tas), s 5; *University of Western Australia Act 1911*(WA), s 4.
11 *Clark v University of Lincolnshire and Humberside* [2000] EWCA Civ 129, although not necessarily in the same decision: *Griffith University v Tang* (2005) 221 CLR 99, [81]: 'If the decision derives its capacity to bind from contract or some other private law source, then the decision is not "made under" the enactment in question'.
12 As eg in the case of the Australian Catholic University or Bond University; cf *Herring v Templeman* [1973] 3 All ER 569.
13 *Thomson v University of London* (1964) LJ Ch 625.
14 *Sammy v Birkbeck College* (1964) *The Times* 3 November.
15 *Herring v Templeman* [1973] 3 All ER 569; *Clark v University of Lincolnshire and Humberside* [2000] EWCA Civ 129; *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424; *Moran v University College Salford* (1994) ELR 187.
16 (2005) 221 CLR 99.
17 See Patty Kamvounias and Sally Varnham, 'Doctoral Dreams Destroyed: Does *Griffith University v Tang* Spell the End of Judicial Review of Australian University Decisions?' (2005) 10 *Australian and New Zealand Journal of Law and Education* 1 5.
18 H W R Wade 'Judicial Control of Universities' (1969) 85 *Law Quarterly Review* 468; see also *Clark v University of Lincolnshire and Humberside* [2000] EWCA Civ 129, [11]-[12]:
But ULH is simply a statutory corporation with the ordinary attributes of legal personality and a capacity to enter into contracts within its powers. The arrangement between a fee-paying student and ULH is such a contract: see *Herring v Templeman* [1973] 3 All ER 569, 584-5. Like many other contracts, it contains its own binding procedures for dispute resolution, principally in the form of the Student Regulations.
19 That is, a (statutory) member of the corporation: as to use of the term 'corporator', see *Re University of Melbourne; ex parte De Simone* (1981) VR 378, 386 (Governor Sir Henry Winneke sitting as Visitor).
20 Law Book Company, *Laws of Australia* Vol 2 (at 1 October 2006) 2 Administrative Law; '2.7 Other Forms of Review and Appeal', [2.7.920].
21 *Administrative Law Act 1978* (Vic) s 2.
22 Denis Galligan, *Due Process and Fair Procedures: a Study of Administrative Procedures* (Clarendon Press, 1996), 235-236.
23 Id, 236.
24 Ibid.
25 Id, 246-7.
26 *University of Ceylon v Fernando* [1964] 3 All ER 865; *Glynn v Keele University* [1971] 1 WLR 487.
27 *R v Aston University Senate; Ex parte Roffey* [1969] 2 All ER 964.
28 See *Ivins v Griffith University* [2001] QSC 86, [42].
29 J R S Forbes, *Justice in Tribunals* (Federation Press, 3rd ed, 2010), [2.17]. Hybrid tribunals being '… entities that formerly exercised purely consensual jurisdiction, and retain certain "domestic" features, but which now have statutory support. Their social importance has attracted the attention of the legislature, domestic remnants notwithstanding'.
30 See also n 1-2 above.
31 *Page v Hull University Visitor* (1993) 1 All ER 97, 109f.
32 The classic cases dealing with the nature and scope of the Visitor's 'exclusive' jurisdiction include *Philips v Bury* [1694] All ER 53 and *Thompson v University of London* (1864) LJCh 625. For contemporary application in the Australian jurisdiction, see *Murdoch University v Bloom and Kyle* (1980) WAR 193; *Andreevski v Western Institute Students' Union Inc* [1994] IRCA 49; *Nadjarian v University of Tasmania* [1986] TASSC 26; *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424. The ancient origins of the Visitor, as an office inherent at common law, in the establishment of particular types of charitable (eleemosynary) corporations and an incident of the powers of the corporation's 'founder' (including, in the

case of public universities, the relevant Parliament), are elaborated in *Philips v Bury* [1694] All ER 53, *Page v Hull University Visitor* (1993) 1 All ER 97, and in Sadler, n 1 above.

