Administrative Law and the Rule of Law:

Still Part of the Same Package?

Papers presented at the 1998 National Administrative Law Forum

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Preface

This publication contains the edited papers from the Administrative Law Forum held in Melbourne in June 1998. The Forum is an annual event sponsored by the Australian Institute of Administrative Law (AIAL). Every second year it is sponsored on a rotating basis by one of the State Chapters.

This book is the eighth publication deriving from the annual Forum. Previous proceedings have been published under the following titles:

Fair and Open Decision Making, proceedings of the 1991 AIAL/IPAA Forum, edited by John McMillan, H McKenna and J Nethercote (published in (1991) 66 *Canberra Bulletin of Public Administration*)

Administrative Law: Does the Public Benefit?, proceedings of the 1992 AIAL Forum, edited by John McMillan

Administrative Law and Public Administration: *Happily Married or Living Apart Under the Same Roof?*, proceedings of the 1993 AIAL/IPAA Forum, edited by S Argument

Administrative Law: Are the States Overtaking the Commonwealth?, proceedings of the 1994 AIAL Forum, edited by S Argument

Administrative Law and Public Administration: Form vs Substance, proceedings of the 1995 AIAL/IPAA Forum, edited by K Cole

Administrative Law: Setting the Pace or Being Left Behind?, proceedings of the 1996 AIAL/IPAA Forum, edited by L Pearson

Administrative Law under the Coalition Government, proceedings of the 1997 AIAL/IPAA Forum, edited by J McMillan.

The Co-Directors for the 1998 Forum were Kim Rubenstein and Susan Kneebone, both members of the Executive of the Victorian Chapter of the AIAL and lecturers in the Law Faculty at Melbourne University and Monash University, respectively. They extend their thanks to the Executive of the Victorian Chapter for assistance provided in the organisation of the conference, and to Jenny Kelly and Kathy Malcolm of the IPAA/AIAL Secretariat for their excellent administrative assistance. Due to the arrival of Cohava Rubenstein

Sturgess in November 1998, the principal responsibility for continuing and completing the editing of the papers became Susan Kneebone's. However, Kim continued to provide support and guidance to Susan on editorial issues and she thanks Kim for that. Thanks also to Fiona Knowles who assisted Susan in the early stages of the editing process, and to David Ruschena who provided invaluable research and editorial assistance to Susan thereafter. The assistance of John McMillan in the final stages of the production of this publication is also acknowledged. Finally the support of the Law Faculty at Monash University must be acknowledged.

Administrative Law and the Rule of Law: Still Part of the Same Package?

SUSAN KNEEBONE*

INTRODUCTION

The title of the 1998 Forum, *Administrative Law and the Rule of Law: Still Part of the Same Package?* was chosen to provoke discussion about whether administrative law can be neatly packaged or compartmentalised, distinct from broader public "rule of law" issues or from private law values.[1] It was intended to expose both the diversity and direction of contemporary change in administrative law, but at the same time to show how those changes must be rooted in basic ideas about the role of government, administration, and our democratic system. Whereas the 1997 Forum concentrated upon the direction of change following the election of a coalition government,[2] in 1998 we concentrated upon putting those changes into perspective. We were not disappointed in our expectations. The engaged involvement of all presenters of papers and lively questions from conference participants ensured a high level of comment and debate. The annual

* Co-Director with Kim Rubenstein for the 1998 Administrative Law Forum, Executive Member of the Victorian Chapter of the Australian Institute of Administrative Law (AIAL); Senior Lecturer in Law, Faculty of Law, Monash University. I would like to thank Kim for the useful comments and additions that she suggested for this Introduction.

1 See also M Aronson, "A Public Lawyer's Responses to Privatisation and Outsourcing" in M Taggart (ed), *The Province of Administrative Law* (1997) at 53: "The perception that administrative law is a single and indivisible package may well be a peculiarly Australian phenomenon."

2 J McMillan (ed), *Administrative Law under the Coalition Government* (1998).

Forum continued to provide a valuable exchange of information and ideas between practitioners of administrative law and academics. In this volume of materials you will find a stimulating, varied, and immensely readable set of papers.

To elaborate upon the themes of the conference, or to "unpack" the contents of the administrative law parcel,[3] three plenary sessions were held. The first, entitled *Accountability: Parliament, the Executive and the Judiciary* focused upon our democratic system and our understandings of "accountability" and its role in administrative law. The second focused broadly upon *The Commercialisation of Administrative Law*, and the third upon the impact of international law under the heading *Human Rights and Administrative Law*. Additionally the workshop sessions picked up the two themes of diversity and change by focusing upon the substantive content of administrative law and upon the practical skills needed in the changing context.

With such a diverse range of topics and group of participants, it was not surprising that a variety of views was expressed on the questions which the title of the Forum posed: is administrative law still part of the same package as the rule of law? What is meant by the "rule of law"? What model of democracy should be followed? What basic values determine the contents of the package? How do we ensure that those values are maintained and protected? Whilst there was general consensus that the "core" values can be stated to reflect the grounds of judicial review, which Justice Doyle explained succinctly as requiring that executive and administrative decisions be made "in power", that they be "lawful" and "fair", different views were expressed about the application of those values.

Three contexts in particular highlighted this divergence in views in relation to contemporary issues. First, the Federal Government's proposed reform of the federal tribunal system provoked considerable discussion. Second, in considering the effects of the "commercialisation" of administrative law, there was disagreement about whether "public" and "private" law values are, or can be, successfully merged. In this and the other contexts, concern was expressed about the application of concepts of efficiency, or economic values, to the detriment of individual rights and the maintenance of core administrative law values. There has been an undoubted shift in emphasis in the direction of "economic rationalism" in Australia in recent years since the publication of the Hilmer (National Competition Policy) Report in 1993.[4] For example, the Financial Management and Accountability Act 1997 (Cth), s 44 imposes an obligation upon the "Chief Executive" of an "Agency" (defined in s 5 to include a Department of State) to promote the "efficient, effective and

3 This is to borrow from the paper by S Tongue, "Writing Reasons for Decisions" in this volume of materials.

4 National Competition Policy Review, *National Competition Policy: Report of the Independent Committee of Enquiry* (1993) (*Hilmer Report*).

ethical" use of Commonwealth resources.[5] In the migration and social security areas, the tribunals are required to provide a "mechanism of review which is fair, just, economical and quick."[6] Recent legislation in the migration area underscores the Federal Coalition Government's concern with economic values in its second term of office.[7] This concern with the application of economic values was most marked in the third context, namely the implementation of international law in domestic law in relation to individual or human rights. The questions which this set of papers should leave a reader to ponder include:

- In our democratic system, which is recognisably part of a global framework, what do we expect of our governments?
- In this context, should the rule of law be perceived as involving strictly instrumental and nationalistic goals, or should it be seen in broader, substantive terms?[8]
- Finally, how can we achieve a balance between these views when there is disagreement?

In the opening address and in the first plenary session on *Accountability: Parliament, the Executive and the Judiciary*, the speakers began to unravel the notion of the rule of law in our democratic system. In opening the Forum, Justice Susan Kenny highlighted the twin pillars of accountability and independence in administrative law, as necessary to maintain public confidence in our system of public administration. As her Honour pointed out, when applied to courts and tribunals, the hallmark of public confidence is the independence of those institutions. The corollary is that such institutions should operate without undue influence, a principle which her Honour acknowledged lies at the heart of procedural fairness.[9] Thus, her Honour introduced one recurrent refrain of the Forum. This was a concern with maintaining the independence of tribunals in any amalgamation that may occur at the federal level.

The first plenary session also looked at the idea of accountability from the perspective of, or in relation to, each of the branches of government. In particular, it looked at the relationships between

5 The provisions of the Act are discussed by I Harvey, "The Hughes Aircraft Case and the Private Law of Public Tenders" (1998) 5 *AJ Admin L* 207 at 210 – 212. See also Commonwealth Services Delivery Agency Act 1997 (Cth), s 12(1)(b) which defines the role of the Board of Management of the Services Delivery Agency "to ensure that the Agency's functions are properly, efficiently and effectively performed."

6 Eg, Migration Act 1985 (Cth), s 420(1) in relation to the Refugee Review Tribunal.

7 Migration Legislation Amendment Act 1998 (No 1) (Cth)—Act No 113\98.

8 D Dyzenhaus, "Reuniting the Brain: The Democratic Basis of Judicial Review" (1998) 9 *PLR* 98; cf P Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Pub L* 467.

9 The fundamental nature of the natural justice or procedural fairness principle is also highlighted in the papers by I Holloway, "Legitimate Expectations, Human Rights and the Rule of Law" and M Allars, "The Commercialisation of Administrative Law" in this volume of materials.

these different branches. The session started with a provocative address by Justice John Doyle, Chief Justice of South Australia, who concentrated upon judicial review. Justice Doyle challenged the oft-held view that judicial review of administrative action by the courts is central to the accountability of the executive. Increasingly a number of commentators have exhorted the courts to take a proactive stance on judicial review to clarify administrative law principles.[10] Justice Doyle, whilst accepting that judicial review can make a "modest contribution" to executive behaviour, argued that to focus upon the judicial review function of an unelected judiciary leads to confusion. Instead he concentrated upon the accountability of the courts by comparing it with that of executive government. On the basis of such comparison, Justice Doyle not only exposed problems in securing executive accountability, but demonstrated that the courts are "as accountable as fully as their function permits." Such accountability, his Honour suggested, "differs from that of the executive government only in form". Whilst empirical evidence is beginning to emerge to challenge the perception of the normative effect of judicial review,[11] a preliminary study by three Australian academics demonstrates positive responses by agencies to judicial review.[12] Indeed a paper in a later session by two officers of the Australian Securities Commission substantiated this impact.[13] The important point that Justice Doyle makes is that the courts are unelected and we cannot load them with too many expectations about improving administrative processes. Not surprisingly, Justice Doyle's account is a court-centred one which implicitly reveals a view of democracy in which judges are equal to elected officials, not on the basis of a broad Rousseauian notion of the "general will of the people",[14] but rather perhaps on the basis that they are equal "senior officials" in a sovereign legal system.

Following Justice Doyle's account of judicial and executive accountability, we were treated to a view of the role of the Senate Standing Committee on Regulations and Ordinances by Senator Kay Patterson. Senator Patterson considered the accountability of the executive and the judiciary to Parliament through the work of the Committee. Senator Patterson stressed the central function of the federal legislature in defining the role of courts exercising federal jurisdiction, and related some interesting examples of direct control over the making of court rules. She also instanced some examples of the work of the Committee in the protection of individual rights.

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10 Eg, DJ Galligan, "Judicial Review and the Text-book Writers" (1982) 2 *Ox JLS* 257; T Prosser, "Towards a Critical Public Law" (1982) *JL & Soc* 1.

11 R Cranston, "Reviewing Judicial Review" in G Richardson and H Genn (eds), *Administrative Law and Government Action* (1994) at 45; cf G Richardson and M Sunkin, "Judicial Review: Questions of Impact" (1996) *Pub L* 79.

12 D Pearce, J McMillan and R Creyke, "Success at Court—Does the Client Win" in J McMillan (ed), above n 2 at 239.

13 See L Macauley and M Chalmers, "Administrative Law and Corporate Regulation: The Australian Securities Commission's Experience" in this volume of materials.

14 Cf D Feldman, "Democracy, the Rule of Law and Judicial Review" (1990) 19 *Fed LR* 1.

Senator Patterson's paper gives a legislator's perspective of the overall importance of parliamentary control over the other arms of government.

Anne Coghlan, a former member of the old Victorian Administrative Appeals Tribunal (AAT) and now a member of the new Victorian Civil and Administrative Tribunal (VCAT) who is well known for her previous paper on the normative effects of AAT decisions,[15] pointed out that "accountability" in the context of tribunals occurs in two senses. First, a tribunal is accountable in terms of the normative or "trickle" down effects of its decisions. Secondly, whilst remaining independent, a tribunal is accountable to the executive. Coghlan echoed the comments and concerns of Justice Kenny about the independence of tribunal members. She also emphasised the need for realistic performance indicators for tribunals and expressed a concern that such indicators not detract from the merits review function.

The final paper in the first plenary session by Dr Mary Crock and entitled "Privative Clauses and the Rule of Law: Administrative versus Judicial Review Within the Construct of Australian Democracy", discussed the relationship between the judiciary and the executive in the context of privative clauses. Justice Doyle commented in his paper that if such clauses were largely effective, "a mockery would be made of the rule of law". Dr Crock concentrated upon the proposed changes to the Migration Act 1958 (Cth) in Migration Legislation Amendment Bill (No 5) 1997 (Cth),[16] but put her discussion into the larger context of the Australian social, political and constitutional framework. Dr Crock suggested that the Minister of Immigration's view of the rule of law is a formal or "rule" based one,[17] whereas she clearly prefers a "rights" based view to accord with a notion of representative democracy.[18] Thus in this session several different versions of the rule of law emerged.

In the second plenary session entitled broadly, *The Commercialisation of Administrative Law*, which involved presentations from four legal academics, there was disagreement as to whether the core administrative law values are being realised. This begs the question of whether there are differences in public and private law values, and raises the issue of the role of economic values in administrative law. Professor Dawn Oliver has indeed argued that

15 A Coghlan, "Can Review Bodies Lead to Better Decision Making?" in J McMillan (ed), *Fair and Open Decision-Making* (1991) at 87.

16 This legislation lapsed with the prorogation of Parliament in September 1998, but was resurrected as Migration Legislation Amendment (Judicial Review) Bill 1998. This legislation was the subject of a Report by the Senate Legal and Constitutional Legislation Committee, April 1999.

17 Cf J Raz, *The Authority of Law: Essays on Law and Morality* (1979) extracted in M Allars, *Australian Administrative Law: Cases and Materials* (1997) at [1.5.3]; Craig, above n 8.

18 Cf D Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Taggart (ed), above n 1 at 279 who ibid at 280 describes the two "camps" as democratic positivists and liberal antipositivists.

there are common key values which apply to both public and private law.[19] These she identifies as: dignity, autonomy, respect, status and security.[20] Professor Margaret Allars who examined the decision of Finn J in *Hughes Aircraft Systems International v Airservices Australia*[21] applauded the assimilation of public law concepts of fairness in contracting out situations. That decision is arguably consistent with Oliver's common key values and suggests that economic security is a relevant value in administrative law.[22] Allars thus questioned the assumption that administrative law is incompatible with commercial interests and objectives. In a similar vein, Chris Finn summarised the results of his study of the United Kingdom's privatised industries which demonstrated that whilst privatisation prima facie diminishes "public" law accountability, its values of openness and participation are enshrined in consultative and participatory mechanisms which regulation brings, following on from privatisation. However, Professor Spencer Zifcak and Dr Susan Kneebone took a less sanguine view and highlighted the need to protect the interests of consumer-citizens.[23] Professor Zifcak's analysis and critique of the report into the office of the Victorian Auditor General questions many of the assumptions that are made in the context of commercialisation of government. In particular he queried the appropriateness of a complete market analogy to the delivery of government services. In common with Professor Allars and Dr Kneebone, he asked; what do we expect of governments in this context?

The particular theme of the third session, *Human Rights and Administrative Law*, concentrated upon the interaction between international and administrative law. The focus of Moira Rayner's paper, "The Diminution of Human Rights in Australian Administration" was on the "winding back" of protection of human rights by the Australian government in a variety of contexts. Her talk highlighted the need for the courts and tribunals to be vigilant of such rights. In this respect her paper complemented that of Ian Holloway, who as the final speaker concentrated upon the High Court decision on procedural fairness in *Minister for Immigration v Teoh*.[24] Holloway commented enthusiastically upon how the High Court in that case embraced human rights law through the procedural fairness doctrine. Rayner's paper also complemented that of Dr Mary Crock in the first plenary session, who examined the use of privative clauses in Australia in the migration context and expressed disquiet about the government's approach. Fiona McKenzie's paper, "Migrating Family and Human Rights: Australia in an International

19 D Oliver, "Underlying Values of Public Law" in Taggart (ed), above n 1 at 217.
20 Ibid at 218.
21 (1997) 146 ALR 1.
22 As demonstrated by innumerable decisions involving the procedural fairness principle.
23 Finn also questioned whether competition is an adequate safeguard or alternative for administrative law mechanisms.
24 (1995) 183 CLR 273.

Context"[25] built upon the public-private theme by considering what concept of "family" is recognised in the international context, which is in turn relevant in domestic migration law because of our commitments under the International Covenant on Civil and Political Rights (ICCPR). Her analysis of cases decided under the similarly worded European Convention of Human Rights (ECHR) revealed that a very "private" concept of the nuclear family is often preferred against one which favours consideration of the needs of the individual child. McKenzie cautioned against adopting such an analysis in migrant applications for social security. To complement McKenzie's paper, Michael Argy gave a useful background paper on the practical issue of "Using the New Federal Human Rights Procedures" under the Human Rights Legislation Amendment Bill 1997.[26]

Unsurprisingly, the first concurrent session on *Merits Review Tribunals* attracted considerable interest. It began with discussion of the proposed changes to the federal tribunals, continued with discussion of developments at the Victorian level and concluded with valuable perspectives from two tribunal members; Peter Blair from the Refugee Review Tribunal[27] (RRT) and Phillip Swain[28] talking about the role of non-legal welfare members on the AAT. This session thus offered some sharp insights and comparisons about tribunals in our system of administration. Inevitably there was discussion of the concern about moves to amalgamate tribunals in the federal system which had already been foreshadowed by Justice Kenny, and discussion of the new VCAT (foreshadowed by Coghlan). The enduring impression from this session was the expressed pride and faith in our system of tribunal justice, and a concern that it not be devalued by "economic rationalism". This point was expressly made by Sue Tongue, Principal Member of the Immigration Review Tribunal (IRT) in her paper on "Writing Reasons for Decisions".

Some familiar themes were addressed in the concurrent session on *Other Accountability Mechanisms*. For example, Rick Snell in his paper "Rethinking Administrative Law: A Redundancy Package for FOI?" echoed the concerns about economic values expressed in the *Commercialisation* session, and raised the question of the role of government in this context. Carol Foley who was frustrated by judicial interpretation of the Superannuation Complaints Tribunal (SCT) legislation,[29] which has been established to protect the rights of individuals under the compulsory superannuation legislation,

25 An updated version of this paper appears in this volume of materials under the title "Public Support of Private Lives: The Migrating Family, Human Rights Treaties and the State".

26 For an update of the status of this legislation see the paper by Argy in this volume of materials below, at n 12.

27 An extract from this paper appears in this volume of materials.

28 A slightly revised version of this paper is published as PA Swain, "Critical or Marginal?—The Role of the Welfare Member in Administrative Review Tribunals" (1999) 6 *AJ Admin L* 140.

29 The legislation is described by Foley in her paper "The Role of the Superannuation Complaints Tribunal" produced in this volume of materials below, at n 10 and accompanying text.

demonstrated the difficulties which can arise in using public law means to enforce private rights. By contrast, Colin Neave spoke positively about the success of the Banking Ombudsman as a form of alternative dispute resolution in protecting the interests of the banking public. Interestingly, this scheme illustrates a combination of private law (contractual) and public law mechanisms.

The concurrent session on *Further Aspects of Commercialisation* produced an interesting comparison of the Commonwealth and Victorian attempts to reform the process of subordinate law making. Victor Perton MP gave us a colourful account of Victoria's "'New Millenium' Law Making", which is aimed at regulatory efficiency, and which attempts to implement economic values in a practical way. By contrast, Stephen Argument gave us "The Sad and Sorry Tale of the (Commonwealth) Legislative Instruments Bill 1996 (No 2)", a self-explanatory title. In the same session, Caron Beaton-Wells discussed "Administrative Review of Australian Securities Commission Decisions: Jurisdictional Issues" to illustrate the intersection between administrative and corporations law. Her paper suggested that the AAT has not been able to realise the full potential of its merits review jurisdiction in this context, as a result of arguably restrictive interpretation of jurisdictional issues. Her paper thus echoes Foley's in exposing frustration in applying public law procedures to what could be called "private" law rights. By contrast, Megan Chalmers and Louise Macauley from the former Australian Securities Commission (now Australian Securities and Investments Commission—ASIC) spoke positively about the effect of administrative review overall, in the contexts in particular of formulation and application of policy, and the use of investigative powers. Their paper suggested that administrative review is important in protecting the rights of individuals to procedural fairness.

The skills-focused concurrent sessions effectively combined the practical issues which are so important to practitioners with a theoretical overview. On the first day, Murray McInnis from the Victorian Bar, Regina Perton, part time member of the RRT and IRT and Cate McKenzie, President of the Anti-Discrimination Tribunal all spoke about advocacy skills before tribunals, with an emphasis upon inquisitorial and conciliation techniques. McInnis's paper, which is published in this volume of materials, stressed the relationship between professional advocacy standards and good communication skills. In particular McInnis gave some useful hints for cross-examination.

On the second day of the Forum, the two skills sessions were directed to different ends of the practical spectrum. Ros Germov from the Victorian Bar and Mick Batskos, from FOI Solutions prepared practical scenarios for their session entitled *A beginner's guide to Administrative Law in Practice*. The participants sat informally around tables and debated the solutions to the scenarios amongst themselves. Germov and Batskos then discussed the responses with the participants. The second skills session, which moved from the "beginners" to the more "practised" in *Writing Reasons for Decisions*

drew a large gathering to hear Susanne Sheridan from Minter Ellison, Sue Tongue, Principal Member of the IRT and Michael Halliday, Stipendiary Magistrate, Queensland. The format of this session comprised introductory presentations by Tongue and Halliday. The second part of this session involved the participants breaking up into groups in order to prepare reasons for a hypothetical decision, the facts of which had been prepared by Sheridan. Just as the annual Forum brings together practitioners and academics, so too did these skills sessions draw upon the skills and specialties of the membership of the AIAL. As Tongue's paper which is published in this volume of materials displays, the practical and theoretical can be skilfully combined. Tongues's paper is a timely plea for the intrinsic value of reasons by decision-makers, and particularly in the migration jurisdiction, which is in contrast to the effects of the Migration Legislation Amendment Act 1998 (No 1).[30]

From this Introduction, a flavour of the issues raised and discussed can be gleaned, and of the variety of responses given. It gives a true indication of the success of the 1998 Melbourne Forum and of the challenges that lie ahead for administrative law in this country.

30 See n 7 above. This legislation removes the mandatory requirement to publish reasons for decisions of the IRT and RRT and gives a discretion to the Principal Member to publish decisions considered to be in the public interest.

Opening Address

THE HONOURABLE JUSTICE SUSAN KENNY*

Ladies and gentlemen, it is a pleasure to be here. But I fear I come under a false banner. When I was invited to speak to you, it was to be for a brief ten to fifteen minutes, not for the 45 minutes nominated on your programme. I am not, I regret to say, like Norman Lindsay's pudding, "a magic", or a "cut and come again puddin'" so I would ask you to travel with me briefly, to receive a light starter rather than the first course of what is to be your intellectual repast for the next day or so.

Accountability and independence are, it seems to me, central to the framework of administrative law in this country. The conference itself acknowledges the central importance of accountability, in terms of the accountability of each branch of government. Neither Parliament nor the judiciary are to be kept out of the equation. A glancing reference to the administrative law statutes, whether regulating freedom of information, the Ombudsman, subordinate legislation or otherwise, confirms that one of the objectives of administrative law is to foster the accountability of public administration. But to whom? I will return to this in a moment. Independence, or freedom from undue influence, is, if you like, the other side of accountability. Its importance is acknowledged in the precepts of procedural fairness which lie at the heart of administrative law. That basic requirement, that each party be accorded a fair opportunity to advance his or her case before the decision-maker and that the decision-maker must listen fairly to it, informs all aspects of administrative law. But the need to balance accountability and independence from an undue influence confronts administrative lawyers at each turn, whether in areas of commercialisation of administrative law or in the area of human rights. Thus I note that the

* Justice of the Victorian Court of Appeal (subsequently appointed to the Federal Court of Australia).

Administrative Review Council is planning to publish a report on contracting out,[1] the focus of that report being upon complaint handling for the recipients of services rather than the tender process. Why, one may ask, is accountability and independence so important? The answer lies in their object. The object of both is to foster public confidence in the public administration.

Whether or not adequate steps have been taken in relation to the maintenance of accountability or independence depends, in the end, upon whether or not those steps are adequate to preserve the public confidence in the institutions of public administration.

But who are the public? The question is more easily asked than answered. But answered it must be, because the answer tells us something of the appropriateness of the measures for accountability and independence. Who are the public? It cannot be the electorate, for under our system of government, save for ministers of the Crown, for most of those called upon to apply the administrative law are in no sense accountable to the electorate. Nor can it be merely a sector of the public. Nor, in the present context, can the public be said to be represented by the Parliament, the Executive, or the Judiciary or any other institution of government. After all, the Judiciary, who are not uncommonly called upon to apply the administrative law, are plainly not responsible to either the Parliament or the Executive. Even less can the public be taken to be a major community institution, such as a bank or a sporting club. The question, who are the public? falls to be answered by reference, I think, to the primary object of the rule of administrative law, namely, the maintenance of an ordered, rational and fair public administration system operating for the benefit of each and every member of the community. Whether the measures taken to maintain and foster accountability and independence are sufficient depends upon whether they are adequate to maintain and foster the confidence of the community in the tendency of the rule of administrative law to maintain an ordered, rational and fair public administration system.

What, do you say, is the relevance of this? Let me answer this question by another. Who determines the application of the administrative law? Primarily, of course, the administrators, that is, the primary decision-makers or the departmental review officers, who apply the administrative law in the routine performance of their work. But after them there are the merits review tribunals and the judiciary. It is these two institutions which assume the most responsibility for setting normative standards.

It is therefore imperative that the community have confidence in the tribunals and the courts to frame and apply the administrative law so as to foster its primary object, and if there is to be this confidence, these institutions must be seen to be, and in fact be, both accountable and independent.

There is, of course, a well recognised constitutional preoccupation with the maintenance of public confidence in the

1 Editor's note: See Administrative Review Council, *The Contracting Out of Government Services* (Report No 42, 1998).

judiciary as an institution. Accordingly, the Commonwealth Constitution can operate to render invalid legislation which, by virtue of the power it would confer, would tend to diminish public confidence in the integrity of the judiciary as an institution. Judges have sought, from time to time, to explain the basis of this concern. In relation to the offence of scandalising the court, the majority of the High Court said in *Gallagher v Durack*[2] as follows:

> The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges.[3]

One may infer from this that the majority saw confidence in courts and judges as resting on the twin pillars of integrity and impartiality. I would substitute, in the context of tribunals, accountability and independence. The position would doubtless be worse if those attacks were found to have foundation.

So much for the courts. But what of tribunals? Is independence as important as accountability in this context? In the Commonwealth sphere at least, it is accepted that the tribunals wield a power which is quite different in nature from that of the courts. As the decision of the High Court in *Brandy v Human Rights and Equal Opportunity Commission*[4] shows, Ch III of the Commonwealth Constitution constrains the nature of the power which may lawfully be conferred upon, or invoked indirectly by, an administrative body. For any very serious (or simply contentious) matter involving the vindication of a right said to be unlawfully denied an individual by government, the parties must go to the courts for the final and enforceable resolution of the dispute. The primary task of merits review tribunals is much more limited. It is simply "to ensure that the administrative decision under review is the correct and preferable one", or perhaps, as the Administrative Review Council would have it, to ensure that "all administrative decisions of government are correct and preferable".[5]

Nonetheless, despite the differences between courts and tribunals, the success of the tribunals depends, I think, as much as that does of the courts, upon the maintenance of public confidence and that in turn depends upon appropriate accountability and real and apparent independence from undue influence. This much was recognised by the Administrative Review Council in its Report No 39 (*Better Decisions* report).[6] The ARC recognised that what it termed the credibility of the tribunals depends upon the community's confidence, first, that tribunal members have the necessary skills for high quality merits review and, secondly, that each member will make an impartial determination of the merits of the case brought

2 (1983) 152 CLR 238
3 Ibid at 243.
4 (1995) 183 CLR 245.
5 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 1995) (hereafter Better Decisions report) at vii.
6 Ibid.

before him or her. There needs to be a visible and genuine quality of independent inquiry. Tribunal members also need to be accountable.

It must be acknowledged that the maintenance of independence, real and apparent, can be especially difficult in the tribunal setting, where, in the day to day operations of tribunals, liaison with government can be useful and, at times, even necessary, but can also substantially increase the risk of perceived, if not actual, undue influence on the government's part. Furthermore, tribunals must pay very much greater regard to the policies of government than the courts. There is, therefore, a particular need for an intelligent appreciation by all participants in tribunal operations of the entire setting in which tribunals work.

You may well ask, what is the causal or temporal relationship between the loss of confidence in tribunals (or the judiciary) and the failure of those institutions to perform their work? This of course is not easy to answer. One can only ask another question. What would have been the fate, for example, of the Supreme Court of the United States which struck down so much of Roosevelt's New Deal legislation had there not been a fortuitous change in the membership and voting pattern of the Court? The threat to continued vitality of the Court as then constituted indicates at least one possibility. And what about Caligula's horse? About two thousand years ago, the emperor, Caligula, appointed his horse joint consul, the highest officer in the Roman Empire. Dressed in appropriate purple, the horse had a stall lined in marble. The horse had the panoply of power and the blessing of the Executive. But did Caligula's horse encourage public confidence? It seems not. It was assassinated.

The Federal Government has announced that it has decided to proceed with the amalgamation of the AAT, SSAT, the IRT and the RRT into an Administrative Review Tribunal.[7] It is thought that amalgamation will provide an opportunity to:

- maximise information-sharing and foster the development of existing best practice across the range of jurisdictions;
- enable the adoption of more streamlined review structure and processes; and
- rationalise resources and create efficiency.

There is no draft bill as yet. In this State too, what has been described as "the undisciplined proliferation of tribunals" has led to steps for their consolidation. The new super tribunal, known as the Victorian Civil & Administrative Tribunal, is designed to cover many of the pre-existing jurisdictions.[8]

The Commonwealth proposal places a deal of emphasis on accountability. But it has, I think, placed rather less emphasis on the need to ensure that tribunals are, and are seen to be, independent of undue or improper influence. It reports:

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7 The Hon D Williams, Commonwealth Attorney General, *Reform of Merits Review Tribunals* (News Release, 3 February 1998).

8 Victorian Civil and Administrative Tribunal Act 1998 (Vic).

> Efforts by the ART President and Executive Members to implement and maintain efficient management and administrative practices may not be fully effective if individual Members are not accountable for their performance. The Government considers that measures to increase the accountability of Members need to be introduced. The Government believes it is possible to institute accountability mechanisms for standards of work performance while maintaining Members' independence from interference in individual cases. For example, performance can be assessed by the ART against standards set out in a code of conduct and in administrative directions made by the President or Executive Member.[9]

The issue of performance appraisal is a complex one. The proposal plainly and properly raises concerns about independence, including the appropriate relationship between members and tribunal management. As the ARC reported:

> There is a consensus that it is not appropriate for targets to be set, or performance of individual members to be measured, in respect of review outcomes—in terms of set-aside or variation rates—these must remain an essentially unpredictable product of the "best" decision in each individual case.[10]

On the other hand, the Council went on to say that:

> There is broad agreement that performance appraisal for members is both desirable and inevitable in respect of all other aspects of their functions. Performance standards may appropriately be developed for such matters as timeliness of decisions and written reasons, the process employed in dealing with cases, and the quality of reasoning.[11]

I would pause on this latter point. The delivery of reasons is an exacting measure of accountability, for both the courts and tribunals. Reasons, whether delivered by a tribunal or a court, are designed to expose why it is, in the circumstances of the case, the decision-maker made the decision that he or she did. In the language of contemporary philosophy, the ideal of a judge's reasons conveys:

> Many voicedness; the integration of thought and feelings; the acknowledgment of the limits of one's own mind and language (and an openness to change them); the insistence upon the reality of the experience of other people, and upon the importance of their stories, told in their own words.[12]

It may be that the interest in "accountability" is best met by demanding the delivery of full and adequate reasons and discouraging the pro forma type style of decision-writing which has become fashionable with some. But, of course, I would be unwise to be too dogmatic about this. In some tribunal jurisdictions, the statutory framework itself constrains the decision-maker very precisely and a pro forma which simply directs his or her attention to the matters which must be considered is not necessarily bad.

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9 Commonwealth Attorney-General's Department, *Reform of the Merits Review Tribunals—Government Proposal* (Consultation Paper, 13 March 1998) at 13.

10 *Better Decisions* report, above n 5 at 86 para [4.78].

11 Ibid at para 4.79.

12 J B White, *Heracle's Bow: Essays on the Rhetoric and Poetics of the Law* (1985) at 132.

There are, of course, other constraints upon the judicial method which are not tolerated in tribunals. For example, it is agreed, at least in the common law world, that court proceedings ought, save in exceptional circumstances, take place in public. The constraints on administrative tribunals are different. Accordingly, the accountability mechanisms appropriate for courts may not be appropriate for tribunals and vice versa.

The appointment of members of merit and ability tends, I think, to lessen the possibility of conflict between accountability and independence. In it's *Better Decisions* report, the ARC took a like view. It said that "the selection and appointment process for all tribunal members should be rational, merit-based and transparent".[13] It recommended:

- all prospective members should be assessed against selection criteria that relate to the tribunal's review functions and statutory objectives;
- those selection criteria should be made publicly available, as should the various steps to be followed in the selection process itself, so that members of the public can see what skills are required of potential tribunal members and how candidates will be assessed;
- assessment against the criteria should be undertaken by a broad-based panel established by the minister responsible for the proposed appointment; and
- appointments should only be made from within a pool of people who have been through such a process and assessed as suitable to perform the required task.[14]

The ARC also recommended that members be appointed for terms of between three and five years and that they should be eligible for re-appointment, although assessed against the same criteria as new applicants. The assumption is that if individuals are appointed who are suitable intellectually to the decision-making task, they will have the intellectual fortitude to withstand any attempt to influence them improperly. This may or may not be true. It does, it seems to me, overlook the need, in the interests of maintaining public confidence, to protect as much against an apparent as against a real want of independence. There is, I think, a legitimate concern that this aspect of the independence dilemma tends to be overlooked.

The present Federal Government proposal for the new super tribunal follows, to a large extent, the recommendations of the ARC. The terms of appointment are contemplated to be for three to five years. It is also proposed that there be a greater use of part-time members. Appointments to the tribunal's divisions are to continue to be on the recommendation of the minister responsible for that jurisdiction, save in a case of the commercial and general divisions.

13 *Better Decisions* report, above n 5 at 77 para [4.35].
14 Ibid.

The role of lawyers is to be constrained. The President of the new super tribunal need not be a judge. This contrasts with the position in Victoria where the President of the new super tribunal must be a judge of the Supreme Court[15] and the Vice-President, a judge of the County Court.[16] Under the Commonwealth proposal, it is said that except where portfolio legislation specifies otherwise, "the expectation is that representation at proceedings would only be allowed in exceptional or prescribed circumstances and where agreed by the Member".[17] This again contrasts with the Victorian position which would enable a party to appear personally and to be represented by a professional advocate if the party is a child, the State or a minister, or a public authority, or if the other party is professionally represented, representation is permitted by or the other parties agree. The Commonwealth proposal appears to reflect a considerable distrust of those who have been trained to be lawyers. This training can, and should, however, promote an intelligent sensitivity to the competing needs of accountability and independence. Of course, one can understand the basis for the distrust of lawyers: there is a legitimate concern, I think, that the participation of lawyers may promote a proceeding which is unnecessarily lengthy and legalistic in the perjorative sense. I would hope, however, that the tribunal members themselves might take a firm approach to improper practice whilst accepting whatever assistance a legally qualified person can offer.

There is another moral to the story of Caligula's horse. That is, that public confidence depends upon the merit and ability of the officeholder. Whilst independence and accountability are twin pillars of administrative law, in the present imperfect system the merit and integrity of the officeholder may provide the practical solution. Under our present system, that, in turn, depends in part upon the integrity and good sense of those who appoint to office. But is this enough? Some may say so far so good. But can we really say, that that horse has run his race?

There may be a need to revisit the issue of independence, having regard to the very great weight we now place upon the interest in accountability.

15 Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 10.
16 Ibid at s 11.
17 Commonwealth Attorney General's Department, above n 9 at 7.

Accountability: Parliament, the Executive and the Judiciary

Accountability: Parliament, the Executive and the Judiciary

THE HONOURABLE JOHN DOYLE*

INTRODUCTION:

Traditionally, the judicial review of the decisions and conduct of the executive government has been founded upon the common law doctrine of the rule of law. The expression "the rule of law" is used in many different senses.[1] But a well recognised sense in which the expression is used is that the legal validity of decisions of the executive government must conform to the law administered by the courts. This is a fundamental principle of our system of government.

While the rule of law is still invoked as the foundation of judicial review, accountability has become a widely used concept in discourse about the principles on which our system of government rests. Accountability has infiltrated discussion about the courts and their relationship to the executive government.

Judicial review is now often described as one of the processes by which the executive government is made accountable for its actions. In that setting, one encounters complaints that the courts, while unaccountable, seek to make the executive government accountable. It is suggested that there is some incongruity about this. We also find complaints that the courts exercise the power of judicial review in a manner that conflicts with the power and authority of the executive government as an elected government accountable to the people.[2]

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* Chief Justice of the Supreme Court of South Australia. I am grateful for the comments and assistance of Jonathon Redwood.

1 S Bottomley and S Parker, *Law in Context* (2nd ed 1997) at 46.

2 T Ison, "The Sovereignty of the Judiciary" (1985) 10 *Adel L R* 1; See also discussions of this objection to judicial review in Sir A Mason, "Administrative Review: The Experience of the First Twelve Years" (1989) 18 *FLR* 122 at 128; D Pearce, "Executive versus Judiciary" (1991) 2 *PLR* 179 at 181.

I argue that the courts as an institution are accountable as fully as their function permits. I argue that their accountability differs from that of the executive government only in its form. On the other hand, I argue that to rest judicial review upon the enforcement of accountability of the executive government can cause confusion. We need to remind ourselves of the limits to the proper use of judicial review. It can make only a limited contribution to accountability. Judicial review remains, I suggest, a central element in the maintenance of the rule of law. I also suggest that judicial review can make no more than a modest contribution to the quality of decision making by the executive government. As part of the package of administrative law, judicial review remains that part most closely identified with the maintenance of the rule of law. That is a sufficient justification for it, and we should not load it with other expectations.

ACCOUNTABILITY

"Accountability" is one of the popular concepts of the 1990's. A fair bit has been written about public accountability, and accountability of governments.[3] There has also been some discussion of judicial accountability.[4] Accountability features a lot in political debate, and in public comment upon the conduct of the executive government and of Parliament.

Accountability does not have a precise meaning. The underlying notion is that of giving an account or an explanation to a person or body to whom one is responsible. That part of it is clear enough. But the form or process of accountability, as that term is used in debate, varies widely. The process of accountability ranges from merely being subject to comment or criticism, through to loss of office, to personal liability for damage caused by a poor decision, and to prosecution for criminal offences.

It seems to me that discussion in which accountability is an issue is often confused because of the different processes and meanings of accountability. There is often a silent assumption that only certain processes of accountability, such as loss of office, represent true accountability. I suggest, as I have said, that the underlying idea of accountability is that of giving an account or an explanation, and that it is necessary to recognise that the process of accountability can vary widely.

I turn to consider the accountability of the executive government for decisions made in the exercise of public powers. By public

3 P Finn, "Public Trust and Accountability" (1993) AQ 50; M L Barker, "Accountability to the Public" in P Finn (ed), *Essays on Law and Government, Vol 1: Principles and Values* (1995) 228; R Mulgan, "The Processes of Public Accountability" (1997) 56(1) *AJPA* 25; J Uhr, "Redesigning Accountability" (1993) 65(2) AQ 1.

4 The Hon M Gleeson, "Judicial Accountability" in *Courts in a Representative Democracy* (1995) at 165; The Hon M Gleeson, "Who Do Judges Think they Are?" (1998) 22 *Crim LJ* 10; The Hon A Nicholson, "Judicial Independence and Accountability: Can They Co-Exist?" (1993) 67 *ALJ* 406.

powers I mean powers conferred by statute, and by the common law when the power is exercised in the public interest. I have in mind decisions that are amenable to judicial review. I will refer to them as reviewable decisions. My treatment of the accountability of the executive government for reviewable decisions has to be fairly brief, because of the extent of the subject.

In this discussion, by executive government I mean Ministers and public servants or government employees. Ministers are accountable to the electorate. They are called upon to explain their decisions, and can lose their parliamentary seat and hence their ministerial position. However, in practical terms they are accountable to the electorate only as a group, not as individuals. If the party of which a Minister is a member loses an election, the Minister will lose office along with all other Ministers. In that respect the fate of the ministry is closely tied to the performance by the Prime Minister or Premier of his or her role. But this form of accountability cannot really be described as accountability for reviewable decisions. In my opinion the link is too distant. This process of accountability is, in reality, not linked to the making of reviewable decisions.

Ministers are accountable to Parliament for reviewable decisions. They can be called upon to provide an explanation for, and account of, their decisions. But there is no convention these days of ministerial responsibility for reviewable decisions made by public servants.[5] And, even at the level of reviewable decisions made by Ministers, the control that the executive government exerts over Parliament means that, in the ordinary sense, there is not effective accountability to Parliament for particular reviewable decisions.[6] Whether an adverse consequence flows from the making of a reviewable decision by a Minister, or by a Minister's Department, depends upon political aspects of the decision, and the process of parliamentary accountability is a highly political one. I would not regard this as an effective form of accountability for decision making. A similar comment applies to the accountability of an individual Minister to the Prime Minister or Premier who leads the Government of which the Minister is a part.

Public servants are accountable to a departmental head, and sometimes to a Minister, for reviewable decisions that they make. But in a system in which most public servants can be punished or dismissed only for cause, erroneous reviewable decisions do not lead to sanctions against the decision-maker, unless the decision involves misconduct as distinct from mere error.

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5 In *R v Toohey; Ex Parte Northern Land Council* (1981) 151 CLR 170 at 222 Mason J noted that decline of the doctrine of ministerial responsibility underpins the comprehensive system of judicial review of administrative action which now prevails in Australia.

6 There are a host of statements to this effect. For a recent discussion see The Hon G Brennan, "The Parliament, the Executive and the Courts: Roles and Immunities" Paper delivered at School of Law, Bond University, 21 February 1998; see [http://www.hcourt.gov.au/bond2].

My view is that accountability involving loss of office or some formal punishment has only a slender link to decision making by Ministers and by public servants. To treat the executive government as accountable for the making of reviewable decisions, by a process involving loss of office, is, I suggest, erroneous.

Neither Ministers nor public servants are usually required to submit their decision making processes to contemporaneous public scrutiny. There can be contemporaneous comment upon a decision that is being made or is anticipated. That comment may take place in Parliament, in the media or elsewhere. There can also be retrospective scrutiny, in particular through judicial review, by merits review when legislation so provides, by an Ombudsman or by use of freedom of information legislation. However, it remains true to say that the decision making process of the executive government is not transacted in public.

It is also true, I suggest, that responsibility for reviewable decisions made by the executive government is often diffused. By this I mean that reviewable decisions made by the executive government are often made by a process of consideration and advice at various levels. Responsibility for a given decision may be diffused downwards to various advisers or upwards to a departmental policy. For this reason, it is often difficult to identify a reviewable decision made by the executive government with a particular decision-maker. That can be a limit upon accountability.

Ministers and public servants are not routinely required to give full reasons for a reviewable decision.[7]

Ministers and public servants are usually not personally liable for damage or loss caused by a poor decision. If a decision is made that goes beyond power, the decision maker might then be liable in damages,[8] but even then would usually be indemnified by the executive government.

Decisions made by the executive government are, of course, subject to judicial review to determine whether they are made within power (jurisdiction), whether they are in compliance with the law, and for fairness or natural justice. Some governments have also provided a process of review on the merits.

Many reviewable decisions made by the executive government are subject to scrutiny by Parliamentary Committees, by an Ombudsman, by the Auditor-General, and can also be exposed under

7 Section 13 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) imposes a duty on Commonwealth administrators to provide reasons for their decision to persons entitled to seek review of a decision under s 5 of the Act. Section 28(1) of the Administrative Appeals Tribunal Act 1975 (Cth) makes similar provision. At common law there is no general duty to give reasons (*Public Service Board (NSW) v Osmond* (1986) 159 CLR 656), but the particular circumstances of the case may be such as to require reasons as an aspect of procedural fairness. See M Aronson & B Dyer, *Judicial Review of Administrative Action* (1996) at 578–586.

8 *Northern Territory v Mengel* (1995) 185 CLR 307.

legislation relating to freedom of information. Decisions made by the executive government are always subject to public comment.

This survey of accountability may be incomplete, and is fairly general. But what it illustrates is that the accountability of the executive government for reviewable decisions has many aspects. It involves a variety of processes and sanctions, formal and informal. It exposes the uncertain meaning of accountability when applied to the making of reviewable decisions by the executive government.

I now turn to the judiciary. I consider its accountability for decisions made in the exercise of judicial power.

Judges are not liable to the loss of office, or to other sanctions, as a consequence of a decision made by them. They are not liable to such consequences at the instance of the public, on whose behalf they exercise judicial power, at the instance of the executive government which appoints them and remunerates them, or at the instance of a litigant who brings a dispute before them. Judges can be removed from office for proved misconduct, by a process that is rarely used and is difficult to implement. But convention ensures that that process is not implemented in relation to the making of a particular decision. In addition, the principle of judicial independence, as fundamental as that of the rule of law,[9] supports the independence of the judiciary as an institution and in its decision making. The fundamental importance of judicial independence is most obvious in judicial review proceedings where the government is a litigant before the court. Independent determination of citizens' rights against the executive government is a hallmark of a modern democracy. If the judiciary was not in actuality and perception independent of the other arms of government, the legislature and the executive government of the day, then individuals (including corporations and other governments) would not be guaranteed, nor perceived to be guaranteed, a fair and impartial determination of their legal rights. Furthermore, as the High Court has recently stressed, public confidence in the justice system is contingent on the judiciary's reputation as an independent resolver of disputes concerning legal rights.[10]

It is fair to say that the executive government is more exposed than is the judiciary to a personal sanction as part of the process of accountability. However, as I have argued above, the link between reviewable decisions made by the executive government and loss of office is a slender one.

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9 It might also be argued that judicial independence is part of the very definition of the rule of law. See J Raz, "The Rule of Law: its Virtue" (1977) 93 *LQR* 195 at 201.

10 *Wilson v Minister for Aboriginal and Torres Straight Islander Affairs* (1997) 189 CLR 1; *Kable v DPP* (NSW) (1996) 189 CLR 46; *Grollo v Palmer & Ors* (1995) 184 CLR 348; See also *Nicholas v R* (1998) 151 ALR 312. The same point has been stressed by the United States Supreme Court in *Mistretta v Unites States* 488 US 361 (1989) and recently by the Supreme Court of Canada in *Reference re: Public Sector Pay Reduction Act* (1997) 150 DLR (4th) 577.

Judges must transact their business in public, fully exposed to contemporaneous and retrospective scrutiny, comment and criticism.[11] In this respect they are more accountable than the executive government.

Judges must give full reasons for all significant decisions that they make.[12] In this respect they are more accountable than the executive government. The basal importance of the judicial duty to give reasons cannot be overstressed. The obligation to give written reasons is one of the defining features of the judicial process. The articulation of reasons is essential to doing justice in the instant case, and to the individual and public perception that justice has been done. Reasons also constitute the most significant form of judicial accountability in a democracy which values the high constitutional importance of judicial independence. With a few minor exceptions, an exercise of judicial power absent the publication of written reasons is an abnegation of a judge's constitutional responsibility. The obligation to give reasons is consistent with the requirement of:

> [A] democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give, in public, an account of the reasoning by which they came to those decisions.[13]

Reasons are also essential to the integrity of appellate review, another important form of judicial accountability. Unless the judge adequately discloses every element in his or her reasoning the decision cannot be correctly evaluated on appeal.[14] Finally, not only are the reasons for judgment exposed to the litigants and to the scrutiny of judges on appeal, they are also subject to contemporaneous public analysis, the appraisal of the legal profession, and of the legislature which may subsequently choose to change the law based on the cogency of the reasons, as well as the political ramifications of the decision. Of course constitutional convention and doctrine prevents the decision itself being tampered with by Parliament.

Judges must accept individual responsibility for decisions that they make. There can be no dispersion or diffusion of responsibility, except to the law that the judges apply. In this respect individual

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11 *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J; *Wilson v Minister for Aboriginal and Torres Straight Islander Affairs* (1997) 189 CLR 1 at 11 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ, and at 23 per Gaudron J; *Re Nolan* (1991) 172 CLR 460 at 496 per Gaudron J; *Grollo v Palmer* (1995) 184 CLR 348 at 379 per McHugh J; *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 476 per McHugh JA.

12 *Soulemazis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247; *Apps v Pilet* (1987) 11 NSWLR 350; *Sun Alliance Insurance Ltd v Massuod* [1989] VR 8; *Grollo v Palmer* (1995) 184 CLR 348 at 394 per Gummow J; The Hon M Kirby, "Reasons for Judgment: 'Always Permissible, usually Desirable and often Obligatory.'" (1994) 12 *ABR* 121; The Hon G Brennan, "The State of the Judicature" (1998) 72 *ALJ* 33 at 39; The Rt Hon F Kitto, "Why Write Judgments?" (1992) 66 *ALJ* 787 at 790.

13 Gleeson above n 4 (1995) at 169; Dzenyhaus, "Developments in Administrative Law: 1992–1993 Term" (1994) 5 *Sup Ct L Rev* 189 at 243.

14 Sir A Mason, "Future Directions in Australian Law" (1987) 13 *Mon L R* 149 at 159.

accountability is clearer in the case of the judiciary than in the case of the executive government.

Judges are not liable for loss or damage caused by a poor decision. There is a possibility of liability when a judge acts wholly beyond power. In this respect the judiciary and the executive government appear to be in comparable positions.

Most decisions made by the judiciary are subject to full review for legality and on the merits, although that review is conducted by other members of the judiciary. Judicial decisions are not subject to review by external processes such as the Ombudsman, the freedom of information legislation and so on. The reason for that, however, is that the public aspects of the judicial process, the obligation to give reasons and the availability of rights of appeal make other external processes unnecessary.

Both the judicial process and the outcome are subject to public comment.

I suggest that, when the elements are exposed, the accountability of the judiciary for judicial decisions is significant. It is quite misleading to focus on security of tenure and to speak of the unaccountable judiciary calling an accountable executive government to account by way of judicial review. As I have argued, even in relation to loss of office the accountability of the executive government is not, at the practical level, radically different from that of the judiciary. Be that as it may, security of tenure is the one aspect that does distinguish the judiciary from other arms of government. But this is necessarily so, having regard to the nature of judicial independence. The other relevant distinction is that judicial decision making must be independent of the parties, of the executive government and of external influences generally, and be seen to be independent. On the other hand, reviewable decision making in the executive government must accord with law, but subject to that need not be independent of outside influences.

JUDICIAL REVIEW

For present purposes, it is sufficient to describe judicial review as a procedure by which the courts scrutinise decisions made by the executive government, exercising statutory and certain common law powers. The purpose of the scrutiny is to determine if the decision is of a kind that the decision maker has the power to make, to determine whether the decision is lawful, in the sense of being made by reference to the authorised criteria, and to determine whether the decision is made fairly, to the extent that the requirements of fairness have not been excluded.

Judicial review, as it is exercised today, is the product of a change of approach by the judiciary that occurred during the 1960's. The decision in *Ridge v Baldwin*[15] can be seen as a turning point. Since that decision was given by the House of Lords, Australian courts

15 [1964] AC 40.

have abandoned significant limitations that existed on the range of decisions subject to judicial review, have applied the duty to act fairly to decisions that affect rights, interests or legitimate expectations, and have more firmly insisted that fairness be accorded unless clearly excluded by Parliament.[16]

I am not concerned in this paper with the reasons for the courts becoming more assertive in the exercise of their powers of judicial review. Other commentators have said, and I agree, that the increased assertiveness is probably attributable to a realisation of the very wide range of powers exercised by the executive government, and other public bodies, affecting individual rights and interests, and attributable to a realisation that individuals had very limited rights of redress in respect of those decisions. In other words, the rule of law had been eroded by the huge growth in the powers of the executive government, and the response of the courts was to reassert their right and obligation to enforce the rule of law. The balance of power between the individual and the executive government had swung in favour of the executive government to an unacceptable extent, and the court set about redressing that balance.[17]

I think that most commentators agree that there was a problem, and that the courts were right to act as they did. To those who would argue otherwise, it is relevant to say that it is surely no coincidence that from about that same time Parliament and the executive government provided for various other forms of accountability. I refer here to legislation to create the office of Ombudsman, to provide for freedom of information, to provide for merit reviews often involving specialist and semi-independent tribunals, and other like measures. Greater assertiveness by the judiciary in protecting individuals affected by decisions of the executive government has to be seen in the context of a widely acknowledged problem.

THE IMPORTANCE OF JUDICIAL REVIEW

Judicial review can be described as a means of ensuring the accountability of the executive government to the people for reviewable decisions.

But we must keep our feet on the ground. Judicial review should be seen as one of a number of means by which the accountability of the executive government is enforced. I have mentioned other means. The particular processes and sanctions that go with judicial review must also be kept in mind, and we must be realistic in our assessment of what it can achieve.

16 *Kioa v West* (1985) 159 CLR 550 at 584 per Mason J; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 653 per Deane J; *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ and Deane, McHugh JJ.

17 For statements to this effect see *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170 at 192 per Gibbs CJ and 222 per Mason J; The Hon G Brennan, "Courts, Democracy & the Law" (1991) 65 ALJ 32; *R v Home Secretary; Ex parte Fire Brigades Union* [1995] AC 513 at 567–568 per Lord Mustill.

Judicial review has certain unique features in the field of administrative law. It enables an individual whose rights, interests or legitimate expectations are affected by a decision, to require the executive government to submit its decision to scrutiny. That decision is carried out by an independent judiciary. The judiciary has power to quash a decision, and is not limited to the making of a recommendation. The complainant can require the court to decide a case brought before the court. The scrutiny is wide ranging, in terms of lawfulness, although it does not go to merits.[18] In short, judicial review is central to the enforcement of the rule of law as against the executive government. It enables the individual to require the executive government to demonstrate that its decision is lawful.

Put this way, it is difficult to understand how there can be an objection to judicial review, in a modern democracy in which the executive government exercises significant controls over the individual by the making of reviewable decisions.

To say this is not to say that the courts do not err, or that decisions given by the courts always have adequate regard to the need for efficient decision making by the executive government.[19] Nor is it to say that judicial review comes without a cost in terms of the effort that it may require the executive government to devote to process rather than to outcomes.[20] But, acknowledging the limitations of judicial review, it is surely an indispensable element in our society, simply because it is the key to the maintenance of the rule of law.

THE UTILITY OF JUDICIAL REVIEW

Judicial review can do no more than secure for a successful complainant an opportunity to have a decision reconsidered. It does not determine the merits, although sometimes a decision that a certain matter cannot be taken into account, or must be taken into account, will mean that the complainant will get the desired outcome when the decision is reconsidered.

Judicial review supports the legitimacy of the decision making process that it reviews. A decision-maker whose decisions are reviewable can claim that because the decision is reviewable for its legality, as determined by an independent judiciary, the decision has a legitimacy that it otherwise would not have. Its legitimacy lies in the fact that it is open to a dissatisfied person to challenge its validity.

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18 *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70 per Brennan J; *Attorney General (NSW) v Quinn* (1990) 170 CLR 1 at 36 per Brennan J; *Minister for Ethnic Affairs v Wu* (1996) 185 CLR 259 at 271–272 per Brennan CJ and Toohey, McHugh, Gummow JJ.

19 M Bouchard, "Administrative Law in the Real World: A View from Canada" in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s, Problems and Perspectives* (1986) at 179.

20 Sen P Walsh, "Equities and Inequities in Administrative Law" (1989) 58 *Canberra Bull Pub Admin* 29.

It can also be said that a decision reached by a fair decision making process is likely to be a better decision. It is likely to be better because requiring the decider to hear both points of view can make a contribution to the soundness of the decision.

But beyond that, as it seems to me, we have to acknowledge that judicial review does not have a great deal to contribute to the quality of decision making by the executive government. Its ultimate rationale remains the maintenance of the rule of law. Although the rule of law is said to represent many things,[21] I am here primarily concerned with legality, but I recognise that the term encompasses fair procedures.

There are various reasons why judicial review has little to contribute to the overall quality of decision making. Judicial review occurs sporadically, and only at the instance of a disaffected individual. It does not occur in response to an informed assessment that decision making in a particular field is of poor quality.

Not many decisions made by the executive government are subjected to judicial review. In South Australia in 1997 there were 27 proceedings instituted seeking judicial review, in 1996 there were 31 such proceedings and in 1995 there were 42 such proceedings. By way of contrast, in those three years the number of appeals from decisions by magistrates was 272, 446 and 369. That is about ten times the number of proceedings by way of judicial review. The Annual Reports of the Federal Court reveals that the number of applications to that Court under the Administrative Decisions (Judicial Review) Act 1997 was 251 in 1996–1997, 348 in 1995–1996 and 352 in 1994–1995.

When judicial review occurs, the focus is on a particular decision, not upon the process generally. While a court can be expected to treat the particular case before it as an instance of a type, the nature of the judicial process is such that there is not a great deal of scope for consideration of the broader picture.

Judicial review is relatively costly.

The impact of a court decision on other decision-makers in the executive government will depend upon a lot of factors. It is naive to assume that, when a court quashes a particular decision, other decision-makers in the executive government routinely and as of course take the decision of the court as providing a benchmark for their conduct. Commonsense suggests that the educative effect of a particular decision will depend very much upon the response of the executive government itself to the decision of the court. That is so because the response of other decision-makers in the executive government will depend upon the extent to which they are informed of the decision that the court has made, of the principles that underlie it, and upon the extent to which they are advised to apply the underlying principles and given the resources to do so.

21 K Mason QC, "The Rule of Law" in P Finn (ed) *Essays on Law and Government, Vol 1* above n 3 114.

I believe that it is unrealistic to regard judicial review as a process that naturally and inevitably contributes to a better standard of decision making. It can do that, but I believe that we must recognise that that will depend upon a lot of factors.

THE JUDICIARY AND THE EXECUTIVE GOVERNMENT

It is not surprising that there should, at times, be an element of tension in the relationship between the judiciary and the executive government. The executive government is a regular litigant before the courts. It is a party to all serious criminal cases. It is a litigant in many civil cases. The executive government does not always get the outcome that it seeks. As well, judicial review submits the executive government to a powerful form of scrutiny and accountability, one that other interests such as the media and an opposition party will often in turn rely upon as a basis for criticism of the executive government.

As well, there is a tension between the court's insistence upon legality and fair procedures, and the concern of the executive government with efficient decision making, the making of decisions that reflect its policies, and its wish to use public resources as it considers best in the public interest.[22]

There has been some resistance to the extent of judicial review. The use of other forms of accountability that are more likely to contribute to better decision making, and the provision of a form of merits review, have an obvious justification. It is also fair to say that there is a place, at times, for widely expressed powers that make it difficult for the court to review a decision for legality. There is also a place, in relation to certain decisions, for the exclusion of the ordinary rights of fairness, wholly or in part. I do not intend in this paper to deal with the vexed issue of whether there are any common law limits on the power of Parliament to exclude judicial review.[23] I will confine myself to a couple of brief observations. The first is that presumably legislatures (that is, the government) seek to exclude or limit the power of the courts to examine the decision-making processes of the executive, because they consider that judicial review compromises efficient decision-making and spawns unnecessary formality and technicality. To this end governments sometimes set up tribunals to review decisions and attempt to insulate those tribunals from judicial review. No doubt there is a legitimate role for tribunals, particularly specialist tribunals. However the fundamental constitutional distinction between tribunals and courts should not be forgotten.[24] Generally speaking, the former lack the institutional

22 J Griffith, "Procedural Fairness" in P Finn (ed) *Essays on Law and Government, Vol 2: The Citizen and the State in the Courts* (1996) 188 at 189.

23 P Craig, "Ultra Vires and the Foundations of Judicial Review"(1998) 57 *CLJ* 63; H W R Wade, "Beyond the Law: A British Innovation in Judicial Review" (1991) 43 *Admin LR* 559.

24 *Craig v South Australia* (1995) 184 CLR 163 at 176–179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ.

independence which is the hallmark of the judicial branch of government.[25] The second observation I would make is that appellate courts are reluctant to accept that Parliament could have intended to exclude judicial scrutiny of the lawfulness of executive action because that frustrates observance of the rule of law. If the ouster clause were effective a mockery would be made of the rule of law; decision-makers or tribunals could do as they pleased unperturbed by the restraints imposed by their empowering statute. It is the constitutional function of superior courts, in discharging their duty to maintain the rule of law, to ensure that such limits are respected, not flouted. Accordingly, in my opinion, the fundamental importance of the adherence to the rule of law, and the unique place which judicial review plays in ensuring adherence to the rule of law, mean that we should always scrutinise carefully, and view with concern, attempts to exclude judicial review.

CONCLUSION

I began this paper by arguing that the suggestion that the judiciary is unaccountable is misconceived. This misconception stems from the imprecision of the term accountability. In truth accountability is a concept the content of which varies according to the context in which it is being considered. A comparison of the forms of accountability of the judiciary and of the executive reveals that the accountability of the judiciary is significant, and at a practical level not much different from that of the executive. The main difference lies in the security of tenure afforded to judicial officers. However, there are compelling constitutional reasons for the security of tenure; namely, the critical importance of judicial independence. In short, the judiciary is highly accountable, but in ways compatible with its constitutional independence.

I also argued that whilst judicial review is a means of ensuring executive accountability, it should not be ascribed purposes and a role to which it is not suited and which it is not capable of performing. Its ultimate constitutional rationale is to sustain the rule of law. In this respect judicial review plays an indispensable role in our democratic system of government. However, judicial review has its limits. It is not a solvent or panacea for all the imperfections of public administration. After all, it can do no more than secure for a complainant an opportunity to have a decision reconsidered; it is by its nature event-specific and infrequently deployed; and it does not concern itself with the merits. Within these parameters it can make no more than a modest contribution to the overall quality of administrative decision making. This is not to say that judicial review serves no useful purpose; rather it is to recognise its fundamental constitutional role, but at the same time to caution against expecting too much from it. Judicial review should be viewed as an

25 See the comments of Lamer CJC in *Cooper v Canadian Human Rights Commission* (1997) 140 DLR (4th) 193 at 202.

integral part of our system of government. But it should also been seen as merely one component of a comprehensive system of public accountability, which includes scrutiny by other bodies, such as Parliamentary Committees, the Ombudsman, the Auditor-General, Administrative Appeal Tribunals and freedom of information legislation.

By judicial review the judiciary, as accountable to the public as its function permits, tests the legality of action of the executive government, an institution that is in its own way, but no more so than the judiciary, accountable to the public that it serves.

The Accountability of the Executive and the Judiciary to Parliament the Role of the Senate Standing Committee on Regulations and Ordinances

SENATOR KAY PATTERSON

INTRODUCTION

The theme of this session is accountability and this paper will present a parliamentary perspective on the accountability of the executive and the judiciary to Parliament, with a particular emphasis on the role of the Senate Standing Committee on Regulations and Ordinances.

The accountability of the executive to Parliament is well known. The Commonwealth, the States and the mainland Territories all have a system of responsible government, which is also called parliamentary government. This is in direct contrast to other countries such as the United States of America, which have a system of government based on the separation of powers. Under responsible government, members of the executive government must effectively be members of Parliament and are responsible to Parliament.[1] If the executive loses the confidence of Parliament then a new executive must be formed which does have that confidence or a fresh election must be held, to choose a Parliament out of which an executive will be appointed. This is the broad, overall aspect of accountability of the executive to Parliament. On a day to day basis, however, the Parliament scrutinises the actions of the executive by questions to Ministers, by debates on executive policies and actions and by

1 See ss 61 & 64 of the Commonwealth Constitution, said to enshrine the convention of ministerial responsibility.

inquiries by parliamentary committees, especially estimates committees. Of course the executive government will normally be able to count on majority support in the Lower House of Parliament and therefore it falls to second chambers such as the Senate to balance ministerial control of the Lower House.

LEGISLATIVE SCRUTINY COMMITTEES

The two legislative scrutiny committees of the Senate, the Standing Committee for the Scrutiny of Bills and the Standing Committee on Regulations and Ordinances, are among the most important bodies through which the legislative branch exercises this control over the executive. This paper will deal only with the activities of the Regulations and Ordinances Committee, but it should be remembered that the Scrutiny of Bills Committee operates parallel to it, with the task of scrutinising proposed primary legislation rather than delegated legislation which has already been made.

The Senate Standing Committee on Regulations and Ordinances scrutinises every disallowable legislative instrument[2] tabled in the Senate to ensure that these instruments comply with its high standards of personal rights and parliamentary propriety.[3] This scrutiny is crucial, because the administrative details of almost every Commonwealth scheme are implemented by regulations or by a host of other subsidiary legislative instruments. Every year the Committee, assisted by its legal adviser, Professor Jim Davis of the Law Faculty of the Australian National University, detects hundreds of apparent defects or other matters worthy of comment in the almost 2,000 legislative instruments. This scrutiny is generally effective, with Ministers undertaking to amend many of these instruments to meet the Committee's concerns or giving explanations which satisfy the Committee. Such executive accountability has operated since the establishment of the Committee in 1932,[4] which predates by decades the other bodies or processes now associated with the systematic scrutiny and supervision of the executive branch such as the Administrative Appeals Tribunal,[5] the Ombudsman,[6] the Adminis-

2 Defined in s 46A of the Acts Interpretation Act 1901 (Cth).

3 Senate Standing Order 23:

> The Committee scrutinises delegated legislation to ensure:
> (a) that it is in accordance with the statute;
> (b) that it does not trespass unduly on personal rights and liberties;
> (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
> (d) that it does not contain matter more appropriate for a parliamentary enactment.

4 In 1979, para (c) of Order 23 (above n 3) was amended. See Senate Standing Committee on Regulations and Ordinances (Report No 64, 1979); Senate PP 1979 No 42.

5 Administrative Appeals Tribunal Act 1975 (Cth).

6 Ombudsman Act 1976 (Cth).

trative Review Council,[7] the Freedom of Information Act 1982 (Cth) and the Administrative Decisions (Judicial Review) Act 1977 (Cth).

PARLIAMENTARY SCRUTINY OF THE JUDICIARY

The judiciary is also accountable to Parliament, which exercises a number of controls over federal courts. The Constitution itself provides for Parliament to exercise an obviously important, even decisive, role in the operations of the High Court. There are ten sections in Ch III of the Constitution, which deal with the judicial power of the Commonwealth,[8] and nine out of the ten refer to the Parliament.[9] For instance, Parliament decides how many justices the High Court will have, subject to a minimum of three,[10] and may fix their remuneration. Parliament may decide that High Court judges should be removed for proved misbehaviour or incapacity.[11] Parliament decides the exceptions and rules of the appellate jurisdiction of the High Court.[12] Parliament may make laws about the right of appeal to the Privy Council[13] and, of course, has done so.[14] Parliament may also confer additional original jurisdiction on the High Court[15] and make laws conferring rights to proceed against the Commonwealth and the States in relation to all matters within the judicial power.[16]

The Parliament has exercised some of these powers in the High Court of Australia Act 1979 (Cth) and the Judiciary Act 1903 (Cth). The High Court of Australia Act 1979 (Cth) controls and directs the High Court in a number of ways which illustrate the prerogatives of Parliament. That Act provides for the number of justices to be seven, although Parliament could provide any number at all greater than three.[17] The Act also provides for the qualifications of judges and here again Parliament could apparently provide for any qualifications at all.[18] The Act also provides that justices are not capable of accepting or holding any other office of profit within Australia.[19] Presumably without this provision justices could hold such an office. The Act provides detailed arrangements for the administration[20] and procedures[21] of the High Court, including a requirement to keep proper

7 Created under Part V of the Administrative Appeals Tribunal Act 1975 (Cth).
8 Commonwealth Constitution, ss 71–80.
9 The exception is s 75 of the Constitution.
10 Ibid at s 71.
11 Ibid at s 72.
12 Ibid at s 73.
13 Ibid at s 74
14 Privy Council (Limitation of Appeals) Act 1968 (Cth); Privy Council (Appeals from the High Court) Act 1975 (Cth); see also Australia Act 1986 (Cth).
15 Commonwealth Constitution, s 76.
16 Ibid at s 78.
17 High Court of Australia Act 1979 (Cth), s 5.
18 Ibid at s 7.
19 Ibid at s 10.
20 Ibid at Part III.
21 Ibid at Part IV.

accounts and records of the affairs of the court[22] and for the Auditor-General to audit the accounts and to report any irregularity.[23] The Act also obliges the High Court to prepare an annual report for presentation to Parliament.[24] The Act exempts the High Court from taxation by the Commonwealth, a State or Territory.[25] Again, in the absence of this provision it may be that the High Court could be subject to such taxation. The Judiciary Act provides extensively for the actual operations of the High Court, including its general jurisdiction and power and procedures.

The other federal courts are entirely creations of the Commonwealth Parliament. The Constitution actually refers to federal courts created by the Parliament.[26] In fact, for the great majority of the time since Federation in 1901 Australia has not had a general Federal Court, relying instead on Parliament giving federal jurisdiction to State courts.[27] The Federal Court was created by the Federal Court of Australia Act 1976 (Cth), which is 66 pages long and provides for all aspects of its operation, including its constitution, jurisdiction and proceedings. The Family Court was created similarly by the Family Law Act 1975 (Cth), which is 198 pages long and which similarly provides for all aspects of its operation. The Commonwealth Directory of December 1997 also refers to both the Australian Industrial Court and to the Industrial Relations Court of Australia, the functions of the latter being now exercised by the Federal Court. The fate of these two courts illustrates how Parliament can abolish a federal court as well as create them.

The Parliament has, therefore, provided by legislation for detailed aspects of the operation of both the High Court and of the other federal courts. However, these Acts not only provide directly for these matters but also delegate power to make legislative instruments affecting the courts. In common with almost all other Acts the Acts controlling the High Court and creating the other federal courts provide for the Governor-General to make regulations with respect to specified matters.[28] Any such regulations are subject to disallowance by either House of Parliament.[29] The Acts controlling federal courts also provide for the judges of the courts to make rules of court.[30] The Parliament has given all of the courts a general "necessary or convenient" power to make rules. The High Court has also been given more specific powers in relation to some matters.[31] Parliament has

22 Ibid at s 42.
23 Ibid at s 43.
24 Ibid at s 47.
25 Ibid at s 44.
26 Commonwealth Constitution, s 71.
27 See Judiciary Act 1903 (Cth), s 38.
28 For example, Judiciary Act 1903 (Cth), s 88. See also Family Law Act 1975 (Cth), s 36 (1); High Court of Australia Act 1979 (Cth), s 5.
29 Acts Interpretation Act 1901 (Cth), s 48(4).
30 High Court of Australia Act 1979 (Cth), s48; Federal Court of Australia Act 1976 (Cth), s 59; Family Law Act 1975 (Cth), s 26B.
31 High Court of Australia Act 1979 (Cth), s 48; Judiciary Act 1903 (Cth), s 86. These matters are the court sittings; procedure and practice; evidence, forms, fees and admission qualifications.

been a bit more expansive for the Family Court, giving it not only the general power[32] but also 24 specific powers,[33] and—even more expansive for the Federal Court—giving it a general power[34] and 32 specific powers.[35] The different Acts all provide for the rules of court of each of the three courts to be subject to certain provisions of the Acts Interpretation Act 1901 (Cth), which provides generally that legislative instruments must be tabled in both Houses and are subject to other safeguards, as well as to the ultimate sanction of disallowance by either House.[36]

Parliament has other options in its supervision and control of federal courts and their judges. For instance, two Senate select committees in 1984 and a statutory Parliamentary Commission of Inquiry established in 1986 inquired into the conduct of Justice Murphy of the High Court.[37] It also exercises some degree of scrutiny of the courts' financial management through examination of their proposed appropriations, and annual reports, by the relevant Senate legislation committee. However, the most direct relationship between the Parliament and the judiciary has been developed through scrutiny by the Regulations and Ordinances Committee of all delegated legislation relating to the courts.

This paper will now describe several case studies of scrutiny by the Standing Committee on Regulations and Ordinances (the Committee) of legislative instruments made both by judges and by members of the executive. In deference to the presence of Chief Justice Doyle and Justice Kenny the paper will first describe some instances of scrutiny of rules of court, which are of course subject to the same accountability to Parliament as legislative instruments made by the executive.

The first public exercise of the right of the Regulations and Ordinances Committee to propose disallowance of rules of court occurred in 1982, when on Budget Day the then chair of the Committee gave notice of disallowance of rules of the High Court.[38] The Committee had noted that there was possible prejudicial retrospectivity against individuals in respect of interest on judgment debts. On its face this was a breach of the principles which trigger the Committee's jurisdiction.[39] In accordance with normal practice, the notice had been given to enable the Committee to continue negotiating with the High Court to provide a satisfactory solution. The rules of court were duly remade, and the Committee publicly acknowledged the High Court's cooperation in the matter.[40]

Several other such instruments have been scrutinised, and as a result of the Committee's concern have been appropriately amended.

32 Family Law Act 1975 (Cth), s 26B
33 Ibid at s 37A.
34 Federal Court of Australia Act 1976 (Cth), s 59.
35 Ibid at s 59(2).
36 Acts Interpretation Act 1901 (Cth), ss 46A, 48, 48A, 48B, 49 & 50.
37 Parliamentary Papers 168/1984 (24 August 1984), 271/1984 (31 October 1984).
38 Sen Deb 1982, Vol 595 at 12 per Senator Lewis.
39 See Senate Standing Order 23, above n 3.
40 Sen Deb 1982, above n 38 at 1189 per Senator Lewis.

But such scrutiny, and the attendant successful outcomes, have not been confined to the High Court. Two more recent examples involved the newly established Industrial Relations Court.

The Industrial Relations Court Rules, Statutory Rules 1994 No 110, were made by nine judges of the Court, including the Chief Justice, on 30 March 1994 and expressed to come into effect on the same day. The Committee scrutinised the Rules in the same way as it scrutinises all other disallowable instruments and found substantial deficiencies. The Rules included numerous drafting errors and oversights, with many wrong references, including one to an office abolished some 10 years previously. More serious problems included a provision which expressly negated provisions of an Act without the judges having the power to do so and the fact that the Rules were not gazetted until 5 May 1994, more than five weeks after they came into effect. Under s 48(2) of the Acts Interpretation Act 1901 (Cth), which applied to the Rules, any instrument which adversely affects anyone except the Commonwealth is void if it takes effect before gazettal. The Committee accordingly wrote to the Chief Justice for his comments.

The Chief Justice replied, advising that the Rules had been prepared under circumstances of great urgency and that he would consider what amendments were necessary. In relation to the delay in gazettal the Chief Justice advised that the delay could not prejudice anyone because the Rules were available publicly before gazettal. The Committee considered the reply and wrote again to the Chief Justice, advising that his comments on the availability of the Rules did not appear to be relevant to the question of validity and that in the opinion of the Committee the Rules were void, with all action taken under them similarly void. The Committee also informed the Chief Justice that in order to preserve its options it would give a notice of disallowance of the Rules.

By this time the Rules had been amended, but to address matters not related to the Committee's concerns. The amending Rules included a number of deficiencies, about which the Committee also wrote to the Chief Justice. The Committee then received a letter from the Acting Chief Justice, advising that the Court had discussed the matter with officers of the Attorney-General's Department who had offered to assist the court with remaking the Rules so that a clearly valid set of Rules could be made available.

The Committee then wrote to the Acting Chief Justice and to the Attorney-General for advice, noting that the undertaking to remake the Rules would certainly allow them to operate in the future with unambiguous validity but that there was a period of at least four months during which the apparently void Rules were administered. The Acting Chief Justice and the Minister for Justice replied, advising in effect that the Rules were procedural and therefore did not themselves adversely affect anyone. The Committee did not accept this advice but in the interests of the orderly administration of justice agreed to remove its notice of disallowance on the basis that the Rules would be repealed and remade. This subsequently occurred on 11 October 1994.

The Committee had further correspondence with the Court when the Industrial Relations Court Rules (Amendment), Statutory Rules 1996 Nos 219 and 220, were not tabled within the required time and subsequently ceased to have effect. This was the first time for many years that statutory rules were not tabled, although other types of disallowable instrument frequently become void for this reason. In this case the Committee asked the Chief Justice for an assurance that the Rules were not administered between the dates upon which they ceased to have effect and the date upon which fresh Rules were made.[41]

The Committee also scrutinises the rules of the other federal courts. In relation to the Federal Court Rules the Committee earlier this year advised the Chief Justice that the Rules incorporated a legislative instrument which had become void more than four years earlier because it was never tabled in Parliament. The Chief Justice then advised the Committee that the provision would be removed.

SCRUTINY BY THE REGULATIONS AND ORDINANCES COMMITTEE OF LEGISLATIVE INSTRUMENTS MADE BY THE EXECUTIVE

The Committee's scrutiny of the rules of the federal courts, while important, is nevertheless only a small part of its operations. Most of the instruments which it scrutinises are made by the executive and it is upon these that the Committee spends most time. This paper will now describe its scrutiny of a number of such instruments which illustrate accountability of the executive, first, for provisions which unduly breach personal rights and, second, in relation to provisions which breach parliamentary propriety.[42]

Personal rights

The Committee's inquiry into Public Service Determination 1992/27 began on 27 April 1992 after it received a representation from a retired officer of the Australian Public Service, which drew attention to an apparent injustice affecting what turned out to be a substantial group of retired officers, although this was not disclosed at the time. The problem related to credits received in lieu of recreation leave, dating back to the early 1970s. Without going into details, a combination of factors resulted in retiring officers receiving less money than that to which they were fairly entitled. The amounts involved were not great, in most cases less than $1,000. The matter could have been resolved by either retrospective legislation or an act of grace payment, but the Departments involved declined to do this, on the basis that it was too hard to identify potential claimants and publicise the change. Accordingly an aggrieved officer approached the Merit Protection and Review Agency (MPRA), which after investigation found that the application of the law was unfair and inequitable.

41 Cf, *Thorpe v Minister for Aboriginal Affairs* (1990) 97 ALR 543.

42 See Senate Standing Order 23, above n 3.

Armed with this finding the officer then approached the Department of Industrial Relations (DIR), who were responsible for the matter. Three days later an officer of DIR made Public Service Determination 1992/27, which effectively extinguished the rights of the officers affected by the injustice. The Explanatory Statement which accompanied the Determination did not advise of these effects. Also, the DIR did not consult with the officer or the MPRA or inform them after the Determination was made. The officer therefore came to the Committee. Shortly after this DIR discovered that the Determination had not been drafted properly and so made a second Determination (1992/46), the sole purpose of which was to correct the errors in the previous instrument. Again the Explanatory Statement did not advise that the Determination extinguished the rights of officers and again the DIR did not consult with those affected before it made the second Determination or inform them after it was made.

This matter raised a number of concerns for the Committee. First, the Explanatory Statements for the two Determinations appeared to be misleading, both advising that they "clarified" the position. The Explanatory Statements even seemed to imply that they were to the benefit of all those affected. In fact the position was perfectly clear to the DIR and everyone else, but the two Determinations then actively altered the position to the detriment of those affected.

Next, the Committee was concerned about the relationship between the MPRA and the DIR. The MPRA had been actively pursuing the matter with the DIR, but DIR did not consult with the MPRA about its proposed course of action or inform it of developments even after they happened. This would have been a deficiency in any event. In the present case, however, there was an additional cause of concern. This was because the Committee had previously raised with DIR the question of review of discretions in Public Service Determinations. In each case the DIR replied that there was an adequate safeguard in that officers could go to the MPRA with any grievances. The Committee had always accepted those assurances and had refrained from taking further action. In the present case, however, the DIR had not only failed to implement recommendations of the MPRA but also had not even told those affected that it had done so.

Finally, and most importantly, here was an obvious injustice which was entrenched by a legislative instrument and which needed to be addressed.

The Committee first took action by asking its then Legal Adviser, Emeritus Professor Douglas Whalan AM, to prepare a special report on the Determinations and the representation. After the Committee considered this report it wrote to the Minister for Industrial Relations advising of its serious concerns and that it was disturbed by the whole matter, particularly by DIR ignoring recommendations of the MPRA in the way that it did. The Committee asked the Minister if the officer who made the Determinations, and other suitable officers,

could attend upon the Committee at its next meeting. Also, in order to protect its options, the Committee advised the Minister that it would give a notice of disallowance of the Determinations.

The Committee then presented a short report to the Senate about the matter.[43] This was done by the Chair of the Committee at the time, Senator Patricia Giles. The Committee also wrote to the MPRA about the issues raised. The Minister replied to the Committee advising that he had asked the DIR to cooperate fully with our inquiries and that the appropriate officers would appear before the Committee. The Minister also advised that he had asked the DIR to provide the Committee with a paper on the matter as soon as possible.

The officers of the DIR duly met with the Committee and received what can be described as an unsympathetic reception. As an aside, this meeting illustrated one of the great strengths of the Committee, which is its non-political and non-partisan operation. In fact, the officials were questioned most closely by the late Senator Olive Zakharov and by Senator Kay Patterson, who are from opposite sides of the political fence but who united here in their efforts to see an injustice corrected. Under questioning by Olive Zakharov an official advised that the administrators of the Public Service Act 1922 (Cth) had been aware of the problem for some 20 years and that about 30,000 people, alive and deceased, were affected. The gist of the official's answers were that there were now considerable administrative difficulties in identifying these people and the amounts to which they were entitled and in deciding a method of payment. The substance of the comments by members of the Committee were that these administrative difficulties were not such as to preclude action. The meeting concluded with the Committee asking the DIR officials to prepare another paper setting out ways in which as many people as possible who had been unfairly treated by the Determinations could be compensated.

This paper from DIR advised that the best option would be to deal with the problem by direct appropriation through the current budget process and that this would be the basis of a submission to the Minister. The Committee then wrote to the Minister advising that it would be satisfied if the DIR option was adopted, but noted that another option was to amend the Public Service Act. The Minister then wrote to the Committee advising that he had written to the Prime Minister asking that the matter be dealt with by special budget appropriation. The Prime Minister then advised that in view of the actions of the Committee and of equity issues, the budget would include a one-line appropriation of $2.7 million with a further $1.4 million in the next year. The Committee thanked the Minister for his cooperation and presented a full report to the Senate.[44]

43 Sen Deb 1992, Vol S152 at 2642 per Senator Giles.
44 Sen Deb 1992 Vol S154 at 61 per Senator Giles.

Outcome of case

This case illustrates a number of aspects of the operations of the Committee. First, it is an instance of the effectiveness of the Committee in carrying out its mandate from the Senate to ensure that legislative instruments do not infringe personal rights. Most significant of all, the matter was raised by an individual, whom the Committee was willing to protect even if he had been the only person affected. In fact it is clear that without intervention by the Committee a serious injustice would have continued and affected thousands. The next conclusion is that the Committee has an appropriate variety of techniques for ensuring a satisfactory outcome in such cases. Here the Committee wrote to the Minister, reported to the Senate, gave notices of disallowance of the offending provisions, asked for officials to attend upon it and asked for officials to prepare an options paper. The Committee's concerns were also communicated to the Prime Minister.

This matter also illustrates the high level of cooperation which the Committee receives from Ministers, with the Prime Minister, the Minister for Industrial Relations and the Minister for Finance all responding generously to its concerns. The reasons for this cooperation are, as mentioned previously, the non-partisan nature of its operations and secondly, the fact that the Committee does not question policy, restricting itself to ensuring that legislative instruments do not breach personal rights or parliamentary propriety. The case also shows the flexibility of the Committee. The difficulty here could have been addressed either by amendment of the Act, by amendment of the Determinations or, as actually happened, by parliamentary appropriation. Any of these courses of action, which would have resulted in further parliamentary scrutiny, would have been acceptable.

The case also illustrates that the concerns of the Committee are not theoretical or speculative. Here tens of thousands of employees were treated unfairly over two decades. The actions of the Committee removed a real and not a possible injustice. This matter also illustrates how the Committee complements and reinforces other agencies whose charter is to protect personal rights. For instance, the Committee ensures that discretions in legislative instruments will, where appropriate, be subject to review by the Administrative Appeals Tribunal.[45] On other occasions the Committee has asked that certain matters should be referred to the Administrative Review Council and the Auditor-General. In the present case the Committee took account of findings by the MPRA. The Committee does not act in isolation but cooperates with other bodies whose function is to achieve the same outcomes as the Committee.

The case also illustrates the insistence of the Committee that the Explanatory Statement which, due to previous activities of the

45 See Senate Standing Committee on Regulations and Ordinances, *Statement on Work during Autumn and Winter Sittings* 1998 (tabled 1 July 1998) Sen Deb 1998, No 10 at 4626.

Committee, now accompanies every legislative instrument, should genuinely explain what the instrument does and why it was made. In the present case the Explanatory Statements were misleading and this was a significant deficiency. Finally the case illustrates the need for openness, consultation and transparency, all of which were grievously lacking in the process and substance of the two Determinations.

PARLIAMENTARY PROPRIETY

The previous case illustrates a breach of personal rights by the executive, which was corrected by the Committee. Breaches of parliamentary propriety, however, present different problems and the following case studies are instances of these.

The Tenth Amending Deed to Establish an Occupational Superannuation Scheme for Commonwealth Employees and Certain Other Persons, among other things, corrected some substantive errors in earlier deeds. The Explanatory Statement, however, advised that the Deed was administered to produce the intended outcomes pending the present corrections. The Committee wrote to the Minister noting that the scheme had been administered in the form it was intended, rather than the form in which it actually existed after being legally made under the authority of an Act of Parliament. The Minister wrote back advising that this was acceptable because the intended effect had been clearly set out in the Explanatory Statements for the earlier Deeds. The Committee wrote again to the Minister, asking under which provisions of Commonwealth law this had been done. At the Committee's suggestion the Minister then agreed to amend the enabling Act to validate the administrative actions.

There was a similar problem with some Rules under the Life Insurance Act 1995 (Cth), which commenced on 18 September 1996. The Explanatory Statement, however, advised that the Rules would be administered as if they had taken effect on 1 January 1996 and that since that date the Rules had been administered according to their intent rather than their literal legal provisions. The Committee advised the Minister that this was a matter of some concern. If the Rules had no adverse effect on anybody then they could and should have been made retrospective to 1 January 1996. If, however, there were any adverse provisions then the amending Act should be amended to provide for prejudicial retrospectivity. The Committee emphasised that agencies should administer the actual provisions of legislation, not what the agency considered those provisions should be. The Minister then advised that he agreed with the Committee and that instructions had been given to apply strictly the earlier Rules and that a new Explanatory Statement would be produced which would be tabled in Parliament.

Excessive delay in making legislative instruments when it is appropriate to do so may be a breach of parliamentary propriety. The enabling legislation for the Heard Island Wilderness Reserve Management Plan provided that a Plan must be made as soon as

possible after it commenced, which was 11 January 1988. The Plan was not made, however, until 11 September 1995, more than seven years later. In reply to the Committee's query, the Minister advised that the delay was due to extensive, protracted and difficult consultation with interest groups. The Committee also raised the question of delay in relation to the Australian Pork Corporation Regulations, which provided a legal basis for that Corporation to pay pay-roll tax. In response to the Committee's query the Minister advised that the Corporation had been paying this tax for nine years although under no legal obligation to do so. The Committee advised that it was concerned that a Commonwealth agency had for years mistakenly paid these State and Territory taxes because of a failure to make the necessary legislative instrument.

Personal rights and parliamentary propriety

The next case raises issues of personal rights as well as parliamentary propriety. In the last 10 years regulations made under a variety of Acts have implemented United Nations total or partial sanctions against a number of countries, initially Iraq and Kuwait and then Yugoslavia and Libya. These presented especial difficulties for the Committee. The sanctions on their face affected personal rights to travel, while restrictions on imports, exports and foreign exchange transactions would affect adversely the right to earn a living. Also, the scheme of the sanctions was similar in each case, being a general prohibition subject to exemption by the Minister. In such cases this may be a breach of personal rights if there is no independent, external review of these decisions. Also, importantly, the regulations could have breached parliamentary propriety, in that they may have been more suitable for inclusion in a Bill which would be subject to all of the safeguards of parliamentary passage. In addition, the regulations were unusual in that their provisions were not directly authorised by the enabling Act or any other Act. Rather, the sanctions were the consequences of United Nations resolutions with which international law obliges Australia to comply.

The Committee scrutinised these regulations in the usual way and at first glance they appeared to be a case where the matters dealt with should be included in an Act rather than be prescribed by regulations. However, the Committee took advice that Australia had a legal obligation to comply with sanctions imposed by the United Nations. As such the regulations did not impose any new duties but instead merely spelt out the details of duties which already existed. They therefore came within the classic function of legislative instruments and were acceptable as regulations rather than as an Act.[46] In relation to merits review of the discretions in the regulations, the Committee ascertained that these generally had to be exercised personally by the Minister; delegation was not possible. In such cases the Committee usually does not press for merits review. Also, in the

46 See Senate Standing Order 23, above n 3.

circumstances, the regulations did not appear to operate harshly on individuals.

In fact, the regulations illustrated the speed and flexibility which are among the main advantages of legislative instruments, implementing the United Nations sanctions faster than would normally be the case if done by Act. For instance, the initial three sets of regulations imposing sanctions on Iraq and Kuwait were made on 8 April 1990, only two days after the relevant United Nations resolutions. The initial regulations in relation to Yugoslavia were made on 2 June 1992, three days after the resolution.

The report of the Committee in these regulations[47] was the inspiration for the Charter of the United Nations Amendment Act 1993 (Cth), which provides almost entirely for the power to make regulations. The Minister's second reading speech[48] and the Explanatory Memorandum[49] both referred positively to the Committee's findings. The Minister explained that under the existing legislation it was not possible to apply strict new sanctions against Yugoslavia. For instance, it was not possible to freeze funds held in Australia by companies based in Yugoslavia. The new Act would give power to do this. In the five years that the amendments have been in force regulations have imposed sanctions upon Yugoslavia, Angola, Haiti, Libya, Bosnia and Herzegovina, Rwanda and Sierra Leone.

CONCLUSION

As noted earlier, the theme of this session of the Forum is accountability and this paper has examined the broader aspects of the general accountability of the executive and the judiciary to Parliament, noting that in the case of the executive such accountability is total in the context of responsible government. In relation to the judiciary the paper noted that the Parliament controlled important aspects of the operation of the High Court and that the other federal courts were mere creations of Parliament. The accountability of the executive and the judiciary for legislative instruments made under the authority of Acts of Parliament is even greater, with the Standing Committee on Regulations and Ordinances exercising a mandate from the Senate to ensure that such instruments meet the highest standards of personal rights and parliamentary propriety. It should be noted that the Senate has never failed to accept a recommendation from the Committee in relation to disallowance of a legislative instrument, although this step is rarely necessary. In fact, it has been more than three years since the Committee resolved formally to recommend disallowance of a regulation unless the Minister on that same day undertook to amend it. In that case the Minister did so.

47 Sen Deb 1993 Vol S158 at 208 per Sen Faulkner; H Reps Deb 1995 Vol 188 at 1105.
48 Ibid at 209; H Reps Deb 188 at 1107.
49 Charter of the United Nations Amendment Bill 1993 (Cth) at 3.

It is appropriate to close with a quotation from the late Senator Ian Wood, who was a member of the Committee for 28 years and Chairman for 22 years. In successfully moving for the disallowance of a legislative instrument Senator Wood referred to a reported quotation from Sir Robert Garran, a counsel who helped draft the Constitution and the first Commonwealth Solicitor-General, that the Regulations and Ordinance Committee was the most important in Parliament, because:

> Its duty was to see that Parliament ran the country with legislation, not the Executive with regulations and ordinances.[50]

50 Sen Deb 1971, Vol S49 at 195.

Heads or Tails? Still the Same Coin

ANNE COGHLAN*

INTRODUCTION

The theme of this conference is the implication of current administrative law developments both at the State and Federal levels on "The Rule of Law". It follows from the unifying theme of the 1997 Administrative Law Forum which was the issue of public accountability in the context of potential changes to the existing system.[1]

In the Commonwealth area there is still much speculation about possible reforms of the administrative law system but in Victoria, which has a system closely modelled on the federal one, we have just seen the introduction of three Acts which will bring about significant structural changes in the system from 1 July 1998[2]. The Victorian Civil and Administrative Tribunal Act 1998 (Vic) (the VCAT Act) and accompanying legislation brings together a number of tribunals in the Attorney's portfolio. It creates the Victorian Civil and Administrative Tribunal (VCAT) comprised of an Administrative Division and a Civil Division, exercising review or original jurisdiction respectively. Review cases, such as planning appeals and occupational regulation appeals will be heard in the Administrative Division and inter partes matters, such as referrals from the Equal

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1 J McMillan, "Administrative Law Under a Coalition Government—Key Issues" in J McMillan (ed) *Administrative Law under a Coalition Government* (1997) 1.

2 The Victorian Civil and Administrative Tribunal Act 1998 (Vic) (the VCAT Act); The Business Licensing Authority Act 1998 (Vic) and the Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998 (Vic). See also J Pizer "The VCAT—the Dawn of a New Era for Victorian Tribunals" in this volume of materials.

Opportunity Commission and Domestic Building cases will be heard in the Civil Division.

In this paper I consider different aspects of accountability with respect to review tribunals in Victoria and in particular the Administrative Division of the new VCAT. The aspects of accountability are the role tribunals play in the area of public sector accountability and how tribunals themselves are accountable. I look at how the forthcoming changes might affect those matters.

The first side of the coin is the role tribunals play in public sector accountability. Tribunals are but one of the institutions that enhance public accountability; others include the Auditor-General, the Ombudsman and freedom of information legislation. The roles they play are different.

As Mr Tony Blunn, when he was Secretary to the Department of Social Security, said in a paper in the 1995 AIAL Administrative Law Forum on "Accountability Processes and the Administration":

> The processes by which those various bodies achieve that enhancement are also numerous and as varied as the bodies themselves and they create, or at least significantly modify, much of the environment in which the administration operates.[3]

It is well recognised that tribunals have a very important function beyond simply reviewing individual decisions[4].

Robin Creyke in her paper "Sunset for the Administrative Law Industry?"[5] at last year's conference described several aspects of a tribunal's role, as it related to public accountability. She said:

> Accountability in the context of merit review tribunals has several faces: was a decision by a merit review body implemented by the agency when the review body varied a primary decision (the normative effect); was that decision followed in other, similar cases (the precedential effect); and are decisions made by tribunals respected, disseminated and generally followed throughout an agency, for example, by changing policy, by seeking legislative change, or by appealing the decision if the agency disagrees with it (the systemic effect).[6]

She elaborated on the systemic effect, describing the benefits that administrative law can have by feeding back down into the process, providing guidance to decision-making and thus improving the quality of decision-making.

So far as the Victorian experience is concerned, there has been little examination of the role tribunals have played in any of those areas. There is no data on whether decisions have been imple-

3 A S Blunn, "Accountability Processes and the Administration" in K Cole (ed) *Administrative Law and Public Administration: Form vs Substance* (1995) at 61.

4 A Coghlan "Can Review Bodies Lead to Better Decision Making?" in J McMillan (ed) *Fair and Open Decision-Making* (1991) at 87.

5 R Creyke, "Sunset for the Administrative Law Industry? Reflections on Developments under a Coalition Government" in McMillan (ed), above n 1 at 20.

6 Creyke, ibid at 40, added the footnote "[T]his is a usage of 'normative' in this context which is narrower than is common."

mented, followed in similar cases, have led to a change in policy or legislation, or led to an improvement in primary decision-making.[7]

The flip side of the coin is a tribunal's own accountability. Whilst there has been discussion and analysis of the performance of Commonwealth tribunals on a range of fronts, there has been little critical analysis of Victorian tribunals. Those experiences are not unique to that State[8].

TRIBUNAL HISTORY IN VICTORIA

Any insight into, or forecast about how the forthcoming changes might affect, the VCAT's role in the area of public accountability and its own accountability is not complete without an appreciation of some of the history.

The Victorian administrative law package is closely modelled on the federal system. After the introduction of the Office of the Ombudsman,[9] judicial review[10] and freedom of information,[11] the Administrative Appeals Tribunal Act 1984 (Vic) (the AAT Act), creating the Administrative Appeals Tribunal (AAT), completed the framework of administrative law reform. The second reading speech, introducing the AAT Act, noted:

> [Q]uite the most comprehensive scheme of reform anywhere in the common law world has been undertaken by the Commonwealth, with its package of reforms dubbed the "new administrative law". The focal point of these reforms has been the creation of its Administrative Appeals Tribunal. Further elements of the package include the Office of the Ombudsman, the detailed provisions regarding judicial review and the Freedom of Information Act. As I have stated, Victoria has already established three of those four pillars, and, with the present Bill, completes its own framework of administrative law reforms.[12]

When describing the AAT's purpose, Parliament acknowledged its role in ensuring a greater degree of public accountability and fairness in the administrative decision-making process.

> Its purpose is to establish in Victoria an Administrative Appeals Tribunal. The tribunal will be an independent body with powers to review a wide range of administrative decisions upon their merits. It will provide the much needed central structure for review of those decisions and is doing so stem the rapid proliferation of administrative tribunals as review bodies and thereby induce a significant saving of public expenditure.
>
> The establishment of the tribunal represents a further significant step in ensuring a greater degree of public accountability and fairness in the administrative decision-making process. It should be viewed as part of the Government's comprehensive commitment to the principles which it

7 The Hon D O'Connor, "Effective Administrative Review: an analysis of two-tier review" (1993) 1 *A J Admin L* 4.

8 R Snell, "The First Steps in Understanding the Impact of Administrative Law on Public Administration at the State Level: The Tasmanian Story" in L Pearson (ed) *Administrative Law: Setting the Pace or Being Left Behind?* (1996) at 237.

9 Ombudsman Act 1973 (Vic).

10 Administrative Law Act 1978 (Vic).

11 Freedom of Information Act 1982 (Vic).

12 Vic PD, Legislative Council Vol 375 at 585 per Mr Kennan.

> inaugurated with the enactment of the Freedom of Information Act 1982. The Office of Ombudsman introduced by the previous Government, the procedures for judicial review available in the Supreme Court and the reforms effected by the Administrative Law Act 1978 provide other important elements of administrative law in Victoria.[13]

It was acknowledged that administrative decisions are likely to be better if they are liable to be reviewed and that a consistent approach to how review of decisions should be undertaken was desirable.

It was envisaged that the AAT would ensure a cohesive and systematic approach to the review of administrative decisions.

> The establishment of an Administrative Appeals Tribunal represents a significant step forward for administrative law in Victoria. It realizes the Government's election promise and will provide a firm basis upon which this branch of the law may develop. It will ensure that a cohesive and systematic approach to the review of administrative decisions will take place. It will provide a consistent set of rules and principles based upon fairness and equity. By virtue of its status it will significantly affect the manner in which the administrative decision-making process is carried out in Victoria. Finally, it will also provide the focus to help stem the rapid proliferation of administrative tribunals as review bodies and, in the longer term, rationalize those already in existence.[14]

From fairly modest beginnings and a relatively limited range of jurisdiction including state taxation appeals, motor accident compensation appeals, criminal injuries compensation appeals, estate agents registration appeals and freedom of information appeals, there has been a steady referral of jurisdiction to the Tribunal.

The Planning Appeals (Amendment) Act 1987 (Vic) integrated the functions of the Planning Appeals Board into the AAT by creating a Planning Division of the AAT. Commenting that (until the introduction of that legislation) the major administrative appeals jurisdiction in the State had remained outside the AAT framework, the second reading speech reiterated the purpose of the AAT:

> The major reform effected by the Bill is to integrate the functions of the Planning Appeals Board into the Administrative Appeals Tribunal—AAT—by creating a Planning Division of the Administrative Appeals Tribunal. The other important reform made by the Bill is to limit the circumstances in which the Supreme Court can deal with planning disputes so as to ensure that the Planning Division of the AAT becomes the 'one-stop shop' for planning appeals in this State.
>
> Since coming to office this Government has undertaken a wide-ranging program to improve the efficiency and accessibility of the court and tribunal systems in the State. An important reform was the establishment in 1984 of an Administrative Appeals Tribunal.
>
> In establishing the AAT, the Government sought to provide citizens with an independent and high quality forum in which appeals against decisions by ordinary administrative tribunals and statutory decision makers could be heard in a speedy and relatively informal setting. Previously an uncoordinated and often inconsistent pattern applied to the nature and availability of appeal rights from ordinary administrative tribunals and

13 Ibid at 585.

14 Vic PD, Legislative Assembly Vol 386 at 279 per Mr Mathews.

> decision makers. Several separate administrative appeals tribunals jurisdictions then existing were abolished by the legislation establishing the AAT and were transferred to the AAT.[15]

At last count there were some 101 Acts conferring jurisdiction on the Tribunal.

Since 1984 some jurisdictions have been removed. Estate agents licensing appeals and domestic building disputes have been removed as part of substantial restructuring in those areas.

In October 1996 the Attorney issued a discussion paper, "Tribunals in the Department of Justice."[16] In the background to the discussion paper, it was stated:

> Despite the perceived and actual benefits of tribunals as opposed to courts, the development of tribunals has been piecemeal and has taken place without any real consideration of the overall system by which Victoria strives to administer justice. Consequently, there appear to exist a number of deficiencies in the current structure and operation of tribunals within the Department of Justice. Of course, criticism of the structure and operation of tribunals ought to be directed not at tribunals but at Parliament, for it is Parliament that has established tribunals, conferred jurisdiction on them, and made the rules by which they operate.[17]

The paper identified perceived deficiencies in the structure and operation of the tribunals:

(a) Absence of a logical structure to accommodate numerous and disparate tribunals;

(b) Inappropriate transfer of jurisdiction from courts to tribunals;

(c) Inappropriate conferral of administrative or policy functions on tribunals;

(d) Lack of independence of tribunal members from the Executive Government;

(e) Absence of uniform or harmonised rules of procedure applicable to tribunals;

(f) Inappropriate merits review of decisions requiring specialist knowledge; and

(g) Inappropriate exclusion of judicial review of tribunal decisions.

The discussion paper set out a number of principles relevant to remedying the perceived deficiencies and proposed reforms. The reforms were:

(a) A logical structure for Victoria's tribunals;

(b) Jurisdiction of the Victorian Civil and Administrative Tribunal;

(c) Transfer of administrative functions of existing tribunals to Executive Government;

(d) Ensuring the independence of Tribunal members;

(e) Common rules of procedure;

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15 Ibid.

16 The Hon Jan Wade MP, Attorney-General, *Tribunals in the Department of Justice—A Principled Approach* (1996).

17 Ibid, at 3–4

(f) Constitution of Tribunal; and

(g) Judicial review of Tribunal decisions.

Introducing the legislative changes, the Attorney in the second reading speech, having referred to the significant growth in the number and variety of tribunals servicing the community, and the piecemeal development, said:

> The reform package gives effect to the government's pre-election commitment to provide Victorians with a modern, accessible, efficient and cost-effective civil justice system by meeting commitments contained in the government's policy statement A Safer Victoria. A high priority for this government has been to provide Victorians with access to a civil justice system which is modern, accessible, efficient and cost-effective. The increasing complexity and volume of cases require continued improvements to court and tribunal processes to ensure that the civil justice system meets community expectations. This package of reforms will ensure that both the public and business community, including people living and working in rural Victoria, will benefit from improved access to civil justice services which are relevant, responsive and efficient. The key proposal to amalgamate a number of tribunals within the Victorian Civil and Administrative Tribunal is aimed at meeting these objectives.
>
> **Victorian Civil and Administrative Tribunal**
>
> The establishment of the Victorian Civil and Administrative Tribunal, to be known as VCAT, will:
>
> - improve access to justice for all Victorians including the business community;
> - facilitate the use of technology (such as video link-up and interactive terminals), consequently improving access to justice for Victorians living in both metropolitan and rural areas;
> - complement measures to increase alternative dispute resolution programs by providing a range of procedures including mediation and compulsory conferences to help parties reach agreement quickly;
> - streamline the administrative structures of tribunals, thereby improving their efficiency;
> - develop and maintain flexible, cost-effective practices;
> - introduce common procedures for all matters, yet retain the flexibility to recognise the needs of parties in specialised jurisdictions; and
> - achieve administrative efficiencies through the centralisation of registry functions, improvement of information technology systems and more efficient use of tribunal resources.
>
> In combination, these measures will enhance the Victorian community's confidence in the tribunal system.[18]

The speech echoes the sentiments expressed in 1984 about proliferation of administrative tribunals as review bodies and the advantages of a central structure for review. In 1984 there was an emphasis on public accountability and fairness in the decision-making process. In 1998 there is a greater emphasis on providing a modern,

18 Vic PD, Legislative Assembly, 53rd Parliament, 2nd Session No 5 (unbound) at 972–3 per Ms Wade.

accessible, efficient and cost-effective civil justice system. The same coin, but with different faces.

How well have the tribunals been performing their role and what effect will the changes have?

PUBLIC ACCOUNTABILITY

One tribunal role is as a tool in the area of public accountability. In Victoria very little information is available which would enable a thorough examination of the different faces described by R Creyke in her paper,[19] such as data on the implementation of a decision by an agency or, whether that decision was followed in other similar cases. Nor is there much information such as might be given in an annual report highlighting significant and influential cases and their effect on primary decision-making or which have led to legislative change.

There is no doubt that the Victorian AAT was a powerful accountability tool. Obvious examples can be found in the areas of freedom of information, and planning appeals. In the area of freedom of information, where in Victoria there is a provision which enables the decision-maker to release exempt documents if the public interest requires, there are numerous examples of the AAT performing its function as part of the accountability process. A number of cases evaluating the exercise of that discretion by the AAT have been carefully examined by Damian Murphy in his paper "Commercial Confidentiality, Freedom of Information and the Public Interest".[20]

In high volume lists such as Transport Accident Commission (TAC) cases, review has provided a forum to enable applicants to have decisions of the TAC scrutinised. On numerous occasions the Tribunal has provided guidance on how to interpret and apply the legislation.[21] Its published reasons for decision have played an important role in ensuring accountability in the primary decision-maker.

The AAT played a key role in the planning jurisdiction where, aside from the individual merits of the case, the legislation requires that policy be considered.

The AAT was instrumental in formulating policy approaches and interpreting policy and thus giving guidance to the relevant planning authorities. There are many examples. For example, in *Australand Holdings Pty Ltd v City of Boroondara and Crow and Others*[22] the AAT set out its view of the correct approach to planning decisions involving the application of an urban consolidation policy, in the context of a medium density proposal. Again, in *Kirzner Development Pty Ltd v City of Malvern,*[23] the Tribunal discussed the

19 Creyke above n 5.
20 D Murphy, "Commercial Confidentiality, Freedom of Information and the Public Interest" (1996) 9 *AIAL Forum* 1 at 11.
21 See, for example, *Re Stolfa and Transport Accident Commission* (1997) 12 VAR 343.
22 (1997) 21 AATR 3.
23 (1994)13 AATR 17.

principles and criteria of the Victorian Code for Residential Development—Multi-dwellings,[24] and the importance of site responsive design. In *Micett Hotels Pty Ltd and Shoppers Without Pokies Inc and Hobsons Bay City Council v Carlton Cricket and Football Social Club*[25], the Tribunal considered the social impacts of a gaming venue in the context of the application of s 60 of the Planning and Environment Act 1987 (Vic).

The role the AAT plays in this area has been noted by David Whitney, general editor of AATR, who in the June 1998 edition of Victorian Planning News[26] referred to a Tribunal decision in *Woodhouse and Patterson v Rural City of Wodonga*[27]. He commented:

> It would be useful for applicants and responsible authorities to take note of this decision. Under the new Victorian Planning Policy based schemes, the achievement of policy will play a much greater role in the outcome of planning decisions.
>
> Let's hope under VCAT, we are able to maintain a stable of members who understand planning policy and the role it will play in achieving a municipality's strategic objectives.
>
> Let's hope also, that Councils realise the importance of the policy components of their new planning schemes.[28]

TRIBUNAL ACCOUNTABILITY

Very little information about the performance of the AAT is available. Apart from some basic statistical information about numbers of applications lodged and disposed of, overall times taken, together with some budgetary information, there has been no particular gathering and publishing of data about any outcomes. A very crude evaluation of performance in budgetary terms can be made of the General and Planning Divisions, by simply looking at the average cost per finalised application.[29] Just what this tells us is another question. There has been no evaluation of the quality of decision making, the effectiveness of the process, the accessibility of the system or how the AAT has provided leadership in the area of administrative review in Victoria.

In 1995 the AAT published a Corporate Plan in which it set out its mission, community expectations and concerns, its vision and organisational priorities. Many of the matters referred to related to the accountability of the Tribunal itself, with a plan as to how and when the accountability measure would be achieved. For example, one of the AAT's organisational priorities was to be "efficient and timely". Steps were identified about how this would be achieved, but there has been no systematic evaluation on either progress or outcomes.

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24 Incorporated in November 1993 into the Planning Scheme cll 3 – 3A.4.
25 (1997) 20 AATR 176.
26 D Whitney, "Editorial" (1998) 24(5) *Victorian Planning News* at 11.
27 (1997) 21 AATR 281.
28 Whitney, above n 26.
29 See Table in Appendix A, attached.

THE CHANGES

The VCAT Act contains a number of provisions which have the potential to enhance the VCAT's role in the area of public accountability and its own accountability. They include an advisory function for the President, the provision of an annual report and a responsibility for the professional development and education of members.

Section 31 of the VCAT Act refers to an advisory function of the President.

> **Section 31.** ***President to advise Minister***
>
> It is a function of the President to advise the Minister with respect to any action that the President considers would lead to—
>
> (a) the more convenient, economic and efficient disposal of the business of the Tribunal;
>
> (b) the avoidance of delay in the hearing of proceedings;
>
> (c) this Act or any enabling enactment being rendered more effective.

The section provides scope for feedback to the Minister, not only regarding the economic and efficient disposal of its business, but also on action that could lead to any of the many enabling enactments being rendered more effective. It would be possible to provide advice where member of the various lists, both on the civil and administrative side, identify anomalies, difficulties with statutory interpretation and matters of that kind, in a broader sense than just effectiveness of process. In that way VCAT could play a greater role in the area of public accountability.

The second provision is s 37 which provides for the submission of an Annual Report:

> **Section 37. Annual report**
>
> (1) As soon as practicable in each year but not later than 30 September, the Tribunal must submit to the Minister a report containing
>
> (a) a review of the operation of the Tribunal and of the Rules Committee during the 12 months ending on the preceding 30 June; and
>
> (b) proposals for improving the operation of, and forecasts of the workload of, the Tribunal in the following 12 month period.
>
> (2) The Minister must cause each report under sub-section (1) to be laid before each House of the Parliament within 14 sitting days of that House after it is received by the Minister.

Apart from the emphasis on performance, there is scope when reviewing the operation of VCAT to highlight significant areas of operation, cases or class of cases. This provides the potential to inform and educate those whose decisions VCAT reviews or, in the inter partes cases, informing and educating the general public as well as the parties, inevitably leading to a better informed public and better educated decision-makers.

Section 34 of the VCAT Act lists administrative functions of the President and Vice-Presidents. Apart from directing the business of the Tribunal and being responsible for the management of adminis-

trative affairs they are responsible for directing the professional development and training of members.

A Rules Committee was established under Part 6 of the VCAT Act. Its functions are to develop rules of practice and procedure and practice notes and to direct the education of members in relation to those rules, thus providing an opportunity to improve the Tribunal's performance.

The other side of the coin is the VCAT's own accountability. While introducing the VCAT Bills, the Attorney said:

> In recent times there have been a variety of pressures for change within tribunals, and indeed the wider justice system in general. In particular there is a need to ensure the accountability of organisations that receive public funding, tribunals are no exception. The government believes that both the independence enjoyed by the tribunal and the need for it to be accountable for its own operations to both the government and to the Victorian community generally are able to be balanced. In doing so, the tribunal will focus on its effective performance and cost-efficient use of resources. In line with community expectations, the government considers that not only is this achievable, it is essential.[30]

The VCAT Act contains some very clear accountability provisions relating to how it conducts its business. I have already referred to the President's advisory role and to the obligation to submit an Annual Report with an emphasis on performance.

There is a range of matters that should assist the Tribunal in providing an appropriate forum for review of a wide range of matters in an informal and expeditious manner whilst ensuring that the correct or preferable decision is made. Aside from the hearing of matters, the VCAT Act provides for alternative dispute resolution processes including compulsory conferences and mediation.[31]

The VCAT Act enables separate lists to be created in both the Civil and Administrative Divisions. The separate lists will still be able to adopt procedures appropriate to the particular characteristics of the list, to accommodate the very diverse needs in each jurisdiction.

There is also provision for the flexible allocation of work. Members will be able to sit in different lists and applications can be transferred to another list. For example, there can be a rule that enables a particular class of application in the Credit List to be transferred to and heard by a member of the Civil Claims List. The potential for a Civil Claims List member, who may be hearing claims in the country, to also hear a Credit List matter quickly, can be realised. The resources of the Tribunal can be used efficiently and can provide a timely and accessible review process for all concerned.

In those areas the new legislation has great potential to enhance the Tribunal's accessibility, efficiency and overall performance, whilst preserving distinct procedures appropriate to the various lists.

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30 Vic PD, Legislative Assembly, above n 18 at 974–975 per Mrs Wade.

31 See VCAT Act ss 83 – 87 for practices dealing with compulsory conferences; ss 88 – 93 for practices dealing with mediations.

One of the keystones of providing a system of review in which the public has confidence is to ensure that its members are independent. Hand in hand with independence is security of tenure. The relationship between tenure and the nature of the decisions which tribunals review is sensitive. Concerns about independence, terms of appointment and security of tenure are not new. The manner in which a tribunal member can be dismissed and how that process might impact upon a tribunal member's performance, has been a topic of discussion over a long period.

These concerns were discussed in 1984. The 1984 Parliamentary debates on the Administrative Appeals Tribunal Bill reflect an interesting discussion on the independence of the AAT, security of tenure and the process of removal of members from office[32]. The 1984 Act as passed, provided for terms of appointment as specified in the instrument of appointment with eligibility for re-appointment. The original Bill had provided for term appointments with eligibility for re-appointment. In recent years AAT appointments and re-appointments have been for relatively short periods. The VCAT Act provides for appointment for 5 years with eligibility for re-appointment.

In 1984 concerns were expressed in relation to the AAT about a system which provided for dismissal of members by order of the Governor-in-Council as opposed to the protection available where dismissal was only as a result of a parliamentary process. The Bill was amended to provide for removal of Deputy Presidents upon an address of both Houses of Parliament, but leaving the removal of members by the Governor-in-Council.

The VCAT Act provides for removal of non-judicial members on the recommendation of the Minister following suspension and investigation. The Minister can only recommend that a member be removed if satisfied that the member:

(a) has been convicted of an indictable offence or an offence that if committed in Victoria, would be an indictable offence;

(b) has become incapable of performing, or has neglected to perform, the duties of office; or

(c) is unfit to hold office because of misconduct.[34]

CONCLUSION

Concerns related to the Tribunal's accountability such as the independence of the members, security of tenure and terms of appointment have not been alleviated by the changes. In that sense we still have the same coin. Just how the changes will affect the whole review process and the Tribunal's performance remains to be seen.

32 Vic PD, Legislative Assembly, Vol 375 at 934 per Mr Maclellan.
33 VCAT Act ss 23, 24.
34 Ibid at s 32(5).

The greater emphasis in the VCAT Act on Tribunal performance and accountability, it is to be hoped, will provide an impetus for the provision of a more accessible, timely and expeditious process. In striving to achieve that, let us hope that the role the Tribunal plays in providing guidance to decision-makers and making the correct or preferable decision does not suffer.

APPENDIX A

GENERAL DIVISION

	Number of Applications Finalised to 30 June	Average Time From Lodgement to Completion	Budget Allocation to 30 June	Cost per Finalised Application
1995	2330	252	$913,458	$392
1996	1848	217	$1,464,480	$792
1997	2350	284	$1,682,489	$715
1998	2319	326	$1,483, 864	$640

PLANNING DIVISION

	Number of Applications Finalised to 30 June	Average Time From Lodgement to Completion	Budget Allocation to 30 June	Cost per Finalised Application
1995	2016	112	$2,306,235	$1,143
1996	1758	107	$2,275,235	$1,295
1997	1824	113	$2,276,600	$1,249
1998	1970	123	$2,358,548	$1,197

** Figures have been updated since June 1998.
Figures supplied by the Registrar of the Administrative Appeals Tribunal.

Privative Clauses and the Rule of Law: The Place of Judicial Review Within the Construct of Australian Democracy

MARY E CROCK*

CURBING THE COURTS: PROPOSALS TO FURTHER RESTRICT THE JUDICIAL REVIEW OF MIGRATION DECISIONS.

Australia is in the midst of a period of radical change. Not since the 1970s and the advent of a Labor Government after 23 years in the political wilderness have we seen a government with such grandiose visions of reform for the country. The current climate under the Coalition Government shares more than a little in common with the heady days of Whitlam governance. There is a sense of urgency, at times almost of recklessness, in the rush to alter the laws governing the land rights of our indigenous peoples, industrial relations—especially on the waterfront—the public service, taxation and immigration.[1] As in the Whitlam era, the reforms are proving highly divisive. In 1998, the country once again faced the prospect of federal Parliamentary deadlock and hotly contested elections. At the end

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1 See the changes proposed by Migration Legislation Amendment Bill (No 4) 1997 (Cth) (Bill No 4); Migration Legislation Amendment Bill (No 5) 1997 (Cth) (the Judicial Review Bill); and the Migration Legislation (Strengthening of Character and Conduct Provisions) Act 1997 (Cth) (the Character and Conduct Act).

of that year the Coalition was returned to office, but with its huge majority slashed to the barest margin. It remains to be seen whether the Howard government will alter the political, social and cultural landscape to the extent achieved by the sacked Prime Minister now revered as a national treasure. While many of the Coalition initiatives have been entrenched for years in the legal and political cultures of other Western democracies,[2] the fascination of Australian politics is its individuality and, on occasion, its unpredictability.

This paper examines one aspect of the government's reform agenda that is of particular interest to administrative lawyers: a proposal to strip the courts of jurisdiction to judicially review virtually all migration decisions. The Migration Legislation (Judicial Review) Bill 1998 (Cth) (the Judicial Review Bill)[3] is reminiscent of measures introduced in the United States in 1996 which have altered dramatically the face of migration law in that country: the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the IIRAIRA)[4] and the Antiterrorism and Effective Death Penalty Act of 1996 (the AEDPA).[5] Where the privative clauses in IIRAIRA were passed almost unnoticed as part of a much larger reform agenda, the Judicial Review Bill has met with fierce opposition in Parliament.[6] Indeed, its passage into law is not at all certain.[7]

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2 On the impact of right-wing political ideology in England, see W Hutton, *The State We're In* (1996). On the American situation, see K Phillips, *The Politics of Rich and Poor: Wealth and the American Electorate in the Reagan Aftermath* (1990).

3 Editor's note: this bill is substantially the same as the Migration Legislation Amendment Bill (No 5) 1997. See n 6 below and the text that follows.

4 IIRAIRA, Division C of the Omnibus Appropriations Act of 1996 (HR 3610) Pub L No 104–208, 110 Stat 3009 (1996). The Act was amended in a technical corrections bill enacted 11 October 1996, Pub L No 104–302, 110 Stat 3656 (1996). This legislation has been the subject of much academic comment. In seeking to gain an understanding of the American laws, I am indebted to the clear exposition and stimulating reflections contained in the following books and articles: S H Legomsky, *Immigration And Refugee Law And Policy* (2nd ed, 1997); L B Benson, "Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings" (1997) 29(4) *Conn LR* 1411; and D Kanstroom, "Surrounding the Hole in the Doughnut: Discretion and Deference in US Immigration Law" (1997) 71 *Tul LR* 703.

5 Pub L No 104–132, 110 Stat 1214 (1996). Section 440(a) of the AEDPA amended s 106(a) of the Immigration and Nationality Act (INA), 8 USC para 1105a to preclude review "by any court" of any final order of deportation against an alien who is deportable by reason of having committed certain enumerated criminal offences: see ibid para 440(a), 110 Stat at 1276–77.

6 The present Bill was introduced first as part of the Migration Legislation Amendment Bill (No 4) 1997 (Cth). This Bill was split and the relevant parts became the Migration Legislation Amendment Bill (No 5) 1997 (Cth), rejected by the Senate in November 1997. See H Reps Deb 1997, No 14 at 8275–8305; Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Migration Legislation Amendment Bill (No 4) 1997 and Migration Legislation Amendment Bill (No 5) 1997* (October 1997), minority report of Senators Bolkus, McKiernan and Murray, 41ff. The present Bill was introduced into Parliament on 2 December 1998 after the re-election of the Coalition government.

7 While the Labor Opposition and the minor parties oppose the measure, the Government is unlikely to gain the support that it needs in the Senate to pass the Bill.

The pivotal provision in the Judicial Review Bill is s 7 which proposes the repeal and replacement of the present Part 8 of the Migration Act 1958 (Cth)(the Act). Proposed s 474(1) reads:

> A privative clause decision:
>
> (a) is final and conclusive; and
>
> (b) shall not be challenged, appealed against, reviewed, quashed or called in question in any court; and
>
> (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

A "privative clause decision" is defined as a decision of an administrative character made under the Migration Act or Regulations other than a narrow range of decisions. These are set out in proposed s 474(4), with provision made for the specification of further types of decision by regulation: see proposed s 474(5). The Federal Court's jurisdiction is set out in the proposed s 476(1), which specifies:

> Despite any other law, including sections 39B and 44 of the judiciary Act 1903(Cth), the Federal Court does not have any jurisdiction in relation to a privative clause decision if:
>
> (a) a decision on review of the privative clause decision has been made under Part 5 or 7 or section 500; or
>
> (b) the privative clause decision is reviewable under Part 5 or 7 or section 500, but a decision on such review has not been made ...; or
>
> (c) the privative clause decision would have been reviewable under Part 5 or 7 or section 500 if an application for such review had been made within a specified period, but such an application was not made within that period.

Proposed s 476(4) continues:

> Despite section 44 of the Judiciary Act 1903, the High Court must not remit a matter to the Federal Court if it relates to a decision or matter in respect of which the Federal Court would not have jurisdiction because of subsection (1) or (2)

By way of explanation, Part 5 of the Migration Act provides for the administrative review of general migration decisions,[8] while Part 7 governs the merits review of decisions relating to refugee status.[9] Section 500 of this Act provides for the review of a narrow range of migration decisions by the Administrative Appeals Tribunal (AAT).

The most immediate difference between the Judicial Review Bill and the legislation in place in America is its reach. Where the United States laws act to restrict the judicial review of specified classes of migration decisions,[10] the Judicial Review Bill would impose a

8 This part of the Migration Act provides for two "tiers" of review: first, by the Migration Internal Review Office and then by the Immigration Review Tribunal (IRT). These two bodies are to be replaced in 1999 by the Migration Review Tribunal (MRT).

9 Review of such decisions is carried out by the Refugee Review Tribunal (RRT).

10 See the explanation of the 1996 laws in Benson, above n 4.

blanket restraint on the judicial review of all but a small number of migration rulings, namely those falling outside of the definition of "privative clause decision".[11] On the face of the Bill presented to Parliament, proposed s 476(1)(a) appears to remove the jurisdiction of the Federal Court in virtually all instances where a challenge is made to a "privative clause decision".[12] It would also operate to prevent the High Court from remitting any application for the judicial review of a privative clause decision to the Federal Court. At the same time the privative clause would extend to both the High Court and the Federal Court: a departure from the present Part 8 of the Migration Act which operates to constrain the grounds on which the Federal Court (only) can review migration decisions.[13]

In the course of the Senate's inquiry into the Judicial Review Bill in January 1999, some confusion was generated about the proposed scope and purpose of the amending legislation. I have maintained that the Bill would do two things: restrict the way (any) court can review migration decisions (through the introduction of a privative clause); and restrict the range of courts with jurisdiction to review migration decisions.[14] According to statements made by the Deputy Secretary of the Department of Immigration and Multicultural Affairs, Mr Mark Sullivan, on 29 January 1999, the government's intention is not to remove the Federal Court's jurisdiction to review all or most migration decisions. Rather, he asserts, the aim of proposed s 476 is to preclude the Federal Court from reviewing decisions where an applicant is able to seek or is in the process of seeking administrative or ministerial review of a privative clause decision. The privative clause would operate simply to place both the High Court and the Federal Court in the same legal position when reviewing migration decisions.[15] This interpretation is not supported by the text of the legislation presented to Parliament in both 1997 and 1998.[16] As is explored below, serious questions arise as to the wisdom and perhaps even the constitutionality of proposed s 476(1)(a) as

11 The only exceptions to the definition are those set out in proposed s 474(4) or the subject of regulations made under proposed s 474(5).

12 It is possible to conceive of "privative clause decisions over which the Federal Court would retain jurisdiction. These are matters such as decisions relating to the place to which a removee or deportee is to be sent. Such decisions come within the definition of "privative clause decision" but are not reviewable by any tribunal, which means that they do not come within the terms of proposed s 476(1)(a).

13 Note that the terms of s 75(v) of the Constitution prevent Parliament from precluding all judicial review by the High Court. See below.

14 Editor's note: a copy of the report of the Senate Legal and Consitutional Committee's report into the Judicial Reivew Bill (tabled 21 April 1999) may be downloaded from http://www.aph.gov.au/senate/committee/legcon_utte/index.htm.

15 See ibid.

16 The problem seems to lie in the omission of the word "not" in proposed s 476(1)(a). To be interpreted in the way asserted by the Department, the clause should state that the Federal Court will have no jurisdiction where "a decision on review of the privative clause decision has *not* been made under Part 5 or 7 or section 500" (emphasis added).

originally drafted. For present purposes it suffices to note that there is an important difference between provisions that remove the jurisdiction of a court to hear any application for judicial review; and provisions which proscribe the grounds on which a decision can be challenged.

As to the type of privative clause adopted by the drafters of the Judicial Review Bill, it was recognised that providing that a privative clause decision is "final and conclusive" will not of itself be enough.[17] Such a finality clause only makes the decision final on the facts—but not final on the law. The remedy of certiorari will still be available to quash a decision for error of law on the face of the record.[18] Instead, the Government has been far more ambitious, inserting a provision that endeavours to constrain all judicial review of migration decisions. Its effect would be to prevent any court from intervening in the review of a decision except where the decision is vitiated by what is known as a "jurisdictional error".[19] Put another way, the provision would operate to severely limit judicial oversight of migration decision-making both at the level of primary decision making and on review by any of the relevant administrative tribunals.[20]

In this paper I look briefly at the nature and function of privative clauses and consider the questions they raise about the proper role of the courts in the administrative process and the legitimacy of judicial review within a democracy. The paper begins by examining both the function of privative clauses and the factors that appear to motivate the introduction of such measures. It then provides an overview of the constitutional issues raised by legislative moves to restrict judicial review. There follows a broader critique of the Judicial Review Bill and the impact that the proposed privative clause would have on the operation of Australia's migration laws. The removal of the courts as an avenue of redress draws attention to the adequacy of the available mechanisms for reviewing the merits of migration and refugee decisions. It also invites reflection on the nature of discretions and on the question of where the balance of power should lie in determining the content and application of the law. The paper concludes by examining the legitimacy of judicial review within the Australian democratic system of government and whether special considerations apply in cases involving non-citizens.

17 See *Hockey v Yelland* (1984) 157 CLR 124 at 130, 139 and 142; *R v Medical Appeals Tribunal; Ex parte Gilmore* [1957] 1 QB 5740; and *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1. On this point, see M Aronson and B Dyer, *Judicial Review of Administrative Action* (1997) ch 18 at 948ff.

18 *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574; *R v Nat Bell Liquors Ltd* [1922] 2 AC 128.

19 The meaning of this phrase is explored below.

20 The chief of these being the IRT, the RRT and the Administrative Appeals Tribunal (AAT).

THE SCOPE AND PURPOSE OF PRIVATIVE CLAUSES: POLITICS, PRACTICALITIES AND THE DEFERENCE QUESTION

Leaving aside for the moment the question of removing the jurisdiction of the Federal Court to review migration decisions, the privative clause proposed in the Judicial Review Bill is not revolutionary on its face. There are other areas of law where similar clauses have been introduced to restrict the ability of the courts to review decisions made by either inferior courts or tribunals. Such clauses are used typically in state legislation to protect rulings by tribunals or inferior courts charged with determining compensation for economic loss;[21] loss occasioned by personal injury;[22] and industrial relations.[23]

There are two reasons why privative clauses have not featured in the federal arena. The first is the guarantee provided by s 75(v) of the Constitution which is discussed below. The second is the Administrative Decisions (Judicial Review) Act 1977 (Cth) which has operated since 1 October 1980 to provide easy and simple access to judicial review by the Federal Court for all types of legal errors in decisions "of an administrative character" made under a federal enactment.[24]

The jurisprudence on the subject of privative clauses attests to the difficulties encountered when legislatures and courts have grappled with the issue of how judicial review should interface with mechanisms put in place to ensure the finality of administrative decision-making.[25] Suffice to say that the case law does not provide anything like a workable guide as to how either the High Court or the Federal Court are likely to treat the privative clause proposed in the Judicial Review Bill. As discussed below, the guarantees provided by the Constitution ensure that privative clauses are not to be read literally: their effect is to constrain but not remove altogether the power of the courts to intervene in the review of a decision.

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21 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Jet 60 Minute Cleaners Pty Ltd v Brownette* [1981] 2 NSWLR 232.

22 *Hockey v Yelland* (1984) 157 CLR 124; *R v Medical Appeals Tribunal*; *Ex parte Gilmore* [1957] 1 QB 5740.

23 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1; *R v Commonwealth Industrial Court Judges; Ex parte Cocks* (1968) 121 CLR 313; *Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88.

24 The only exceptions are those classes of decisions excluded from the legislation under Schedule 1. Note that decisions made under the Migration Act 1958 (Cth) relating to visas are so excluded.

25 For academic comment on the subject, see M Allars, *Introduction to Australian Administrative Law* (1990) at 5.139–5.146; M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) ch 18; EI Sykes, D Lanham and RRS Tracey, *General Principles of Administrative Law* (3rd ed, 1989) at 57–77; BC Gould, "Anisminic and Judicial Review" [1970] *Pub L* 658; G Peris, "Statutory Exclusion of Judicial Review in Australian, Canadian and New Zealand Law" (1982) *Pub L* 451.

However, the scope of future judicial oversight of migration decision making would have to be determined by the Courts' interpretation of a principle or standard essentially set by the courts themselves. As the Law Council pointed out in its submission to the Senate in January 1999, this aspect of the Bill would ensure an increase in litigation, rather than the converse.[26] This is one of the great ironies of the Judicial Review Bill—targeted as it is at constraining the role of the courts and reducing the incidence of litigation.

It is not the purpose of this paper to scrutinise in detail the law that has grown up around privative clauses. Nor is it proposed to dwell on the likely operation of the Judicial Review Bill.[27] The intention, rather, is to explore the broad rationale behind the clauses in the Judicial Review Bill, and to examine some of the concerns that have given rise to the proposals.

The case law suggests that restrictive clauses are introduced by Parliaments for two main reasons. The first is to promote the finality of either the primary decision or ruling by a specialist review authority in jurisdictions involving the making of a high volume of decisions.[28] Such clauses may reflect a desire to prevent abuse by individuals who wish to prolong a process even though their claim is lacking in substance or merit. Second, protection from judicial oversight may be sought because of the political sensitivity of decisions made.[29] The efficiency aspect of privative clauses could be seen as procedural in its objective. The second function relates more to the substance of the rulings for which protection is sought. The concern may stem from a belief that the specialist knowledge of the primary decision maker or administrative review authority makes further review unnecessary or inappropriate. There may be a direct concern that rulings by the courts do not concur with the policy position taken by the government of the day.[30]

The privative clause proposed in the Judicial Review Bill is typical in that it reflects both procedural and substantive concerns about the place of judicial review in the oversight of migration decisions. One obvious factor in moves to reduce review rights in the migration field is the cost (and productivity) of the present system for the review of migration decisions. Costs have risen sharply in recent years in spite of various measures to improve efficiency and discour-

26 See above n 14.

27 For a recent article on the proposed legislation, see C Campbell, "An Examination of the Provisions of the Migration Legislation Amendment Bill (No 4) 1997 Purporting to Limit Judicial Review" (1997) 5 *AJ Admin L* 135–156.

28 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168.

29 *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 143 ALR 55.

30 For a discussion of these issues in the context of corporate takeovers and the Corporations and Securities Panel, see B Dyer, "A Revitalised Panel?" (1998) 16(4) *CSLJ* 261. In this instance the author is arguing for the introduction of a preclusive clause to restrict access to judicial review.

age applications for judicial review.[31] The Minister has expressed concern about the delays engendered by judicial review, particularly as court actions rarely result in the finalisation of a case.[32] Even where an applicant is successful in having a decision ruled unlawful, the courts are most likely to remit a case for re-determination or re-hearing in accordance with the law. In the case of matters going from the RRT to the Federal Court, the average duration of the judicial review process had reached 354 days in 1998, while IRT appeals to the Federal Court were taking on average 488 days to complete.[33]

A significant sub-text in the concerns expressed about the cost of the review system is that the money spent on migrants is in some sense "wasted" because the beneficiaries are not Australian citizens or permanent residents. The Minister made this point with some eloquence during the debate on the Judicial Review Bill. He said:[34]

> A further point I wish to make is that, in providing access to review here in Australia and access to our courts, we are providing access to people who are not citizens of this country. What we are saying is, "You are entitled to every opportunity to exploit every loophole in the law—supported in many cases by the Australian taxpayer through the legal aid system—and you are entitled to do it notwithstanding the fact that you broke our law in coming to Australia and that you are not a citizen of this country". What we are talking about is the access to our courts by non-citizens.

It may be argued that the present (conservative) administration is particularly sensitive to the prevailing anti-immigrant mood in the Australian population. The knowledge of community resistance to immigration has long been regarded as one of the most pressing reasons for a bipartisan approach to immigration. Given this tide of opinion, measures to restrict the access of migrants to judicial review are seen as popular.[35]

As to the substance of the decisions being reviewed by the Courts, the Minister has also made repeated and very public criticisms of the courts' review of decisions made by some of the tribunals, the curial review of AAT rulings in character and criminal

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31 On this point see M Chaaya, "Proposed Changes to the Review of Migration Decisions: Sensible Reform Agenda or Political Expediency?" (1997) 19 *Syd LR* 547; M Crock, "Judicial Review and Part 8 of the Migration Act: Necessary Reform or Overkill?" (1996) 18 *Syd LR* 267; and M Crock, "Reviewing the Merits of Refugee Decisions: An Evaluation of the Refugee Review Tribunal" in P McNab (ed), *Retreating from The Refugee Convention* (1997).

32 See P Ruddock, "The Broad Implications for Administrative Law under the Coalition Government with Particular Reference to Migration Matters" [1997] *Admin Rev* 4.

33 Department of Immigration and Multicultural Affairs, *1997 Annual Report* (1998) 52.

34 H Reps Deb (1997) No 10 at 8302.

35 See, for example, the party manifesto of Ms Pauline Hanson's One Nation Party that advocates zero net immigration to Australia. In this context, see also the government's moves to ensure the hasty exclusion or removal of "bad" migrants in the Character and Conduct Act.

deportation cases being examples in point.[36] In these instances, the Minister has made no secret of the fact that he believes that it is his view—and not that of the unelected judiciary—that should have prevailed. In cases where the tribunals get it wrong and an injustice occurs, the Minister has argued that his non-compellable, non-reviewable discretion to overrule tribunal decisions or otherwise act with leniency[37] is both more efficient and more appropriate than providing wholesale access to judicial review.[38]

A curious aspect of the discourse on the Judicial Review Bill is the personal nature of the debate over the planned reforms. For over a decade, successive federal Immigration Ministers have demonstrated a virtual fixation with immigration control.[39] The present Minister has been particularly vocal in expressing his disquiet about the role that the courts and the specialist tribunals have played in determining the shape and application of government policy. These concerns extend back to the 1980s when judicial activism in the migration area was at its zenith.[40] Indeed, in those days there were many cases in which it was very difficult to distinguish between judicial review in the Federal Court and administrative review wherein the reviewer's function is to ensure that the best or most preferable decision is made taking into account the merits and all the facts of a case.[41] Changes to the migration legislation have removed or reduced most of the discretions that facilitated and even required curial intervention in the 1980s.[42] The role of the courts has also been defined

36 The Hon P Ruddock, Commonwealth Minister for Immigration, Speech delivered at *Immigrant Justice: Courts Tribunals and the Rule of Law*, University of Sydney, 6 June 1997; Speech to the AIAL (Victorian Chapter), 12 November 1997; Speech to National Press Club, Canberra, 18 March 1998, at 7 of the electronic transcript. See also H Reps Deb 1998, No 3 at 1134 – 1136, and 1246.

37 Sections 345, 351, 391, 417 and 454 of the Act. Other examples of this type of discretion include the Minister's power to consider the grant of a visa to a person subject to an application bar and mandatory removal under s 91C–91E of the Act: see s 91F; and the power to permit the lodging of a second application for a visa: see s 48A and s 48B. The Act spells out the Minister's power in each case, but stipulates that he or she is under no duty to exercise the discretion so conferred. Section 475(1)(e) of the Act provides that the exercise or non-exercise of such discretions is not "judicially reviewable". See below.

38 P Ruddock, "Narrowing of Judicial Review in the Migration Context" (1997) 15 *AIAL Forum* 13.

39 M Crock, *Administrative Law and Immigration Control in Australia: Actions and Reactions* unpublished PhD Thesis, University of Melbourne, 1994; S Cooney, *The Transformation of Migration Law* (1995); K Cronin, "A Culture of Control: An Overview of Immigration Policy-making" in J Jupp and M Kabala (eds), *The Politics of Australian Immigration* (1993).

40 See the comments of Mr Ruddock MP (as he then was) on the "rod" for the government's back created by the High Court's interpretation of the UN definition of "refugee" in the case of *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, H Reps Deb 1992, Vol 187 at 3935.

41 See *Dahlan v Minister for Immigration, Local Government and Ethnic Affairs* (Hill J, 12 December 1989, unreported); Damouni v Minister for Immigration, Local Government and Ethnic Affairs (1989) 87 ALR 97. These and other cases are discussed in Crock (1996), above n 31.

42 For a description of the changes see M Crock, *Australian Immigration and Refugee Law* (1998) ch 3.

and confined. In spite of these changes, the Minister clearly believes that the problem of inappropriate judicial activism has not gone away.[43] While the cases heard by the Federal Court are being resolved overwhelmingly in favour of the government,[44] there continue to be judicial rulings that have had a disproportionate impact on what the Minister sees as policy issues. Put crudely, the present Minister clearly believes that the courts are not showing enough deference to government policy.[45] On the one hand, a line of authority has developed that favours curial circumvention of certain restrictions that have been placed on the courts' power to review migration decisions.[46] In other instances, the Federal Court has taken a literalist approach to legislative requirements, with quite spectacular consequences for the migration bureaucracy. For example, in *Din v Minister for Immigration and Multicultural Affairs*[47] the Federal Court ruled unlawful an entire series of English language tests because the authority to conduct the examinations had not been given by the Minister. The practical impact of the decision was to require the reprocessing of literally thousands of visa applications.[48]

For its part, the High Court has endorsed the notion of judicial deference to government policy in a number of key migration cases, but has resisted attacks on its own jurisdiction and powers.[49] The courts' resistance to measures designed to restrict judicial review have only served to heighten the Minister's resolve to reduce their sphere of influence. In reviewing the legislative product of this resolve, the first issue is the extent of the Minister's power to take the challenge to the courts head-on.

CONSTITUTIONAL CONSTRAINTS ON THE PRECLUSION OF JUDICIAL REVIEW

A critical issue raised by any restrictive clause is the extent of Parliament's power to strip the courts of their powers and/or jurisdiction. It is not the purpose of this piece to rehearse all the arguments that could be raised about the constitutionality and likely

43 H Reps Deb 1998, Vol 3 at 1135–6. The Minister refers to Federal Court judges "out there" being "on a frolic of their own".

44 Statistics provided by DIMA Litigation Section. Note that while over 90% of applications to the Federal Court are dismissed by that court, close to 20% of cases are settled by being remitted to the tribunals with the consent of the Minister.

45 On this Minister's view of what constitutes "policy" see below.

46 See the Minister's comments in Parliament, Commonwealth Parliamentary debates, *Hansard* House of Representatives, 2 December 1998, at 1135, 1136 and 1246. The Federal Court decisions to which the Minister refers include *Eshetu v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 474. This case is discussed in M Crock and M Gibian, "Before the High Court: *Minister for Immigration and Multicultural Affairs v Eshetu*" (1998) 20 *Syd LR* 457.

47 (1997) 147 ALR 673.

48 This case is discussed in Crock, above n 42 at 293.

49 Compare *Wu Shan Liang v Minister for Immigration and Ethnic Affairs* (1996) 185 CLR 259; and *Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1. The cases are discussed in Crock, above n 42 at ch 13. See further below, note 60ff.

effect of the Judicial Review Bill. However, a few points need to be made.

Removal of the Federal Court's jurisdiction

The Federal Court is not a constitutional court but a creature of statute.[50] As such, its jurisdiction is subject to limitation or removal by a further legislative amendment or enactment. The Federal Court itself was established only in 1976. It was not until 1 October 1980 that the main vehicle for judicial review by that court, the Administrative Decisions (Judicial Review) Act (Cth) 1977, came into operation. The youth and statutory basis of the Court may support the contention that what Parliament gives, it may take away. On the other hand, the Federal Court has quickly established itself as a fixture in the Australian judicial landscape. There has been no instance to date where the Federal Parliament has abolished a Federal Court.

The constitutionality of a measure that removes altogether the jurisdiction of this court to review a class of federal administrative decisions has never been tested. In my view there are strong reasons why the High Court might work hard to find a constitutional obstacle for the proposed clause. In the case of the Judicial Review Bill, the removal of the Federal Court's jurisdiction would cause a judicial review vacuum that could only be filled by the High Court.

The High Court is a constitutional Court, access to which is guaranteed under s 75(v) of the Australian Constitution. This provision guarantees judicial review by the High Court of decisions by federal officers by way of mandamus, prohibition and certiorari. As s 75(v) is a constitutional grant of jurisdiction, it is more clearly beyond the power of the Parliament to withdraw any matter from the grant of jurisdiction or to abrogate or qualify the grant.

The High Court produces on average about 100 written decisions each year. It has 7 members, a number that has not altered in spite of the vast change in the scope and number of matters that now come before the Court compared with the situation at Federation in 1901. The present constraints on the Federal Court have already led to an unprecedented 33 migration matters before the High Court in December 1998.[51] With over 700 applications going to the Federal Court each year, it is not difficult to see that the closure of this avenue altogether would result in a flood of applications to the High Court that could well paralyse this body. Given the constitutional foundations of the High Court, the argument could be made that any measure that puts in jeopardy the effective operation of that Court must be unconstitutional.

50 On this point, see the discussion by Campbell, above n 27 at 148–150.

51 See Department of Immigration and Multicultural Affairs (DIMA), Litigation Report, 8 January 1999, appended as Table 1 to the submission of the Law Council of Australia to the Senate Legal and Constitutional Legislation Committee, above n 14.

Other issues raised by the proposed privative clause: the *Hickman* principle

The guarantees provided in the Constitution also go more broadly to the scope of the proposed privative clause as it would operate in either the Federal Court or the High Court.[52] If s 75(v) guarantees that the High Court can intervene to judge the legality commonwealth administrative action, s 71 provides that the exercise of the "judicial power" is to be exercised (only) by a court of law.[53] These provisions create problems insofar as the typical privative clause purports to stop the courts from reviewing (or ruling on the legality) of a decision. On the one hand this could be seen as an improper ouster of the judicial power of the Courts.[54] On the other, the quarantining of tribunal decisions could be seen as an improper conferral on an administrative body of the judicial power—namely the power to make final determinations on points of law.[55]

To overcome the constitutional constraints on Parliament, the argument put forward by the Minister is that the privative clause proposed in the Judicial Review Bill does not attack the ability to rule on the legality of administrative action. Rather, it operates to redefine what is "legal." The effect of such clauses, in the Minister's words, would be "to expand the legal validity of the acts done and the decisions made by decision-makers. In practical terms it would constrain the scope for judicial review to that of narrow jurisdictional error and malafides."[56] As judicial review is sought in most instances of tribunal decisions, the reality is that the clause would operate to protect tribunal rulings by rendering "legal" virtually any decision made.

The effectiveness of the proposed privative clause is predicated on a deference doctrine first enunciated by the High Court in 1945. The comments of Dixon J (as he then was) in *R v Hickman; Ex parte Fox and Clinton*[57] (*Hickman*) have come to enshrine the notion that Parliament can direct the judiciary to adopt a deferential or non-interventionist role in the review of administrative action. His Honour described the effect of a clause identical to that envisaged in the Judicial Review Bill in the following terms:

> No decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power,

52 In the discussion that follows I am accepting the Department's assertion that the proposed privative clause is not intended to include the removal of the Federal Court's jurisdiction. In this circumstance the clause would apply in the same way to both the Federal Court and the High Court.

53 On the scope and interpretation of s 71, see T Blackshield and G Williams, *Australian Constitutional Law and Theory* (2nd ed, 1998) ch 12.

54 See *Kable v Director of Public Prosecutions (NSW)* (1995) 189 CLR 51.

55 See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

56 See Ruddock, above n 32.

57 (1945) 70 CLR 598.

that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.

The case law on privative (preclusive) clauses in Australia reveals the uncertainty that attaches to the *Hickman* principle. There are a number of cases in which the High Courts have confirmed the principle as a rule of statutory construction.[58] Judicial opinion has varied widely on the question of what constitutes excess of jurisdiction or a bona fide attempt to exercise a power. The problem is that in most of the cases involving a privative clause, the High Court has done little more than re-state the Hickman principle. For example, in *Darling Casino Ltd v New South Wales Casino Control Authority*,[59] (*Darling Casino*) Gaudron and Gummow JJ stated that the terms of s 75(v) of the Constitution would be defeated if a privative clause operated to protect against jurisdictional errors being refusal to exercise jurisdiction, or excess of jurisdiction. The judges tempered their remarks by holding that there is no constitutional reason why a privative clause might not protect against errors of other kinds. Within the limits of the relevant legislative powers, such a clause could operate to alter the substantive law to ensure that an impugned decision or conduct or refusal or failure to exercise a power is in fact valid and lawful.

The critical issue in many cases is the interpretation placed on relevant legislation and the significance placed on a perceived error in interpretation or application of the law. Two schools of thought have emerged. The first would regard the notion of jurisdictional error in the narrowest of terms, permitting intervention on very rare occasions where an exercise of power is plainly in excess of the power conferred by Parliament.[60] The other view is that where decisions are made by a body that is not exercising judicial powers, all errors of law—in the broad and narrow sense—must go to jurisdiction and be reviewable by the Courts.[61]

In immigration cases the conflict between the call for deference and the need to uphold the courts' power to determine what is the Rule of Law is acute. The courts have been receiving clear messages

58 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 275; *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 143 ALR 55.

59 (1997) 143 ALR 55. The case concerned the grant of the Sydney casino licence. The applicant sought to have the grant of the licence to a competitor set aside. The decision to grant the licence was protected by a privative clause which provided that a decision of the Casino Control Authority was final and conclusive.

60 This is the view implicit in the comments of Gaudron and Gummow JJ in *Darling Casino*, discussed above. See also *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100; *Re Queensland Electricity Commission*; *Ex parte Electrical Trades Union of Australia* (1987) 72 ALR 1; *R v Gray*; *Ex parte Marsh* (1985) 157 CLR 351.

61 See *Craig v State of South Australia* (1995) 131 ALR 595. For a discussion of this issue, see Aronson and Dyer, above n 13 at 987–988; M Allars, *Administrative Law: Cases and Materials* (1997), 686–698; R Creyke, "Restricting Judicial Review" (1997) 15 *AIAL Forum* 22; Crock, above n 42 at 293.

from Parliament for a number of years now to the effect that they should refrain from the review of migration decisions. In cases involving the judicial review of rulings by the RRT, the High Court has repeatedly advocated judicial restraint in the review of decisions on the basis that this tribunal is best suited to make determinations about whether a refugee claimant meets the international definition of refugee.[62] At the same time, in *Craig v South Australia*[63] the High Court advocated a much greater level of curial scrutiny for tribunal decisions, in comparison with those made by inferior courts. It reiterated in that case the assertion that, absent statutory intention to the contrary, administrative tribunals do not have authority to finally determine questions of law.[64] To compound the confusion in the messages coming from the High Court in migration cases, judges of that court have reacted strongly to assertions by counsel for the Minister that it is possible to confine the High Court's power to review administrative decisions on grounds such as denial of procedural fairness: grounds that go to the most basic elements of justice in administrative decision making.

An example in point are the High Court proceedings in the Lorenzo Ervin visa cancellation matter.[65] Mr Ervin was a black American (and former militant civil rights activist) who had his visa cancelled on character grounds. The Minister issued a "conclusive" certificate under s 502 of the Act, effectively excluding merits review by the Administrative Appeals Tribunal. Judicial review by the Federal Court was also unavailable by virtue of Part 8 of the Migration Act 1958 (Cth): in consequence the matter immediately proceeded to the High Court. In the course of the hearing, it was submitted on behalf of the Minister that the High Court had no jurisdiction to consider whether the applicant had been denied procedural fairness. This submission was clearly insupportable and was met with a degree of amazement from Brennan CJ, as the Act does not currently attempt to limit the jurisdiction of the High Court in any way. Nevertheless, Brennan CJ's response to the submission provides some insight into the Chief Justice's views on the Judicial Review Bill and the attempts to restrict access to the High Court. He stated that the submission advanced on behalf of the Minister:

> [I]s a proposition which I regard as completely inconsistent with the notion of judicial review for it would isolate the Executive from judicial control in respect of acts done which are unlawful, and that cannot be, surely, the intention that one would either attribute to the Constitution or to the Parliament.

62 See *Wu Shan Liang v Minister for Immigration and Ethnic Affairs* (1996) 185 CLR 259; *Guo Wei Rong v Minister for Immigration and Ethnic Affairs* (1996) 135 ALR 421.

63 (1995) 184 CLR 176 at 179.

64 AV Dicey, *Introduction to the Study of the Law of the Constitution* (3rd ed, 1889) at 181.

65 See the transcript of the proceedings in *Re Minister for Immigration and Multicultural Affairs Ex parte Ervin* B29/1997 (10, 11 July 1997).

His Honour considered it a matter of the gravest constitutional import that a proposition would be advanced on behalf of the Minister that the High Court did not have the jurisdiction to control unlawful acts committed by a Minister. Since leaving the bench the former Chief Justice has spoken out strongly against proposals to constrain the judicial review of migration decisions.[66]

If the current bench maintain this rage against attacks on the judiciary's power to review administrative action, it is not too difficult to envisage the High Court permitting the Federal Court to follow the *Craig* line of reasoning in its review of migration cases. In these circumstances, denial of procedural fairness, and legal "unreasonableness" could creep back in under the *Hickman* rubric.

As yet there has been no sustained consideration of the so called *Hickman* formula by the High Court. At the very least, as noted earlier, the introduction of such a clause into the Migration Act 1958 (Cth) would introduce new uncertainty into the review of migration decisions. Until such time as Parliament has decided upon the fate of the proposed legislation, the real issues must go to the merit or justification of the Bill.

JUDICIAL REVIEW AS SAFETY NET: MERITS REVIEW, DISCRETIONS AND THE RULE OF LAW

The complicated jurisprudence that has emerged from the courts' dealings with privative, ouster and similarly restrictive provisions reflects the foundational difficulties in determining the place of Parliament-made rules and the proper limits of judicial review. The traditional, Diceyan view, is that it is possible to draw clean lines between the legislative, executive and judicial powers of government. A true believer in the concept and reality of the separation of powers, former Chief Justice Brennan offers this defence of judicial review:

> Under both the Australian and the American Constitutions, the political branches of government are kept separate from the judicial branch. Montesquieu had pointed out that "there is no liberty, if the power of judgment be not separated from the legislative and executive powers".[67] Hamilton, following Montesquieu, described[68] an independent judiciary as "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.[69]

66 Dawson J has also used a High Court hearing as a forum to indicate his opinion that there will be constitutional difficulties with the Judicial Review Bill and any legislative attempt to restrict the avenue of reviewing decisions under the Migration Act. See the transcript of proceedings in *Re Minister for Immigration and Multicultural Affairs; Ex parte Thambythurai* M47/1997 (22 July 1997).

67 Montesquieu, *The Spirit of Laws* (1751), vol I, Bk XI, Ch 6, 185.

68 Hamilton, No 78 of *The Federalist Papers* at 464–65

69 Sir G Brennan, "The Parliament, the Executive and the Courts: Roles and Immunities", Address to School of Law, Bond University, 21 February 1998, at 3 of electronic transcript. See http://www.hcourt.gov.au/bond2.htm

His Honour continued later "[t]he rule of law would be a hollow phrase if the courts were not bound to ignore popularity as an influence on a decision".[70]:

The notion that the "judicial power" should only be exercised by a court of law[71] is fundamental to the sense of balance implied in the Constitution's separation of powers between the Executive, the Legislature and the Judiciary. In theory, the work of the tribunals is meant to fall into the administrative sphere, loosely speaking as part of the executive arm of government. Their role is to determine the best or preferrable decision in all the circumstances, taking into account the law, relevant government policy and all relevant factors going to the "merits" of a case. Judicial review, on the other hand, is meant to be confined (in theory at least) to questions of law.

The difficulty for the judiciary in this age of postmodernism and poststructuralism, is that fewer people accept the propositions that law and politics exist in separate spheres.[72] On one level the new cynicism is manifest in criticisms that the courts have periodically strayed into the forbidden realm of merits review, making decisions that are based more on their own view of policy and the merits of a case than on strict legal issues. On another level it is apparent in the confusion that has developed between administrative review by the tribunals and judicial review by the courts.

If the courts are seen to be engaging in merits review, the tribunals are seen to be making rulings on points of law.[73] This reality is not answered adequately by making fine distinctions between statutory interpretation (a curial function) and statutory construction (a tribunal function).[74] The notion of jurisdictional and functional overlap between the two authorities has fuelled arguments about the superfluity and inefficiency of judicial review. The existence of a discretion in the Minister to correct injustices at tribunal level is said then to be an adequate substitute for curial review—or so the argument runs.

The difficulties inherent in distinguishing between the administrative and judicial function in reviewers draws attention to the attributes of the migration tribunals and the extent to which they offer a sufficient alternative to curial review. They also highlight the conflicting jurisprudence that is emerging from the High Court on the subject.

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70 Brennan, above n 69 at 4.

71 See the discussion of s 71 of the Constitution above.

72 HW Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 *Osgoode Hall LJ* 1; T Ison "The Sovereignty of the Judiciary" (1985) 10 *Adel L Rev* 1.

73 Various commentators have noted these difficulties in demarcation between court and tribunal review. See P Bayne, "Dispute about Tribunals" (1990) 64 ALJ 493 at 497; S Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* (1987) at 282–83 and S Legomsky, *Specialised Justice: Courts, Administrative Tribunals and a Cross-National Theory of Specialisation* (1990) at 86.

74 KC Davis and RJ Pierce Jr, *Administrative Law Treatise* (3rd ed, 1994) at 112 para 3.3.

As the courts themselves have readily acknowledged, there may be very real cause for judicial deference in instances where the protected adjudicator is using special knowledge to make an assessment of a factual situation.[75] The more difficult cases are those where the specialist body is enlisted to make determinations that involve both the assessment of facts and the interpretation of the law, for example by determining whether facts exist to meet criteria established by law. It is in this context that the High Court's call for deference towards the migration tribunals becomes problematic.

A major problem with the privative clauses proposed in the Judicial Review Bill is that none of the tribunals whose decisions are sought to be protected have the status of courts. It is not a prerequisite for membership of any of the tribunals that members must have legal training: indeed, many members are not qualified as lawyers and few have backgrounds in specialised adjudication.[76] A Parliamentary inquiry in 1995 into the appointment processes for the IRT suggested that many appointees to that body were chosen because of their political affiliations.[77]

The hearing procedures established by the Act provide further grounds for questioning the merits of quarantining tribunal rulings from judicial oversight. Both the IRT and the RRT sit as single member tribunals. The refugee hearings may be observed by a representative of the United Nations High Commissioner for Refugees but are otherwise closed to the public: for all intents and purposes they are held in camera. Client dissatisfaction with the treatment afforded some refugee claimants has been documented in a number of court actions where allegations of biased behaviour have been made.[78] Although difficult to prove, this may reflect more general dissatisfaction with the refugee determination process as a whole. There has been an increasing tendency to fast-track refugee claims. According to the Department's State Director of New South Wales, only about 20% of applicants are interviewed by the primary (Departmental) decision-makers.[79] This means that in a large number of cases refugee claimants have no opportunity to put their claims in person until they meet the RRT member allocated to hear their "appeal".

Members of both the IRT and the RRT are given sweeping powers to determine who appears before them and what matters are investigated.[80] A common feature of both tribunals is that applicants

75 Eg, the work of the specialist medical tribunal in *Hockey v Yelland* (1984) 157 CLR 124.

76 J-P Fonteyne, "Overview of Refugee Determination Procedures in Australia" (1994) 6 *IJRL* 253.

77 Joint Standing Committee on Migration *The Immigration Review Tribunal Appointment Process* (1994).

78 See the cases discussed in Crock (1996), above n 31.

79 Figure supplied by the State Director to the New South Wales Asylum Seekers and Refugee Forum, January 1999.

80 See S Kneebone, "The RRT and the Assessment of Credibility: An Inquisitorial Role?" (1998) 5 *AJ Admin L* 78.

have no right to be legally represented. Where a representative is present in a hearing she or he has no direct role in the proceedings: she or he can advise, but not speak on behalf of an applicant. While an adviser can make written submissions about the interpretation of legislation, the opportunity is not given to make oral presentations on the point, unless the tribunal requests as much.[81]

Another feature of the specialist migration tribunals is that members are appointed for fixed terms. These arrangements have practical implications for the independence of the tribunals. If they are to continue in their role, members must put themselves forward for re-appointment every five years. Ministers past and present have used this process to weed out tribunal members who are perceived as too liberal or who are not otherwise toeing the policy line.[82]

It is of great concern that the present Minister has actively criticised decisions of the tribunals with which he disagrees. In December 1996, the Minister took the unusual step of initiating appeals against two decisions by the RRT in which refugee status was granted to victims of domestic violence. As well as opining that the Convention definition of refugee was never intended to cover such situations, the Minister is reported to have warned tribunal members that their reappointment prospects would be threatened by such attempts to re-write the Convention.[83] Whether or not such threats can be proved to have influenced RRT members, it is alarming to note that "set aside" rates for refugee appeals in the month preceding the May 1997 re-appointment process plummeted to 3.7% nationally (2.1% in Sydney).[84] In 1996–97 initial statistics suggest that the set aside rate in the RRT was 11.6% nationally, a considerable drop from the 18.5% of the previous financial year. The sudden fall in decisions set aside could be explained by any number of factors: it is well to bear in mind that each case, by definition, must be decided on its facts and merits.

The picture that emerges from this sketch is that the migration tribunals are specialised in their function—if not always in the expertise of their members—but highly controlled in their operation. The work of all three bodies that hear migration appeals[85] involves a mixture of fact finding and legal analysis and interpretation. It is in this reality that most objection can be taken to the imposition of a blanket privative clause. While it may be acceptable to create finality in a body charged with making factual findings, it is quite another to

81 For a discussion of the powers and procedures of the tribunals, see Crock, above n 42, at ch 12.

82 Joint Standing Committee on Migration, above n 77.

83 *The Canberra Times*, 27 December 1996, article and Editorial, at 14.

84 Evidence supplied by Mr Mark Sullivan, Deputy Secretary of the Department, to the Senate Legal and Constitutional Legislation Committee. See the Minority Report, *Consideration of Migration Legislation Amendment Bill (No 4) 1997*, above n 6 at 45–46. Note that the setting aside of a Departmental decision by the RRT represents the acceptance that a claimant is a refugee.

85 Namely, the RRT, the IRT and the AAT in its migration jurisdiction.

suggest that a non-curial body should be answerable only to a political master for its interpretation and application of the law. This is particularly so in cases which turn on the interpretation of written rules, as is the reality in most IRT reviews.

Rather than a blanket exclusion of judicial review, perhaps what is needed is a clearer understanding of the strengths and weaknesses of administrative review so as to re-establish demarcation lines between the function and authority of courts and tribunals. Dan Kanstroom argues persuasively[86] that a good starting point in this process is a realisation that the legal discourse has failed to understand the "taxonomy" or different meanings of the terms "policy" and "discretion". Both are words that have different meanings depending on their context.

Government policies are the published statements of how a government intends to govern the country. The word "policy" is used also to describe the guidelines issued to administrators. Policies made within administrative agencies can be part of a government's grand vision, or they can be quite detailed statements about how the agency and the Minister intend a particular rule to be applied.

The notion of discretion also has multiple meanings. In this postmodern age, it is trite to acknowledge that the interpretation of any rule involves (multiple) choices that will depend on multiple contextual variables. If the interpretation of the law involves an exercise of discretion, so too does the determination of facts and the application of law to the facts so determined. These understandings of discretion are predicated on discretion as choice.[87] Another way of viewing the concept involves the notion of freedom from the constraints of regulation—the space left where there are no rules or Dworkin's famed "hole in the doughnut."[88] The indeterminacy of the concept has also been expressed by arguing that discretion "is an idea of morals, belonging to the twilight zone between law and morals".[89]

In the exercise of administrative power, the nature of the discretion will determine the extent to which a decision-maker can be guided and the extent to which a ruling should be protected from curial oversight. Different considerations will apply according to whether an assessment of facts and credibility is required or whether a ruling is dependent on a more complicated application of rules to a determined fact situation. It may well be desirable to protect a tribunal's assessment of matters such as credibility or of factual findings. Too much judicial oversight of discretionary decision making

86 Eg, Kanstroom, above n 4 and the learned authors referred to therein.

87 JM Evans, *De Smith's Judicial Review of Administrative Action* (4th ed, 1980) at 278; Legomsky (1987), above n 73 at 12–13; and Kanstroom, above n 4 at 710–11.

88 RM Dworkin, "Is Law a System of Rules?" in RM Dworkin (ed), *The Philosophy of Law* (1977) at 52. Dworkin argued that discretion "like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction".

89 See R Pound, "Discretion, Dispensation and Mitigation: the Problem of the Individual Special Case" (1960) 35 *NYULR* 925 at 926, cited in Kanstroom, above n 4 at 718.

in these instances may frustrate the process by adding expense and unnecessary delays.[90] As Pearce notes,[91] the primary task of tribunals is to resolve disputes involving individual parties. The peculiarity of each case is reflected in the fact that the rulings of tribunals are not binding in subsequent cases: there is no doctrine of stare decisis.[92] Where the discretion to be exercised goes to the interpretation of written laws and the establishment of a changed understanding has a normative effect in subsequent cases, the arguments for curial involvement are stronger.

An understanding of this process also assists in understanding the role of policy in administrative and judicial review. Few would argue that "policy"—in both senses outlined above—should be set by government. However, care should be taken to distinguish between the *should* function of guidelines and the *must* function of binding laws. It may be appropriate and helpful for policy to guide the exercise of discretions where choice is required between broad lines of action. There is less justification for policy to dictate the outcome of a particular case where the exercise of discretion involves an evaluative process or a process of weighing up factors required by law to be placed in the balance. This understanding of policy and discretion can aid in determining the proper place of curial review and/or the proper scope of the deference doctrine. It can also provide guidance on the propriety of ministerial intervention.[93]

The final irony of the Judicial Review Bill is that while it reflects a post-modern disenchantment with the administrative and curial process, at the same time it harks back in a profoundly conservative way to a monolithic vision of the Rule of Law. The black and white vision of the proposed legislation seems to presuppose that it is possible to distinguish sharply between right and wrong decisions; and between "right" and "wrong" interpretations of the law. Of greatest concern is the underlying presumption that it is the Minister's interpretation that is always right.

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90 M Allars, "Administrative Law: Neutrality, the Judicial Paradigm and Tribunal Procedure" (1991) 13 *Syd L R* 377 at 377.

91 D Pearce, "Judicial Review of Tribunal Decisions—The Need for Restraint" (1981) 12 *FLR* 167 at 169.

92 This has been criticised by some as fostering inconsistency in decision making: it has been argued that the binding ingredient in these cases should be government policy. See F McKenzie, *The Immigration Review Tribunal and Government Policy: To follow or not to follow?* (1997) 4 *AJ Admin L* 117. See also S Cooney, above n 39.

93 See also K Johnson, "Responding to the "Litigation Explosion": the Plain Meaning of Executive Branch Primacy Over Immigration" (1993) 71 *NCL Rev* 413.

THEORISING THE REFORMS: OF MIGRANTS, REPRESENTATIVE GOVERNMENT AND NOTIONS OF DEMOCRACY

> Again, the courts have reinterpreted and re-written Australian law—ignoring the sovereignty of Parliament and the will of the Australian people.[94]

At this point, it is useful to explore further the deeper philosophical and theoretical underpinnings of the proposed reforms to judicial (and merits) review of migration decisions. As a card carrying member of Amnesty International and of the Australian Commission of Jurists, the present Minister Ruddock's belief in the primacy of the Rule of Law is not to be doubted. From his public utterances, however, it would appear that the Minister's understanding of this phrase—and the consequential role of the courts in judicial review—is founded very narrowly in the federal Parliamentary process and in a narrow view of the Australian polity. The Minister's approach might be described as at once a majoritarian and an exclusionary view of democracy. His vision of the Rule of Law is clearly rule-based, rather than rights-based in its orientation.[95] It is also predicated on the notion that different rules should apply for persons who are non constituent members of the Australian polity—namely citizens.

As an elected Member of Parliament, the argument runs, the Minister has the mandate to make policy decisions and is responsible for the carriage of changes to the law through the legislature. Unlike the courts, he is accountable for those decisions through the ballot box. This quintessentially Diceyan vision of what constitutes the Rule of Law sees Parliament as the creator of the rules by which society is to be governed and the primary source of the Rule of Law.[96] The absence of a Bill of Rights in the Constitution is reflected in a resistance to the notion that the rules made by Parliament must conform to super-arching values or principles.[97] This construct presupposes that the courts should take a deferential approach to the review of administrative decisions, but most particularly in the review of migration decisions.[98] The subjects of such rulings—almost by defin-

94 The Honourable P Ruddock, National Press Club, Canberra, 18 March 1998, at 7 of the electronic transcript. See www.immi.gov.au/general/minspe18.htm.

95 The distinction is between the notion that Parliament is the sole dispositor of the rights or entitlements of citizenry, versus the theory that our legal system is predicated on principles, enforceable as rights, that exist independently of laws made by Parliament. Eg, TRS Allan, *Law, Liberty and Justice* (1993).

96 To this point, it is one with which the former Chief Justice Brennan would in many respects agree. See Brennan, above n 65.

97 K Rubenstein, "Towards 2000: An Assessment of the Possible Impact of a Bill of Rights on Administrative Law in Australia" (1993) 1 *AJ Admin L* 13 (Part 1) and 59 (Part 2). On this point, see HLA Hart, *The Concept of Law* (1961) at 181–82.

98 The classic case for the argument that judicial review is a "deviant institution in democracy" is made by A Bickel, *The Least Dangerous Branch* (1962), at 18.

ition—are non-citizens or aliens. Non-citizens are not members of the Australian polity and they do not enjoy the same constitutional guarantees, rights or privileges.[99]

The majoritarian view of how a democratic system should operate has been criticised in the American context by writers who point to the flaws in the electoral process that delivers the members of (Congress) into power.[100] In Australia there is a major difference in that voting is compulsory and it is a requirement that is enforced. This fact may explain the persistence of the Ministerial claims regarding the (exclusive) legitimacy of his right to make or determine government policy. Another point of difference is the immediacy of the links between the bureaucracy in Australia and the elected representatives in Parliament under the Westminster system of government.[101] Even so, many of the criticisms made of Western societies' democratic processes[102]—the lack of real participation, the alienation and apathy of voters—are apposite also in Australia.[103] It is my view that it is no more valid in Australia than it is in other democracies to rely on the electoral mandate as a justification for the assertion of untrammelled administrative power.

Whether the Australian readiness to delegate power to elected representatives is indicative of a belief in a majoritarian style of democracy is open to question. In spite of the centrality of Parliament in the administrative process, Australians are notorious for their suspicion of politicians. Indeed, the desire to avoid the result of having a politician as Head of State was one of the forces driving the compromise that emerged from the Constitutional

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99 On this issue, see K Rubenstein, "Citizenship as Democratic Participation and Exclusion: The High Court's Approach to Judicial Review and Refugees" in P McNab (ed) above n 31.

100 W Bishin, "Judicial Review in Democratic Theory" (1977) 50 SCL Rev 1099; D Held, *Models of Democracy* (1987); A Ides, "The American Democracy and Judicial Review" (1991) 33 *Ariz L Rev* 1.

101 See C Saunders, "Democracy, Representation and Participation" in PD Finn (ed) *Essays on Law and Government: Vol 1: Principles and Values* (1995). Unlike the United States where the President appoints persons to Cabinet rank who are not members of the Congress, the Australian Prime Minister is required to appoint her or his Ministers from sitting members of the Parliament who will be members of the Prime Minister's political party. Those Ministers are given responsibility for particular portfolios and the Department (or agency) attached thereto. The Minister becomes the conduit for the implementation of government through the Department and the conduit for the accountability of the Department to Parliament.

102 A Hutchinson and P Monahan, "Democracy and the Rule of Law" in A Hutchinson and P Monahan (eds), *The Rule of Law: Ideal or Ideology?* (1987) at 97–98; C Pateman, *Participation and Democratic Theory* (1970); P Nonet and P Selznick, *Law and Society in Transition: Towards Responsive Law* (1978); T Prosser, "Towards a Critical Public Law" (1982) 9 *JL & Soc* 1; T Prosser, "Democratisation, Accountability and Institutional Design: Reflections on Public Law" in JPWB McAuslan and J McEldowney (eds), *Law, Legitimacy and the Constitution* (1985) at 170; and Ely, *Democracy and Distrust* (1980).

103 See C Saunders in PD Finn (ed), above n 101; D Cass and K Rubenstein "Representation/s of Women in the Australian Constitutional System" (1995) 17 *Adel L R* 3.

Convention in February 1998.[104] Given the realities of the party lines that determine voting patterns in both Houses of federal Parliament, few would argue that Parliament provides adequate mechanisms for either ensuring the accountability of the bureaucracy or providing adequate protection for the individual against abuse of the State's powers.

The exclusionary aspects of the proposed laws are not always articulated openly but are implicit nonetheless in the Minister's assertions regarding his role in determining policy and the content of the Rule of Law. There can be little doubt that raw public opinion regards the migrant as "other." Public feelings about migrants who abuse their "privileges" by committing crimes run deep. The High Court has done its part to develop an Australian version of the plenary power doctrine in United States immigration law. It has confirmed that many of the rights implied in the Australian Constitution do not apply to non-citizens. Implicit in these findings is the notion that the government should have the ultimate say in determining the composition of the Australian community. Again, it is open to question that this notion of the primacy of political control provides a theoretical justification for excluding all forms of curial or administrative review of migration decisions.

There are many ironies in Australia's migration laws—actual and proposed. In 1989 amendments to the Migration Act replaced the sweeping discretions of earlier years with closely defined rules and regulations. The paradox of codified decision making is that while regulations are a vehicle for delivering more clearly the policy intentions of the government, they are also legal instruments that create rights and entitlements in the immigrant "clients." On the one hand such legislative regimes have helped to break down old notions that applicants for a visa or for any other benefit under the law are supplicants for a privilege. On the other, codification has focussed the courts in their task of statutory interpretation. Codifying the law for the purpose of keeping lawyers out of the administration is like throwing Brer Rabbit into the briar patch: lawyers were born and bred to work within the thickets of written laws.