33 Sadler, note 1 above, 11-13.

34 Forbes, n 29 above, [2.23]-[2.27].

35 As to its quasi-judicial character, among the limits on the exercise of the Visitor's discretion was the requirement to accord natural justice: see *Page v Hull University Visitor* (1993) 1 All ER 97, 109j (Lord Browne-Wilkinson).

36 There was a trend to public reporting of Visitor decisions in the law reports from the 1970s and 1980s: see eg *Re University of Melbourne; ex parte McGurk* [1987] VR 586; *Re La Trobe University; ex parte Wild* (1987) VR 447; *Re Macquarie University, ex parte Ong* [1989] 17 NSWLR 113; *Re University of Melbourne; ex parte De Simone* (1981) VR 378.

37 Perhaps more consonant with the university in the 'social club' or elite mode, as suggested in *Roffey's* case: see n 7 above.

38 Legislative Council Standing Committee on Public Administration, Parliament of Western Australia *The Appeals and Review Processes for Western Australian Universities* (1996), 12. In the UK inconsistency with human rights standards played a significant part in its decline: see Tim Kaye 'Academic Judgement, the University Visitor and the *Human Rights Act 1998'* (1999) 11 *Education and the Law* 3 165.

39 See n 60 below.

40 Department of Education, Employment and Workplace Relations, *Student 2010 Full Year: Selected Higher Education Statistics*, Appendix 4.6.

41 Jim Jackson, Sally Varnham and Helen Fleming, *Student Grievances and Discipline Matters Project – Final Report* (Australian Learning and Teaching Council, 2009), [6.2.3].

42 Bruce Lindsay, 'Rates of Student Disciplinary Action at Australian Universities' (2010) 52 *Australian Universities Review* 2 27; Bruce Lindsay, 'Student Discipline: a Legal and Empirical Study of University Decision-making' (unpublished PhD thesis, Australian National University, 2010), 94-99.

43 See eg *Secretary, Department of Social Security v Willee* (1990) 96 ALR 211, 220 (Foster J): 'It would be strange if, even allowing for the administrative nature of the proceedings, the general onus, based on common sense and considerations of justice and summed up in the phrase—he who asserts must prove,‖ did not apply'.

44 Eg *Flanagan v University College Dublin* [1988] IEHC 1, [20]: 'The present case is one in which the effect of an adverse decision would have far-reaching consequences for the applicant. Clearly, the charge of plagiarism is a charge of cheating and as such the most serious academic breach of discipline possible. It is also criminal in its nature. In my view, the procedures must approach those of a court hearing'.

45 *Simjanoski v La Trobe University* [2004] VSC 180, [22].

46 Lindsay, n 42 above, chs 6, 7, and 8 respectively.

47 Also other legal standards as they were appropriate to consider, including the duty to make inquiries, the burden and standard of proof, and jurisdictional facts.

48 Lindsay, n 42 above, 214.

49 That is, the establishment of offices such as University Ombudsman: see generally, Rachael Field and Michael Barnes, 'University Ombuds: Issues for Fair and Equitable Complaints Resolution' (2003) 14 *Australasian Dispute Resolution Journal* 198; Hilary Astor, 'Improving Dispute Resolution in Australian Universities: Options for the Future' (2005) 27 *Journal of Higher Education Policy and Management* 1 49.

50 See eg Simon Marginson, *Markets in Education* (Allen and Unwin, 1997).

51 The marshaling and economic realization of intellectual or cognitive capacities on the market is the central theme of 'human capital theory', generally associated with the so-called Chicago School and writers such as Milton Friedman and Gary Becker: see eg Milton Friedman *Capitalism and Freedom* (University of Chicago Press, 1962), Ch 6; Gary Becker *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education* (University of Chicago Press, 1993 [1964]); see also Simon Marginson *Education and Public Policy in Australia* (Cambridge University Press, 1993), 38:
As developed by the Chicago School [of neoclassical economics], human capital theory has two core hypotheses. First, education and training increase individual cognitive capacity and therefore augment productivity. Second, increased productivity leads to increased individual earnings, and these increased earnings are a measure of the value of human capital.

52 The notion of 'industrialisation' of knowledge famously goes back at least to University of California President Clark Kerr's famous analysis of the 'multiversity': Clark Kerr, *The Uses of the University* (Harvard University Press, 1963).

53 On 'positional goods' and 'positional advantage' in relation to higher education, see Simon Marginson, n 50 above, 50.

54 Simon Marginson and Mark Considine, *The Enterprise University: Power, Governance and Reinvention in Australia* (Cambridge University Press, 2000).

55 Bill Readings *The University in Ruins* (Harvard University Press, 1996).

56 Ibid, 39.

57 Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* (University of Minnesota Press, 1984), 41ff; Franco Piperno, 'Technological Innovation and Sentimental Education' in Paulo Virno and Michael Hardt (eds), *Radical Thought in Italy: a Potential Politics* (University of Minnesota Press, 1996), 123-132.

58 Cf Lyotard, n 57 above, 4:

We may thus expect a thorough exteriorization of knowledge with respect to the 'knower', at whatever point he or she may occupy in the knowledge process. The old principle that the acquisition of knowledge is indissociable from the training *(Bildung)* of minds, or even of individuals, is becoming obsolete and will become ever more so. The relationship of the suppliers and users of knowledge to the knowledge they supply and use is now tending, and will increasingly tend, to assume the form already taken by the relationship of commodity producers and consumers to the commodities they produce and consume—that is, the form of value.

59 See eg Oxford Dictionaries, http://oxforddictionaries.com/definition/in%2Bstatu%2Bpupillari (accessed 2 May 2012): '1 under guardianship, especially as a pupil: *we are not children in statu pupillari, but adults*… 2 in a junior position at university; not having a master's degree'. See also eg University of Cambridge *Statute K: Commencement, Interpretation, Invalid Proceedings* (2011), http://www.admin.cam.ac.uk/univ/so/pdfs/statutek.pdf (accessed 11 July 2012), cl 3(h):
the term person *in statu pupillari* shall mean a member of the University (in which term shall be included a member of a College, or of an Approved Society, resident in the University with a view to matriculation) who has not been admitted to an office in the University (or to a post in the University Press specially designated under Statute J, 7 or to an appointment approved by the University for the purpose of Statute A, III, 7(*e*)), or to a Fellowship or office of a College, or to a degree which qualifies the holder for membership of the Senate under Statute A, I, 6(*c*), and is of less than three and a half years' standing from admission to his or her first degree (if any)…

60 The *de facto* private internal authority of the British universities was somewhat reluctantly curtailed and subject to judicial power in *Glynn v Keele University* [1971] 1 WLR 487, in which Pennycuik VC identified the relationship in terms of 'tutor and pupil' and with the 'upbringing and supervision of the pupil under tuition': at 494. The power of the (University) Vice-Chancellor was, in his Honour's opinion, 'regretfully' not 'magisterial': at 495, and therefore limited by public law. The sentiment of the noted administrative lawyer Sir William Wade at around the same time was comparable: see Wade, n 18 above.

61 Eg consider present trends to rules governing preparation and organisation of syllabus and course content, codification of 'graduate attributes' (ie the character of the university-trained), rules and procedures governing research, operational and strategic planning, auditing, etc.

62 It is instructive that, as a matter of law, decisions 'of an administrative character' have been held to include decisions with educational content or character: *Evans v Friemann* (1981) 53 FLR 229.

63 See Francine Rochford 'The Relationship Between the Student and the University' (1998) 3 *Australian and New Zealand Journal of Law and Education* 1 28, especially 43-45.

64 As application of the principles of contract would suggest.

65 Cf Mark Lewis, 'An Alsatia in England' (1984) 47 *Modern Law Review* 171, who argues that, aside from the English Bar, there probably is no genuinely domestic private tribunal, subsequent to judicial interventions to supervise and control voluntary associations.

66 Eg the standards of bias applying to university tribunals, namely that apparent as well as actual bias, must be avoided, are comparable to (other) statutory tribunals: see *Simjanoski v La Trobe University* [2004] VSC 180; *R v Cambridge University; Ex parte Beg* [1998] EWHC Admin 423.