The readiness of Australians to delegate their power to elected representatives also speaks against the view that Australian democracy is based simply on the ballot box, on numbers and on an exclu-

104 The first moves towards determining the shape of a remodelled Australia were made by the calling of a Constitutional Convention, half of the members of which were elected and half appointed by the Howard Coalition government. The communiqué that emerged from the Convention held in February 1998 proposes a referendum. Australian electors will be required to vote Yes or No on a proposal that a republican head of State be chosen through a broad range of community consultations followed by the nomination of a single candidate proposed for election at a joint sitting of the two Houses of Parliament. It is difficult to imagine the American people countenancing a Convention brought together in this manner, much less a proposal that the selection of their President should be made other than through a popular election. Although under the Unites States Constitution the President is elected by an Electoral College, for the past century elections have been held by popular vote in each state.

sionary vision of the body politic. I am inclined to agree with commentators who argue that the systems in both America and Australia are based on a more sophisticated understanding of shared values and standards—and on a rights-based, rather than a value-free rules-based vision of the Rule of Law.[105] From this perspective the (unelected) Courts are not only a legitimate part of the system: they are critical to it. This idea of the Rule of Law in a democracy is implicit in the notion of the Common Law: a shared legal heritage that in both our countries runs parallel and frequently crosses paths with the rules laid down by the Parliament. I have argued that the Judicial Review Bill is aimed at creating a system where the Minister is always right, whether in the interpretation of legislation or in the exercise of discretion. It is my view that this situation is one that many Australians would find antithetical to their notion of democracy.

IN DEFENCE OF JUDICIAL REVIEW: OTHER REFORM OPTIONS THAT WILL DETER ABUSE WITHOUT ABUSING THE RULE OF LAW

In light of the complaints being made of the costs and inefficiencies of courts actions in the migration area, it is well to recall some of the arguments that have been made over the years in favour of judicial involvement in the oversight of administrative action. It is not intended at this point to revisit arguments about the role of the courts in determining the content and application of the Rule of Law. Rather, what follows are points that build on the earlier discussion and provide some alternative models to deal with the criticisms thrown up about the current judicial review processes.

The most obvious benefit brought by judicial review is that it forces care in administrators and reviewers in their adjudicative process. As Legomsky notes,[106] one bi-product of judicial review as an accountability measure is that it can encourage independence and integrity. A decision maker whose ruling is subject to curial oversight is less likely to toe a particular policy line or to succumb to political pressure to decide cases in a particular way. The courts offer security for those who make a bona fide attempt to make findings on the facts and the law as presented and sanctions for those who chose to act on arbitrary or capricious considerations. Legomsky argues that the independence of the administrative review bodies is critical in the migration context as non-citizens by definition lack many of the safeguards that attend formal membership of the community.

If independence in this sense is synonymous with impartiality and fairness, it is well to note the impact that migration decisions have on the lives of both non-citizens themselves and the "Australian" parties who are often involved in or affected by the immigration status of the non-citizen applicant. In the case of asylum seekers,

105 Eg, HWR Wade, *Administrative Law* (6th ed 1988); Bishin, above n 100.

106 See S Legomsky, "Political Asylum and the Theory of Judicial Review" (1989) 73 *Minn L R* 1205 at 1209–16.

decisions on status can quite literally be matters of life and death. These realities may be inadequate to move the sensibilities of a society engrossed with its own introverted sense of alienation and injustice. Legomsky reminds us of the international political (and economic) ramifications of a system that is perceived abroad as arbitrary and unjust.[107]

Other benefits of judicial review that are apposite in any democratic system are the legal skills and objectivity brought by judges who may *not* be specialists on the subject of immigration law. Legomsky notes the tendency in specialist review bodies to develop mind sets: a natural human response when a person is presented with a series of applications characterised by a sameness in the issues raised or in manner of presentation. He remarks that:

> It would be unrealistic to expect a person to adjudicate a steady stream of (asylum) cases without at least unconsciously devaluing the allegations of hardship. A court of general jurisdiction, faced with a few asylum cases, has less opportunity to develop either that kind of institutional callousness or undue sympathy for the agency officials whose decisions it reviews. Thus, a generalist court can approach asylum cases with a broader and less tainted perspective.[108]

In the case of generalist migration decisions, there is less occasion for IRT members to develop an institutional mindset, if only because of the diversity and legal complexity of the cases presented. Nevertheless, in this generalist field of migration decision making, the strong textual focus of review would seem to make ouster of the courts an act of folly. As I have argued elsewhere,[109] the curial review of IRT decisions does not represent a huge workload for the Federal Court as most applications are emanating from the RRT. Conversely, the courts are performing an important function in clarifying for the IRT difficult points of law.

The judicial guidance function would appear to be of critical importance given the youth of both the IRT and the RRT and the frequency and nature of legislative change. There is also the prospect in the near future of a spill of all tribunal positions and the appointment of newcomers to the field.[110] Again, in this situation the courts would play a significant role in bedding down new laws and processes. The normative effect of judicial rulings can help ensure uniformity of approach that simply cannot be achieved by the tribunals of their own motion.

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107 Ibid. On this point, the reaction of Australia's Asian neighbours has played a significant role in changing the government's treatment of Ms Pauline Hanson's One Nation party with its anti-immigrant and anti-multiculturalism policies.

108 Ibid.

109 See Crock (1996), above n 31.

110 The Migration Legislation Amendment Bill No 4 (1997) envisages the abolition of the IRT and its replacement with a new tribunal entitled the Migration Review Tribunal or MRT. This new tribunal would retain the procedures of the IRT but would operate somewhat differently because of the merger of the internal review unit with the tribunal and the introduction of "case officers" to assist in the inquisitorial process.

If the Judicial Review Bill does not pass into law, there remains the issue of the perceived "problem" of judicial review and how it should be addressed. Again, as I have argued elsewhere,[111] a major flaw with the Judicial Review Bill is its blanket approach to what is essentially a localised problem. The numerical blow-out in judicial review applications can be sourced to a particular tribunal: the RRT. If action is to be taken, it should be targeted and it should be proportionate. Although a matter of concern in Australian political circles, it is well to recall that the judicial review figures are insignificant by world standards. It is a matter of some mystification for most American immigration experts that Australia should even be contemplating the introduction of privative clauses given the numbers involved.[112] It has long been my view that if restrictive measures are to be implemented, they should go to the expedition, rather than the abolition of judicial review. Consideration could be given to the introduction of "leave to appeal" mechanisms in the Federal Court whereby a full hearing of an appeal would become contingent on a discretion vested in that Court similar to the powers given to the High Court in its appellate function. This could be devised in conjunction with procedures to ensure the speedy determination of leave applications. This would act to remove or reduce the delays which provide the incentives for persons minded to abuse the judicial review avenue so as to prolong their stay in the country when they have no legal grounds for so doing.

Legomsky argues with some passion that the benefits of judicial review are considerable and the countervailing costs are not unduly onerous. In the Australia of 1998 his arguments are compelling. The "alien" in Australia is as unpopular as ever was the case. Tolerance of difference seems to in decline and the hard won gains of multiculturalism appear an illusion. The change in mood is very much the product of ignorance and fear, peddled by politicians who have managed to tap the disillusion and hurt of the disenfranchised. Measures like those envisaged in the Judicial Review Bill may bring short-term political gains to the government. In broader terms, they cannot be in the best interests of a country that prides itself on being a free and fair society where respect for the Rule of Law and for the dignity of the individual is paramount.

111 See Crock (1996), above n 31.

112 For a discussion of the problems facing the United States, see D Martin, "Reforming Asylum Adjudication: On Navigating the Coast of Bohemia" (1990) 138 *U Pa L R* 1247.

Other Accountability Mechanisms

Rethinking Administrative Law: A Redundancy Package for Freedom of Information?

RICK SNELL*

INTRODUCTION

On the eve of the introduction of a radically revamped freedom of information (FOI) model for the United Kingdom,[1] and 25 months after the presentation of the joint Australian Law Reform Commission and Administrative Review Council report (hereafter the ALRC/ARC Report), the relevancy and efficacy of FOI in Australia needs to be questioned.[2] The ALRC/ARC reforms were not mere tinkerings on the edges of a fully functioning access regime but an urgently needed overhaul of a legislative scheme under stress.

The ALRC/ARC reforms were formulated in the mid 1990s. At that time the ramifications of the reinvention of Australian government and public administration for FOI were only partially and dimly perceived.[3] The concentration of concern was on the early warning signs coming from the major structural alterations concerned with the commercialisation, corporatisation and privitisation process, and only peripherally with other processes such as contracting out and an operational emphasis on cost-recovery. A plethora of other new economic policy and new public management initiatives (risk management, responsive regulation, cost recovery,

* Lecturer, University of Tasmania; Editor, *FOI Review*.

1 See H Sheridan and R Snell, "FOI Developments in the United Kingdom—White Paper—Your Right To Know" [1998] 73 *FOI Review* 2.

2 Australian Law Reform Commission (Report No 77, 1996) and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982* (Report No 40, 1996) (hereafter ALRC/ARC Report).

3 D Osborne and T Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (1992).

deregulation) were occasionally caught in an academic searchlight but were rarely connected to a larger picture concerning access to information.

The reality of a reinvented or redesigned state has left the world of administrative law reeling in confusion and divided in formulating responses.[4] Some are valiantly fighting a rearguard action which is aimed at either preserving a guarded sanctuary of, or at least ensuring its safe interchange into a new world order, of the values of openness, rationality, fairness and participation.[5] Others like Aronson confronted by the foundations upon, and the rigid framework within which administrative law has fashioned (or bestowed) its legitimacy, see the need to adapt the tools required to achieve the still important administrative law goals of accountability and participation.[6]

Justice Kirby argues that judges ought not to resist, and indeed ought to facilitate, Parliament's decision to withdraw from the public market place.[7] If "the very purpose of corporatisation and privatisation is to take the government out of the marketplace, can courts really be blamed for giving full effect to this policy?"[8] In this dominant economic paradigm the problem is seen as simply recasting private law to develop effective mechanisms "to protect the individual dealing with the corporation, where once public administrative law could have been invoked."[9] This approach does not prevent judicial invention and transfiguration of contract and other private law areas or the importation of international norms to construct benevolent operating principles in the new marketplace.

Finally Arthurs, an experienced commentator, sees the inevitable collapse of a flawed participative experiment and welcomes the promise and potential of a market state.[10] In this market state the enhanced, indeed sovereign status, of the citizen as a consumer heralds a new age of service delivery and decision-making.

The general dislocation caused to administrative law as a whole by the reinvention of government is magnified for FOI. The state of Australian FOI was already perilous before the transformation of governance in the 1990s. The Australian Law Reform Commission Report found significant problems with FOI at both an operational

4 Throughout the paper I tend to slip between the terms "reinvented" and "restructured" to provide a generalised description of the massive transformation or reconfiguration of Australian government and public administration in the 1990s.

5 M Allars, "Private Law But Public Power: Removing Administrative Law Review From Government Business Enterprises" (1995) 6 *PLR* 44.

6 M Aronson, "A Public Lawyer's Responses to Privatisation and Outsourcing" in M Taggart (ed) *The Province of Administrative Law* (1997) at 70.

7 The Hon M Kirby, "Australian Corporations Law and Global Forces" (1997) 2 *FJLR* 49.

8 Ibid.

9 Ibid.

10 HW Arthurs, "Mechanical Arts and Merchandise: Canadian Public Administration in the New Economy" (1997) 42 *McG LJ* 29.

and motivational level. Authors such as Ardagh[11] and Campbell[12] demonstrated that when access to personal affairs information is removed from the equation then the performance levels of FOI were sadly insipid in contrast to the reasonable expectations of its designers and legislative midwives. Anne Cossins has carefully documented the reluctant embrace of FOI in NSW, the multitude of design defects, a vast catalogue of administrative non-compliance and a prevailing ethos of secrecy that shrouds public administration in Australia's most populous state.[13] Meanwhile, in a series of articles about the Tasmanian experiment, I have confirmed Ralph Nader's observation that "the Freedom of Information Act, which came in on a wave of liberating rhetoric, is being undercut by a riptide of agency ingenuity."[14]

Australians in the late 1990s are confronted with a dilemma. Do we prescribe ad hoc remedies for a system in entropy (the disintegration of a system into chaos and uselessness) or do we ask ourselves what an access regime would look like if it were designed to operate in Australian conditions in the early years of the new millennium? Creyke argues that the changing relationship between public administration and administrative law is one that necessitates profound changes.[15]

Aronson moots a possible alternative of linking the pivotal role which information plays in the efficacy of market place operations to the case for an expanded role for FOI.[16] More disturbing is the realisation that a condemnation Ralph Nader made against US agencies in 1970 is still applicable to the way Australian FOI legislation (federal and State) is designed, implemented and administered in 1998:

> I have reached a disturbing conclusion: government officials at all levels in many of these agencies have systematically and routinely violated both the purpose and specific provisions of the law. These violations have become so regular and cynical that they seriously block citizen understanding and participation in government. Thus the Act, designed to provide citizens with tools of disclosure, has been forged into a shield against citizen access. There is a prevailing, official belief that these federal agencies need not tolerate searching inquiries or even routine inquiries that appear searching because of their infrequency.[17]

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11 A Ardagh, "Freedom of Information in Australia: a Comparative and Critical Assessment" in R Douglas and M Jones (eds) *Administrative Law: Cases and Materials* (1993) at 145.

12 M Campbell and H Arduca, "Public Interest, FOI and the Democratic Principle—A Litmus Test" paper presented at INFO 2, 2nd Australian National Conference on Freedom of Information, Gold Coast, March 1996.

13 A Cossins, *Annotated Freedom of Information Act New South Wales: History and Analysis* (1997) at ch 1.

14 R Nader, "Freedom From Information: The Act and the Agencies" (1970) 5(1) *Harv CR—CL Law Rev* at 5.

15 R Creyke, "Sunset for the Administrative Law Industry? Reflections on Developments Under a Coalition Government" in J McMillan (ed) *Administrative Law Under the Coalition Government* (1997) at 20.

16 Aronson, above n 6 at 58–63.

17 Nader, above n 14 at 2.

If Australian FOI has been forged into a shield against access, rather than constituting an undeniable right of citizenship, then we ought to consider pensioning it off. Nader argued that under the FOI Act, United States agencies were in effect baronies beyond the law.[18] If Australian agencies remain like minded informational fiefdoms then FOI will only serve the purpose of a public charade that blinds us to the problems of preferential access and treatment of vested interest groups and a selectively chosen informational elite.

The time has come to complete the reinvention of the state by restoring the full rights of citizenship.

THE REINVENTED STATE

The reinvention of the state has converted public administration into a new marketplace for goods and services.[19] This reinvention has removed or severely distorted the basic rationales and paradigms within which administrative law has evolved over the last few decades. Aronson notes that "judicial review was once regarded as one of administrative law's central devices for ensuring accountability."[20] His comment clearly indicates that this pre-eminence is now questionable. Aronson argues that the reconfiguration of the state as a marketplace leaves few areas for judicial review to operate either under its current rationale, or any defensible or justifiable future rationale. Governments keen to create a smaller operational domain for the state (leaving it to be a select purchaser of certain services and to avoid being a service provider) have by legislative fiat removed significant sections of the state from the public domain by devices such as:

- ouster clauses;
- creation of government business enterprises;
- creation of delegated administrative authorities;
- legislative inertia;[21] and
- jurisdictional slip.[22]

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18 Ibid at 1.

19 R Mackey, "Towards Government in 2010" paper for the Australian Industry Conference, Reinventing Government, 12 July 1994, Sebel Town House, Sydney.

20 Aronson, above n 6 at 70.

21 I have in mind here a general reluctance to implement legislation that requires the state to play either a) an active role or b) a role that gives citizens rights or avenues of action against the state or its service providers. In the administrative law area this is shown by the refusal to create modern administrative appeal systems at the state level despite numerous recommendations from EARC, Commission on Government (WA) and the Sackville Committee (the recent creation of an ADT(Administrative Decisions Tribunal) in NSW being the notable exception).

22 This occurs where an institution like an Ombudsman is granted jurisdiction via reference to a specified listing of agencies (the Ombudsman Act 1978 (Tas) Schedule 1 is a good example) and little or no updating of that listing occurs. As new agencies are created or change their names and the accountability watchdog slowly loses its jurisdiction over significant areas.

The reinvention of government agenda, within public sector management ranks, has seen public sector leadership positions filled by short term contractual appointees whose operating instructions and basic values are at odds with the administrative law mantra of "openness, rationality, fairness and participation." Budget management practices aimed at doing more with less, seeking cost reductions, cost recovery and the implementation of user pays for a wide array of services create an operating environment which in turn throws up demands for a reassessment of various elements of the new administrative law package.

Other initiatives such as risk management present even more confronting challenges to the traditionally process orientation of administrative law systems. Risk management is being offered to public sector managers as a transferable private sector methodology that can achieve greater efficiencies and produce acceptable outputs in service delivery in terms of quantity and quality. The Management Advisory Board and the Management Improvement Advisory Council (MAB/MIAC) recommended the introduction of risk management as a best practice management technique to improve decision-making processes, enhance accountability and facilitate better resource allocation in the public sector.[23] Allan Hawke highlights the dilemma the output orientation of risk management poses for the process orientation of the traditional administrative law accountability mechanisms:

> The need for public confidence in our system of government demands that public servants be publicly accountable. At the same time, an overemphasis on process has led in a number of cases to aversion to reasonable risk on the part of public servants. ... We need to find a better balance between the legitimate requirement to be accountable and a responsible approach to achieving public policy outcomes on an efficient basis. We should recognise that many of our public accountability mechanisms of the past have been focused primarily on process.[24]

Arthurs argues that "changes in technology and the social organisation of work, globalisation and regional economic integration, and shifts in the boundary between the state and civil society—demand a reconsideration of the ways we have thought about bureaucracy, government and the role of the interventionist state."[25] Arthurs paints the key elements of the administrative law package as embodying a participative ideology that in his analysis becomes outmoded when faced with the reinvention of public administration as a market. In this new market, smaller, smarter governments will construct contractual arrangements in a way which safeguards quality of service delivery (specifying level, standard, quality and

23 Management Advisory Board and the Management Improvement Advisory Council, *Guidelines for Managing Risk in the Australian Public Service* (Report No 22, 1996) at 9.

24 A Hawke, "Challenges Facing the Australian Public Service" (1997) 85 *Canberra Bull Pub Admin* 38 at 41.

25 Arthurs, above n 10 at 29.

auditing of service provisions) and any contract failures will merely involve short term teething or adjustment problems. Accountability is now ensured by the incentives being offered for service delivery.

Accepting that the state has been irreversibly redefined[26] Aronson has suggested a careful recasting of administrative law to escape the idea of administrative law as a package of interlinked parts. Aronson argues that the idea that administrative law has to exist as one solid "package" may well be peculiar to Australia, and indeed, only some elements of the "package" may be appropriate in the new out-sourced arena.[27] Authors, such as Schoombee, warn that without such a recasting public administrators will adopt particular value rankings when making decisions:

> The shift from public law to private law brought about by contracting out also marks a change of ethos. Dissatisfied recipients can no longer rely on the values we expect, at least in theory, from public administrators, such as accountability, rationality and openness. In fact those who argue for contracting out often do so as part of a "privatisation ideology." This ideology puts values such as faith in market mechanisms and closed commercial decisions above values such as collective political choice, openness and citizenship.[28]

In the drive to reconfigure themselves governments have shown little restraint in the choice of methods or the range of instruments used to achieve restructuring. This reconfiguration has probably laid to rest the rigid and artificial public-private approach to conceptualising state activity. While it is arguable whether the distinction ever had any basis in reality, or efficacy as a conceptual device, its current utility is minimal. Finn sees the conflicting views on this distinction as encapsulating "an endemic theoretical tension between the demands of economy and polity."[29] The various instruments and methods chosen to reconfigure the state have included:

- introducing commercial disciplines into public services;
- a focus on separating service delivery and policy formulation;
- changing legal structures or forms of service providers;
- proliferation of government corporations;
- deregulation and responsive regulation embraced;
- privitisation; and
- outsourcing.

This diversity of methods calls for a new approach to analysis. Our previous assumptions about the givens in policy debates and discussions now have to be significantly modified, or numerous excep-

26 Ibid at 43–44 discusses the difficulty faced by the new minimalist state if the pendulum should swing again in favour of a more interventionist approach to governance.

27 Aronson, above n 6.

28 H Schoombee, "Privatisation and Contracting Out—Where Are We Going?" in McMillan (ed) above n 15 at 138.

29 C Finn, "Getting the Good Oil: Freedom of Information and Contracting Out" (1998) 5 *AJ Admin L* 113.

tions made to principles which were once general in their application. Aronson argues that:

> Mixed governmental methods fracture the old dichotomy between public and private power into a trichotomy which recognises the sharing of governmental functions between organs of the state and organisations sourced in the private sector.[30]

If the administration landscape is viewed as a trichotomy then the mechanisms we design or rely on for accountability, to deliver transparency and to empower the citizenry must be modified or recreated.

THE CHALLENGES TO ADMINISTRATIVE LAW

Three important challenges to administrative law have arisen, prompted by the reinvention of the state and public administration. These are: focus, terminology and the values and principles of administrative law. The very core values, aspirations and underlying reasons for administrative law have been confronted by a dominant economic paradigm which is "bent upon transforming the public interest into something not far removed from commercial interests."[31]

The focus of administrative law has varied over the centuries but it has always had a concentration on "public"—public authorities, public decision-makers, public power. The debate has largely been about the ways and the extent to which, administrative law has regulated the relationship between the citizen and the state.[32] A generation of administrative law academics were inclined to delimit the potential application of administrative law. An example of this is found in Skyes, Lanham and Tracey's 1979 work *General Principles of Administrative Law*:

> It is the basic premise of the present work that administrative law is concerned with the controls exercisable by the law (whether common law or statute law) over the decision-making processes of governmental authorities where the validity of such decision-making is not dependent upon special constitutional considerations and where it does not involve a mere question of liability under existing categories of tort or contract law.[33]

A more recent generation believes that "administrative law is concerned with decisions made by administrators, but encompasses more than a set of legal rules applied by the courts in review of those decisions."[34] For this generation the answer to what is administrative law has been an open ended question that has seen the exploration of an ever expanding perimeter. Yet the reinvention of public administration into a marketplace has also converted the citizen into

30 Aronson, above n 6 at 69.
31 Ibid.
32 S Streets, *Butterworth's Casebook Companions: Administrative Law* (1997) at 4.
33 EI Skyes, DJ Lanham and RR Tracey, *General Principles of Administrative Law* (1979) at v.
34 M Allars, *Introduction to Australian Administrative Law* (1990) at 1.

a fairly passive consumer and recipient of goods and services from an array of providers (some of whom can trace antecedents to public entities). So now administrative law is confronted by the transformation of its heartland and the forced separation from its citizen constituency which legitimised its operations.

Some authors, such as Aronson, would contest whether the focus of administrative law upon the citizen legitimised its activities. Rather administrative law ought to be seen as providing in some small measure, legitimacy to the state's dealings with its citizens. He argues that the list of guiding values adopted by most Australian public lawyers[35] could be subsumed under the label of legitimacy and that "administrative law was long regarded as one way of providing legitimacy to the exercise of state power, particularly discretionary power."[36]

The terminology of administrative law is replete with words and phrases whose definitions are inextricably linked to a public rather than a market orientated concept of administration. For example the jurisdictions of most Ombudsman are determined by the limit of what amounts to an "administrative action" or a "matter of administration". The traditional approach to this question of jurisdiction is to interpret the phrase widely and to rely on a threefold classification, where anything that cannot be considered an executive or judicial matter or action is therefore by default an "administrative action". Yet to what extent can such a simplistic classification regime be applied to a public sector entity engaged in a trading activity particularly where the ground of complaint is the standard or quality of the good traded?

Arthurs reminds us that public administration is "contested terrain, whose control is a valuable strategic asset sought by contending forces."[37] For the past few decades in Australia, administrative law and its associated values have been considered legitimate contenders of that contested ground. In many of the contests, especially in the immigration area, the victories of administrative law have been short lived or subjected to immediate legislative revocations. Nevertheless, a need for administrative law and its principles were acknowledged and a place allocated in the ranks of other contenders such as efficiency, service delivery, Westminster government, professionalism and ministerial responsibility. However, concepts are "shaped by time, place and circumstance"[38] and the advent of a reinvented state has changed the parameters within which the ground rules for contesting are being rewritten. To a large extent administrative law has been simply overlooked in the rule changes. When it has been considered, it has usually been with a hostile

35 Aronson lists these values as openness, fairness, participation, accountability, consistency, rationality, legality, impartiality, and accessibility of judicial and administrative individual grievance procedures. See M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) at 1–7.

36 Aronson, above n 6 at 43.

37 Arthurs, above n 10 at 33.

38 Ibid at 32.

attitude. That attitude sees its process orientation as being counter-productive, if not deadly, to the output objectives of the new much smaller state. A state reconfigured as a buyer of services in a greatly expanded market place and not the producer of services (whether it be cleaning services or information services).

Consequences for Freedom of Information

The already perilous state of FOI simply magnifies the dislocations caused to administrative law mechanisms by the reinvention of the state. The challenges of focus, terminology and contested values have significant ramifications for the operation of access regimes. At one level, the ALRC/ARC review into Australia's national freedom of information regime produced a reassuring finding that the "FOI Act is now an integral part of Australia's democratic framework."[39] Albeit with the suggestion that "this is not to say that the Act is working perfectly or that it is not susceptible to attack or weakening."[40] At a more significant level the extent, nature and reasoning behind the 106 recommendations in the final report suggested that an urgent overhaul of this instrument of accountability was needed.[41] Whilst some of the changes were mere tinkering, a number were critical modifications designed to revitalise a creaking piece of legislative machinery. The two year silence and lack of observable progress towards implementing any of these 106 recommendations has further contributed to a quickening of a process of entropy in Australian FOI operations.

In addition to the deficiencies which the ALRC/ARC Report attempted to address, several authors have highlighted major shortcomings in Australian FOI legislation in terms of both operational limitations and performance outcomes. The most recent version of the traditional critique was outlined by Justice Michael Kirby of the High Court to a British audience in December 1997.[42] Justice Kirby presented what he considered to be the seven deadly sins associated with FOI in the Australian experience. Sins which countries considering future access legislation ought to avoid or at least beware were:

1 Strangling at birth;
2 Keeping it secret;
3 Granting it exemptions;
4 Upping the costs and fees;
5 Weakening independent decision-makers;
6 Narrowing the interpretation; and
7 Stopping the rot.

39 ALRC/ARC Report, above n 2 at para 1.3
40 Ibid.
41 For a more detailed discussion see R Snell "Open Government: A Slow Train Coming" (1996) 61 *FOI Review* 2.
42 The Hon M Kirby, "Freedom of Information: The Seven Deadly Sins" presented to JUSTICE, the British Section of the International Commission of Jurists, Fortieth Anniversary Lecture Series, London Wednesday 17 December 1997.

Justice Kirby warned his London audience that the fundamental change of administrative culture promised by FOI proposals often leads to the eventual emergence of a much emaciated final legislative version. The early history of the development of FOI in Australia and the aftermath of the Senate Standing Committee Report 1979 are valuable lessons. Bob Brown had not only to watch his FOI proposals in Tasmania go through a bureaucratic and political overhaul during the passage of the Freedom of Information Act 1991 (Tas) but then saw a series of changes incorporated at the last minute, in December 1992, before the Act came operational on the 1 January 1993. Cossins documents the blunt resistance campaign led by both the political and bureaucratic leadership in NSW that resulted in the creation of an FOI Act afflicted by numerous design defects.[43]

In his second and third points Justice Kirby concentrated on the number of exemption categories chosen for FOI legislation and the areas considered to be off limits for those seeking information. The problems caused by creating a "no go zone" around Cabinet information have been extensively dealt with in another article.[44] The construction of categorical exemptions, with or without public interest exceptions, seems highly problematic for the efficacy of FOI legislation. Buchanan observes that the New Zealand and Australian approaches to exemptions are easily contrasted. Australian withholding provisions "are worded in categorical, or exemptive terms" whereas New Zealand's exemptions are "consequential ones."[45] This gives a completely different focus to the two access regimes. A consequence of the Australian approach is the creation of a complex set of exemption provisions which fail the tests of accessibility and intelligibility:

> The exemption provisions in Part IV of the Commonwealth Act currently span 16 pages of the Act with some individual exemptions covering one-and-a half pages. Many present passages in the text of the exemptions can be characterised as the antithesis of plain English.[46]

In Australia the battle for access is predominantly fought by requesters on the grounds of demonstrating that documents are not covered by a particular exemption or that a public interest test for release is applicable. Once the design decision has been taken to rely on categories to exempt information, then it appears to create an Achilles heel. FOI litigation and evaluation becomes hampered by arid and technical disputes, over the appropriate categorisation of information (for example, does this document meet the criteria for an internal working document in this jurisdiction?). Consequently,

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43 Cossins, above n 13 at paras 1.3–1.3.12.

44 H Sheridan and R Snell "Freedom of Information and the Tasmanian Ombudsman 1993–1996" (1997) 16(2) *Tas L Rev* 107 especially at 129–145.

45 R Buchanan, "Cabinet, policy documents and freedom of information: the New Zealand experience" (1991) 31 *FOI Review* 2.

46 T Moe and J Lye, "Prospects for review of FOI: can the Commonwealth regain the initiative?" in S Argument (ed) *Administrative Law: Are The States Overtaking the Commonwealth?* (1996) 147.

it does not confront the issue of whether the information could be released without any significant consequence for governmental operations.

An example of this fruitless technical squabbling produced by a categorical approach to exemptions is in relation to clause 5(1)(b) of the Freedom of Information Act 1992 (WA). A series of WA Information Commissioner rulings and WA Supreme Court decisions have been made on this issue.[47] The broad scope of the exemption clause 5(1)(b), after the decision in *Police Force of Western Australia v Kelly and Smith*,[48] allowed an investigation into an alleged dog attack; an investigation into employee grievances; an investigation concerning the suitability of gas appliances; an investigation concerning medical practitioners and an investigation involving petty offences all to be exempted on the grounds of protecting law enforcement, public safety and property security. The categorical approach to exemptions focuses the debate on protecting the category itself, rather than whether the requested information ought to be given the protection of that particular exemption category.

The concern about fees and the efficacy of FOI appears in numerous reports. Experience in Australia and Canada has demonstrated the direct casual relationship between fee charges and FOI applications. It appears that FOI operation is particularly sensitive to fee changes. It is a sensitivity exploited by governments, but also particularly vulnerable to the rise in a user pays or cost recovery methodology in public administration.[49]

Justice Kirby warns that a fifth deadly sin for FOI is the threat of "undermining the essential access to an independent decision-makers who can stand up to government and require that sensitive information be provided."[50] Justice Kirby appears not to have changed his views on this topic over the last 15 years:

> It is vital that someone or some agency ... should be more closely monitoring the experience under the FOI Act ... Otherwise, the preventive value of legislation of this character would be lost, in a concentration of effort on simply responding to individual claims. We should aggregate experience and draw lessons from it. For example, a persistently recalcitrant government agency ... continuously reverse on appeal, should have its attitude drawn to political and public attention so that they can be corrected, to bring even the most obdurate official into line with the new policy.[51]

In his assessment of Canada's freedom of information laws, Roberts reached the conclusion that guaranteed access to an independent decisionmaker was not an irrevocable tenet of govern-

47 WA Information Commissioner, *Fourth Annual Report* (1997) at 15–16.

48 Supreme Court of Western Australia, 30 April 1996, unreported (Library No. 960227).

49 A Roberts, *Limited Access: Assessing the Health of Canada's Freedom of Information Laws*, Freedom of Information Research Project, April 1998, School of Policy Studies, Queen's University, at 47–50. Available at http://qsilver.queensu.ca/sps/.

50 Kirby, above n 42 at 20.

51 The Hon M Kirby, "Information and freedom" *The Housden Lecture*, Melbourne 6 September 1983 at 11.

mental practice.[52] However, when designing New Zealand's *Official Information Act*, the Danks Committee determined that:

> The main elements of the legislation as we have proposed them (para 68) could not be satisfied, however, without some *independent body of sufficient status to undertake continuing inquiry into and definition of categories of information, and formulation of rules* moderating conditions of access.[53]

In his London talk Justice Kirby highlighted the problem that many of the judiciary have caused to FOI by not formulating their interpretation of FOI legislation in a way that is harmonious to the objects of the legislation. Justice Kirby suggested that "Judges also grew up in the world of official secrets and bureaucratic elitism. Sometimes they may share the sympathies and the outlook of the Sir Humphreys of this world."[54] Several academics have suggested that the judiciary need to change their interpretative approach,[55] but their calls have gone unheeded. The ALRC/ARC Report recognised the problem by suggesting amendments to give effect to the objectives of FOI legislation.[56] One particular suggestion of the ALRC/ARC Report was that the objects section of the Commonwealth FOI Act be amended to expressly recognise that the information, collected and created by public officials, is a national resource that ought to be readily accessible to the public.[57]

In his final point Justice Kirby alludes to the entropy which can occur with FOI if its passage through Parliament is perceived as "enough of itself to work the necessary revolution in the culture and attitudes of public administration. Going on Australian experience, it is not."[58] The NSW Ombudsman has recently criticised the lack of publicity and education, high levels of refusal or resistance to FOI applications, lack of monitoring, inadequate reporting standards and failure to adopt best practices.[59]

RECONCEPTUALISING FOI PERFORMANCE IN AUSTRALIA

The performance of administrating FOI in Australia has been subject to many critiques, including Justice Kirby's observations. The dissatisfaction ranges from the failure to provide adequate annual reporting on performance to concerns about deliberate and malicious practices designed to defeat legitimate requests for access.

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52 Roberts, above n 49 at i. In 1991 Newfoundland abolished the position of Ombudsman.

53 Committee on Official Information (Danks Committee), *Towards Open Government: General Report Vol 1* at para 107.

54 Kirby, above n 42 at 22.

55 Cossins above n 13 at paras 1.13–1.13.13.

56 ALRC/ARC Report above n 2 at paras 4.1–4.9.

57 Ibid at para 4.9.

58 Kirby, above n 42 at 22.

59 NSW Ombudsman, *Implementing the FOI Act: A Snap-shot on FOI* (July 1997). For an analysis of this report see J McMeekin, "FOI in New South Wales: Two Perspectives from the Ombudsman" (1997) 70 *FOI Review* 50–52.

More common is the lament that experiences with using FOI have been ones of "frustration, delay and the haphazard provision of information."[60]

Roberts has offered a conceptual framework which allows for greater precision in identifying deficiencies in FOI administration. More importantly his analysis allows specific measures to be adopted to offset different problems. Previous approaches floundered in trying to reconcile an array of conflicting findings. On the one hand, there was the paradox of high level commitment to the principles of FOI by FOI officers and agencies. On the other hand, there exists what the Canadian Information Commissioner described as a confrontational relationship between agencies and requesters.[61] Roberts argues that there are 3 broad categories of bureaucratic response to FOI namely: malicious non-compliance, administrative non-compliance and official adversarialism (see Appendix 1).

The advent and operating principles of a redesigned smaller state, that functions solely as a marketplace, exploits and compounds existing design defects in Australian FOI legislation. The performance of FOI in Australia points towards either one of two conclusions. First, the evidence could be seen as exhibiting clear signs of a system in the early stages of entropy—the optimistic diagnosis. Secondly, the evidence could be interpreted to show a system that is the preserve of a small informational elite (members of parliament, journalists, lawyers, lobbyists and academics) who receive some tangential benefit from engaging in frustrating adversarial fishing expeditions that at best produces fragments of information—the pessimistic diagnosis.

Furthermore, the type and level of administrative compliance will determine the degree to which these existing design defects accelerate that entropy; or discourages even the most fanatical of an informational elite from engaging in a one sided contest. Administrative compliance can be pictured as occupying a continuum ranging from malicious non compliance to administrative activism.

In addition both the type of information being requested and the category of requester will significantly affect the outcome of a FOI request. Writers and authorities have pointed out that there is a marked differential in FOI performance depending on whether the measure is accessing personal information or policy information. The FOI process could be seen as a complicated interrelationship between these several factors:

Design principles x Type of Administrative Compliance x Type of Requester = Extent to which FOI Applications Dealt With in Accordance to Objects of Legislation.

60 R Snell, Issues Paper Submission No 31 cited in ALRC/ARC Report above n 2 at para 2.8, fn 24.

61 Information Commissioner of Canada, *Annual Report: Information Commissioner* (1993–1994) at 7.

Further elements in this interrelationship include: the type and approach of the external review body and the vitality and size of a jurisdiction's FOI constituency.

A more detailed model for the analysis of administrative compliance regimes offers insights into the complex variety of administrative responses to access regimes. These responses will vary by agency, jurisdiction, time, information requested and the category of requester. This type of analytical framework can only take us so far in the attempt to pinpoint why FOI is less effective than envisaged by its original designers. A regime which reflected the dominance of several of Kirby's deadly sins could easily display signs of administrative compliance. This would occur where several factors have combined to limit the types of users and the purpose of their access request. These factors could include:

- judicial interpretation which has muted access objectives;
- categorical exemptions that have been given a wide ambit or have limited public interest tests;
- public interest tests are construed as a balancing test where the onus is on the requester; and
- agencies have been completely exempted.

Nevertheless in most jurisdictions the effectiveness of FOI could be immediately improved by encouraging a change in administrative compliance. The recent development of FOI standards and performance measures, by the Office of the Information Commissioner of Western Australia and a network of FOI coordinators, may herald the type of initiative which can return the operation of FOI to a closer approximation of the original intent behind the legislation.[62]

In her first chapter, charting the history of FOI in NSW, Cossins offers numerous examples which, when placed into the compliance framework in Appendix 1, or entered into the efficacy formula, presents a jurisdiction whose access regime is in serious trouble. Cossins has outlined the original and significant design limitations of the NSW legislation but then also draws attention to compliance problems:

- Continued receipt by the Ombudsman of notices of determination which fail to meet the more important of the Act's requirements;
- Prevailing ethos of secrecy;
- A growing dissatisfaction with the application of exemption clauses;
- Information withheld despite it previously being released by press release;

62 Office of the Information Commissioner Western Australia, *FOI Standards and Performance Measures*, May 1998.

- Agencies finding methods to deter applicants and frustrate the objects of the Act without technically breaching its provisions (excessive fee charging and information otherwise available at a premium price);
- Pedantic interpretation; and
- Two cases of Chief Executive Officers removing documents.[63]

THE PRESCRIPTION

A radical redesign of Australian FOI legislation and operational practice is the prescription. The interrelationship between design, administrative compliance, type of information, requester, external review model and the nature of the local FOI constituency will necessitate changes at several levels. Nevertheless the choice of new design principles based on the lessons learnt from the experiences of Australian jurisdictions, New Zealand and Canadian will be fundamental.

The ALRC/ARC reform process illustrates the problems that arise with a "tightening the bolts and occasional component upgrade" approach to FOI. The final report has languished for over two years gathering dust while Australian FOI applicants blunder through a labyrinth of exemptions, fee trip wires, variable administrative compliance practices and a general shroud of lingering secrecy. In sad contrast legislative amendments designed to cripple FOI quickly slip through Australian parliaments. Ideas for new administrative practices that circumvent FOI zap across jurisdictional borders, in rare examples of cooperative federalism, and are taken up with relish and ingenuity.

The reinvention of the state, the challenges to administrative law in the 1990s, the deficiencies in FOI legislation, and the types of bureaucratic responses to FOI present those in favour of open government a number of hard choices. John Ralston Saul and Arthurs present a very strong case to write FOI off as a noble but inherently unachievable experiment. Arthurs sees the product of FOI as a rarely resorted to windfall for privileged users, "such as businesses, lobbyists and journalists who have the time and money to take advantage of it."[64] In 1970 Nader viewed FOI as ineffectual in removing or offsetting for the citizen the preferential access and treatment accorded to lobbyists, trade associations, and corporations.[65] Ralston Saul dismisses access legislation by observing:

> As for the freedom of information or access to information laws, they have simply confirmed that all information is private unless it is specifically requested. Requests must be clearly defined and often cost money, with the result that information is stored in increasingly narrower and more specific categories. A request produces a fragment of information, and

63 Cossins, above n 13, examples given between paras 1.9.3–1.10.4.

64 Arthurs, above n 10 at 32.

65 Nader, above n 14 at 2–3. Since that observation a handful of Nader inspired community or citizen orientated public interest groups could be added to the list.

> only those citizens with funds can engage in these frustrating fishing expeditions.[66]

The redundancy option would be attractive to the likes of Arthurs and Ralston Saul. The reform has missed its target and now occupies an informational niche far removed from its participative rationale. Others, like Rayner, whilst viewing the current state of FOI as unacceptable, would want to keep it in place but seek some sort of Damascus conversion by both governments and bureaucrats:

> A significant cultural change is required if Australian government agencies are to reconceptualise themselves as part of a democratic process rather than as an elite body in possession of occult wisdom. This change can only be achieved if the public service's opposition to "open government" is resisted, and if agencies are encouraged to develop new ways of working that take the principles of openness and accountability to heart. Left to their own devices, governments will not do the job; as the experience of the past decades has shown, they have been among the prime movers in hobbling FOI.[67]

It is time to redesign Australian FOI legislation and operational practice. We now have over 50 years of combined operational experience with FOI at Commonwealth, State and local government level in Australia from which to draw lessons. There have been several significant government and parliamentary reviews and academics are starting to produce a number of empirical studies. In addition we have lessons learnt from Canada and New Zealand and the design innovations set out in the 1997 UK White Paper. From this accumulated experience and knowledge there are several clear design principles that ought to be incorporated in any Australian FOI legislation which was being formulated to be best practice in the late 1990s. A number of these design principles are set out in Appendix 2.

In reconceptualising FOI in Australia the first step would be to change the title of the legislation to "Access to Information". Such a change is more than a mere cosmetic relabelling. It is a symbolic reassertion of the central rationale for the legislation. Refusals to supply information would no longer be a denial of an FOI request, but a clear rejection of the right of a citizen to access public information. When FOI was being considered for Australia the target of access was, primarily that information vital to the effective participation of citizens in the formulation of governmental policy and, second, the information needed to hold governments and their agents accountable for their decisions. Generally speaking that information was held and stored in the government sector. Now the information is scattered across an intriguing variety of locations, many of which contain "Keep Out—Private Property" signs despite the state paying most of the tab.

The second step would be to ensure that the coverage of the legislation is sufficiently wide and generic to cover all organisations undertaking important public functions, whether those organisa-

66 JR Saul, *The Unconscious Civilization* (1997) at 46.

67 M Rayner, *Rooting Democracy: Growing the Society We Want* (1997) at 240.

tions are publicly or privately-owned. The rapid restructuring of the Australian public sector in the mid-1990s serves notice that the jurisdictional foundations of administrative law cannot be based upon definitional assumptions restricted to statutory authorities in the public sector arena. Zifcak notes that the first matter that "catches one's attention about the British Government's new proposals is the breadth of the FOI Act's coverage."[68] It applies not only to government departments and agencies but even to private agencies insofar as they carry out statutory functions. The White Paper's authors have attempted to ensure that: "Commercial confidentiality must not be used as a cloak to deny the public's right to know."[69]

The third step would be make *information* the target of access rather than documents. The New Zealand experience has demonstrated the value of this design principle. In the seminal case *Commissioner of Police v Ombudsman*[70] Jeffries J declared:

> Perhaps the most outstanding feature of the definition is that the word "information" is used which dramatically broadens the scope of the whole Act. The stuff of what is held by Departments, Ministers, or organisations is not confined to the written word but embraces any knowledge, however gained or held, by the named bodies in their official capacities. The omission, undoubtedly deliberate, not [sic] to define the word "information" serves to emphasise the intention of the Legislature to place few limits on relevant knowledge.[71]

While it would be fanciful to believe that New Zealand is completely devoid of practices that fall into Robert's category of malicious non-compliance (shredding, avoidance of official minute taking and yellow sticky labels) the long term advantages are far less certain than in a jurisdiction like Australia. New Zealand administrators know that the Ombudsman will query the absence of documentation and require a post facto attempt at reconstruction.

The fourth step of enshrining an overriding interpretative approach in favour of disclosure is one long advocated by supporters of FOI and law reform bodies such as the ALRC. The choice of external review body seems to have a determinative role in the success of this interpretation aim. If the judiciary is allocated a prime reviewing role it appears that as Justice Kirby acknowledges, that the outcome will be an interpretative approach that is narrow and legalistic. If the reviewing role is allocated to an administrative actor like an Ombudsman or Information Commissioner, it appears that the interpretative approach is more likely to be in favour of disclosure and facilitative of the legislation's objects and purpose to achieve a higher degree of open government.

Extreme care must be given to the design, function and structure of charging regimes in FOI legislation. As the ALRC acknowledged

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68 S Zifcak, "Thinking Clearly About the Right to Know: Britain's White Paper on Freedom of Information" (1998) 16 *AIAL Forum* 37.

69 Cm 3818, *Your Right To Know: The Government's Proposals for a Freedom Information Act*, (December 1997) (hereafter UK White Paper) at 18.

70 *Commissioner of Police v Ombudsman* [1985] 1 NZLR 578.

71 Ibid at 586

"the cost of obtaining information under the FOI Act is one of the most controversial aspects of the legislation."[72] The ALRC recommendation that charges should only be levied in respect of documents released would transform day to day practice of FOI administration. Agencies would be encouraged to release more information and applicants would not be confronted with the possibility of a prohibitive bill.

The sixth step would be to tackle the area of withholding provisions. This would be achieved by replacing the categorical approach to exemptions with a consequential approach. The parody that can result from a purely categorical approach to exemptions is best illustrated from a recent decision by the Tasmanian Ombudsman.[73] The Ombudsman held that whilst the vast majority of the 150 documents requested were purely factual material already in the public domain since 1996, they could not be released because they met the technical requirements of s 24 of the Tasmanian Act (Cabinet Exemption).

The reliance upon categorical exemptions in the designing of Australian FOI legislation has encouraged academics, the judiciary, external reviewers, law reform organisations and others to search for a simple interpretational formula that will unlock the stranglehold that exemptions have on Australian FOI practice. The search for an interpretational Holy Grail has been one of false promises and dashed expectations. The use of categorical exemptions seems to entice officials into approaching discretionary exemptions as mandatory. Officials seem drawn to a simple grasping of an automatic exemption, instead of asking how will the public interest best be served by choosing in descending order: release, partial release, non release at the present time and permanent non-disclosure only as a last resort.

The magnitude of the problems caused by categorical exemptions is governed by the presence or absence of various public interest considerations. In this arena of competing considerations, FOI practice seems to fall into a random system of overlapping exemptions, where information is allocated the same protection levels regardless of its merit, value or the consequences of its disclosure or non-disclosure. Purely factual information and information which is of the highest public interest (relating to public safety or breaches of the law) end up receiving equality of protection.

The seventh step would be to place public interest considerations at the core of all decisions to release and withhold information requested under an FOI Act. The UK White Paper has proposed that in deciding the standard that all decisions on disclosure should be determined, the test that ought to be used is "will the disclosure of this information cause substantial harm?"[74] This comprehensive

72 ALRC/ARC Report, above n 2 at para 14.1.

73 *Snell v Department of Premier and Cabinet*, Tasmanian Ombudsman, 30 May 1998, unreported.

74 UK White Paper, above n 69 at 16.

public interest should be applied to all decisions not to release information, including cabinet documents.

The eighth step would be to either completely remove internal review, or allow applicants to have the choice whether to pursue internal review or immediately seek access to external review. Design decisions about the review of decisions, by those creating or reconfiguring FOI legislation, are critical. An effective, inexpensive and timely mechanism for reviewing decisions refusing access lies at the heart of a successful FOI regime. The ALRC/ARC Review received a number of submissions highlighting the advantages and disadvantages of internal review (see Appendix 3).

The strong support within Australia for internal review is closely connected to the position of merits review within the "new administrative law" package. The accepted dogma within Australian administrative law is that the overall objective of a merits review system is to ensure that administrative decisions are correct and preferable.[75] Therefore any system that incorporates a merits review component will also ensure greater fairness, accessibility, timeliness, informality and openness of decision making.[76]

The ALRC/ARC Report finally expressed its preference for internal review but also opted to allow applicants the option to proceed directly to external review. This suggestion was strongly opposed by a number of agencies including Defence, Treasury, Finance, Prime Minister and Cabinet and Immigration. The Public Interest Advocacy Centre submission outlines the reasoning for this proposed reform:

> [A]ssist in improving the original decision making process within the agency to ensure that judgments are made within the terms of the legislation. Agencies would know that potentially they would be immediately accountable to external review ... Such a course would also benefit applicants in that costs and delay could be minimised if the issue appeared to be one that was so contentious it was heading for an external review in any case.[77]

Another consideration in removing an internal review avenue from FOI practice is to partly address serious problems with time delays associated with the handling of FOI requests. A compulsory internal review avenue factors in a mandatory time delay for many applicants. The Canadian Information Commissioner has described an increasing trend in time delays associated with the processing of FOI requests as a "festering silent scandal." The same phenomenon is no less evident in Australia. The 1997 Annual Reports in New South Wales and Queensland draw specific attention to increases in average processing times.

Roberts notes that one of the forgotten aspects of FOI is that it was meant to deliver timely access to information.[78] He reports that

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75 Administrative Review Council Report No 39, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (1995) at 11.

76 ALRC/ARC Report, above n 2 at para 13.2.

77 Ibid at para 13.4. Submission 34.

78 Roberts, above n 49 at 20.

in Canada "one of the most widespread complaints among the requesters interviewed for this study was that the principle of timely access is no longer respected by governments."[79] Timely delivery of information is one of the most critical benchmarks for the efficacy of an access regime. Most applicants, not only journalists, are seeking information whose immediate value is extremely time-sensitive. Days, weeks or months taken to resolve an FOI request can substantially erode the value and utility of the requested information.[80] Journalists often cite time delays as being a significant deterrent to their use of FOI. Yet most users only consider using FOI when there is an apparent immediate need for the information whether it be to investigate the commencement of legal proceedings, or required by a citizens group to help initiate public discussion on a particular governmental policy. Many years ago Nader made the point clearly and concisely:

> A well informed citizenry is the lifeblood of democracy; and in all arenas of government, information, particularly timely information, is the currency of power. ... In our polity, where ultimate power is said to rest with the people, a free and prompt flow of information from the government to people is essential to achieve the reality of citizen access to a more just governmental process.[81]

The ninth step would be to give the external review institution the power to order release of information. This is the approach favoured by the UK White Paper which argues that the power is "an essential guarantee of the Commissioner's role in ensuring that public authorities fulfil their duties under the Act."[82] In isolation this reform cannot transform FOI practice. A number of jurisdictions have given this power to their external review body and it has not improved administrative compliance.[83] The WA Information Commissioner has recently requested this power but has excluded its application to Cabinet documents.[84] However, there have been a number of instances in Australian FOI practice where documents technically exempt ought to have been released in the public interest.[85]

The tenth step would be to put into place something akin to Kirby's guardian mechanism or what the ALRC/ARC Discussion Paper 59 described as an "information monitor". The efficacy and support of FOI is closely linked to the good will of agencies and officials. Good will forms the life blood of FOI ranging from sufficiency of searches, approaches to interpretation, application of exemptions, timely delivery of information and avoidance of the

79 Ibid.
80 Ibid at 18.
81 Nader, above n 14 at 1.
82 UK White Paper, above n 69 at para 5.12.
83 Victoria is an example. Roberts indicates that such a power exists in Quebec, Ontario, British Columbia and Alberta.
84 WA Information Commissioner, above n 47 at 25.
85 See Sheridan and Snell, above n 44; WA Information Commissioner, above n 47 at 25.

non-compliance activity outlined in Appendix 1. It is the inclination of those who are crafting responses to FOI requests to resist the pressure, or perceived pressure, from superiors to withhold information which will make a real difference rather than a drafter's magic combination of prescriptive words.

It is not surprising that the design principles of Australian FOI reflect a perception that the legislation would need to survive an unwelcoming reception and the distinct possibility of a short life expectancy. These design principles reflect the history of FOI in Australia from its very slow uptake by reformers, to the difficult negotiation through the bureaucratic labyrinth and the stark conclusion of the ALRC/ARC Report that a culture of secrecy was still present after 13 years of operation at the national level in Australia. The New Zealand experience demonstrates the possibilities that can be achieved where the legislative framework reflects design principles based on a belief that such legislation would need to be evolutionary.

Good will has to be nurtured, encouraged, protected and evidence of bad faith immediately converted. Nader recognised that FOI legislation is "a unique statute, since its spirit encourages government officials to display an obedience to the unenforceable."[86] That good will needs not only to be inspired, monitored and protected internally within the bureaucratic lager but also by a determined, resourced, vigilant and encouraging external FOI constituency. The Western Australian Information Commissioner has expressed a desire to have the ability to carry out audits of agencies and has even mooted the desirability, in some way, to punish agencies that do not do the right thing. She states:

> Whilst I do not consider that, in normal circumstances, penalties should be applied against agencies who are slow to accept the challenge offered by FOI, applicants should not have to bear the consequences of such tardiness.[87]

Roberts has argued that performance monitoring is essential for any FOI system:

> Although the British plan has many strengths, it has one substantial weakness, which is shared to varying degrees by all Canadian FOI laws. No Canadian FOI system does an effective job of collecting and reporting the data that is needed to make judgements about the working of the FOI system as a whole.[88]

The second last reform would be to adopt the Queensland and Western Australian Information Commissioner model of dispute resolution. This has allowed conciliation and mediation to play a significant role in the access to information process. In 1997 the WA Information Commissioner conciliated 72% of the requests for external review.[89]

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86 Nader, above n 14 at 1.
87 WA Information Commissioner, above n 47 at 25.
88 Roberts, above n 49 at 59–60.
89 WA Information Commissioner, above n 47 at 25.

A final reform that is needed to ensure both the longevity of legislation like FOI and its capacity to achieve the objectives of its designers and supporters, is the existence and continuation of an active and diverse constituency. Roberts argues that the absence of an active constituency is a key contributing factor in the failing health of Canadian access legislation. Australian, New Zealand and Canadian FOI practice is marked by the absence of key non-governmental supporters or support organisations that can be called to arms or act as monitors of FOI practice external to the bureaucracy.

The design of FOI is based on a premise that raw information gained from governmental holdings will be converted into information that can be used to participate in policy development and, at a later stage, to evaluate the policy process in retrospect. Journalists, lawyers, lobby and community groups and academics are meant to be key actors in this conversion process. Yet in Australia we are either strangely silent, isolationist or reliant on the commitment of a small number of trusted public officials (Ombudsman, Information Commissioners, their staffs and a small number of hard pressed dedicated FOI officers).[90] External to the bureaucracy there is the occasional former campaigner who drops in from time to time, an occasional rogue academic and a small number of journalists (usually inspired by the efforts and words of Chadwick, Waterford and Ricketson) working on solo forays into the world of government held information.

FOI in Australia is treated as a jurisdictionally unique operation. Tasmanian academics, journalists and community groups react only to proposed changes to the Tasmanian Act. Developments in NSW receive no coverage outside its borders. Yet proposals for retrograde amendments, new ways of avoiding scrutiny and questionable practices (requiring Ministers to be notified of all requests before a decision to release or not is made) flow easily across the country.

Journalists and editors need to lift their sights, every now and then, from the immediate pursuit of a particular file to think about setting up an Australian version of the Reporters Committee for the Freedom of the Press. Lawyers need to stop occasionally and think about the design elements of access information rather than merely feeding at the trough. Academics need to contemplate a break from the endless pursuit of a respectable publication track record to helping make the machinations of FOI amenders and administrative non-compliers known to other citizens. In 1970 Nader urged that "there need to be institutions, be they universities, law reviews, public interest law firms, citizen groups, newspapers, magazines, or the electronic media who systematically follow through to the courts on denials of agency information".[91] Rather than limiting the

90 The next three paragraphs are taken from my December 1996 editorial in the *FOI Review*. Despite the passage of almost 2 years little has caused me to want to change the words or the tone.

91 Nader, above n 14 at 14.

focus to the courtroom we need to lift our focus to the complete interplay between FOI, governance, citizenship and democracy.

CONCLUSION

The UK White Paper shows the modifications which existing access legislation in Westminster systems like Australia and Canada need to embrace. This is not to argue that the Blair government is odds on favourites to produce world's best practice in access legislation. Zifcak notes:

> It did not start auspiciously—Britain's White Paper on Freedom of Information was leaked to the press prior to its final approval by Cabinet apparently in order to sidestep anticipated opposition from senior ministers in the Blair Government.[92]

In another paper I have expressed a number of serious concerns about several of the White Paper's proposals.[93] However the contrast between the design principles being advocated in the United Kingdom, and the increasing trend towards entropy in both legislative frameworks and operational practice of Australian FOI could not be more stark. Zifcak observes that "it also contains much from which established FOI jurisdictions can learn."[94] I believe that is an understatement.

We need a fresh start in Australia. A return to the drawing board. In the meantime the total FOI constituency needs to recharge, grow and demand timely access to the currency of power. The objective is access to information not an opportunity to be an informational mendicant.

92 Zifcak, above n 68 at 35.
93 Sheridan and Snell, above n 1 at 2–11.
94 Zifcak, above n 68 at 35.

Appendix 1: Administrative Compliance and Freedom of Information

	Malicious non-compliance	Adversarialism	Administrative non-compliance	Administrative compliance	Administrative activism
	Shredding	Automatic resort to exemptions	Inadequate resourcing	Requests handled in a co-operative fashion	High priority given to processing requests
	Deconstruction of files	Us versus Them mentality	Deficient record management	Objective is maximum release	Objective is maximum release outside FOI
	Relabelling of files	Sitting on requests	Cost recovery or minimisation major factors	Timely decisions	Information identified and available in public interest — without FOI requests
	Sticky labels	Significant delays in processing	Low priority attached to processing of requests	FOI officers key decision makers about release	FOI officers key actors in agency information management
	Pre-emptive exploitation of exemptions	Non-existent or very poor statement of reasons even at internal review stage	Adequate reason statements but often missing aspects (number of documents being withheld etc)	Exemptions only applied as a last resort and to the minimum extent possible	Exemptions waived if no substantial harm in release.
	Fee regimes manipulated to discourage request	Fee waivers rejected	FOI officers play a processing role		
	Internal reviews uphold original decision 90% + of times	Internal reviews uphold original decision 75% + of times	Internal review seen as preparing a better case for external review	Internal review new decision	Internal review an opportunity to refine information handling
	External reviews avoided	External reviews depicted as a battle against external reviewer	External review findings not fed back into decisionmaking process	External review decisions used as future guide	Adverse external review seen as a quality control check
TYPE OF INFORMATION					
Personal				✓	✓
Mid level policy			✓	✓	
High level policy	✓	✓	✓		
TYPE OF REQUESTER					
Individual				✓	✓
Active Group			✓	✓	
Journalists			✓		
Opposition MPs		✓	✓	✓	

Appendix 2: Redesigning Australian FOI

Key features	Present system	Proposed system
Design Feature	Freedom of Information	Access to Information
Coverage	Diminishing	Broad and linked to public purposes
The target of access	Documents	Information
Interpretation	Narrow	Pro-disclosure
Charges	Based on modified user pays	Based on released material
Withholding provisions	Categorical	Consequential
Public Interest	Specific	General
Internal Review	Yes	No
External Review	Non determinative	Information Commissioner with power to order release
Administering the Act	Ad hoc and internal	Systematic and external for 5 years
Dispute resolution	Legalistic	Alternative dispute resolution
FoI Constituency	Weak	Active
Designer Expectations	Hostile reception.	Evolutionary

Appendix 3: Views presented to ALRC/ARC on Internal Review

Arguments against[95]	Arguments for[96]
complicates appeal process	enables management to monitor decision making and allows an opportunity to correct original errors
unnecessary	educative role for agency staff
junior officers likely to play safe and give a restrictive decision – leaving it to be reviewed by a senior officer	conducive to developing cultural change within agencies
original decision only varied in 25% of cases	cost effectiveness for both agency and applicant
increases overall costs of administration	minimising number of appeals
should be optional allowing applicant to go straight to external review	provides opportunity for agency and applicant to revisit the decision

95 These arguments raised in ALRC/ARC Issues Paper 12 at para 8.4.
96 These arguments raised mainly in ALRC/ARC Discussion Paper 59 at para 9.3.

The Role of The Superannuation Complaints Tribunal

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THE FORGOTTEN TRIBUNAL

Until very recently,[1] the Superannuation Complaints Tribunal (the SCT) did not, to put it euphemistically, have a high profile. Essentially, it was the forgotten tribunal. It was never listed in major reports dealing with Commonwealth tribunals. It was not mentioned in academic text books, and only rarely made an appearance in journal articles and newspapers, save for industry-based magazines.

This omission is strange, particularly considering that the SCT is concerned with complaints about the most valuable asset most of us will ever own in our separate lifetimes—our superannuation benefits. These benefits are compulsorily acquired from us pursuant to federal legislation and are then held for the better part of our lives, usually by corporate trustees, in whom are reposed wide-ranging powers of management, investment and control. These powers extend to the quantification and distribution of both the accumulated and insured components of the benefit. For example, the trustee generally has the discretionary power to override the member's choice of nominated beneficiary in relation to the payment of a

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1 In the aftermath of the Full Federal Court decisions in *Wilkinson & Ors v CARE & Ors* (*Wilkinson*) (1998) 152 ALR 332; and *Breckler & Ors v Leshem* (*Breckler*) [1998] 57 FCA (unreported, 12 February 1998)—both decisions handed down on 12 February 1998.

death benefit (and often exercises this discretion).[2] The trustee/insurer also has the power to decide whether or not a member is entitled to receive a disability benefit in the event of mental and/or physical incapacity.[3] These are very significant powers, routinely involving amounts ranging anywhere between $10,000 and $200,000.[4] The need for a cost-effective,[5] "user-friendly" forum to deal with complaints arising from the exercise of such powers is patent.

ESTABLISHMENT OF THE SUPERANNUATION COMPLAINTS TRIBUNAL

In its first report on superannuation,[6] the Senate Select Committee on Superannuation (the SSCS), recommended the establishment of an external, alternative dispute resolution body to resolve the "hard core of disputes"[7] that could not be satisfactorily resolved internally between fund members/beneficiaries and their superannuation funds.[8] The SSCS's recommendation was adopted by the Keating Government and, subsequently, the SCT was established to meet this need. Prior to the establishment of the SCT, the only external avenue of review available to persons who had a superannuation-based grievance was through the court system, which was, according to the SSCS, "a costly, time-consuming and often distressing process."[9]

The SCT was set up as an independent, statutory body pursuant to the Superannuation (Resolution of Complaints) Act 1993 (Cth)(the SRC Act). The SRC Act was one of six cognate bills[10] which were introduced into the Commonwealth Parliament concomitantly with the Superannuation Industry (Supervision) Act 1993 (Cth)(the

2 Death complaints comprised the second largest category of all written complaints received during the 1996-97 year at the SCT that were within jurisdiction—24 per cent: Superannunation Complaints Tribunal, *Annual Report 1996-97* at 37-8.

3 Disability complaints comprised the largest category of all written complaints within jurisdiction—27 per cent—in the 1996-97 year: ibid at 37-8.

4 Note that, unlike "industry-based" dispute resolution bodies, the SCT does not have a pecuniary limit; although the SCT may withdraw a complaint under s 22(3)(b) of the Superannuation (Resolution of Complaints) Act 1993 (Cth) (the SRC Act) on the basis that it is "trivial" if a very small amount is involved.

5 The SCT operates cost-free to complainants and is funded by an industry levy which is paid into Consolidated Revenue, so it is not a direct charge on the taxpayer.

6 Senate Select Committee on Superannuation (SSCS report), *Safeguarding Super: The Regulation of Superannuation* (June 1992).

7 Ibid at 142.

8 Albeit that the SSCS envisaged an industry-based model comprising members nominated by the Minister: ibid at 142-3.

9 Ibid at 142.

10 The other five bills were: Occupational Superannuation Standards Amendment Bill 1993 (Cth); Superannuation (Financial Assistance Funding) Levy Bill 1993 (Cth); Superannuation (Rolled-Over Benefits) Levy Bill 1993 (Cth); Superannuation Supervisory Levy Amendment Bill 1993 (Cth); Superannuation Industry (Supervision) Consequential Amendments Bill 1993 (Cth).

SIS Act). These seven bills were intended to give effect to the superannuation reformation announced in the Labor Government's "Strengthening Super Security" statement of 21 October 1992. In essence, the bills repealed the Occupational Superannuation Standards Act 1987 (Cth) (OSSA)[11] which, until this time, had been the principal enactment regulating the operation of superannuation funds in Australia, and implemented a new prudential supervisory regime[12] which focussed on the direct control and regulation of the superannuation industry.[13] It was intended that the SCT fulfil an integral and necessary role in this overall scheme in terms of consumer protection. The SCT commenced operation on 1 July 1994, although it was not formally opened until 15 December that same year.[14]

THE ROLE AND DEVELOPMENT OF THE TRIBUNAL

The role of the SCT, as envisaged by the Government and by the Parliament, was and is, both straightforward and simple in concept:

> This body will seek to resolve complaints by fund members or the beneficiaries of funds about the decisions made by trustees where those decisions may be unfair, unreasonable or beyond power. The tribunal will first attempt to conciliate the complaints, before taking measures to review the trustee's decision. In this regard, the tribunal proceedings will not be bound by the rules of procedure and evidence and, as an administrative body, the tribunal will have no enforcement powers. So questions of law will have to be referred to the Federal Court.
>
> The tribunal is bound to affirm the trustee's decision unless it is satisfied that the decision was clearly unfair or unreasonable, although the legislation provides no criteria as to what might be unfair or unreasonable in this context.[15]

With these objectives in mind, the SCT was legislatively designed as an adjunct to the existing court system. Its purpose

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11 Enacted under the Commonwealth Constitution, s 51(ii) (taxation power). SSCS Report, above n 6 at 24, para 3.13.

12 Enacted under the Commonwealth Constitution: s 51(ii) (taxation power), s 51(xx) (corporations power) and s 51(xxiii) (pensions power). SSCS Report, above n 6, ch 3, esp at 27, para 3.28. Note particularly s 5A of the SRC Act which was specifically inserted in 1995 as a constitutional protection so that, in the event of a successful challenge to the SCT's power based upon the Commonwealth Constitution, s 51(xxiii) (pensions power), the entire scheme underlying the SRC Act would not be invalidated: see Explanatory Memorandum to the Superannuation Industry (Supervision) Legislation Amendment Bill 1995 (Cth) at 31, item 154.

13 Cf OSSA sought to indirectly regulate superannuation funds by granting taxation concessions only to funds which complied with certain minimum standards as specified in that Act.

14 The SCT was formally opened by the then Treasurer, the Hon Ralph Willis MP, and also held its first review meeting on this date.

15 H Reps Deb 1993, Vol 189 at 1068 per Mr Johns (then Parliamentary Secretary to the Treasurer), 2R speeCh

was to filter out those superannuation-related grievances which could most effectively be dealt with by inquiry, conciliation and/or *de novo* merits review[16] in a "fair, economical, informal and quick"[17] manner. Those complaints and those persons who do not fit within the SCT's stringent jurisdictional and standing requirements are invariably those which involve the more complex matters which cannot "fairly" be accommodated "economically, informally and quickly". Such matters are, therefore, more suited to resolution via judicial procedures in a court of law.

Initially, the SCT's jurisdiction was confined to dealing with certain decisions/conduct of trustees of "regulated superannuation funds"[18] and "approved deposit funds".[19] However, a range of constitutional[20] and operational[21] problems surfaced in the SCT's first year. These problems were addressed by the Government and implemented by the Parliament in Schedule 5 of the Superannuation Industry (Supervision) Legislation Amendment Act 1995 (Cth) (SISLA), one of the "main purposes" of which was to "expand and strengthen the jurisdiction" of the SCT.[22] Thereafter,[23] the SCT's jurisdiction encompassed not only trustees, but also insurers[24] and included "life policy funds" and "annuity policies".[25] The number of Tribunal Members was also commensurately increased.[26]

In 1997, the SCT's jurisdiction and powers were further expanded and streamlined pursuant to Schedule 2 of the Retirement Savings Accounts (Consequential Amendments) Act 1997 (Cth) (the RSA(CA) Act)[27] and Schedule 4 of the Superannuation Contributions Tax (Consequential Amendments) Act 1997 (Cth)(the SCT(CA) Act).[28] The RSA(CA) Act empowered the SCT to deal with various complaints relating to Retirement Savings Accounts (RSAs);[29] while the SCT(CA)

16 SRC Act, s 12.
17 Ibid at s 11.
18 Ibid at s 3(1) as defined in SIS, ss 10(1) and 19.
19 Ibid at s 3(1) as defined in SIS, s 10(1).
20 Discussed in detail below.
21 The operational aspects will not be discussed in this paper. For a full account refer to the SCT's *Annual Report 1994-95*, ch 1; *Annual Report 1995-96*, chs 3 - 4; and *Annual Report 1996-97*, chs 3 - 4.
22 H Reps Deb 1995, Vol 205 at MC 3398, per Mr Elliott (then Parliamentary Secretary to the Treasurer and to the Minister for Communication and the Arts), 2R speeCh
23 Most of SISLA commenced operation on 12 December 1995; the remainder on 19 April 1996.
24 SRC Act, ss 14A, 15A and 15B.
25 As defined in the SRC Act, s 3(2): "annuity policy", "life policy" and "life policy fund" are referable to the Life Insurance Act 1995 (Cth).
26 The maximum number of part-time Tribunal Members was increased from 8 to 10 (ibid at s 7(1)) and the position of "Deputy Chairperson" was created (ibid at s 7(1),(2A)).
27 Operative as of 2 June 1997. According to the *Explanatory Memorandum*, the purpose of the amendments was "to ensure consistency in the treatment of complaints relating to all superannuation products."
28 Operative as of 5 June 1997.
29 SRC Act, ss 15E, 15F, 15H and 15J.

Act enabled the SCT to deal with certain complaints about decisions of "superannuation providers"[30] in respect of the calculation of superannuation contributions subject to the surcharge tax.[31]

CONSTITUTIONAL PROBLEMS AND ANOMALIES

The progressive enhancement of the SCT's jurisdiction and powers evidences governmental and parliamentary intent to lay down a comprehensive complaints-handling regime both in the private and, where possible, in the public sector,[32] with the SCT as its centrepiece.[33] However, intention and ability are not synonymous concepts. The case law shows that it is quite common for adjudicative bodies to be invested with unconstitutional powers, irrespective of governmental and parliamentary intent. Sometimes, the problem may be cured by legislative amendment to tailor the body's powers to its character.[34] Other times, it has been found necessary to reconstitute the body, or even to abolish it altogether.[35] However, there are times where the constitutional problems are "perceived", rather than "actual", and the activation of the doctrine of the separation of powers, as a remedial tool, amounts to no more than a "knee-jerk" judicial reaction. Such times, to cite Barwick CJ, serve no purpose other than to introduce "excessive subtlety and technicality

30 As defined in the SRC Act, s 3(2) and referable to the Superannuation Contributions Tax (Assessment and Collection) Act 1997 (Cth), s 42: ie the trustee of a superannuation fund (note that the fund is not specified to be "regulated" which may simply be a drafting oversight) or of an approved deposit fund; an RSA provider; a life assurance company; or a "registered organisation" as defined in the Income Tax Assessment Act 1936 (Cth), Part III, Div 8A.

31 SRC Act, s 15CA.

32 *Heads of Government Agreement between the Commonwealth and States on Exempt Public Sector Schemes*—late 1995/early 1996; and, Superannuation Complaints Tribunal, *Annual Report 1995-96* at 19-20; *Annual Report 1996-97* at 24-5.

33 At the time of writing this paper, yet another amending bill is before the Parliament—the Superannuation Legislation Amendment Bill 1997 (Cth) (SLAB). SLAB was introduced into the House of Representatives on 27 November 1997, and passed on 26 March 1998. It was then introduced into the Senate on 30 March 1998. It is expected that the Senate will consider SLAB once Parliament resumes sitting after the October 1998 federal election. Schedule 3 of SLAB specifically aims to amend the SRC Act by, *inter alia*, streamlining Tribunal procedures, rectifying certain inadvertent anomalies, and clarifying diverse provisions concerning remedies, notification requirements and penalties.

34 Section 140 of the *Conciliation and Arbitration* Act 1904 (Cth) purported to invest the Commonwealth Industrial Court with an "administrative" power—see *R v Spicer: Ex parte Australian Builers' Labourers Federation* (1957) 100 CLR 277; sections 44, 50 and 51 of the *Income Tax Assessment Act 1922* (Cth) purported to invest the Taxation Board of Appeal with judicial power—see *British Imperial Oil Co Ltd v FCT* (1925) 35 CLR 422.

35 Eg the Interstate Commission in *New South Wales v Commonwealth* (*the Wheat case*) (1915) 20 CLR 54; the Commonwealth Court of Conciliation and Arbitration in *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 and (as reconstituted in 1926) in *R v Kirby; Ex parte Boilermakers' Society of Australia* (*the Boilermakers' case*) (1956) 94 CLR 254.

in the operation of the Constitution, without ... any compensating benefit."[36]

It is submitted that this last is the case in respect of the SCT's current constitutional problems.

The Federal Court of Australia has, both at first instance and upon appeal, specifically considered the constitutionality of the SCT's review powers in a number of cases,[37] culminating in the tandem cases of *Wilkinson & Ors v CARE & Ors* (*Wilkinson*)[38] and *Breckler & Ors v Leshem* (*Breckler*).[39] In *Wilkinson* and *Breckler*, the majority[40] of the Court held that the SCT's review function, as set out in s 37 of the SRC Act, was "wholly" invalid on constitutional grounds in that it purported to confer the "judicial power of the Commonwealth" upon the SCT in contravention of Chapter III of the Commonwealth Constitution. Less drastically, but still very significantly in operational terms,[41] the minority[42] was of the view that the SCT's review powers were limited to reviewing discretionary[43] exercises of power.[44] This meant that non-discretionary[45] exercises of power lay outside the SCT's jurisdiction, even although there are many sorts of non-discretionary decisions which may also be unfair or unreasonable.[46]

Significantly, because the majority decision was jurisdictionally based, the result has been to invalidate *ab initio* every determination the SCT has ever made since December 1994; put into "limbo" the two

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36 *R v Joske: Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87 at 90.

37 *Pope & Ors v Lawler & Ors* (1996) 41 ALD 127; *Dobrich v Pope & Ors* (No. WG 61 of 1996); *National Mutual Life v Jevtovic* [1997] 359 FCA (Sundberg J, 8 May 1997, unreported); *Briffa & Ors v Hay* (1997) 147 ALR 226; *Collins v AMP Superannuation Ltd & Piscioneri* (1997) 147 ALR 243; *Bassett & Partners v Doherty* [1997] 715 FCA (Northrop J, 31 July 1997, unreported); *CARE & Life Reinsurance of Australia Ltd v Bishop* [1997] 714 FCA (Northrop J, 31 July 1997, unreported).

38 (1998) 152 ALR 332.

39 [1998] 57 FCA (Lockhart, Heerey and Sundberg JJ, 12 February 1998, unreported).

40 Lockhart & Heerey JJ (judgment delivered by Heerey J, in which Lockhart J concurred).

41 Eighty per cent of the complaints that reach the review stage involve non-discretionary exercises of power by decision-makers.

42 Sundberg J.

43 Eg, a decision as to the quantitative distribution of a death benefit between potential beneficiaries.

44 This view was based upon the fairness and reasonableness concept legislatively enshrined in the grounds and review provisions of the SRC Act (and will be discussed in detail below). Note: The majority also agreed with this view in the case of *Wilkinson*. Cf Merkel J in *Briffa v Hay* (1997) 147 ALR 226 and in *Collins v AMP Superannuation Ltd & Piscioneri* (1997) 147 ALR 243.

45 Eg, a decision, based on factual criteria, as to the payment of a total and permanent disability benefit or a death benefit.

46 Eg, where a decision-maker fails to make a decision as to a non-discretionary entitlement; or, where the view taken by the decision-maker of its legal obligations is not reasonably open to it as a matter of fact or law. According to Merkel J, excluding non-discretionary exercises of power from the SCT's jurisdiction "would be inconsistent with the statutory scheme" and would "defeat, rather than give effect to, the purposes of the Complaints Act"—B*riffa & Ors v Hay* (1997) 147 ALR 226 at 237.

hundred matters currently at the review-stage; and, jeopardise the very existence of the SCT itself.[47] The ramifications attaching to such an outcome are demonstrably so fundamental and far-reaching that any court should eschew such a result unless the principles at stake are so great as to warrant the severity of the "cure".

THE MAJORITY JUDGMENT OF THE FULL FEDERAL COURT IN THE CASES OF *WILKINSON* AND *BRECKLER*:

The majority judgment[48] was "cumulatively"[49] based upon five factors:

1 the private law/public law dichotomy which, it was said, precluded the SCT from reviewing a "private law" trustee, insurer, or employer decision;
2 the contention that only a "governmental body" can initiate proceedings before an administrative tribunal; whereas, in the case of the SCT, proceedings are instituted by individuals;
3 the perceived "judicial" nature of the review power exercised by the SCT based upon the inclusion of the "fairness and reasonableness" concept in the grounds and review provisions of the SRC Act;
4 the perceived inability of the SCT to pronounce upon matters of policy;
5 the purported "conclusiveness" of the SCT's enforcement regime.

Factor 1: The Private Law/Public Law Dichotomy:

The majority judges were of the opinion that the SCT was impermissibly intruding into the sphere of private law, which they believed was the exclusive province of the courts. This made the SCT's function "essentially different"[50] from that of a body—such as the AAT—which juridically "stood in the shoes" of a government decision-maker. According to the majority, the rights and obligations of SCT complainants vis à vis private decision-makers[51] were based upon private law "property rights" established under trust and contract law. Such rights, they said, were constitutionally outside the purview of the SCT. This is a novel view, unsupported both in law and in prac-

47 In response, the Attorney-General, by way of intervener, lodged Applications for Special Leave to Appeal both decisions to the High Court of Australia—*A-G(Cth) v CARE & Ors* (M18 of 1998) and *A-G(Cth) v Breckler & Ors* (P10 of 1998). Subsequently, however, the parties (ie, the Trustee, the Insurer and Mr Bishop) in A-G v CARE reached a settlement and the Application was discontinued as of 18 June 1998. The remaining Application in respect of *A-G v Breckler* was granted on 19 June 1998 and the hearing has been set down for 8 December 1998—*A-G(Cth) v Breckler & Ors* (P28 of 1998).

48 The majority judgment was articulated in *Wilkinson* and expressly adopted in *Breckler*.

49 (1998) 152 ALR 332 at 345-7 per Heerey J.

50 Ibid at 345 per Heerey J.

51 That is, trustees, insurers and employers.

tice.[52] Although, it must be said that a like situation in respect of the Human Rights and Equal Opportunity Commission (HREOC), has given rise to speculation by one writer[53] that perhaps the High Court's "particularly restrictive" application of the doctrine of the separation of powers in the case of *Brandy v HREOC* (*Brandy*)[54] was precipitated by the fact that HREOC's review powers "extended beyond the normal domain of administrative review"[55] to disputes between individuals. I disagree with this supposition for three reasons. First, on the facts, I disagree that the Court's application of the doctrine of the separation of powers in *Brandy* was "particularly restrictive". Given that s 25ZAB of the Racial Discrimination Act 1975 (Cth) automatically gave effect to a registered administrative decision as if it were a judicial order, it followed, on normal principles, that neither the decision nor the provision was constitutionally sound.[56] Secondly, there is nothing whatsoever in the judgements in *Brandy* to suggest that any member of the Court took the private law factor into account.[57] In fact, it was clear that, but for the frailty of the enforcement regime, the powers exercised by HREOC would have been regarded by the Court as administrative in nature.[58] Thirdly, I am aware of no reason in law[59] which puts it beyond the capacity of a sovereign parliament, acting within the confines of its jurisdiction, to enact legislation empowering an administrative body to deal with private law disputes, provided only that it is open to the parties to appeal the decision to a court of law. To this end, I regard Griffith CJ's

52 Eg, the Small Claims Tribunal and the Residential Tenancies Tribunal in Victoria deal with contractual disputes (Note: the fact that the separation of powers doctrine does not apply at a State level is irrelevant for the purposes of characterising the nature of powers and functions). Similarly, at a Commonwealth level, Registrars of the Family Court of Australia routinely decide a range of matters as between private persons under the Family Law Act 1975 (Cth). Likewise, administrators deal with various matters involving bankrupts and trustees under the Bankruptcy Act 1966 (Cth) - eg: review of trustee decisions by the Inspector General under s 139ZD.

53 J Nand, "Judicial Power and Administrative Tribunals: The Decision in *Brandy v HREOC*" (1997) 14 *AIAL Forum* 15 at 25, 26.

54 (1995) 183 CLR 245.

55 Nand, above n 53 at 25.

56 Particularly so, considering that the nature of the rights involved clearly fell within the ambit of those "basic rights" described by Jacobs J as the sorts of rights which traditionally and historically are judged by "the bulwark of freedom"—ie, by an independent judiciary: *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 11.

57 A factor which is also acknowleged by Nand, above n 53 at 25.

58 (1995) 183 CLR 245 at 269 per Deane, Dawson, Gaudron and McHugh JJ.

59 Historically there are certain areas of law which are regarded by the courts as involving processes which are "judicial" in character: eg, the law of bankruptcy which had its origins in criminal law: *Clough v Samuel* (1905) AC 442 at 444. However, tradition notwithstanding, it is accepted that it remains open to the Parliament to empower an administrator to deal with such matters via non-judicial procedures should it choose to do so: *R v Davison* (1954) 90 CLR, 353 at 364-5 per Dixon CJ and McTiernan J: Fullager J at 376; and Taylor J at 389. See also *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11-12 per Jacobs J.

"classic" definition of judicial power,[60] which exclusively tied the concept of judicial power to the court's ability to "decide controversies" relating to "life, liberty or property", as applying only to a *conclusive*[61] determination of such a controversy.[62]

Moreover, despite the majority's peremptory disposal of the issue, the private law/public law interface is far from clear-cut, and has long plagued and intrigued administrative lawyers. According to Galligan, the legal face of society has changed in contemporary western societies as the State has progressively taken control of "wider spheres of social and economic activity"[63]. As a consequence, public law has made inroads into traditional private law areas by using the "public interest" maxim both as a means and a justification. Simultaneously, he says, the emphasis has moved from:

> [P]rivate rights, guaranteed by explicit legal norms and enforceable by legal institutions, to a system in which power is exercised by officials according to a wide sense of the public interest, which includes, but is much wider than the personal interests of individuals.[64]

This raises obvious problems for the courts' endeavours to ensure administrative accountability and thereby compliance with the rule of law. If the discretionary powers reposed in administrators are predicated upon broad, subjective criteria, such as the "public interest", or a general test of "reasonableness", it becomes difficult for courts to apply legal norms and principles without, themselves, usurping the role of the administrator and thereby infringing the doctrine of the separation of powers. Galligan says:

> The role of the courts depends not only on the constitutional arrangements of the eighteenth century but also on a sensitive understanding of the twentieth.[65]

There is much to be said for this perspective.

Factor 2: The Contention that Only a "Governmental Body" can Initiate Proceedings Before an Administrative Tribunal:

According to Heerey J in *Wilkinson v CARE*:[66]

> [T]he Tribunal's jurisdiction is enlivened by the complaint of an individual (s 14(2)). By contrast, one of the indicia of administrative as opposed to judicial functions is that only a governmental body can initiate proceedings: *Precision Data* at 190, *R v Trade Practices Tribunal*; *ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 375.[67]

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60 *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.

61 In the words of Griffith CJ: "a binding and authoritative decision": ibid.

62 Furthermore, according to Hall, Griffith CJ's classic statement in *Huddart Parker* is referable to "the primary or private law aspect" of judicial power, rather than to the "secondary or public law aspect": see AN Hall, "Judicial Power, the Duality of Functions and the Administrative Appeals Tribunal" (1994) 22 *FLR* 13 at 14.

63 D J Galligan, "Judicial Review and the Textbook Writers" (1982) 2 *OJLS* 257.

64 Ibid.

65 Ibid at 260.

66 (1998) 152 ALR 332.

67 Ibid at 346.

With respect, it is contended that Heerey J misread the judgments cited and that his characterisation of the above factor as an indicium of an administrative function is misconceived and incorrect, both in case law and in common practice.[68]

While it is true that there is no exclusive and conclusive definition of "judicial power", it is generally accepted[69] that a court should begin with the "classic statement" set down by Griffith CJ in the case of *Huddart Parker & Co Pty Ltd v Moorehead*.[70] According to Griffith CJ, "judicial power" comprises three elements:

- a conclusive determination;
- of a controversy;
- about existing rights.

It is submitted that the judgements in the cases of *Precision Data Holdings v Wills* (*Precision Data*)[71] and *R v Trade Practices Tribunal*; *ex parte Tasmanian Breweries Pty Ltd* (*Tasmanian Breweries*),[72] as cited by Heerey J, were simply making the point that the indicator of "controversy" was missing in the particular circumstances before the Court; not that the classification of an applicant as a "governmental body" was as essential ingredient in characterising the adjudicative body as administrative in nature.

The Decision in Precision Data:

The decision in *Precision Data*[73] was a joint judgment of the Full Court of the High Court of Australia before Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. The crucial issue in *Precision Data* was whether or not the Corporations and Securities Panel (the Panel) exercised the judicial power of the Commonwealth in the course of making certain declarations (pursuant to ss 733 and 734 of the Corporations Law) concerning the acquisition of shares in Precision Data Holdings Ltd in a "take-over" bid. The Court unanimously decided that the Panel did not exercise judicial power.