67 See eg John McMillan, 'Administrative Tribunals in Australia – Future Directions' in Robin Creyke (ed), *Tribunals in the Common Law World* (Federation Press, 2008), 237; Heather MacNaughton, 'Future Directions for Administrative Tribunals: Canadian Administrative Justice – Where Do We Go from Here?' in Robin Creyke (ed), *Tribunals in the Common Law World* (Federation Press, 2008), 206-208.

68 See eg Robin Creyke, 'Administrative Justice – Towards Integrity in Government' (2007) 31 *Melbourne University Law Review* 705; Robin Creyke, 'The Special Place of Tribunals in the System of Justice: How Can Tribunals Make a Difference? (2004) 15 *Public Law Review* 220.

69 Cf Nick Wikely, 'Future Directions for Tribunals: a United Kingdom Perspective' in Robin Creyke (ed), *Tribunals in the Common Law World* (Federation Press, 2008), 185-190, where he identifies the 'distinctive ethos of tribunals'.

70 The language here might be instructive or even determinative of the role to be played by such an internal body. For example, reference to 'prosecuting' or even 'informing' of breaches has resonances of criminal action. The term 'file' is used for the sake of neutrality, although it may seem excessively administrative in nature.

71 See J R Forbes, 'University Discipline: a New Province for Natural Justice?' (1971) 7 *University of Queensland Law Journal* 85, 86-88.

72 *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 49, [23]; see also Zac Chami 'The Scope and Meaning of "in private" Hearings: the Implications of SZAYW' (2006) 51 *Australian Institute of Administrative Law Forum* 67.

73 See Office of the Independent Adjudicator for Higher Education, 'Recent Decisions of the OIA', http://www.oiahe.org.uk/decisions-and-publications/recent-decisions-of-the-oia.aspx (accessed 9 May 2012).

74 Eg *Fair Trading Act 1999* (Vic) s 108.

75 *NABM of 2001 v Minister for Immigration & Multicultural Affairs* [2002] FCA 335, [66] (Beaumont J).

76 Higher Education Provider Guidelines 2007 *(Cth), sub-para 4.5.2;* National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007 *(Cth) (*ESOS National Code*), standard 8.3.*

77 *ESOS National Code*, standard 8.5.

78 By way of comparison, it has been noted that student complaints procedures and associated information are relatively inaccessible to students: Jackson *et al*, n 39 above, [11.2]-[11.3].
79 Creyke, 'The Special Place of Tribunals in the System of Justice', n 68 above, 233-234.
80 Jackson, et al, n 41 above, [11.4.2]; Jim Jackson, Helen Fleming, Patty Kamvounias and Sally Varnham *Student Grievances and Discipline Matters Project: Good Practice Guide* (Australian Learning and Teaching Council, 2009), 24-27.
81 Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (2009), http://152.91.15.12/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_A_Guide_to_Standards_of_Conduct_for_Tribunal_Members_-_Revised_2009 (accessed 8 May 2012).
82 Creyke, 'The Special Place of Tribunals in the System of Justice', n 68 above, 233.

THE PRIVATIVE CLAUSE AND THE CONSTITUTIONAL IMPERATIVE

Robert Lindsay*

During the Bismarkian era of Prussian expansion the flamboyant politician Ferdinand Lassalle said 'Constitutions are not originally questions of law, but questions of power. Written Constitutions only have value and last if they express the real power relations in society'. In the last twenty years, the High Court has chosen not to scrutinise with the same rigour as the English courts in administrative decision making, largely because of the Court's observance of the separation of powers under the Australian Constitution.[1] Conversely, recent decisions on privative clauses establish how determined the High Court and now other courts in Australia have become in scrutinising the constitutional legality of both judicial and administrative decision making. In doing so the High Court ensures that the legislature confines itself to its proper sphere of operation.

To declare what the law is has always been a central part of the judicial function. Yet, Parliament, whether Federal or State, has frequently sought to close off appellate and review avenues by the use of privative clauses. In recent times the High Court has become increasingly vigilant in ensuring that avenues of judicial review are preserved.

Commonwealth legislation

It is convenient to consider privative clauses in relation to Commonwealth and State Legislation separately, although the decision of the High Court in 2010 of *Kirk v Industrial Relations Commission,*[2] discussed later, has made this bifurcation less meaningful. Formerly, the legislative distinction rested very much upon recognition of the separation of powers under the Commonwealth Constitution, which separation is not to be found in the State Constitutional Acts.

Industrial regulations

Prior to the 21st century, the most quoted Australian authority on privative clauses was that of *R v Hickman ('Hickman')*. An order nisi for a writ of prohibition under section 75(v) of the Commonwealth Constitution was sought in relation to a board ruling that haulage contractors, who carted coal as well as other things, were required to grant their lorry driver employees minimum wage rates specified under an award. The Commonwealth regulations provided that such regulations 'shall apply to industrial matters in relation to the coal mining industry'. Regulation 17 provided that a decision of the board 'shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any Court on any account whatever'. In ordering that the rule nisi should be made absolute it was held that the employees who carried on the business of carriers were not in any real sense part of the coal mining industry and therefore the minimum wage rates under the award did not apply. Dixon J said that the decision of the board:

> should not be considered invalid if they do not upon their face exceed the board's authority and if they do amount to a bona fide attempt to exercise the powers of the board and relate to the subject matter of the regulations.[3]

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The migration legislation

In 2002, the Howard Government introduced a privative clause to prohibit appeals from decisions made by the Refugee, Migration and Administrative Review Tribunal to the Federal or the High Court. An amendment to the *Migration Act 1958 (Cth)* prohibited such appeals from decisions described as 'privative clause' decisions. In *Plaintiff S157/2002 v the Commonwealth*[4] Gleeson CJ said that a privative clause may involve a conclusion that a decision or purported decision is not a 'decision ..... under this Act'.[5] The plurality said that a privative clause cannot protect against a failure to make a decision required by the legislature, which decision on its face exceeds jurisdiction.[6]

In commenting upon the Commonwealth Government's argument that the three Hickman provisos, quoted by Dixon J above, enlarged the power of decision makers, to enable such decisions to be protected, so long as they complied with those three provisos, the plurality said that the position was otherwise, that the so called protection which the privative clause affords will be inapplicable unless those provisos are satisfied.[7] To ascertain what protection a privative clause purports to afford, it is necessary to have regard to the terms of the particular clause. It is inaccurate to describe the Hickman provisos as expanding or extending the powers of the decision maker. The legal process is not one which can place a construction on the privative clause as one provision and assert that all other provisions may be disregarded.[8] If a privative clause conflicts with another provision, pursuant to which some action has been taken or decision made, its effect will depend upon the outcome of its reconciliation with that other provision.[9] A specific intention in legislation as to the duties and obligations of the decision maker cannot give way to the general intention in a privative clause to prevent review of the decision.[10]

Their Honours said that the expression 'decisions ..... made under this Act' must be made so as to refer to claims which involve neither a failure to exercise jurisdiction nor an excess of jurisdiction. An administrative decision which involves jurisdictional error is 'regarded in law as no decision at all'.[11] Section 474(2) of the *Migration Act 1958 (*Cth*)* required that the decision in question be 'made under [the] Act' and, where the decision made involved jurisdictional error, such a decision was held not to be 'made under the Act' so as to be protected against judicial review.

In *Plaintiff S157/2002* it was said with reference to section 75(v) of the Constitution which authorised prerogative relief against a Commonwealth officer:

> First, the jurisdiction of this Court to grant relief under s 75(v) of the Constitution cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.[12]

In the following year in *Minister for Immigration v SGLB,*[13] the Court reaffirmed what had been said in *Plaintiff S157*, that jurisdictional error negating a privative clause decision may arise where there has been a failure to discharge what has been called 'imperative duties' or to observe 'inviolable limitations or restraints' found in the *Migration Act*. As Gummow and Hayne JJ said, the three *Hickman* provisos render a privative clause inapplicable unless they are satisfied. However, *Plaintiff S157* also rejected the proposition that those provisos would always be sufficient, so that the satisfaction of them necessarily takes effect as 'an expansion' or 'extension' of the power of the decision maker in question.[14]