One of the major factors bearing upon the High Court's decision was its finding that the object of the Panel's adjudication was not to resolve a dispute about existing rights and obligations, but to determine what future legal rights and obligations should be created as between the parties. Integral to this finding was the *locus standi* requirement that only the Australian Securities Commission (the ASC) could institute s 733 proceedings before the Panel and invoke its authority. The ASC was "not seeking vindication of any right or obligation",[74] thus the Panel's declaration, when made, did "not

68 Ie, many tribunals exercising administrative power routinely deal with applications from individual members of the public—eg: Administrative Appeals Tribunal; Native Title Tribunal.

69 *Brandy v HREOC* (1995) 183 CLR 245.

70 (1908) 8 CLR 330 at 357.

71 (1991) 173 CLR 167.

72 (1970) 123 CLR 361.

73 (1991) 173 CLR 167.

74 Ibid at 190.

resolve an actual or potential controversy as to existing rights."[75] Significantly, therefore, in the Court's opinion, one of the classic indicia of judicial power—the "controversy" factor—was missing.

The Decision in Tasmanian Breweries:

The *Tasmanian Breweries*[76] case was heard before the Full Court of the High Court of Australia by McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ. McTiernan, Kitto, Windeyer, Owen and Walsh JJ held that the Trade Practices Tribunal did not exercise judicial power. Menzies J, on the other hand, thought that s 49 of the Trade Practices *Act* 1965–68 (Cth)(the TP Act) required the Tribunal to act judicially. The issue in this case was whether or not provisions in Part VI of the TP Act were repugnant to Ch. III of the Commonwealth Constitution in that they conferred judicial power upon the Trade Practices Tribunal.

Both Kitto and Windeyer JJ referred specifically to the role of the Commissioner of Trade Practices as the only person authorised to institute proceedings before the Tribunal. Once again, as in *Precision Data*, the emphasis upon this factor was to illustrate that the matter before the Tribunal was not a "controversy". According to Kitto J:

> He [the Commissioner] is of course a party to the proceedings, but he does not come before the Tribunal asserting a right to relief in either a personal or a representative capacity.[77]

Windeyer J said:

> The Tribunal is not set in motion to adjudicate in a dispute between parties. It is set in motion by the Commissioner of Trade Practices. Indeed, as I understand the Act, individual persons cannot directly initiate proceedings. This may lessen the effectiveness of Parliament's plan; but it is an additional feature that tells against the proposition that the Tribunal exercises the judicial powers.[78]

Clearly, when read in context, their Honours were not laying down a general indicium in relation to characterising either judicial or administrative power. The "additional factor" telling against the proposition that the Trade Practices Tribunal was exercising judicial power was simply that the only persons who could initiate proceedings in respect of "controversies" were precluded from doing so under the TP Act; so again, one of the classic indicia of judicial power was necessarily absent.

Factor 3: The Nature of the SCT's Review Power:

According to the majority judges, the SCT's review function amounted to an exercise of judicial power because it involved the application of the law to facts found, both past and present.[79] In their opinion, the SCT was not concerned with the creation of future rights as

75 Ibid.
76 (1970) 123 CLR 361
77 Ibid at 373.
78 Ibid at 403.
79 (1998) 152 ALR 332 at 346 per Heerey J.

between the parties—which would have been constitutionally sound,[80] but rather with the application of a new substantive right created by the SRC Act: the "right [of complainants] not to be adversely affected by decisions of a trustee which are not fair and reasonable."[81]

While I disagree with the majority's evaluation of the SCT's review function,[82] it is easy to see why such a conclusion was reached. The text and structure of the SRC Act are misleading. Most surprisingly, in the light of the SCT's *de novo* review function, a grounds provision—s 14(2), was inserted into the SRC Act.[83] Section 14(2) introduces the "fairness and reasonableness" concept[84] into the SRC Act and ties it to the review provision—s 37,[85] by way of ss 37(4) and (6). The application of this concept is fundamental to ascertaining the ambit of the SCT's jurisdiction because it sets the parameters of the SCT's determinative powers at review.[86] The SRC Act does not define "fair/unfair" and "reasonable/unreasonable" for the purposes

80 There is extensive judicial authority supporting the contention that such an exercise of power is administrative in nature. See: *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189; *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140 at 149; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 376, 411-12; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 at 64; *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656.

81 (1998) 152 ALR 332 at 346 per Heerey J.

82 My view accords with the governmental view expressed below: see n 95 below. See also G Williams "The End of the Road for the Superannuation Complaints Tribunal?" (1998) 1 *J Aust Tax* 31 at 38.

83 See also the equivalent grounds provisions in the SRC Act, ss 14A(1), 15A(1), 15B(1), 15CA(1), 15E(1), 15F(1), 15H(1) and 15J(1). Note, however, that for ease of reference, s 14(2) will be cited as the grounds provision throughout this paper. Also note that the SCT has, to date, dealt only with s 14 complaints; thus, s 14(2) was the grounds provision specifically considered by the Federal Court of Australia.

84 Note that the Government rejected a "vague" unfairness or public interest test in favour of the standard "objective" fairness and reasonableness test, because it was believed that the former would be strongly opposed by the insurance industry as creating uncertainty in the market place (eg, by enabling the SCT to override "objectively" structured contractual obligations based upon vague and highly subjective review criteria). As to the judicial interpretation of the concept, see *Pope & Ors v Lawler & Ors* (1996) 41 ALD 127 (Federal Court at first instance per Nicholson J) and *Dobrich v Pope & Ors* (No WG 61 of 1996) (on appeal to the Full Court of the Federal Court per Hill, Carr and Lehane JJ—although note that this case was resolved after commencement of the proceedings by agreement as between the parties; consequently, the comments made by the Court have no precedential value). See also E Campbell, "Administrative Tribunals and the Separation of Powers" (1981) 12 *FLR* 24 at 30-1.

85 Reproduced in full in Appendix A. Note also the equivalent review provisions in the SRC Act, ss 37A, 37B, 37C, 37CA, 37D, 37E, 37F and 37G. As with the grounds provision, for ease of reference, s 37 will be cited as the review provision throughout this paper. Likewise, s 37 was the specific provision considered by the Federal Court and the only provision under which the SCT has, to date, exercised its review function.

86 SRC Act, ss 37(6), 37A(7), 37B(4), 37C(5), 37CA(5), 37D(4), 37E(6), 37F(4) and 37G(6).

of the Act,[87] although various factors to be considered in assessing the fairness and reasonableness of certain insurance-related decisions and decisions of RSA providers are listed.[88]

Initially, s 14(2) enabled a person to make a complaint to the SCT on the grounds that the decision: "(a) was in excess of the powers of the trustee; (b) was an improper exercise of the powers of the trustee; or (c) is unfair or unreasonable." However, as a consequence of the High Court of Australia decisions in *Brandy*[89] and *Re Dingjan; Ex parte Wagner*,[90] s 14(2) was amended by the deletion of paragraphs (a) and (b).[91] It was thought that these two paragraphs were expressed in a way that could be interpreted as empowering the SCT to review the legality, as well as the merits, of a trustee's decision, thereby amounting to an exercise of judicial power.[92] The amended (and current) version of s 14(2) reads as follows:

> **14(2) [Grounds]** Subject to subsection (3)[93] and section 15[94], a person may make a complaint (other than an excluded complaint)[95] to the Tribunal, that the decision is or was unfair or unreasonable. [footnotes added]

Following this amendment, the Government was confident that any potential constitutional problems had been satisfactorily addressed.[96] As a threshold step,[97] the SCT was required to ascertain whether or not the relevant decision was "fair and reasonable" in its operation in relation to particular persons as set out in s 37(6) of the SRC Act. If so, the decision was to be affirmed. Alternatively, if the

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87 Nicholson J in *Pope & Ors v Lawler & Ors* (1996) 41 ALD 127, 135 held that "fair" meant "just, unbiased, equitable, impartial"; and, "reasonable" meant "within the limits of reason; not greatly less or more than might be thought likely or appropriate." This view has been subsequently endorsed by the Federal Court – eg, *National Mutual Life v Jevtovic* [1997] 359 FCA (unreported, 8 May 1997) per Sundberg J.

88 SRC Act, ss 14A(2),(4),(5); 15A(3),(4); 15B(6); 15E(3),(4); 15F(10), 15H(3),(4) and 15J(10).

89 (1995) 183 CLR 245.

90 (1995) 183 CLR 323.

91 SISLA, Schedule 5, item 28: operative as of 12 December 1995.

92 Explanatory Memorandum to the SISLA Bill, item 28. Author's note: In my view, the deletion of paragraphs (a) and (b) was unnecessary given that the decision of the SCT is not "conclusive" in law.

93 Section 14(3) sets out time limits in relation to certain death benefit complaints.

94 Section 15 sets out *locus standi* requirements.

95 An "excluded complaint" is defined in the SRC Act, s 3(2) and referable to the SRC Regulations, r 4. [Note that r 4 was repealed by the Superannuation (Resolution of Complaints) Regulations (Amendment) No 118 of 1997—commencing 2 June 1997—because the substance of the regulation had been incorporated into the SRC Act itself by Schedule 5 of SISLA, and by Schedule 2 of the RSA(CA) Act, thereby rendering the regulation otiose.]

96 H Reps Deb 1995, Vol 205 at MC 3399, per Mr Elliott (then Parliamentary Secretary to the Treasurer and to the Minister for Communications and the Arts), 2R speech; and at MC 3415, per Mr Rocher (the Member for Curtin), MC.

97 The methodology to be followed by the SCT was set out by Merkel J in *Collins v AMP Superannuation Ltd & Piscioneri* (1997) 147 ALR 243 at 254-6; likewise per Sundberg J in *National Mutual Life v Jevtovic* [1997] 359 FCA (8 May 1997, unreported) at 10; and by Lehane J in *Dobrich v Pope & Ors* (No WG 61 of 1996)—Transcript of Proceedings 17 March 1997 at 14.

SCT was of the opinion that the decision was not "fair and reasonable", s 37(3) was activated and the SCT utilised the remedies set out therein[98] (provided, of course, that the grounds of "unfairness or unreasonableness" were made out).[99] On this view, the SCT's opinion as to the legality, or the fairness and reasonableness, of the particular decision does not form a part of its own final decision; it is simply a step along the way (or incidental to) reaching that final decision. It is the final decision, or determination, that creates the future relationship as between the parties.[100]

If anything at all is clear from this discussion, it is that the majority's characterisation of the SCT's review powers as "judicial" is far from cut and dried. The High Court has unsuccessfully been trying to distil a workable definition of "the judicial power of the Commonwealth" for over eighty years.[101] At best, it has come up with a list of inconstant criteria, none of which are both necessary and sufficient as indicators of judicial power. Consequently, in characterising a power, the courts have a considerable amount of latitude.

According to the leading judgment of Jacobs J in *R v Quinn; Ex parte Consolidated Foods Corporation*,[102] there are two "distinct" questions which a court must ask when characterising a function. First, what did the Parliament intend? Secondly, is the power of a kind which is capable of being characterised as either judicial or administrative?[103] In the course of his leading judgment in *Munro v FCT*[104] Isaacs J said:

> Nullification of enactments and confusion of public business are not lightly to be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will. Construction of an enactment is ascertaining the intention of the legislature from the words it has used in the cir-

98 Under s 37(3) the SCT may affirm the decision, remit the matter back to the decision-maker for reconsideration in accordance with directions, vary the decision, or set the decision aside and substitute its own. Note that a broader range of remedies is available to the SCT in relation to some other of its review provisions—SRC Act, ss 37A(3),(4); 37B(2) 37D(3); 37F(3),(5): eg, amendment of the governing rules of a superannuation fund; cancellation or amendment of the terms of a life policy or an RSA; ordering the repayment of monies and/or the repayment of interest.

99 Note that the concept of fairness and reasonableness as set out in s 37(6), is narrower than the unfairness/unreasonableness concept which attaches to the grounds provision and to s 37(3): *Collins v AMP Superannuation Ltd & Piscioneri* (1997) 147 ALR 243 at 255 per Merkel J. This difference further complicates the operation of the SRC Act, especially in relation to the discretionary/non-discretionary aspect of the SCT's review function.

100 This constitutes a valid exercise of administrative power: eg, n 78.

101 For example, nn 34, 35 and 78.

102 (1977) 138 CLR 1 at 9.

103 Also known as a "neutral" power, or a power which, according to Hall, has a "duality of function": see Hall, above n 62 at 21-5; and see E Campbell, above n 84 at 32. See also *FCT v Munro/BIO v FCT* (1926) 38 CLR 153 at 175-6 per Isaacs J; *R v Davison* (1954) 90 CLR 353 at 369-70 per Dixon CJ and McTiernan J; and 388 per Taylor J.

104 (1926) 38 CLR 153.

> cumstances, on the occasion and in the collocation it has used them. There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds. If the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail.[105]

In relation to the SCT, the intention of the Parliament to create an administrative tribunal is manifestly clear.[106] Similarly, the power of review is arguably a "neutral" power which is capable of being reposed in either a court or an administrative body.[107] According to the High Court in *Precision Data Holdings v Wills*:[108]

> [A]lthough the finding of facts and the making of value judgments, *even the formation of an opinion as to the legal rights and obligations of the parties*, are common ingredients in the exercise of judicial power, they may also be elements in the exercise of administrative and legislative power. ... It follows that functions may be classified as either judicial or administrative according to the way in which they are to be exercised.[109]

This being the case, the decision of the majority in *Wilkinson* and *Breckler* is difficult to rationalise, and indeed, flies in the face of established legal principle.

Factor 4: The Perceived Inability of the SCT to Pronounce Upon Matters of Policy:

According to Heerey J[110] the SCT's review function does not involve the application of policy considerations, but rather the application of an objective, "albeit indeterminate" criterion of "fairness and reasonableness", the application of which is "no different", he says, from that applied "in other contexts by courts: Did the defendant take reasonable care? Is the alleged implied term reasonable?"

First of all, the mere fact that an administrative body and a judicial body both apply an objective test of fairness and reasonableness does not mean that both bodies are exercising the same type of power. It simply means that each is exercising its own particular type of power "fairly and reasonably". If this were not the case, objective "fairness and reasonableness" could only ever be the exclusive domain of *either* an administrative *or* a judicial body (never both), which is nonsensical.

Secondly, the SCT has always been able to take policy into account to the extent that the trustee is constrained to do so. Essentially, the SCT "stands in the shoes" of the trustee when exercising its review powers.[111] Thus, the SCT has all the powers, obliga-

105 Ibid at 180.
106 See above, n 15.
107 The expression "review" "has no settled meaning; it takes its meaning from the context in which it appears." per Mason CJ, Brennan and Toohey JJ in *Brandy v HREOC* (1995) 183 CLR 245 at 261.
108 (1991) 173 CLR 167.
109 Ibid at 189 [emphasis added]
110 (1998) 152 ALR 332 at 347.
111 Eg, ss 37(1)(a); 37A(1)(a) of the SRC Act.

tions and discretions of the trustee and this includes policy obligations. Presently, under the SRC Act,[112] the SIS Act,[113] and diverse Regulations,[114] the SCT is empowered to deal with trustees of certain public sector funds. Public sector fund trustees are governmental decision-makers and, as such, may, at any time, be constrained to have regard to matters of policy. Likewise, because the SCT is empowered to deal with public sector fund trustees, it is entirely able to take "policy" into account in so far as a public sector trustee may be required to do so[115]—for instance, pursuant to ministerial directions. Neither the SCT nor the public sector trustee could, however, inflexibly apply governmental policy, or "act under dictation", without leaving itself open to judicial review—unless it was expressly required to do so pursuant to relevant Commonwealth or State legislation.

Factor 5: Enforcement:

The majority view of the SCT's enforcement regime was based upon a very cursory examination of the legislation and case law.[116] Notably, this view was expressly rejected by the minority on the basis that (1) the SCT did not itself enforce its decisions; and, (2) it was open for those decisions to be independently considered by way of collateral challenge in the Federal Court of Australia or in a State Supreme Court.[117] It is submitted that the minority view is the correct view. First of all, the implementation of the SCT's enforcement regime[118] is not "automatic", but invariably depends upon the discre-

112 Section 4A of the SRC Act.

113 Section 10 of the SIS Act.

114 Regulation 4A and Schedule 1 of the SRC Regulations; Regulation 1.04(4A) and Schedule 1AA of the Superannuation Industry (Supervision) Regulations.

115 See above, n 109.

116 Note that the majority's conclusion is largely based upon a reading of the case of *R v Wicks* (*Wicks*)[1997] 2 WLR 876 at 893; although, significantly, Heerey J failed to enunciate his reasoning for applying *Wicks* to the specific case of the SCT. In *Wicks*, the House of Lords dealt with a collateral challenge to the validity of an enforcement notice served upon the defendant by the local planning authority. However, a reading of *Wicks* shows that the majority of the House of Lords was of the opinion that it was "impossible to construct a general theory", but that each case must be decided from the "scheme of the Act and the public law background against which it was passed." (at 893 per Lord Hoffman). The SCT's enforcement regime is distinguishable from that set out in the Town and Country Planning Act 1971 in *Wicks* (at 893-7). For a detailed discussion see C A Foley, "The Federal Court and the Superannuation Complaints Tribunal: (Appeals, Judicial Review, Penalties and Enforcement)", paper tabled at the Senate Select Committee on Superannuation Forum on the Superannuation Complaints Tribunal, Sydney 28 April 1998.

117 (1998) 152 ALR 332 at 357-62 per Sundberg J. This view was also held by Merkel J in the earlier Federal Court case of *Briffa & Ors v Hay* (1997) 147 ALR 226 at 239.

118 See particularly: SIS Act, ss 31(1); 32(1); 34; 64A; 263(1)(c),(2); 285; 289; 298; 310; 312(5)-(8); 313(1A)-(12); and 315 (and the equivalents in the RSA Act); and the SIS Regulations, r 13.17B. Note that s 65(1)(b) of the SRC Act, activates this regime.

tion of a court of competent jurisdiction[119]—even as to the imposition of penalties.[120] According to established authority, such a regime is not "judicial" in character.[121] Secondly, there is a striking similarity between the SCT and the reconstituted Taxation Board of Review as set up under the Income Tax Assessment Act 1925 (Cth)(the ITA Act). The functions of the Board of Review were held to be valid by the High Court of Australia in *FCT v Munro*[122] and *BIO v FCT*,[123] and by the Privy Council in *Shell v FCT*.[124] By way of comparison: s 41(3) of the SRC Act "deems" an SCT decision to be that of the particular decision-maker;[125] the SCT is legislatively expressed to "stand in the shoes" of the particular decision-maker;[126] and, s 46 of the SRC Act allows for an appeal to the Federal Court of Australia, in its original jurisdiction,[127] on a question of law. Thirdly, the characterisation of the SCT's enforcement regime as administrative, rather than judicial

119 There are no enforcement provisions whatsoever in the SRC Act. Enforcement is achieved via procedures set out in the SIS Act/RSA Act and Regulations; all of which are implemented by the Federal Court of Australia or a State/Territory Supreme Court by way of orders or injunctive relief after "inquiry" or forming an "opinion" as to the necessity or desirability of the specific remedy sought. No determinations, orders or directions of the SCT are "automatically" enforceable—which distinguishes the SCT's enforcement regime from that of HREOC as considered, and invalidated, in the landmark case of *Brandy v HREOC* (1995) 183 CLR 245; and from that of the National Native Title Tribunal as struck down by the Full Federal Court of Australia in *Fourmile v Selpalm Pty Ltd* (1998) 152 ALR 294 (per Burchett, Drummond and Cooper JJ) on 13 February 1998 (the day after the *Wilkinson/Breckler* decisions were handed down).

120 SRC Act, ss 24(7), 24AA(5), 24A(1),(2),(2A) & (2B), 25(5), 44(3), 60(4), 63(3B),(5); and SIS Act, s 34(2) and s 285 of SIS. These sections are to be construed in the light of *Matthews v Foggit Jones Ltd* (1925) 37 CLR 455 ("the case of the Newcastle sausage"); *Butler (or Black) v Fife Coal Co* [1912] AC 149; *Waugh v Kippen* (1986) 64 ALR 195; *Scott v Cawsey* (1907) 5 CLR 132 at 154-5 per Isaacs J; and, *Donaldson v Broomby* (1982) 40 ALR 525 at 526 per Deane J. For a detailed discussion see C A Foley, above n 116.

121 Eg, *Brandy v HREOC* (1995) 183 CLR 245; *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 199; *FCT v Munro* (1926) 38 CLR 153 at 176; *Shell Co of Australia v FCT* [1931] AC 275 at 297.

122 (1926-27) 38 CLR 153.

123 Ibid.

124 (1930) 44 CLR 530 at 541, 544.

125 Section 44 of the ITA Act deemed a decision of the Board to be that of the Commissioner.

126 SRC Act, ss 37(1)(a),(2)(b); 37A(1)(a); 37B(1)(a); 37C(1)(a); 37CA(1)(a); 37D(1)(a),(2)(b); 37E(1)(a),(2)(b); 37F(1)(a),(2)(b); 37G(1)(a),(2)(b). Likewise, s 44 of the ITA Act gave the Board the powers and functions of the Commissioner to make assessments, determinations and decisions. According to the Privy Council this lead to a "striking and suggestive" conclusion that the decisions of the Board were not conclusive and evinced a "convincing distinction ... between a 'decision' of the Board and a 'decision' of the Court"—*Shell v FCT* (1930) 44 CLR 531 at 543.

127 Federal Court of Australia Act 1976 (Cth), s 19(2). Similarly, s 44 of the ITA Act allowed an appeal on a question of law to the High Court of Australia in its original jurisdiction, which was said by the Privy Council "to negative the notion of the Board being judicial"—*Shell v FCT* (1930) 44 CLR 531 at 541.

in nature, accords with mainstream academic opinion.[128] However, surprisingly, in my view, the enforcement issue is the factor which both the Government and the superannuation industry regard as the most insuperable in terms of significance and rectification.

OPTIONS

The decisions in *Wilkinson and Breckler* have left the Government with a number of remedial options ranging from the mundane to the fanciful. There is insufficient time to pursue any of them in detail here, other than to list them and offer a very select and brief commentary. Seven options have been mooted to date:

1 to amend the SRC Act so as to restore the SCT to its full powers of inquiry, conciliation and review;
2 to amend the SRC Act to enable the SCT to operate as an arbitral body based on the consensual agreement of the parties;
3 to reconstitute the SCT as a court;
4 to adopt the recent "HREOC" model—that is, the SCT would continue to exercise its inquiry and conciliation functions, but a special division would be created in the Federal Court[129] to deal with those matters which could not be successfully conciliated;
5 to re-establish the SCT via a legislative scheme modelled upon that of the current corporations law by utilising s 122 of the Commonwealth Constitution (Territories power) and State legislation;
6 to establish a court with identical powers to the SCT so that complainants may choose either to have their matter heard "judicially" before that body, or "administratively" before the SCT; or
7 to abolish the SCT and establish an incorporated industry-based scheme.

Options 3–6 inclusive may realistically be put to one side as simply inefficient, ineffective or inappropriate in terms of complexity and cost. Option 2—the conferment of a consensual arbitral function upon the SCT, is currently in the process of being implemented as an

128 For example, E Campbell, above n 84 at 34-5; Nand, above n 53 at 29-30; Sir Anthony Mason, "A New Perspective on Separation of Powers" (1996) 82 *Canberra Bulletin of Public Administration* 1 at 6; Hall, above n 62 at 16.

129 Note that the Federal Attorney-General, the Hon Daryl Williams, has recently stated that he favours the establishment of a separate Federal Magistrates' Court to deal with certain "less complex matters" that are presently within the jurisdiction of the Federal Court of Australia. The Attorney-General contemplates that this new jurisdiction will, if established, encompass some of the HREOC matters that are now due to be shifted to the Federal Court "because of the Constitutional difficulties arsing from *Brandy*'s case."—*Australian Financial Review* 26 October 1998 at 28. The applicability, or otherwise, of the proposed new Magistrates' Court to the SCT has not been officially considered to date, but, seemingly it may also be regarded as a possible variation to option 4. See also G Williams, above n 82 at 40.

"interim" band-aid measure[130] pending the outcome of the *Breckler* appeal to the High Court of Australia.[131] This leaves Option 1—the reconstitution of the SCT, and option 7—the establishment of an industry body, as the two main "long-term" remedial contenders.

Acting upon a proposal put forward by the SSCS, the Senate referred the matter of dispute resolution options to the SSCS on 7 April 1998 for inquiry and report. The SSCS considered five of the options listed above[132] at a Forum on superannuation which it held in Sydney on 28 April 1998.[133] The Forum was chaired by Senator John Watson and was comprised of members of the SSCS, the SCT Chairperson, Mr Neil Wilkinson, and a broad representation of consumer and industry stakeholders. The SSCS supported option 2—the interim arbitral solution, "as a matter of urgency" provided that a "feasible" model could be developed.[134] In respect of options 1 and 7, the SSCS thought that both were "viable",[135] although it found that each option had "associated difficulties".[136] However, on balance, the SSCS favoured reconstituting the SCT for the following reasons:[137]

- the SCT is already well-established; consequently, it would be possible to restore the complaints resolution process via the SCT more quickly than would be possible if a new body had to be established;
- the existing complaints resolution structure would be preserved and the continuity of current cases ensured;
- the SCT is more likely to be perceived by fund members as independent of the industry;

It is submitted that the view of the SSCS is correct. The reconstitution of the SCT clearly offers the fastest, most cost-effective solution to the current impasse, whilst maintaining current levels of accountability in terms of rights' protection for individuals. It is fur-

130 The Superannuation Legislation Amendment (Resolution of Complaints) Bill 1998 is currently being drafted to invest the SCT with an arbitral function which depends upon the consensual agreement of the parties. The Bill also, *inter alia*, seeks to make it clear that the SCT is empowered to deal with non-discretionary as well as discretionary exercises of power by trustees, insurers, RSA providers, superannuation providers and other relevant decision-makers in respect of all its functions.

131 See above, n 47.

132 Options 1, 2, 4, 5 and 7. Of these, the SSCS did not consider that options 4 and 5 were "viable" or "acceptable"; Senate Select Committee on Superannuation, *31st Report of the Senate Select Committee on Superannuation: Resolving Superannuation Complaints: Options for dispute resolution following the Federal Court decision in Wilkinson v CARE*, (1998 SSCS Report) Canberra, July 1998 at 39 and 53; see generally chs 6 and 8. The remaining options 1, 2 and 7 are discussed further below.

133 The results of the Forum are set out in the 1998 SSCS Report. It is not proposed to discuss the Forum or the SSCS Report in depth in this paper.

134 Ibid at 17; see generally Chapter 4. Refer also to n 129.

135 Ibid at 31, 50 and 57.

136 Ibid at 57; see generally chs 5 and 7.

137 Ibid at 57; see generally ch 10.

ther submitted that the reconstitution of the SCT is constitutionally possible and may be achieved quite simply by:

- the removal of the "fairness and reasonableness" concept in its entirety from the SRC Act;
- the insertion of a new standing provision couched in terms of "person affected";
- the definition of the SCT's jurisdiction in terms of "reviewable" and "non-reviewable" decisions;
- the insertion of a policy provision to legislatively clarify the *status quo*;[138]
- the rectification of current anomalies in the SRC Act in relation to enforcement and the clarification of the relevant SIS/RSA enforcement provisions and regulations.

However, these factors notwithstanding, and in line with its current "privatisation" agenda, the Government appears to favour the implementation of option 7 in the long-term; an option which, predictably, is also favoured by a certain sector of the superannuation industry[139] and its advisors. It is argued by the proponents of option 7 that the establishment of an industry body will eliminate the present constitutional uncertainties by removing the executive branch of government from the equation. This is true, but so too will the consumer safeguard of judicial review be lost. Nor can private law contractual remedies be confidently relied upon to redress wrongs because such remedies are often simply inadequate. According to Dr Jenny Stewart,[140] in those cases where administrative law remedies are not applicable to private contractual arrangements of a public nature, there will be a "yawning gap opening in terms of accountability".[141] She says:

> A feature which distinguishes the public from the private sector is that decisions taken by public servants must be justifiable in terms of procedural fairness. The apparatus of administrative law exists to bolter that fairness.[142]

Dr Stewart believes that, over time, there will be an increasing public perception that private law cannot offer safeguards commen-

138 For example, [Policy Considerations] "In the exercise of its functions, the Tribunal may take into consideration such policy statements as are given to the Tribunal by the Minister in writing."

139 Although, recently Ms Phillippa Smith, the Chief Executive of the Association of Superannuation Funds of Australia Ltd (ASFA)—"the peak national body of the superannuation industry", has publicly stated that ASFA's "preferred option is for a statutory scheme such as the Superannuation Complaints Tribunal to be maintained and that it has the power to both conciliate and determine cases". Ms Smith went on to say that "[f]rom both the consumer's and the funds' point of view, the key elements of any superannuation complaints mechanism are: independence, affordability, accessibility and the need to be non-legalistic."—*Australian Financial Review* 28 October 1998 at 8.

140 J Stewart, "Administrative Law in the Age of Contract" in J McMillan (ed), *Administrative Law Under the Coalition Government* (1998) at 152.

141 Ibid at 153.

142 Ibid.

surate with those offered by public law. Consequently, the reach of administrative law will, in her opinion, overtake private contractual arrangements. To this end, she believes that the role of administrative law will not only continue, but will expand, because the general public will want to be reassured that the same review processes are available in the private sector as in the public sector.[143] Logically, this rationale has much to recommend it. If an exercise of power is thought to warrant judicial protection in the public sector, it is hard to see why the mere transference of that power to the private sector removes that warrant.

There is, however, a possibility that if the industry body is not solely dependent upon contract for its authority and is found to perform the requisite "public duty" it may, if the principles enunciated in the United Kingdom case of *R v Panel on Take-overs and Mergers; ex parte Datafin*,[144] are applicable, be amenable to public law remedies.[145] However, at present, federal legislation is incapable of facilitating judicial review of private bodies in the Federal Court because of the restrictive terminology used in s 3(1) of the Administrative Decisions (Judicial Review) Act 1977 (Cth)(the AD(JR) Act)[146] and in s 39B of the Judiciary Act 1903 (Cth).[147] Similarly, in respect of s 75(v) of the Commonwealth Constitution[148] in terms of the High Court.

In either case, the private/public issue will not be resolved painlessly. The reach of public law principles and remedies into the private sphere in the context of *Datafin* is far from settled in Australia. In fact, this area of law is even more uncertain than the constitutional characterisation of powers problems which have beset the SCT and will, *a fortiori*, likewise need to be resolved by the courts.

CONCLUSION

Whatever the ultimate fate of the SCT, its experience will have highlighted a number of fundamental concerns that are emerging in modern administrative law. The chief amongst these, in my opinion, is the misuse of the federal doctrine of the separation of powers, vis à vis administrative tribunals, by the judiciary. There is no doubt that the doctrine has a necessary role to play in Australian constitutional law for all the "rights-based" reasons with which we are familiar.

143 Ibid at 155.

144 [1987] 1 All ER 565.

145 See also *R v Disciplinary Committee of the Jockey Club, Ex parte Aga Khan* [1993] 1 WLR 909; and *R v Wadley. ex parte Burton* [1976] Qd R 286; *Typing Centre of New South Wales v Toose & Ors* (Supreme Court of New South Wales, 15 December 1988, unreported); *Dorf Industries Pty Ltd and Anor v Toose & Ors* (Federal Court of Australia, 9 December 1994, unreported); *The State of Victoria v The Master Builders Association of Victoria* [1995] 2 VR 121.

146 Must be a decision of an "administrative" character. Note, however, that the reach of the AD(JR) Act could be broadened to cover private law decisions simply by omitting the word "administrative" in s 3(1).

147 Applies only to an "officer of the Commonwealth".

148 Also applies only to an "officer of the Commonwealth".

However, as already mentioned, both the reason and the justification for the activation of the doctrine are based upon protecting the freedom of the individual *by way of* protecting the independence of the judiciary. The protection of the judiciary is, therefore, not an end in itself, but the means to an end. There is no point protecting the judiciary if, by doing so, the individual is left unprotected, or less protected, than s/he was before the doctrine was invoked. With this in mind, it is difficult to see how the powers of review reposed in the SCT pursuant to s 37 of the SRC Act threaten individual rights by way of undermining judicial independence. Alternatively, the benefits of allowing s 37 to stand, and the SCT to continue operating to its full capacity are patent.

In my view, each individual exercise of power should be considered upon its merits, as Isaacs J suggested, in the light of the particular legislative scheme.[149] Once the parliamentary intent to establish an administrative body has been elucidated and the power concerned is one that can be administratively exercised, for a court to reason otherwise is, in itself, unconstitutional. As Zines says: "Such an approach has little to do with the maintenance of the rule of law or individual freedom ..."[150]

Author's Note: Since the writing of this article, the case of *A-G(Cth) v Breckler* [1999] HCA 28 was heard by the full bench of the High Court of Australia on 8 December 1998. The decision of the High Court was handed down on 17 June 1999. All seven justices (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne, Kirby and Callinan JJ) unanimously held that the SCT had not, in the exercise of its s 37 review powers, breached Chapter III of the Commonwealth Constitution. This decision, together with the insertion of new s 14AA of the SRC Act in December 1998 (by the *Superannuation Legislation Amendment (Resolution of Complaints) Act 1998* (Cth)), has fully restored the SCT's jurisdiction and powers. There is also a further Bill currently before the Commonwealth Parliament which seeks to expand the SCT's jurisdiction and powers even further—the Superannuation Legislation Amendment Bill (No 3) 1999 (Cth). Note also that since the writing of this article, the Superannuation Legislation Amendment Bill 1997 (Cth) (SLAB), referred to in n 33, was reintroduced into the Parliament as SLAB 1998 and subsequently passed as the *Superannuation Legislation Amendment Act 1999* (Cth).

CAF. July 1999.

149 *Munro v FCT* (1926) 38 CLR 153 at 180.

150 L Zines, *The High Court and the Constitution* (3rd ed 1992) at 176-7.

APPENDIX A

SECTION 37 TRIBUNAL POWERS—COMPLAINTS UNDER SECTION 14

37(1) [Tribunal's powers when reviewing decision of trustee] For the purpose of reviewing a decision of the trustee of a fund that is the subject of a complaint under s 14:

(a) the Tribunal has all the powers, obligations and discretions that are conferred on the trustee; and

(b) subject to subsection (6), must make a determination in accordance with subsection (3).

37(2) [Tribunal's powers when reviewing decision of insurer or decision-maker]

If an insurer or other decision-maker has been joined as a party to a complaint under section 14:

(a) the Tribunal must, when reviewing the trustee's decision, also review any decision of the insurer or other decision-maker that is relevant to the complaint; and

(b) for that purpose, has all the powers, obligations and discretions that are conferred on the insurer or other decision-maker; and

(c) subject to subsection (6), must make a determination in accordance with subsection (3).

37(3) [Tribunal's determination] On reviewing the decision of a trustee, insurer or other decision-maker that is the subject of, or relevant to, a complaint under section 14, the Tribunal must make a determination in writing:

(a) affirming the trustee's decision; or

(b) remitting the matter to which the decision relates to the trustee, insurer or other decision-maker for reconsideration in accordance with the directions of the Tribunal; or

(c) varying the trustee's decision; or

(d) setting aside the decision and substituting a decision for the decision so set aside.

37(4) [Extent of Tribunal's determination] The Tribunal may only exercise its determination-making power under subsection (3) for the purpose of placing the complainant as nearly as practicable in such a position that the unfairness, unreasonableness, or both, that the Tribunal has determined to exist in relation to the trustee's decision that is the subject of the complaint no longer exists.

37(5) [Determination must not be contrary to law governing rules or contract]

The Tribunal must not do anything under subsection (3) that would be contrary to law, to the governing rules of the fund concerned and, if a contract of insurance between an insurer and trustee is involved, to the terms of the contract.

37(6) [Decision to be affirmed if fair and reasonable] The Tribunal must affirm a decision referred to under subsection (3) if it is satisfied that the decision, in its operation in relation to:

(a) the complainant; and

(b) so far as concerns a complaint regarding the payment of a death benefit—any person (other than the complainant, a trustee, insurer or decision-maker) who:

(i) has become a party to the complaint; and

(ii) has an interest in the death benefit or claims to be, or to be entitled to benefits through, a person having an interest in the death benefit;

was fair and reasonable in the circumstances.

Jurisdiction, Procedures and the Code of Banking Practice

COLIN NEAVE*

INTRODUCTION

Industry based dispute resolution schemes are a relatively recent but increasingly common factor of which Australian business must take account in its dealings with the public.

The Banking Industry Ombudsman Scheme is now an essential factor in any retail bank's customer relations. It is a credible alternative to the courts through which to seek redress, when a bank's customer has a problem which falls within the Ombudsman's Terms of Reference.

INDUSTRY BASED CONSUMER DISPUTE RESOLUTION SCHEMES

The Australian Banking Industry Ombudsman was announced in May 1989 as an initiative of the Australian Banking Industry. The inaugural Chairman of the Council, The Rt Hon Sir Ninian Stephen, said:

> [T]he Scheme is not only a bold initiative on the part of the banking industry, but has also involved the creation of the most far reaching alternative dispute resolution mechanism yet instituted by any industry in Australia.[1]

The Scheme is based on that adopted by the United Kingdom banks in 1980. It was the first time in Australia that an industry had agreed to implement an independent alternative dispute resolution

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* Australian Banking Ombudsman. The contribution of the staff (both past and present) of the Australian Banking Industry Ombudsman Scheme to the preparation of this paper is acknowledged.

1 Australian Banking Industry Ombudsman Limited, *Annual Report 1990–1991* (1991) at 4.

scheme as part of a self regulatory regime. Since that time, various dispute resolution mechanisms funded by industry have emerged which seek to provide consumers with a cost free, effective and relatively quick means of resolving complaints concerning the products or services provided by that industry. It is interesting to note that most of these schemes have arisen in the financial services sector.

Major industry dispute schemes presently include:

- General Insurance Enquiries & Complaints Scheme;
- Life Insurance Complaints Service;
- Telecommunications Industry Ombudsman;
- Electricity Industry Ombudsman Victoria;
- Financial Planning Association Complaints Resolution Service; and
- Credit Union Schemes.

In addition, government run dispute resolution schemes such as the Superannuation Complaints Tribunal,[2] Victorian and New South Wales Legal Services Ombudsmen[3] and the Private Health Insurance Complaints Commissioner have been instituted under legislation.[4]

The basis for participation in these various schemes varies between industries. In the areas of electricity and telecommunications, for example, industry participants are required to submit to the jurisdiction of the relevant scheme as a condition of their licence to operate. Other industries (such as the banks and credit unions) have implemented Codes of Practice which provide for an external dispute resolution process to which industry participants must submit as part of their obligations under Codes.

It should not therefore be controversial to suggest that alternative dispute resolution (ADR) schemes are here to stay and are going to play an increasing role in many industries' customer relations. And it is possible to argue that they will become an important accountability mechanism.

RESOLUTION VS REGULATION

These schemes must, of course, be separated from the regulatory function of government. Dispute resolution schemes are generally restricted to the facts of the particular case and are not primarily concerned with issues of policy or principle, but rather with the payment of compensation to individuals who claim to have been disadvantaged by the wrongful conduct of the industry participant concerned. A regulator may "punish" the industry participant for breach of the regulations the regulator administers, whereas a dispute resolution scheme may take these regulations into account in assessing a complaint. The dispute resolution scheme does not

2 Superannuation (Resolution of Complaints) Act 1993 (Cth). See C Foley, "The Role of the Superannuation Complaints Tribunal" in this volume of materials.
3 Legal Practice Act 1996 (Vic) Part 18; Legal Profession Act 1987 (NSW) Part 10.
4 Health Insurance Commission Act 1973 (Cth).

punish, but only compensates the dissatisfied customer for loss incurred as a result of that breach.

The difference is seen clearly in the Financial Planners Scheme where the complaint resolution procedure appears to operate in tandem with what is, in effect, a Professional Conduct Review Board. The Australian Competition and Consumer Commission receives many complaints, some of them about banks. In taking up a complaint further, however, the Commission is primarily concerned with clarifying policy issues of principle rather then compensating the complainant.

WHAT IS ALTERNATIVE DISPUTE RESOLUTION?

One academic has said:

> The discussion of what is meant by alternative dispute resolution has the potential for legal practitioners and academics to produce the most sterile pedantry possible.[5]

A precise definition of ADR is surprisingly controversial, but is generally considered to be "alternative to adjudication by the courts" and to comprise two basic models invented by lawyers as a means of regaining work lost to them as litigators: conciliation or mediation and arbitration.

The Banking Industry Ombudsman, like most of the industry based dispute resolution schemes, offers a hybrid of these models, such that the Ombudsman as independent umpire will first seek to "promote the settlement or withdrawal of the complaint by agreement between the applicant and the bank"[6] and if this is not possible, he may make a Recommendation for the settlement or withdrawal of the complaint.[7]

If this decision is not accepted by the complainant, the Ombudsman cannot further assist. If this decision is not accepted by the bank, then the Ombudsman may make an Award which is binding on the bank if the complainant accepts it.[8] Thus, the perception that there is an inequality of resources and bargaining power between individual customer and bank is counteracted by the knowledge that in the final analysis the bank may be bound by the Ombudsman's decision.

Lawyers from various banks have been bemused at their experience with what they had expected to be a conciliation by the Ombudsman. Although the case began in that way, it ended as an arbitration. This approach does not fit into any classical ADR model, but has proven to be an effective and fair way of providing redress for consumers.

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5 R Ingleby, *"Why not toss a coin? Issues of Quality and Efficiency in Alternative Dispute Resolution"* Paper presented to the AIJA Ninth Annual Conference 1990 at 1.

6 Australian Banking Industry Ombudsman, above n 1 at Terms of Reference, cl 10.

7 Ibid at cl 12.

8 Ibid at cl 13 (ie both parties are bound).

THE STRUCTURE AND ROLE OF THE BANKING OMBUDSMAN SCHEME

The Banking Industry Ombudsman is based on a corporate structure (the Australian Banking Industry Ombudsman Limited (ABIO)—a company limited by guarantee). The membership of the company is constituted voluntarily by industry members (that is, banks). As well as subscribing to the Memorandum and Articles, member banks sign an agreement, the Terms of Reference, which establishes the Ombudsman's jurisdiction and is an acknowledgment that member banks agree to be bound by the decisions of the Ombudsman. Thus, banks in Australia agree to abide by the Ombudsman's decisions to the exclusion of pursuing remedies in other forums. Consumers approaching the ABIO are not required to relinquish any existing rights to other forums unless and until they decide to accept the Ombudsman's decision, at which time they may be required to sign a release and indemnity. The Scheme operates therefore as an alternative, running parallel to the legal system and not in substitution for it.

The Board of Directors of the company consists of representatives of banks and a Deputy Governor of the Reserve Bank of Australia. It determines the Terms of Reference of the Scheme and passes the Budget.

Standing between the Board and the Ombudsman is a Council consisting of three public and consumer interest and three banking representatives, with an independent Chairman, currently Sir Edward Woodward, OBE QC. The Council appoints the Ombudsman, assists the Ombudsman in the development of policy issues, advises the Board on any changes it considers desirable to the Ombudsman's jurisdiction and submits to the Board a budget for the funding required for the efficient running of the Scheme.

The Ombudsman determines whether or not a matter falls within his jurisdiction, investigates disputes, attempts to resolve them and ultimately determines whether or not an Award is warranted, administers the Scheme and submits policy issues, the Budget and other proposals to the Council for their consideration.

However, the Ombudsman consults with the Council to which he is responsible on all policy issues. In this way, representatives of consumer and public interests have a direct involvement in the development of policies on, for example, the provision of information about the existence of the Banking Ombudsman Scheme to heighten community awareness of the Scheme. It could be argued, therefore, that in addition to guaranteeing the independence of the Ombudsman, the Council plays a very valuable role in the process of ensuring public interest and community involvement in the affairs of the Scheme.

The three tier structure of Board-Council-Ombudsman was created to ensure the independence of the Ombudsman in the decision making process. The format has been duplicated in a number of schemes, such as Telecommunications and Electricity.

The role of the Scheme is to provide:

> [A] free alternative to other proceedings (usually a court) to users of Bank services who have disputes with their banks where those disputes fall within the Ombudsman's jurisdiction.[9]

Generally, individuals[10] with amounts in dispute of under $150,000, that dispute involving the provision of a "banking service" to them, fall within that jurisdiction.

For the 12 months to 31 March 1998, the Ombudsman received about 45,000 telephone inquiries (an increase of 22% on the previous year). The number of new cases received by the Ombudsman rose by 19% to 4,661.

In the 1997/98 year, of the almost 4,500 cases resolved by the Ombudsman, 20% were not resolved by the bank to the customer's satisfaction, although the Ombudsman was satisfied that there was enough information to find that the bank had acted reasonably and his further intervention was not warranted. A further 6% of cases proceeded to investigation and required the intervention of the Ombudsman to obtain further material in order to assess the merits of the case. It should be obvious, however, that in these cases the time taken to resolve the problem increases dramatically from a matter of a month or two up to six months or more. The further the case proceeds through the Ombudsman's procedures, the smaller the chance of the bank successfully retaining the complainant's business.

PROCEDURES

The Terms of Reference provide for the Ombudsman to determine the procedures to be applied in resolving disputes. An investigatory, rather than adversarial, model has been adopted.

Banks, like most other institutions which are members of external dispute resolution schemes, operate their own internal dispute resolution (or "customer relations") departments. The external scheme is thus a "last resort" when the internal processes are unable to resolve the problem to the complainant's satisfaction.

This is expressed in the case of the Banking Ombudsman by the provision in the Terms of Reference that:

> The Ombudsman shall only consider (or continue to consider) a complaint made to him if he is satisfied that the senior management of the bank named in the complaint (at the management level notified to the Ombudsman) have had the opportunity to consider the complaint, but the applicant has not accepted any observation made or conditions of settlement or satisfaction offered by the bank and deadlock has been reached.[11]

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9 Australian Banking Industry Ombudsman, above n 1,"Introduction to the Terms of Reference".

10 As from 6 July 1998, the Scheme will accept complaints from incorporated small businesses. Also, small business complainants will be charged a fee by the Scheme for services provided beyond initial consideration of a complaint by the Scheme.

11 Australian Banking Industry Ombudsman, above n 1 at Terms of Reference, cl 20 (b).

The Code of Banking Practice provides[12] that:

> 20.1 A Bank shall have an internal process for handling a dispute between the bank and a customer and this process will be readily accessible by customers without charge upon them by the bank. A dispute arises where a bank's response to a complaint by a customer about a banking service provided to that customer is not accepted by that customer.
>
> 20.4 A Bank shall have available for its customers free of charge an external and impartial process (not being an arbitration) having jurisdiction similar to that which applies to the existing Australian Banking Industry Ombudsman Scheme, for resolution of a dispute that comes within that jurisdiction and is not resolved in a manner acceptable to the customer by the internal process.

It is arguable that the reference to the Scheme in the Code of Banking Practice has the effect of making the Scheme an integral part of the accountability mechanisms available to customers of banks in respect of the duties of those banks to their customers. Whilst the Reserve Bank receives information from banks direct about possible breaches of that Code, information is also provided by the Scheme in relation to allegations made by complainants about possible Code breaches. There is in place, therefore, an independent body directly involved in the receipt of consumer complaints with an interest in the question of whether or not banks are complying with the Code. This involvement is, in itself, an important accountability mechanism.

The Code also picks up the concept of "deadlock" and ensures that banks have the opportunity to consider an attempt to resolve a problem experienced by a customer before it is referred to the external body.

How does the Scheme ensure that this occurs? From a very early point in its history, the Scheme has had three stages of intervention in considering a complainant's case. The first is the telephone service (using a toll free number) which individuals with complaints about a service received from their bank may use to contact the Ombudsman's office. At this stage, involvement is generally limited to referring the person back to the senior customer relations management of the bank involved and if this has failed to resolve the matter to the customer's satisfaction, then they are invited to write to the office setting out their complaint.

Customers with language or other difficulties inhibiting their ability to write, may explain their complaint over the phone and a summary of the issues they have raised is taken down by an Inquiries Officer and forwarded to them for their approval, signature and return with any supporting documentation.

Secondly, the written material submitted by the complainant is referred once again to the bank after a preliminary examination to

12 Australian Banker's Association, *Code of Banking Practice* (3 November 1994); see below for a discussion of the effect of certain provisions of the Code of Banking Practice.

ensure it is within the Terms of Reference. The bank is invited to respond to their customer directly to attempt to resolve the matter or if this is not possible, then to provide sufficient explanation to the ABIO to allow the office to assess the merits of the complaint. There is frequently enough material available at this stage to allow an initial assessment to be made of the merits of the case.

It is only if the complainant remains unsatisfied and it is evident that there are issues to which the bank has not responded adequately that the Scheme will commence an investigation of the issues raised.

Once a consumer and bank are in a deadlock situation, the dispute is referred to a case manager within the Ombudsman's office. The case manager talks to the consumer, obtains statements and talks to bank officers. The case manager may also take advice on industry banking practice or obtain legal advice from other specialist staff within the Ombudsman's office.

The consumer and bank will then be notified of the case manager's findings and will each have the opportunity to correct any misconceptions and/or make further submissions with additional material, in which case the Ombudsman will review all the material provided and issue a Recommendation for the resolution of the case.

Cases may be set down for a conference bringing the bank and the consumer together with the Ombudsman to discuss the issues and point out any difficulties the Ombudsman may be experiencing in either obtaining information or in reaching a conclusion. Such conferences have been found to be a successful means of dispute resolution—approximately 90% of matters referred to conference resolve. Consumers may come with a next friend, legal, financial or other adviser.

If the matter does not resolve at the conference or in cases where the Ombudsman determines that the matter will not benefit from a conference, a consumer may request the Ombudsman to proceed to a written Recommendation setting out to the consumer and the bank the Ombudsman's view as to how the matter should be resolved. The parties may then either accept that Recommendation or not. The bank may request further consideration, in which case the final step is for the Ombudsman to prepare an Award which is sent to both parties and which becomes binding on the bank only if it is accepted by the consumer. That is, acceptance by the consumer renders the Award binding on both parties as a full and final settlement. The determination of an Award by the Ombudsman discharges his functions.

The Scheme has an obligation to observe procedural fairness. No decisions are made within the Ombudsman's office, either as to the jurisdiction or the merits of a case, without the provision of reasons on which the decision is based, as well as having the right to have the matter reconsidered. Usually the reconsideration will be undertaken by someone other than the person who undertook the initial assessment. In the absence of any appeal mechanism, internal review procedures assume greater importance.

There is provision in the Terms of Reference that at any stage up to the Ombudsman making an Award, in circumstances where the bank claims the complaint may have important consequences for the business of the bank or banks generally or which raises a novel or important point of law, a bank may require the Ombudsman to cease considering a complaint for the purpose of the complaint becoming a "test case".[13] In those circumstances, if either the bank or the consumer issue proceedings the bank will meet the cost of the consumer's legal fees, on a solicitor client basis, at first instance and any subsequent appeal proceedings commenced by the bank.

Only one such request (in 1991) has been made in a case in which the bank claimed repercussions to consumers in similar situations may lead to substantial claims against the bank. The consumer commenced proceedings in the Victorian Supreme Court and the case was settled, in 1997, broadly on the same terms as were suggested by the Ombudsman in 1991.

A dispute where the merits have already been adjudicated upon in another forum cannot be re-adjudicated by the Ombudsman. The Ombudsman has power to determine that a dispute is more appropriately dealt with through a court (or other procedure) and decline to further deal with the matter. This is invoked in circumstances where the Ombudsman is unable to obtain information necessary to fairly determine a complaint or there is another body with superior expertise in the relevant issues (such as an insurance matter).

The Ombudsman, unlike his statutory counterparts, has no power to subpoena witnesses or take evidence under oath. The banks have agreed to provide the Ombudsman with any information relating to the subject matter of the complaint which is in their possession (unless the disclosure of such information may breach a duty of confidentiality to a third party, in which circumstances the bank must attempt to obtain the consent of the third party for the disclosure of the information)[14].

Banks resolve about 70% of all complaints submitted to the Ombudsman and this proportion has risen substantially over the years. The number of full investigations undertaken by the Scheme has decreased markedly, although the complexity of the issues cases raise and the time they take to complete has increased.

The procedures of the Ombudsman, like other industry based dispute resolution schemes, are intended to ensure that the bank has had every opportunity to resolve the problem through its internal processes before the Ombudsman's office intervenes as an external mechanism for the addressing of the issues raised. This includes not only ensuring that the bank has attempted and failed to satisfy their customer, but that the senior management of the bank have had the opportunity to consider and correct the problem.

13 Australian Banking Industry Ombudsman, above n 1 at Terms of Reference, cl 22.
14 Australian Banking Industry Ombudsman, above n 1 at Terms of Reference, cl 5.

CODE OF BANKING PRACTICE

The Code of Banking Practice[15] is now fully and formally implemented in conjunction with the Consumer Credit Code. The Code of Banking Practice is intended to codify part of the banker-customer relationship and to express and clarify many of the previously implied incidents of that relationship. Clause 2.2 requires a bank that has stated it will abide by the Code to incorporate the provisions of the Code in the terms and conditions applicable to the relevant banking services it provides. There is a close inter-relationship between the Consumer Credit Code and the Code of Banking Practice as they both prescribe standards of disclosure and conduct in their respective areas of operation.

The Code states:

> The Code of Banking Practice ("the Code") seeks to foster good relations between Banks and their Customers ... and to promote good banking practice by formalising standards of disclosure and conduct which Banks that adopt the Code agree to observe when dealing with their Customers.[16]

The first objective of the Code is to "describe standards of good practice and service".[17] The question of whether the Code is intended to in fact "describe" or to "promote" good practice is one that has generated significant discussion within the office. While the Code may be descriptive, it is an open question whether it is an exhaustive description, and similarly, one would expect that as its provisions are terms of the contract between bank and customer that the Code does more than merely promote good banking practice. Nevertheless, it is without doubt that the Code has had a significant impact in clarifying the terms of the banker-customer relationship and has indeed codified many principles which the Scheme has long applied.

From the perspective of the Scheme it is worth noting that the jurisdiction of the Ombudsman is different from the coverage of the Code, despite the words of the external dispute resolution clause which I quoted to you earlier. Thus, the Ombudsman may not consider a complaint where the amount in dispute is over $150,000 or is about a banking service provided to a company. The Code is not subject to a monetary limit, but only applies to banking services acquired "wholly or exclusively for private or domestic use".[18]

The Code is having an impact on the way in which banks relate to customers. Three instances of this by way of "current issues" can be given to provide a sense for their operation.

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15 Australian Banker's Association, above n 12. Those sections of the Code relevant to the procedures of the office are dealt with above.

16 Ibid at Preamble.

17 Ibid at Objectives.

18 Ibid at cl 1.1.

Variation to Terms & Conditions

The Code imposes a differential disclosure regime depending on the nature of the term the bank wishes to vary. If a bank intends to:

> [I]ntroduce a fee or charge, ... or to vary the method by which interest is calculated or the frequency with which it is debited or credited,

the bank must provide written notice of the change to each affected customer at least 30 days before it takes effect.[19] In other words, a letter to each affected customer is required. Any other variation may be notified by means of an advertisement in the national or local media no later than the day on which the variation is to take effect.

Professor Tyree has written of the implications of this[20] as including the conclusion that an obligation which the law may otherwise imply to give reasonable notice is no possibly longer, required where Clause 9.3 applies. On the other hand, the recent and well publicised proposal of a major bank for a maintenance fee on housing loans of a significant size was notified 30 days in advance in accordance with the Code, following which its application was significantly reduced when, apparently, some customers brought to the bank's attention that the contract specifically provided that no such fee would be imposed.

Fees

Fees are also a thorny issue in foreign exchange services. The Code provides that:

> [I]n providing a foreign exchange service, other than by credit or debit card or travellers cheque, a bank shall provide to a customer:
>
> i. details of the exchange rate and commission charges that will apply, or if these are not known at the time, details of the basis on which the transaction will be completed.[21]

In recent years, correspondent banks receiving money telegraphically transferred from Australia have begun to levy charges on a scale not previously experienced. This, not infrequently, has the effect of a disgruntled sender of funds finding that the amount which arrives is substantially less than that which was sent. The difficulty for the transmitting bank in Australia is that it is frequently unaware of the charges which a particular correspondent bank may impose. All banks' application forms for such transfers include the appropriate disclaimer, but the Ombudsman considers it to be good banking practice that where a bank is unaware of the precise charges which may be imposed on a transfer, that the customer is informed of the possibility, if not the precise amount of such charges, in order that they may make the appropriate allowance in the amount to be transferred, if necessary.

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19 Ibid at cl 9.1.
20 A Tyree, "Banking Code Losers" (1995) 6 *JBFLP* 49.
21 Australian Bankers Association, above n 12 at cl 11.1.

Provision of Credit

As a final example of the way in which the Code has codified good banking practice and transformed it into an express contractual obligation to the customer, I turn to Clause 15.1 concerning the provision of credit. It should be self evident that in making the decision to lend, a bank considers the customer's capacity to repay and the Scheme has long held this principle to be within its jurisdiction to consider under the guise of good banking practice. This clause, however, makes it an express contractual obligation, although of course the weight and precise application of these factors is left open by the Code.

CONCLUSION

The Australian Banking Industry Ombudsman Scheme has been in operation for over eight years now and was the pioneer in Australia among the now proliferating industry based, independent dispute resolution schemes. Over time, the Scheme has experienced steady increases in the number of complaints received as consumer awareness grows and market increases in the proportion of these complaints resolved by the banks themselves without the active intervention of the Scheme. Although not suitable for every complaint or every customer, the Scheme has, within its jurisdiction, proven itself to be an effective and timely avenue of redress for customers involved in a dispute with their bank.

The face of retail banking is to undergo significant changes in the immediate future and the Ombudsman stands to play a significant role in this evolutionary process.

The Commercialisation of Administrative Law

The Commercialisation of Administrative Law

MARGARET ALLARS*

INTRODUCTION

A member of the community with a grievance against a private sector contractor, regarding its performance of a government function, is likely to have no public law remedy against either the private sector contractor or the government decision-maker. Earnest debates as to whether administrative law should apply to private sector bodies exercising functions contracted out by government tend to place an onus upon those inclined to answer in the affirmative. The impression is gained that there needs to be a very good reason for imposing upon the private sector a body of law which is really appropriate only for public sector decision-makers. The implicit assumption is that administrative law is incompatible with commercial interests or objectives.

This assumption is misconceived. In fact administrative law has catered admirably for commercial interests. Property, livelihood and other proprietary interests historically lie at the core of the protective cordon of procedural fairness. So important are these interests that in the earliest cases procedural fairness was extended to the private sector bodies commonly called domestic tribunals.[1] With power sourced in contract rather than in statute, these bodies, such as trade unions and sporting clubs, had significant power to damage commercial interests through suspension or expulsion decisions. Protection of commercial undertakings from unauthorised and

* Professor of Public Law, Faculty of Law, University of Sydney. This paper has been revised to include reference to the Administrative Review Council's *Contracting Out Report* n 6 below, which was published after the Administrative Law Forum 1998.

1 See generally D Mullan, "Administrative Law at the Margins" in M Taggart (ed), *The Province of Administrative Law* (1997) at 134.

irrational government action has also been secured through the doctrines of excess and abuse of power. Indeed it is sometimes argued that administrative law has lagged in protecting non-commercial interests, such as those of an environmental, cultural or spiritual nature, where they come into conflict with commercial interests.[2]

Since the 1980s a sweeping ethos of managerialism has introduced a new emphasis upon market based incentives and commercialism in public sector decision-making. Integral to this is a pressure for corporatisation of government business enterprises (GBEs) and contracting out of government functions, now with the added impetus of the demands of national competition policy.[3] It is rapidly dawning upon administrative lawyers that as government shrinks, the rule of law in the exercise of many powers will no longer be the rule of public law, but will become the rule of private law.[4] If this means a loss of accountability in the exercise of power it may also mean that compliance with the rule of law in its true sense is diminished.

Skirting the problem of the onus in the debate about extending administrative law to private sector decision-makers, another kind of response to these changes may be explored. This is the solution of infiltration of the principles of administrative law into private law. In this paper I examine the potential for this, focusing on a recent example of this process, *Hughes Aircraft Systems International v Airservices Australia*.[5]

The decision in *Hughes Aircraft* provokes a number of questions about the inter-relationship between public law and private law applicable to tendering decisions of government. I shall argue that developing answers to questions about the roles of public law and private law in relation to tendering decisions is the linchpin to any response to the question of accountability of private sector operators which perform government functions under contract.

This paper falls into four parts. First, it examines the solutions canvassed by the Administrative Review Council (ARC) in its *Issues Paper* published in 1997 and *Report* published in 1998 on contracting out.[6] Secondly, the decision in *Hughes Aircraft* is examined to ascertain how administrative law principles have infiltrated contract law

2 Eg, *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493; *Norvill v Chapman* (1995) 133 ALR 226 (*Hindmarsh Island case*)

3 See Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies* (Report No 48, 1996); *National Competition Policy Review, National Competition Policy: Report of the Independent Committee of Enquiry* (1993) (*Hilmer Report*).

4 I Harden, *The Contracting State* (1992); M Freedland, "Governing by Contract and Public Law" [1994] *Pub L* 86.

5 (1997) 146 ALR 1.

6 Administrative Review Council, *The Contracting Out of Government Services: Issues Paper* (1997) (*Contracting Out Issues Paper*); *The Contracting Out of Government Services:* Report to the Attorney-General (Report No 42, 1998) (*Contracting Out Report*). The general *Contracting Out Issues Paper* was followed by a discussion paper concerned solely with freedom of information: Administrative Review Council, *The Contracting Out of Government Services: Access to Information: Discussion Paper* (1997).

applicable to the tendering process. This necessitates a focus upon judicial review to the exclusion of other administrative law accountability mechanisms. Thirdly, procedural fairness is examined as a basis for implication in contracts of a term of fair dealing. Finally, the paper examines the potential of *Hughes Aircraft* to provide a way forward in settling the proper roles of public law and private law in relation to tendering decisions and decisions made by private sector contractors.

THE ADMINISTRATIVE REVIEW COUNCIL'S *ISSUES PAPER* AND *REPORT*

The question as to how public law may in future ensure the accountability of private sector contractors performing government functions has engaged the attention of the Commonwealth Ombudsman as complaints in this arena have increased.[7] The appropriateness of a range of other administrative law review mechanisms have been canvassed by administrative law scholars and government lawyers.[8] These include extension to these contractors of judicial review, tribunal review, freedom of information and privacy legislation, and creation of internal review procedures associated with guarantees of service, customer councils and tender protest schemes.

The administrative law implications of contracting out of government functions were the subject of the *Contracting Out Issues Paper* and *Report* published by the ARC. The *Issues Paper* raises well the questions whether avenues of accountability familiar in administrative law at the federal level should be extended to the private sector contractors and not-for-profit bodies which provide services under contract to the government. Should the activities of contractors be subject to judicial review, merits review by tribunals, investigation by the Commonwealth Ombudsman, Freedom of Information Act 1982 (Cth) and the Privacy Act 1988 (Cth)? Three possible answers are:

- extend administrative law to these private sector decision-makers
- leave private sector decision-makers to perform government functions subject to the market and private law; and
- develop a new approach particularly suited to these private sector decision-makers.

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7 See Commonwealth Ombudsman, *Annual Report 1995–96* (1996) at 17–18.

8 D O'Brien "Administrative Law—Can it Come to Grips with Tendering and Contracting by Public Sector Agencies?" in L Pearson (ed) *Administrative Law: Setting the Pace or Being Left Behind?* (1997) at 420; A Tang, "Contracting Out in Community Services" in Pearson (ed), ibid at 334; M Hogan and G Rogers, "Contracting of Community Services: Can it be Done in the Public Interest?" in Pearson (ed), ibid at 348; H Schoombee "The Judicial Review of Contractual Powers" in Pearson (ed), ibid at 433; H Schoombee "Privatisation and Contracting Out: Where are We Going?" in J McMillan (ed), *Administrative Law under the Coalition Government* (1997) at 135; N Seddon "Commentary: Privatisation and Contracting Out—Where Are We Going?" in McMillan (ed), ibid at 146; M Hunt, "Constitutionalism and the Contractualisation of Government in the United Kingdom" in Taggart (ed), above n 1 at 21.

Care needs to be taken to ascertain whether some solutions are truly new approaches or rather, whether they leave decision-makers subject only to the market and private law. For example, private sector ombudsmen, if not themselves accountable via judicial review and freedom of information, are arguably simply devices for dealing with consumer complaints in a manner which preserves market share, and hence belong to the second rather than the third category of answer.

However, the ARC's *Issues Paper* is disappointing in two respects.

The first disappointment is that the ARC has excluded from discussion the issue of the government decision to contract out. Tendering decisions and government procurement generally are treated as beyond the scope of the *Issues Paper*. The ARC says that the disappointed tenderer can complain to the Commonwealth Ombudsman, and also refers to the new procurement policy under preparation in the Department of Finance.[9]

Questions as to which government functions ought to be contracted out and how GBEs, Departments and agencies are to be made accountable for the decision to do so, the terms of the contract and its management, are fundamental and need to be confronted.[10] We need to ask what kind of power is exercised? What kinds of interests can be affected by the exercise of that power? What is the relationship of the power-holder to the executive branch of government? Is this the kind of governmental function which ought not to be performed by a private sector decision-maker? Does the decision-maker have power to contract out the function? Does contracting out amount to delegation of statutory power? How can the function be performed in a manner which is both efficient and in conformity with the rule of law?

More explicit acknowledgement is given to some of these questions in the later *Contracting Out Report*. As in the *Issues Paper*, the ARC treats as outside the scope of its report questions relating to the decision to contract out, the tendering process and the delivery by the states of Commonwealth-funded programs.[11] The ARC clearly leaves such questions to the province of departmental reports on procurement and management of contracts.[12]

The ARC's general approach in the *Contracting Out* Report is that the process of contracting out government services should not deprive people of rights of access to complaint handling mechanisms, and the obligation to ensure that this accountability is achieved should rest with the government agency.[13] This approach is to be applauded. However the ARC's application of the principle may not attract ready agreement. The ARC acknowledges that contracting out can involve delegation of statutory power to private sector decision-

9 *Contracting Out Issues Paper*, above n 6 at 8.
10 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law* (Report No 38, 1995).
11 Administrative Review Council, *Contracting Out Report*, above n 6 at 2.
12 Ibid.
13 Ibid at 29–30.

makers and regards decisions made in exercise of such delegated power as valid and subject to judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) or the Judiciary Act 1903 (Cth) s 39B.[14] This raises important questions in administrative and constitutional law about delegation of power and justiciability of decisions of private sector decision-makers who may or may not be "officers of the Commonwealth". Those questions will not be pursued further in this paper.

It is the decision to contract out which holds the key to finding answers to the questions which arise later about accountability of the contractors. For example, the ARC asks in the *Issues Paper* whether it should be possible to complain about deficiencies in the contracts between government and private sector contractors; and whether members of the community should be able to enforce the terms of the contract between government and the private contractor. One alternative is that contracts should expressly bind the contractor to be subject to administrative law review or to observe principles of administrative law. In its *Report* the ARC opts for requirements that agencies include terms in contracts which ensure that provision is made for a limited number of matters concerning accountability. These include provision that the agency is provided with sufficient information to enable proper management of the contracts; sufficient information to enable scrutiny by the Auditor-General; establishment of complaints-handling mechanisms within the contractor; imposition of a duty on one contracting party to ensure consumers are made aware of those mechanisms; and provision to the agency of documents to which access is sought under the Freedom of Information Act 1982 (Cth). All these recommendations depend upon the terms of the contract between the agency and the private sector provider. Without an examination of the decision to contract out and the terms of the contracts entered into, accountability mechanisms are unlikely to be fully explored or developed.

As will be seen later, the question of how accountability and the rule of law are to be addressed in the terms of the contract are tackled in *Hughes Aircraft* at a more conceptual level.

Secondly, the *Issues Paper* and the *Report* are imbued with the language of "service provision", "service recipients", "service delivery", "consumers" and "complaints". This language is strongly suggestive of a situation where only certain kinds of government functions are contracted out. These functions are assumed to be the provision of services. Answers to the first set of questions about what government functions ought to remain within the immediate control of government for the sake of the rule of law are implicitly answered in favour of government, without discussion. Only services are contracted out and the decision to contract out is assumed to be appropriate.

This language is private sector language, the language of the market place implying a choice and financial capacity to obtain

14 Ibid at 80–1, 84–5.

something of benefit. Certainly in its *Report* the ARC acknowledges that changing from an unsatisfactory service provider to another may be impossible or impractical for a consumer.[15] Yet the language of service provision itself, which persists in the *Report*, suggests that the solutions are to be found in private law rather than public law. It obscures the possible element of compulsion for individuals to deal with the contractor. It leaves out of account the fact that rights and duties of individuals are normally at stake rather than occasionally.[16] The discretionary exercise of power to make policy is not identified. Given the way that discretion permeates the administrative hierarchy surely policy-making functions will be contracted out.

Suddenly what government does is to provide services. The business of administrative law has been to examine the way in which government exercises powers conferred upon it by Parliament, powers which impact upon the interests of individuals. Administrative law also concerns itself with the performance of statutory duties. The common law has developed a set of duties requiring government to act within power, not to abuse power and to act fairly. The common law thus confines the scope and manner of exercise of powers. Some aspects of the exercise of power may properly be described as services. Others are not.[17] These different aspects of power may not be easily separated. The statute is unlikely to make the distinction. When government makes a policy to structure a broad discretionary power does it provide a service? Is the making of a decision that a person is not eligible for a licence or a benefit the provision of a service? Why has the language of powers, rights, discretion and grievances, so familiar in administrative law reform reports such as the *Kerr Report*,[18] disappeared?

Administrative law is much more than a method for dealing with consumers' complaints about the quality of services. Had the language of the *Contracting Out Issues Paper* and *Report* been different the questions posed would have been more acute.

THE *HUGHES AIRCRAFT CASE*

Hughes Aircraft Systems International v Airservices Australia[19], a recent decision of Finn J in a complex private law action with enormous financial interests at stake, has captured the attention of those concerned about accountability in relation to contracting out. It con-

15 Ibid at 24–6.

16 Ibid at 47 n 86.

17 For discussion of the meaning of "services" in anti-discrimination legislation, see *IW v City of Perth* (1997) 146 ALR 696 and *Australian Education Union v Human Rights and Equal Opportunity Commission* (1997) 49 ALD 485 at 492–3 per Merkel J. In the latter case, the management of a superannuation fund was the provision of a service but the employer's payment of contributions under a superannuation scheme was not.

18 Administrative Review Committee, *Report* PP No 144 of 1971 (*Kerr Committee* report).

19 (1997) 146 ALR 1 (*Hughes Aircraft*).

fronts the questions which the ARC does not. The general message of *Hughes Aircraft* is that there is no "authoritative guidance on the place of statutory corporations in our system of government—and, importantly, on their proper relationship both with Parliament and the Executive".[20] In *Hughes Aircraft* the Federal Court had to fashion its own response, blending the concerns of public law and private law in a novel way which provides some answers to questions of accountability with respect to contractual decisions of government.

The case

In *Hughes Aircraft* a disappointed tenderer sought relief in a private law action for breach of contract, misleading and deceptive conduct under the Trade Practices Act 1974 (Cth), and in negligence and equitable estoppel. The company claimed that the Civil Aviation Authority (CAA) failed to conduct itself fairly and in accordance with agreed procedures when awarding the Australian Advanced Air Traffic System (TAAATS II) contract to another company, Thomson. A previous tendering process involving Hughes and Thomson had been aborted because it was unsound and unfair. Following an inquiry by the McPhee Committee, the CAA adopted its recommendation to provide a fairer procedure.

The CAA held a "restart" meeting attended by the Hughes and Thomson. In presenting the new process the CAA showed a slide depicting its objectives, which included:

- conduct a fair and equitable evaluation:
  - will allow the tender committee to make recommendation on contract to the board;
- respect and protect proprietary and confidential information;
- conduct the evaluation in a manner which is auditable and defensible;
- provide a basis for debriefing companies.

The CAA's chief executive officer promised to institute:

> [A] process that is fair to both companies, and give both companies an equal opportunity to be the successful contractor.

In a letter sent to the two tenderers, the CAA set out the criteria for selection and the procedures by which tenders would be evaluated, and promised that an independent auditor would be appointed:

> [T]o verify that the evaluation procedures were followed, the evaluation was conducted fairly and the offers receive[d] due consideration.

The companies were required by the CAA to endorse the proposed procedure as fair if they wanted to restart the process. They signed the letter.

20 Ibid at 24–5.

The contract was awarded to Thomson. Hughes' tender was for $190.3 million while Thomson's was for $207.0 million. Rejecting the recommendation of the tender evaluation committee in favour of Hughes, the board of the CAA decided that the substantial benefits offered by the Thomson proposal to the wider Australian community through Australian industry involvement, and to the CAA itself, outweighed the price disadvantage.

Hughes claimed that the CAA failed to evaluate the tenders in accordance with the procedures set out in the letter; allowed political interference by the Minister; failed to contract an independent auditor; allowed itself, its board members and the Department to have an improper interest in the Thomson bid; did not protect confidentiality of Hughes' tender information from Thomson; took account of a price reduction offered by Thomson after final submission of tenders; and failed to conduct the tender evaluation fairly. The claims in negligence and equitable estoppel ultimately were not major areas of contention at the hearing and Finn J made no findings on them.[21]

Finn J held that the CAA engaged in conduct in contravention of s 52 of the Trade Practices Act by making misleading and deceptive representations both in the course of dealing prior to its decision and in the de-briefing. The most important holding of Finn J was that the CAA acted in breach of a contract with *Hughes*. Leaving aside the other causes of action, I focus now on the holding of breach of contract, which has two broad bases: the formation of a pre-award contract and the implication in that contract of an obligation of fair dealing.

The pre-award contract

Finn J held that in the circumstances of the case, there was a pre-award contract. The appointment of the auditor was held out to the tenderers as an inducement to their participation in the new tendering process. When in response to the request for tenders Hughes lodged its best and final offer, a pre-award contract was formed, the act of participation by Hughes being good consideration for the contract.[22] Finn J made it plain that the decision that there was a pre-award contract depended on the specific factual circumstances of the case where special steps had been taken to protect "the integrity of the bidding system". By confining the case to its own particular facts, Finn J was able to decline to enter into the policy arguments for and against finding that there are pre-award contracts in the procurement context.[23]

The implied term

Finn J held further that it was an implied term of this contract that the CAA would conduct its evaluation of the tenders fairly and in a

21 Ibid at 119.
22 Ibid at 29–31.
23 Ibid at 31.

manner that would ensure equal treatment of the tenderers. In Finn J's words:

> Without the assurance of fairness there would have been no contract.[24]

This implied term also depended upon the particular circumstances of the case where the tenderers simply would not have agreed to restart the process had it not been for the CAA's assumption of this broad obligation to be fair. Finn J concluded that the CAA acted in breach of the pre-award contract by failing to evaluate the tenders in accordance with the priorities and methodology agreed upon, failing to ensure strict confidentiality of information contained in tenderers' proposals and accepting an out-of-time change to the successful tenderer's proposal.

Implied term in pre-award contracts generally

In an obiter dictum concerning pre-award contracts, Finn J considered whether at law a duty of good faith and fair dealing is implied in all contracts. The case law was indecisive and different views had been expressed in different cases by Priestley JA and by Gummow J.[25] Finn J inclined to the view that there is an implied duty of fair dealing as a standard of conduct to which all contracting parties are to be expected to adhere throughout the lives of their contracts.[26] Finn J regarded this holding as strictly unnecessary but appropriately stated in case he was incorrect in his previous holding, the ratio of his decision, that there was an implied term ad hoc in the pre-award contract.[27]

Another obiter, of narrower scope than the first, was Finn J's holding that the duty to deal fairly is a term which as a matter of law should be implied into all contracts of the particular class of pre-award contracts. He concluded that a pre-award contract relating to a competitive tendering process is only workable and effective if it contains a binding reassurance of fair dealing in its performance.[28] Since the circumstances fell within this paraticular class, this was in truth an alternative basis for Finn J's decision. However, the ratio remained the implied term ad hoc.

Special position of government procurement contracts

The implication in *Hughes Aircraft* of an implied term containing an obligation of fair dealing in pre-award contracts has attracted much

24 Ibid at 35.

25 In *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 Priestley JA held that was a general implied duty of fair dealing in all contracts, while in *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84 Gummow J held that as a matter of law there is no general implied term of fair dealing in Anglo-Australian jurisprudence, which has placed greater emphasis upon specific terms. See *Hughes Aircraft* (1997) 146 ALR 1 at 36–7.

26 *Hughes Aircraft*, ibid at 37.

27 Ibid at 36.

28 Ibid at 38.

attention, and rightly so. The attention has been attracted by a proposition about the implied term which narrows the obiter dictum to a second level. This is that the term is especially easily implied in pre-award contracts in government procurement.[29] Indeed Finn J makes it clear that he regards the implied term of fair dealing as having a stronger foundation in the area of government contracts because the contract involves the expenditure of public funds.[30]

The initial premise which provides the foundation for Finn J's moving to the conclusion that there is an implied term in pre-award contracts of government is the idea that an agency of government has no private interest separate from the public interest which it ought to serve. The same is true of a public body such as the CAA, whose owners are ultimately the Australian community. From this proposition Finn J moved to a "broad notion" applying to government agencies and public bodies, that:

> [H]aving no legitimate private interest in the performance of its functions, a public body (including a state owned company) should be required as of course to act fairly towards those with whom it deals at least in so far as this is consistent with its obligation to serve the public interest (or interests) for which it has been created.[31]

The terms in which this principle of democratic theory has been formulated deepens the shock which *Hughes* has generated. Not only are statutory authorities such as the CAA subject to the implied term of fair dealing. So too, the principle suggests, are state owned companies. The broad principle of democratic theory clearly animated Finn J's conclusions about terms implied ad hoc and at law, both generally and in relation to government procurement contracts. However, Finn J cleverly disavowed reliance upon the broad principle of democratic theory. Instead he gathered together three groups of case law which offered him a more conventional and acceptable route to exactly the same destination.[32] I shall return to examine the cases after dwelling briefly upon the concepts of public body and government which underlie the conclusion that state owned companies fall within the scope of the particularly strongly implied duty of fair dealing in pre-award contracts.

Public bodies and government

It is time to step back from *Hughes Aircraft* and interrogate the nature of the new relationship it forges between administrative law and contract law by casting a duty of fair dealing upon public bodies entering pre-award contracts.

It is critical to ask what is a public body. In *Hughes Aircraft* the expressions "public body" and "government" are used differently. Government appears to denote agencies of the executive branch of

29 Ibid at 40.
30 Ibid at 38, 42.
31 Ibid at 40–1.
32 Ibid at 41.

government. Public body includes a state owned company and domestic tribunals. So a public body need not be a decision-maker located within the executive branch of government. Thus, public body is the broader term, potentially extending across that contested blurred line drawn between public and private sectors. This approach accords with the thinking of many administrative law theorists who have argued that the state is broader than government, including all sites for the exercise of public power.[33]

But how much broader? If we accept that the fundamental democratic duties of public bodies are not duties confined to government, when government contracts out its functions the body performing those functions may be equally subject to those democratic duties. Although Finn J explicitly includes within the scope of public body domestic tribunals and state owned corporations, other even more tricky questions are unanswered. Are fully privatised GBEs public bodies? Are ordinary corporations which are the competitors of state owned corporations and privatised GBEs, with no history of being part of government or owned by government, public bodies?

The touchstone for Finn J is that the body has no private or self-interest separate from the public interest the body is constitutionally bound to serve.[34] This is the answer *Hughes Aircraft* gave to what Finn J characterised in the opening description of the case as two major jurisprudential issues:

> The one concerns the constitutional status and standing in our system of government of statutory corporations that by statute are subject to prescribed (hence presumably, correspondingly limited) powers of ministerial direction. Do they fall within the Executive? Or are they a fourth arm of government? The other raises the extent to which the manner of scrutiny of the formally "non-governmental" action of a statutory corporation (ie entering into a "commercial" contract) can or should be affected by the considerations that it nonetheless is a public body that is so acting and that in so doing it is exercising a public function.[35]

While Finn J had no doubt that the CAA is a public body, he would have liked to be able to sketch in some answers to the broad question of definition of such bodies and their relationship to the executive branch. Counsel for Hughes declined to take up the invitation to consider the constitutionality of corporatised GBEs by reference to the catch-all source of non-statutory powers, s 61 of the Commonwealth Constitution.[36]

Working from the point reached by Finn J we might ask, in what sense are domestic tribunals, corporatised GBEs privatised GBEs or other corporations *constitutionally* bound to serve the public interest? The expression "public interest" on its own is problematic. There is no one public interest but multiple competing interests and different theories of democracy as to how those conflicts should be

33 A C Hutchinson, "Mice under a Chair: Democracy, Courts, and the Administrative State" (1990) 40 *UTLJ* 374.
34 *Hughes Aircraft* (1997) 146 ALR 1 at 40.
35 Ibid at 24.
36 Ibid at 24–5.

resolved in legislative and policy making processes. The constitutional duties may be sought in the common law of public law before resort is taken to non-legal norms.

A common law source for the duty of fair dealing: Administrative law?

According to Finn J, three groups of cases support the conclusion that public bodies are subject to a duty of fair dealing in pre-award contracts. The three groups of cases are:

- principles of procedural fairness, which apply to decisions of the executive branch of government generally, and also to decisions of domestic tribunals;
- an old-fashioned, almost instinctive, standard of fair play which requires government to adopt the highest standards in dealing with its subjects and in particular to be a "model litigant";
- the rule that high principled action should be taken by public bodies when they receive mistaken payments.

Each group reflects a common law policy captured in three fundamental democratic duties of public bodies. They:

- should protect the reasonable expectations of those who deal with them;
- exercise their statutory and contractual powers for the public good; and
- act as moral exemplars.

The first group, the principles of procedural fairness, is clearly drawn from administrative law and warrants the most attention. I shall return to this group of cases below. For the present I wish to examine the second and third groups of cases to see how much support they provide for the proposition that there is an implied term of fair dealing in government procurement contracts.

"Old fashioned fair play": The model litigant

The second group of cases[37] is presented in support of the principle that the Crown should never take "technical points" even in civil proceedings, and especially not in criminal proceedings:

> [T]here is an old fashioned traditional and almost instinctive standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary.[38]

The foundational case in which this principle of fair play is stated in *Melbourne Steamship Co Ltd v Moorehead*,[39] a 1912 case of

37 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333; *SCI Operations Pty Ltd v Commonwealth* (1996) 139 ALR 595; *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125; *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537 and *Director of Public Prosecutions (Cth) v Saxon* (1992) 28 NSWLR 263.

38 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342 per Griffith CJ.

39 Ibid.

collateral judicial review in a criminal prosecution brought for the statutory offence of refusal to answer questions asked by a delegate of the Comptroller-General of Customs.[40] The court held that the coercive power to ask questions was exercised for the improper purpose of obtaining information relevant to other criminal proceedings already brought against the company. The Comptroller-General sought to side-step the improper purpose ground by claiming that the questions were asked in relation to similar conduct which occurred on a later date and which might ultimately be the subject of a new charge. It was the Crown's raising of this "technical point of pleading" which drew the comment from Griffiths CJ describing a duty of old-fashioned fair play on the part of the Crown in litigation.[41]

It is in the context of civil actions rather than criminal actions that the courts have more recently sought to strengthen the formulation of the old-fashioned fair play principle and extend it to contexts which seem to reach beyond the idea of not "taking technical points".

In *Logue v Shoalhaven Shire Council*[42] Mahoney JA in a dissenting judgment applied *Melbourne Steamship*, strengthening the formulation of old-fashioned fair play as one of the "highest standards" to be met by government:

> It is well settled that there is expected of the Crown the highest standards in dealing with its subjects: see *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at pp 342–344, per Griffith CJ. What might be accepted for others would not be seen as in full accord with the principles of equity and good conscience to be expected in the case of the Crown: see *P & C Cantarella Pty Ltd v Egg Marketing Board* (NSW) [1973] 2 NSWLR 366 at pp 383, 384. In my opinion, a standard of conduct not significantly different should be expected of a statutory corporation of the present kind; there being no competing interests, the council should be seen as holding the land subject to the appropriate rights in equity.[43]

The principle arose in *Melbourne Steamship* itself in a collateral judicial review. Unlike *Melbourne Steamship*, the context in *Logue* was not one of the role of the Crown in litigation. Mahoney JA called

40 Ibid.

41 See also *Director of Public Prosecutions (Cth) v Saxon* (1992) 28 NSWLR 263 at 267–8, cited by Finn J. In *Saxon* Kirby P characterised old-fashioned fair play as a general principle applying within the criminal justice system, and as requiring that the representative of the Crown act with scrupulous fairness both to the court and to the accused. The principle was invoked in proceedings under the Proceeds of Crime Act 1987 (Cth) by which the DPP would have deprived the accused of the funds he would have used for his legal representation at trial.

42 [1979] 1 NSWLR 537.

43 *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537 at 558–9. In *Logue* the majority of the NSW Court of Appeal declined to hold that inaccuracy in an advertisement relating to sale of land for overdue rates rendered the entire process of recovery of the rates by sale of the land procedurally ultra vires. Mahoney JA in dissent held that non-compliance in this respect with the statutory procedure rendered the council's sale of the land to itself ultra vires and invalid. An inappropriate use of this power could also amount to an equitable fraud. Mahoney JA concluded that the council held the land subject to the equitable interests of the previous landowner.

upon the old-fashioned fair play principle to buttress his conclusion that declaratory relief was appropriate in a case of breach by a shire council of its statutory duties in circumstances which also gave rise to equitable fraud.[44]

Cantarella, referred to by Mahoney JA in *Logue*, was a case like *Melbourne Steamship* concerned with the conduct of litigation.[45]

In *Greiner v Independent Commission Against Corruption*,[46] also cited by Finn J, Mahoney JA in dissent referred to the old-fashioned fair play principle as relevant to the availability of declaratory relief, but made it clear that the principle does not assist an applicant where no unlawful conduct can be established.[47]

In *SCI Operations v Commonwealth*[48] the old-fashioned fair play principle was briefly invoked in support of the conclusion that where a decision has been set aside as unlawful in judicial review proceedings, the Crown's default should be taken into account in determining whether interest is paid on customs duty paid on account of the unlawful decision for the period prior to the court's order setting aside the decision. In *SCI Operations* Beaumont and Einfeld JJ strengthened the formula in *Melbourne Steamship* by describing government as the "model litigant":

> [T]he position of the Crown itself, especially given its default in failing to make the [Commercial Tariff Concession Order], should also be taken into account. Otherwise the Crown would be taking, or be seen to be taking, advantage of its own default, whereas it is well established that the Crown must act, and be seen to act, as a model litigant.[49]

Where do these cases fit into the scheme of administrative law? *Melbourne Steamship* was a case of collateral judicial review on the ground of improper purpose in criminal proceedings. *Logue* was a case of procedural ultra vires and equitable fraud. *Greiner* was a case of jurisdictional error. *Cantarella* was a case of judicial review on the

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44 It would be equitable fraud for the council to have the benefit of registration of its ownership of the land so it held the land subject to the rights in equity of the previous owner to have the transfer set aside.