Taxation legislation

In *Commissioner of Taxation v Futuris*[15] the High Court was asked to consider the validity of an income tax assessment where it was alleged the assessor deliberately double counted

actual income tax. Under the *Income Tax Assessment Act 1936 (*Cth*)* section 175 provided 'the validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with'. The High Court upheld the validity of the assessment applying the principles of statutory construction set out in *Project Blue Sky Incorporated v Australian Broadcasting Authority*[16] to the effect that the question in the present case was whether it is a purpose of the Act that a failure by the Commissioner in the process of assessment to comply with the provisions of the Act rendered the assessment invalid. In determining that question of legislative purpose, regard must be had to the language of the relevant provision and the scope and purpose of the statute. When this was done it was found that section 175 was not strictly a privative provision and that the assessor did not engage in 'double counting' with any knowledge or belief that there was a failure to comply with the provisions of the Act.

State legislation

In *Kirk v Industrial Relations Commission,*[17] the High Court considered how far, under State legislation, it was necessary to take account of the requirements of Chapter III of the Constitution. The Court said that, at Federation, each of the Supreme Courts had a jurisdiction that included that of the Court of Queen's Bench in England and, whilst statutory privative provisions had been enacted by colonial legislatures, which had sought to cut down the availability of certiorari in *Colonial Bank of Australasia v Willan,*[18] the Privy Council had said of such provisions:

> It is, however, scarcely necessary to observe that the effect of [such a privative provision] is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, *except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it* (emphasis added).

In *Kirk* the Court enunciated a new principle that 'legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power'.[19]

Under section 179(1) of the *Industrial Relations Act 1996 (*NSW*)* a decision of the Industrial Court 'is final and may not be appealed against, reviewed, quashed or called into question by any Court or Tribunal'. The High Court said 'more particularly, although a privative provision demonstrates a legislative purpose favouring finality, questions arise about the extent to which the provision can be given an operation that immunises the decision of an inferior court or tribunal from judicial review, yet remain consistent with the constitutional framework of the Australian Judicial System'.[20] *Kirk* had been charged with offences that inadequately particularised the nature of the offence alleged against the *Occupational Health and Safety Act*; the High Court said that this constituted jurisdictional error against which the privative clause afforded no protection.

Where a privative clause is found, the question arises as to whether there is 'jurisdictional error' of such a kind that the privative clause will not protect against a superior court intervening to review the findings of the decision maker. As the plurality said in Kirk, 'the principles of jurisdictional error (and its related concept of jurisdictional fact) are used in connection with the control of tribunals of limited jurisdiction on the basis that a tribunal of limited jurisdiction should not be the final judge of its exercise of power; it should be subject to the control of the courts of more general jurisdiction'.[21]

In *Kirk*, the Court referred to its earlier decision in *Craig v South Australia*[22] in which it was said:

> if.....an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material, or at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.[23]

It was reiterated again in *Kirk* that the above reasoning was not to be 'a rigid taxonomy of jurisdictional error'.[24] For example, it was recognised that, in some cases, failure to give reasons may constitute a failure to exercise jurisdiction.[25] So too, natural justice requires that both sides be heard.

The Crimes legislation

In *Wainohu v New South Wales*[26] the *Crimes (Criminal Organisations Control) Act 2009 (*NSW*)* provided that the Attorney General may, with the consent of a Judge, declare a Judge of the Supreme Court to be an 'eligible Judge', for the purposes of the Act. The Commissioner of Police may apply to an 'eligible Judge' for a declaration that a particular organisation is a 'declared organisation', and the Judge may make a declaration that this is so if satisfied that members of a particular organisation are engaged in serious criminal activity and that the organisation 'represents a risk to public safety and order'. The Act said that the eligible Judge is not required to provide any grounds or reasons for making a declaration and, once made, the Supreme Court may on the application of the Commissioner of Police, make a control order against individual members of the organisation. The Act was held to be unconstitutional in that it impaired the institutional integrity of the Supreme Court.