45 It was the duty of the executive branch of government to ascertain the law and if necessary to approach the court in order to do so, and then obey it. Officers of the Crown should not throw any difficulty in the way of a proceedings. This observation appears to have been made in order to encourage the egg board and the plaintiff to determine between them what matters were in dispute. Once the court knew what conditions the board was actually imposing on the plaintiff egg producer it would be able to formulate the declaration.

46 (1992) 28 NSWLR 125 at 179.

47 Mahoney JA reasoned as follows. As a matter of fair play the Crown will give effect to a declaration. Fair play meaning procedural fairness is a different concept. If there is no error of law and no denial of procedural fairness there is no basis for granting declaratory relief simply because old-fashioned fair play suggests it is unfair for the Independent Commission Against Corruption Act 1988 (NSW) to empower the ICAC to label Mr Greiner and Mr Moore corrupt when that may be a misleading description of what they had done.

48 (1996) 139 ALR 595.

49 Ibid at 613. Sackville J in dissent said that "care must be exercised in translating references to the 'considerations of justice' or fairness from one context to another": ibid at 642.

ground of narrow ultra vires. *STC Operations* was a case of claim for interest to be paid on customs duty refunded pursuant to a Commercial Tariff Concession Order.

The cases on old-fashioned fair play comprise a rather untidy group ranging across civil and criminal proceedings and issues of the role of government as litigant and the court's discretion to grant a remedy. These are very different contexts than that of pre-award contracts entered into by government.

Nor is this a mainstream principle of public law. Old-fashioned fair play is not a principle regularly applied in the arena of public law remedies and it certainly is not a ground of judicial review. Indeed when we turn to judicial review the government decision-maker which immediately comes to mind when mention is made of model behaviour is the Poplar Borough Council, which took into account the irrelevant consideration of trying to be a model employer.[50] Here the court rejected the idea of a local council as a model employer, but did not consider the issue of government as a model litigant. Of course *Roberts v Hopwood* is an old English case which hopefully would be decided differently today in Australia and the duty to ratepayers the case introduced has not been adopted in Australia.

Nevertheless the point remains that the old-fashioned fair play principle does not provide a firm foundation for the general implication at law of an implied term of fair dealing in pre-award contracts entered into by government.

Public bodies as moral exemplars: Special principles of restitution

The third principle relied upon by Finn J in *Hughes Aircraft* to establish the implied term of fair dealing in government pre-award contracts, namely that public bodies are moral exemplars, draws upon principles of restitution.

An ordinary litigant may retain money paid under mistake of law but this is really a shabby thing to do. The court will not allow one of its own officers to do this. Thus a trustee in bankruptcy must be more "high minded" and repay the money.[51] In the United Kingdom a rating authority must also meet "the highest standards of probity and fair dealing" by repaying money obtained by mistake of law.[52]

The confined area of operation of this principle again makes it a thin basis on its own for developing the implied term. Let us turn to the first group of cases Finn J cites, which draw directly upon administrative law—procedural fairness.

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50 *Roberts v Hopwood* [1925] AC 578.

51 *Ex parte James* (1874) LR 9 Ch App 609; *R v Tower Hamlets London Borough Council; Ex parte Chetnik Developments Ltd* [1988] 1 AC 858 at 874–5, 876–7.

52 *R v Tower Hamlets London Borough Council; Ex parte Chetnik Developments Ltd* [1988] 1 AC 858 at 879.

PROCEDURAL FAIRNESS: IN JUDICIAL REVIEW AND IN IMPLIED CONTRACTUAL TERMS

The common law principles of procedural fairness offer most promise as a basis for implying a term of fair dealing in all pre-award government contracts. Whether the notion of fair dealing is, or ought to be, a broader concept than that of procedural fairness can be put to one side for the present.

The reference Finn J makes in *Hughes Aircraft* to the administrative law cases is very brief. Only two cases are mentioned without elaboration.[53]

A useful point of departure is to ask whether procedural fairness applies in circumstances such as *Hughes Aircraft*? A preliminary question arises. Irrespective of whether procedural fairness arises, was the CAA's tendering decision justiciable? There is no doubt that the fact that a decision is of a commercial nature is not enough on its own to remove it from the ambit of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act).[54] It is still "of an administrative character".

However, since the decision of the Full Federal Court in *General Newspapers Pty Ltd v Telstra*,[55] decisions of corporatised GBEs have failed to satisfy the requirement in the test of justiciability under the ADJR Act s 3(1) that the decision be made "under an enactment".[56] Even where the empowering statute confers a general power to enter contracts, this simply effects the conferral of all the powers of a natural person including the power to enter contracts.[57] Thereafter when the corporatised GBE enters into, or acts under, a contract its actions are not required or authorised by the statute but are governed entirely by the law of contract.[58]

Thus, in *General Newspapers* Davies and Einfeld JJ (Gummow J concurring on this issue) held that a decision by Telstra not to put the printing of the *White Pages* to tender was not justiciable under the ADJR Act. At first instance in *General Newspapers* Wilcox J was equally reluctant to concede the decision justiciable.[59] Indeed he was

53 *Haoucher v Minister of State for Immigration and Ethnic Affairs* (1990) 169 CLR 648; *Annetts v McCann* (1990) 170 CLR 596.

54 *Evans v Friemann* (1981) 3 ALD 326 at 332; *James Richardson Corp Pty Ltd v Federal Airports Corp* (1992) 117 ALR 277 at 279 (later disapproved in *General Newspapers Pty Ltd v Telstra* (1993) 117 ALR 629 on the different ground of the test of "under an enactment"); *Century Metals and Mining NL v Yeomans* (1989) 100 ALR 383.

55 (1993) 117 ALR 629.

56 Previous decisions made it clear that a decision to award a contract entered into in exercise of non-statutory power, albeit with some statutory regulation of the tendering procedure, was not made "under an enactment": *Hawker Pacific Pty Ltd v Freeland* (1983) 52 ALR 185.

57 For criticism of the decision see M Allars "Public Power but Private Law: Removing Administrative Law Review from Government Business Enterprises" (1995) 6 *PLR* 44.

58 (1993) 117 ALR 629 at 637.

59 *General Newspapers Pty Ltd (trading as Hannanprint) v Australian & Overseas Telecommunications Corportation Ltd* (1993) 117 ALR 135.

franker than the Full Court in expressing his reasons. He pointed to the government's policy decision to remove the old Telecom from a high degree of control and give it a new structure as a corporation with minimal statutory support:

> That policy involves the proposition that [Telstra] should be amenable to the ordinary law of the land, including the Trade Practices Act, but not to special legislation devised for government instrumentalities and statutory decision-makers, such as the ADJR Act. Even if it was technically possible for the court to intervene in this matter under the ADJR Act, it ought not to do so.[60]

This does not mean that tendering processes can never be justiciable. Other tendering processes concluded under statutory schemes at the federal level may satisfy the test of justiciability under the ADJR Act.[61] Review may also be available at general law. In judicial review actions brought at general law in State Supreme Courts no problem of justiciability has arisen.[62]

However it is clear that on the authority of *General Newspapers* tendering decisions of the CAA are not justiciable under the ADJR Act. Thus, in *CEA Technologies Pty Ltd v Civil Aviation Authority*[63] decisions of the CAA to enter contracts for the supply and installation of equipment were held not justiciable under the ADJR Act. The only statutory provisions which could have authorised or required the entry into the contract were those expressing in very general terms the functions of the CAA.[64] A corporatised GBE and even the traditional statutory corporation is not subject to judicial review in the Federal Court's extended jurisdiction under the Judiciary Act 1903 (Cth) s 39B(1) because it is not an "officer of the Commonwealth."[65]

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60 Ibid at 171.

61 *Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce* (1987) 14 ALD 351; *Century Metals and Mining NL v Yeomans* (1989) 100 ALR 383. For an example of judicial review of a tendering decision under the Judicial Review Act 1991 (Qld) see *KC Park Safe (Brisbane) Pty Ltd v Cairns City Council* [1997] 1 Qd R 497.

62 See *White Industries Ltd v The Electricity Commission of NSW* (Supreme Court of NSW, Yeldham J, 20 May 1987, unreported); *Cord Holdings Ltd v Burke* (Supreme Court of Western Australia, Smith J, 22 January 1985, unreported). For another kind of contract review situation at general law see *Chapmans Ltd v Australian Stock Exchange Ltd* (1994) 33 ALD 463 per Beaumont J, affirmed on other grounds (1996) 137 ALR 433.

63 (1994) 122 ALR 724.

64 Other exercises of power by the CAA may well be justiciable under the ADJR Act. Note that certain decisions under the Civil Aviation Act 1988 (Cth) are excluded from the scope of the duty to give reasons under s 13 of the ADJR Act: ADJR Act s 13(11), Sch 2(p)(i). Decisions relating to aircraft design, construction of maintenance of aircraft or the safe operation of aircraft or otherwise relating to aviation safety and arise out of findings on material questions of fact based on evidence or other material that was either supplied in confidence or whose publication would reveal a trade secret.

65 *Post Office Agents Association Ltd v Australian Postal Commission* (1988) 84 ALR 563. In this case the court held it had accrued or associated jurisdiction but this approach has since been doubted. Jurisdiction under s 39B(1A) of the Judiciary Act (Cth) could be considered.

If the decision of the CAA which was the subject of *Hughes Aircraft* had been justiciable, would procedural fairness have been an available ground of review? There is no doubt that it would. The representations made at the restart meeting, and in the letter, that the process would be fair and equal, generated a legitimate expectation that the CAA would not depart from those representations without giving Thomson or Hughes a hearing on the issue.[66] On the factual findings, there was such a departure from the representations and no hearing on the issue was given to Hughes. The letter could also have been seen as a statement of policy which generated a legitimate expectation with the same requirements in terms of fairness.[67]

An apt example in the tendering context is *Century Metals & Mining NL v Yeomans*,[68] where the liquidator of the Christmas Island Phosphate Mining Company, appointed under a special ordinance, conducted a tendering process which was infected by bias. The minister breached his public promise that tenders would be evaluated by an independent and unbiased person. The promise generated a legitimate expectation so that a hearing should be given prior to any departure from the promise.

The problem in *Century Metals* was that the liquidator was not independent. He was appointed to do the bidding of the government and reject the tender made by the applicant consortium, which included a union with a difficult history. Here administrative law principles ensured that a proper commercial process would be observed, rather than a political decision be made influenced by the government's dislike of the union. The fairness of administrative law promoted commercial objectives.

In *General Newspapers* itself, the ground of review argued was denial of procedural fairness. At first instance Wilcox J took the view that Hannanprint, which was disappointed by Telstra's dishonouring of its promise to invite tenders for printing of the *White Pages*, had been denied procedural fairness. The Full Court held that because tenders were not called there was no relationship between Telstra and Hannanprint so as to give rise to the implication of procedural fairness.[69]

This is another curious aspect of *General Newspapers*. It suggests that a body may be immune from judicial review in contracting out decisions yet still clearly fall within the scope of the implication of the general common law principles of procedural fairness. Here we find an intriguing argument for the *Hughes Aircraft* approach. It is

66 This is an application of *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629. See also *Century Metals and Mining NL v Yeomans* (1989) 100 ALR 383 and *BHP Direct Reduced Iron Pty Ltd v Chief Executive Officer, Australian Customs Service* (Federal Court, Carr J, 23 October 1998, unreported).

67 *Haoucher v Minister of State for Immigration and Ethnic Affairs* (1990) 169 CLR 648. In the same way the Department of Finance and Administration *Commonwealth Procurement Guidelines* (March 1998) generate a legitimate expectation entitling a tenderer to a hearing before the decision-maker departs from them in a tendering process to which they apply.

68 (1989) 100 ALR 383.

69 (1993) 117 ALR 629 at 637.

acceptable to enforce procedural fairness through the law of contract because this is not special legislation designed for government.

But then we are left with the uncomfortable question as to whether it is indeed appropriate to enforce procedural fairness through the law of contract when it cannot be enforced through judicial review. Moreover, the narrower obiter dictum in *Hughes Aircraft* infiltrates into contract law a special principle for government, that in pre-award contracts it is more strongly obligated to act fairly than is the case for other contractors. Finn J noted that Hughes had not argued as part of its case in its private law action that the judicial review ground could be argued. It had confined itself to arguments from the law of contract.[70] While Finn J observed that his judgment had nothing to do with *General Newspapers*, really it has everything to do with it. The larger picture of the inter-relationship between public law actions and private law actions needs to be interrogated.

Nevertheless procedural fairness has been implied in relation to decisions of domestic tribunals, whose power is sourced in contract,[71] and in relation to the exercise of prerogative power. There seems no reason in principle why procedural fairness could not be implied in relation to the exercise of the non-statutory power to enter contracts and flow through to the terms of the contracts themselves.

But clearly there are many other questions to be considered, for the full range of kinds of cases, regarding the relationship between the *Hughes Aircraft* approach and the approach taken in judicial review to accountability. Much depends upon the nature of the implied term of fair dealing. Is it to be commensurate with the common law rules of procedural fairness, in particular the element of content which requires disclosure of adverse allegations from other sources? Moreover, to what extent does the bias rule of procedural fairness apply in the course of dealings under the contract?

HUGHES AIRCRAFT: THE WAY FORWARD?

Reception

The reception of *Hughes Aircraft* might be assessed at a general and at a more particular level.

At a general level there are indications that the courts are ready to adapt public and private law principles in the way that occurred in *Hughes Aircraft*. Cases are arising where, as in *Hughes Aircraft*, a mix of public law and private law actions and issues are argued. *General Newspapers* involved both a trade practices action and the ADJR Act action. The mix of causes in a single action before a court encourages the interpenetration of public law and private law principles, although of course that did not happen in *General Newspapers*.

70 *Hughes Aircraft* (1997) 146 ALR 1 at 40.

71 Eg, *Trivett v Nivison* [1976] 1 NSWLR 312; *Dale v New South Wales Trotting Club Ltd* [1978] 1 NSWLR 551.

A recent example which is more encouraging is *Moran Hospitals Pty Ltd v King*,[72] a challenge to decisions of ministerial delegates within the Department of Human Services and Health in relation to recovery of overpayments of nursing home benefits. Departmental officers advised the nursing home company that it was likely it would seek to recover $1.1 million in overpayment of nursing home benefits. The company claimed that in the course of its communications with departmental officers a compromise of the amount had been reached and that this estopped the Department from now insisting on the full amount being repaid. The company brought an ADJR Act action and an action under the Trade Practices Act 1974 (Cth) for misleading and deceptive conduct.

Beaumont J struck out the action under the Trade Practices Act and one ground raised in the ADJR Act action.[73] Beaumont J held that while the ADJR Act action was a public law one, it had private law aspects in relation to the contractual and restitutionary claims involved. The existence of a compromise had to be determined according to the law of contract before the judicial review aspects of the action were considered. The claim failed at this point because there was insufficient evidence that either side had actually committed itself to the compromise alleged.

In *Moran* Beaumont J foresaw an intermingling of public law and private law principles in the resolution of the claims:

> On the one hand, invoking the Court's jurisdiction under the ADJR Act, Moran seeks to rely upon the public character of the responsibilities of the Commonwealth and its officers in the discharge of their statutory functions under the National Health Act 1953. On the other hand, Moran also claims that, in the discharging of those functions, contractual and other private law causes of action, perhaps of a restitutionary kind, arose.
>
> In my opinion, it was reasonably arguable that Moran could rely upon both the public and private law aspects of its relationship with the Commonwealth's officers. It is true that a claim that an agreement and compromise has been reached, or that a party should be held to be estopped from denying the existence of such an agreement, are more readily recognised as private, rather than public law, remedies. Nonetheless, it is possible, in my opinion, in appropriate circumstances, that these public and private causes of action and remedies may not only be able to co-exist under the general law, but also may intermingle.[74]

The response to *Hughes Aircraft* will be most interesting in contract law cases where public law elements are muted or non-existent. This will put to the test the obiter holding that there is an implied term of fair dealing at law in all contracts and all pre-award contracts.

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72 (1997) 49 ALR 444.

73 This was the question whether there was a change of ownership of the nursing homes. The cash for shares transaction was not a purchase or sale by way of the transfer of the business carried out at the home from one person to another within s 65(2) of the National Health Act, and consequently the normal overpayment recovery provisions applied.

74 *Moran Hospitals Pty Ltd v King* (1997) 49 ALD 444 at 460.

In the public law arena there will be a stronger argument for implication of the term. Of course most developments in contract law will normally occur at the State level and here in a tendering case judicial review under the general law test of justiciability may be raised in the same action. This will provide a fertile context for mingling of public and private law principles.

At a more particular level, *Hughes Aircraft* has already been welcomed in Victoria. In *Willow Grange Pty Ltd v Rantack Pty Ltd*[75] Byrne J granted an interlocutory injunction restraining the City of Yarra from giving effect to a decision to grant a lease to a tenderer. An unsuccessful tenderer for the lease of Crown land on the banks of the Yarra River at Fairfield, including a restaurant, kiosk and boat hire facilities, argued that it was denied procedural fairness for three reasons. First, it was not told what selection criteria were to be applied to assess the tenders. Secondly and thirdly, the terms of the lease offered to the successful tenderer were different from those offered to tenderers, with regard to the period allowed to the lessee to obtain planning permission for renovations, and in permitting amplified music to be played within the premises.

Attracted to principles set out by Finn J in *Hughes Aircraft*, Byrne J held that there was a triable issue that the City of Yarra was contractually bound in its performance of the tender process to act fairly to each of the tenderers. Byrne J held that there was a triable issue that documents issued to the tenderers later in the tender process and referring to certain assessment criteria, should be interpreted in the light of what had gone before so that a tenderer might reasonably have concluded that the (different) criteria set out in the initial tender document, called the Blue Book, were to be the basis of the tender assessment. There was no triable issue in relation to the second or third complaints.

Byrne J declined to make a interlocutory order restraining the City of Yarra from disturbing the unsuccessful tenderer's current possession of the premises. This would involve implying a term into the interim lease it held, which was impermissible under the Crown Land (Reserves) Act 1978 (Vic). The interlocutory relief should therefore be confined to an order restraining the City of Yarra from implementing its decision to award the lease to the successful tenderer.

Other administrative law principles as implied terms?

In *Hughes Aircraft* counsel for Hughes disclaimed any attempt to put a case that the actions of the CAA were through the medium of express and implied contractual terms subject to scrutiny on all the traditional grounds of judicial review. Finn J observed that judicial review grounds were a constant undertone throughout the case and that it was not possible to say that when the CAA entered a contract it was a matter of private law only.[76] While formally a private law

75 Supreme Court of Victoria, Byrne J, 1 December 1997, unreported.
76 *Hughes Aircraft* (1997) 146 ALR 1 at 25.

action, Finn J regarded this as a case where inevitably there was an interpenetration of private law and public law:

> I would have to say that those grounds were nonetheless a constant undertone in much of the case as argued. I have not in these reasons been able to avoid having regard to the public function being performed by the CAA in the TAAATS tender or to its status as a public body. To use an old description, it is not possible to say that when the CAA contracted it was a matter of "juris privati only".[77]

The administrative law principles which gain a passing reference elsewhere in *Hughes Aircraft* are narrow substantive ultra vires, procedural ultra vires, relevant considerations and the no-fettering doctrine.[78] In the future there may be potential to argue for further implied terms drawn from administrative law.

CONCLUSION

The law is entering a period of exploring the interpenetration of public law and private law. This will not be without its difficulties.

For example, in *Moran* where Beaumont J contemplated interpenetration of public and private law, the public/private mix presented a problem. Estoppel was argued. The rules of estoppel are very different in public law than in private law.[79]

The traditional reluctance of courts in judicial review to interfere with government decisions concerning resource allocation also needs to be addressed.[80] Such interference may actually be achieved by the back door through implication of administrative law terms into contracts.

However the decision in *Hughes Aircraft* is to be welcomed. It tackles the questions which need to be tackled. Accountability with regard to entry into the contracting out arrangement is the logically prior issue. It is necessary to settle the rights and duties arising at this point before it is possible to tackle those of private sector contractors. And if *Hughes Aircraft* is followed it offers some solutions. Finn J suggests that there is a stronger argument for implication of the term of fair dealing in government contracts than in other contracts. There may also be a stronger argument for implication of the term in any contract which can be established to exist between a member of the community and a private sector contractor whose authority to provide a service or exercise discretionary power is

77 Ibid at 25.

78 Ibid at 49–50, 51, 52, 59, 61, 66.

79 *Formosa v Secretary, Department of Social Security* (1988) 46 FCR 117; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193; *Commonwealth v Verwayen* (1990) 170 CLR 394; *City of Camberwell v Camberwell Shopping Centre Pty Ltd* [1994] 1 VR 163; *Minister for Immigration and Ethnic Affairs v Polat* (1995) 57 FCR 98; *Koltay v Law Institute of Victoria* (1995) 9 VAR 105; *L'Huillier v State of Victoria* [1996] 2 VR 465; *Enoka v Shire of Northampton* (1996) 15 WAR 483; See M Allars, "Tort and Equity Claims Against the State" in P D Finn (ed) *Essays on Law and Government Vol 2: The Citizen and the State in the Courts* (1996) 49 at 86–100.

80 *Yarmirr v Australian Telecommunications Corp* (1990) 96 ALR 739.

derived from its contract with government. Beyond this, Finn J's obiter dictum that the implied term of fair dealing arises for all contracts in any event makes private sector contractors accountable in a way which was not envisaged by the ARC in its *Issues Paper* and to which it makes no response in its *Report*.

Competitive tendering processes are intended to ensure that market based decisions are made in government procurement contracts. Since *Hughes Aircraft* was decided the Senate Finance and Public Administration References Committee has commented that the story of the deficiencies in the tendering process for the TAAATS II contract demonstrates:

> [T]hat the cost of flawed processes can be considerable—in financial penalties, delays in implementing decisions or introducing new approaches, loss of confidence in government and damage to this country's reputation as a place to do business.[81]

The compatibility of administrative law principles of procedural fairness with the commercial interests of government and the private sector ought now to receive sustained and creative recognition—by courts, law reform agencies and government.

81 Senate Finance and Public Administration References Committee, *Contracting out of Government Services: Second Report* (1998) ch 2 at 5.

The Regulation of Privately Owned Utilities in the UK: Lessons for Australia?

CHRIS FINN*

INTRODUCTION

The question I wish to examine is the extent to which privatisation of what were formerly publicly owned utilities results in a loss of accountability. In doing so, I will draw upon the experience of the last 15 years or so in the United Kingdom, and attempt to draw some parallels which may be of use in the Australian context.

To begin with, I wish to make clear the narrow sense in which I am using the term "privatisation". I am referring to the outright sale of public utilities to the private sector.[1] Thus, I am not directly addressing the issue of contracting out or outsourcing, though I would suggest that useful parallels could be drawn between this and privatisation in the narrow sense. Even more emphatically, I am not addressing the question of "deregulation", though this is sometimes described as an aspect of "privatisation" in a broad sense. It will be evident from the body of this paper that I view deregulation and privatisation as vastly different matters.

There is little doubt that the transfer of utility industries from public to private ownership takes them out of the sphere of accountability provided by the specific institutional mechanisms of public law. They are no longer subject to judicial review by courts, or to

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1 Such as the partial sale of Telstra which has already occurred, and the full sale which is the policy of the current government.

administrative review by tribunals. Equally, they no longer fall within the jurisdiction of public sector Ombudsmen and are outside the scope of freedom of information legislation.[2] Prima facie then, they are subject to much diminished levels of accountability. It is the purpose of this paper to review this prima facie proposition and examine the extent to which it survives a closer scrutiny.

My starting point is an extremely pragmatic one. The institutions of public law accountability listed above are not "sacred cows". Given that they represent the pinnacle of an astonishing development in administrative law in this country, our attachment to them as administrative lawyers is inevitably a deep one. Nonetheless, in the end, their value, I suggest, is instrumental in that it is to be judged by the degree to which they successfully achieve the underlying goals and values of public law. The deeper questions concern the nature of these public law goals and values and whether or not there exist alternative means of vindicating them. That question is brought sharply into focus by the view expressed by the Administrative Review Council (ARC) in 1995 that exposure to competition would provide an adequate substitute for the application of the administrative law package to Commonwealth Government Business Enterprises (GBEs).[3]

The broad lessons which can be drawn from the regulation of privately owned utilities in the UK

A number of broad lessons seem to be evident from the experience in the United Kingdom. I will state these conclusions here, then attempt to explain their basis in what follows.

(i) "Privatisation" need not in any sense imply deregulation. On the contrary, privatised utility providers in the United Kingdom are subject to complex regulatory arrangements, for which there is an ongoing need.[4]

(ii) Private ownership of public resources in the United Kingdom has not been equated with full private control of those resources. On the contrary, the regulatory schemes which have been set up have resulted in a situation where government has privatised ownership, but explicitly retained control in order that a variety of public goals be met.

(iii) This separation of ownership and control, of regulator and regulatee, brings with it the possibility of a much clearer formulation of regulatory goals and specification of both the required

2 This "escape from jurisdiction" is documented in M Allars, "Private Law but Public Power: Removing Administrative Law from Government Business Enterprises" (1995) 6 *PLR* 44, which concludes with an argument for the imposition of judicially enforceable "Community Service Rights".

3 Administrative Review Council, *"Government Business Enterprises and Commonwealth Administrative Law"* (Report No 38, 1995).

4 A sharp contrast can be drawn between the institutional arrangements described below, and the comparative dearth of regulation in New Zealand. The emerging Australian regulatory institutions conform much more closely to the UK model.

performance standards and of the applicable sanctions in the event of these not being attained. The independence of the regulatory body is a key to the credibility of this process.

(iv) The operation of the regulatory schemes in the UK has, in practice, been characterised by a considerable, and increasing, degree of openness and transparency, as well as meaningful public participation. In this respect, these regulatory schemes contrast very favourably with the very limited degrees of openness and participation which previously typified the operation of publicly owned utilities.

(v) Finally, it appears that the combination of privatisation and regulation has been accompanied by significant advances in terms of service quality and indeed in the provision of universal service facilities. It is important to be clear about what this demonstrates and what it does not. Clearly, this does not demonstrate any inherent superiority of the private sector in service delivery. However, it does amount to an empirical demonstration that a properly regulated private sector is at least as capable of delivering these type of utility services as a publicly owned one. In particular, an appropriately regulated private sector is capable of delivering on significant "public" goals.

THE REGULATORY SCHEMES IN THE UK

The movement towards private sector delivery of utility services generally proceeds in four stages, although these do not always occur at the same time, or in the same order. The stages are:

(a) vertical disaggregation;

(b) corporatisation;

(c) privatisation; and

(d) the development of regulatory institutions, goals and tools.

Vertical disaggregation involves the separation of the contestable parts of an industry from those which are of a "natural monopoly" nature. In short, those parts of the industry in which competition is considered to be feasible are separated from the others. For example, an electricity industry is typically considered to break down into four sectors. These are power generation, transmission via high voltage grids, local distribution, and retail supply. Competition is considered feasible in the first and last of these sectors, which are then usually subdivided between a number of players for this purpose. On the other hand, transmission and distribution remain as areas of natural monopoly, at least with foreseeable technologies.

Once vertical disaggregation and corporatisation have taken place, the competitive aspects of the industry are usually privatised by government, although it is at least arguable that effective competition does not actually require this. Natural monopoly sectors of an industry will either be retained in public ownership or, if privatised,

will require more extensive forms of regulation in order that monopoly power is not abused.[5]

A Brief History Of Utility Privatisation In The UK

Although not a major part of the platform upon which the Thatcher government came to power in 1979, privatisation soon emerged as a key element in economic policy. The government embarked upon a program of selling nationalised industry, including the utility industries. One rationale was a desire to reduce the public sector borrowing requirement at a time when considerable investment in new infrastructure was required; a policy of encouraging wider share ownership, thus creating a "people's capitalism", soon became one of the key political selling points. In addition, it was strongly argued that exposure of these industries to the discipline of effective market competition wherever possible, would do much to increase their efficiency, with resultant cost benefits flowing to consumers.

The framework for the privatisation of each utility was provided by industry specific statute.[6] Each private company providing utility services was required to hold a licence, and a range of licence conditions detailed the licensee's obligations. Varying arrangements were made for consumer involvement in the regulatory structure.

Telecommunications was the first of the utilities to be privatised, in 1984.[7] British Telecom (BT) was transferred intact from public to private ownership, thus replacing a public monopoly with a private one. Though now exposed to greatly increased levels of competition in more profitable sectors, BT retains the vast share of the domestic telephone market.[8] Under the terms of its licence, BT is required to operate the national telephone network, including exchanges, and is responsible for the actual transmission of calls.[9] It is required to provide a universal telephone service throughout virtually all of the UK. BT is also obliged to provide public call boxes, services in rural areas, directory enquiry services and special services for disabled people.[10]

The gas industry was privatised in 1986.[11] As with British Telecom, British Gas was floated with its monopoly position virtually intact, but considerable strides towards restructuring and competition have subsequently been made. A key element has been the separation of the production and distribution of gas from its subsequent sale, allowing competition at the latter stage. Competition for supply to industrial consumers has been in place since privatisation in

5 These would include price caps in many instances and access regimes to allow new players in competitive sectors non-discriminatory use of network facilities.
6 Telecommunications Act 1984 (UK); Gas Act 1986 (UK); Water Act 1989 (UK); Electricity Act 1989 (UK).
7 Telecommunications Act 1984 (UK).
8 In 1994–5, BT still retained 94% of residential exchange lines.
9 Licence granted to British Telecom under s 7 of the Telecommunications Act 1984 (UK), sch 1, pt 2.
10 Ibid.
11 Gas Act 1986 (UK).

1986.[12] Trials of competition in the domestic supply market commenced in 1996 and the full introduction of competition in this market is planned for 1998. All suppliers, however, use common infrastructure such as pipelines. These are owned by a subsidiary of British Gas.

Water and Sewerage Services in England and Wales were privatised in 1989.[13] At that point ten companies supplied both water and sewerage services, while a further 29, which had always been privately owned and operated, supplied water only. Subsequent mergers have reduced that number. Given the natural monopoly characteristics of the water supply industry, each company possesses a virtual monopoly in its geographical area, though large consumers living on the boundaries of these areas may be able to opt for a neighbouring supplier. This limits the possibilities for direct competition.

Electricity privatisation occurred in 1990–91.[14] Prior to this, the industry was restructured and divided into 4 separate sectors; generation, transmission, distribution and supply. Two companies[15] control the majority of the generating capacity; nonetheless, competition is deemed to exist in this sector, and regulation is limited. As with gas, the intention of the UK government is to introduce full competition in the domestic supply market by 1998.

The Regulators

Regulatory powers and duties are divided between individual utility regulators, the Mergers and Monopolies Commission (MMC) and the relevant Ministers. Each of the four major utilities; telecommunications, gas, water and electricity, has its own office of regulation. These are usually referred to simply as Oftel, Ofgas, Ofwat and Offer respectively. They are independent, non-Ministerial government agencies.

The MMC functions as an appeal body and arbiter in cases of dispute between a utility company and its regulator. However, it cannot investigate on its own motion but must await a reference from a regulator, the Secretary of State, or the Director of Fair Trading. The privatisation statutes also confer regulatory powers on the responsible Ministers.[16] However, apart from the issuing of new licences, the Ministers have left the regulation very much in the hands of the Directors General. Powers to issue "general directions", also granted in the privatising statutes, have likewise remained dormant. In general then, political direction of the privatised industries and their regulators has been limited and indirect.

12 The initial legislation allowed competition for supply to consumers of more than 25,000 therms per annum. This threshold was reduced to 2,500 therms in 1992.

13 Water Act 1989 (UK); now consolidated in the Water Industry Act 1991 (UK).

14 Electricity Act 1989 (UK).

15 National Power and PowerGen.

16 These are the Secretary of State for Trade and Industry in the case of Telecommunications, Gas and Electricity, and the Secretary of State for the Environment in the case of water and sewerage.

In addition to the specific statutes which apply to particular industries, there are a number of general statutes which form part of the regulatory framework. Both the Fair Trading Act 1973 (UK) and the Competition Act 1980 (UK) apply to the privatised utility companies. The regulators are expressly given power by the privatising statutes to exercise some of the powers of the Director General of Fair Trading which derive from those Acts. The Competition and Service (Utilities) Act 1992 (UK) made further provision for more extensive competition.

Finally, the Director General of Fair Trading has power to investigate anti-competitive practices and to publish a report thereon. If this does not resolve the matter, there is further power to make a "competition reference" to the MMC. The appropriate regulator can also make a "monopoly reference" to the MMC.

Licensing

All companies operating in the regulated sectors of the industries require a licence.[17] The original licences were drawn up by the government when the utilities were privatised, in terms designed to make them attractive investments. Much of the subsequent process of regulation has consisted in a gradual tightening of these initial terms. The responsible Ministers retain the power to issue new licences in the case of gas and telecommunications, while the relevant Directors General have power to issue new licences in the electricity and water industries, albeit subject to the consent of the Minister.

The licenses impose a wide range of duties upon their holders. Many licence conditions are common between competitors; however, the regulators can and do vary individual licence conditions in response to performance. Licence conditions include price capping formulae where appropriate, specified service levels and requirements as to customer relations, such as procedures to be followed in cases of potential disconnection. An interesting recent inclusion in BT's licence is a general provision which repeats sections from the Treaty of Rome[18] prohibiting cartels or behaviour amounting to the abuse of a dominant market position.

Licence modification is the principal regulatory process. Each regulator has the power to modify the terms of a utility company's licence by agreement with that company. Where such consent is not forthcoming, the dispute must be referred to the MMC which will make a recommendation for implementation by the regulator.

Regulators also have a duty to supervise compliance with the terms of existing licences, as well as with statutory requirements. Where a regulator determines that a utility company is operating in breach of its licence, interim and final orders may be made. Breach of a final order will render the offending utility company liable to

17 In the case of gas, this is termed an "authorisation"; in the case of water it is an "instrument of appointment".

18 The Treaty establishing the European Economic Community in 1957.

civil damages. In extreme cases, repeated and serious breach of a final order would lead to the withdrawal of a licence.

The Duties of the Regulators

Each of the privatising statutes sets out the primary and secondary duties to which the regulator must have regard in exercising their licensing and other powers.

The Telecommunications Act 1984 imposed 2 primary duties upon the Director General of Oftel:

> (a) to secure that there are provided throughout the United Kingdom, save in so far as the provision thereof is impracticable or not reasonably practicable, such telecommunications services as satisfy all reasonable demands for them including, in particular, emergency services, public call box services, directory information services, maritime services and services in rural areas.
>
> (b) without prejudice to the generality of paragraph (a) above, to secure that any person by whom such services fall to be provided is able to finance the provision of these services.[19]

Thus, the prime objective of the regulatory scheme is the general availability of telecommunications services, importantly including those services which might not be well provided by a pure market mechanism but are judged to be socially desirable. The second prime objective is the "financing" duty. This duty requires an exercise of regulatory discretion which allows telecommunications service providers the opportunity for viable commercial operation; however, it does not override the first duty. Secondary duties direct the regulator to the protection of consumers in respect of price and service quality, and to the promotion of effective competition.[20]

A similar pattern is apparent in the other privatisation statutes, though there are some variations. Thus, the prime duties expressed in the Gas Act 1986 were again the satisfaction of all reasonable demands, though this was expressed "to the extent that it is economical to do so",[21] and the financing duty.[22] These duties were significantly altered by the Gas Act 1995 in preparation for increased competition in the domestic supply market. The duty to satisfy all demands became a duty to ensure that "all reasonable demands for gas conveyed through pipes are met".[23] A third primary duty was added: "to secure effective competition in the carrying out of activities" under the Act.[24]

The Director-General of Gas has secondary duties to protect the interests of consumers and to promote efficiency and economy on the part of gas suppliers.[25] Finally, both the Director-General and the

19 Telecommunications Act 1984 (UK), s 3(1).
20 Ibid at s 3(2).
21 Gas Act 1986 (UK), s 4(1)(a).
22 Ibid at s 4(1)(b).
23 Gas Act 1995 (UK), s 1, amending s 4 of the Gas Act 1986 (UK).
24 Ibid.
25 Gas Act 1986 (UK), s 4(2)(a)–(c).

Secretary of State are required to take into account "the interests of those who are disabled or of pensionable age".[26]

The first primary duty of the water regulator is simply "to secure that the functions of a water undertaker and of a sewerage undertaker are properly carried out as respects every area of England and Wales".[27] The financing duty is more specific than in other legislation, referring to the securing of "reasonable rates of return upon capital".[28] Secondary duties again include protecting the interests of customers and facilitating effective competition".[29] The water regulator has recently argued that the statutory duties should be amended so that there should be a single primary duty to protect the interests of customers. Other existing duties should remain but be secondary to that duty.[30]

In the case of electricity, as with gas, there are 3 primary duties, to ensure that all reasonable demands for supply are satisfied, to ensure that licence holders are able to finance their activities and to promote competition in the generation and supply of electricity.[31] The secondary duties once again include protection of consumer interests in matters of price and other terms of supply, continuity and quality of supply, promotion of efficiency and economy, both by gas suppliers and by users, and, in addition, the effect of activities on the physical environment.[32] Finally, there is a requirement to take into account the interests of rural consumers in pricing matters, and the interests of disabled consumers in questions of quality.[33]

A variety of regulatory aims are evident in these statutory duties. These not always easily reconciled. In practice, their resolution in the processes of licence supervision and modification has tended to be a matter for the discretion of the individual regulator. The balance struck has varied according to the degree of competition present in a particular industry or industry segment and the particular difficulties which have emerged over time. A consistent thread has been a gradual movement from the regulation of monopoly, particularly through the use of price control mechanisms, towards the policing of competition as market sectors have been progressively liberalised. Regulatory policy has also continued to embrace questions of customer service levels and universality. It is notable that there appears no sign of the need for regulation abating in these fields; "market forces", even within a fully liberalised competitive environment, do not appear capable of providing an adequate substitute.

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26 Ibid at s 4(3).
27 Water Industry Act 1991 (UK), s 2(2)(a).
28 Ibid at s 2(2)(b).
29 Ibid at s 2(3).
30 Director General of Water Services, *Review of Utility Regulation: Submission by the Director General of Water Services*, 25th September, 1997.
31 Electricity Act 1989 (UK), s 3(1).
32 Ibid at s 3(3).
33 Ibid at s 3(4)–(5).

REGULATORY OUTCOMES IN THE UNITED KINGDOM

In what sense, if any, have these regulatory schemes provided an adequate substitute for the more familiar mechanisms of administrative law? It is suggested that they have been surprisingly effective, particularly along the dimensions of transparency, openness and accountability.

Transparency, openness and participation

These are values which are central to public law. They reflect both the democratic stake which citizens have in the achievement of public goals, whatever the means adopted to do so, and the individual interest of citizens in participating in the making of decisions which affect them. It was noted above that the privatising statutes in the UK reflect a mix of regulatory goals; striking the appropriate balance between those goals is a difficult task for the regulators. What is most evident about the operation of the regulatory schemes is the extent to which they have brought this process out into the open, providing both opportunities for the regulatory process to be subject to public scrutiny and for meaningful participation in that process to take place. In short, the combination of privatisation and regulation in the UK has delivered a much greater degree of access to information and meaningful participation than existed under the previous regime of public ownership.

Openness & Participation in the Regulatory Process

There are varying degrees of consultation with consumer representatives and with the public generally. The Telecommunications regulator has gone to considerable lengths in this regard, whilst the electricity regulator attracts the most criticism, both from industry representatives and consumer groups. However, there is little doubt that even Offer's limited consultative processes compare favourably with the secretive way in which important industry decisions such as the setting of tariffs were taken by publicly owned utilities.

Each of the UK regulators has consumer representative bodies to assist it, though the exact arrangements vary and their comparative effectiveness would repay careful scrutiny. In the case of telecommunications there are advisory committees to assist the regulator, including committees for England, Scotland, Wales and Northern Ireland, as well as specialist committees for small business, the disabled and the elderly. In addition there are over 150 local telecommunications advisory committees.

In the water industry, consumer representation occurs by means of customer service committees which the regulator is statutorily obliged to establish; there are ten of these. The chairs of these ten committees make up a non-statutory National Consumer Council (NCC). These committees have played a significant role in the price control process. The NCC meets with the regulator and with the water companies as part of the periodic review process; the representatives hear and comment upon the representations made by the water companies, as well as having access to their confidential business plans.

In the case of the electricity industry there are regional consumer councils, with functions including review of supply matters, the provision of advice to the regulator and the resolution of certain complaints. The members are selected by the regulator. There is also a National Consumers Consultative Committee, composed of the chairs of the regional councils. There are arguments as to whether this body possesses a sufficient degree of independence from the regulator, and a separate, independent, non-statutory body has also been established.

Consumer interests in the gas industry are represented by a separate Gas Consumers Council, established by legislation,[34] which investigates complaints in an Ombudsman style role, advises the regulator and otherwise represents consumer interests.

The levels of wider public consultation also vary between the regulators. Once again however, it is fair to say that in all the industries, the levels of public participation in the regulatory process greatly exceed those previously attained prior to privatisation.

Each of the regulators issues a series of consultation documents in the period preceding any review of a regulated industry. Similar processes are followed in regard to proposed changes in industry structure or regulatory approach. For example, the gas regulator engaged in an extensive consultation process, including public conferences, in the period preceding the liberalisation of the domestic gas market. The regulators provide many of these documents free of charge on public request; they may also be accessed via websites.

The telecommunications regulator provides an example of what is now seen as "best practice" in this aspect of the regulatory role. Consultation documents are issued by Oftel in a two stage "notice and comment" procedure. Comments and representations are invited after the issue of the initial consultation documents by Oftel, and the representations received are then published, so that they may become the subject of a further round of consultation documents and representation by interested parties. Any parties wishing to preserve the confidentiality of their submissions are warned that such responses will be given less weight, if they have not been submitted to the test of contrary public opinion. This procedure is supplemented by public hearings in which industry and consumer representatives have the opportunity to openly debate the merits of one another's submissions to the regulator. For example, public hearings were held on the question of incorporating in BT's licence a general prohibition of anti-competitive behaviour, modelled on provisions from the Treaty of Rome. The licence condition was subsequently incorporated, despite strong objections from BT, in exchange for the removal of some of the existing price caps. Oftel has also established working groups of consumer and industry representatives to consider much matters as disconnection policies and services for the disabled.

34 Gas Act 1986 (UK), ss 2, 32, 40.

Openness and participation are thus central features of Oftel's regulatory style, with a further example being provided by the publication of any advice given by the regulator to the relevant Minister, subject only to commercial confidentiality.

Information as to service standards and performance

The right of access to government information provided by FoI legislation finds its rationale in the openness to public scrutiny which is a necessary incident of a system of representative government. As such, it is often contrasted with a perceived need to preserve the confidentiality of commercially sensitive material. It is striking, however, that a genuine commitment to the efficiency gains claimed to result from the operation of competitive pressures will frequently require the adoption of these same values of openness and transparency. Both democracy and the market hinge upon choice, and the effectiveness with which they function is directly related to the quality of information flows within the system. That is, just as the effective operation of a system of representative democracy is premised upon the free flow of information between citizens and government and between citizens, so too the effective operation of a market system is premised upon the free flow on information between providers and consumers and between individual consumers. This requires that consumers have independent sources of information against which they can verify the claims made by various suppliers in the market. This is an important role for the regulators.

The water regulator (Ofwat) has been particularly innovative in ensuring access to information. Licence Condition J of the licences of water and sewerage companies requires them to supply information on matters relating to service quality, and to set service targets. These include such matters as water availability and pressure, interruptions to supply, floodings, leakages and responses to complaints.

The companies must supply detailed returns on these matters; the regulator then appoints independent reporters to confirm these returns. Given that direct competition is not practicable in the water industry, the importance of this information to individual consumers is reduced. However, it is of considerable value to the water regulator, who engages in "benchmark" comparisons between water supply companies. Such comparisons have on occasion resulted in licence modifications, including the reduction of the levels at which price caps are set for poorly performing water companies. Moreover, it is evident that information of a similar type will be of great interest to consumers in the other utilities who do possess a direct choice between suppliers as full domestic competition comes into operation. Similar types of information are now collected by all the regulators and are made publicly available.

Openness and transparency have thus become increasingly prominent features of regulatory practice. Further examples include the provision by regulators of detailed information as to their own activities in the form of management plans, including goals and

objectives. These are made publicly available, as are accounts of progress and current projects. They can be accessed via the regulator's websites.[35] The regulators are also moving towards the consistent practice of giving reasons for their decisions, including summaries of and responses to the various representations they have received. Another innovation of the water regulator is the practice of publishing the regulator's letters to Managing Directors of Water Companies.

Fairness, rationality and legality

These are some of the key values traditionally associated with judicial review as a supervisory control over the exercise of discretionary power.[36] It is not immediately apparent how competition, or even regulated competition, is capable of adequately protecting such values, despite the apparent views of the ARC to the contrary.[37] However, several points can be made.

First, it should not be thought that judicial review actions against public utilities have been a commonplace. Rather, they are rare. For example, a brief survey of the Austlii Federal Court database for matters involving Telstra or its predecessor Telecom revealed some 97 matters. Of these 70, or 72% of the total, were workers compensation or other employment related matters.[38] Of the remaining 27, 15 were trade practices matters. Other matters included taxation, and copyright. The very small residual category included such matters as *General Newspapers v Telstra Corporation*,[39] *Yarmirr v Aust Telecommunications Corporation*[40] and *Kendall v Telstra*.[41] It is perhaps a little disheartening for an advocate of judicial review to observe that only in the last of these matters was the applicant ultimately successful.

Second, the simple fact that regulatory systems are in place means that many of the discretionary decision making powers which might require judicial supervision are in fact retained in public hands. It follows that judicial review will be available, subject to the normal constraints of justiciability and standing. Indeed, the greater specificity of regulatory goals and duties may provide a firmer basis for such review.

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35 http://www.oftel.gov.uk/; http://www.ofgas.gov.uk/; http://www.gtnet.gov.uk/offer/offer.htm; http://www.gtnet.gov.uk/ofwat/index.htm

36 See, for example, M Aronson, "A Public Lawyer's responses to Privatisation and Outsourcing" in M Taggart (ed), *The Province of Administrative Law*, citing to M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) at 1–7.

37 Administrative Review Council, above n 3.

38 This is not to diminish the significance of such matters to those directly involved; it is well recognised that employees often bear the brunt of the "efficiencies" which are said to flow from a privatisation. Nonetheless, the scarcity of judicial review applications against government utilities in any other context must raise the question of whether values such as fairness, rationality and legality have been well served.

39 (1993) 117 ALR 629.

40 (1990) 96 ALR 739.

41 (1994) 124 ALR 341; on appeal *Telstra v Kendall* (1995) 55 FCR 221.

Finally, there are occasions where the regulatory regimes have provided workable substitutes for some of the doctrines of judicial review, such as in providing adequate procedures in cases of potential disconnection of supply and dispute resolution and complaint handling mechanisms generally. In general, these procedures are much more accessible than judicial review, and may well provide a more useful range of remedies. These will be considered, albeit briefly, below.

Substantive successes of the regulators

Having looked at the procedural innovations of the UK regulators, it should be observed that they have also achieved notable successes in the areas of service standards and universality of service. This is of interest for two reasons. First, it can be strongly argued that just as the according of procedural fairness is said to improve the accuracy of administrative decision making,[42] so too the consultative and participatory mechanisms discussed above have been instrumental in the effectiveness of the regulatory schemes. That is, the substantive successes in improving service quality provide evidence that the consultative and participatory mechanisms are effective, and not mere "window dressing". Second, it is striking that consumer concerns with private sector service delivery typically focus on such substantive matters. There is a notable contrast between this focus and the administrative lawyer's concern with process rather than with substantive outcome. The matter cannot be explored further in this paper, but, in the context of utility privatisation at least, it seems open to question whether this denial of substantive concerns remains appropriate.

The history of the UK regulators reveals something of a common pattern in relation to issues of service standards. Notably, there were often difficulties in the period immediately subsequent to privatisation, due in some cases to a lack of regulatory power to intervene, and in other cases due to an over reliance upon market forces. However, it appears that subsequent regulatory intervention has achieved considerable success. The position of the regulators was strengthened in 1992 with the enactment of the Competition and Service (Utilities) Act. This legislation empowered the regulators to make regulations prescribing individual performance standards, dispute resolution procedures and compensation payable for breaches of the performance standards. Overall standards of performance could also be set, and the regulators were empowered to collect relevant information and to compel its publication. These formal powers provided a valuable backup to the regulators who had previously had to rely upon voluntary agreements.

For example, there were early difficulties with service quality in telecommunications in the period immediately following privatisation. BT stopped publishing service quality data on privatisation but was forced to recommence doing so by Oftel in 1987. Service quality

42 M Bayles, *Procedural Justice: Allocating to Individuals* (1990).

requirements were subsequently included in the licence conditions. By 1996, the telecommunications regulator was able to publish comparative performance data, including customer reported faults, fault repair, complaint handling and bill accuracy. Customer Service Guarantee Schemes were also operating. Similar reporting measures, service guarantee schemes and complaint handling procedures are now in place in each of the utilities.

The regulators have also achieved notable success in terms of universal service provision. Again, this was an area where standards initially fell and strong regulatory intervention was necessary. A particularly controversial issue has been that of disconnections. The regulatory experience tends to have been that disconnections have initially risen after privatisation as the new operators of the utility companies apply commercial credit management practices. However, after regulatory intervention, disconnection rates have fallen sharply, and are now lower than during the previous period of public ownership. This has been achieved by a variety of means, including Codes of Practice which specify procedures to be followed prior to disconnection, and the avoidance of disconnection during any genuine dispute. The telecommunications regulator has also developed alternatives to full disconnection such as the selective barring of outgoing calls. In the case of electricity and gas, there has been a large shift towards the use of prepayment meters.[43] In electricity, disconnection rates have fallen from 70,000 prior to privatisation to a mere 674 in 1995–6.[44]

Water disconnections have been particularly sensitive. Given the public health implications, this is not surprising. The rate of such disconnections more than doubled in the first two years after privatisation, despite licence condition H which requires the water companies to observe a Code of Practice in relation to disconnections. Practices also varied widely between water companies. Further guidelines were issued by the water regulator in 1992 and amendments to licence conditions were considered. However, by 1993 disconnection rates had begun to fall and Ofwat's Annual report in 1995 showed only 5,826 disconnections, less than half of the pre-privatisation levels.[45]

Any summary of this experience must conclude that continuing regulation has proved indispensable in order to achieve improvements in service quality and in universality of that service. On the other hand, regulation has indeed proved capable of achieving those goals, though the tools at the regulator's disposal required strengthening, primarily through the additional powers provided by the 1992 legislation. Given those powers, it has been possible to achieve higher levels of service quality and universality of service than previously attained under public ownership. It is appropriate to stress that

43 The use of such meters can be criticised as leading to hidden "self-disconnections". Nonetheless, this is probably preferable to complete disconnection by the utility provider, whether "public" or "private".

44 Offer, *Report on Customer Services* (1996) at 31.

45 Ofwat, *Annual Report* (1995) at 20.

this does not demonstrate any inherent superiority in private sector service delivery; no doubt, similar regulatory innovations could have been instituted whilst retaining the utilities in public ownership. Rather, the lesson may be that improved regulatory accountability is seen by a government intent upon privatisation as part of a trade off designed to make such privatisation more politically palatable.

What is also evident is that effective regulation has required the quantification of service standards. There is now a much greater level of accountability in the sense that verifiable data relevant to a wide range of performance characteristics is now collected and made publicly available. Equally, there is much greater public involvement, via the regulatory process, in the continued monitoring of those service standards and performance.

WILL THE UK MODEL WORK IN AUSTRALIA?

The remaining question is whether the UK experience is readily translatable into the Australian environment. It is notable that there are both broad similarities and significant differences between the regulatory schemes now established in the UK and those emerging in Australia. Our constitutional scheme further complicates the picture.

Similarities

(i) There are broad structural similarities between the regulated industries in the UK and those in Australia. In both jurisdictions, there has been an emphasis upon vertical disaggregation, with a separation between contestable areas and the remaining natural monopolies. In both jurisdictions, this has required the development and regulation of interconnection regimes between the two. Continued price controls will also be required in those parts of the industry, such as the transmission and distribution sectors of the electricity industry, which will continue to be natural monopolies.

(ii) There is also a broadly similar mix of regulatory goals, ie, the regulation of monopoly where it remains, the creation and maintenance of competition, and the achievement of desirable public goals such as universal service provision at an affordable price. It is arguable, however, that Australian statutes typically place more stress on the desirability of "decreasing the regulatory burden" to be imposed on industry. An example is provided by s4 of the Telecommunications Act 1997 (Cth), which sets out the regulatory policy to be followed:

> The Parliament intends that telecommunications be regulated in a manner that:
>
> (a) promotes the greatest practicable use of industry self-regulation; and
>
> (b) does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry;
>
> but does not compromise the effectiveness of regulation in achieving the objects mentioned in section 3.

Section 3 provides that

> (1) The main object of this Act, when read together with Parts XIB and XIC of the Trade Practices Act 1974, is to provide a regulatory framework that promotes:
>
> (a) the long-term interests of end-users of carriage services or of services provided by means of carriage services; and
>
> (b) the efficiency and international competitiveness of the Australian telecommunications industry.

Thus, self-regulation is to be promoted wherever possible, but not at the expense of consumers. It remains to be seen how this strategy will work in practice. Much depends on exactly what is meant by "self-regulation". On the basis of the UK experience, it is not unreasonable to suggest that the need for stronger regulatory intervention will emerge over time as market based solutions prove inadequate in particular instances.

(iii) Broadly similar regulatory tools have been adopted. In each jurisdiction there is considerable reliance upon licence conditions, their supervision and enforcement, and periodic modification as the prime regulatory devices. In addition the licence provisions may require the formulation of enforceable customer service guarantees, provide penalties for failure to meet these standards and require the development of dispute resolution procedures. These licensing requirements are supplemented by statutory provisions.

Differences

(i) The United Kingdom has, of course, progressed considerably further down the privatisation path than is generally the case in Australia. The situation with respect to telecommunications, and the privatisation of Telstra in particular, is too well known to require reiteration here. With respect to electricity, although major restructuring has occurred to pave the way for the implementation of the National Electricity Market, it is only in Victoria that this has been accompanied by privatisation to date. In other State jurisdictions, this remains a matter of considerable political controversy.[46]

(ii) A more significant difference relates to the UK practice of conferring extensive discretionary power upon the person of the individual regulator. This aspect of the UK regulators has been criticised as lending itself to a heavily personalised style of regulation, and has led to considerable variations in style between the individual regulators. It does not appear to be a feature of the emerging Australian regulators.

(iii) A major difference is the jurisdictional complexity which arises from our federal system, where the Commonwealth does not

46 Both South Australia and Tasmania have announced plans for electricity privatisation, but these face considerable political opposition. In New South Wales, such opposition has forestalled any announcement.

possess plenary legislative power in all fields, notably electricity and gas. There is thus considerable complexity to the creation of the National Electricity Market. Historically, of course, these industries have been state based, rather than national, though there has been a gradual development of interstate connectivity. The National Electricity Market is operated by two regulatory companies, the National Electricity Market Management Company (NEMMCO) and the National Electricity Code Administrator (NECA), as well as a National Electricity Tribunal from which appeals on questions of law are taken to the Supreme Courts of the participating jurisdictions. In addition, it is anticipated that there will be a continuing role for the existing State based regulatory bodies such as the Office of the Regulator General (ORG) in Victoria, and the Independent Pricing and Regulatory Tribunal (IPART) in NSW. The Electricity Industry Ombudsman of Victoria is also likely to continue in that jurisdiction, with similar bodies being created in other States.

This jurisdictional complexity is exacerbated by the vertical division of regulatory functions within an industry. An example would be the clear distinction between the respective roles of the Australian Competition & Consumer Commission (ACCC), the Australian Communications Authority (ACA) and the Telecommunications Industry Ombudsman (TIO) with respect to telecommunications regulation. The ACCC is primarily concerned with the regulation of competition, including the prevention of the abuse of monopoly or dominant positions in the marketplace. It exercises particular powers and functions with respect to telecommunications under Parts XIB and XIC of the Trade Practices Act 1974 (Cth).

The Australian Communications Authority (ACA) is the primary telecommunications regulator. It is an independent statutory body and a body corporate. However, the ACA must perform its functions in a manner consistent with policies of the Commonwealth government as notified under s11 or directions given by Minister under s12.[47] It may establish advisory committees[48] and must establish a Consumer Consultative Forum.[49] The ACA is subject to the Commonwealth administrative law package, including ADJR, AAT, Ombudsman and FoI.

The ACA's key functions include licensing and the supervision of licence compliance. In line with the "self regulatory" intent of the legislation, the ACA encourages the development of Industry Codes by bodies representing various industry sectors, with appropriate consumer input, and has power to formulate industry standards where a self-regulatory code has not been developed, or is deficient.

47 Australian Communications Authority Act 1997 (Cth) s 10.
48 Ibid at s 51.
49 Ibid at s 52.

The Telecommunications Industry Ombudsman (TIO) deals with a range of consumer complaints in relation to the provision of telecommunications services, including internet service provision. The Telecommunications Act 1997 requires all carriers and carriage service providers, unless exempted by the ACA, to comply with the scheme.[50] Section 246 requires that the TIO have power to investigate, make determinations relating to, and give directions relating to, complaints about carriage services by the "end users" of those services. End users are residential and small business consumers. The TIO does not resolve industry disputes. Complaints may be made by consumers with regard to such matters as the provision or non-provision of basic carriage services, mobile telecommunications services, operator and directory assistance, white pages, billing and interference with individual privacy. They may also be made in regard to the exercise by a carrier of its statutory rights to enter land. The TIO does not deal with complaints regarding tariff levels or the contents of a service. Nor does its jurisdiction extend to Universal Service Obligation policy matters, or other matters of telecommunications policy. The TIO is also an "office of last resort" in that complainants are required to first attempt to resolve the matter with the telecommunications company.

The TIO may make determinations in matters not exceeding $10,000 in value which are automatically binding upon the industry participant. However, the complainant may elect not to accept the TIO's determination and pursue other remedies. The TIO may make non-binding recommendations in matters between $10,000 and $50,000 in value, but may only make findings of fact where the value exceeds $50,000. In the latter situation, the TIO may arbitrate the complaint if both parties agree to this.

The TIO also has power to issue a determination that a service provider or carrier is in breach of the requirements of the customer service guarantee. Under the CSG, which came into force on 1st January 1998, service standards are set, and compensation is payable for breaches of these standards.

The funding of the TIO comes from the regulated industry, according to a formula related to the number of complaints made against industry members and the severity of those complaints.[51] The service is free to complainants.

(iv) By comparison with the UK, this plethora of regulators exists to service many fewer people, spread over a vastly greater geographical area. It is notable that this simple fact provided much

50 Telecommunications Act 1997 (Cth) s 244. The possibility of exemptions by the ACA is provided for under s 247.

51 This appears to maintain the independence of the TIO from any one industry player, but the exact workings of such an industry based funding scheme deserve careful examination. The Electricity Industry Ombudsman (Victoria) is funded in a similar fashion.

of the original rationale for an expanded public sector in Australia.

Adding factors (iii) and (iv) together, there is a real possibility that regulatory bodies will not function as well in the Australian context, since they may not be able to avail themselves of the same economies of scale that are available in the United Kingdom. It is arguable that governments wishing to ease regulatory burdens as much as possible will fail to adequately resource the regulators, to the detriment of the achievement of a range of public interest goals, from the facilitation of fair competition to the delivery of universal service objectives. In consequence, there is a strong argument for regulators merging wherever possible across State jurisdictions, or possibly forming quasi-national regulatory institutions. One possible model for this is the National Electricity Tribunal.

CONCLUSION

The UK experience demonstrates that privatisation need not entail the death of "public" values. However, the attainment of those values requires a continued commitment to regulation; pure market forces alone are unlikely to produce desirable public outcomes.

One issue will be the regulatory strategies adopted; will the regulators opt for negotiated compliance or be prepared to enforce punitive sanctions in appropriate cases? It is evident that even those regulators who prefer to negotiate wherever possible will need appropriate statutory powers to which they can turn on those occasions where persuasion does not succeed.

Another key variable will be the free flow of information between regulators, regulatees and the general public. As argued above, this involves both enforceable requirements that utility companies provide information as to service performance and the adoption of regular, open, transparent and participatory procedures by the regulators for the determination of licence modifications and the resolution of quality of service issues, including those relating to universal service. As to service quality data, the ACA possesses power to gather service quality information from telecommunications companies.[52] The ACA is required to report annually to the Minister. The first such report, which will be publicly available, is expected by the end of 1997. The ACA also publishes quarterly performance monitoring bulletins. The information supplied by companies for these purposes is required to be supplied in "auditable form", but is not currently audited. Whilst the adequacy of information supplied will be a matter of considerable interest, there is little doubt that in Australia, as in the UK, the separation of the regulator from the regulatee provides an opportunity for greatly improved transparency.

52 The Victorian Office of the Regulator General possesses similar power to collect information from electricity industry players.

Finally, the importance of public and consumer participation in the regulatory process should be emphasised. It is particularly important in the development of Industry Codes and standards, in the formulation of performance standards, the monitoring of performance against those standards, and the identification of emerging problems with universal service. Arguably, it is not the role of administrative lawyers to specify the substantive levels of performance which should be required of a utility service provider, though this point remains very much open to debate. However, it is surely our role to ensure that the interests of individual citizens and of the public as a whole receive a full and adequate consideration in the ongoing regulatory process.

Competitive Auditor or Category Mistake?: A Study of the Limits of Contractual Governance

SPENCER ZIFCAK*

> As distinguished from this "objectivity", whose only basis is money as a common denominator for the fulfilment of all needs, the reality of the public realm relies on the simultaneous presence of innumerable perspectives and aspects in which the common world presents itself and for which no common measurement or denominator can ever be devised.
>
> Hannah Arendt, *The Human Condition*

INTRODUCTION

In April 1997, the Victorian Government received the final report of the Maddock inquiry into the operation of the office of the Victorian Auditor General.[1] The report is one of the most notable and significant reviews of the operation of government to have been undertaken in recent years. It is a report conceived in politics, forged in ideology, mired and marred by controversy. To my knowledge, it is the first report about an Auditor-General to have provoked demonstrations in the street. The report, and the legislation based subsequently upon it, played a not insignificant part in the Government's heavy defeat at a subsequent parliamentary by-election. The Maddock report is, by any account, an extraordinary document. This paper is devoted to its explication.[2]

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1 Department of Premier and Cabinet (Chair: R Maddock), The Audit Act 1994 Review (the *Audit Act Review*) (1987).

2 See also the extensive and excellent review of the same report contained in W Funnell, "The Curse of Sisyphus: Public Sector Audit Independence in an Age of Economic Rationalism" (1997) 56 *Aust J Pub Admin* 87.

The document is extraordinary because it raises very fundamental questions about how we should view our system of government. By proposing new reforms, unprecedented in the Westminster system, to the office of the Auditor-General, it is of substantial political significance. By encasing those reforms within the framework of competition policy, it is of major administrative significance. And by applying entrepreneurial principles to the operation of a core institution of parliamentary and administrative review, it is of substantial constitutional significance. It is with each of these effects that I will be concerned.

The case study of the "Competitive Auditor" as I have called it is, in my view, crucial, for one overarching reason. It raises, in stark form, the question of whether and what limits should be placed upon the application of market principles in government. More particularly, in relation to this audience, it raises the following question. If competition policy is to be applied to the Auditor-General, why should it not be applicable for example, to the Ombudsman, or perhaps, to the provision of services by tribunals?[3] Perhaps the courts should also be embraced.

Of course, the answer in this paper is that competition principles should not be implemented in these areas as they should not have been in the case of the Auditor and that to do so is to engage in a category mistake. In providing a practical and theoretical justification for this position, I hope that my argument will be of wider salience when considering the question of the applicability of competition principles to other institutions of constitutional government.

BACKGROUND

It has not been an easy time for governmental scrutineers in Victoria. This latest altercation over the Auditor-General is but the last of a series which has seen a steady erosion of the power, authority and influence of those engaged in the monitoring and review of executive government in the State. The Director of Public Prosecutions left office after his independence was compromised by legislation, the Equal Opportunity Commissioner was dismissed, the Ombudsman retired and was not replaced for eighteen months and the Public Advocate and the Health Services Commissioner retired, criticising their treatment by Government.[4] Given the Government's generally dismissive attitude to institutions of accountability, it was unsurprising that it should also have clashed with the Auditor-General's office which had produced reports critical

3 Editor's Note: as the papers in the concurrent session on Merits Review tribunals (reproduced in this volume of materials) demonstrate, economic values are being applied to tribunals.

4 I have treated these broader changes in S Zifcak, "Accountability, Constitution and Governance in Victoria: the Liberals' first term" in L Pearson (ed) *Administrative Law: Setting the Pace or Being Left Behind?* (1997); S Zifcak, "Managerialism, Accountabililty and Democracy: A Victorian Case Study" (1997) 56 *Aust J Pub Admin* 106.

of governmental performance in a number of politically sensitive arenas.[5]

In the years preceding the Maddock Report, the Government had already acted to reduce the Auditor's independence and autonomy. The Audit Act 1994 (Vic) (the Act) created an independent auditor, appointed by Parliament, to audit the Auditor-General. The Auditor-General was prohibited from questioning government policy objectives which were defined to include Ministerial policy directions, policy statements in Budget papers and "any other document evidencing a policy decision of the Government or a Minister": s 16(9) of the Act. The Financial Management and Audit (Amendment) Act 1995 (Vic) further weakened the Auditor's powers and increased the government's capacity to reduce substantially the amount of information contained in agencies' annual financial statements. Then, in December 1996, the Premier announced a review of the Act. The ostensible purpose of the review was to examine the Act's conformity with the competition principles set down first in the Hilmer Report and subsequently embodied in the Competition Policy Reform Act 1995 (Cth). Undoubtedly, however, the review was also keenly political in intention. There would appear to be no other explanation available for the early choice of this Act for competition review given that such legislative restrictions on competition as may exist within it have such minor economic ramifications. The Committee, chaired by my colleague Professor Rod Maddock of the School of Business at La Trobe University, engaged in an extensive process of community consultation prior to delivering its report to the Premier in April 1997. The report formed the basis for further amendments to the Act, passed by the Victorian Parliament late in 1997 and due to be implemented in the second half of this year.

THE MADDOCK REPORT

The Maddock report recommended that all public audits be put to tender. To facilitate this objective, it recommended that the existing office of the Auditor-General be separated into two parts having different functions. First, an Office of the Auditor-General will be created and will carry overall responsibility for the audit programme, including its methodology, its practice and the communication of its results to Parliament. Secondly, from the former Auditor-General's office, a new government business enterprise will be created, entitled Audit Victoria. This new enterprise will compete with private audit firms for the Auditor-General's and other business on competitively neutral terms. In summary, then, a separation will be created between the Auditor-General as purchaser, and public and private accounting agencies as providers, of audit services.

5 Two recent examples are Auditor-General of Victoria, *Acute Health Service under Casemix: A case of mixed priorities* (Special Report No 56, 1998); Auditor-General of Victoria, *Public Transport Reform: Moving from a System to a Service* (Special Report No 57, 1998).

In its report, the review committee was not unmindful of the issue of audit independence. To secure this independence, it recommended that the new Office of Auditor-General be directly responsible to Parliament. The Auditor-General would be appointed by the Governor-in-Council with the agreement of the Public Accounts and Estimates Committee. The Office would receive its funding from the annual appropriation made to the legislature. Meanwhile, the bulk of the Auditor's staff would be transferred to Audit Victoria which would be directed by a Board of Management appointed by, but operationally independent of, the Government.

In formulating its recommendations the review committee considered three alternative models of an Auditor-General's Office. The first it termed a decentralised model. In this model, the auditee would be considered as the primary client. The second was described as the integrated model. Most closely resembling current arrangements, this model would provide that the direction of the audit programme and the audit function itself would be remain the exclusive responsibility of the Auditor-General. The third model was the segmented model. This model, which the Committee preferred, confines the Auditor-General's functions to the management of the audit programme and to reporting to Parliament about its outcomes.

To choose between the models, the committee developed a number of criteria. These related among other things to the independence of the Auditor-General, the quality and integrity of parliamentary reporting, the creation of good relationships with auditees, the presence of competition and the desirability of transparency in the assignment of audit business. It is plain, however, that competition was the driving motive.

As Professor Maddock explained in a paper for the Institute of Public Affairs, the Review Committee's task was to evaluate the Act in the light of the 1995 Competition Principles Agreement:[6]

> The import of the Agreement is not widely understood. It creates a presumption in favour of competition, at all times, in all contexts. Only if competition is not possible can a government impose a legislative structure which restricts competition; and then only if the restriction is also in the public interest. This unusual structure, quite deliberately, follows on from the Hilmer Report. Many commentators on the *Audit Act Review* have obviously not read the Agreement or the Hilmer Report or have misunderstood those documents.[7]

The Competition Principles, adopted by all State Governments in agreement with the Federal Government in April 1995, require that legislation should not restrict competition unless it can be demonstrated first, that the benefits of that restriction outweigh its costs and, second, that the objectives of the relevant legislation can only be achieved by restricting competition. Both criteria must be met for legislative restrictions upon competition to survive. Thus, even if an existing Act is achieving its objectives effectively, the

6 R Maddock, *The Victorian Audit Act Review*, Institute of Public Affairs, Economic Policy Unit, Issues Paper, July 1997.

7 Ibid at 1–2.

Competition Principles will, nevertheless, require its amendment to incorporate competitive practice.[8] The Competition Policy Reform Act 1995 (Vic) in which the Principles are embodied, therefore, constitutes a sweeping invitation to reform the law in conformity with market principles.

With this backing, Maddock was able to argue, I think fairly, that his review was fully in accordance with federal and State Government policy and that such restrictions upon competition as existed in the Act required intensive re-examination. Whether that policy is wise and whether it was properly applied, of course, are quite different questions.

THE AUDITOR-GENERAL'S RESPONSE

Community criticism of the report and of the legislation which incorporated its recommendations was sharp. The main arguments against it were encapsulated in the foreword to the Auditor-General's *Report on Ministerial Portfolios*, tabled in the Victorian Parliament in May 1997.[9] The Auditor-General, Ches Baragwanath, observed that two previous audit reviews of his office had concluded that it had functioned exceptionally effectively.

There did not appear, therefore, to be a significant case for change. Despite this he said:

> [T]he review team has proceeded to recommend a model which represents no more than an ideological experiment in terms of the structure for future public sector auditing in Victoria ... In rejecting the objective already enshrined in the legislation and proposing a new audit model based on its own objective, the review team has clearly devalued, without substantiation, the distinctive strengths to the Parliament and community of the current arrangements under which the Auditor-General operates exclusively as a single audit and reporting voice.[10]

The Auditor proceeded to attack the report on a number of different grounds. Competition, he argued, was an article of faith having uncertain outcomes. Its embrace in the field of public auditing was experimental and the review team's conclusion that it would improve the audit process was speculative and conjectural.

Its recommendations with respect to the autonomy of the Office may perhaps enhance the Auditor-General's personal independence but, he argued, this would come at the cost of a very significant decline in the Office's operational independence. The removal of the Auditor-General's power, discretion and control with respect to the actual conduct of public audits would leave the Office with "trappings without power, form without substance."

Mr Baragwanath criticised the political nature of the inquiry. The review team should, he said, have been appointed by the

8 Council of Australian Governments (COAG), *Competition Principles Agreement* (1995) Principle 5.

9 Auditor-General of Victoria, *Report on Ministerial Portfolios 1997*, No 48 (1996–97).

10 Ibid at x.

Parliament and not the Government. The significant changes to the Office recommended by the review team, he suggested, had very little to do with the elimination of anti-competition provisions.

The Maddock Report, he concluded:

> [H]as no precedent in any Westminster-based administration. The team's model has been postulated in a report which is devoid of empirical evidence and is characterised by unsubstantiated assertions, textual inconsistencies, uncertainty as to likely outcomes and recommendations based on minority views ... I am more convinced than ever that the direction proposed by the review team will lead to a situation in which a future Parliament, if confronted by either an oppressive or corrupt government, would be relatively impotent and not privy to information which would allow it to call such government to account.[11]

These, then are the political dimensions of the disagreement. To appreciate its full import, however, demands attention not only to the politics but also to the structure and substance of the argument adopted by the review and the assumptions and values that underpin it. I deal with the substance and structure in the section which follows.

SUBSTANCE AND STRUCTURE

While the *Audit Act* review committee was certainly constrained by national competition principles, its report leaves little doubt that it fervently supported them. This is discernible clearly by the nature and content of its argument which proceeded from the following initial propositions:

1 Open and unrestricted competition is generally the most efficient method of allocating the community's resources. The benefits of a restriction on competition will, therefore, outweigh its costs only in situations of demonstrable market failure.[12]

2 In the absence of market failure, restrictions on competition will impose substantial costs not only upon consumers but also on the wider society. Such costs may take the form either of higher prices or lower quality.

3 In the present case, market failure is evident. The failure consists of an asymmetry of information between Parliament (the principal) and government agencies supplying governmental services (the agents).

4 The issue, therefore, is whether legislative restrictions on competition contained in the Act are necessary to remedy the information asymmetry identified and thus to ensure informed decisions by Parliament on governmental service delivery.

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11 Ibid at xvii.

12 This is a restatement of the primary guideline contained in the Department of Premier and Cabinet, *"National Competition Policy: Guidelines for the Review of Legislative Restrictions on Competition"* (1996) and adopted by the *Audit Act* review, above n 1 at 30.

5 In this context, a legislative restriction on competition will be justified only where a direct link can be established between the restriction and the achievement of the outcome desired.

6 Such a link will not be established unless it can be demonstrated first that the benefits of the restriction outweigh its costs and second that the objectives of the legislation can be achieved solely by restricting competition.[13]

Having established these benchmark principles, the *Audit Act* review proceeded to apply them to the Act as follows:

- For the purpose of the Review the relevant market is the market for the provision of audit services to bodies required by law or seeking voluntarily to have audits conducted. As with any market, this market will operate more efficiently if subjected to competition.
- The Act, however, restricts competition. In so far as it does so, the market for audit services may be assumed to operate inefficiently, imposing additional costs on the consumers of audit services and reducing both quality and consumer choice.
- In this Act, the relevant legislative restriction takes the form of the provision to the Auditor-General of a legislated monopoly right to conduct public audits and to authorise their conduct. There is no scope, therefore, for the Parliament as principal to exercise choice or to attain competitive and, therefore, efficient outcomes from the public audit market.
- The Auditor-General's counter submission, and that of Australasian Council of Public Accounts Committees, to the effect that the Auditor should have complete discretion in the performance of his/her functions and powers implies that Auditors-General should be able to engage in anti-competitive conduct if they choose to do so. Such a position will justifiable only where a direct link can be demonstrated between the legislative restriction imposed and the outcome desired, in this case the reduction of the market asymmetry between the Parliament and government.
- Here, no such link can be demonstrated. This is because, first, the benefits of the introduction of competition in the public audit market outweigh its costs. More particularly, competition will reduce confusion and associated costs over the Auditor-General's role, generate clarity and certainty through the use of contract, and provide a measure of benefit through improved quality of audit and transparency in the use of public funds that will be greater than the cost of its introduction. Secondly, while the operational independence of the Auditor-General is important, it is, nevertheless, compatible with more

13 This is a restatement of Principle 5 of the *Competition Principles Agreement*, above n 8.

competitive arrangements. These arrangements are likely to result in improved focus for both the Office of Auditor-General as purchaser and Audit Victoria as provider.

In summary, the report concluded that:

> The recommended model protects the essential elements of independence. It defines the roles more sharply and provides for greater transparency which will lead to better public administration. It allows for the more extensive use of competition, in a way that is competitively neutral between public and private sector providers and hence is likely to lead to better outcomes. Whilst the cost of audit may rise, it is the Committee's judgment that benefits to Victoria will exceed any rise in costs and that the reforms proposed are in the public interest.[14]

ASSUMPTIONS AND VALUES

When set out like this, it is apparent that the Maddock report's recommendations and conclusions are founded upon assumptions and built on values that are predominantly economic in nature. It is worth making some of these more explicit.

The report assumes that public administration can and should be reconceptualised as a market in the provision of public goods and services. Having done so, it is only a small step to presuming that, as in the private sector, the public sector market will allocate goods and services better if competition is introduced. That, in turn, will generate benefits in terms of consumer choice. It will also result in an appreciable improvement in general community welfare.

In relation to these assumptions, at this stage I note only that the conceptualisation of governance as market is radically incomplete; that competition principles, therefore, may be more or less applicable in government depending upon their area of operation; that the proper definition of "consumer" in government is subject to uncertainty; and that an improvement in community welfare in the sense previously used may not, necessarily, equate with an enhancement of the public and political interest. I return to these themes presently.

Informing the assumptions is a cluster of values. The first is economy. So, on normal market principles, the lower the price at which government services can be provided, the more likely it is that the interests of consumers will be satisfied. The second is efficiency. Efficiency, and hence economy, in the market for governmental services will best be promoted by unimpeded competition between service providers whether public or private. The third is rationality, here defined in economic terms, implying that producers and consumers in the governmental service market, acting rationally in pursuing their economic self-interest, will interact to provide that

14 *Audit Act* review above n 1 at 53.

combination of price and quality which will not only be to the benefit of each but also to the wider benefit of all.[15]

Together this combination of economic values now exercises powerful sway in governmental circles. And yet, clearly, it is not the only cluster available. As Mark Aronson remarked in a recent article when commenting on an Industry Commission suggestion that the public interest largely implies that there is some market failure and that such failure is best remedied through competition and private sector provision:

> This, of course, is anathema to most Australian public lawyers, whose conceptions of public interest are wider than the correction of market failure or the delivery of cross-subsidies. Indeed whilst their advocacy of state intervention and regulation acknowledges the need to protect the poor, they have a much broader agenda than the correction of market failure. Their lists of guiding values include openness, fairness, participation, accountability, consistency, legality, impartiality and accessibility of judicial and administrative grievance procedures. Perhaps these could all be subsumed under the label of legitimacy.[16]

It is to a re-analysis of the *Audit Act Review*, in the light of such public law values that I now turn.

A PUBLIC LAW PERSPECTIVE

A reinterpretation of the evidence before the *Audit Act* review in the light of values more familiar to public law may well have generated quite different conclusions. A different argument, founded on different assumptions would, almost certainly, have produced a result that is more consonant with the position the Victorian Auditor-General adopted. Let me sketch this argument briefly.

Fundamental to the rule of law is the proposition that agencies of state should act legally. That is, government departments, agencies and other public bodies must act within constitutional boundaries and inside the parameters set by Parliament when creating and regulating them.

Similarly, the agencies of executive government must expend public moneys only for the purposes for which it has been voted by Parliament in the Appropriation Acts. The public account is not the creature of Treasury and Finance but is, rather, the precondition of their creation and maintenance.

To monitor public expenditure by agencies, Parliament requires the assistance of an office possessing the requisite knowledge, skills

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15 I remark here, in passing, that the combination of these values, derived as they are from an economic foundation, also imports and places a premium upon the requirement of calculability. Developments in the technology of calculability in turn have had a profound effect on the conduct of governance and in particular on the place of expertise within it. Further consideration of this issue, regrettably, is beyond the scope of this paper. See further N Rose, "Governing Advanced Liberal Democracies" in A Barry, T Osborne, and N Rose (eds), *Foucault and Political Reason* (1996).

16 M Aronson, "A Public Lawyer's Response to Privatisation and Outsourcing", in M Taggart (ed), *The Province of Administrative Law* (1997) at 43.

and experience to undertake the annual review of the public account. The office of the Auditor-General has been established for this purpose. It acts for the Parliament as a constitutional guardian having responsibility for ensuring financial propriety in public administration. As Gladstone described it, the Audit Office "completes the circle" of parliamentary control over government finance.

The role of the Auditor-General's office goes beyond mere verification of governmental accounts. From the nineteenth century, the Auditor-General has also sought to discover instances of waste and extravagance. The Office has been given jurisdiction to examine whether public moneys have been expended efficiently and economically. More recently, and amidst some controversy, the Office has in some jurisdictions assumed responsibility for ensuring that governmental programmes are also delivered effectively.

To properly perform its constitutional obligations, the Office of Auditor-General must, necessarily, be independent of both parliament and executive. It is for that reason that the terms and conditions of the Auditor-General's appointment commonly resemble those of judges. Further, it has been recognised in legislation that the Auditor's independence must be both operational and personal. Operational independence requires, among other things, that the Auditor-General should determine the content and conduct of the audit programme free from suasion either by audited agencies or the parliament itself.

In exercising its functions the Auditor-General's office forms part of a wider system of parliamentary, judicial and administrative review. As with judges, administrative tribunals, ombudsman and the like, the office exists to ensure that public officials wielding significant power stay true to their role as the people's trustees. Possessing a fiduciary relationship to the people, the executive is required regularly to explain and justify its decisions and actions. The bodies to which such explanation and justification is given, like that of the Auditor-General's office, contribute therefore to continuing public deliberation about political and governmental purposes. This process of accountability is central to the task of democratic legitimation.

As with the economic argument previously outlined, this public law provocation also has its foundations in distinctive values. For the purpose of the discussion three seem of particular relevance—openness, fairness and reason. I use openness here to refer to Parliament's requirement for information as the precondition of the effective scrutiny of the public account. Fairness requires that the financial scrutiny undertaken on Parliament's behalf be undertaken impartially. That in turn underpins the necessity for the Auditor-General's independence. Reason underpins the idea of accountability. In this conception, reason may be understood as requiring a structured and considered exchange of fact and opinion between Parliament and government as the foundation for informed political judgment.

To anticipate the argument in the next part of the paper I note here that reason should not be equated with rationality in the eco-

nomic sense discussed previously. Certainly, there are similarities. But rationality suggests a unitary approach to the resolution of pubic dilemmas. Reason, on the other hand, adopts and embodies a dialogical and deliberative methodology.

The *Audit Act* review reviewed the Office of the Auditor-General by adopting an argument founded upon the values of economy, efficiency and rationality. In the next section, by contrast, I examine the report's recommendations with the values of openness, fairness and reason and their concomitants, information, impartiality and accountability in mind.

A REINTERPRETATION

The *Audit Act* review recommended that the current Office of Auditor-General be split in two so as to reflect an economically rational division between purchaser and provider. Thus, the new Office of Auditor-General will consist of a small core staff whose task will be to manage the audit programme and facilitate the communication of its results to the Parliament. A second agency, Audit Victoria consisting of the bulk of the present Auditor's staff will be reconstituted as a service delivery agency and will compete with private sector accounting firms for public audit business. This dual structure, founded in agency theory, presents significant problems when considered through the prisms of openness, fairness and reason.[17] I take each of these in turn.

Openness

For Parliament to hold the executive to account for public expenditure, it requires ample and adequate information about financial arrangements and practices in government departments and agencies. This information is the lifeblood of the Auditor-General's review. At the same time, however, it is realistic to assume that agencies will not always come forward with the information required. In government, as elsewhere, an incentive exists to cover over the under-use and misuse of public funds. Consequently, Auditors-General are normally possessed of significant powers of investigation.

To create a division between the Auditor-General and his/her operational units, however, may well reduce the quality and volume of information available to the Office. This reduction may occur for a number of reasons. The Office's fragmentation will have the effect of fracturing its institutional memory. This loss of longitudinal perspective can be expected, at least in the first instance, to impair the capacity of auditors to scrutinise and criticise their auditees. For similar reasons, the Auditor-General's investigative capacity may also suffer. Effective investigation requires an Auditor-General to have sufficient familiarity with the operation of an audited agency to

17 On agency see the recent account in C Althaus, "The Application of Agency Theory to Public Sector Management" in G Davis, B Sullivan and A Yeatman (eds), *The New Contractualism?* (1997).

perceive quite subtle alterations in institutional patterns and practices as the precursor to more intensive examination. The diversification of audit providers is calculated to reduce this appreciative capacity. Where private auditors are employed, audited agencies may be less willing to provide information. This is because the Auditor-General, as the agent of Parliament, is recognised as acting in the public interest rather than for private gain. Further, departments and agencies will quite properly be concerned at the prospect of opening their accounts to private firms that act on behalf of companies having an interest in those accounts.

In this context it is also important to observe that the increasing commercialisation of governmental activity has generated a rash of claims that information, particularly that held by state owned corporations, is commercially confidential. This is a subject upon which the Victorian Auditor-General has expressed deep concern and requested an inquiry by the Public Accounts and Estimates Committee of the Victorian Parliament. Again, it can reasonably be expected that private sector auditors will be more sympathetic to claims of commercial confidentiality than their public sector counterparts and this despite specific contractual terms.

Fairness

As Parliament's representative, it is incumbent upon the Auditor-General to act fairly. The Office should not be beholden to the sectional interest of one side of politics or the other, nor should it be compromised by too close an attachment to executive government. Fairness implies impartiality and impartiality necessarily requires independence. The independence of the Auditor-General may be one of two kinds. The Auditor's personal independence means that the holder of the Office is appointed on terms and conditions which will assure that he or she is not subject to improper influence. The Auditor's operational independence means that the Office retains control of the content and conduct of the Audit programme.