Mr Wainohu was a member of the Hells Angels Motorcycle Club. Under the Act there was no appeal from the Judge's decision and a broadly expressed privative clause purported to prevent a decision by an eligible Judge from being challenged in any proceedings, though it was acknowledged by counsel that this would not protect the decision against jurisdictional error in light of the earlier *Kirk* decision.[27] It was said by French CJ and Kiefel J:

> A state legislature cannot, consistent with Ch III, enact a law which purports to abolish the Supreme Court of a State or which excludes any class of official decision, made under a law of the State, from judicial review for jurisdictional error by the Supreme Court of the State.[28]

Gummow, Hayne, Crennan and Bell JJ adopted the earlier comments of Gaudron J, that confidence reposed in judicial officers 'depends on their acting openly, impartially and in accordance with fair and proper procedures for the purpose of determining the matters in issue'.[29]

It can be seen, therefore, that the High Court looks at the exercise of judicial power with emphasis on the need for procedural fairness, manifested in an obligation to provide a fair hearing to a party and observance of a requirement for reasons to be given, and that failure in this regard manifests jurisdictional error against which a privative clause would not afford protection.

The building and construction legislation

The decision in *Kirk* has facilitated review in the area of building and construction adjudication. In *Chase Oyster Bar v Hamo Industries*[30] the NSW Court of Appeal said 'to the extent that the New South Wales Court of Appeal in *Brodyn Pty Ltd v Davenport*[31] decided that the Supreme Court of NSW was not required to consider and determine the existence of jurisdictional error by an adjudicator making a determination under the *Building and Construction Industry Security of Payment Act 1999 (*NSW*)*, that an order in the nature of certiorari was available to quash or set aside a decision of an adjudicator, and that their

legislation expressed or implied a limit to the Court's power to deal with jurisdictional error, it was in error.....' It seems likely that there is scope for argument that a determination under section 41 of the *Construction Contracts Act 2004 (*WA*)* is not final if jurisdictional error is discovered.

The WA Worker's Compensation legislation: the Seddon case[32]

Seddon applied for an order nisi for a writ of *certiorari* and writ of *mandamus* arising out of an injury received in 2001 at work. He subsequently lodged with the dispute resolution directorate a claim that his injuries were not less than the 30% threshold for the purposes of a common law claim. The matter was referred to a Medical Assessment Panel by the directorate, as the employer contended that the permanent disability was less than 30%. In September 2010, the Panel determined that the permanent disability was 27% and, in doing so, gave Mr Seddon a nil percentage permanent degree of loss of use of the right arm. The Panel indicated that although there were right shoulder symptoms, this injury was unrelated to the accident. The solicitors for Mr Seddon requested that the Panel reconsider this question because the Panel's jurisdiction under the relevant Act was limited to assessing the degree of disability and not how the disability arose. The Panel, in December 2010, reaffirmed its determination that there was a nil loss of permanent function in relation to the right shoulder.

Prior to November 2005, the *Worker's Compensation Act 1981 (*WA*)* said that determinations of the Medical Assessment Panel were 'final and binding' but did not exclude judicial review on previous authority.[33] However, a privative clause was introduced in November 2005 by the *Worker's Compensation Reform Act, 2004 (*WA*),* which said that 'a decision of a Medical Assessment Panel or anything done under this Act in the process of coming to a decision of a Medical Assessment Panel is not amenable to judicial review'.

In seeking *certiorari* and *mandamus*, Seddon argued: first, that the privative clause does not apply since it was only introduced in November 2005 and the injury had occurred in 2001. Second, if it did apply and, notwithstanding that the provisions of the Act also said that a determination of a Panel is 'final and binding', these provisions did not exclude judicial review where there has been jurisdictional error. A 'decision' should be read as meaning 'a decision within jurisdiction' and not a decision made without jurisdiction. Furthermore, the words 'anything done under this Act' should mean anything validly done under this Act, and the words 'not amenable to judicial review' should be read as 'not amenable to judicial review for non-jurisdictional error'.[34] Finally, it was argued that, if the Court considered that the privative clause excluded judicial review for jurisdictional error in the light of the obiter dictum in *Kirk* (ie 'legislation which would take from the Supreme Court power to grant relief on account of jurisdictional error is beyond State Legislative power'), this would mean that the privative clause was unconstitutional.

It was argued that there had been jurisdictional error because: first, the Panel had not analysed the various conflicting medical reports and thus had failed to take into consideration jurisdictional facts necessary to their decision. Second, the Panel had on both occasions on which they made a determination had regard to whether the injuries were work related and in doing so stepped outside their jurisdiction. Third, the determination did not properly disclose the underlying reasoning process upon which the finding of nil loss of use of the right arm had been made.