To its credit, the Maddock Committee sought to strengthen the personal independence of the Victorian Auditor-General. It did so by recommending that the Auditor be an independent officer of the Parliament, that the office-holder be appointed by the Governor-in-Council with the agreement of the Public Accounts and Estimates Committee and that the Office (but not Audit Victoria) be funded from the annual appropriation to the Parliament. However, by separating the Auditor-General from those providing audit services and mandating that all public audits be subject to competitive tendering by public and private providers, the operational independence of the Office is likely seriously to be compromised.

The *Audit Act* review recommended that the selection of audit providers be removed from the Auditor-General alone and placed instead in the hands of a tender panel consisting of three persons only one of whom would be supplied by the Auditor-General. This recommendation, if implemented, clearly weakens the Auditor's control of audit conduct. Further, were the other two members of the

panel to be appointed by the executive, the independence of the selection process would neither be nor be seen to be impartial. The fact that the Auditor-General is given a power to veto any appointment by the panel after it has been made is a poor substitute for the plenary discretion that has previously been possessed by the Office and raises legitimate questions about why, if the veto is to be taken seriously, this discretion was removed in the first place.

At the other end of the spectrum, the independence of the Auditor's operational arm, Audit Victoria, is substantially weakened. It moves from the parliamentary to the executive arena and is made subject to the control of a Board of Management appointed by the Government. Both the Maddock Committee and the Victorian Government have made it clear that Audit Victoria's continuing existence will be subject to review after three years. During that period, its incentive to expose fraud and corruption will correspondingly be reduced.

To invite private sector participation in public audit in a manner that is not within the Auditor's control raises several problems involving potential conflicts of interest. So, for example, it would be unwise for a private sector provider to be retained to conduct a public sector audit where that provider is or has been employed by the audited agency in a different capacity. Similarly, an audited agency providing commercial services may be less than content with the prospect that it will be audited by a firm that has been retained by one of its competitors.

It can be expected that, at least initially, there may be some confusion of roles. In the private sector the auditor's client is the audited agency. Under the new arrangements, however, private firms will be required to subordinate the interests of those they audit to the broader interests of the Auditor-General and the Parliament. Such a switch is not impossible. But it will require a recognition by private providers that unlike private audit which is conducted within a wider framework of commercial collaboration, public audit requires attention to and exposure of fraud and improper dealing and may, therefore, be inherently conflictual.

Reason

Reason, as applied here, embodies the notion that political and executive decision-making will be improved when it is deliberate and considered. Governments will act more appropriately when they are required to give reasons for their decisions, receive counter-arguments (that is, counter-reasons in return) and to make more informed political judgments as a consequence. Clearly, to require that governments be held to account by external scrutineers forms one important part of this reasoning process.

The Auditor-General is one of a diverse array of accountability mechanisms of which ombudsmen, tribunals and courts are others. To weaken these is to weaken executive government's accountability to the Parliament and the courts and, hence, the process of public reason of which it is part. The Maddock committee recommendations invite further criticism from this perspective.

The split between the Office of Auditor-General and Audit Victoria breaks the direct chain of fiscal accountability which until now has existed between auditees and the Parliament. While the Auditor-General will remain accountable to no one but Parliament, Audit Victoria will assume new responsibilities to its Board and, correspondingly, private providers of audit services will continue to account primarily to their management. The explicitly parliamentary focus of public audit may, therefore, be weakened by virtue of a new diffusion in lines of reporting responsibility.

Next, for public and private providers alike, accountability to Parliament will be defined by contract not convention. Contract, however, can specify the only the outer boundaries of the accountability relationship. Unlike convention, which is founded upon common understandings developed and fashioned through historical practice, contract cannot shape and structure the many discretionary judgments inherent in the establishment of an effective relationship between auditor and legislature and the understandings upon which this relationship is founded. Indeed it is highly likely that with the introduction of private sector providers, such understandings may be substantially altered perhaps to the detriment of established conceptions of public standards and scrutiny.

In Parliament and government, for example, it has been generally accepted that fraudulent practice should be eliminated. In the private sector, by contrast, it might more readily be accepted that where the costs of its prevention are too high, minor levels of fraud may be overlooked. Similarly, in the private sector, risk is an established component of entrepreneurial practice. In the public sector, however, the degree of risk acceptable must necessarily be moderated in the interests of wider public responsibility. Such attitudinal differences between private and public auditors can be expected to impact adversely upon the perspective which the Auditor-General brings to the examination of the public account.

It might be possible to devise a public law contract in which all aspects of the contractual process, including the assumptions underlying public audit and parliamentary accountability are specified against the background of a shared "Parliamentary mission". But such novel contracts are yet to emerge and the likelihood that contract, in and of itself, will be sufficient to instill the relevant understandings is not very great.

Finally, there is a substantial difference between conceiving of accountability as private arrangement rather than public duty. The latter requires an affinity in outlook and purpose between purchasing and providing organisations, between Auditor-General and auditors, that is unlikely to be replicated once private sector providers act more or less autonomously in the field. It is for this reason that prominent authors on contractual governance have warned continuously against the employment of private contractors in situations where service provision must necessarily be conducted within a framework of distinctively public and political commitments and values. It is difficult to conceive of a more public ethic than that of accountability and a more political arena than that

of the Parliament. Its contractualisation, therefore, should be approached very cautiously lest there be an alteration in the nature of, and a diminution in, the quality of external scrutiny and parliamentary review.

My purpose in this section has been to demonstrate that the application of public law values to the problems presented to the *Audit Act* review may well have produced conclusions that differ markedly from those reached by the reviewers themselves. For example, instead of inquiring, as the Maddock committee did, as to what degree of audit independence was consistent with the imperative of competition, a review founded upon the values of public law is more likely to have asked, "what degree of competition, if any, is consistent with the imperative of audit independence?" When framed in this way I think it unlikely that a different review would have differed from Mark Aronson's conclusion that:

> Where there are government contracts, licenses and privileges, there are opportunities for corruption, and where there are opportunities, corruption will occasionally happen. Its likely frequency must surely be significantly increased when one adds government secrecy to these risk factors. The independence and powers of Auditors-General should be strengthened, not reduced, and the commitment to open government should transcend the private sector's commitment to secrecy.[18]

This analysis, however, takes us only so far. To use administrative law jargon, it may be sufficient to persuade many that a solution to the Auditor-General dilemma consonant with public law values is preferable to one that is founded upon economic values. But it says little about which solution is not only preferable but correct. In the next part of the paper I address the second question directly.

DELIBERATING ABOUT DEMOCRACY

In the last two or three years, a new and very rich strain of theorising about democracy has emerged. Republican in origin, it requires, I think, that we re-evaluate many contemporary understandings of the democratic process including our understanding of accountability. Let me begin then by summarising the essential features of the new approach.

In his recent writings, the German social theorist, Jurgen Habermas, has sought to draw a distinction between liberal, republican and discourse theories of democracy.[19] On a liberal view, democracy is understood as the process by which individual voting preferences are aggregated to provide for the formation of government that governs by the consent of the majority, subject, of course, to the observance of certain fundamental human rights. On the republican view, as Habermas posits it, democracy is constituted as the medium through which citizens become aware of the their dependence on one another, and through that realisation come

18 M Aronson above n 16 at 61.

19 See generally, J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996).

together to establish the ethical foundations upon which they can live as free and equal associates under law. Under liberalism, political will is formed through the aggregation of individual preferences in a manner that resembles market processes. In contrast, the republican view is that political opinion should arise through a process of public communication that is oriented towards the achievement of mutual understanding. The paradigm is not the market but dialogue.

Habermas differs from republicanism, however, where it assumes a communitarian focus. The communitarian focus he argues, based as it is upon a particular conception of the civic good, has the tendency to constrict public discussion within the parameters of that conception. To avoid this constriction Habermas proposes a related but different form of conceptualising democracy which he terms the discourse theory of democratic deliberation. Discourse theory relies for its foundation not upon the convergence of settled ethical convictions but rather upon the establishment of certain procedural preconditions for effective political and hence democratic deliberation. The success of deliberative politics, he argues, will rest upon the institutionalisation of the procedures and conditions of effective communication. It will rest, in other words, on the establishment by the constitution of institutions of government that will ensure that democratic deliberation is governed by the standards of procedural fairness:

> [D]eliberative politics should be conceived as a syndrome that depends upon a network of fairly regulated bargaining processes and various forms of argumentation, including pragmatic, ethical and moral discourses, each of which relies on different communicative presuppositions and procedures ... it conceives the principles of the constitutional state as a consistent answer to the question of how the demanding communicative forms of democratic opinion and will formation can be institutionalised.[20]

For Habermas, three ideas are central. The first is the importance of dialogue as the foundation for the formation of political will. The second is procedure. Only where political discourse takes place within the context of fair procedural rules will deliberative politics serve its democratic purpose. The third is constitutionalism. It is the constitution that will provide the institutional structures within which the conditions for fair procedure will materialise and from which a truly democratic, deliberative politics will emerge.

For the most part, Habermas engages in his discussion at an uncomfortable level of abstraction. Fortunately, there are other republican theorists who, while sharing these core ideas, provide a more tangible edge to the republican project. In my view, the most interesting of these is Philip Pettit, a political philosopher from the Australian National University. In his book, *Republicanism: A Theory of Freedom and Government*, Pettit conceives of liberty as non-domination. People will be free, in other words, when they are not

20 J Habermas, "Three normative models of democracy" in S Benhabib, *Democracy and Difference* (1996) at 25, 27.

subject to arbitrary interference by others. Interference, in turn, will not be arbitrary to the extent that it is forced to track the interests and ideas of the person suffering the interference. When translated to the exercise of governmental power, what non-domination requires, then, is not principally consent to that power but the permanent possibility of contesting it. The state will not interfere arbitrarily with the interests of its citizens to the extent that acts in full appreciation of the interests and ideas of those affected by its actions:

> This does not mean that the people must have actively consented to the arrangements under which the state acts. But what it does mean is that it must always be possible for people in society, no matter what position they occupy, to contest the assumption that the guiding interests and ideas are really shared and, if the challenge proves sustainable, to alter the pattern of state activity.[21]

For non-domination in this sense to prevail, Pettit proposes that three essential conditions must be fulfilled. First, a society must be governed by law. That is, there must be a constitutional state characterised, among other things, by adherence to the rule of law, the dispersion of political power and a respect and concern for minority rights. More than this is required, however. Wherever public power is exercised, Pettit argues, the decisions made by public authorities must be subject to contestation. For decision-making to be contestable, three further preconditions must be met. The most important of these is the presence of debate. At every level of decision-making, legislative, judicial and administrative, there should be procedures in place which identify the considerations relevant to the decision, thereby enabling citizens to determine whether those considerations are the considerations that should apply in the circumstances. Similarly, there should be procedures in place which enable citizens to determine whether the relevant considerations actually determined the outcome. The decisions made, therefore, must be arrived at under the condition of openness and the threat of scrutiny. What is required, in other words, is a deliberative democracy marked, as Quentin Skinner observes, by a commitment to dialogical reason:

> [O]ur watchword ought to be *audi alterem partem*, 'always listen to the other side.' The appropriate model ... will always be that of dialogue, the appropriate stance a willingness to negotiate over rival intuitions concerning the applicability of evaluative terms. We strive to reach understanding and resolve disputes in a conversational way.[22]

For the most part, Pettit observes, contestation will take place in the cauldron of Parliament and in the tumult of popular discussion. But there are clearly circumstances in which popular or parliamentary debate may provide the worst form of hearing. In these cases, a deliberative democracy may require recourse to more detached and reflective forums—it may demand that parties are heard "in the relative quiet of parliamentary, cross party committees,

21 P Pettit, *Republicanism: A Theory of Freedom and Government* (1997) at 63.

22 The quotation is from Quentin Skinner quoted in Pettit, ibid at 189.

or the quasi-judicial tribunal", or the "autonomous, professionalised body".

Like Habermas, Pettit places considerable emphasis on dialogue, on fair procedure and on constitutionalism as the core components of a deliberative and republican democracy. To these he adds the idea of contestability as an essential precondition for the achievement of liberty as non-domination. Underlying each and every one of these elements rests the republican faith in dialogical reason. "Under the contestatory image," Pettit remarks, "the democratic process is designed to let the requirements of reason materialize and impose themselves. It is not a process that gives any particular place to will."

Within the framework of these core conceptions, the idea of accountability may now be re-examined.[23] Accountability is one form of contestation. At its core it requires that actors who have the power to interfere in the lives of others explain and justify their decisions to do so. The process of explanation and justification implies, in turn, that those who possess power must make their case for its exercise in the context of and in response to the criticisms and concerns of those whom their decisions affect. Accountability, then, may be regarded as one, very important form of political and democratic dialogue. It embodies the right to be heard and in so doing, promotes thoughtfulness and deliberateness in decision-making.

To be effective, accountability must proceed on the basis of a number of preconditions. Sufficient information must exist to permit informed discussion and debate. The considerations relevant to a decision must be made explicit. The process of explanation and justification must be structured fairly. Sanctions should be in place to ensure against arbitrary or capricious decisions and actions. With these preconditions fulfilled, democratic decision-making is likely to become less arbitrary and more thoughtful as the interests of citizens are tracked and considered.

To this conception of accountability, the organisational theorists March and Olsen add one further gloss.[24] Regimes of accountability, they argue, facilitate the development of deliberateness in decision-making when they create the conditions under which deliberation can proceed according to the "logic of appropriateness". The logic of appropriateness refers to commonly shared appreciations and perceptions about the standards and fitness of official conduct. Arguments about accountability, they argue, are vivid examples of the logic of appropriateness in action, with competing interpretations of standards and fitness being discussed and contributing to the development of new arguments, justifications and political understandings. The structuring of discussion through mechanisms of accountability is designed, therefore, to generate new interpretative communities in which deliberation and reason will prevail. The discussion itself becomes one form of public learning.

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23 I am indebted in this part of the discussion to the discussion of accountability in J Uhr, *Deliberative Democracy in Australia* (1997) ch 7.

24 J G March and J P Olsen, *Democratic Governance* (1995).

Beneath each of these expositions, rests the assumption that values are plural, that they will conflict and that the central challenge of democracy is to arrive at acceptable formulations of the common good, despite the inevitability of difference. Disagreements about values, about the goods of human existence, cannot be resolved by reference to an overarching religious or moral life without, at the same time, forsaking fundamental liberties. So, agreements in societies characterised by plural values are to be sought not at the level of substantive beliefs but at that of the processes, procedures and practices for attaining and revising these beliefs. Democratic proceduralism, then, is one reasoned answer to the persistence of substantive conflicts of interest and value.

APPLYING THE THEORY

It remains, then, to apply these considerations to the case study with which we have been concerned. Consistent with the discourse theory of democracy, Parliament may be conceived of as the crucible of democratic deliberation. It is a forum that hosts a plurality of contestations, structuring and mediating a diversity of dialogues between the rulers and the ruled. One part of its dialogical function is to force executive government to explain and justify its decisions and actions. In doing so, it draws the executive into continuous discussion, requires it to track the interests of its constituents, and holds it to account.

For accountability in this sense to be effective, it must be fairly structured. Parliament and executive, therefore, must engage in dialogue on more or less equal terms. Among other things, this requires that Parliament be sufficiently informed to engage in discussion, that it possess the requisite skills to do so, and that the criteria on the basis of which opinions about the validity of explanations and justifications will be formed are made explicit. In certain circumstances, and in particular where professional knowledge and skills are necessary, this will require that Parliament be provided with independent and expert advice and with the capacity to investigate the factual and methodological foundations upon which executive explanations and justifications are based. In the financial arena, the Auditor-General, provides a paradigm example of just such an independent advisor.

The Auditor-General's purpose, then, is not simply to check whether the agencies of executive government have complied with the financial and administrative rules to which they are subject. The Office's task is to engage in a continuous and expert dialogue with both executive and Parliament that in turn forms part of the much larger project of promoting fair and equal contestation between these two central institutions of constitutional government. The Office's focus, then, is not primarily technical but dialogical. It exists to facilitate informed deliberation about the fitness and standards of the financial and administrative practices of government. And, in so doing, it contributes to the development of a "logic of appropriateness" that will inform and enliven public discussion in this discrete area of democratic governance.

REVISITING THE *AUDIT ACT* REVIEW

With this conceptual framework in mind, one may more readily appreciate why the economically founded approach taken by the Maddock report to its review of the Act was fundamentally mistaken. Its mistake rested, in essence, upon its assumption that the rules of the market could be made applicable when evaluating the operation of a central organ of constitutional governance. The application of these rules, in turn, produced a result which while it may do something to enhance technical proficiency of audit provision will do so at significant cost to democratic deliberation.

The sociologist, Anna Yeatman, recently described the work of government in the following terms:

> The distinctive work of government is two-fold in nature. [Firstly] to provide a remedy for those effects of market based-action and exchange (that is, of privately oriented action) which harm the integrity of individuals, of human groups and of their environment; and [secondly] to provide policies, procedures and institutions which enable those who belong to a political community to address their common needs, aspirations, goals and issues. Government is public action on behalf of public values in the service of a public or citizen community. In providing remedies for the injurious effects of privately-oriented action, and in offering a vehicle for the pursuit of group interests and public values, government can do what the market cannot do.[25]

This description is useful first, because it provides the foundation for a considered analysis of the role of government, secondly, because it distinguishes clearly two separate arenas in which governmental interventions may be framed and thirdly because it emphasises properly, the essentially public and communal, rather than private and individual, character of political deliberation. The error into which the *Audit Act* review fell was to proceed on the basis that analytical tools entirely appropriate to the first of the arenas Yeatman identifies, that is government participation in the private market for goods and services, could equally be extended to the second, that is, the constitutional and governmental structuring of public and political dialogue. This category error may be considered from a number of different perspectives.

First, the Review appears incorrectly to identify the purchaser, provider and client as these terms apply to the operation of the Auditor-General's office. Compulsory competitive tendering is generally best applied in circumstances where a government agency seeks to provide goods and services in a combination of price and quality that will best meet the needs of the consumers of those services.[26] When applied to the Auditor-General's office this structure suggests that the Auditor-General, as purchaser, should contract with public and private sector auditors, as providers, for the provision of

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25 A Yeatman, "Trends and Opportunities in the Public Sector: A critical assessment", Paper presented to the Conference, Public Policy and Private Management, Centre for Public Policy, University of Melbourne, February 1998.

26 For an enlightening discussion of the preconditions for effective government contracting see C Foster and F Plowden, *The State Under Stress* (1996) ch 6.

audit services to their consumers, in this case, the audited government agencies. The audited agencies, then, will benefit from the provision of audit services by the contracted auditors in the sense that those services will be provided both less expensively and with greater technical expertise.

Viewed from the parliamentary perspective, however, these designations are inappropriate. Thus, it is not the Auditor who is the purchaser but the legislature. It is not public and private audit firms that are the providers but the Auditor. It is not the auditees that are the beneficiaries but the wider public. In terms of agency theory, it may be appropriate for the purchaser-provider model to be applied so that Parliament initiates a competitive process for the provision of the services currently provided by the Auditor-General. But, the idea of competing Auditors-General may even be too hard for economic thinkers to swallow.

Beyond this, one may question the validity of applying the purchaser-provider terminology in this context more generally. For the beneficiary of the Auditor-General's intervention is not really any one institution or another whether in the guise of purchaser or client. It is, rather, the process of contestation of which accountability forms one integral part. Into this process, the Auditor-General injects facts, standards, considerations and assessments which provide the foundation for a more balanced political dialogue and more reasoned political judgment. The Maddock Committee's suggestion that the Auditor-General should no longer necessarily be required to report annually to Parliament on the financial operation of ministerial portfolios provides but one example of the fact that audit was not conceived of in these communicative terms.

Second, the *Audit Act* review misapprehended the nature of the task in which the Auditor-General was engaged. The entire report is framed with the provision of a product in mind rather than in the more conversational and preceptorial terms proposed in the preceding characterisation of accountability. The review was concerned, in other words, with outcomes rather than process.

Again, to take one example, the committee concluded that the conduct of evaluations of governmental programmes might better be conducted by agencies themselves rather than the Auditor. Its interviews with auditees had persuaded it that reviews of programme effectiveness were difficult to perform successfully by external scrutineers since they necessarily involved the making of subjective judgments about programme objectives, outputs, outcomes and impacts and the most appropriate means to achieve them. Agencies, having a greater knowledge of the programmes concerned, were better placed to assess their effectiveness, therefore, whilst the Auditor should be confined to assessing performance, system compliance and efficiency.

Not only does such an approach neglect entirely the fact that agencies will have a direct interest in the outcomes of any evaluation they conduct but it also fails to perceive that these reviews are engaged in primarily to facilitate debate and discussion rather than

to assure the presentation of an objective, methodologically certain product.[27]

Third, the Maddock Committee underestimates the importance of the public ethic involved in parliamentary review. As an instrument of public accountability, the Auditor-General plays a distinctively public role. The Office's task, as so clearly demonstrated by the active public examinations and commentary conducted and provided by the Victorian Auditor-General in recent years, is not only to sign-off on the public account but to undertake expert consideration and provoke public contestation about the manner in which public programmes are executed. In so doing, the Office contributes to public learning and to the development of shared appreciations about the standards and fitness of public financial and administrative conduct. To draw the private sector into public audit except in a manner defined precisely by the Auditor-General is, potentially, to introduce an essentially private, different and perhaps incompatible set of perspectives into the process of realising public values. It is by no means clear, in this regard, that the *Audit Act* review's professed aim of introducing into public audit "a culture more attuned to commercial pressures and client service" is something which is either appropriate or to be encouraged.

Fourth, the *Audit Act* review mistook the values that ought properly to be deployed in thinking about the role of the Auditor-General within the larger framework of political and democratic discussion. Politics, properly understood, involves at its heart, the activity of people acting and speaking together, of working together towards the resolution of problems and dilemmas experienced in common, but about which widely divergent opinions may be held both about means and ends. Democracy, and its counterpart, constitutionalism, is a system designed to structure action and speech so as to achieve practical and acceptable rather than optimal outcomes through a process of deliberation in common. As Dewey remarks:

> The method of democracy ... is to bring ... conflicts out in the open where their special claims can be seen and appraised, where they can be discussed and judged in the light of the more inclusive interests that are represented by either of them separately.[28]

In a not insignificant way, the Office of Auditor-General exists to foster democratic discussion and judgment, first, by acting as a procedural mechanism through which competing claims and forms of conduct can be evaluated and assessed in relative quiet and secondly, on the basis of that evaluation, to place its expertise and conclusions in the service of a wider dialogical contestation. From this perspective it is difficult to understand how the deployment of values associated with economic analysis can make an effective

27 Statements of findings and recommendations, the review states, "must be objectively supported and as far as possible be agreed upon with management, rather than leaving the reader of the final report uncertain who is right when the two parties disagree." *Audit Act* review, above n 1 at 62.

28 J Dewey, *Liberalism and Social Action* (1963) at 79.

contribution. How, for example, can one assess the economy of public speech, the efficiency of dialogue or the rationality of shared appreciations which provide the foundation for political judgment in common?

It is in response to this question that one is drawn back to a consideration of the public law values set forward earlier. For if the constitution is understood, as in discourse theory, as a fair procedural and institutional structuring of democratic deliberation, then the values of public law—openness, impartiality and reason—must surely and appropriately play their part in underpinning such a participatory and deliberative process. An inappropriate application of values associated with market exchange may on the other hand result, as I have sought previously to argue, in the diminution of the resources (information, independence, accountability) required for a fair and equal inter-institutional dialogue, marshalled in the pursuit of collective and reasoned political judgment.

Finally, and at the risk of overstating the matter, the *Audit Act* review in my opinion failed to understand the nature of the political and democratic project. For what it sought to do, in a small but not insignificant way, was impose upon an essentially political process, that is, the practice of accountability, an a priori set of assumptions and rules of conduct that were inherently incapable of containing and embracing the essentially contingent, processual, plural and dialogical nature of the enterprise.

In this the *Audit Act* review is not alone. The attempt to refashion politics in the image of other disciplines and subject it to their more scientific rules has been a preoccupation of philosophers at least since Plato sought to confer upon philosopher-kings the right to determine the laws in accordance with which government ought to be conducted. Where such totalising endeavours have been successful, however, it is freedom that has been the most usual casualty.

In this context, I end where I began with Hannah Arendt whose study, *The Human Condition*, remains, perhaps, the most eloquent theoretical discussion of the problem with which I have most fundamentally been concerned:

> It has always been a great temptation, for men of action no less than for men of thought, to find a substitute for action in the hope that the realm of human affairs may escape the haphazardness and moral irresponsibility inherent in a plurality of agents. The remarkable monotony of the proposed solutions throughout our recorded history testifies to the elemental simplicity of the matter. Generally speaking, they always amount to seeking shelter form action's calamities in an activity where one man, isolated from all others, remains master of his doings from beginning to end. This attempt to replace acting with making is manifest in the whole body of argument against "democracy", which, the more consistent and better reasoned it is, will turn into an argument against the essentials of politics.[29]

29 H Arendt, *The Human Condition* (1963) at 220.

Consumer Remedies in the Contracting State: The "Shield of the Crown" and the Woodlands Decision[1]

SUSAN KNEEBONE*

Commercialisation: The process of public bodies adopting management practices of private sector businesses (for example, by setting commercial and profit goals as the basis of decision making and accountability).[2]

Accountability: "that is, that the power-holder explain and justify the use of his power."[3]

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1 *Woodlands v Permanent Trustee Co Ltd* (1996) 68 FCR 213; *Bass v Permanent Trustee Co Ltd* [1999] HCA 9 (24 March 1999) available at http://www.austlii.edu.au/au/cases/cth/high_ct/1999/9.html.

2 Administrative Review Council, *Government Business Enterprises And Commonwealth Administrative Law* (Report No 38, 1995) (hereafter, ARC Report No 38) at 92.

3 D J Galligan, "Judicial Review and the Textbook Writers" (1982) 2 *Ox JLS* 257 at 272.

INTRODUCTION

The evolutionary and experimental nature of the methods of delivering services to the public in this country[4] cannot be overstated. As the 20th century draws to a close, it is clear that "the state has been reconceived on a model of market ordering"[5] with an overwhelming emphasis on supposedly "private" law values of economic efficiency and competitive neutrality, between the public and the private sectors.[6] By contrast, over 100 years ago, the infant colonial governments were concerned to fit the expanded range of their activities into theories of "public" accountability and responsibility. An editorial in the Hobart Mercury of 13 June 1891 discussed the issue of whether "public works" should be conducted by private bodies or by government. It stated that "all the signs show a reaction against the private enterprise theory of fifty years ago" and predicted that "in the course of time the general wants of communities will be supplied, so to speak, by themselves, that is, by public bodies which represent the people". In a variant on this theme, in 1932 Eggleston published his book, *State Socialism in Victoria*, in which he approved the creation of statutory authorities as "sound because [they] recognise the sovereign principle of reposing responsibility in individuals under conditions where responsibility could be discharged."[7] His view was that the "managers" would be blamed for failure and that their whole prestige in the community was bound up with the success of statutory authorities. The philosophy which drove such early enterprises was arguably one of "public service" and responsibility to the community at large.

By contrast, in the context of "new model" government, very serious questions arise as to the accountability to individuals who have become "consumer-citizens" and as to the ability of such individuals to obtain compensation for loss or damage.

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4 R L Wettenhall, "Administrative Boards in Nineteeenth Century Australia" (1964) 23 *Pub Admin* 255; R L Wettenhall, "Savings Banks, Bureaucracy and the Public Corporation" (1964) 10 *Aust Jo of Politics and History* 54.

5 M Hunt, "Constitutionalism and the Contractualisation of Government in the United Kingdom" in M Taggart (ed), *The Province of Administrative Law* (1997) at 21.

6 ARC Report No 38, above n 2, Appendices D and E. For example, the Hearing Services Administration Act 1997 (Cth) creates a system under which the existing statutory authority, Australian Hearing Services (AHS) competes with private providers of hearing services to become a contracted service provider. Section 8 of that Act states that the criteria for administering the system are "regard" for "the limited resources available to provide services and programs" under the Act and "the need to consider equity and merit in accessing those resources". The "market ordering" model also favours "downsizing" the public sector in favour of private enterprise, as for example by the Commonwealth Services Delivery Agency Act 1997 (Cth) which creates a single agency (Centrelink) to replace part of the functions previously exercised by various government departments relating to social security payments. This has been followed by the subsequent contracting out of the functions previously performed by the Commonwealth Employment Services.

7 F W Eggleston, *State Socialism in Victoria* (1932) at 47.

J McLean describes this context as one where:

> [G]overnments have a range of methods for the delivery of goods and services to the public. ... [A] government may act as both owner and manager; it may retain ownership, setting broad objectives and removing itself from the day to day management of delivery; it may purchase goods and services from the private sector, retaining control through contracts; or sell state trading enterprises leaving their regulation to the general law.[8]

These methods can be identified roughly and respectively as traditional "departmental" government, corporatisation,[9] contracting out[10] and privatisation.[11]

Accountability is often described in terms of financial accountability, political/parliamentary accountability, and administrative law mechanisms.[12] Accountability in the political or parliamentary sense focuses upon the responsibility of the elected minister. In a contracting state[13] defined both literally (by contracting out of government services) and metaphorically (through the corporatisation and privatisation of government functions) the ministerial role, is often limited. As we shall see, the emphasis in legislation dealing with corporatisation and privatisation is upon a lessening of ministerial control in the traditional sense,[14] but there is a strong focus upon financial accountability. The form of control has changed from detailed management control to overall policy, especially financial directions. As has been well documented, administrative law mechanisms have either been removed or are difficult to apply in this context.[15] For that reason, the ability of individual consumer-citizens to use "private" law remedies in tort, contract and under consumer protection legislation becomes crucial as another form of accountability.

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8 J McLean, "Contracting in the Corporatised and Privatised Environment" (1996) 7 *PLR* 223.

9 ARC Report No 38, above n 2, Glossary at 92, defines this as "the process of transforming the structure and organisation of Government departments and statutory authorities so that the structure resembles that of companies."

10 Administrative Review Council, *The Contracting Out of Government Services* (Issues Paper, 1997) (subsequently: ARC *Contracting Out Issues Paper*) at 1 defines the expression "to refer to the use by the Government of contractors to provide services to the public on behalf of the Government. Within this context, the term 'contractor' is used to refer to both private sector contractors and not-for-profit bodies funded wholly or in part by Government."

11 ARC Report No 38, above n 2, Glossary at 93, defines this as: "A process whereby the ownership of a body moves from the Government to the private sector."

12 The ARC *Contracting Out Issues Paper*, above n 10 identifies these three forms of accountability: ibid, ch 2.

13 I Harden, *The Contracting State* (1992).

14 M Aronson, "Ministerial Directions: The Battle of the Prerogatives" (1995) 6 *PLR* 77.

15 M Allars, "Private Law but Public Power: Removing Administrative Law from GBEs" (1995) 6 *PLR* 44. Some however suggest that such mechanisms are replaced by equally effective methods of accountability. Eg C Finn, "The Regulation of Privately Owned Utilities in the United Kingdom: Lessons for Australia" in this volume of materials; J Sprott, "Privatisation, Corporatisation and Outsourcing: A Critical Analysis from the Consumer Perspective" (1998) 5 *A J Admin L* 223.

In this paper I concentrate upon the "shield of the Crown" doctrine which is often a preliminary to determining whether a corporatised, privatised or contracting entity is bound by consumer protection legislation. Examples of such legislation are the Trade Practices Act 1974 (Cth), (TPA) Part V, and the Fair Trading Acts (FTAs) and similar legislation of the various States. The degree of control exercised by the executive government is a central factor under the traditional tests for determining whether the body is indeed entitled to enjoy the shield of the Crown. The degree of control exercised is also relevant to the distinction between the vicarious and personal or direct liability of governments; to whether governments are liable in tort for the actions of their servants, agents and contractors. Thus I also comment tangentially upon the tort liability of contracting government (in the metaphorical sense), but I do not deal with contractual liability as such.

It is commonly assumed that those who deliver services under the new model of government, which were formerly regarded as "public", are unlikely to be able to bring themselves within the "shield of the Crown".[16] For example, the Administrative Review Council in its Discussion Paper on *Administrative Review of Government Business Enterprises*[17] assumed that an incorporated company was unlikely to be equated with the Crown, in the absence of a specific conferral of immunity.[18] As we shall see, those assumptions are somewhat optimistic. There is a trend to apply the "shield" doctrine broadly so that projects which reflect and are directed by overall government policy are protected by the doctrine and consumer protection legislation is not applicable.[19] Furthermore, such immunity is extended to bodies in a contractual relationship with the government.

The decision of the Full Court of the Federal Court in *Woodlands*[20] reflects that broad trend. But on appeal the High Court[21] suggested a more practical approach to the issues and expressed a distaste for the shield of the Crown doctrine in that context. However, because of the way the appeal was argued, the issues were not fully considered by the Court. Thus the future direction of the law is a

16 Report No 38, above n 2, Appendix D, citing the National Competition Policy Review, *National Competition Policy—Report by the Independent Committee Of Inquiry* (1993). See also M Taggart, "Corporatisation, Privatisation and Public Law" (1991) 2 *PLR* 77 at 79.

17 Administrative Review Council, *Administrative Review of Government Business Enterprises* (1993).

18 Ibid at para 2.33. See also Telstra Corporation Act 1991 (Cth), s 26.

19 Cf *State of Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121, following *R v Panel on Take-overs and Mergers: Ex parte Datafin PLC* [1987] 1 QB 815 where the fact that the bodies were implementing government policy was a crucial factor in decisions about remedies. This fact highlights the increasing gap between the general law and the availability of remedies under the ADJR Act. Cf Allars, above n 15.

20 *Woodlands v Permanent Trustee Co Ltd* (1996) 68 FCR 213.

21 *Bass v Permanent Trustee Co Ltd* [1999] HCA 9 (24 March 1999).

matter for speculation. In this paper I argue that the High Court in *Woodlands* missed an opportunity to re-examine and to redirect the law in terms which clearly recognised the interests of consumer-citizens. I suggest the direction that the law should take in this area.

First, we look briefly at the relevance of control both in terms of principle and in the context of the "contracting" state. This is followed by a discussion of the application of the "shield" doctrine in recent decisions and by the *Woodlands* decisions.

CONTROL IN CONTEXT

The principles

The degree of control exercised by the executive arm of government over its servants, agents and contractors is central both to the "shield of the Crown" doctrine and to the imposition of vicarious liability in tort. In the context of "responsible government" the control question highlights the constitutional nature of the executive's relationships with those who act on its behalf, and its obligations of responsibility to those who are affected by such acts. Certainly the shield doctrine has the same underlying purpose—to link the body to the chains of responsible government. The same purpose can also be detected in the application of principles of vicarious liability to the Crown.

Shield of the Crown and Executive Government

The "shield of the Crown" doctrine refers to the idea that a body acting for or on behalf of the Crown (synonymous with executive government) can claim an immunity which belongs to the Crown.[22] More often than not that immunity is a common law presumption of statutory interpretation that the Crown is not bound by a statute unless expressly named in the statute, or unless a "necessary implication" can be drawn from the statute that the Crown was intended to be bound. The presumption applies to render the Crown, and those who come within its shield, immune from the operation of the statute.

In the context of determining whether a body other than the Crown can claim the "shield of the Crown", the courts generally ask whether the body is a Crown servant or agent for the particular purpose for which immunity is claimed. This concept recognises that the Crown does not act personally, but through others, and employs tests to determine the status of the body which are analogous to those which determine whether a relationship of vicarious liability exists. It is generally accepted that the courts apply two tests to determine this question of status.[23] The first is based upon the nature and degree of control exercised by executive government over the body, and the

22 S Kneebone, Tort *Liability of Public Authorities* (1998) ch 7.
23 R Flannigan, "Crown Agent Status" (1988) 67 *Can Bar Rev* 229.

second upon the nature of the function being exercised, that is, where it falls on a spectrum between governmental[24] and commercial activities. For example, in *Kinross v GIO Australia Holdings Ltd*,[25] Einfeld J decided that the commercial functions of the privatised GIO were essentially non-governmental, that it acted substantially independent of government and was thus not entitled to the "shield of the Crown" in relation to Part V of the Trade Practices Act 1974 (Cth). But other recent decisions suggest a broadening of the tests for the "shield of the Crown" doctrine to bring GBEs[26] within its scope, with results that are arguably inconsistent with the aims of "new model" government.

In several recent decisions concerning GBEs the courts have applied a broader test of control[27] which strongly suggests that the overall type of policy control which governments exercise over their GBEs is enough to establish an immunity, even in relation to "operational" activities.[28] Yet in many of the older cases the control test was concerned with the degree of specific control exercised by executive government.[29] In those cases the test was based upon a narrow model of ministerial responsibility.[30] But more recently in *Hawthorn Pty Ltd v State Bank of SA*[31] for example, O'Loughlin J expressly rejected an argument that the control test was concerned with day to day ministerial management.[32] This is an important issue in the context of recent legislation establishing GBEs which often specifically states that the body is to be responsible for the "day-to-day" administration and control of its operations.

The control test of the "shield of the Crown" doctrine and exposes a conundrum—the reason for establishing statutory authorities (in the "old style") was to give them some independence from the executive government, and indeed the degree of control by executive government was the measure of this test. If the courts are now willing to apply a broader control test to bring the "new model" GBE

24 In *Atyeo v Aboriginal Lands Trust* (1996) 93 LGREA 57 at 63 it was suggested that the Aboriginal Lands Trust was akin to the Sovereign.

25 (1994) 55 FCR 210. The decision is discussed by Kneebone, above n 22 at 293–294.

26 In this paper I use this term loosely to refer to "privatised" bodies.

27 Cf Kneebone above n 22 at 293; P Hogg, *Liability of the Crown* (2nd ed, 1989) at 250–253.

28 Cf *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1 at 20–21, 25. Finn J regarded such features as establishing the "public" character of CAA's functions. *[Editor's note: for a further discussion of this case see the article by M Allars, "The Commercialisation of Administrative Law", in this volume of materials.]*

29 Eg, *Tamlin v Hannaford* [1950] 1 KB 18; *Wynyard Investments Pty Ltd v Commissioner for Railways* (1965) 93 CLR 376.

30 Eg, in *Paul Dainty v National Tennis Centre Trust* (1990) 94 ALR 225, the overall and general control of the Minister did not bring the Trust within the shield of the Crown.

31 (1993) 40 FCR 137.

32 (1993) 40 FCR 137 at 142.

within the "shield of the Crown", this has important implications for our understanding of the scope of executive government.[33]

Vicarious liability

Vicarious liability arises where there is a vicarious relationship: master and servant, or principal and agent, or employer and independent contractor, and the elements of the relevant tort are made out. The central element of the vicarious relationship, and the reason for imposing liability upon the "master" is the element of control. The distinction between direct and vicarious liability in tort law is essentially a distinction between a personal and an imputed liability. The application of direct or vicarious liability indicates important policy considerations in the story of proceedings against the Crown and public authorities.[34] One important indication of a non-vicarious relationship is the exercise of an independent discretion by a public officer; this is essentially the converse of control by executive government.[35]

On the other hand, it is traditionally recognised that governments are liable for activities over which they have de facto control, such as, as an occupier of land or as an employer[36]. They can be liable under ordinary tort principles for "operational" negligence. In particular, they can be liable for "non-delegable" duties, that is duties which the courts consider are basically too important to be delegated, even to an independent contractor.[37] Significantly, the basis of such duties has been described in terms of control on one side and special vulnerability on the other.[38] In the context of government, this duty can be found from the special features of responsible government. For example, in *Western Australia v Watson*[39] the knowledge of the relevant Minister was attributed to the government. In particular through the concept of non-delegable duties, the courts recognise the overall responsibility of responsible government.

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33 In *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1 at 24 Finn J raised the issue of the constitutional status and standing of statutory corporations, and queried whether they were a "fourth arm of government" in relation to s 61 of the Constitution. See also J Goldring, "Accountability of Commonwealth Statutory Authorities and 'Responsible Government'" (1980) 11 *Fed LR* 353 at 364; J Goldring and R Wettenhall, "Three Perspectives on Responsibility of Statutory Authorities" in P Weller and D Jaensch (eds), *Responsible Government in Australia* (1980) ch 13. who describe statutory corporations as a continuum of the executive. See also C Mantziaris, "Interpreting Ministerial Directions to Statutory Corporations: What Does A Theory of Responsible Government Deliver?" (1998) 26 *Fed LR* 309.

34 Kneebone, above n 22, ch 7.

35 Ibid at 302–306, 312–316.

36 Ibid at 324–326.

37 Eg, *Commonwealth v Introvigne* (1982) 150 CLR 258. Cf *State of Victoria v Bryar* (1970) 44 ALJR 174. Note that in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 this concept was said to be based upon the central element of control. The concept was recently affirmed by the High Court in *Northern Sandblasting Pty Ltd v Harris* (1998) 146 ALR 572.

38 Kneebone, above n 22 at 328–331.

39 [1990] WAR 248.

Corporatisation and Privatisation

What type of control does a Minister exercise in relation to corporatised and privatised bodies? This will obviously differ according to the specific legislative context, but generally there is a trend to put Ministers at an arms length relationship with the privatised entities that government has created. This raises very important questions about the meaning and scope of "responsible government" in this context,[40] about the place of GBEs in our market-oriented state, and indeed about what we expect from governments in our democracy.

An extreme example of limited control in a (loosely) "privatised" context, arises from the Commonwealth Services Delivery Agency Act 1997 (Cth) (the Centrelink Act) which provides for the creation of a Board of Management of the Agency. The Board's functions are to decide the Agency's "goals, priorities, policies and strategies" (s 12(1)(a)), and although the Minister can give written directions to the Board (s 9), under s 10 of the Centrelink Act the Minister must consult the Board before giving directions, and in so doing *must* have regard to any such advice or comments.[41] But under s 32 of the Centrelink Act, the Chief Executive Officer of the Agency is specifically responsible for the "day-to-day" administration of the Agency, and the control of its operations. By contrast, the Telstra Corporation Act 1991 (Cth), s 9 provides that the Minister "may, after consultation with the Board, give to Telstra such written directions in relation to the exercise of the powers of Telstra as appear to the Minister to be necessary in the public interest."[42]

General legislation which governs corporatised and privatised statutory corporations also indicates the nature of the control exercised by executive government in relation to corporatised and privatised statutory corporations. For example, under the State Owned Enterprises Act 1992 (Vic), (SOE Act) corporatised and privatised statutory corporations[43] become respectively State business corporations (SBCs) (Part 3 of the Act) and State owned companies (SOCs) (Part 4). In the Act it is envisaged that both categories of GBEs will operate for the public benefit, efficiently and consistent with prudent commercial practice, with the objective of maximising their

40 Goldring, above n 33; Goldring and Wettenhall, above n 33, ch 13.

41 Under the Australian Meat and Livestock Industry Act 1997 (Cth), ss 9 and 59 respectively, the Secretary and the Minister of the Department of Primary Industry and Energy are to "have regard to any broad policies formulated jointly by prescribed industry bodies." Under s 69 of that Act the Minister can direct the industry bodies upon matters of national interest, but the scheme of the Act is to limit government involvement in the meat export industry, expect in relation to licensing and quotas.

42 Cf Civil Aviation Act 1988 (Cth), s 12 which gave the Minister a general power to direct the Civil Aviation Authority (CAA), and s 45 which stated that the power included directions relating to a financial plan. In *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1, Finn J found that the CAA was performing public functions in the context of those powers.

43 This term is defined to mean both a body incorporated by other legislation and under the SOE Act; ss 3 and 14.

contribution to the State's economy and "well-being".[44] The legislation however envisages a dichotomy between "public" and financial interests in some circumstances, which tends to negate this objective.[45] Another important feature of the legislation is the power of the government to direct SBCs,[46] and to reach agreement with SOCs,[47] in respect to non-commercial functions. Provision is made for the reimbursement of the corporation if it suffers financial detriment as a result of complying with such a direction.

In the case of SBCs, the State (through the relevant Minister and Treasurer) retains the power to "direct"[48] the SBC in respect to its corporate plan,[49] which includes financial information. The Treasurer and the Auditor-General have a controlling role in relation to financial details and obligations.[50] The contrast between the focus of public sector reports and those of SBCs is marked.[51] SBCs must supply mainly financial information, and Ministers arguably acquire a greater amount of information than ordinary shareholders.[52] The SOE Act like the New Zealand legislation distinguishes between "accountability" to the shareholding Minister and the latter's "responsibility" to Parliament for the SBC's performance.[53] It is clearly intended that the government's role be in relation to overall policy, which is commercially oriented, rather than in the detailed operation of its SBCs.[54] Thus whilst the SBC is a separate entity, not subject to direction in relation to its daily activities, it is subject to the government's policy directions.

Under the SOE Act it is envisaged that generally the directors of the SBC will be personally liable,[55] a fact which is underscored by the provision in s 39 which precludes SBCs from exempting or indemnifying directors against liability in "respect of a wilful breach of duty or breach of trust of which the director may be guilty in

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44 SOE Act, ss 18, 69.

45 Taggart, above n 16 at 79 makes a similar point re the social objectives requirement in the New Zealand legislation. Note that the model of the SOE Act 1986 (NZ) which stated in s 4(1)(c) that "every State enterprise shall operate as a successful business and, ... [an] organisation that exhibits a sense of social responsibility ..." was not followed. See M Taggart, "State Owned Enterprises and Social Responsibility: A contradiction in terms?" [1993] *NZ Recent Law Review* 343. The NSW legislation, State Owned Corporations Act 1989 (NSW) is in similar terms. See Aronson, above n 14 at 87.

46 SOE Act, s 45.

47 Ibid at s 72.

48 Ibid at ss 41(4) and (5) require the board of the SBC to "consider" comments made by the Treasurer and the relevant Minister, and to "consult in good faith" the Treasurer and the relevant Minister following communication to it of the comments, and to make such changes as are agreed between all three.

49 Ibid at ss 41–43. Section 43 states that the SBC must act only in accordance with its corporate plan, unless there is written approval to do otherwise from the relevant Minister and Treasurer.

50 Ibid at ss 46–58.

51 Aronson, above n 14 at 86.

52 Ibid.

53 Taggart, above n 16 at 81. See SOE Act s 57.

54 Ibid.

55 SOE Act, s 36.

relation to the corporation."[56] However, this does not preclude the vicarious liability of the SBC for the torts of its employees or agents, or its direct/personal liability under, for example, the non-delegable duty concept (which is also based upon a control concept).[57] As the discussion below indicates, under current judicial approaches a SBC may come within the "shield of the Crown", subject of course, to the terms of its statute. Would this include the immunity of the Crown in Victoria from direct tort liability?[58] On the other hand, would it be an "agent" for the purpose of the "Crown's" vicarious liability? These are some of the issues that could arise in a tort context.

The important difference between a SBC and a privatised SOC (see Part 4 of the SOE Act) is the absence of a statutory basis for control in relation to corporate plans. Although the memorandum and articles must be consistent with the Act,[59] and there is potential for an agreement about reimbursement for non-commercial activities, the Act makes no provision for directions by the government on corporate plans. The potential for contractual arrangements however exists in s 67, and it seems that this is how it may be done. The government does however retain control through financial reports, which are presented to Parliament[60] (and there may be an auditing by the Auditor-General if the articles so provide).[61] Thus in this respect, the line of accountability and responsibility to Parliament is preserved. But it is stated quite unambiguously in s 70 that a SOC "is not, and does not represent, the State" and that it "cannot render the State liable for any debts, liabilities or obligations of the company". The premise is that the lessening of ministerial control makes a difference to the status of a privatised body. The SOE Act envisages the direct liability of a SOC.

At the federal level, the Commonwealth Authorities and Companies Act 1997 (Cth) provides a single set of core reporting and financial accountability requirements for "Commonwealth authorities" (defined in s 7 as bodies incorporated by legislation for "public purposes"—a term which is not defined) and for "Commonwealth companies", defined in s 34 as Corporations Law companies in which the Commonwealth has a direct controlling interest. A "wholly-owned Commonwealth company" is a subspecies of the latter, but for the purposes of this legislation it is treated in some respects like a Commonwealth authority. The Act sets out the requirements for annual reports to be given to the responsible minister. Directors of Commonwealth authorities and wholly-owned companies must notify the minister of certain activities such as significant acquisi-

56 Note that the word "wilful" was added by way of amendment by Act No 56 of 1995: the provision previously referred to "negligence, default, breach of duty etc".

57 Kneebone, above n 22 ch 7. In the High Court decision in *Northern Sandblasting Pty Ltd v Harris* (1998) 146 ALR 572, Toohey J thought that the concept was concerned with "assumptions of responsibility".

58 Crown Proceedings Act 1958 (Vic) s 23(1)(b); cf s 23(3) which seems to contemplate the direct liability of a "public statutory corporation".

59 SOE Act, ss 61, 71(3).

60 Ibid at ss 74, 75.

61 Ibid at s 73.

tions of shares or businesses,[62] and if the body is a prescribed government business enterprise (GBE),[63] it must prepare an annual corporate plan.[64] The Act provides for the minister to notify such bodies of applicable government policies, such as in relation to foreign trade, equal employment opportunities, and similar general policies.[65] An important change in relation to Commonwealth authorities is that the legislation subjects their officers to standards and penalties similar to those provided by the Corporations Law.[66] However, these provisions do not affect obligations which arise under other laws.[67]

This brief summary of some relevant legislation indicates that the emphasis in the legislation governing GBEs is upon financial accountability and adherence to government's broad policies, with concomitant autonomy in relation to "operational" matters. Prima facie, a vicarious relationship can arise even where the body is implementing government policy.

Control and lines of accountability: privatisation, contracting out and regulation

The process of privatisation is generally characterised by fragmentation of the component parts of the relevant industry, some or all of which are "privatised". The role of government tends to be limited to ensuring performance of contractual or licensed obligations with the privatised sectors. This is also often followed by the establishment of a regulatory scheme.[68] In a privatised industry the government's prime role is to set industry policy and to establish regulatory mechanisms.

Contracting out or outsourcing is another technique for delivery of services. The government's role in relation to the contractor is determined by the terms of the contract. Some examples of contracted out services include employment assistance programs, and counselling services for Vietnam veterans. Chris Finn's case study of the South Australian Water (SA Water) contract under which SA Water contracted out parts of its role for economic development objectives, is illuminating.[69] For example, United Water, a consortium of French, British and South Australian firms is contracted to manage, operate, and maintain the Adelaide water and sewerage functions. It is also responsible for developing and managing the capital works program. The government continues to own the major infrastructure assets, and to supply bulk water to the metropolitan

62 Ibid at ss 15, 40.
63 Ibid at s 5.
64 Ibid at ss 17, 42.
65 Ibid at ss 28, 43.
66 See Part 3, Division 4 of the Act.
67 SOE Act s 25.
68 See the paper by C Finn in this volume of materials.
69 C Finn, "Getting the Good Oil: Freedom of Information and Contracting Out" (1998) 5 *AJ Admin L* 113.

water network. Under this arrangement, the government remains responsible for water quality, asset management and the environmental program.[70]

The trend for "privatised" industries is to establish industry-specific complaints mechanisms.[71] The Hearing Services Act 1997, s 26 provides that the Minister must make arrangements for dealing with complaints. But the Act also assumes that the corporations with which it contracts may be liable in civil proceedings. Part 7 of the Act deals with matters of proof for the vicarious liability of such corporations for acts of directors, employees or agents acting "within the scope of his or her actual or apparent authority".[72]

The efficacy of regulation schemes becomes all-important with privatised industry. Some such schemes have been subject to scrutiny and controversy as a result of well-publicised disasters in recent times.[73] In Victoria, a general regulator with general responsibility for several industries[74] has been established. The Office of the Regulator-General commenced operation on 1 July 1994. The Regulator-General has a great deal of independent discretion.[75] In performing its functions and exercising its powers the Office of the Regulator-General has the following objectives:

- to promote competitive market conduct;
- to prevent misuse of monopoly or market power;
- to facilitate entry into the relevant market;
- to facilitate efficiency in regulated industries;
- to ensure that users and consumers benefit from competition and efficiency.[76]

The government's role in relation to the Office is basically to set policy, and the regulator's is to administer that policy.[77]

The evidence which is beginning to emerge shows that the Regulator-General has introduced a concept of "competition by comparison" to measure the standard of performance by participating industries.[78] Under this concept, the performance of different companies within an industry are compared. By this approach the emphasis moves away from comparison with an independent scale.

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70 In late 1998 the Productivity Commission advertised for tenders to undertake case studies.

71 Eg AUSTEL established in 1989 to regulate the telecommunications industry.

72 See s 43 of the Act. There is also provision for the issue of injunctions by the Federal Court—see Part 6 of the Act.

73 Eg the Civil Aviation Authority (CAA), and currently in Victoria, the regulation of the gas industry arising from the explosion at the Esso plant at Longford on 25 September, 1998.

74 Water and electricity. See A Stuhmcke; "Administrative Law and the Privatisation of GBEs: A Case Study of the Victorian Electricity Industry" (1997) 4 *AJ Admin L* 185.

75 Office of the Regulator-General Act 1994 (Vic), s 7(2).

76 Ibid at s 7(1).

77 (Vic) Office of the Regulator-General, *Water Industry Performance Standards Review (Recommendations to the Minister for Agriculture and Resources)* (1996) para 2.3.25.

78 Ibid at Recommendation No 2.

This is consistent with a "light-handed" approach to regulation which has been noted by others.[79] The Office of the Regulator-General has stated that it prefers consultation rather than confrontation[80] despite its enforcement powers. In relation to the electricity distribution business, a formal Statement of Government Policy declares that the Office should intervene in the setting of standards only where there is a "demonstrated" failure to comply with standards, or a "clear" need for an additional standard to prevent abuse of monopoly powers.[81] Despite evidence of lack of reliability and quality of electricity supply, the 1997 Performance Report[82] had little or no criticism of the distribution business, and argued that customers may have to take steps to protect themselves, by, for example, voltage restoring equipment.[83] The Report mentioned that the distribution companies now provide insurance cover to customers, against damage caused by power surges.[84]

The tort liability of regulators who fail to prevent disasters is an issue that is ripe for further exploration.[85]

SHIELD OF THE CROWN: WAITING FOR *BROPHO?*

The so-called doctrine of the "shield of the Crown" is associated with the presumption of statutory interpretation that the Crown is not bound by its own statutes. It is well-documented that over time the presumption came to be expressed as a rule of statutory construction that no statute binds the Crown unless the Crown is expressly named or unless there is a necessary implication that it was intended to be bound.[86] Indeed, the Privy Council in *Province of Bombay v Municipal*

79 Stuhmcke, above n 74; I Harvey, "Australia's New Regime of Aviation Regulation" (1996) 3 *A J Admin L* 215; B Zipser, "The regulation game: the CAA and regulation enforcement" (1996) 4 *A J Admin L* 103. This may be evidence of what is called the "capture" theory: P Grabosky and J Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1986) in M Allars, *Administrative Law: Cases and Commentary* (1997) at 27–28.

80 (Vic) Office of the Regulator-General, above n 77 at 2.3.45. Cf J Black, "Talking about Regulation" [1998] *Pub L* 77.

81 (Vic) Office of the Regulator-General, *Electricity Performance Report* (June 1997) para 2.2.

82 Ibid, ch 3.

83 Ibid at 22.

84 Ibid at 1.

85 Eg, the liability of the Civil Aviation Safety Authority (CASA) arising from the South Pacific Seaplane crash in July 1998 exposed its weaknesses. Cf *Yuen Kunyeu v Attorney General* [1988] AC 175; *Davis v Radcliffe* [1990] 2 All ER 536, discussed Kneebone, above n 22 at 33–34, both cases involving the liability of financial regulators.

85 Discussed Kneebone, above n 22 at 392

86 As to which see H Street, *Governmental Liability: A Comparative Study* (1953) at 143–157; H Street, "The Effect of Statutes upon the Rights and Liabilities of the Crown" (1948) 7 *U Tor LJ* 357; G Williams, *An Account of Civil Proceedings By and Against the Crown as Affected by the Crown Proceedings Act, 1947* (1948) at 48–58; Hogg, above n 27 ch 10; *Commonwealth v Rhind* (1966) 119 CLR 584 at 598 per Barwick CJ; *Downs v Williams* (1972) 126 CLR 61 at 86 per Windeyer J; *British Broadcasting Commission v Johns* [1965] 1 Ch 32 at 72 (per Diplock LJ).

Corporation of the City of Bombay[87] said only if it were apparent from the terms of a statute that its "beneficent purpose must be wholly frustrated unless the Crown were bound, then it must be inferred that the Crown has agreed to be bound".[88]

The High Court of Australia in *Bropho v State of Western Australia*[89] described this as an "eye of the needle test"[90] and said that the presumption is not to be applied as an inflexible principle or rule. It was suggested that in subsequent decisions the courts should consider the circumstances, content and purpose of the statute and the identity of the entity to which the statute is to be applied to determine whether there was a legislative intention to bind the Crown.[91] The majority of the Court explained that a strong presumption might have been appropriate so long as "the Crown" encompassed "little more than the Sovereign, his or her direct representatives and the basic organs of government." Further they explained that the inflexible rule was consistent with the general proposition that "laws are made by rulers for subjects"[92]. They described the Australian context as one:

> [W]here the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour and where it is a common place for governmental, commercial, industrial and developmental instrumentalities and their servants or agents, which are covered by the shield of the Crown either by reason of their character as such or by reason of specific statutory provision to that effect, to compete and have commercial dealings on the same basis as private enterprise.[93]

Elsewhere I have suggested that the *Bropho* decision encourages courts to weigh up the purpose of an Act against the extent to which "governmental" interests are affected[94] and that there is evidence that it has generally resulted in a more flexible approach to application of the presumption.[95] The decision in *Bropho* has been described as incorporating "a process of assimilation"[96] or principle of equality.

However, the view that executive government in all its manifestations of GBEs is entitled to Crown immunity does not fit with the *Bropho* emphasis upon parity.[97] Neither does a broader control test for determining whether privatised and contracting bodies have a relationship with executive government which entitles them to an immunity from legislation. In the recent decision of the High

87 [1947] AC 58.
88 Ibid at 63.
89 (1990) 171 CLR 1.
90 Ibid at 17 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.
91 Ibid at 21–22. Cf Brennan J at 28.
92 Ibid at 18.
93 (1990) 171 CLR 1 at 19 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.
94 For analysis see S Kneebone, "The Crown's Presumptive Immunity from Statute: New Light in Australia" [1991] *Pub L* 361–370.
95 Kneebone, above n 22 at 291.
96 *Commissioner for Railways of Queensland v Peters* (1991) 24 NSWLR 407 at 433–434 per Kirby P.
97 Note that in *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1 Finn J demonstrated the "process of assimilation" by applying "public" law principles of fairness to the tendering process of a GBE.

Court[98] on appeal from the Federal Court in *Woodlands v Permanent Trustee Co Ltd*[99] the Court approves the Bropho decision and by implication a broader approach to the "shield of the Crown" doctrine in modern government. The case may yet be argued in full at trial. In this context there is much "to be done"[100] to ensure that the courts conform to the methodology and broad spirit of the *Bropho* decision. To understand the *Woodlands* decisions we need to look at the background law.

The *Bradken* decision and consumer protection

The decision in *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd*[101] is one essential background ingredient to the *Woodlands* decisions. In that case, whose facts are discussed below, the High Court held that Part IV of the TPA did not apply to a State instrumentality. That case established that the Crown's presumptive immunity applies in a federation to the Crown in all its capacities.[102] Since *Bropho*'s case it has been assumed without close examination that the general proposition established by *Bradken* is unaltered, and that the TPA does not apply to State Crowns.[103] However, *Bropho* required courts to have regard to the language and purpose of the statute and the identity of the entity claiming the immunity. The distinction between Part IV (monopoly behaviour) and Part V (consumer protection) of the TPA is highly relevant.[104] Moreover, since *Bradkens*'s case, legislation has been passed to apply Part IV of the TPA to State Crowns.[105] Therefore there is possibly room to argue that Part V should apply to States either where there is no equivalent State legislation, or the State legislation does not provide a satisfactory remedy.

This first aspect of *Bradken*, namely that the TPA does not bind the States, was applied by the Federal Court in *Woodlands*.

A second aspect of *Bradken* which is known as the "second leg" of *Bradkens*'s case, established that a body in a contractual relationship with the government or a Crown agent may claim Crown immunity. This "second leg" was also applied by the Federal Court in *Woodlands*. This aspect of *Bradken* is of particular interest to us in the

98 [1999] HCA 9. See n 1 above.

99 (1996) 68 FCR 213.

100 Cf S Beckett, *Waiting for Godot*, Act I, line 1: Estragon to Vladimir; "Nothing to be done."

101 (1979) 145 CLR 107.

102 Cf *Commissioner for Railways of Queensland v Peters* (1991) 24 NSWLR 407 discussed in Kneebone, above n 22 at 359–362.

103 Eg, *Kinross v GIO Australia Holdings Ltd* (1994) 55 FCR 210.

104 The courts have not paused to consider the difference between the effect of Part IV which deals with restrictive trade practices, and Part V which deals with consumer protection, and the effect of the presumption upon corporatisation and privatisation. See R Steinwall, "The Liability of the Crown and Its Instrumentalities under the Trade Practices Act 1974 (Cth)" (1994) 17 *UNSWLJ* 314. In relation to Part V, the Trade Practices Act is replicated in State Fair Trading legislation. Moreover, s 2B of the TPA now applies Part IV to State Crowns.

105 Competition Policy Reform Act 1995 (Cth) s 81 added a new s 2B to the TPA. See also Competition Policy (Victoria) Reform Act 1995 (Vic).

context of modern government. We look first at applications of the first aspect of the *Bradken* decision in recent cases to demonstrate how it has been applied widely in conjunction with a broad test of control.

Application of Bradken

The decision in *Hawthorn Pty Ltd v State Bank of South Australia*[106] is an example both of the application of *Bradken*, and of a broader control test. One issue in that case was whether the Bank was subject to Part V of the Trade Practices Act 1974 (Cth), (TPA) and in particular to s 52 which prohibits misleading or deceptive conduct. Similar claims were also brought in negligence and under the Fair Trading Act 1987 (SA) (FTA) and Consumer Affairs and Fair Trading Act 1990 (NT). The applicants were partly successful in an application to strike out the statement of claim as disclosing no cause of action. O'Loughlin J concluded that the Bank was not bound by the provisions of the TPA[107] or the Consumer Affairs and Fair Trading Act 1990 (NT), but that the applicants could pursue their claims in negligence and under the South Australian legislation. In relation to the TPA O'Loughlin J relied upon the decision in *Bradken*.

In reaching his conclusion about the TPA, O'Loughlin J relied on provisions in the bank's enabling legislation which were similar to those in the SOE Act (Vic) discussed above. The State Bank of South Australia Act 1983 (SA) provided that although the bank was "an instrumentality of the Crown" it was liable to pay taxes as if it were not,[108] and that it was dependent upon and accountable to the State for its financial needs. In particular, O'Loughlin J referred to provisions in the legislation that the liabilities of the bank were guaranteed by the Treasurer out of General Revenue, that an annual operating surplus was to be paid to the Treasurer, and that the bank's Annual Report was to be laid before both houses of Parliament. His Honour further emphasised the provision that entrusted a social responsibility to the bank for the economic well-being of the State. He agreed with the Royal Commissioner into the activities of the bank in rejecting a description of it "as a commercial entity, ... independent of government control."[109]

Ventana Pty Ltd v Federal Airports Corporation[110] is another recent decision which illustrates both the application of *Bradken*'s case and a broad test of control to determine the "shield" issue. Both the reasoning in the case and its outcome demonstrate the difficulties which arise in application of the doctrine to corporatised bodies, and their contractors. It was a case in which the ideal of competitive neutrality was tested, but as we shall see, ironically it was the com-

106 (1993) 40 FCR 137.

107 *Jellyn Pty Ltd v State Bank of South Australia* [1996] 1 Qd R 271 is consistent with this decision.

108 Section 6(4) of State Bank of South Australia Act 1983 (SA). Further s 6(3) provided that the Bank holds property "for and on behalf of the Crown".

109 (1993) 40 FCR 137 at 141.

110 (1997) 147 ALR 200.

mercial accountability of the corporatised body which swung the decision in favour of it being under the shield of the Crown.

In this case the question was whether the Federal Airports Corporation (FAC) was bound by a provision of the Planning and Environment Act 1987 (Vic) in relation to use of land at Moorabbin Airport. In this case part of the airport land was used by the assignee of FAC's lessee for a weekend market. A competitor, Ventana, who owned a large shopping centre nearby, complained that neither the FAC nor the assignee had sought planning approval for the use of the land as a weekend market under the Act. Ventana argued that it was thus placed at considerable competitive disadvantage. Ryan J decided that the FAC was not bound by the Victorian Act, and consequently that its lessee (with whom it was in a contractual relationship) and the latter's assignee were validly using the land. Under the terms of the lease, "permitted uses" included such markets, and the lessee was empowered to grant a licence for their establishment. Yet s 7(2) of the Federal Airports Corporation Act 1986 (Cth) (FAC Act) provided that:

> The Corporation shall endeavour to perform its functions in a manner that:
>
> ...
>
> (d) ensures that, where land at a Federal airport is to be used for a purpose not directly related to aviation, being land in respect to which a lease, ... has been granted ... the use would, if land were not in a Federal airport, be allowed by the law of the relevant State ...

It is clear that in this case, as counsel indicated, the "Crown" privileges were extended to the "private" activities of the lessees.[111]

The first issue in this case was whether FAC, a corporation set up to operate airports for the Commonwealth, was bound by State planning legislation in relation to an ancillary commercial function, or whether it was entitled to the Crown's presumptive immunity. To answer that question, Ryan J applied *Bradken* by "parity of reasoning" to conclude that the Planning Act did not bind the Crown in right of the Commonwealth.[112] That approach, with respect, is an incorrect application of the presumption which is concerned with particular functions of bodies claiming a Crown immunity, and the application of specific statutes.[113] Moreover, Ryan J noted that the Planning Act "applies to the use and development of land rather than to the ownership, acquisition or disposition of proprietary or similar interests in land."[114] (Compare this with his Honour's reasoning below.) His Honour then concluded that FAC was entitled to the privileges or immunities of the Crown in right of the Commonwealth

111 Ryan J suggested that observation focused "on the question solely from the perspective of the lessees". See (1997) 147 ALR 200 at 218. Cf *NSW Bar Association v Forbes Macfie Pty Ltd* (1988) 18 FCR 378.

112 (1997) 147 ALR 200 at 208.

113 Cf *Jacobsen v Rogers* (1995) 182 CLR 572 discussed in Kneebone, above n 22 at 291, 342.

114 (1997) 147 ALR 200 at 206. On that basis he rejected the literal meaning of s 7(2) set out above.

for *all* purposes[115] on the basis of the terms of the FAC Act and the *general* relationship between the FAC and the Commonwealth government. Overall Ryan J considered that there was "a high degree of actual control of the FAC" as well as "the statutory ability to control."[116] He said:

> The actual exercise of control is achieved through such matters as ministerial appointment of the whole board and compulsory audit by the Auditor-General, while the scope for control is provided, [for example] by the power reposed in the minister to disapprove the FAC's corporate plan and to disallow charges proposed to be fixed by it for aeronautical services. In my view, the degree of actual and potential ministerial control far outweighs the significance of the autonomous discretions entrusted to the FAC in such matters as borrowing and short-term investment funds.[117]

Ryan J also stressed that the establishment of airports is "traditionally" a public function. But these comments surely beg the question as to the actual function involved and the purpose of the planning legislation.[118] It is not to point that the establishment of airports is a public function as that was not in issue in this case.

Bradken—the "second leg"

In *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd*[119] where the High Court held that Part IV of the TPA did not apply to a State instrumentality (the Commissioner for Railways for the State of Queensland), it was also held that the immunity extended to bodies with whom the Commissioner for Railways was in a contractual relationship. This part of the decision is known as the "second leg" of *Bradken*. In that case the Commissioner was constructing a new access railway line to a mine, and had entered into restrictive contracts with various private companies with respect to the supply of the equipment, which it was alleged were in breach of Part IV of the

115 (1997) 147 ALR 200 at 217.

116 Ibid at 216 citing *Superannuation Fund Investment Trust v Commissioner of Stamps* (SA) (1979) 145 CLR 330 at 348 per Stephen J. Factors which Ryan J regarded as significant included that the FAC was required to act in accordance with government policies, that although the FAC had a board to set its own objectives and corporate plan, under s 40 of the FAC Act the minister could give directions in relation to financial targets, and under s 65 the FAC was required to give the minister an annual report together with financial statements which must first be submitted to the Auditor-General.

117 (1997) 147 ALR 200 at 216.

118 In any event the FAC Act seemed to make a clear distinction between safety issues, aviation use and other purposes.

119 (1979) 145 CLR 107. In that case the liability of a State instrumentality under Part IV of the Trade Practices Act was in issue. It was highly relevant that s 2A of the Act specifically referred to the Crown in right of the Commonwealth but not the State. In July 1996 a new s 2B was added to the Act which makes Part IV bind the Crown in right of each of the States and mainland Territories "so far as the Crown carries on a business". The meaning of "carries on a business" in s 2A was considered in *J S McMillan Pty Ltd v Commonwealth* (1997) 140 ALR 419. The decision suggests that the Commonwealth may not be "carrying on business" if it contracts out arrangements to another.

TPA. There were three very relevant features of the facts of that case. First, the Commissioner was described under the Railways Act 1914–1976 (Qld), s 8(1) as "representing the Crown". That is, it was specifically conferred with the status of Crown agent in relation to the Crown in right of Queensland. Thus, one of the specific issues in this case was whether Commonwealth legislation applied to a State Crown agent.[120] Secondly, the nature of the remedies sought was significant. Injunctions were unsuccessfully sought to restrain the Commissioner and the companies from acting in breach of the legislation. Therefore the prejudice to the Commissioner was directly in issue and apparent, as thirdly, it was accepted that in Australia the conduct of railways is a function of government.[121]

In *Bradken*, a majority of the High Court (Murphy J dissenting) applied some older authorities in deciding that the contracting companies were not bound by the legislation. Gibbs ACJ decided the "second leg" of *Bradkens*'s case on the basis that the injunctions, if granted against the companies, would prejudice the Commissioner "just as much as if its provisions had been directly enforced against him."[122] Mason and Jacobs JJ however concentrated upon the Commissioner's capacity to enter into contracts on behalf of the Queensland government, and the legislative authority to construct railways. In particular, they relied upon the status of the Commissioner as a Crown agent, and upon provisions in the Railways Act which required legislative approval of plans to construct a railway (ss 33 and 34), and which gave the Governor in Council the power to issue directions to the Commissioner (s 35).[123]

The older authorities on this "second leg" are largely cases where the property[124] or contractual[125] interest of the Crown or its agent[126] was affected. *In Re Telephone Apparatus Manufacturers' Application*,[127] which was heavily relied upon by the High Court in *Bradken*, involved similar facts as it concerned a series of restrictive contracts entered into by the Postmaster-General for the supply of equipment.

120 That aspect of the case is an example of the principle that the Crown's presumptive immunity applies to the Crown in a federation in all its capacities. See Kneebone, above n 22 at 342.

(1211979) 145 CLR 107 at 115 per Gibbs ACJ.

122 Ibid at 123. Stephen J reasoned in a similar way and explained that the prejudice arose because the Commissioner was "interested in transactions affecting those parties"; ibid at 129.

123 Ibid at 133 – 134, 137.

124 Eg, *Doyle v Edwards* (1898) 16 NZLR 572; *Clarke v Downs* (1931) 145 LT 20; *Rudler v Franks* [1947] KB 530; *Lower Hutt City v Attorney-General* [1965] 1 NZLR 65.

125 Eg, *Roberts v Ahern* (1904) 1 CLR 406, which involved a contract for the removal of night soil with the Postmaster-General. In this case an employee of the contractor was held not liable under the Police Offences Act (Vic) for transporting the soil without licence. This case was referred to by Gibbs ACJ in Bradken (1979) 145 CLR 107 at 116, 124.

126 *In Re Telephone Apparatus Manufacturers' Application* [1963] 1 WLR 463.

127 Ibid.

However, this "second leg" is not without its critics.[128] In *Bank Voor Handel En Scheepvaart v Slatford*,[129] Denning LJ stressed that the prejudice must be to a legitimate Crown or government activity.[130] He doubted that the activities of the Custodian of Enemy Property in issue in that case could be so described. Denning LJ emphasised the need for caution in extending the proposition to corporations set up by government. A cautious approach was also adopted in *Wellington City Corporation v Victoria University of Wellington*[131] although it extended the immunity to a contractor engaged in building contract with the University. Cooke P relied upon the features of that case, namely that the contract involved building on Crown land, that public money was financing the contract and that the provision of university buildings was a governmental function. On the basis of these authorities, the application of the "second leg" of *Bradken* was justifiable on its facts, as the building of railways was a legitimate government activity.

However, an earlier decision of the House of Lords in *Dixon v London Small Arms Company Limited*[132] doubts that this "second leg" is a separate and distinct principle from the shield doctrine. Arguably, the reasoning of this decision has been overlooked in the enthusiasm to extend the shield to contracting parties. The rationale of the shield doctrine: to link the body claiming immunity to "responsible government" has been forgotten.

In *Dixon* the defendant had contracted with the Secretary of War to manufacture a certain type of arms. This was in breach of the plaintiff's patent, and the question was whether the defendant was entitled to share the Crown's immunity from the patent. In the Court of Appeal the question was answered in favour of the defendant. Kelly CB said that the contract was for the benefit of the public, and that this was in essence "a manufacture by the direction of the Crown"[133]. Mellish LJ concluded that on the facts of the case, there was no real distinction between the relationship of master-servant and employer and independent contractor.[134] In other words, a vicarious relationship was established. The House of Lords applied the same principles, but disagreed in the result. They drew a distinction between independent contractors under a contract of sale and those acting under a contract of service.[135] Unfortunately, Lord Cairns added a further justification for his conclusion, namely that the

128 P Hogg, above n 27 at 238–239.

129 [1953] 1 QB 248. Overturned on appeal to the House of Lords on the basis that the activities of the Custodian were close enough to the functions of central government; [1954] AC 584.

130 Cf *Roberts v Ahern* (1904) 1 CLR 406 discussed above n 125.

131 [1975] 2 NZLR 301.

132 (1876) 1 App Cas 632.

133 [1875] 1 QBD 384 at 393–394.

134 Ibid at 397–398.

135 (1876) 1 App Cas 632 at 645 per Lord Cairns, at 657 per Lord O'Hagan; cf *Lower Hutt City v Attorney-General* [1965] 1 NZLR 65. This argument was rejected in *Roberts v Ahern* (1904) 1 CLR 406 at 419.

defendant was supplying and using its own materials, not the property of the Crown. It seems that this part of his reasoning (which was obiter) has been taken out of context, and has become the basis of the "second leg". From this the "principle" of prejudice to the Crown's proprietary or contractual interests has become established.[136] The real "shield" issue however is *both* whether a vicarious relationship exists, based upon the nature and degree of control by the executive, *and* whether a governmental interest is affected.

It is however often suggested that the "second leg" is a principle which does not depend upon the status[137] of the body, but rather upon whether the interests of the Crown or government are directly and prejudicially affected. This is clearly incorrect. The potentially broad application in the context of a "contracting" state is obvious.

In *Ventana Pty Ltd v Federal Airports Corporation*[138] Ryan J applied the "second leg" of *Bradken*'s case, referring to the reasoning of Mason and Jacobs JJ discussed above. He concluded that the lessee and the assignee were also entitled to the Crown's immunity, on the basis that the legislation would affect FAC's statutory powers[139] to enter into contracts of the type in question. That conclusion, with respect, is surely wrong as those ancillary powers (which were exercised for the purpose of "disposition" of a proprietary interest) were required to be exercised in accordance with the FAC Act, s 7(2)(d) set out above. Arguably such compliance would not prejudicially affect FAC's substantial duty to provide airport facilities. From Ventana's point this was surely an unjust decision as a "private" competitor was given a commercial advantage ahead of it, because it was in a contractual relationship with a Commonwealth statutory body in relation to the latter's ancillary functions.

The *Woodlands* decision in the Federal Court

The Federal Court decision in *Woodlands v Permanent Trustee Co Ltd*[140] which subsequently went on appeal to the High Court, raised the question of the application of both aspects of *Bradken*: whether the State of New South Wales (NSW) was bound by the TPA and whether the shield of the Crown doctrine extended to bodies in a contractual relationship with the NSW government. The claims in this case were substantially for relief under the consumer protection provisions of the TPA (Part V). The case came before the Full Court on a referral from Wilcox J on questions of law.[141] In answer to questions posed for its consideration, the Full Court concluded that both aspects of *Bradken*'s case applied on the facts.

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136 *Doyle v Edwards* (1898) 16 NZLR 572; *Clarke v Downs* (1931) 145 LT 20; *Rudler v Franks* [1947] KB 530; *Lower Hutt City v Attorney-General* [1965] 1 NZLR 65. In the latter case, the court wrongly distinguished Dixon. See [1965] 1 NZLR 65 at 76.

137 *Lower Hutt City v Attorney-General* [1965] 1 NZLR 65. See also *Bradken*'s case (1979) 145 CLR 107 at 124 per Gibbs ACJ.

138 (1997) 147 ALR 200.

139 FAC Act, ss 9(2)(a) and (b).

140 (1996) 68 FCR 213.

141 See below n 155 and text that follows.

This case concerned the NSW government's now infamous HomeFund scheme which was authorised by the Housing Agreement Act 1985 (NSW). The purpose of the scheme was to give tenants of public housing an opportunity to purchase the homes they were renting by offering them low-cost mortgages. In 1986 the then Housing Commission was replaced by a statutory body, the NSW Land and Housing Corporation, in which the public land was vested. At the same time the Department of Housing was created. In 1988 the department began to actively promote the HomeFund scheme.

The scheme involved a number of players both public, private and quasi-public: the State Bank of NSW; Australia National Mortgage Acceptance Corporation (Fanmac) a public company 26 per cent owned by the government which raised funds for the scheme and managed the mortgages; Permanent Trustee Company Limited (Permanent) which was the trustee of trusts created with Fanmac and the mortgagee of mortgages granted under the scheme; various non-profit making housing co-operatives which were authorised to accept and determine loan applications from prospective purchasers pursuant to selling and management agreements with Fanmac; the Department of Housing which from 1988 promoted the marketing of the scheme in conjunction with the housing societies.

From December 1986 Permanent, Fanmac, the State and a subsidiary of Permanent[142] entered into and acted upon various deeds, agreements, arrangements and undertakings to provide home loans to borrowers through participating cooperative housing societies. One deed entitled "State Deed (Australia) No 1" made by two Ministers of the NSW government on behalf of the State,[143] State Bank of NSW, Fanmac and Permanent provided[144] in clause 24.2:

> The State represents and warrants that this Deed is a commercial rather than public or governmental act and that the State is not entitled to claim immunity from legal proceedings with respect to itself or of any of its properties and assets on the grounds of sovereignty ... .

In 1992 when interest rates in the general market fell it became clear that the HomeFund scheme was in trouble, as low-income earners were left on fixed high-interest rates. In an Investigators program screened on ABC television on 21 April 1992, it was alleged that borrowers had been forced to pay considerably more than 27 per cent of their income in repayments, despite having been assured at the time they took out their loan that this ceiling would not be breached. Allegations were also made about a time-gap between repayments and deductions from the mortgages which effectively increased overall repayments.[145] In May 1992 two senior executives of the North South West Co-operative Housing Society, one the largest HomeFund lenders, who were dismissed as a result of making allegations on the Investigators program, set up a HomeFund Hotline which was the

142 Permanent Custodians Ltd (Custodians).
143 The agreement was also made with the approval of the Commonwealth.
144 (1996) 68 FCR 213 at 226.
145 *The Sydney Morning Herald* 21 April 1992 at 3.

genesis of a large protest group of disaffected mortgagors.[146] The Auditor-General's annual report tabled in Parliament on 9 December 1992 revealed that the government had been required to meet a $92.4 million shortfall of income in Fanmac trusts in the previous financial year, bringing the total shortfall to $200.5 million.[147] The Auditor-General expressed concern that he did not have the authority to audit Fanmac's accounts.[148]

A parliamentary inquiry into the scheme found that the Department of Housing was negligent in its administration of the scheme and in its failure to consult the Treasurer on the financial risks[149] and that it was guilty of "grossly irresponsible practice" by not making borrowers aware of their rights.[150] In giving evidence to the parliamentary inquiry Ms Suzanne Kennedy, a former general manager of the North South West Co-operative Housing Society[151] stated that borrowers believed that they were borrowing directly from the government, in whom they placed their trust, but that it was "too complicated" to explain the scheme to borrowers.[152]

In June 1994, the HomeFund Commissioner[153] made an offer of $400 compensation to individual HomeFund borrowers,[154] but in November of the same year 750 borrowers in three representative actions began actions for misleading and deceptive conduct under Part V of the TPA, the Fair Trading Act 1987 (NSW) (FTA) and for breach of fiduciary duty by the State. The actions came before the Full Court of the Federal Court on preliminary questions of law,[155] namely whether the TPA applied to the State and to the other respondents (Permanent, Fanmac, the housing co-operatives) (other respondents) who were said to be acting on behalf of the State in providing funds or affecting transactions.

In answer to the first question, the Full Court of the Federal Court found on the authority of *Bradken*, that the State was not bound by the TPA (Part V). It was accepted that *Bropho*'s case had not altered that principle, or at least that the question was one for consideration by the High Court.[156] Clause 24.2 of the State Deed No 1 (set out

146 *The Sydney Morning Herald* 8 May 1992 at 8.
147 *The Sydney Morning Herald* 10 December 1992 at 6.
148 Ibid.
149 *The Sydney Morning Herald* 7 May 1994 at 5.
150 *The Sydney Morning Herald* 12 May 1994 at 3.
151 She had taken part in the Investigators program referred to above.
152 *The Sydney Morning Herald* 18 August 1993 at 6.
153 Appointed April 1993. *The Sydney Morning Herald* 30 April 1993 at 4.
154 *The Sydney Morning Herald* 4 June 1994 at 7.
155 Altogether 6 questions were posed. The 3 that are relevant to this paper were as follows:
1. Whether the State of NSW was bound by the TPA;
2. Whether the respondents other than the State of NSW were bound by the TPA;
3. Whether the respondents other than the State of NSW were bound by the Fair Trading Act 1987 (NSW).
156 (1996) 68 FCR 213 at 223. The Court also rejected arguments that s 64 of the Judiciary Act or s 5(2) of the Crown Proceedings Act (NSW) applied the TPA. Regarding s 64 see Kneebone, above n 22 ch 8. Regarding the Crown Proceedings Act, see *Downs v Williams* (1972) 126 CLR 61.

above) was considered in the context of an estoppel argument. Clause 24.2 arguably suggests that the HomeFund scheme involved a "commercial" not a governmental function. It is established that *Bradken* applies to governmental functions, so the implication is that the Court construed the scope of "governmental" functions broadly, as its reasoning on the "second leg" confirms.[157]

The second question was whether the respondents other than the State of NSW, the contracting parties, were immune from the claims in the light of the "second-leg" of *Bradken*'s case. The Court concluded that there was "little scope" for applying the TPA to the other respondents.[158] The Court thought that the critical point was that the "scheme was devised by NSW government functionaries and implemented as a government initiative at government financial risk."[159] The government, it explained, conceived the scheme and underwrote it financially.[160] To the extent that they were implementing the HomeFund scheme, the Court said they appeared to be acting as "mere agents"[161] of the government and were entitled to immunity.[162]

In answering the second question, the Court considered (somewhat uncritically) the authorities relied upon in *Bradken*,[163] and said that the issue was whether the denial of Crown immunity would "significantly prejudice the Crown; for example, by restricting actions it would otherwise be free to undertake or diminish the value of its property."[164] It was not enough, said the Court, that the interests of the Crown would be indirectly affected (such as by the award of large damages payments).[165] The Court appeared to reject a suggested distinction of *Bradken*'s case, on the basis of the injunctive relief sought in that latter case.[166] However, in an earlier passage it recognised that there was a distinction on the facts, as *Bradken* involved the application of Part IV of the TPA. In *Bradken*, application of the statute would have completely frustrated the Commissioner's transactions, but in *Woodlands* the Court conceded that the contractual arrangements would continue in force, despite the application of Part V of the TPA.[167]

In my view the Federal Court interpreted the "second leg" principle correctly, as it recognised that it applies to Crown "agents" *and*

157 Moreover, *Bradken* applied Part IV of the TPA, a point which was considered in relation to the "second-leg" argument but not at this point, although it was noted that Part IV now applies to States. See (1996) 68 FCR 213 at 223.
158 (1996) 68 FCR 213 at 237.
159 Ibid at 236.
160 Ibid at 234.
161 Ibid at 237.
162 Ibid at 238.
163 *Roberts v Ahern* (1904) 1 CLR 406; *Broken Hill Associated Smelters Pty Ltd v Collector of Imposts* (Vic) (1918) 25 CLR 61; *Wirral Estates Ltd v Shaw* [1932] 2 KB 247.
164 (1996) 68 FCR 213 at 231.
165 This was a prejudice suggested at 229 of the judgment: ibid.
166 Ibid at 231.
167 Ibid at 229.

requires establishing prejudice to a Crown or governmental interest. However they interpreted the "shield" issue, the control test, broadly by being satisfied that the respondents were carrying out government policy. The Court's conclusion on the facts can be questioned. This was clearly a commercial contract involving commercial judgments as the Deed indicated (and as the Court recognised in answer to the third question, discussed below). As the report of the Royal Commission into the commercial activities of the Western Australian government commented, "[t]here is often no clear line to be drawn between economic activity and political activity. Where the Government itself is directing a particular commercial endeavour, political and electoral considerations can obviously bear sharply on a commercial decision taken." Moreover, *Bradken* was arguably distinguishable as suggested above.

Another question is raised by this aspect of the decision. If, as it seems, the shield of the Crown doctrine applies to contracting parties, a further issue is the effect of contractual provisions which attempt to provide special protection to those parties.[168] In the *Woodlands* case, arguably the Court frustrated the intention of clause 24.2 of the State Deed which attempted to prevent the parties from claiming special protections.