Edelman J granted an order nisi on 8 September 2011, finding that it was arguable that jurisdictional errors arose in relation to the determination by the Medical Assessment Panel on the three grounds presented. On 10 January 2012, his Honour found, after hearing argument from the deemed employer, that the order nisi should be made absolute, on grounds that there had been jurisdictional error by the Panel in having regard improperly to

whether or not the arm injury was work related when so to determine was not within their jurisdictional statutory power. His Honour found that this constituted jurisdictional error and that the privative clause, which he did find to be operative, did not protect the determination of the Panel from judicial review.

Summary of decisions

In recent times the High Court has been ready to permit judicial review in an increasingly wide range of instances, where privative clauses have been impugned on the basis of some form of jurisdictional error. Jurisdictional error itself now casts a wide net.[35] It has been said that 'a privative clause will sometimes, although not often, protect against a refusal or failure to exercise power'[36] but such circumstances appear now increasingly rare in light of the constitutional imperative to ensure the maintenance of a balanced distribution of power under the Constitution. As Ferdinand Lassalle recognised as long ago as 1862 'political institutions matter, that constitutions rest on power relationships, and that human will can change things'.[37]

Endnotes

1 Robert Lindsay, 'Natural Justice: Now We See Through a Glass Darkly' 2010 63 *AIAL Forum* 67 – 79, in which I contrast Australian and English developments in judicial review of administrative law action.
2 *Kirk v Industrial Relations Commission* [2010] HCA 1.
3 *R v Hickman* (1945) 70 CLR 598.
4 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.
5 *Plaintiff S157/2002* per Gleeson CJ at [19].
6 *Plaintiff S157/2002* Gaudron, McHugh, Gummow, Kirby & Hayne JJ at [57].
7 *Plaintiff S157/2002* at [64].
8 *Plaintiff S157/2002* at [65].
9 *Plaintiff S157/2002* at [60].
10 *Plaintiff S157/2002* at [65].
11 *Plaintiff S157/2002* at [76], see also *Cashman v Brown* [2011] HCA 22 where a privative clause making a determination of a Medical Panel in Victoria 'final and conclusive' was held not to exclude judicial review in respect of a common law claim since the claim was not brought under the *Accident Compensation Act 1985* (Vic).
12 *Plaintiff S157/2002* at [98].
13 (2004) 207 ALR 12; (2004) 78 ALJR 992.
14 SGLB at supra at [57].
15 (2008) 247 ALR 506.
16 (1998) 194 CLR 355.
17 *Kirk* supra footnote 2.
18 *Colonial Bank of Australasia v Willan* 1874 LR 5PC 417 at 442.
19 *Kirk* supra at [100].
20 *Kirk* supra at [93].
21 *Kirk* supra French CJ, Gummow, Hayne, Crennan,Kiefel & Bell JJ at [64].
22 *Craig v South Australia* (1995) 184 CLR 180.
23 *Kirk* supra at [67].
24 *Kirk* supra at [74].
25 *Kirk* supra at [63].
26 [2011] HCA 24.
27 *Wainohu* supra French CJ and Kiefel J at [15].
28 *Wainohu* supra French CJ and Kiefel J at [46].
29 *Wainohu* supra Gummow, Hayne, Crennan and Bell JJ at [74].
30 (2010) 272 ALR 750: [2010] NSWCA 190.
31 [2004] NSWLR 421.
32 *Seddon v Medical Assessment Panel (No. 1)* 2011 WASC 237; Seddon v Medical Assessment Panel (No. 2) 2012 WASC 1.
33 *Seddon (No 1)* and cases cited by Edelman J at [37].
34 *Seddon (No 2)* at [40] see commentary of Edelman J.
35 Se*ddon (No 1)* at [55] to [61].
36 *Darling Casino Ltd v NSW Casino Corporation* (1997) 191 CLR 602 (Gaudron and Gummow JJ).
37 Jonathan Steinberg, *Bismarck* (Oxford University Press, 2011): page 205 citing 1862 lectures by Ferdinand Lassalle.