The third question was whether "on the assumption that the claim against the State is not maintainable ... the respondents other than the State, ... are immune from the claims under the FTA, in the light of the principles referred to in *Bradken*." The Court answered this question in the same way as the second question, although they said that there was "something to be said" for the view that the State was carrying on a business[169] (and hence within the scope of the Act). By this answer, the Court appeared to be inconsistent in its characterisation of the government's activities, as for the second question it described them as "governmental". In these circumstances, the High Court decision was awaited with much interest to see whether it recognised that the spirit of *Bropho*'s case had become lost under the "second leg" of *Bradken*.

The *Woodlands* decision in the High Court

A majority of the High Court[170] allowed the appeals in part but decided the case on the basis that the questions posed were largely hypothetical and involved an inappropriate exercise of judicial power. Kirby J dissenting disagreed.

In relation to the first question, whether on the authority of *Bradken*, the State of NSW was bound by the TPA, the appellants mounted an additional argument of statutory interpretation in the

168 Cf M-C Goulet and K Katz, *Tort Liability of the Crown and Contracting Out* (Department of Justice, Canada, 10 April 1997) at 3–4.

169 (1996) 68 FCR 213 at 238.

170 [1999] HCA 9, above n 1 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne, Callinan JJ.

High Court. They argued that the reference in ss 6(3)[171] and 75B(1)[172] of the TPA to a "person" included the Commonwealth and hence extended the operation of the Act indirectly to the State. The next step in the argument was to refer to s 22(1) of the Acts Interpretation Act 1901 (Cth) which states that a "person" includes a "body politic". The court rejected that argument,[173] which as the majority pointed out raised a "different question" to *Bradken*'s case. However in passing, the majority commented that the shield of the Crown issue was a misleading one in the context of inter-State relations, and approved the *Bropho* decision as endorsing a flexible application of the doctrine.[174] They suggested it was "more appropriate to ask whether it was intended that [legislation] should regulate the conduct of members, servants, agents of the executive government of the polity concerned".[175]

In relation to the "second leg" argument and the application of the TPA and the FTA to the "other respondents", the majority accepted the authority of *Bradken* and the *Telephone Apparatus* decision,[176] which was relied upon in that case. They said that the "second leg" was a "common law rule that a statute is not to be construed as divesting the Crown of its property, rights, interests or prerogatives in the absence of express words".[177] They also suggested that the Full Court's view, that the other respondents were carrying out the State's policy, "extends beyond that principle of construction".[178] Kirby J however thought that the precise association of these parties with the State had yet to be elucidated. He expressed a view that the issues should be dealt with fully at trial, and that the authority of *Bradken* itself in this context should be re-opened.[179]

As a result of this decision, the High Court confirmed the authority if not the reasoning of the first aspect of *Bradken*'s case. It is possible, but unclear that the comments of the majority about the shield of the Crown doctrine, coupled with their approval of *Bropho*,[180] suggest a pragmatic and more flexible approach to the doctrine: one that concentrates more upon the effect upon governmental interests. However in relation to the "second leg", the reasoning of the Full Court is clearly preferable to that of the High Court for the reasons discussed above. The High Court's decision on this aspect is disappointing as it will extend the scope of the shield to contracting parties, although they are not part of "responsible government", and deny remedies to consumers. The facts of *Woodlands* attest to the

171 Section 6(3) refers to conduct involving, *inter alia*, "radio or television broadcast".
172 Section 75B(1) refers to the scope of the remedies available under s 82. It was then argued that it extended to "persons" including the State.
173 Kirby J agreed in substance with this aspect of the decision.
174 [1999] HCA 9, above n 1 at para 42.
175 Ibid at para 18.
176 *In Re Telephone Apparatus Manufacturers' Application* [1963] 1 WLR 463.
177 (1999) HCA 9, above n 1 at para 42.
178 Ibid.
179 Ibid at paras 95, 99.
180 Ibid at paras 16 to 17.

enormity of the effect of a broad application of this aspect of *Bradken*.

CONCLUSION

In this paper I have argued that the "shield of the Crown" doctrine and the distinction between direct and vicarious liability are related to the concept of responsible government. Paradoxically, as the "chains of responsibility" with executive government have loosened, the shield of the Crown doctrine has broadened in its application, thus bringing more "privatised" bodies within its scope. Moreover, the "second leg" of *Bradken*'s case embraces ad hoc contractors. The High Court in *Woodlands* missed an opportunity to reconsider these principles and their application to the "contracting state". I have suggested that the "second leg" in particular needs to be considered as an aspect of the shield doctrine and the accountability of government. Immunity from consumer protection legislation should not be extended without considerable thought.

The discussion of the "contracting state" reveals the vulnerability of consumer-citizens in this context and the issue that we face to fit GBEs and other actors into a model of responsible, accountable government. On the "public" law side I do not think we are doing an awfully good job at the moment about thinking through these issues. On behalf of the consumer-citizen we need to be vigilant to ensure that commercial accountability does not overpower the obligation of decision-makers to citizens who are entitled to place their trust in government. The emphasis upon economic values is endemic in this context. For example, the Financial Management and Accountability Act 1997 (Cth), s 44 imposes an obligation upon the "Chief Executive" of an "Agency" (defined in s 5 to include a Department of State) to promote the "efficient, effective and ethical" use of Commonwealth resources.[181] The premise for such view seems to be that as resources measured in economic terms are limited, that issues of justice should rank second.[182] I do not mean to imply a complete disjunction between efficiency measured in economic terms and justice issues,[183] but I am concerned that in a context where the role of the state is contracting, that the position of the consumer-citizen be a continuing focus through the mechanisms of responsible government.

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181 The provisions of the Act are discussed by I Harvey, "The Hughes Aircraft Case and the Private Law of Public Tenders" (1998) 5 *A J Admin L* 207 at 210 – 212. See also Commonwealth Services Delivery Agency Act 1997 (Cth), s 12(1)(b) which defines the role of the Board of Management of the Services Delivery Agency "to ensure that the Agency's functions are properly, efficiently and effectively performed."

182 This premise is enshrined in some recent legislation, such as for example, the Hearing Services Administration Act 1997 (Cth), s 8, set out above n 6.

183 Scholars of economic theory would argue that there is none. Specifically in this context see Sprott, above n 15, who argues that consumers stand to benefit from the changes to government's role.

Further Aspects of Commercialisation of Administrative Law

"New Millennium" Law-Making

VICTOR PERTON*

As a result of my eight years experience in the field of Parliamentary Scrutiny of Legislation, I feel passionate about the need to provide and refine good parliamentary scrutiny regimes to protect the human rights and civil rights of the community. In this paper I touch upon new challenges in the field of regulation reform.

INTRODUCTION

The Victorian Parliamentary Law Reform Committee (the Committee), which I chair, completed an inquiry last year into Regulatory Efficiency Legislation[1] (the Inquiry) at the cutting edge of reform of governmental regulation-making processes. The Committee's final report,[2] which was tabled in the Victorian Parliament at the end of October last year, has been received with great enthusiasm and acclaim by experts worldwide. A former head of Regulatory Affairs at the Treasury Board of Canada has said that assuming the Victorian Government adopts the Committee's "thoughtful" recommendations, the report "will move forward the yardstick against which other governments will have to measure their own progress in achieving effective and efficient regulatory systems". Not only was it well received by experts in the field but we have recently heard that the Victorian Government has basically accepted all the recommendations made by the Committee.

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* MLA, Chairman, Law Reform Committee, Parliament of Victoria. I acknowledge the assistance of Mr Douglas Trapnell, the Committee's Director of Research, and Ms Padma Raman, Research Officer, in the preparation of this paper.

1 The Inquiry into Regulatory Efficiency Legislation was referred to the Law Reform Committee of the Victorian Parliament by the Executive Council of Victoria (terms of reference were published in the Victorian Government Gazette on 20 June 1996).

2 Victorian Law Reform Committee, *Regulatory Efficiency Legislation Report* (October 30, 1997).

My Committee found the Inquiry to be an exciting, challenging and rigorous reference. Exciting because the original nature of the subject-matter required the use of new communications technologies to conduct research, to achieve the optimum degree of public and expert consultation and to advance the cause of law reform in this important area. Challenging because it required the Committee to operate at the cutting edge of the theory and practice of regulatory reform.

The reference was rigorous because it required the Committee to be innovative in developing solutions to the problem of reducing the burden of government regulation. The solution was a multi-disciplinary study, involving constitutional law, administrative law and practice, legislative drafting, environmental and planning laws, business law and economics. Victoria was the ideal place for such an inquiry because of its long history and commitment to regulatory reform which laid the foundations for our Inquiry.

The Inquiry posed several challenges for the Committee in seeking to obtain a high level of public input. Upon receiving the reference the Committee realised that Regulatory Efficiency Legislation was a fairly specific area of inquiry with a few experts who are scattered around the world. The term "regulatory efficiency" is not widely understood and does not evoke a clear link to specific concerns facing Victorian businesses. This view was reinforced when the Committee's initial advertisements received a muted response. The Committee realised that it would have to look beyond conventional methods of consultation in order to obtain the necessary information and to encourage educated responses to the Inquiry.

I developed a number of strategies to overcome these difficulties. A fundamental approach was to complement traditional methods of consultation with the extensive use of new communications technologies. During the course of the Inquiry, the Committee used the Internet for research, publication, and collaboration. It utilised the World Wide Web, email, Internet discussion groups and listservers, which not only provided the Committee with invaluable comments and a wealth of information from around the world, but also brought the Committee praise for its utilisation of innovative and creative approaches to public consultation.

Initial literature searches revealed that, while there were relatively few hard copy articles in leading journals on the subject of regulatory reform, there was considerable material on the Internet. It became clear that most of the experts who could discuss the technical requirements and nuances of alternative compliance mechanisms resided in North America. The Committee used email to contact these experts and maintained contact with them during and since the Inquiry.

The Committee published its Discussion Paper[3] and its Final Report[4] on the Internet simultaneously with their publication in

3 Victorian Law Reform Committee, *Regulatory Efficiency Legislation Discussion Paper* (25 May 1997).

4 Victorian Law Reform Committee, above n 2.

hard copy. I invited comments on the Discussion Paper and Final Report by using relevant listservers. The Committee's Internet site was also used to publish feedback received and to publicise new issues as they arose. The result was that the Committee received numerous email submissions of a very high quality. Contributions came from as far afield as the Kennedy School of Government at Harvard, London University, the Organisation for Economic Co-operation and Development (OECD) in Paris and the Premiers' departments of New Brunswick, Saskatchewan and Manitoba in Canada.

This Inquiry challenged the Committee to "rethink its processes, create new processes for collecting and disseminating information and creatively incorporate the old processes into the new".[5] Meeting these challenges has produced a collaborative report that incorporates international expertise and experience and has placed the Committee at the forefront of innovative law reform.

THE CHALLENGE FACING PUBLIC ADMINISTRATION IN THE NEXT MILLENNIUM

> There is no doubt that there is community demand for government regulation, particularly to achieve social and environmental goals. At the same time, the public expects government to act more efficiently, to reduce its cost and size to the taxpayers. These contradictory demands amount to calls for both more and less regulation, for both bigger and smaller government. Resolution of this problem is a major challenge facing public administration.[6]

There is also increasing pressure on governments to improve the business environment by reducing costs and other impediments. There are increasing demands that regulations be "efficient and effective". In response, governments (or, at least, those that wish to be elected and re-elected) increasingly pledge that they will "cut red tape". However, governments also realise that innovative approaches to regulation and regulatory reform can only succeed if there is public confidence in the system. As one of the Submissions to the Victorian Law Reform Committee's Inquiry noted:

> Good regulatory frameworks need to retain public confidence. Without such confidence public outrage may lead to ill advised changes in the event of environmental, consumer, occupational or some other harm.[7]

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5 S J McGarry, *A Perspective on the Internet and the Legal Profession* (paper presented to the Global Forum, Paris, 17 Sept. 1995) at 3, [reproduced at http://www.hg.org/article01.html, and http://www.oecd.org/puma/country/gdoz.pdf].

6 New South Wales Guide to Best Practice, quoted in OECD, *Regulatory Reform: A Country Study of Australia*, 1996, (OCDE/GD (96) 91) http://www.oecd.org/puma/country/gdoz.pdf, at 15.

7 F Haines, *Regulatory Efficiency Legislation—Comments*, Submission to the Victorian Parliamentary Law Reform Committee, 14 July 1997.

It is this balance between increasing regulatory efficiency while maintaining public confidence in the system that the Victorian Law Reform Committee attempted to achieve in its Inquiry.

At this point I want to focus on the implementation of regulatory flexibility and some of the broad issues that came up in the Law Reform Committee's consultations.

REGULATORY REFORM IN VICTORIA

I believe Victoria is well-placed to be innovative with regulatory reform because we have built strong foundations over the last ten years. We have already implemented reforms including:

- mandatory cost-benefit regulatory analysis;
- mandatory consultation with interest groups and the general public;
- ten year sunset clauses; and
- a strong system of review by an all-party parliamentary committee with disallowance by either house of the bicameral parliament.[8]

In fact, the reforms that Victoria has had in place for ten years are only now being introduced in the United States under the somewhat more glamorous title of "regulatory flexibility". The wide difference in terminology in this general field has led the Committee to recommend that we should rename our Subordinate Legislation Act 1994 (Vic) something appropriately "sexy" like the Regulatory Efficiency Act. The Victorian Government (the Government) in its response to our Inquiry accepted this recommendation.

While at present it has the lead, Victoria has not "cornered the market" on regulatory innovation. In June last year, I met with officials of the New South Wales Premier's Department who are grappling with many of the same issues and reform proposals that we are in Victoria. The New South Wales Government has issued a Green Paper entitled "Regulatory Innovation: Regulation for Results."[9] In that paper, they opened up discussion on the concept of "regulatory

8 A system that incorporates the regulatory impact statement (RIS) process and staged repeal of regulations operates in New South Wales under the Subordinate Legislation Act 1989 (NSW). The New South Wales system is fairly similar to that in place in Victoria, the only difference being that regulations sunset after 5 years in New South Wales. Under the Statutory Instruments Act 1992 (Qld), Queensland has now instituted an RIS process and ten year sunsetting. Tasmania introduced amendments to the Subordinate Legislation Act 1992 (Tas) that brought in ten year sunset and an RIS process in 1995. In South Australia amendments passed in 1992 to the Subordinate Legislation Act 1978 (SA) introduced a ten year sunset for all new regulations and an RIS process. The Joint Standing Committee on Delegated Legislation in Western Australia recommended regulatory reform along the lines of other jurisdictions in 1995. These recommendations have yet to be instituted.

9 New South Wales Government, *Regulatory Innovation: Regulation for Results* (May 1996).

innovation strategies", the common thread of which is expressed to be "that they create room for businesses to influence the means by which they will satisfy the objectives of the regulation."[10]

It has been long recognised that regulatory reform in Australia has been substantially advanced by State governments rather than the Commonwealth Government. As the OECD has noted:

> [C]ombined with the emergence of a national internal market, regulatory reform in the States has resulted from, and contributed to, a competition for reform, in which efficient State regulation is seen to give State producers an edge in the market.[11]

The Victorian Law Reform Committee's consultations in Canberra indicated that even the Australian Federal Government, regarded as a long way behind the States on regulatory reform, was taking up the challenge of catching up with the States. Along with National Competition Policy, initiatives such as the Small Business Deregulation Task Force, and the Federal Government's policy entitled "More Time For Business"[12] recognise the centrality of regulatory reform to improving the economic climate for business and thus enhancing business efficiency.

This is further evidence of the fact that governments and parliaments in Australia are aware of the demands of those being regulated, the pressures these demands place on the regulators, and also of the alternative compliance mechanisms that are available. However, I note with some regret, the Federal Government's Legislative Instruments Bill, which would have gone some way towards improving the efficiency of that Government's regulatory processes, has failed to pass the Australian Senate unamended, and now appears to be a dead letter.[13]

REGULATION THROUGH COOPERATIVE PARTNERSHIPS

I believe current progress in regulatory reform is more than the knee-jerk reaction of government to the self-interested demands of business. Rather, governments must look at ways of improving their approach to regulation, because regulation is increasingly believed to be beyond the capacity of governments to manage on their own (and from their own resources). That being so, there is a wider public interest in regulatory reform.

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10 Ibid.

11 OECD, *Regulatory Reform: A Country Study of Australia*, above n 6.

12 Federal Government, *More Time for Business: Governmental Response to the report of the Small Business Deregulation Task Force* (1 November 1996).

13 Editor's note: see S Argument, "The Sad and Sorry Tale of the (Commonwealth) Legislative Instruments Bill" in this volume of materials.

As a New South Wales Labor Minister pointed out:

> In the past, the regulatory reform agenda has been dominated by those who favour small government, on principle ... However, the debate has moved on. It is now clear to all those with a ... commitment to better government that regulatory reform is close to the core of much public policy development and public administration.[14]

Regulatory reform now not only elicits bipartisan support, but also international cooperation.[15] The thesis that the business of regulation is becoming too much for governments to handle has been put by Dr Peter Grabosky, an Australian commentator on regulatory policy.[16] In his words, "governments are not omnicompetent". Nevertheless, governments of many countries have been torn between a pressure to reduce public spending, on the one hand, and an increasing pressure to deliver more, on the other. He has suggested that, this being so, one way of addressing the issue is to harness resources outside the public sector, to mobilise non-governmental resources and to enter into "co-productive" arrangements with those to be regulated.

Thus, governments may achieve more efficient and effective regulation with better compliance if they engineer a regulatory system in which they themselves play a less dominant role, one in which they facilitate the "constructive regulatory participation of private interests",[17] in which their role is in "manipulating incentives in order to facilitate the constructive contributions of non-government interests"[18] and in which they "act as facilitators and brokers, rather than commanders".[19] The Law Reform Committee and now the Government of Victoria is of the view that alternative compliance mechanisms could contribute to such a regulatory system where the regulated negotiate the means by which they comply with regulatory standards.

ALTERNATIVE COMPLIANCE MECHANISMS

I will briefly outline what is meant by alternative compliance mechanisms and the proposal that was recommended by my Committee.

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14 A Refshauge, quoted in OECD, *Regulatory Reform: A Country Study of Australia*, ibid at 10.

15 See S Rimmer, "Regulation Reform in the '90s: Challenges & Opportunities" (1995) *Policy* 20.

16 PN Grabosky, "Using non-governmental resources to foster regulatory compliance" (1995) 8(4) *Governance: An International Journal of Policy and Administration* 527. Similar themes are also discussed in PN Grabosky, "Green markets: Environmental regulation by the private sector" (1994) 16(4) *Law and policy* 419. For similar views from an alternative source, see PD Jonson and EP Jonson, "Financial regulation and moral suasion" (1994) July–August *Quadrant* 85 at 89.

17 Grabosky (1995) above n 16 at 543.

18 Ibid at 544.

19 Ibid at 545. This idea was also taken up by the Chairman of the Environment Protection Authority (Victoria), Dr Brian Robinson, in a speech to the Australian Centre for Environmental Law on 2 July 1996, entitled "ISO 14000: Eagle or albatross?" at 2–3.

The concept of "alternative compliance mechanisms" (ACMs), was first embodied in the (Canadian) Regulatory Efficiency Bill (C–62). Under this 1994 Bill, Ministers would be able to approve alternative methods of complying with regulations pertaining to a particular business or industry. Before a draft "compliance order" is negotiated between the government agency and the relevant business or industry group, there must be consultation with affected parties. It is a key feature of an ACM that, while it does not meet the prescriptive requirements of the relevant regulations, it must nevertheless meet the regulatory objectives of the regulations. In that sense, it focuses on the ends, rather than the means.

However the Canadian proposal has since died. The Bill was the subject of a scathing report by the Standing Joint Committee for the Scrutiny of Regulations (the Canadian Scrutiny Committee) on the basis that the proposal would give the executive undue control and that it was inconsistent with the constitutional values of the rule of law, equality and government accountability.[20]

The Committee received a submission from one of the original designers of the Bill who suggested that the Canadian Committee did not understand the purpose and operation of C–62.[21] The submission pointed out that the Canadian Committee ignored recent Canadian case law in relation to its concerns regarding constitutional values; and that it placed undue emphasis on the inequality in resources (and thus ability to obtain ACMs) while failing to notice that small businesses in Canada were in favour of the Bill. Finally, the submission noted that the Canadian Committee has since passed several Bills that gives bureaucrats a much wider, unfettered discretion to exempt the private sector from regulations than C–62 had ever envisaged.

At its last "outing", the proposal was defeated in the governing Federal Liberal Party's caucus room. In 1996, I travelled to Ottawa to interview its authors (the Regulatory Affairs Division of the Treasury Board of Canada), proponents, and opponents. It appears to me that the main reason for its defeat was a political assessment that the proposal would be bad politics in that it would be seen as the Liberal Party pandering to its business constituency. A secondary reason for its caucus defeat was a perceived lack of equity in that only large corporations could afford the resources to successfully apply for and maintain an ACM.

REGULATORY EFFICIENCY LEGISLATION—THE VICTORIAN PROPOSAL

While ACMs may have died in Canada, when conducting the Inquiry into regulatory efficiency we noticed there was some impetus in Victoria to take up the idea, provided the concerns expressed in rela-

20 Standing Joint Committee for the Scrutiny of Regulations (Canada), *Report on Bill C–62* (16 February 1995).

21 J Martin, *Comments on Regulatory Efficiency Legislation*, Submission to Canadian Law Reform Committee, 17 June 1997.

tion to the Canadian proposal were adequately overcome. As part of its platform for the 1996 election, the Victorian Government pledged that it would:

> Introduce Regulatory Efficiency Legislation which allows business to propose alternative means of compliance with regulatory objectives. This will lower compliance costs across a range of regulations, by allowing business to tailor its method of compliance to suit its specific business circumstances and will build on flexibilities which are already being implemented in relation to specific legislation.
>
> For example, a road haulage firm with an integrated anti-fatigue program might have this accredited as an alternative to compliance with detailed driving log requirements, or a business might propose an inspection schedule for major machinery which suits its own maintenance schedule rather than meeting periodic requirements set in regulation.[22]

This commitment was, in turn, taken up by the Executive Council who (on 28 June 1996) referred the issue of Regulatory Efficiency Legislation to the Law Reform Committee of the Victorian Parliament for inquiry, consideration and report.

A proposal prepared by the Office of Regulation Reform (ORR) with the Victorian Department of State Development was made available to the Law Reform Committee.[23] The proposal was similar to that in the Canadian Bill. This raises my suspicion that OECD meetings—which Australian and Canadian regulatory reformers attend—and other communication, result in a process whereby a reform proposal stalled in one jurisdiction will spring up in another.

However, this is not necessarily a bad thing. An OECD Committee, the Public Management Committee, has a Regulatory Management and Reform Group. This Group endeavours to ensure that regulation and regulatory systems are increasingly internationalised, with best practices being identified and information shared throughout the member countries. An important theme is that as economies globalise, so regulation must be harmonised if it is not to replace tariffs and quotas as the most significant barrier to trade.

The ORR proposal took into account the reasons for the defeat of the Canadian proposal. There was a requirement that the proposal not involve any lowering of regulatory standards and an assurance that proponents of ACMs would, in all cases, be required to demonstrate that their proposals would meet the identified regulatory objectives and performance standards at least as effectively as the specific regulations that they seek to replace.[24] In particular, an ACM would not be approved if it would compromise any safety, health or environmental objectives of the relevant regulations. The proposal included a requirement that the relevant Minister publish details of the statutory rule affected, the statutory objectives and all relevant criteria used by the Minister to approve the ACM. There was also

22 Liberal Party of Australia (Victorian Division), *Small Business Policy* (March 1996) at 8.

23 Office of Regulation Reform, *Discussion Paper: Regulatory Efficiency Legislation* (1995)

24 Ibid at 2–3.

a commitment to the principles of equality, fairness, competitive neutrality and government accountability will be respected and that government budgetary policy will not be compromised.

THE COMMITTEE'S RECOMMENDATIONS AND THE GOVERNMENT RESPONSE

The Committee conducted a series of meetings with relevant federal and New South Wales agencies. We held a public hearing for representatives from business organisations, a twilight seminar on regulatory reform and met with regulatory officers from all Victorian Government departments to discuss the proposal. We also met with the heads of a number of the top 100 businesses in Victoria to aid the consultation process. The message we received was that ACMs would make a great experiment in Victoria where there has been a history of regulatory reform. We also heard that Victoria already had some positive experience with ACMs in action in the form of our accredited licensees system under the Environmental Protection Act 1970 (Vic). The accredited licensee system enables a business that can demonstrate a high level of environmental performance and ongoing ability to maintain and improve that performance, to be exempt from prescriptive works approval and licensing requirements. Our wide consultations and discussions gave us a sense for the scope of ACMs in Victoria. The Department of Premier and Cabinet heavily criticised the proposals contained in our Discussion Paper, but found that all their criticisms had been answered in the final report.

In its final report, the Committee recognised that if the proposal were to be ultimately adopted in Victoria, it would only succeed if it ensured maximum transparency and accessibility to the general public and, in turn, maximum accountability of the government to the electorate. It must not simply be a means for a government to ingratiate itself with big business or a political party's financial backers.

The Committee closely examined the Canadian criticisms and our Department of Premier and Cabinet's criticisms. In formulating a model for Regulatory Efficiency Legislation, one of the first issues we faced is how to start such a scheme. The Committee considered several options for coverage including general application of Regulatory Efficiency Legislation to all subordinate instruments; nominating industries or portfolios where such legislation would apply; scheduling of regulations by Ministers; or using the existing sunsetting provisions as a trigger for the operation of Regulatory Efficiency Legislation. One great benefit that Victoria has is that all our regulations have sunsetted and have gone through a process of review where regulatory objectives have had to be identified for all regulations. The Committee's recommendation was to use this process by backcapturing the regulatory objectives specified in the review for the operation of Regulatory Efficiency Legislation. The Government accepted that ACMs should apply to all regulations that

impose regulatory compliance obligations upon business and, decided to give the process of determining which regulations will be subject to ACMs more consideration.

The Committee clearly understood that the proposal could not involve any inappropriate delegation of legislative power to the executive. Transparency and accountability must be guiding principles for any proposed legislation. It would be necessary for the relevant minister to be accountable to the Parliament and the general public for any exercise of such power. This could be achieved by ensuring that proposed ACMs—and the criteria by which they are to be judged—are published and subject to input from stakeholders and the public. The Australian Competition and Consumer Commission (ACCC) suggested that the relevant minister should have extensive legislative criteria for the approval of ACMs. The Committee also considered whether there should be any legislative right of appeal for an ACM that is rejected. The Committee believed that it is imperative to ensure that the ACM is a public document. Our final conclusion was that there should be no intellectual property attached to an ACM. The ACM would be a public document that upon ministerial approval can be utilised by other businesses. The Government agreed with this approach and recognised, as we did, that business would have to make a commercial decision in certain circumstances as to whether they wished to disclose commercially confidential material.

A further measure we recommended to counter any potential criticism regarding the lack of applicability of ACMs to small business, was to allow industry groups to draw up and apply for an ACM. Individual businesses would have to sign the ACM but the resource intensive work would be done by the industry group. The Government also supported this recommendation.

We also recommended that ACMs should be tabled in Parliament and be subject to disallowance in a similar manner to subordinate legislation. In my opinion, ACMs will only be politically acceptable if they are subject to the same level of parliamentary scrutiny as the regulations they replace. They must be subject to disallowance by either House of Parliament with appropriate examination by the Scrutiny of Acts and Regulations Committee (SARC).

A further issue for the Committee was what criteria should be used in the scrutiny of ACMs? Chris Sidoti, the federal Human Rights Commissioner, suggested to the Committee that human rights and social justice concerns should be criteria in the scrutiny of ACMs. However, the Committee had to decide whether such concerns should be restricted to the scrutiny of ACMs or whether they should also play a role in the approval of ACMs. Ultimately, the Committee recommended that regulatory efficiency legislation should incorporate the following minimum criteria:

a) Every alternative compliance mechanism should meet the identified regulatory objectives of the regulation it supersedes at least as effectively as the regulation does.

b) A clear explanation of the proposed alternative compliance mechanism, together with the identification of businesses, activities, and classes of persons subject to it, should be published. The explanation should include a description of how the stated regulatory objectives will be achieved under the alternative compliance mechanism.

c) An alternative compliance mechanism should not be approved where it would compromise any safety, health or environmental objectives of the regulation it supersedes or any other relevant legislation.

d) An alternative compliance mechanism should not be approved where it would restrict competition, unless the benefits of the restriction to the community outweigh the costs.

e) Every alternative compliance mechanism should allow for adequate means of monitoring compliance including providing sufficient access to such information as may be necessary to effectively monitor compliance.

These conditions were again supported by the Government. The Committee also grappled with some of the mechanics of the scheme such as the best way to penalise non-compliance of ACMs, procedures for sunsetting of ACMs along with the regulations they replace and circumstances where revocation, termination or suspension of ACMs would be appropriate. Most of these recommendations were accepted in totality.

The Report was, I believe, truly revolutionary and represents a bipartisan approach to making regulations for the new millennium. My current thinking is that ACMs will have a fairly narrow operation in the short term. I envisage that ACMs will provide the ideal mechanism for businesses involved with rapidly developing technology where prescriptive, command and control type regulation becomes obsolete. I believe that ACMs can provide the impetus and acceleration required to achieve the ultimate aim of performance-based regulations. The Committee recommended that Regulatory Efficiency Legislation, if introduced, be reviewed within the first five years of operation. The Government supported a threshold of review in its response.[25]

REGULATORY IMPACT STATEMENTS

In the process of our consultations, we gained valuable insights into the deficiencies inherent in the current system. For example, we received some important evidence in relation to the regulatory impact statement (RIS) process that has forced me to question my initial view that the RIS procedures worked and that they helped to make regulations in Victoria both more effective and more efficient. The major business and industry groups seem to be saying that the RIS process is not working as Parliament intended. They believe the

25 Victorian Government, *Government Response to the Law Reform Committee's Report on Regulatory Efficiency Legislation* (December 1997).

process has been hijacked by bureaucrats and that there should be greater consultation at an early stage before a decision to regulate is made.[26] The evidence to date indicates that the RIS has become a mere justification for a political imperative to regulate. As Martin Soutter from the Business Council said

> I think the problem with the process is that those who go through the RIS already know the outcome they want and they tailor their approach to achieve that outcome.[27]

The evidence and submissions we received on the issue suggested that at the very least, there needs to be further work done by government to investigate the validity of some of the criticisms made of the current RIS process. We recommended that this task should be performed by the Scrutiny of Acts and Regulations Committee and the Government agreed with us.

CONCLUSION

In the 1980s a priority for regulatory reform was to reduce the number of regulations. Despite the fact that in Victoria and New South Wales the volume of regulation has been almost halved with the impact of sunset clauses and regulatory impact statements, there is still a perception among business that regulations are on the increase. This partly suggests that we need to work hard to ensure that the general public and business understands what we are doing. It also suggests that a reduction in the number of regulations does not automatically mean a reduction in the regulatory burden on business. Regulatory reform is no longer a matter of mere deregulation, but must now focus on improving the quality of regulations by reducing their legal and technical complexity and enhancing their effectiveness by increasing flexibility and transparency.

Government should ensure that the resourcefulness of the private sector is brought to bear on regulatory mechanisms—whether it be by consulting the private sector on the form and content of regulations or by inviting the private sector to use its own expertise (and resources) to develop alternative compliance mechanisms. One Commonwealth treasury official lamented the fact that business organisations rarely get involved in the regulation making stage and yet are the first to complain about regulations and their onerous requirements. Even if there are very few alternative compliance mechanisms produced because of the high cost of preparation, we will have opened a door to business and an avenue of counter-attack to criticism. We will be able to require those who criticise government regulation to propose better alternative means which benefit the community and themselves.

Regardless of the benefits of regulatory reform, ultimately the success of reform is dependent on public confidence. The

26 Victorian Law Reform Committee, *Public Hearing with Business Organisations*, 7 April 1997.

27 Ibid at 25 per M Soutter.

Committee's consultations suggested that while ACMs will be beneficial to business, there needs to be a big sales job, because public confidence in regulations remains a real issue. Public confidence in such a system will only be developed and maintained if there is vigorous parliamentary and public scrutiny. We need to ensure that commentators and the media acknowledge the efforts of governments who do explore and implement innovative regulatory strategies.

Ultimately governments need to recognise that there is no one solution to the myriad concerns surrounding government regulation. Rather:

> We should acknowledge that at the end of the day regulation is needed to protect the community and that there must be some sort of bottom line—a lower base, if you like—that provides a measure of protection for the community from those who would behave egregiously. There should, therefore, be an attempt in setting regulation to look at both carrots and sticks. Obviously you need the existence of sticks for people who will simply not comply with the rules as the community might expect, but equally regulation or alternative regulation should fundamentally be aimed at achieving best-practice outcomes in the community, and I think this is the real challenge before Parliament: not simply to regulate in a way that will stop people doing things that might kill or harm people, but to do things in a way that encourages all enterprises to adopt best-practice outcomes.[28]

28 Ibid.

The Sad and Sorry Tale of the (Commonwealth) Legislative Instruments Bill

STEPHEN ARGUMENT*

INTRODUCTION

Victoria's role as the trailblazer in regulatory reform is emphasised when its efforts are compared to those of the Commonwealth in this area. While the Victorian jurisdiction has gone ahead in leaps and bounds in recent years, the Commonwealth jurisdiction has been running on the spot since (at least) 1994. This is no more evident than in the difficulties experienced in trying to put in place the Legislative Instruments Bill.

THE LEGISLATIVE INSTRUMENTS BILL

In 1994, the previous (ALP) Government introduced the Legislative Instruments Bill 1994 (the 1994 Bill). This Bill was, in large part, the Government's response[1] to the Administrative Review Council's 1992 report, *Rule Making by Commonwealth Agencies*.[2]

The 1994 Bill was subjected to fairly rigorous scrutiny by both Houses of the Parliament—including inquiry and report by Parliamentary committees in both Houses[3]—and was amended significantly by the Senate, in the light of that scrutiny.

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* Secretary, National Executive, Australian Institute of Administrative Law.

1 PP No 93 of 1992.

2 Administrative Review Council, *Rule Making by Commonwealth Agencies* (Report No 35, 1992).

3 See Senate Standing Committee on Regulations and Ordinances Report No 99, *Legislative Instruments Bill 1994* (October 1994) (PP No 176 of 1994); House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Legislative Instruments Bill 1994* (February 1995) (PP No 11 of 1995).

At the time of the 1996 federal election, the 1994 Bill—as amended by the Senate—was awaiting passage. When the election was called, the Bill lapsed. In its election policies, the Coalition affirmed its commitment to the reforms promoted by the 1994 Bill, focussing, in particular, on the Bill's potential benefits for business.[4]

This commitment was given effect when the current (Coalition) Government was elected. The Legislative Instruments Bill 1996 (the 1996 Bill) was introduced into the House of Representatives on 26 June 1996. It incorporated many of the amendments that had been made to the 1994 Bill. The greater business focus was also evident in this version of the Bill, in provisions that would require public consultation in relation to legislative instruments "likely to have a direct, or a substantial indirect, effect on business".[5]

Unfortunately, this Bill has gone nowhere. Between June 1996 and December 1997, the Bill bounced between the House of Representatives and the Senate, essentially because the Senate kept making (and insisting upon) amendments that the Government (and, as a result, the House of Representatives) was not prepared to accept. Finally, on 5 December 1997, the House laid the 1996 Bill aside.

On 5 March 1998, the Legislative Instruments Bill 1996 (No 2) (the 1996 (No 2) Bill) was introduced into the House of Representatives. It is in the same form as the (original) 1996 Bill. On 14 May 1998, the Senate passed the 1996 (No 2) Bill, again with substantial amendments. This was despite the Minister for Justice, Senator Vanstone, telling the Senate at the opening of the substantive debate that:

> The latest draft of amendments put forward are entirely unacceptable ... For the reasons given to the Senate last year, the Government is unable to accept the many recycled amendments that I understand are now being proposed by the Opposition and the Greens. The Government will again reject those amendments in the other House and the Bill will not be returned to this chamber.[6]

The 1996 (No 2) Bill now seems doomed. However, given its reintroduction in the same form as the 1996 Bill, it stands as a potential double dissolution trigger. As a result there is the possibility that it might be passed by a Joint Sitting, should a double dissolution be called. One might (for various reasons) wonder just how realistic a prospect this is.

In the remainder of this paper, I would like to briefly touch on the original motivation for a Legislative Instruments Bill, the main features of the 1996 version of the Bill and also the amendments upon which the Senate has been insisting.

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4 As part of both its *Law and Justice* and *New Deal for Small Business* policies.

5 Contained in Part 3 of the later versions of the Bill.

6 Sen Deb 1998, No 6 at 2597.

THE LEGISLATIVE JUNGLE

Delegated legislation in Australia, at the Commonwealth level, is currently in a parlous state. Much of it is badly drafted and almost inaccessible to the general public. There is no discernible logic to the categorisation and nomenclature of delegated legislation or the extent to which particular examples of it are subject to scrutiny by the Parliament while others are not.

There are four basic problems. The first three are the:

- proliferation
- poor quality of drafting; and
- inaccessibility;

of quasi-legislative instruments (and by this I mean the vast array of "guidelines", "directions", "orders", "rules" and other types of instruments that are provided for in Commonwealth legislation and that fall outside the jurisdiction of the Statutory Rules Publication Act 1903 (Cth)).[7] The fourth problem is the tendency for legislative activity to be conducted other than by the legislature and without the scrutiny of the legislature. I do not propose to traverse these issues in detail here since, to the extent that what I refer to requires any further explanation, one need look no further than the ARC's report, *Rule Making by Commonwealth Agencies* for a discussion of these issues.[8]

One point that I should make, however, is that the poor quality of drafting should not be seen as a criticism of those who draft the vast bulk of instruments that are covered by the Statutory Rules Publication Act, that is, the Office of Legislative Drafting (OLD). Rather, it is a reflection of the fact that, since the kinds of instruments that I am concerned with here fall outside OLD's jurisdiction, they tend to be drafted by "ordinary" public servants, rather than by professional drafters.

A RAY OF LIGHT—THE LEGISLATIVE INSTRUMENTS BILL

The Legislative Instruments Bill (in its various forms) has always promised to be the answer to the problems that I have mentioned above. It is useful to set out its main features. For the sake of currency, I shall refer to the 1996 versions of the Bill.

Clause 5—Definition of "legislative instrument"

The first thing to note about the 1996 Bill is that it operates in relation to all "legislative instruments". The concept of "legislative instrument" is defined in subclause 5(1) of the 1996 Bill as:

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7 For further general discussion of "quasi-legislation" see S Argument, *Parliamentary scrutiny of quasi-legislation* (1992).

8 Above n 2.

> [A]n instrument in writing:
>
> (a) that is of a legislative character; and
>
> (b) that is or was made in the exercise of a power delegated by the Parliament.

Subclause 5(2) adds to this definition, by providing:

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

Subclauses (3) to (6) go on to make some more specific provision about what is and is not a legislative instrument, but I do not propose to deal with those provisions in detail here.[9]

The importance of this definition is that (in my view) it clearly encompasses the kinds of instruments that have previously been causing so much concern. The effect of something being a legislative instrument is that it would be subject to an ordered and stringent regime in relation to drafting, publication, registration, Parliamentary scrutiny and, in some cases, public consultation. It is also important to note that, if an "instrument that is of a legislative character" is not made in accordance with the provisions of the Bill then it may be unenforceable.[10]

I might also mention at this point that this is probably one area where the Commonwealth jurisdiction had the opportunity to assert ascendancy over Victoria, in that the Victorian regime operates only in relation to "statutory rules". That term is defined by s 3 of the Subordinate Legislation Act 1994 (Vic). The definition operates by reference to specific types of instruments (for example regulations) rather than by the effect of an instrument. In that sense, it is less inclusive than the proposed Commonwealth definition.

The responsibilities of the Principal Legislative Counsel

Part 2 of the 1996 (No 2) Bill provides for the establishment (within the Attorney General's Department) of an office of "Principal Legislative Counsel". The responsibilities of this officer are set out in clause 15, and are:

> (a) ensuring that all legislative instruments are of a high standard; and
>
> (b) maintaining the Register [see further below];
>
> (c) maintaining a database of all electronic copies of instruments given to the Principal Legislative Counsel ...;

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9 Nor do I propose to deal with clause 7, which provides that rules of court are *not* legislative instruments, or clause 8, which allows the Attorney General to certify whether or not an instrument is a legislative instrument.

10 Eg, Legislative Instruments Bill 1996 (No 2), cls 55, 56.

(d) ensuring that all original legislative instruments lodged with the Principal Legislative Counsel ... are retained and, as necessary, transferred to the Australian Archives for storage;

(e) delivering to each House of the Parliament copies of all legislative instruments for which ... Parliamentary scrutiny is required.

Clause 16 of the 1996 (No 2) Bill further provides:

(1) To ensure that legislative instruments are of a high standard, the Principal Legislative Counsel may take any steps he or she considers likely to promote their legal effectiveness, their clarity and their intelligibility to anticipated users.

(2) The steps referred to in subsection (1) include, but are not limited to:

(a) undertaking or supervising the drafting of legislative instruments; and

(b) scrutinising preliminary drafts of legislative instruments; and

(c) providing advice concerning the drafting of legislative instruments; and

(d) providing training in drafting and matters related to drafting to officers and employees of other Departments or agencies; and

(e) arranging the temporary secondment to other Departments or agencies of staff responsible to the Principal Legislative Counsel; and

(f) providing drafting precedents to officers and employees of other Departments or agencies.

If enacted, this provision would clearly give the Principal Legislative Counsel an important supervisory role in relation to the drafting of legislative instruments, which could only lead to an improvement in the quality and consistency of drafting.

Consultation

Part 3 of the 1996 (No 2) Bill provides for consultation prior to the making of legislative instruments. As indicated at the outset, the consultation requirements essentially apply in relation to legislative instruments "likely to have a direct, or a substantial indirect, effect on business".[11] Subclause 17(2) of the 1996 (No 2) Bill provides that the intention of this requirement is:

[T]o improve the quality of proposed legislative instruments by:

(a) drawing on the expertise of persons in fields relevant to the proposed instruments; and

(b) ensuring that persons likely to be affected by the proposed instruments have an adequate opportunity to comment on the policy and content of the proposed instruments.

I suggest that this is a very similar rationale to that which underpins the Victorian approach.

While I do not propose to deal with the consultation processes in any detail, it is important to note that the only legislative instru-

11 Ibid at cl 17(1).

ments in relation to which those processes are to apply are those made under the primary legislation specified in Schedule 2 of the 1996 (No 2) Bill (which is headed "Enabling legislation providing for legislative instruments likely to have an effect on business"). As you can well imagine, Departments were keen that their legislation not be listed in this Schedule.

It is also important to note that clause 28 of the 1996 (No 2) Bill provides for exemption from the public consultation process. Paragraph 28(1)(a) provides that public consultation is not necessary if the rule-maker is satisfied that various conditions—most of which involve a significant subjective element—exist. Importantly (and contrary to the earlier version of the Bill), decisions under clause 28 would be subject to judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth).

The Federal Register of Legislative Instruments

Part 4 of the Bill provides for the establishment of a federal Register of Legislative Instruments (the Register). The Register would be kept on computer[12] and would be accessible to the public.[13] Subject to certain exceptions, registration would be required in relation to all future[14] and past[15] legislative instruments. In simple terms, a failure to register an instrument would render it unenforceable.[16]

Parliamentary scrutiny

Part 5 of the 1996 (No 2) Bill provides for the Parliamentary scrutiny of legislative instruments. The Part incorporates (and builds on) the provisions contained in sections 46, 46A and 48–50 of the Acts Interpretation Act 1901 (Cth).[17] I do not propose to deal with the detail of the provisions here but suggest that the incorporation of the tabling and disallowance provisions of the Acts Interpretation Act into a Bill such as this is a sensible idea.

Sunsetting

Part 6 of the 1996 (No 2) Bill deals with sunsetting of legislative instruments. The inclusion of this Part is significant in that the 1994 Bill did not contain such provisions. This was, in turn, significant, because the ARC had recommended that provision be made for the sunsetting of legislative instruments.[18] It is also consistent with the kinds of views expressed by the Senate Standing Committee on Legal and Constitutional Affairs in its report *The Cost of Justice: Checks and*

12 Ibid at cl 37.
13 Ibid at cl 38.
14 Ibid at cls 41 – 47.
15 Ibid at cls 48 – 50.
16 Ibid at cls 55, 56 (though note that subclauses 55(2), 56(3) and 56(5) provide a validation mechanism).
17 Though with some modifications in relation to matters such as the time within which instruments must be tabled (see clause 58).
18 Administrative Review Council, above n 2 at 58–60.

Imbalances[19] and by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its report *Clearer Commonwealth Law.*[20]

The essence of the sunsetting regime is that legislative instruments would be automatically repealed—or "sunsetted"—5 years after commencement or, in the case of existing instruments that are required to be registered, of their being "backcaptured" on to the Register (that is, under the procedures provided for by clauses 48 to 50 of the 1996 (No 2) Bill).

The Senate amendments

I now turn to the Senate amendments that are apparently the stumbling block for the Legislative Instruments Bill. For ease of reference, I will refer to the amendments as proposed to the 1996 (No 2) Bill.

The amendments in question may be divided into the following categories:

(a) amendments directed at eliminating the use of gender-specific language in legislative instruments;[21]

(b) amendments making a certificate issued by the Attorney General (under clause 8 of the 1996 (No 2) Bill) to the effect that a particular instrument is or is not a legislative instrument itself an instrument subject to Parliamentary scrutiny and disallowance;[22]

(c) amendments directed at requiring that a Legislative Instrument Proposal (an aspect of the consultation process, provided by cl 21 of the 1996 (No 2) Bill)) contain a statement of the direct and indirect environmental costs and benefits of a particular option for achieving the objective of the instrument, in addition to a statement of the direct and indirect social and economic costs and benefits of the option;[23]

(d) amendments providing further exemption from the consultation processes in relation to instruments "related to the prudential supervision of insurance, banking or superannuation or the regulation of the financial markets" or if "notice of the content of an instrument would enable individuals to gain an advantage over other persons";[24]

(e) amendments removing the exemption from disallowance given by subclause 61(7) of the 1996 (No 2) Bill to instruments relating to national legislative schemes;[25]

(f) amendments intended to give the Parliament a supervisory role in relation to the sunsetting of legislative instruments,

19 PP No 128 of 1993.
20 PP No 127 of 1993.
21 Sen Deb 1998, No 6 at 2598–2607, 2722–3.
22 Ibid at 2723–6.
23 Ibid at 2727.
24 Ibid at 2727–9.
25 Ibid at 2729–31.

in order to avoid "throwing good regulations out with the bad";[26]

(g) amendments intended to ensure that certain instruments dealing with terms and conditions of employment in the Australian Public Service are disallowable by the parliament;[27]

(h) amendments intended to modify the exemption from the sunset provisions (contained in subclause 66(1) of the 1996 (No 2) Bill) provided in relation to "any legislative instrument that gives effect to an international obligation of Australia" and "any legislative instrument that confers heads of power on a self-governing territory"[28]

It is not for me to second-judge the Senate (and, of course, the Government) by proffering a view as to whether or not the issues set up above are important enough to govern the life or death of the Legislative Instruments Bill. This is a judgment that readers of this paper might want to make themselves, after reading the Hansard of the debate. What I will say, however, is that, in my view, this is a very important Bill, containing reforms that are both meritorious and long overdue. It will be an enormous shame if, in effect, the baby ends up being thrown out with the bath-water.

"Canberra"—Leading from behind

Residents of Canberra (such as myself) tend to wince when the media (unfairly) talks of "Canberra" doing this or that (and "this or that" is invariably bad). Having said that, I have to observe that "Canberra" is setting a very bad example at the moment in relation to regulatory review and reform. Quite apart from what I have described about the "progress" of the Legislative Instruments Bill, I can also report that the ACT Legislative Assembly has recently abolished its Scrutiny of Acts and Regulations Committee, a committee that performs a similar function to that of both the Senate Standing Committee on Regulations and Ordinances and the Senate Standing Committee for the Scrutiny of Bills.[29] What makes all this even worse, of course, is that Victoria is setting such a good example!

Postscript: At the time of publication, I understand that the Commonwealth government is intending yet another attempt at securing passage of the Legislative Instruments Bill and will be introducing yet another version of the Bill.

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26 Ibid at 2732–3. The quote is from Senator Murray, and appears at 2732.

27 Ibid at 2733–4.

28 Ibid at 2734. The modifications in question would change "that gives" to "the sole or principal purpose of which is to give" and "that confers" to "the sole or principal purpose of which is to confer".

29 This happened under a resolution of the ACT Legislative Assembly passed on 28 April 1998. While the same resolution assigned the relevant function to *another* committee (the Standing Committee on Justice and Community Safety), the legislative scrutiny role is now to be performed in addition to that committee's other roles. This compares unfavourably with the role being performed by a committee with legislative scrutiny as a specialist function (see, eg, criticism in *The Canberra Times*, 1 May 1998 at 8).

Administrative Law and Corporate Regulation The ASC's Experience

MEGAN CHALMERS AND LOUISE MACAULAY*

INTRODUCTION

The ASC Law[1] and the Corporations Law (the Law) provide for a wide range of administrative decisions to be made by the Australian Securities Commission (ASC). These include:

a) licensing securities dealers and investment advisers, determining the conditions, if any, which should be attached to the licences and whether licences should be revoked or suspended or a person should be banned from holding a licence—Part 7.3 Divisions 1 and 5 of the Law;
b) modifying the provisions of Chapter 6 (takeovers) or Part 7.12 of the Law (offering of securities or prescribed interests) as they apply to a person or class of persons—ss 728, 730 and 1084 Law;
c) banning a person from acting as a director—s 600 Law;
d) refusing to register a prospectus—s 1020A Law;
e) commencing an investigation into suspected breaches of the Law, and decisions in relation to notices to produce books and records and/or attend private examinations—ss 13, 19, 30 and 33 ASC Law;
f) whether, after an investigation, a matter should be prosecuted or civil proceedings instituted—ss 49 and 50 of the ASC Law; and

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* Australian Securities Commission, now the Australian Securities and Investments Commission (ASIC). See below for details of the replacement of the ASC.

1 Section 1B of the Australian Securities and Investment Commission Act 1998 (Cth) (ASIC Act, formerly the ASC Act) provides that the Act may also be referred to the ASC Law (no date), similar to the citation in the Corporations Law.

g) decisions to release material obtained in the course of the exercise of the ASC's powers and functions—see for example, ss 25, 37 and 127 ASC Law.

The Commonwealth administrative law package applies to the ASC, and accordingly, its decisions and decision making processes, including those referred to above, are subject to review in a number of different ways.

The purpose of this paper is to provide an overview of the ASC's experiences with respect to administrative law review and insight into some of the impact this scrutiny has had on the ASC as the national corporate regulator. It is timely to do this as the ASC completes its term, and prepares for its replacement by the Australian Securities and Investments Commission (ASIC).[2]

The expansion in the functions of the corporate regulator which will occur with the introduction of ASIC will inevitably give rise to more administrative decision-making, and no doubt increased challenges, although it appears that the basic parameters of review will not change greatly. It can be envisaged that the wide range of review decisions and precedents developed by the ASC will continue to be used and refined. Two such groups of decisions (the status of ASC policy, and challenges to the ASC's regulatory and investigative powers) in particular will continue to be relevant.

REVIEW PURSUANT TO THE CORPORATIONS LAW

Prior to the commencement of the national scheme legislation on 1 January 1991, corporate regulation was the responsibility of the National Companies and Securities Commission (NCSC) and the State Corporate Affairs Commissions under what was known as the co-operative scheme. The scheme was based primarily on State legislation.

Administrative review under the co-operative scheme was governed by the Administrative Remedies Agreement dated 21 April 1982 between the Commonwealth and the States of Australia. The parties agreed that review of administrative decisions under State laws was a matter to be determined by State Governments, and that State officers exercising powers delegated by the National Companies and Securities Commission Act 1979 (Cth) (NCSC Act) would not be subject to Commonwealth administrative laws.

Features of administrative review under the co-operative scheme included:

a) exclusion from judicial review under the Administrative Decisions (Judicial Review) Act 1977 (AD(JR) Act) of decisions of the NCSC made in the performance of a function, or the exercise of a power conferred or expressed to be conferred upon it by any State Act or law of the Northern Territory;[3]

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2 Editor's note: ASIC began operations on July 1 1998, following Commonwealth Parliamentary approval.

3 AD(JR) Act, schedule 1, para (m).

b) decisions made by members of the NCSC or delegates of the NCSC pursuant to functions conferred by a State Act were not, for the purposes of s 9 of the AD(JR) Act, regarded as decisions of officers of the Commonwealth. Accordingly, these decisions were not subject to review under the AD(JR) Act.

There were, however, other avenues of judicial review available. These were:

a) the High Court exercising original jurisdiction in which a writ of mandamus or prohibition or an injunction was sought against a member of the NCSC or of its staff as an officer of the Commonwealth;[4]
b) the High Court in the exercise of original jurisdiction in a matter in which the Commonwealth or a person, being sued on behalf of the Commonwealth, was a party;[5]
c) the Federal Court in the exercise of original jurisdiction under s 39B of the Judiciary Act 1903 (Cth).

The principal provision under which review was sought was s 537 of the Companies Code of each State. This section provided that a person aggrieved by a refusal of the NCSC to register or receive a document or by any other act or omission or decision of the NCSC could appeal to the Supreme Court of the relevant state.[6]

REVIEW OF DECISIONS OF THE ASC

With the introduction of the current national scheme, which is based on enactment of identical Commonwealth and State legislation, administered by a Commonwealth body as if it were Commonwealth legislation, it was agreed by the Commonwealth, States and Northern Territory that the relevant administrative law would be the package of Commonwealth administrative law legislation.[7]

Section 35 of the Corporations (State) Acts and s 45B of the Corporations Act 1989 (Cth) provide that the Commonwealth administrative laws apply to the Corporations Law and the ASC Law of each State and Territory jurisdiction as if they were laws of the Commonwealth.

Subsection 4(1) of the Corporations Act defines "Commonwealth administrative laws" to mean the provisions of the following Acts:

(a) Administrative Appeals Tribunal Act 1975 (Cth);
(b) Administrative Decisions (Judicial Review) Act 1977 (Cth);
(c) Freedom of Information Act 1982 (Cth);

4 Section 75(v) of the Commonwealth Constitution.
5 Judiciary Act 1903 (Cth) at ss 56, 64.
6 *NCSC v Alexanders Laing and Cruickshank* (1988) 6 ACLC 142 (declaration by the NCSC that a particular acquisition of shares was an unacceptable acquisition); *Acre Development Pty Ltd v NCSC* (1987) 5 ACLC 940 (challenge to a refusal by the NCSC to give the plaintiff a certificate of exemption from a requirement to supply information as to the beneficial ownership of shares); *Elders IXL Ltd v NCSC* [1987] VR 1 (challenge to declaration by the NCSC that a particular acquisition of shares was "unacceptable conduct").
7 Alice Springs Heads of Government Agreement of 29 June 1990, cl 26.1(ii).

(d) Ombudsman Act 1976 (Cth);
(e) Privacy Act 1988 (Cth);
and the provisions of the regulations made under those Acts.

Review of Decisions of the ASC under the AAT Act

Under s 25(1) of the Administrative Appeals Tribunal Act 1975 (Cth) (the AAT Act) a right of review exists only where legislation expressly confers that right. The present conferral of jurisdiction on the AAT to review decisions made by the ASC under the Law was made by way of general grant, with a limited number of exemptions.[8] This position contrasts with other jurisdictions where particular decisions are specifically stated by the constating legislation to be subject to review by the AAT.

The decisions which are excluded from AAT review are set out in s 1317C of the Law. The right of review does not exist in relation to a decision under a few select sections of the Law, and decisions in respect of which an appeal or review is expressly provided, or that are declared by the Law to be conclusive or final or are embodied in a document declared by the Law to be conclusive evidence of an act, fact, matter or thing.

The conferral of jurisdiction on the AAT under s 244 of ASC Law is more limited. The AAT is only authorised to review decisions made under ss 72, 73 74 and 75(1) of the ASC Law which are ASC decisions in relation to the failure to comply with the exercise of ASC investigatory powers. The AAT does not have jurisdiction to review decisions to commence investigations, or decisions to exercise the ASC's compulsory powers to obtain books and records or to conduct private examinations.

The ASC experience

From July 1995 to date the ASC has been subjected to 118 AAT challenges. When one considers the number of decisions made by the ASC, the number of applications to the AAT is relatively small.

In the 1995–1996 and 1996–1997 financial years 40 applications were lodged compared to 19 in the 1994–1995 financial year and 18 in the 1993–1994 financial year. In this financial year 38 applications have been lodged to date.

As in the other areas of administrative law review, applications tend to fall into particular categories. The majority of applications relate to:

(1) decisions affecting a person's livelihood, for example, prohibition of a person from acting as a director under s 600 (18 in the 1995–1996 financial year, 13 in the 1996–1997 financial year and 12 this financial year), licensing decisions under ss 829 and 837 (2 in the 1995–1996 financial year; 7 in the 1996–1997; and 5 this financial year), decisions regarding registration as an auditor/liquidator

8 See s 244 of the ASC Act, s1317B of the Corporations Law and for exceptions see s 1317C.

(2 in the 1995–1996 financial year; 1 in the 1996–1997 financial year; and 3 this financial year); and

(2) decisions to, or not to, modify the Law, for example, takeover decisions made under Chapter 6 of the Law (3 in the 1995–1996 financial year; 10 in the 1996–1997; and 2 this financial year), accounting relief under s 313 or s 317B (2 in the 1995–1996 financial year; 4 in the 1996–1997 financial year; and 4 this financial year) and/or extension of time for AGM/lodgement of documents (2 in the 1995–1996 financial year; none in 1996–1997 financial year and none this financial year).

There have been some interesting decisions of the AAT in relation to two issues:

(a) whether the decision is made under the Law (source of power); and

(b) whether the decision made falls within the meaning of "decision" under the AAT Act.

Source of power

The three cases in recent years dealing with the source of the ASC's power are *HongkongBank of Australia v ASC*[9], *Mercantile Mutual Life Insurance Co Ltd v ASC*[10] and *Burns Philp & Co Ltd v Murphy*. All three cases concerned a decision of the ASC to authorise persons to apply to the court for a summons to examine persons under s 597 of the Law (as it was prior to its amendment on 23 June 1993). The cases highlight the real difficulty which can exist in determining the source of the ASC's power in legislation which is complex.

In *HongkongBank and Mercantile Mutual* the Full Court of the Federal Court held that s 597(1) simply conferred the function on the ASC to make authorisations but was not the source of power.

In *HongkongBank* the Court observed:

> The opening words of s 597(1) ... indicate that its function is one of explaining the sense in which a term is employed in the subsections which follow. The subsection is not expressed as a dispositive provision creating rights or liabilities or reposing powers or functions. Legal rights and duties in relation to the examination of persons concerned with corporations are created in plain terms in the balance of s 597.[12]

The Court left open the issue of the source of power. However, in *Mercantile Mutual* it was held that the source of power was s 11(4) of the ASC Law. As s 11(4) of the ASC Law is not one of the provisions identified in s 244 of the ASC Law as giving rise to a decision reviewable by the AAT, the AAT did not have jurisdiction to review the decisions in question.

In *Burns Philp*[13] the NSW Court of Appeal expressly disagreed with the decisions of the Federal Court in *HongkongBank and*

9 (1992) 7 ACSR 724.
10 (1993) 10 ACSR 140.
11 (1993) 10 ACSR 244.
12 (1992) 7 ACSR 724 at 729.
13 (1993) 10 ACSR 244.

Mercantile Mutual and held that s 597(1) was the source of the power or function to grant an authority to apply to the Court.

In *Re Excel Finance*[14] the Full Federal Court referred to the conflict of judicial opinion, and cited the High Court's decision in *Australian Securities Commission v Malborough Gold Mines Ltd*[15] where the Court had stressed the need for uniformity in judicial interpretation by intermediate appellate courts. The Full Federal Court followed the precedents of *HongkongBank* and *Mercantile Mutual*. Senior Member Kiosogolous in *Finlayson v Australian Securities Commission*[16] stated that the AAT should follow the decisions of the Full Federal Court rather than the NSW Court of Appeal.

The difficulties, for the ASC, AAT and applicant alike, in determining the source of power have led Deputy President McMahon of the AAT to observe:

> I am not sure where the limits to the Tribunal's power of review are now to be found. There are many sections of the Corporations Law—possibly hundreds—drafted in such a way as to confuse powers and functions.[17]

Meaning of "decision" under the AAT Act

The AAT has adopted the same meaning of "decision" as the High Court did in relation to the AD(JR) Act in *Australian Broadcasting Tribunal v Bond*.[18] The High Court confirmed that the types of decisions which are capable of review by the Federal Court under the AD(JR) Act are those which are "final or operative and determinative" and which involve a "substantive determination". Intermediate or procedural decisions are not "decisions" within the meaning of that Act.

Deputy President McMahon of the AAT has commented:

> There are ... very many situations where decisions, although important to the litigant, can be regarded only as interim decisions without the necessary degree of finality. If the Tribunal's view prevails that "decision" is to be interpreted in the same way that it has been interpreted under the AD(JR) Act, then it becomes apparent that there are many exceptions to the generality of the power of review conferred by s 1317B.[19]

Procedural or intermediate decisions in the decision making process are not reviewable as they do not have the necessary element of finality. In addition, where there is no "discretion", that is, the decision is mandatory, a right of review does not exist.[20]

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14 (1994) 52 FCR 69 at 82.

15 (1993) 177 CLR 485 at 492.

16 (1996) 14 ACLC 1471 at 1477.

17 Deputy-President McMahon, 22 July 1993 "Administrative Appeals Under The Corporations Law" paper given at seminar of the Administrative Law Committee of the Federal Litigation section of the Law Council of Australia.

18 (1990) 170 CLR 321.

19 McMahon, above n 17.

20 Eg, the following sections of the Law, s 145(2) (the ASC must register an applicant as a company), s 779B(5) (the ASC must publish in the Gazette the instrument approving a body corporate as the securities clearing house), s 1282(6) (the Commission, must, upon granting an application for registration as a liquidator issue a certificate).

There have been some indications that the definition of "decision" in *Bond*[21] may be widened, at least in the context of some ASC decisions reviewed under the AD(JR) Act. In *Mercantile Mutual*, Gummow and Lockhart JJ said in obiter that the ASC's decision was justiciable in the sense of being a final and operative decision. This obiter reference was picked up and applied by O'Loughlin J in *Worthley v ASC*[22] in relation to a similar decision. It is, however, difficult to see how the decisions in issue in these cases satisfied the *Bond* test. They did not involve a substantive determination in that they only allowed an application to be made to the Court for an examination summons. They did not determine any issues in relation to the summons, because the Court has a discretion in ordering a person to attend for examination. Whether these decisions will be picked up and followed by the AAT remains to be seen.

The issue of the source of power and the meaning of "decision" does impose limitations on the jurisdiction of the AAT. Nevertheless, the AAT's jurisdiction with respect to decisions of the ASC under the Corporations Law remains significant.

Review of Decisions of the ASC under the AD(JR) Act

The AD(JR) Act provides for review by the Federal Court of decisions of an administrative character, made, proposed to be made or required to be made (whether in the exercise of a discretion or not) under an enactment.[23]

The AD(JR) Act provides that a reference to "decision" includes—among other things—making, suspending, revoking or refusing to make an order; issuing, suspending, revoking a licence; and/or imposing a condition or restriction. As mentioned above, the AD(JR) Act appears to have been interpreted to allow for a wider view of "decision" in relation to decisions under the Law than the AAT Act. Under the AD(JR) Act, the Court is also empowered to review conduct engaged in by a decision maker for the purpose of making his/her decision. In reviewing "conduct" the Court looks at the procedural aspects of decision making leading up to the making of the decision.

The ASC experience

There have been relatively few applications made under the AD(JR) Act in respect of ASC decisions. In the 1996–1997 financial year there were 7 applications lodged. In the 1995–1996 financial year 10 applications were received compared to 3 in the 1994–1995 financial year. This financial year there have been 5 applications lodged.

Previously, the majority of applications related to decisions to issue of notices to compel the provision of documents/books under ss 30 and 33 of the ASC Law (2 in 1994–1995 and 5 in the 1995–1996 financial year). However, last financial year two challenges related to

21 (1990) 170 CLR 321.
22 (1993) 41 FCR 376.
23 See s 3 for the definitions of "decision" and "enactment".

the provision of s 19 of the ASC Law transcripts; two (lodged by the same applicant) related to decisions not to authorise examinations under ss 596A and 596B of the Law; two related to s 600 decisions prohibiting a person from acting as a director; and one challenged a review of an AAT decision with respect to the ASC's decision to modify the Law. This financial year 2 applications related to s 600 decisions; 1 to a licensing decision; 1 to a reference to the Companies and Securities Panel under s 733 of the Law; and 1 to a decision to administratively reinstate a company.

As in the case of AAT applications, the majority relate to ASC decisions affecting individuals' livelihoods. By contrast, in the early days of the ASC, there were a number of AD(JR) reviews of the exercise of the ASC's various investigative powers (see below).

Significant issues which have arisen in the review of ASC decisions are set out below.

Denial of procedural fairness

Procedural fairness is a concept which pervades the ASC's day to day conduct as it conducts investigations, and makes decisions modifying the Law or affecting persons' livelihoods. The ASC has extensive powers to release information it has gathered which may adversely affect interests, and continually engages in assessment of what procedural fairness is required in each situation. The fundamental case which the ASC relies on in this area is *Johns v ASC*.[24] However, other cases have arisen.

In *Aboriginal Legal Service Limited and Paul Coe v ASC and Ors*[25] an AD(JR) Act application was lodged on the basis of a denial of procedural fairness as the ASC would not provide the entire transcript of a compulsory examination it had conducted under s 19 of the ASC Law. The facts were that the ASC was preparing a report in accordance with s 17 of the ASC Law, a copy of which was to be provided to the Minister under s 18. In July 1996 the ASC wrote to the Board of the Aboriginal Legal Service (ALS) and to Mr Coe advising them that a report was being prepared and enclosing that part of the draft which the ASC considered might affect the rights or interests of the ALS or persons associated with the ALS. Extracts from the transcripts of examinations of various officers and employees of the ALS were also enclosed. Comments on the draft and its conclusions were sought.

The ALS and Mr Coe sought the entire transcripts on the basis that failure to provide them constituted a denial of procedural fairness. Mr Coe had argued that the entire transcript and exculpatory material was required so that "he may be satisfied that there are no other relevant matters in it". Moore J found that a s 17 report which is critical of a person or Corporation may have two adverse effects. First, it may be published by the Minister and, secondly, to the extent

24 (1993) 178 CLR 408.
25 (1996) 14 ACLC 1,698.

that it contains findings of fact, may be used to prove those facts in civil proceedings.

His Honour considered the decisions of the High Court in *National Companies and Securities Commission v News Corporations Ltd*[26] and Federal Court in *Bond v Sulan*[27]. In the *NCSC* case the High Court considered that, in relation to the investigation which may have resulted in an application to the Supreme Court for orders concerning the acquisition of shares, it was sufficient for the Commission to identify the matters that might result in adverse conclusions and criticisms of the company, to notify the company and to seek their comment. In *Bond v Sulan* where there was an investigation into the affairs of several companies and the ASC was required to provide a report on possible offences, the court held that the obligations of procedural fairness had been satisfied by the provision of the adverse material, based on the investigator's assessment of what material was adverse.

In *Aboriginal Legal Service v ASC*[28], Moore J stated that:

> The ASC appears to have followed a process where, with some care, it has identified material that might result in adverse findings of fact in the final report and conclusions based on them and has then provided both the conclusion and the findings in a draft form and the primary material, insofar as it is transcript of an examinee, upon which those findings will be based.[29]

His Honour then quoted with approval from *Bond v Australian Broadcasting Tribunal*:[30]

> The question whether, in a particular case, an investigator has left a party "in the dark" as to the risk of an adverse finding being made upon a particular subject must depend on the whole of the circumstances of the relevant inquiry ... Rarely will it be appropriate for a court to intervene on this ground prior to the conclusion of an inquiry, and then only where it is clear that, left to its own devices, the Tribunal will leave a party in doubt as to the nature of the inquiry or the risk which it faces.[31]

The application was dismissed with costs.

Boucher v ASC[32] involved a challenge to the ASC's decision to reopen a hearing in relation to a banning order against Mr Boucher under s 829 of the Law. The applicant alleged that to do so would involve a denial of procedural fairness. After the close of the hearing but before the time for lodging submissions fresh evidence had come to light. The ASC wrote to Mr Boucher advising him of this fact and that an application would be made to the delegate to allow the further evidence to be put before him. Mr Boucher objected, and the delegate decided to hear the further evidence.

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26 (1984) 156 CLR 296.
27 (1990) 26 FCR 580.
28 (1996) 22 ACSR 357
29 Ibid at 362.
30 (1988) 24 FCR 494 at 512 per Wilcox J.
31 Ibid at 512.
32 (1996) 15 ACLC 100.

The application was dismissed at first instance. Mr Boucher unsuccessfully appealed. The Full Federal Court relied on the decision of the High Court in *Kioa v West*[33] that the key to applying the rules of procedural fairness was "flexibility" and not "compliance with rigid procedure". The delegate was required to adopt procedures which were "fair in all the circumstances to [Mr Boucher] as a person whose rights, interests or legitimate expectations are liable to be affected by the making of the decision in question". The particular consideration which was important to the issue of whether Mr Boucher had been afforded procedural fairness was "whether the decision to re-open would subject [him] to impermissible prejudice".

The Full Court stated:

> A major purpose of the hearing to which the statute entitles the appellant is to give him an opportunity to answer material which might justify the banning order. It was not suggested that the purpose could not be achieved even if further evidence was received. There was no reason to think that the Commission's delegate intended to act in a way which would deprive the appellant of a proper opportunity to deal with the further material.[34]

It considered that even if the failure of the ASC's lawyer to rely on the further evidence from the outset had been due to a deliberate decision not to use that evidence, that would not be sufficient to make it a denial of procedural fairness in the context of the s 829 administrative proceedings.

THE FREEDOM OF INFORMATION ACT 1982 (CTH)

Relevantly for the ASC, there are several provisions in the Freedom of Information Act 1982 (Cth) (FOI Act) which exempt disclosure of certain documents whilst an investigation is under foot. Of particular relevance are certain provisions of s 37 of the FOI Act, which state that a document is exempt if its disclosure could reasonably be expected to prejudice the conduct of an investigation, or prejudice the enforcement or proper administration of the law in a particular instance. The section also provides that disclosure is exempt if it would reveal the existence of a confidential source of information, prejudice the impartial adjudication of a particular case, or disclose procedures for investigating breaches of the law.

In interpreting s 37, the judiciary has identified the obstacles that face an investigative agency without the exemption:

- if an applicant were allowed access to investigative records, they may discover the direction of an investigation and take steps to frustrate the further conduct of the inquiry;[35]
- disclosure may impede an agency's ability to acquire and provide information to the ASC;[36]

33 (1985) 159 CLR 550.
34 *Boucher v ASC* (1996) 22 ACSR 503 at 511.
35 *News Corporation Ltd and Ors v NCSC* (1984) 57 ALR 550 at 559 per Woodward J.
36 *Easterday v ASC* (1996) 14 ACLC 342.

- the subject of the inquiry may obtain warning of possible civil or criminal proceedings against them;[37]
- by disclosing information the investigative body may lose an advantage when questioning the applicant;[38]
- information may indicate the nature and extent of the evidence against the subject of an investigation;[39]
- to reveal factual information may disclose the existence of a confidential source of information assisting the investigation and enforcement of the law;[40]
- information that is not immediately related to an individual may nevertheless spell out the agency's methods and procedures for achieving their objects. The ramification is that these procedures will be less effective when a person who is attempting to evade them has authoritative knowledge of them.[41]

This last obstacle is also covered by s 40(1)(d) which effectively states that a document is an exempt document if its disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.[42]

The frequent use of FOI Act requests to discover the ASC's progress with a particular investigation, either on-going, or completed, has not had to date a substantial impact on the ASC's functions in enforcing the Law. This would, however, change of there was any substantial amendment to the exemption provisions of the FOI Act. In the meantime, the requests which are received, coupled with the large number of documents obtained by the ASC under its compulsory powers, give rise to many challenging issues.

The ASC experience

In the 1996–1997 financial year the ASC received 55 FOI applications. In the 1995–1996 financial year 71 were received, in 1994–1995 financial year 54 were received. This financial year 44 applications have been received to date.

The majority of applications relate to investigations. Usually the applications are lodged by those who are the subject of the investigation.

There have been relatively few applications to external reviewing agencies (such as the AAT and the Ombudsman). In 1994–5 financial year there were 6 applications to the AAT, none in the 1995–1996 financial year and 1 in the 1996–1997 financial year. However, this financial year there have been 3 applications lodged.

In 1994–5 financial year there were 3 complaints to the Ombudsman, one in the 1995–1996 financial year and 1 in the

37 *News Corporation Ltd and Ors v NCSC* (1984) 57 ALR 550 at 559 per Woodward J.
38 Ibid at 560.
39 Ibid.
40 *Re Anderson and AFP* (1986) 11 ALD 355 at 364 per DP Hall.
41 *Re Mickelberg and AFP* (1984) 6 ALN N176.
42 Section 40(1)(d) applies to documents throughout all stages of the ASC's investigation and litigation.

1996–1997 financial year. There have been no complaints to the Ombudsman this financial year relating to FOI applications.

THE OMBUDSMAN

The ASC has a written agreement with the Ombudsman's office to enable the standardisation of complaint handling. Complaints raising serious allegations, be they policy or operational, and/or complaints concerning ASC investigations, must be raised in writing with the Chairman of the ASC. Other less serious complaints or issues may be raised with a nominated officer, the administrative law coordinator, in the relevant regional office.

The ASC experience

Traditionally complaints to the Ombudsman relate primarily to ASC decisions not to investigate and to the document lodgement issues, particularly the imposition of late lodgement fees.

In the 1996–1997 financial year the Ombudsman investigated 22 formal complaints[43] about the ASC. Of these, 11 related to decisions not to investigate. An additional 4 related to the appropriateness/adequacy of an ASC investigation. Five complaints related to the imposition of late lodgement fees.

In the financial year 1995–1996 the Ombudsman investigated 17 formal complaints about the ASC. Of these 11 related to decisions not to investigate. One related to the manner in which the ASC conducted an investigation.

This financial year there have been 16 formal complaints received. Of these 9 relate to decisions not to investigate, 4 relate to decisions to release or not release information, 2 relate to the manner in which the ASC corresponded with complainants and 1 related to a takeover matter.

THE ASC'S POLICY

In a number of areas of its jurisdiction, the ASC has developed policies to assist its decision makers to allow members of the public who may be affected by decisions of the ASC to understand the principles and procedures which will be adopted in particular matters. The ASC's policies are published in the ASC Digest in the form of policy statements.

The ASC has developed a structured approach to its policy making which involves substantial opportunity for comments from those companies and sectors of the securities and futures markets likely to be affected by the policy. In light of the necessity to promote commercial certainty and achieve uniformity in decision making through the ASC's offices around Australia,[44] the ASC is always con-

43 Commonwealth Ombudsman, *Annual Report 1996–97* (1997) at 277. The statistics appearing in the Ombudsman's annual reports are higher—the statistics in the report include all contact with the agency including telephone enquiries.

44 See ASC objects in ASC Law at s 1(2).

cerned about the consideration of its policy by reviewing courts and tribunals.

In the ASC's experience the AAT has expressed a willingness to apply policy properly made, although it will depart from it when appropriate.

In *Barrie Percival v Australian Securities Commission*[45] the AAT set aside the decision of the ASC to refuse to register Mr Percival as a liquidator under s1282(2) of the Law on the ground that he was not a "fit and proper person". The AAT commented on the ASC's application of the relevant draft policy.

The Deputy President of the AAT concluded it was not appropriate to apply the guidelines as they were "tentative" and had since been revised and, more importantly, the guidelines were intended to assist ASC officers to evaluate persons who had not previously been registered as liquidators. Accordingly, in Mr Percival's case, it was not appropriate as it did not take into account Mr Percival's full previous experience.

In *Australian Metal Holdings Limited v ASC*,[46] a case involving modifications of the provisions of Chapter 6 of the Corporations Law, to allow the sale by tender of a parcel of 51.05% of the shares of the Australian Agricultural Company Limited, the AAT also declined to apply policy not properly formulated. In that case there was an NCSC policy in existence at the time of the decision, which the ASC had announced should not be relied upon as embodying the ASC's attitude to applications for modifications to allow tender bids. After the decision to modify was made, the ASC issued a media release indicating its intention to allow applications for modifications similar to those granted in the case of the Australian Agricultural Company Limited shares. The AAT held that this was insufficient to establish a new policy because it had not been arrived at by any process of public consultation and was not in an enduring form. There was found to be no policy which the Tribunal could apply in its review.[47]

In contrast, in the case of *DB Management Pty Ltdv ASC*[48] the AAT was willing to take account of policy made after the date of the decision to be reviewed, which had been anticipated at the time of the decision, and subsequently adopted after proper public consultation. In the recent decision of *Westchester Financial Services Pty Ltd v ASC*,[49] the AAT considered the same policy in the context of a different decision and found that although the ASC's decision was not in accordance with the detail of the relevant published policy, the principles upon which the policy operated, and the purpose of the statutory discretion provided to the ASC, were fulfilled and the decision was confirmed.

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45 (1993) 30 ALD 280.

46 (1995) 37 ALD 131.

47 Cf *Re Magellan Petroleum Australia Limited* (1993) 11 ACLC 811 where the AAT applied a new policy of the ASC which was in draft at the time of the decision in preference to earlier established policy.

48 (1997) 26 AAR 38.

49 AAT decision W 97/437, D P Barnett and Senior Member Associate Professor Fayle, 4 June 1998, unreported.

THE ASC'S REGULATORY AND INVESTIGATIVE POWERS

The ASC's extensive investigative powers are contained in Part 3 of the ASC Law.[50] The outcomes of the ASC's investigations are varied, and the ASC has a range of powers in relation to litigation and preparation of reports, including:

(a) causing a prosecution for an offence to be commenced—s 1315 Law and s 49 ASC Law;
(b) commencing civil proceedings in the name of another person—s 50 ASC Law;
(c) applying for an injunction against, or the prohibition of, dealing in securities, futures contracts or other property, or appointing a receiver—ss 1323 and 1324 Law; or
(d) intervening in proceedings—s 1330 Law; or
(e) preparing reports to the Minister, who may publish them—ss 17 and 18 ASC Law[51]

Joseph Longo, National Director of Enforcement of the Australian Securities Commission, recently observed:

> Increasingly, legal proceedings are being instituted to obstruct investigations or delay civil and criminal trials ... The "administrative law package" promotes accountability and transparency in all aspects of the ASC's work. However, these protections come at a cost. Speedy and decisive investigations are not promoted by attacks on the investigation itself which often seek to agitate issues more properly left, it is submitted, to resolution at the trial itself.[52]

In the first years after the creation of the ASC, there were several challenges to the exercise of some of the ASC's investigative powers, in particular AD(JR) Act applications challenging decisions by the ASC to issue notices requiring the production of books and records to assist in an investigation (ss 30 and 33 of the ASC Law).

The case of *Stockbridge v Olgivie*[53] challenged two decisions in the use of the ASC's investigatory powers, using the AD(JR) Act. The first was the right to legal representation, and specifically, the right to be legally represented by a particular firm of solicitors during the conduct of the examination under s 19 of the ASC Law. The court referred to the right of an examinee to have a lawyer present on accordance with s 23 of the ASC Law but noted it was subject to the express qualification that if a person is obstructive then he/she may be asked to stop (see s 23(2)). In addition, s 22(1) authorises the inspector to give directions about who may be present during the examination.

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50 Section 244 of the ASC Law precludes review of most of these decisions by the AAT. However, as noted above there have been a number of challenges using the provisions of the AD(JR) Act.

51 As was the case in *ALS v ASC* (1996) 22 ACSR 357.

52 J P Longo, "Investigation Issues", paper presented to the AIJA Seminar, *Perspectives on White Collar Crime—Towards 2000*, 27 February 1998.

53 (1993) 43 FCR 244.

French J found that where a lawyer seeks to represent a number of examinees in the same investigation it may be thought that a risk may arise where, without consciously intending any impropriety, the lawyer might divulge to one examinee something that had occurred in another examination. He noted that the exclusion of a particular firm is a controversial issue where matters of judgement and assessment come into play.

The second matter was the validity of the issue of a s 19 notice of examination. The notice specified:

> To: Mr Robert Edward Stockbridge,
>
> .....
>
> In relation to the investigation of suspected contraventions of s 227(2) of the Companies (Western Australia) Code and/or s 229(3) of the Corporations Law between August 1989 and 7 December 1992 on respect of the companies listed in the schedule marked "A" attached to this notice....and
>
> suspected contraventions of sections 43 and 45 of the Securities Industry (Western Australia) Code and/or sections 780 and 781 of the Corporations Law between September 1988 and 5 February 1993
>
> you are hereby notified that under sub-s 19(2) of the ASC Law you are required
>
> (a) to appear
>
> at: 10am
>
> on: Wednesday, 17 February 1993
>
> at .....
>
> for an examination on oath...and to answer questions put to you in relation to the investigation;....

It was alleged, among other things, that the description of the matter under investigation was inadequate. It was alleged a "person" was required to have been identified as possibly in contravention of the Law.

French J held that the notices must contain a brief and comprehensive description of the matter and the subject of investigation but that s 19(3) does not require particularity[54]. This did not mean that a person be identified as the "inquiry may involve the commission of a contravention, in respect of which the identity of the contravenors is uncertain".

The right to exclude a particular lawyer had been considered by the Full Federal Court in *ASC v Bell*[55]. In *Bell's case* the court indicated that where the lawyer had been personally involved in the affairs of a company being investigated under Div 2 and there was a real risk of his having committed offences it would plainly be inappropriate and improper for him to seek to represent a witness himself. He would gain an insight into the investigation which he could use for his own advantage.

54 Relying on *ASC v Graco* (1991) 29 FCR 491.
55 (1991) 32 FCR 517.

In *Neil McDonald and Anor v ASC*[56] the applicants alleged that the description in a s 30 of the ASC Law notice of the subject matter of the inquiry as being: "In relation to an investigation of the affairs of Project Equity Finance Limited (Project) during the period 2 August 1989 to 12 February 1993" was inadequate and did not comply with the requirements of the ASC Law and Australian Securities Commission Regulations (the ASC Regulations).

Davies J noted that the term "affairs" was extremely broad. He held that the notices did not state the matter to which the ASC investigation related as they had failed to refer to the provisions which may possibly have been contravened. Accordingly, they were set aside.[57]

Following the issue of subsequent notices another AD(JR) Act application was lodged by the MacDonalds.[58] The notices stated:

> In relation to an investigation under division 1 Pt 3 of the ASC Law of suspected contraventions of ss263 and 267 of the Companies (NSW) Code and ss229, 289 and 335 of the Corporations Law during the period 2 August 1989 to 12 February 1993 by persons associated with Project Equity.

The schedule to the notices were in the same terms as the initial notices.

The applicants alleged, among other things, that the notices were invalid as:

(a) they were made without a proper exercise of discretion, the decision-maker taking the step in reaction to the lodging of the complainant;
(b) they were so unreasonable that no reasonable person could have made then because the investigation was commenced as a result of one complaint;
(c) they were not authorised under the ASC Law as the complaint could not give rise to a reason to suspect a contravention of the Law as required by ss 13 and 28 of the ASC Law; and
(d) the schedule to the notices was ambiguous.

His Honour stated:

> There is no evidence as to what happened [between the time of the complaint and the issue of the notices]...but accepting that the combined effect of sections 13, 28, 30 and 33 of the ASC Law required, in the present case, that the notices be in aid of an investigation into the commission of an existing offence or offences, the evidence does not suggest an arguable case that the sole event which not only precipitated an initial investigation but also precipitated the examination by the Commission of the offences specified in the notices was the lodging of the complaints...[T]he evidence falls far short of showing on the balance of probabilities (especially considering the lapse of time between the complaint and the issue of the notice) that the investigation was commenced simply because there was a complaint made without any independent exercise of discretion.[59]:

56 *ASC Digest* 1994 LC 63.
57 Interestingly, the decision of Davies J in is in direct conflict with Drummond J's decision in *ASC v Lucas* (1992) 7 ACSR 676.
58 (1994) 120 ALR 515.
59 Ibid at 518.

The application was dismissed with costs.

The ASC is not alone in having such decisions challenged. As the former Commonwealth Director of Public Prosecutions, Mark Weinberg QC has observed:

> Even the humble search warrant can produce an array of challenges which can tie up the investigators for months, if not years. Judicial review has become a major thorn in the side of those hoping to complete their investigations in a timely manner.[60]

It is, however, the ASC's experience that apart from a few marked exceptions, the number of challenges to the ASC's discretion in conducting its investigations has decreased as the ASC's powers have been defined by the courts and legal practitioners' and the ASC's knowledge of their parameters has improved. The statistics on administrative review since the ASC has commenced operation support this observation. It appears that the challenges now taking place may seek to pre-empt some investigatory findings, rather than contribute to fair and efficient decision-making.

Another case involving the ASC's investigatory powers, which was not so much a challenge to the ASC's investigative processes, but which had the potential to have a significant impact of the ASC's regulatory work is *ASC v Kippe*.[61] It is also one of the few cases in which the ASC has commenced its own action for review of an administrative decision.

The ASC had conducted a hearing in accordance with s 837 of the Corporations Law to determine whether Mr Kippe should be banned from acting as representative of a dealer or an investment adviser. During the course of that hearing the delegate had relied on evidence obtained during the course of an examination undertaken in accordance with s 19 of the ASC Law. Mr Kippe had, during the course of the s 19 examination, claimed privilege for a number of these responses. Section 68(1) of the ASC Law provides an express statutory abrogation of the privilege against self-incrimination. The exceptions to the general abrogation arise only where the proceedings in question can properly be characterised as being for the imposition of a penalty within the meaning of s 68(3)(b) or a "criminal proceeding" within the meaning of s 68(3)(a). Mr Kippe argued that the ASC could not rely on the statements made by him as the banning hearing was, for the purposes of s 68 of the ASC, a proceeding for the imposition of a penalty within the meaning of subsection (3)(b).

The ASC relied on the evidence in the transcripts. Mr Kippe was banned for three years. He lodged an application in the AAT to review the ASC's decision. The AAT held that neither the ASC nor the AAT could take the statements made during a s 19 examination into account as proceedings under s 837 of the Law were proceedings for the imposition of a penalty within the meaning of s 68(3)(b) of the

60 NSW Law Reform Commission, *Criminal Procedure: Procedure from Charge to Trial* (Discussion Paper No 14, 1987).

61 (1996) 137 ALR 423.

ASC Law. It followed, in accordance with s 68(2) that statements made were not admissible. The ASC then lodged an AD(JR) Act application challenging the decision of the AAT. The Full Federal Court held that the AAT had erred in law. It considered that the purpose of the banning order under s 829 of the ASC Law was protective and not punitive. It was not a proceeding for the imposition of a penalty within the meaning of s 68(3)(b) and accordingly, the evidence obtained in a s 19 examination which is subject to a claim of privilege is nevertheless admissible in a licensing hearing conducted under s 837 of the Law.

CONCLUSION

The impact of administrative law review on the work of the ASC must be acknowledged. Recourse to the external review mechanisms provided under the administrative law package is an important aspect of ensuring that decisions which affect individuals are fair and just.

As the national corporate regulator, with a significant law enforcement role, the ASC is in a unique position of being subject to the review of a significant number of its decisions by the Federal Court, the Administrative Appeals Tribunal the Privacy Commissioner and the Commonwealth Ombudsman as well as to Parliament. The supervision has had a positive rather than negative impact. For example, it has contributed to the clarification of the ASC's investigatory powers and the use of timely and thorough procedures to implement policy. There have been instances where it appears administrative review has been used to attempt to stymie ASC investigation or litigation. Fortunately, if that was the purpose, they have been few, and they have not succeeded.

What the future holds for ASIC in this area will depend on how the Commonwealth administrative law package is maintained, and what amendments are made to the Corporations Law and the ASC Law and their successors. Aside from this uncertainty, it is clear that a solid foundation for continuing fair and efficient decision-making has been produced by the administrative review to date of the ASC's conduct of its statutory powers and functions.

Administrative Review of ASC Decisions: Jurisdictional Issues

CARON BEATON-WELLS*

INTRODUCTION

With the commencement of the Corporations Law on 1 January 1991 Australia received its first national legislative scheme dealing with the companies, securities and futures industries, administered by a single national regulatory body, the Australian Securities Commission (ASC). At the same time a new regime of administrative review was introduced to the area of corporate and securities regulation.

Prior to 1991, limited rights of review of certain decisions of the ASC's predecessor, the National Companies and Securities Commission, existed under the cooperative companies legislative scheme.[1] However, the rights conferred were by way of appeal to a court which took the form of a hearing de novo. These rights were in addition to the narrow avenues of review which existed under the Commonwealth Constitution,[2] the Judiciary Act 1903[3] and the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act).

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1 See s 537 of the State and Territory Companies Codes; s 60 of the Companies (Acquisition of Shares) Codes; s 134 of the Securities Industry Codes and s 141 of the Futures Industry Codes.

2 See s 75(v) which gives the High Court original jurisdiction in matters in which prohibition, mandamus and injunctions are sought against Commonwealth officers.

3 See s 39B which confers jurisdiction on the Federal Court equivalent to the jurisdiction conferred on the High Court by s 75(v) of the Commonwealth Constitution.

In 1992 it was predicted that of the full suite of Commonwealth administrative laws,[4] administrative review pursuant to the Administrative Appeals Tribunal Act 1975 (Cth) (AAT Act) was "likely to effect the most significant impact on the administration of the Corporations Law and in advancing the interests of those who are affected by ASC decisions made under the Corporations Law."[5] It was foreshadowed that the AAT's review powers under the Corporations Law would offer a counter-balance to the considerable regulatory powers of the ASC, extending to those involved in the corporate, securities and futures industries the same measure of protection which had been available to other categories of affected persons since the AAT's establishment in 1975.[6]

Some six years on, it should be possible to reflect on the accuracy of these predictions and assess the extent to which the potential of AAT review in the area of corporate and securities regulation has been realised. A review of the case law which has emerged over the period suggests that AAT review of ASC decision-making may have fallen short of its forecast potential. One of the principal reasons for this is that various issues concerning both the existence and the scope of the AAT's jurisdiction arose almost immediately after the conferral of that jurisdiction in 1991 and have had the effect of limiting merits review in this area ever since.

Two such issues demand particular attention. The first concerns the narrow, and arguably erroneous, construction which has been given by the AAT to the term "decision" in determining which ASC decisions are reviewable by the Tribunal. The second concerns the approach which has been taken by the Federal Court (and followed by the AAT) to the question whether, in making a decision, the ASC is exercising a power conferred on it by an Act which provides for AAT review of the decision. Whether the AAT should continue to have jurisdiction at all in relation to certain classes of ASC decisions is a subject of current debate. It is, if not a priority, then at least an item on the agenda of the Corporate Law Economic Reform Program. It should be evident from the case law review and analysis in this paper that the issues identified above must be resolved before the capacity and suitability of the AAT to review decisions affecting the corporate, securities and futures sectors can be properly assessed. Prior to exploring these jurisdictional issues, it is useful to outline the statutory provisions pursuant to which the AAT has jurisdiction to review decisions of the ASC.

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4 Including the Administrative Appeals Tribunal Act 1975 (Cth), the ADJR Act, the Freedom of Information Act 1982 (Cth), the Ombudsman Act 1976 (Cth) and the Privacy Act 1988 (Cth).

5 P Hanks and S Newman, "Standing In The Australian Securities Commission's Shoes: The Administrative Appeals Tribunal And The Corporations Law" (1992) *CSLJ* 318 at 319.

6 Ibid at 329.

STATUTORY FRAMEWORK

The principal source of power of review by the AAT of ASC decisions is found in Part 9.4A of the Corporations Law. However, there are also provisions in the Australian Securities Commission Act 1991 (Cth) (the ASC Act) which allow for AAT review.

Part 9.4A of the Corporations Law is entitled "Review by Administrative Appeals Tribunal of Certain Decisions". Section 1317A of Part 9.4A states that:

> "**[D]ecision**" has the same meaning as in the Administrative Appeals Tribunal Act 1975.

Section 3(3) of the AAT Act states:

> A reference in this Act to a decision includes a reference to—
>
> (a) making, suspending, revoking or refusing to make an order or determination;
>
> (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
>
> (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
>
> (d) imposing a condition or restriction;
>
> (e) making a declaration, demand or requirement;
>
> (f) retaining, or refusing to deliver up, an article; or
>
> (g) doing or refusing to do any other act or thing.

Section 1317B(1) of the Corporations Law is the principal provision conferring jurisdiction on the AAT to review decisions made pursuant to that Law. The section provides that:

> Subject to this Part, applications may be made to the Tribunal for review of a decision made under this Law by:
>
> (a) the Minister;
>
> (b) the Commission; or
>
> (c) the Companies Auditors and Liquidators Disciplinary Board.

Section 1317C excludes from those decisions which may be the subject of an application for review:

> (a) a decision in respect of which any provision in the nature of an appeal or review is expressly provided by this Law; or
>
> (b) a decision that is declared by this Law to be conclusive or final or is embodied in a document declared by this Law to be conclusive evidence of an act, matter or thing; or
>
> (c) a decision made by the ASC relating to the striking off or dissolution of companies; or
>
> (d) a decision made by the ASC to apply for an order for public examination or a decision to apply for an order that a person file an affidavit about an corporation's examinable affairs.

Section 244 of the ASC Act allows for AAT review of decisions by the ASC:

> (a) to make an order under s 72 (in relation to securities of a body corporate), s 73 (in relation to securities generally) or s 74 (in relation to futures contracts);
>
> (b) to make an order under s 75(1) varying an order in force under ss 72, 73 or 74; or
>
> (c) to refuse to vary or revoke an order in force under ss 72, 73, 74.

REVIEWABLE DECISIONS

On its face, s 1317B confers a wide jurisdiction on the AAT to review ASC decisions. However, the approach adopted by the AAT in determining which decisions are reviewable under the provisions of Part 9.4A of the Corporations Law has arguably had the effect of significantly narrowing that jurisdiction. This approach can be traced to *Re Gallivan Investments Limited*[7] *(Gallivan)*, the first substantial decision made by the AAT in an application for review brought pursuant to Part 9.4A of the Corporations Law.

Gallivan concerned a proposed review of a decision by the ASC under s 733(1) of the Corporations Law to apply to the Corporations and Securities Panel (the Panel) for a declaration under s 733(3) that unacceptable circumstances had or may have occurred in relation to an acquisition of shares. A declaration by the Panel under s 733(3) may lead to a wide range of enforcement orders under s 734(2) and to orders by the court under s 736. For example, offers under a takeover scheme or announcement may be cancelled, companies may be ordered not to register certain share transfers, and persons may be required to dispose of their shares or be prohibited from exercising their voting rights. However, decisions of the Panel are not subject to review under s 1317B.

In what may be characterised as an attempt to obtain pre-emptive review, Gallivan applied to the AAT for review of the ASC's decision to apply to the Panel for a declaration. The ASC objected to the jurisdiction of the AAT and, following a preliminary hearing of that issue, the AAT determined that the ASC's decision to apply to the Panel was not a reviewable decision; hence the Tribunal did not have jurisdiction to hear the application. In its decision handed down on 27 September 1991, the AAT, constituted by Deputy President McMahon, concluded that the ASC had not made a "decision" for the purposes of the AAT Act. In coming to that conclusion, the Deputy President relied principally on the High Court decision in *Australian Broadcasting Tribunal v Bond*[8] (*Bond*).

The High Court decision in *Bond* is generally accepted as authority for the proposition that a "decision" under the ADJR Act (which for relevant purposes is the same as under the AAT Act) must gener-

7 (1991) 9 ACLC 1,324; 24 ALD 611; 6 ACSR 579.
8 (1990) 170 CLR 321; (1990) 94 ALR 11.

ally, but not always, be the final, operative, determinative decision of the issue of fact falling for consideration. A conclusion reached as a step along the way to an ultimate decision would not normally be a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the intermediate decision might be a "decision under an enactment." An essential quality of a reviewable decision is that it be a substantive determination. In other words, a reviewable decision is not usually an interim determination and is not a procedural determination.

This approach was followed by the Full Federal Court in *Edelsten v Health Insurance Commission*[9] (*Edelsten*), another case cited by the AAT in support of its decision in Gallivan. In Edelsten a delegate of the Health Insurance Commission had referred a case to the Minister and the reference was challenged under the ADJR Act. The Deputy President noted that:

> In that case, the test of finality and the test of being a substantive as distinct from a procedural determination were again applied, following *Bond* ...[10]

He drew comfort in his reliance on Edelsten from the fact that:

> There is considerable similarity between the legislative structure of the relevant provisions of the Health Insurance Act 1973 dealt with in *Edelsten* and those in the Corporations Law relevant to the present decision, the subject of review.[11]

The AAT also relied in *Gallivan* on the decision in *Director-General of Social Services v Chaney*[12] (*Chaney*) in support of the conclusion that the term "decision" in the AAT Act should be narrowly defined. In *Chaney*, Deane J opined that there was some indication that a "decision" in that Act was prima facie "a reference to the ultimate or operative decision". Applying the authorities of *Bond*, *Edelsten* and *Chaney*, the AAT found that the decision by the ASC to apply to the Panel was not a "decision" in the sense attributed to that term in those three cases. It characterised the decision as "non-operative" in that it was not the decision which would ultimately determine the substantive issues as between the parties and pointed in this respect to the fact that it is open to the Panel to find that unacceptable circumstances had not occurred.

The approach taken in *Gallivan* to determining which decisions are reviewable pursuant to the jurisdiction conferred by s 1317B of the Corporations Law has been perpetuated in its subsequent decisions, including, for example, in *Re Hong Kong Bank of Australia Ltd and the Australian Securities Commission v Murphy*[13] (*Hong Kong Bank*), in *Re Toll*[14] (*Toll*) and, more recently, in *Laycock v The Australian Securities Commission* (*Laycock*).[15]

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9 (1990) 21 ALD 710.
10 (1991) 9 ACLC 1,324 at 1,329.
11 Ibid.
12 (1980) 47 FLR 80; (1980) 31 ALR 571.
13 (1992) 26 ALD 307.
14 (1993) 10 ACSR 37; 11 ACLC 226.
15 (1997) 15 ACLC 274.

In *Laycock* the AAT held that the decision of the ASC to issue a show cause notice pursuant to s 600(2) of the Corporations Law was not determinative of legal rights but only a step in determining whether to give a prohibition notice pursuant to s 600(3), and therefore not a decision for the purposes of AAT review. Consistent with this approach, there has been no objection to the jurisdiction of the AAT to review ASC decisions to issue a notice pursuant to s 600(3) actually prohibiting a person from managing a corporation.[16]

The AAT's approach to this aspect of its jurisdiction is open to criticism in terms of both its legal analysis and its practical effect. With respect to the former, it is questionable whether the High Court's decision in *Bond* does in fact support the narrow approach adopted in *Gallivan* of what qualifies as a "decision" for the purposes of review by the AAT. The judgments in that case are not free from ambiguity.

First, it should be noted that Mason CJ (who delivered the majority judgment), and Toohey and Gaudron JJ (who formed the minority) declined to adopt the conclusion reached by Deane J in *Chaney*, that is that "decision" in s 3(3) of the AAT Act refers to "the ultimate and operative determination." It might also be noted that Deane J himself had acknowledged that the indication which s 3(3) provided to that effect was "slight".[17] In *Bond*, both Mason CJ and Toohey and Gaudron JJ preferred to adopt the statement of the Full Federal Court in *Lamb v Moss*, that:

> [T]here is no limitation, implied or otherwise, which restricts the class of decision which may be reviewed to decisions which finally determine rights or obligations or which may be said to have an ultimate or operative effect.[18]

The minority judges in *Bond* conceptualised a "decision" in terms of the exercise or refusal to exercise a "substantive power" and rejected the notion that a reviewable decision has to be one which has the effect of finally disposing of the issues between the parties. Their Honours found, for example, that where the power to make an order was dependent upon an earlier declaration, the making of the declaration could constitute a reviewable decision, notwithstanding it could not be said to be a decision with "ultimate and operative effect." The decision by the ASC to apply to the Panel under s 733(1) would appear to fall squarely within this category of decision identified by the Toohey and Gaudron JJ. While the ASC's decision does not settle the issues between the parties, the Panel's power to make a declaration under s 733(3) is dependent upon the ASC's decision to apply for a declaration.

Mason CJ adopted a different approach in defining a reviewable decision to that adopted by Toohey and Gaudron JJ. This distinction in approach does not appear to have been recognised by the Tribunal

16 Eg, *Delonga v Australian Securities Commission* (1994) 13 ACLC 246 and *Sheslow v Australian Securities Commission* (1994) 12 ACLC 740.

17 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 411.

18 (1983) 76 FLR 296 at 318.

in *Gallivan*. The Chief Justice took as a starting point in the definition of a reviewable decision the fact that, given the remedial nature of the ADJR Act, a narrow view should not be taken of the word "decision". His Honour then placed several qualifications on this broad approach, two of which are of particular relevance in the present context.

First, the Chief Justice noted that a reviewable decision is one for which provision is made by or under statute. An intermediate decision, that is a finding or ruling which represents a step along the way to the ultimate decision, will not be reviewable unless it can be described as a decision made by or under statute. It is arguable that as the ASC's decision whether or not to apply to the Panel is specifically authorised under s 733(1) as a prerequisite to what may be said to be the ultimate or operative decision by the Panel under s 733(3), the ASC's decision is a decision made by or under statute.[19] The decision which was the subject of review in *Edelsten* is distinguishable in this respect. Unlike the ASC's decision under s 733(1), the power of referral in *Edelsten* was not expressly provided for under the relevant legislation. This point of distinction was not highlighted in *Gallivan*.

Secondly, Mason CJ held that a reviewable decision must have a character or quality of finality, in the sense that it represents a determination or resolution of a substantive issue. Again, the ASC's decision under s 733(1) would appear to meet this requirement. The only means by which the issue of unacceptable circumstances or conduct can come before the Panel is by way of an application by the ASC pursuant to s 733(1). Thus, the ASC's decision finally determines whether or not the Panel will have the power to make a declaration pursuant to s 733(3). The substantive issue at stake is whether or not the Panel's jurisdiction will be invoked.[20]

Issues of legal analysis aside, the decision in *Gallivan* can be criticised having regard to its practical effect. By characterising as non-reviewable ASC decisions which, while perhaps not the final step in the decision-making process, may nevertheless have significant practical consequences for the person(s) affected, it arguably has stunted the potential for merits review in this area. Indeed, the fact that the ASC's application to the Panel may have had such consequences in *Gallivan* was acknowledged by the AAT in its decision in that case.[21]

While not discounting altogether the weight of authorities such as *Bond* and *Edelsten*, they are still distinguishable given that they were decided in relation to the ADJR Act, and not the AAT Act. Arguably, they should be distinguished on that basis. The relatively informal and merits-based system of review by the AAT pursuant to the AAT Act was always intended to distinguish it from review by the

19 This argument was made in E Armson, "AAT Review of the ASC's Decision to Apply or not to Apply to the Corporations and Securities Panel" (1994) 12 *CSLJ* 439 at 444.

20 Ibid.

21 *Re Gallivan Investments Limited* (1991) 9 ACLC 1,324 at 1,330.

Federal Court pursuant to the ADJR Act. Adopting a narrow construction of what constitutes a reviewable decision under the AAT Act arguably stymies the legislative intention in relation to that system.

In an article published in 1993, the Deputy President McMahon, characterised decisions by the AAT of the kind in *Gallivan*, *Toll* and *Hong Kong Bank* as demonstrative of "inherent limitations in the Tribunal's powers" but argued in its defence that these limitations "make sense."[22] According to the Deputy President, s 1317B of the Corporations Law:

> [C]ould not have been intended as a vehicle for review of every decision of the Australian Securities Commission. If it were otherwise, a fragmentation of the process of administrative decision-making ... would inevitably come about.[23]

Whether there is any real substance to the defence offered by the Deputy President of the *Gallivan* approach is questionable. There are other authorities which suggest an alternative approach is equally defensible. In two decisions of the Full Federal Court, *Director-General of Social Services v Hangan*[24] (*Hangan*) and *Director-General of Social Services v Hales*[25] (*Hales*), the Court preferred a more liberal interpretation of a reviewable "decision" under the AAT Act. In those cases, both of which were cited to the Tribunal in *Gallivan*, the decision by the Director-General to pursue recovery of an overpayment pursuant to the Social Security Act 1947 (Cth) was regarded by the Court as having "a real practical effect" on the persons concerned. Such an effect was said to flow from the decision setting "in train a series of events which affect [the individual] and her financial position in a real way."[26]

In *Gallivan* the Tribunal distinguished these decisions on the basis that the Director-General has a broad discretion, taking into account a number of non-justiciable factors, to raise an overpayment debt. The AAT considered that, by comparison, the ASC is "bound by the definition of unacceptable conduct when coming to its conclusion that it has or may have occurred."[27] Even if this were a valid ground for distinction, it does not appear to deal adequately with the fact that a decision of the ASC pursuant to s 733(1) could be said to have "a real practical effect" on the persons affected by the decision, in much the same sense as that phrase was used by the Full Federal Court in *Hangan* and *Hales*.

It should also be noted that since *Gallivan*, there have been indications by the Federal Court that it may be moving towards a more generous approach to the definition of "decision" in the context of review of ASC decisions. In *Mercantile Mutual Life Insurance Co Ltd*

22 BJ McMahon, "Administrative Appeals under the Corporations Law" [1993] *Admin Rev* 62 at 64.

23 Ibid at 64. He cited in this regard a similar statement by the Full Court in *Edelsten* as an explanation for the rationale underlying the High Court's decision in *Bond*.

24 (1982) 45 ALR 23; 70 FLR 212.

25 (1983) 47 ALR 281.

26 Ibid at 307.

27 *Re Gallivan Investments Limited* (1991) 9 ACLC 1,324 at 1328.

v The Australian Securities Commission[28] (*Mercantile Mutual*), Lockhart J observed that a decision by the ASC pursuant to s 597(2) of the Corporations Law to authorise a third party to apply for an examination order was a decision to which the ADJR Act applied. Gummow J also opined that, had it been required for him to so find, he would have found that the decision in question was a decision for the purposes of the ADJR Act.

These observations would appear to be in direct conflict with the approach taken by the AAT in *Gallivan*. Sections 597(2) and (3), as they existed at the time *Gallivan* was decided, provide a similar statutory framework to the ASC's application to the Panel under s 733(1) and (3). Like s 733(1), s 597(2) required it only to appear to the ASC that a certain person had or may have been guilty of misconduct. In *Gallivan* the Deputy President contended that as the ASC under s 733(1) had only to decide that unacceptable circumstances or conduct may have occurred, that decision was not a reviewable one. Given the similarities between the two sets of provisions, the proposition that a decision under one and not the other should be reviewable does not appear tenable. It should be noted moreover that s 1317C, in the form in which it existed at the time *Gallivan* decided, expressly excluded a decision pursuant to s 597(2) from review. The fact that s 733(1) was not subject to a similar exclusion could be seen to suggest that no such exclusion was intended.

Subsequently, in *Re Excel Finance Corporation Limited*[29] (*Receiver & Manager Appointed*), O'Loughlin J held that whilst the comments of Lockhart J in *Mercantile Mutual* were obiter dicta, they came from a strongly constituted court so that a single judge should follow that view.[30] O'Loughlin J's judgment in relation to the meaning of "decision" was approved on appeal by the Full Court in *Worthley v The Australian Securities Commission*.[31]

The Federal Court's approach in these cases to what constitutes a "decision" has been criticised by Deputy President McMahon. He has described Lockhart J's views as obiter, as being given without reasons for their conclusion and as being "throw-away observations"[32]. Even if these observations are correct, the trend towards consideration of the practical effect of a decision in determining whether it is reviewable may becoming increasingly difficult to ignore.

More recently, in *Clark v Wood (in his capacity as Deputy District Registrar of the Federal Court of Australia) & Anor*,[33] Finkelstein J held that a ruling by the Deputy District Registrar in the course of an examination of a bankrupt under s 81(1) of the Bankruptcy Act allowing a particular question to be put to the bankrupt was review-

28 (1993) 112 ALR 463; (1993) 10 ACSR 140.
29 1993) 113 ALR 543.
30 Ibid at 572. See further *Whelan v The Australian Securities Commission* (1994) 12 ACLC 419.
31 (1993) 114 ALR 524 at 526.
32 McMahon, above n 22 at 64–5.
33 19 September 1997, Finkelstein J, unreported.

able under the ADJR Act. His Honour took the view that given the possibility of an examination being oppressive or unfair, the ruling to allow a question to be put was more than a procedural matter, "at least in practical sense". While such a ruling may not resolve a question of fact between the parties, it does resolve the issue of whether a particular question should be allowed. That fact, and the potentially serious consequences which could flow from a ruling under s 81(1), were sufficient to render it a reviewable "decision" under the ADJR Act.[34]

To be fair to the Deputy President, he has recognised that the Tribunal's approach to what qualifies as a reviewable decision under s 1317B has the potential to dramatically restrict its jurisdiction and he has called for legislative clarification.[35] In an indication of the uncertainty surrounding this aspect of the Tribunal's jurisdiction, in a speech delivered on 22 July 1993, the Deputy President noted that whether these Federal Court decisions undermine the AAT's approach "is anybody's guess."[36]

It should also be said that there are examples of cases in which the AAT has exercised its jurisdiction and which illustrate the breadth and the significant practical impact of the Tribunal's powers of review in the corporate arena. Some such examples are given below:

- In *Re Hawker de Havilland Ltd v The Australian Securities Commission*[37] the AAT reviewed and varied the terms of conditions attached by the ASC to a decision (made under s 728(1) of the Corporations Law) to exempt a person from compliance with Chapter 6 of the Law.
- In *Re O'Connell*[38] a bankrupt applied to review an official receiver's decision not to vary his income contribution assessment as determined by a private trustee. The official receiver refused to review the trustee's decision under s 139T of the Bankruptcy Act. The applicant contended that his spouse was wholly dependent upon him. The AAT found that because she received rent from a property half-owned by her, the wife was not a dependent. It then proceeded to actually increase the

34 It should be noted that one relevant consideration before Finkelstein J was that the examination took place before amendments to the Bankruptcy Act subjecting Registrars to review. As a result of these amendments, the practical application of this decision to issues arising in public examinations is likely to be limited. Decisions by Registrars made in the exercise of powers conferred by the Bankruptcy Act are now the subject of specific review provisions. See Order 77 rules 11(4), (7) and (8) of the Federal Court Rules and see, as to the differences in the two review processes, *Re Brundle; ex parte McMahon Pty Ltd* (1992) 35 FCR 506.

35 McMahon, above n 22 at 66.

36 The speech was published in the August 1993 Newsletter of the Federal Litigation Section, Law Council of Australia, and was cited in M Robinson, "Administrative Appeals of Australian Securities Commission Decisions" (1993) 1 *AJ Admin L* 48 at 49.

37 (1991) 6 ACSR 579.

38 Unreported, 3 June 1993.

applicant's contributions as a result of the information which had been placed before it.

- In *Re Bond*[39] the AAT had to consider whether various items such as accommodation and office space were within the *Fringe Benefits Tax Assessment Act* for the purpose of calculating Mr Bond's assessable income. The AAT found that various gifts provided to Mr Bond formed a part of his assessable income for the purpose of his income assessment under the Bankruptcy Act.
- Other examples of AAT review in areas of corporate regulation include review of decisions of the delegate of the ASC to ban persons from managing a corporation pursuant to s 600 (for example, *Iliopoulos & Anor v The Australian Securities Commission*[40]; *Sheslow v Australian Securities Commission*[41]) and review of decisions of the Companies Auditors and Liquidator's Board (for example, *Re the Australian Securities Commission and the Companies Auditors and Liquidator's Board*[42]; *Davies v the Australian Securities Commission*[43]).

CONFERRING ACT

In a line of cases decided by the Federal Court a distinction has been drawn between decisions made by the ASC when exercising its *powers* under the Corporations Law and decisions made by that body when performing its *functions* under the Law. In the case of the former, review by the AAT pursuant to s 1317B is available. In the case of the latter, where the power of the ASC is found to have been conferred by another Act, it is not. There is some contradictory authority emanating from the New South Wales' Court of Appeal in relation to the source of the ASC's powers and the distinction drawn by the Federal Court between powers and functions. However, the AAT has to date adopted the Federal Court's approach and this has had the effect of limiting the circumstances in which it considers itself to have jurisdiction to review decisions by the ASC.

The AAT's decision in *Hong Kong Bank* (discussed above) was the subject of an appeal to the Full Federal Court.[44] The Tribunal had held that it lacked jurisdiction because a decision to authorise trustees to apply to the Supreme Court for an examination order was not a final decision, within the meaning attributed to that term in cases such as *Bond* and *Edelsten*. However, the Full Court did not consider whether or not this was correct. As Deputy President McMahon has described it, "the appeal instead took on a life of its own."[45] The Court found against the applicant, but on a completely different ground.

39 Unreported, 10 September 1993.
40 (1997) 15 ACLC 1512.
41 (1994) 20 AAR 161.
42 (1994) 13 ACSR 373.
43 (1995) 18 ACSR 129.
44 (1992) 7 ACSR 724; (1992) 15 AAR 429.
45 McMahon, above n 22 at 65.

The instrument of authorisation provided by the ASC to the trustees purported to be pursuant to s 597(1) of the Corporations Law. The Full Court held that s 597(2), which authorised the ASC to allow third parties to make examination applications, conferred a function and not a power upon the ASC. The Court construed s 597(1) as merely specifying the membership of a class of persons who, together with the ASC, can make examination applications. Given the way it was drafted, it was, according to the Court, descriptive only when it referred to persons making the examinations being persons authorised by the ASC. It did not amount to a dispositive provision conferring a power of authorisation upon the ASC.

The Court held that the real source of the power of the ASC to authorise persons to apply for examinations was not s 597, so as to be reviewable under s 1317B. Rather, it was s 11(4) of the ASC Act which states:

> (1) The Commission has such functions and powers as are conferred on it by or under the following:
>
> (a) the Corporations Act 1989;
>
> (b) the Corporations Law of the Capital Territory;
>
> (c) this Act.
>
> ...
>
> (4) The Commission has power to do whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions.

Having been made pursuant to s 11(4), the ASC's decision did not attract AAT review as it was not within the decisions under s 244 of the ASC Act for which review is provided (see discussion above).

This view was adhered to by the Full Federal Court on another appeal arising from trustees' proposed examinations. In *Mercantile Mutual* the Court confirmed that s 597 conferred the function upon the ASC of authorising persons to apply to a Court for an examination order but was not the source of the power of authorisation. The source of the power was s 11(4) of the ASC Act. As already noted, Lockhart J also expressed the view that the decision of the ASC to authorise the trustees to apply to the Court pursuant to s 597 was a decision to which the ADJR Act applied within the meaning of that Act (see discussion above).

The Full Court's approach in *Hong Kong Bank* has been noted and followed in a string of subsequent cases. It was first taken up by the AAT in *Re Creswick*[46] in which the Tribunal was asked to review a decision by the ASC refusing to apply, under s 1292 of the Law, to the Company Auditors and Liquidators Board to deal with a liquidator. The AAT determined that the ability to make the application did not provide the power, but was merely the exercise of a function, by the ASC. The source of the power was said to be s 11(4) of the ASC Act. Thus, the AAT found that it had no jurisdiction to review the

46 (1992) 28 ALD 61.

decision. The AAT's decision was approved on appeal to the Federal Court.[47]

Similarly, in *Bond v Minister for Justice*,[48] the AAT held that in deciding to consent to the bringing of prosecutions for offences against the Companies (Western Australia) Code, the Commonwealth Minister for Justice was exercising power pursuant to s 91(3) of the Corporations Act (Western Australia) Act 1990 and not pursuant to s 1315 of the Corporations Law. It followed that, based on *Hong Kong Bank* and *Mercantile Mutual*, the decision was not reviewable under s 1317B of the Corporations Law.

In *Bajaur Holdings v The Australian Securities Commission*,[49] it was held by the AAT that the ASC's decision not to waive a late lodgment fee on an annual return was a decision pursuant to the Audit Act, not the Corporations Law, and was thus not amenable to AAT review. Even more recently, in *Morton v Australian Securities Commission*,[50] the AAT held that the decision by the ASC not to intervene in proceedings, as it is empowered to do under s 1330 of the Corporations Law, but rather to act as *amicus curiae* was not taken under s 1330 but under the more general powers of s 11(4) of the ASC Act. The decision therefore was not a decision which the AAT had jurisdiction to review.

The Federal Court decisions in *Hong Kong Bank* and *Mercantile Mutual* were the subject of implicit criticism by the New South Wales Court of Appeal in *Burns Philp & Co Ltd v Murphy*.[51] The application before the Court of Appeal concerned the validity of a delegation behind a s 597 authorisation. The same arguments were run as in the cases before the Full Federal Court. However, an entirely different result was reached. Clarke and Handley JJA held:

> We have reached the firm conclusion that the function or power is by necessary implication expressed to be conferred by s 597(1) and is actually vested in the ASC by s 11(7) of the ASC Act. Section 11(4) of the ASC Act only applies where it is possible to identify a function of the Commission. It does not apply in terms of the Commission's powers.[52]

Section 11(7) provides:

> The Commission has any functions and powers that are expressed to be conferred by it by a national scheme law of another jurisdiction.

The Court of Appeal held that by the relevant enabling New South Wales legislation, the ASC had power in New South Wales to authorise the trustees to conduct the examination by the express provisions of s 597 and there was no need to rely on the "incidental powers" under s 11(4). Mahoney JA indicated his reluctance to express disagreement with the Federal Court, being conscious of the

47 *Re Creswick* (Federal Court, Foster J, 23 March 1993, unreported).
48 (1995) 13 ACLC 1690.
49 (1996) 14 ACLC 427. See also *Gregory James Finlayson v The Australian Securities Commission* (1996) 14 ACLC 1,471.
50 (1997) 15 ACLC 283.
51 (1993) 10 ACSR 244.
52 Ibid at 252.

desirability of courts adopting a common construction of a national legislative scheme. However, he joined with Clarke and Handley JJA in declining to follow *Hong Kong Bank* and *Mercantile Mutual*.

The current position as a result of these cases is that there are two appellate courts of equal standing which are in disagreement on the meaning and effect of the same legislation. If the Full Federal Court view is correct then (apart from the specific rights of review under s 244 of the ASC Act), unless the source of the power for the making of a decision is clearly contained in the Corporations Law, the decision will not be reviewable by the AAT. If the more literal view of the Court of Appeal is applied, then the exercise of functions by the ASC are reviewable because the source of power is not under s 11(4) but within the Corporations Law itself by reason of the enabling State legislation. In practice, it is extremely difficult to identify the source of power to determine whether it is within the Corporations Law (and thus reviewable by the AAT pursuant to s 1317B) or within the ASC Act and thus (subject to s 244) not reviewable.

The decisions referred to above have clearly created uncertainty about when AAT review will be available. As the ASC is under a statutory obligation to notify affected persons of their review rights when a reviewable decision is made, this uncertainty has also created difficulties for the ASC. The uncertainty is, not surprisingly, a source of some concern for the AAT. As the Deputy President pointed out in his 1993 article:

> There are many sections of the Corporations Law—possibly hundreds—drafted in such a way as to confuse powers and functions, if we are to follow the Federal Court line of authority. ... I would welcome legislative clarification.[53]

The difficulties which existed specifically in relation to s 597 were resolved by the introduction of new provisions dealing with the examination of persons in the Corporate Law Reform Act 1992. However, the general problem of distinguishing between provisions in which powers are conferred and provisions merely describing functions, remains.

POSSIBLE REFORM

The question of both the existence and scope of the AAT's jurisdiction to review ASC decisions has been on the legislative reform agenda for some time. In 1996 the Corporations Law Simplification Task Force received detailed submissions and recommendations by the Commonwealth Administrative Review Council (the ARC) in relation to the issue of what decisions should be reviewable by the AAT.

The ARC acknowledged that the experience derived from the cases to date "suggests that it can be difficult to determine when

53 McMahon, above n 22 at 66.

merits review is available".[54] In a letter to the Attorney-General dated 24 October 1996 the ARC attributed some of the difficulties to the "atypical approach to merits review adopted under the Corporations Law."[55] Rather than identifying specific classes or types of decisions which may be the subject of AAT review as is the case under other legislation, the grant of review jurisdiction under s 1317B of the Corporations Law is very wide. The effect is that virtually all decisions by the Minister, the ASC and the CALDB are reviewable by the AAT, subject only to the exceptions set out in s 1317C.

The recommendations of the ARC have been to remove the jurisdiction of the AAT to review certain categories of decisions by the ASC. Of particular relevance given the preceding discussion is the recommendation that the AAT no longer have jurisdiction to review decisions which it classifies as "preliminary". It cites decisions of the ASC to refer matters to the Panel under s 733(1) as decisions falling into this category.[56] The removal of AAT review in the area of takeover regulation has been supported by several other commentators[57] and was adopted by the Corporations Law Simplification Task Force in its consultation paper, *Takeovers – Proposal for Simplification*. It appears also to have been adopted by the Corporate Law Economic Reform Program.

The ARC identified a number of other classes of decision which it regarded as inappropriate for merits review. These classes of decision were broadly defined as follows:

(a) decisions of a mandatory nature (for example, s 145(2));

(b) decisions to institute proceedings (for example, s 447A(4)(e));

(c) decisions delegate a power or appoint a person to undertake a specified function (for example, s 934(3));

(d) decisions of a law enforcement nature (for example, s 533(1)(e));

(e) quasi-legislative decisions (for example, s 1113A));

(f) decisions where there is no appropriate remedy (for example, s 1116(5));

(g) decisions involving extensive inquiry processes (for example, s 51(1));

(h) polycentric decisions;

(i) decisions that involve the exercise of a discretionary power to determine a penal sanction; and

(j) policy decisions having high political content.

While it is not possible within the confines of this paper to examine the ARC's proposals in detail, it could be said that, if adopted, they would appear to involve a significant reduction of the

54 See the ARC's Twenty-First Annual Report 1996–97, at 14.

55 Ibid at 44.

56 Ibid at 45.

57 Eg, F Todd, "Stepping into the Australian Securities Commission's Shoes: Not as Easy as it Sounds" (1997) 15 *CSLJ* 278; N Calleja, "Furthering the Objectives of the Corporations Law Takeover Provisions: Will Simplification Help?" (1997) 15 *CSLJ* 208.

scope for AAT review in the area of corporate and securities decision-making. What the approach of the Corporate Law Economic Reform Program to these proposals will be, remains to be seen.

Deputy President McMahon has suggested that the somewhat unusual manner in which Part 9.4A of the Corporations Law is drafted suggests that it was inserted as something of an afterthought after the original text of the Law was settled.[58] If this is indeed so, the consequences have become apparent in the confusion and conservatism surrounding the approach taken by the AAT and, in certain respects, the Federal Court, in interpreting and applying the provisions.

It can only be hoped that reformers will seize the opportunity of the current process of reform to clarify the circumstances in which there ought properly be AAT review of decisions in the corporate arena. At the same time, in an effort to remove jurisdictional uncertainties, the high hopes alluded to at the start of this paper as having accompanied the introduction of merits review in this area should not be dashed altogether. The ability of the AAT to act as a counter-balance to the ASC in the exercise of its substantial regulatory powers, providing a measure of protection to individuals affected by ASC decisions, and emphasising the need for transparency and accountability in decision-making remains as important today as it was on 1 January 1991.

58 McMahon above n 22 at 62, 66.

Human Rights and Administrative Law

The Diminution of Human Rights in Australian Administration

MOIRA RAYNER*

INTRODUCTION

This is not an academic presentation, but a comment. I make no apologies for what may be a polemical tone. I believe it is justified.

The standing and credibility of our respect for internationally guaranteed human rights has never been more precarious, after twenty years of legislative acknowledgement. Governments of all persuasions have implemented an executive policy to wind those rights back—to harness them by regulation, and to hobble their enforcement by with-holding the means. Executive power has been employed to hijack parliamentary discretion on lawmaking, and where convenient to override Parliament, and to limit access to the courts.

Australian law has always been influenced by the laws of other countries; from the earliest day when it was respect for the decisions of courts in the UK, whose common law system we inherited, to our more recent apprehension that our laws may be interpreted in the light of our international obligations.[1] These have acquired constitutional dimensions, affecting the Commonwealth's capacity to make laws to protect the environment, prohibit sex, race and disability discrimination, and the human rights of children, refugees and gay and lesbian Australians.

It has become not uncommon for courts to refer to international treaties in interpreting domestic legislation. In *Mabo v Queensland* (No 2)[2] for example, Brennan J (as he then was) referred to the

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1 Sir A Mason, "The Influence of International and Transnational Law on Australian Municipal Law" (1996) 7(1) *Pub LR* 20.

2 (1992) 175 CLR 1. [Editor's note: see the paper by I Holloway "Legitimate Expectations, Human Rights and the Rule of Law" in this volume of materials for a further discussion of this case.]

International Covenant on Civil and Political Rights[3] (ICCPR), saying that international law was a legitimate and important influence on the common law's development, "especially when international law declares the existence of universal human rights."[4] In *Minister of State for Immigration and Ethnic Affairs v Teoh (Teoh)*,[5] Gaudron J made it clear that the significance of the principle in Australian law depended on its nature and purpose; the degree of international acceptance it had achieved; and its relationship with existing principles of municipal law.[6] As summarised by Mason CJ in *Teoh* (the case of the deportation of the father of dependent Australian children), Gaudron J decided:

> [T]he convention [on the Rights of the Child] provision gave effect to a fundamental value accepted by the Australian community. Indeed Art 3 [establishing the primacy of the child's best interests] reflected an existing principle of common law.[7]

But more than lip service is required. The High Court in *Dietrich v R*[8], dealing with Article 14(3) of the ICCPR in relation to the right to a fair trial, said that:

> [I]t is incongruous that Australia should adhere to the Covenant containing the provision unless Australian courts recognise the entitlement and *Australian governments provide the resources required to carry that entitlement into effect*.[9]

I emphasise the latter: there is no point in passing laws and setting up watchdogs over the rights of vulnerable people, if the government under the obligation fails to ensure their real protection. Implementation is a political and moral imperative.

Though we do protect rights and freedoms through laws, the reality test comes from courts reviewing their implementation. They have occasionally limited executive power—though when they do, governments act quickly to reassert their dominion, especially in the field of immigration—under all governments, once immigration authorities lose a case they seem remarkably easily able to persuade their minister to enact new legislation to fill the "loophole". But in other cases, especially during the heyday of the early 1990s, the courts have referred to international treaties to develop the common law, and to affect procedural requirements in administrative decision-making. But the greatest effect has not been on human rights, but on the law of international trade and commerce, as I discuss below.

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3 United Nations International Covenant on Civil and Political Rights (1966).
4 *Mabo v Queensland* (No 2) (1992) 175 CLR 1at 42.
5 (1995) 183 CLR 273.
6 Ibid at 304–5.
7 Sir A Mason, above n 1 at 22 (words in emphasis added, references omitted).
8 (1992) 177 CLR 292.
9 Ibid at 321 (emphasis added).

THE STATES' DISREGARD OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Signing international treaties binds only the Commonwealth, but it thereby assumes an internationally acknowledged obligation to ensure rights are protected, even in a federation which shares political and administrative power among several bodies. International law only recognises the national entity (the Commonwealth) not the States. Some States, particularly Western Australia and Queensland, and the Northern Territory have recently chosen to disregard such obligations as the United Nations Convention on the Rights of the Child (CROC) in setting up their mandatory imprisonment regimes for offending children, with their disproportionate effect on indigenous children. This abuse of the States' privilege in relation to removing the rights of Australian children seems increasingly inappropriate in a modern federation. It is possible, in the future, that the States' role might be limited through constitutional challenges (a faint hope) given Australia's apparent breach of its international agreements. But in the meanwhile, the Commonwealth has the fiscal power to encourage the States to respect our international obligations, as well as the legal power to do it. It has chosen not to do so.

It has a positive duty to comply with international obligation. Such a duty is placed, for example, on the Commonwealth, as "State Party" under the ICCPR, which is also incorporated in Australian law by virtue of its inclusion in Schedule Two to the Human Rights and Equal Opportunity Commission Act 1986 (Cth) (the HREOC Act) which includes:

> Article 2(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[10]
>
> Article 2(3)(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.[11]
>
> Article 26 All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status.[12]

The latter promises equality of treatment, if not identical treatment. The United Nation's Human Rights Committee has said[13] that this prohibits discrimination in any field regulated and protected by public authorities.

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10 International Covenant on Civil and Political Rights, Art 2(1).
11 Ibid at Art 2(3)(a).
12 Ibid at Art 26.
13 Human Rights Committee of the United Nations, General Comment 18(37).

Similarly CROC (also incorporated in Australian law to the extent that it is included as a Schedule to the HREOC Act[14]) requires Australia to "respect and ensure the rights set forth in the present convention to each child within their jurisdiction."[15]

The same kind of provisions apply to citizens protected by the United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the United Nations Convention on the Elimination of all Forms of Racial Discrimination. Further, the Paris Principles require a body such as Australia's rights watchdog, HREOC, to promote and ensure the harmonisation of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation.[16]

EFFECT IN DOMESTIC LAW

Treaties play no part in Australian domestic law unless incorporated by statute. Treaty-making is an executive act: Parliament does not control it, but law-making is the quintessential parliamentary function. In theory, that is. In fact the Executive, as we know, controls the lawmaking agenda: policy decisions taken outside the Parliament drive the actions of representatives in it. The only "independent" element in the political quagmire is the judiciary. Courts can and sometimes do check the Executive, and sometimes Parliament, too.

It has long been recognised that courts may apply treaties to explain ambiguous law. (for example, by applying the presumption that Parliament does not usually intend to disregard the executive's international obligations). This was the case in *Teoh*.[17] Though the Migration Act 1958 (Cth) was unambiguous, the decision turned on the application of the principles of natural justice to the process of decision-making under that Act. The High Court found a legitimate expectation that a decision-maker would act in conformity with the Convention on the Rights of the Child. Thus, a decision maker would be expected to treat the best interests of the Australian children of the intended deportee as a primary consideration (as CROC requires) and give notice if he, she or it did not intend to do so (though need not, as the Federal Court had suggested, actively investigate the child's best interests). But of course even procedural rights are important.

The result of this decision was that courts would seem to be required to favour a construction that did not breach international treaty obligations—instead of merely being entitled to take that interpretative approach. However the Executive, as usual, intervened.

14 Human Rights and Equal Opportunity Commission Act 1986 (Cth), Sch 3, Declaration of the Rights of the Child.

15 Convention on the Rights of the Child at Art 2(1).

16 In 1991, at the Workshop of National Institutions for the Promotion and Protection of Human Rights, Paris, the Centre for Human Rights formulated Principles relating to the status of national institutions, which were endorsed by the General Assembly: Resolution 48/134.

17 (1995) 183 CLR 273.

First, ALP Attorney General Michael Lavarch, then Liberal Attorney General Daryl Williams, announced their intention, then introduced legislation, to negate the "legitimate expectation": a provision in a treaty is *not* to give rise to a legitimate expectation that it will be applied by an administrative decision-maker. Thus former Chief Justice of the High Court, Sir Anthony Mason, could say:

> So, when an Australian convention ratification is announced, they may dance with joy in the Halmaheras, while here in Australia we, the citizens of Australia, must meekly await a signal from the legislature, a signal which may never come. Of course, this concept of ratification involving a statement to the international community but no statement to the national community, is quite insupportable.[18]

Yet the courts' interpretative trend cannot, in my view, be entirely legislatively reversed.

Sir Anthony Mason adds in the same article that the old idea that international and national affairs were disparate is no longer a valid one—there is an inter-action, including in law, particularly in trade regulation, and environmental standards. And of course it was Sir Anthony Mason who suggested, in commenting upon the challenge to Tasmania's homophobic criminal laws, that failure to provide a domestic remedy for a breach of one of Australia's international human rights obligations (in that case, our ratification of the First Optional Protocol to the International Covenant on Civil and Political Rights) was an *abrogation* of Australian sovereignty. If so, the Commonwealth's legislative response could hardly be an affront to the "sovereignty" of the government of the State of Tasmania.

INDUSTRIAL LAW

But there are other ways in which international treaties, and human rights instruments, have a domestic effect. Consider, for example, the changing emphasis on such rights in Australia's industrial laws over the last decade.

The Workplace Relations Act 1996 (Cth) was not, on its face, a radical departure from the Industrial Relations Act 1988 (Cth), last amended significantly in 1994. But what is omitted from the new legislation has changed the tenor of industrial relations law.

The principal objects of both include the prevention and elimination of discrimination. But where the former Act stated that it was "the means" for achieving this, the 1996 Act's non-discriminatory principles are for "respecting and valuing the diversity of the workforce."[20] Where the former Act's principal objects included "ensuring that labour standards meet Australia's international obligations",[21] the 1996 Act's are "assisting in giving effect to

18 Mason, above n 1 at 23.
19 Industrial Relations Act 1988 (Cth), s 3(b).
20 Workplace Relations Act 1996 (Cth), s 3(j).
21 Industrial Relations Act 1988 (Cth), s 3(b)(ii).

Australia's obligations"[22] in relation to labour standards. Thus, the human rights focus is narrowed from the general, to labour standards that fit into the Federal Government's priorities. Freedom of association is referred to, but specifically in the context of trade union membership and the right not to join a trade union:[23] family responsibilities, in the context of their balance with work requirements and achieving such balance to the advantage of both worker and employer.[24] Whereas the old Act reproduced a range of international human rights instruments binding on Australia,[25] the new refers to only two in detail: the Convention Concerning Termination of Employment at the Initiative of the Employer,[26] and the Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities.[27] Where there is reference to International Labour Organisation (ILO) Conventions the Act's objects are to "assist"[28] in giving effect to such Conventions (previously expressed to "give effect"[29] to them) and delete all reference to the much more detailed Recommendations, which gave substance to the right.[30]

The result is to emphasise the discretionary, local, content of the "fair go all round" principle,[31] in other words the Act gives a worker an entitlement to complain, rather than prohibiting the conduct dealt with in those Conventions. The Act even permits the certifying of agreements despite their failing the "no disadvantage" test, if it is in the public interest—meeting a business crisis or need.

Overall the effect is stark. The human rights underpinning our industrial laws have been wound back, in favour of discretionary decisions, influenced by local, not universal, circumstances and values, and the needs of business.

The Inherent Requirements Of The Job

As well, our courts have taken a recent view of human rights that is much narrower than expected and in some cases appears to justify discrimination, not so much because of the nature of the job itself, but because the employee is working in an industry which operates internationally. Consider the two examples of the old pilot, and the wounded warrior.

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22 Workplace Relations Act 1996 (Cth), s 3(k).
23 Ibid at s 298A.
24 Ibid at s 3(i).
25 Eg, Industrial Relations Act 1988 (Cth), Sch 5; Convention Concerning Minimum Wage Fixing with Special Reference to Developing Countries, Sch 6; Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value.
26 Workplace Relations Act 1996 (Cth), Sch 10.
27 Ibid at Sch 12.
28 Industrial Relations Act 1988 (Cth), s 3(k).
29 Workplace Relations Act 1996 (Cth), s 170BA.
30 Eg, ibid s 170BA(b).
31 Ibid s 170CA(2). *In re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95 per Sheldon J.

The old pilot

One such occupation, in a case finally determined by the High Court in March 1998 after years of litigation, is being an international pilot. Poor Mr Christie, the pilot who was sacked because he turned 60, won three cases but finally became a victim to international prejudice.

In *Qantas Airways Ltd v Christie*[32] the employer (Qantas) appealed against a decision of the Full Court of the Industrial Court of Australia that had found it was unlawful to discriminate against Mr Christie—to sack him—because of his age. Christie had been working as an international pilot since 1964, when the retirement age for Qantas pilots was 55, though it was later extended to 60. He was apparently a good one. When Qantas invited pilots over 55 to indicate that they were prepared to keep flying after that age, Christie put his hand up.

When his employment was terminated in 1994 when he turned 60 he complained that he had been unfairly dismissed for a discriminatory reason. ILO Convention 111 is also part of the Schedule to the Human Rights and Equal Opportunity Commission Act 1986 (Cth), and it prohibits age discrimination in employment and occupation. The Industrial Relations Court said that it was all very well for Qantas to argue that international flying regulations—the United Nations' Convention on International Civil Aviation—would not allow them to employ a 60-year old flying over some international routes. It is true that the Convention allowed parties to exclude any aircraft flown by an "elderly"—aged 60 or more—pilot from their airspace. These rules do not apply within Australia, but they are enforced by most other countries over which Qantas flies (except New Zealand, Fiji and Bali (part of Indonesia). However, Australian laws—s 170D of the Industrial Relations Act at the time—did not permit age, or any "discrimination" in a dismissal decision, simply because some other rule did.

The High Court was then asked to determine whether or not Mr Christie was unable, by reason of his age, to comply with an "inherent requirement" of the particular position—and whether being under 60 was such an "inherent requirement".

The High Court found that the standards under the Convention did not prevent Mr Christie from flying within Australia, but they made it very difficult, for roster purposes, to use him. Mr Christie could only "bid" (under Qantas operational arrangements) to undertake a few international flights—Bali and New Zealand (he would have had to fly over American airspace to get to Fiji) and could not, therefore, comply with Qantas' bidding process requirements. The issue was whether or not complying with the roster system *that Qantas had devised* was an inherent requirement of being an international pilot employed by Qantas.

The majority of the High Court said that it was. However, Justice Kirby dissented, supporting the view of the Full Court of the

32 (1998) 152 ALR 365.

Industrial Court that "operational requirements" do not, necessarily, affect the "inherent requirements" of a particular job. Kirby J also pointed out—and this argument seems to have considerable merit—that to allow Qantas' appeal would be to establish a precedent that would allow foreign countries' practices to enable discrimination. If, for example, Saudi Arabia refused to allow women or gays to fly into its airports, Qantas could sack them, in Australia, too:

> To allow such discrimination to operate would be to defy the purposes of the Act and of the international law to which it gives effect,[33]

The result, he said, is a real risk that "operational issues" or "operational requirements" would be elevated to:

> "[I]nherent requirements" of particular positions, to the destruction of the high purpose to which s 170DF of the Act is directed. Only by upholding the application of the Act is it likely that the employer would be persuaded to lend its support to the international review of the arbitrary and discriminatory standards of ICAO which help to sustain the attitudes of aviation authorities in some overseas countries ... Arbitrary standards should be replaced by rational criteria freed from stereotyping.[34]

This decision has significant ramifications for the future of domestic anti-discrimination laws, at a time when our national sovereignty is being limited, to free up the flights and landings of international capital and the development of a global economy.

The significance cannot really be under-stated. Employees (or contractors) of businesses that invest or operate internationally could well find themselves subjected to the kind of discrimination that Australians hold to be so seriously anti-social that they are prohibited in our own employment practices, without redress, in the interests of the "greater good" of the business (and the economy).

It remains to be seen just how quickly other businesses will take up the opportunity to rid themselves of inconvenient anti-discrimination provisions. The opportunity is there.

Wounded Warriors

Another occupation of particular vulnerability is being a member of our armed forces. The "inherent requirements" of being a member of Australian Defence Forces (ADF) are also, it seems, dependent on operational requirements.

In January 1998 the Full Court of the Federal Court found that being a soldier allows the Commonwealth to "discriminate" lawfully—in this case, by discharging a soldier who was HIV positive. In *Commonwealth v HREOC*[35] a soldier who was found to be HIV positive—although asymptomatic—during his training complained of indirect disability discrimination when he was discharged as a result. The Commonwealth relied on s 15 (4) of the Disability Discrimination Act 1992 (Cth), which provides a defence when the employee is unable to perform the inherent requirements of employ-

33 *Qantas v Christie* (1998) 152 ALR 365 at 414.
34 Ibid at 415.
35 (1998) 76 FCR 513 (subsequently *ADF* case).

ment as a soldier. It relied on the argument that deployment was an essential requirement, and because of the risk of transmission of HIV-infected blood, he never could be deployed.

HREOC hearings Commissioner Carter had found that deployment was an "incident" of employment as a soldier—and that there was an insufficient relationship between the inherent requirements of the job, and his disability, that would have prevented him from doing the job. In the Federal Court, when the Commonwealth appealed, Cooper J took a wider view, saying it went beyond the mere physical capacity to execute the tasks or skills: it includes the necessary tasks to be performed and the personal characteristics or qualifications required by the employer—but these must not be the subject of a requirement or condition that would otherwise amount to discrimination. The ADF's imposition of an occupational health and safety policy did not allow it to discriminate with impunity—compliance with such a policy was not an "inherent requirement" of the job—in effect requiring absence of disability as a condition for working. "Bleeding safely" was not, the Court said, an inherent requirement of being a soldier: if it were, it would apply to all work in the ADF, even office work, because accidents happen anywhere.

But the Full Court of the Federal Court found otherwise. The nature of employment as a soldier "has much to do with blood" and the exchange of bodily fluids during combat, and it was an inherent requirement to "bleed safely" if you were employed as a serviceman or woman. Mansfield J also gave a serve to the Commission for presenting submissions on the interpretation of the section, under s 11(1)(o) of the HREOC Act 1996 (Cth) and ordered the Commission to pay the costs.

This decision, too, has implications beyond the particular case. The risk of exchanging bodily fluids applies to any workplace injury, and any help given to any injured worker. It is probably a question of degree—how *much* risk depends on the nature of the work. It would seem open to any employer thoughtfully to impose "requirements" at work that could allow, say, a first-aid worker, or a teacher, or even a transport driver, to be dismissed if they acquired a transmissible disease such as Hepatitis B or C.

THE COURTS' APPROACH TO ANTI-DISCRIMINATION LAWS

These cases reveal a weakening of the strength of domestic laws intended to "assist" human rights protection (against discrimination) or to enable complaints of their breach, by emphasis on pragmatic needs of employers.

There is also a clearly discernible trend towards facilitating employers' interpretation of "operational requirements", at the expense of their duty, as good corporate citizens, not to discriminate against competent employees on the basis of their perceived potential or performance or because of assumptions based on their personal characteristics.

There is not, of course, anything new in this. What is new is the "black letter" law that has been created by the Federal and High Court decisions in the *Qantas*[36] and *ADF*[37] cases. Perhaps at some future time a court may decide that it is not unreasonable (albeit impossible for most women to do, at some time in their lives), and thus it may be an inherent requirement for a partner in a law firm to practise full-time—for "operational" reasons.

At present, under both industrial and equal opportunity laws, employer preferences or convenience may, in unpredictable circumstances, be held to justify what is fundamentally "discriminatory" conduct. It is quite unsettling to contemplate the possibility that discriminatory practices in other countries—those who presume older employees are "unsafe", for example, or who do not fancy dealing with women executives or professionals—may drive employment practices in Australia and the interpretation of domestic laws based on human rights principles.

One other development has yet to become a matter of legal precedent, but I foreshadow that it may. In the docks dispute, earlier in 1998, it became public knowledge that an employer might, through the use of the Corporations Law, and with knowledgeable taxation and industrial advice, distance itself from complaints of discrimination (on the grounds of membership of a Union) and the consequences of possible breaches of industrial law concerning termination of employment.

It apparently came as a surprise to waterside workers to learn that they were not "employed" by Patricks at all. The Patricks group, in 1997, had separated its employment responsibilities from its other business, by contracting with a related company which employed what had been its staff, and in early 1998 terminated the company's contract to deliver employment services to Patricks, leaving those staff without—apparent—redress when they in effect became redundant.

I became aware of another, lower-profile, case in Victoria in 1998 where a company sought to distance itself from liability for sexual harassment by one of its managers by establishing that it, too, had an arms-length relationship between its business, and the labour company by which both the complainant and the alleged harasser were employed, in that business. It argued that it was not, therefore, vicariously liable at all for the alleged unlawful behaviour of the man towards the woman, both of whom thought they were its employees.

It is not beyond the realms of possibility that other employers might find it equally convenient to create companies with slight or no assets to eliminate their responsibility for breaches of their duties not to discriminate against, or indeed to take proper care of, their employees. Many employees in the lowest 30% of the employment market—blue-collar workers or contractors—have only the faintest idea of the legal identity of their employer.

36 (1998) 152 ALR 365.
37 (1998) 76 FCR 513.

It is not a comforting thought, in terms of the big picture. If this trend accelerates, ultimately, only small employers could remain "accountable" to their staff under equal opportunity and workplace relations law. This was not the intention of either industrial regulation or equal opportunity legislation.

CONCLUSION

I have not given this topic its just attention. I can only draw to your attention the signs of deterioration in our protection of human rights at this most vulnerable time. We have seen the removal of the "teeth" of the HREOC by cuts to its budget, the failure to appoint commissioners to offices thus left vacant for long periods of time, and the loss of morale in HREOC while the long-awaited, but still unseen, restructuring legislation remains to be drawn.

This is compounded by the lack of availability of legal aid—especially for children, even when the Family Court has ordered their representation[38]—and in criminal trials.[39] We have witnessed a significant deterioration in access to justice through the restructuring or abolition of what were intended to be informal, cost-free tribunals and administrative review bodies.

It seems to me, on Sir Anthony Mason's view,[40] that this is a breach of our duty to protect our people against discrimination and provide a decent remedy for human rights breaches. Respect for those instruments protecting human rights is historically low, with some States deliberately enacting legislation that breaches fundamental rights—most recently the Northern Territory's mandatory "three strikes and you're in" legislation,[41] triggered by the 1992 Western Australian juvenile sentencing legislation, and the Commonwealth's lamentable failure to take any action to rectify either breach.

We have seen Commonwealth legislation remove refugee rights to due process, and attempts to ensure that international instruments may not be used in the interpretation of domestic statutes, at all, after *Teoh*.[43] We have, most recently, heard the Commonwealth argue that it may use constitutional powers to review native title legislation, to the disadvantage of indigenous Australians, in apparent breach of the Racial Discrimination Act 1975 (Cth), and the apparent purpose of the 1967 amendment to the Constitution giving it the "race" power.

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38 Eg, *Between: "S" (Husband) and "S" (Wife) and the Child Representative and Victoria Legal Aid and the Chief Commissioner of the Victoria Police No ML 9999 of 1995* (1997) 22 Fam L R 112.

39 Eg, *R v Rich* (Supreme Court of Victoria, Winneke P, Brooking and Buchanan JJA, 25 November 1997, unreported). International Covenant on Civil and Political Rights, Art 14(3) guaranteeing representation in criminal trials has been acknowledged in *Dietrich v R* (1992) 177 CLR 292.

40 Sir A Mason, above n 1.

41 Sentencing Act 1998 (NT), s 78A(3).

42 Migration Act 1958 (Cth), Pt 8.

43 (1995) 183 CLR 273.

We are familiar with the concept of the "legitimate expectation". It seems to me that the expectation that, as an ordinary citizen, our rights and liberties will be taken seriously and protected, according to an objective measure, is what legitimates government. But our governments—their extraordinarily powerful executive sides, especially—have not embraced this responsibility. They have acted consistently to preserve the form, but evacuate it of content.

Rights depend on access—to information, but most of all, to a remedy if those rights are infringed. There must be more than in-principle protection. There must be in-practice access to the courts and tribunals, and the possibility of justice. There is no right without a remedy. The very forms of our civil litigation developed from this fundamental principle of our common law based legal system.

Our failure to protect human rights and civil liberties well, or at all, in the face of executive convenience and the preferences of international trade and commerce, has the capacity to devalue the legitimacy of our national government.

Using the New Federal Human Rights Procedures

MICHAEL ARGY*

INTRODUCTION

With the enactment of the Racial Discrimination Act 1975 (Cth) (RDA), the Federal Parliament introduced into the statute books the first element of what was later to become a package of laws designed to give Australians effective remedies against many forms of discrimination. It did so at a time when, and in the knowledge that, the federal administrative law framework was undergoing radical and fundamental change. In the same year, legislation was enacted to establish a merits review tribunal with a wide jurisdiction to review administrative decisions[1]. Two years later, legislation would be enacted to introduce simplified statutory procedures for obtaining judicial review of administrative decisions.[2]

In mid-1998, we are eagerly awaiting the passage of legislation which proposes to introduce new procedures for the handling and resolution of complaints of unlawful discrimination. Once again, this is happening against a background of significant change in the administrative law context, with the contracting role of government throwing up new challenges for traditional administrative law theory and practice, and with major changes proposed for federal administrative review tribunals.

Other papers adopt a more theoretical perspective on the interaction between administrative law and human rights, and the issues

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1 Administrative Appeals Tribunal Act 1975 (Cth).

2 Administrative Decisions (Judicial Review) Act 1977 (Cth) (AD(JR) Act).

that are raised for that interaction by the changes in the administrative law landscape. The focus of this paper, however, will be a practical one: to explain the proposed new federal human rights procedures and to position them within the administrative law framework.

THE IMPETUS FOR CHANGE

The Historical Development of Federal Human Rights Procedures

In order to understand the new procedures, it is instructive to return to the very beginning. As indicated above, the RDA was the first element in the package of federal human rights laws. In its original form, the RDA relied on a statutory Commissioner for Community Relations to inquire into, and to attempt to conciliate, complaints under the Act. If that approach failed, there was provision in the Act for the Commissioner to issue a certificate to enable the complainant to commence civil proceedings in a court of competent jurisdiction.

Successive governments recognised the difficulties—both financial and non-financial—facing complainants who were seeking remedies for unlawful discrimination. Over the 20 years that followed, there were a number of attempts to ameliorate these difficulties.

Human Rights Commission Act 1981

The Human Rights Commission Act 1981 (Cth) (HRCA) established the Human Rights Commission, with statutory functions such as promoting an understanding and acceptance of human rights; undertaking research and educational programs in relation to human rights; and considering whether existing and proposed legislation complied with Australia's international human rights obligations. The new Commission also took over the Community Relations Commissioner's function of inquiring into, and attempting to conciliate, complaints under the RDA.

Significantly, the HRCA also introduced a new complaints mechanism—one which survives today in the Human Rights and Equal Opportunity Commission Act 1986 (Cth) (HREOCA). In relation to a complaint of a breach of "human rights" (defined by reference to certain international human rights instruments annexed to the Act), the Commission was tasked with inquiring into, and attempting to conciliate, the complaint. However, what was new about this procedure was that, where conciliation failed, the Commission had a power to report its findings, and any relevant recommendations, to the Attorney-General, who was required to table the report in Parliament.

Sex Discrimination Act 1984

With the enactment of the Sex Discrimination Act 1984 (Cth) (SDA), the Human Rights Commission was for the first time given a power

to make determinations[3]. Although the SDA clearly stated that any determinations were not binding on the parties, it nevertheless made provision for the Commission to declare that a person had engaged in unlawful conduct, and, for example, to declare that the respondent should pay damages to the complainant, or should take some other remedial action. However, where a person did not comply with the Commission's determination, it was still left to the complainant to take action in the Federal Court, which would hear the matter afresh and reach its own views in relation to the original complaint.

Human Rights and Equal Opportunity Commission Act 1986

In 1986, HREOCA was enacted. This Act replaced the Human Rights Commission with a new body, the Human Rights and Equal Opportunity Commission (HREOC), which inherited the functions of its predecessor. Thus, apart from its education and monitoring functions, HREOC was tasked with making inquiries into, and ultimately making determinations regarding, complaints under the SDA and—by this stage—the RDA. It also retained its predecessor's recommendatory powers in relation to breaches of human rights.

Sex Discrimination and Other Legislation Amendment Act 1992

In 1992, a report of the Senate Committee on Legal and Constitutional Affairs highlighted some of the difficulties facing complainants in discrimination matters[4]. This followed some strong judicial criticism of the procedures. For example, in *Maynard v Neilson*, which involved a complaint under the RDA, Wilcox J commented that:

> [T]he standing of the Commission is not enhanced by a procedure which enables parties to disregard its determinations and to resist enforcement of those determinations by the presentation of evidence withheld from the Commission. If it is constitutionally impossible to make the findings of the Commission ... binding upon the parties, it may be better to dispense with the inquiry procedure altogether and to provide an immediate right of action in this Court upon the failure of the Race Discrimination Commissioner to resolve the complaint by conciliation.[6]

In response to these and other concerns, the Parliament enacted the Sex Discrimination and Other Legislation Amendment Act 1992. That Act introduced a new scheme of enforcement for HREOC

3 The power to make determinations under the RDA was not conferred until 1986, with the establishment of the Human Rights and Equal Opportunity Commission: Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Act 1986 (Cth).

4 Senate Standing Committee on Legal and Constitutional Affairs, *Review of Determinations of the Human Rights and Equal Opportunity Commission and the Privacy Commissioner* (1992).

5 Federal Court of Australia, Wilcox J, 27 May 1988, unreported. There is a digest of the case at (1988) EOC 92–226.

6 Ibid at para 12.

determinations[7]. Under that scheme, which followed the recommendations of a majority of the Senate Committee, a determination was registered with the Federal Court. If not challenged through the commencement of judicial proceedings within a certain period (which could be extended at the Court's discretion), the determination could be enforced as an order of the Court. Further, where the determination was challenged, "new evidence", in the sense of evidence that was not before HREOC at the time of its hearing and determination, would only be admissible with the leave of the Court. This scheme was intended to reduce the burden on complainants seeking to have a HREOC determination enforced, by effectively placing the onus on the respondent to take action to challenge the determination.

The *Brandy* Decision and the Government's Response

In February 1995, the High Court threw a constitutional spanner in the works. In *Brandy v Human Rights and Equal Opportunity Commission*[8], the High Court found that the new scheme for the enforcement of HREOC determinations was invalid because it infringed the principle of the separation of judicial and executive power enshrined in Chapter III of the Constitution. In effect, the High Court found that the act of registering a determination of HREOC with the Federal Court, and having it take effect as an order of that Court, amounted to an attempt to "cloak" the decisions of an administrative body with the judicial power of the Commonwealth.

The immediate legislative response to the *Brandy* decision was the enactment of the Human Rights Legislation Amendment Act 1995 (the 1995 Act). This was always intended to be an interim solution to the problem posed by the High Court's decision. However, more than three years on, it remains in place. While part of the delay can certainly be explained by the previous Government's decision to refer the *Brandy* issue to a joint committee which was then reviewing the operations of HREOC[9], it has to be said that the major reason for

7 Where the respondent to a complaint is a Commonwealth agency, there is a separate enforcement regime which operates. Where the respondent is such an agency, a HREOC determination is self-executing, in the sense that the legislation imposes on the agency an obligation to comply with the determination. The enforcement regime for Commonwealth agencies also provides for review by the Administrative Appeals Tribunal of quantum of damages, where the determination includes a declaration that damages be paid. This enforcement regime was unaffected by the *Brandy* decision, and it remains in place until the passage of the Human Rights Legislation Amendment Bill 1997. After that time, there will not be a separate enforcement regime for Commonwealth agencies as HREOC will no longer have a power to make determinations.

8 (1983) 183 CLR 245.

9 In August 1993, the then Attorney-General announced in the context of the 1993/94 Budget that the Attorney-General's Department, the Department of Finance and HREOC would conduct a joint review of the role and functions, and of the efficiency and effectiveness, of HREOC. After the High Court's *Brandy* decision, the then Attorney-General asked the steering committee for the joint review to consider and report on alternatives to the enforcement regime struck down by the High Court.

the lack of any permanent response to the problem is the fact that the Human Rights Legislation Amendment Bill 1997 (the Bill)[10] is one of a number of bills held up in the Senate.

The 1995 Act replaced the offending registration and enforcement scheme with the pre-1992 regime, which involved complainants commencing proceedings in the Federal Court to enforce HREOC determinations with which respondents refused to comply. The result was—and still is—that a complainant faces the prospect of two full hearings, one of them resulting in an unenforceable determination, before he or she can expect a binding resolution of a complaint.

Both the then Labor Government and the current Coalition Government committed themselves to finding a permanent solution which would balance the need to respect the constitutional boundaries imposed by the High Court against the need for an effective, accessible, informal and fair means of enforcing Federal anti-discrimination legislation. The result was the Human Rights Legislation Amendment Bill, which was introduced into the House of Representatives on 4 December 1996.

THE NEW REGIME

Summary

The Bill implements a number of significant and important changes to the administration, functions and procedures of HREOC:

- The first major reform involves the consolidation of the three separate complaint handling schemes contained in the Disability Discrimination Act 1992 (DDA), the RDA and the SDA into a single uniform scheme contained in HREOCA. The new scheme will simplify the complaint handling process and incorporate best practice procedural provisions. In addition, the Bill will confer on the President sole responsibility for complaint handling under the new scheme.[11]
- The second major reform contained in the Bill is the clarification of the lines of management responsibility in HREOC. In

10 The Bill was passed by the House of Representatives on 19 June 1997. It was introduced into, and had its second reading in, the Senate on 27 June 1997. At the time of printing, the Bill is still held up in the Senate and is yet to come on for debate.

11 The reforms relating to the handling of complaints of unlawful discrimination, and their enforceable resolution by the Federal Court, will not affect the procedures for the handling of complaints under the Privacy Act 1988 (Cth).

this regard, the President is to assume responsibilities as the Chief Executive Officer.[12]

- The final, and most important, reform is, of course, the Government's response to the *Brandy* decision. It is this aspect of the Bill which is the focus of the remainder of this paper.

The Process

The Bill sets up a new regime for the handling of complaints by HREOC, and their eventual enforceable resolution by the Federal Court. This paper runs through, step-by-step, the course of a typical complaint after the passage of the Bill. Because this paper has been prepared for an administrative law conference, it also highlights the main areas in which there may be some scope for the administrative law framework to interact with the new human rights procedures.

However, one point is worth making up front. These new human rights procedures do not change the face of administrative law in any way. Rather, what the Bill does do is to create a new decision-making process within which HREOC must operate. That decision-making process will fit within the existing framework for judicial review of administrative decision making. In seeking to establish new procedures for the handling of complaints of unlawful discrimination, it has not been the Government's intention either to expand or restrict the scope for judicial review of the various decisions in the process.

Of course, the creation of a new decision-making process might raise expectations that there will be increased scope for administrative review of HREOC's decisions. In fact, without wanting to dampen the creative enthusiasm of the legal profession, which will no doubt relish the opportunity to identify avenues of challenge to the operation of the new procedures, it is difficult to see a great deal of work coming the way of administrative law practitioners. While there are clearly stages in the process at which HREOC will be making "decisions of an administrative character ... under an enactment" for the purposes of the Administrative Decisions (Judicial Review) Act 1977 (AD(JR) Act)[13], it is worth bearing in mind that, where matters are not able to be resolved by conciliation in the informal environment of HREOC, the entire process culminates in Federal Court proceedings. The incentive, therefore, to take action in

12 The Bill which is the subject of this paper is the first phase of a broader process of reform of HREOC. The second phase of that process is the renaming, restructuring and refocusing of HREOC. The Human Rights Legislation Amendment Bill (No 2) 1998, which was introduced into the House of Representatives on 8 April 1998, will implement that second phase. The final phase of the process will be the consolidation of Federal human rights legislation into a single Act. *[Editor's Note: the Bill had its second reading in the Senate on 1 July 1998. Following the 1998 Federal Election, the Senate Committee for the Selection of Bills examined the Bill, and tabled its report on 17 February 1999, coinciding with the tabling of the modified version of the Bill: now the Human Rights Legislation Amendment Bill (No 2) 1999.]*

13 See the definition of "decision to which this Act applies" in s 3(1) of the AD(JR) Act.

the Federal Court by way of judicial review at earlier stages of the process will surely not be great.

One other preliminary point to note is that the procedures for the handling of complaints of breaches of human rights will remain unchanged as a result of the passage of this Bill. That is, HREOC will continue to inquire into, and attempt to conciliate, these complaints, and ultimately, to report to the Attorney-General where matters are unable to be resolved by conciliation.[14]

1 Lodgment

The first stage in the new procedure will of course be the lodgment with HREOC of a complaint alleging unlawful discrimination under the DDA, the RDA or the SDA[15]. The Bill provides broad scope for representative complaints to be lodged by a person, a group of persons or a trade union, on behalf of one or more other persons.[16]

2 Consideration by HREOC

HREOC is tasked with examining the complaint and deciding whether it is a complaint within the meaning of the legislation, in other words whether it meets the formal requirements set down in the legislation. HREOC does not, however, examine the merits of the complaint itself—that is a matter for the President (or his or her delegate) during the inquiry phase, and ultimately for the Federal Court in a binding legal sense.

If HREOC decides that a purported complaint is not in fact a complaint within the meaning of the legislation, this would most likely constitute a challengeable decision for the purposes of the AD(JR) Act. It would therefore be possible for a potential complainant to seek judicial review in the Federal Court of HREOC's decision to reject a purported complaint.

Of course, one might be tempted to conclude that there is scope for potential respondents to challenge HREOC's decision that a complaint does comply with the requirements of the legislation. Although there is Federal Court authority to suggest that a decision of this nature may not be a reviewable decision for the purposes of the AD(JR) Act[17], for the reason that it is not "final or operative and determinative",[18] there may nevertheless be scope for action under s 39B of the Judiciary Act 1903 (Cth).

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14 See ss 11(1)(f) and 29 of Human Rights and Equal Opportunity Act 1986 (Cth) (HREOCA) in relation to breaches of "human rights". See also ss 31(b) and 35 of HREOCA in relation to complaints of discrimination in employment or occupation, within the meaning of the International Labour Organisation's *Discrimination (Employment and Occupation) Convention 1958*.

15 Proposed s 46P(1) of HREOCA. "Unlawful discrimination" will be defined in s 3(1) as including any act, omission or practice which is unlawful under Part 2 of the DDA, Part II or IIA of the RDA or Part II of the SDA.

16 Proposed s 46P(2) of HREOCA. Proposed ss 46PA and 46PB set out further conditions applying to representative complaints.

17 *Harris v Bryce* (1993) 113 ALR 726.

18 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337 per Mason CJ.

3 Inquiry and Conciliation

Once HREOC decides that a complaint meets the requirements of the legislation, the complaint will be referred to the President.[19] The President is required to inquire into the complaint and to attempt conciliation.[20] Typically, there would be a compulsory conciliation conference held for this purpose, however the legislation will not require that such a conference be held.[21]

The legislation will make provision for complaints to be withdrawn, but only with the leave of the President.[22] The granting of leave will not be truly discretionary. If the President is satisfied that all the persons affected by the alleged discrimination agree to its withdrawal, he or she must grant leave; if he or she is not so satisfied, leave cannot be granted. The justification for this approach to the issue of withdrawal is that it is necessary to ensure that no members of a representative complaint can be disadvantaged by the unilateral withdrawal of a complaint against their wishes. Thus, a person may withdraw from a complaint at any time, but he or she may not have the entire complaint withdrawn unless the President is satisfied that all the affected persons consent to the withdrawal.

One can of course imagine a scenario in which leave to withdraw might be granted by the President, but an affected person claims not to have agreed to the withdrawal. In such circumstances, it might be possible for the affected person to seek judicial review of the President's decision. However, there will also be nothing to prevent such a person from simply lodging a new complaint on his or her own behalf and avoiding Court proceedings.

4 Termination

At any stage after referral of the complaint to the President, he or she will be able to terminate a complaint on any one of a number of specified grounds.[24]

The most common ground is likely to be that there is no reasonable prospect of the matter being settled by conciliation. However, other grounds include that the President is satisfied that there has been no unlawful discrimination, that there is a more appropriate remedy available to the persons affected by the alleged discrimination or that the subject matter of the complaint has already been adequately dealt with by HREOC or another statutory authority.

Where the President terminates a complaint, the President must notify the complainants in writing of that decision and of the reasons for that decision.[25]

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19 Proposed s 46PC of HREOCA.
20 Ibid at proposed s 46PD.
21 Proposed ss 46PG, 46PH and 46PI of HREOCA deal with compulsory conferences.
22 Ibid at proposed s 46PDA.
23 Ibid at proposed s 46PB(1).
24 Ibid at proposed s 46PE(1).
25 Ibid at proposed s 46PB(2). It is the giving of notice which formally enlivens the right of a complainant to access the Federal Court.

Once again, the termination of a complaint by the President would clearly constitute a reviewable decision for the purposes of the AD(JR) Act. However, given that the immediate effect of terminating a complaint is to create an entitlement to commence proceedings in the Federal Court, it would be a rare case indeed in which judicial review of a decision to terminate would be sought by a complainant. Another mechanism for avoiding the possibility of Court proceedings in relation to a technical error in the President's decision to terminate a complaint is the express provision in the Bill of a power to revoke a termination at any time before the commencement of proceedings in the Federal Court.[26] The purpose of this power to revoke a termination is to deflect matters away from the Federal Court, giving the parties another chance to attempt conciliation.

5 Commencement of Federal Court Proceedings

Once a complaint has been terminated by the President, and a notice has been given by the President, a person or persons affected by the alleged discrimination will have 28 days, or such further time as the Court allows, to commence proceedings in the Federal Court.[27] The Federal Court will have jurisdiction in relation to the subject matter of complaints and will be able to make any orders which it considers appropriate in the circumstances of the case, including that the respondent pay damages, or take other action by way of compensation, to the applicant.

The Bill itself aims to minimise the formality and technicality attaching to Federal Court proceedings in this area. For example, it provides a broad right of representation, including by a non-lawyer.[28]

More significantly, the Bill states that, subject to Chapter III of the Constitution, "the Court is not bound by technicalities or legal forms."[29] This section is intended, amongst other things, to provide a legislative framework for the Court to develop appropriate practices and procedures to facilitate the determination of human rights proceedings. It aims to ensure that the Court's processes are accessible, efficient and as sensitive as possible to the needs of the parties, while not compromising the Court's overriding objective of deciding matters according to law as a court exercising the judicial power of the Commonwealth. In practice, the Court will develop specific rules for this jurisdiction, which will take into account the difficulties traditionally faced by complainants in the judicial system. In addition, the Court will liaise on an on-going basis with HREOC to ensure that the parties are not disadvantaged by the Court's procedures.

Finally, the Bill confers on the Court the power to delegate to Judicial Registrars any of its powers under HREOCA, apart from the

26 Ibid at proposed s 46PE(5). The Explanatory Memorandum for this aspect of the Bill gives as an example of a situation in which the power to revoke might be exercised a situation in which information pertinent to a complaint is found subsequent to termination.

27 Ibid at proposed s 46PL.

28 Ibid at proposed s 46PN.

29 Ibid at proposed s 46PO.

power to grant interim injunctions.[30] It is hoped that this will allow proceedings to be conducted in a more informal manner.

At the time proceedings are brought before the Court, or at any subsequent stage, any Commissioner (other than the Privacy Commissioner) will be able, with the leave of the Court, to appear as *amicus curiae* and make submissions on such matters of law or policy as the Commissioner thinks fit.[31]

CONCLUSION

In 1975, complainants under the RDA faced an unenforceable inquiry and conciliation process before a statutory Commissioner, followed by expensive, and potentially protracted, proceedings in the Federal Court, in order to achieve a binding determination of their rights under the Act. After the passage of the Human Rights Legislation Amendment Bill, the parties will face an inquiry and conciliation process before the President of HREOC, followed by proceedings in the Federal Court, in order to achieve a binding determination of their rights under Federal anti-discrimination legislation. It is tempting to conclude that the "experiments" of the intervening 23 years have taken us nowhere.

In fact, this is not the case. The aim of the registration and enforcement scheme which was struck down by the High Court in the *Brandy* case was, at its most basic, to provide the parties with an alternative to the expense and stress of formal Court proceedings. While the means chosen by the previous Government proved to be unconstitutional, the current Government has nevertheless attempted to achieve the same underlying objectives.

Thus, the vast majority of discrimination complaints will still be resolved in the informal environment of HREOC, without the need for any formal hearing. Where a complaint cannot be resolved by way of conciliation, the new scheme will provide for only one hearing and determination of the complaint, rather than the current two-tier scheme, which imposes an unacceptable burden on complainants and respondents alike. Finally, while a hearing in the Federal Court carries with it a certain unavoidable level of judicial formality dictated by the Constitution itself, there are clear mechanisms in the legislation for avoiding the most undesirable consequences of that formality.

The High Court has set the constitutional parameters within which the Government must work in developing new procedures for the handling and resolution of complaints of unlawful discrimination. The solution adopted by the Government, in the form of the Human Rights Legislation Amendment Bill 1997, is clearly a compromise, but one which attempts to avoid the worst aspects of earlier schemes.

30 Proposed s 18AB(2B) of the *Federal Court of Australia Act 1976*.
31 Proposed s 46PS of HREOCA.

One possibility for the future may be the use of a Federal magistracy to hear and determine complaints of unlawful discrimination. The Attorney-General remains interested in developing a Federal magistracy. The Department is currently examining options for establishing a Federal magistrates' court, and investigating mechanisms by which such a court could improve access to justice, and reduce the costs of justice for the Government and for parties to litigation.

Public Support of Private Lives: The Migrating Family, Human Rights Treaties and the State

FIONA MCKENZIE *

INTRODUCTION

Most of us would not like to imagine a life without some sort of family support. Whether it be from children, parents, partners, grandparents, aunties, uncles, or very close friends—close enough to call "family". Yet as crucial as supportive relationships are in our lives, we may be reticent in acknowledging them, examining them, and legislating about them. We may have difficulties in determining how much power the family structure should have over the lives of those within the family unit; and how much power the state should have over the family. State action regarding the family may be seen as intrusive and interfering, or supportive and protective of the family.

These issues arise out of the International Covenant on Civil and Political Rights (ICCPR),[1] to which Australia is a party. The migrating family is a particularly relevant focus for the application of the ICCPR. The ICCPR's impact on the migrating family raises the following questions: what ICCPR obligations commit Australia to support of the family? What underlying concepts affect our views about the respective roles of family and state? How might a distinc-

* BA/LLB (Mon), LLM (ANU); Solicitor, Australian Government Solicitor, Melbourne Office. This paper is based on work submitted for a LLM, generously supported by the Commonwealth Attorney General's Department through its grant to me of the "Postgraduate Study Award" in 1997. The views expressed in this paper are nevertheless my own. This paper is up to date as at March 1998.

1 New York, 19 December 1966, no 23 of 1980, Australian Treaty Series. (UN citation: GA res 2200A (XXI) 21 UNGAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171. The ICCPR entered into force on 23 Mar 1976.

tion between "individual" and "group" rights affect treatment of the family? How might theory about "public" and "private" concepts enable us to examine the area? How might a dependent child be discriminated against through the above concepts?

This paper attempts to introduce the reader to some of the above issues, with a view to providing some methods of analysis of state action involving the migrating family. I apply these methods of analysis to particular cases emanating from Europe. I do this not to prove that in a numerical or statistical sense decisions or actions of Europe follow a particular trend, but rather to introduce the use of such analytical tools, to assess processes of reasoning found in the cases. It is for the reader to take this analysis further in considering the application of the ICCPR to Australian or other legal systems in a wider sense.

In the first section of this paper I set out the parts of the ICCPR which clearly make the family a relevant consideration in Australian law and decision making. In the second section I briefly examine some theory regarding the relationship between the family and the state, particularly with regard to the individualistic approach of human rights theory. I also introduce the concept of the distinction between the "private" and "public" family.

Taking the frameworks of the public/private divide and the individualistic nature of human rights approaches, I analyse in the third section a few European migration cases which consider the European Convention on Human Rights (ECHR).[2] The ECHR has a provision which is very similar to a relevant provision in the ICCPR. This case analysis does not prove any particular trend in the perspective of the bodies applying the ECHR (the European Court of Human Rights (EHRCt) and European Commission of Human Rights (EHRC'ssn)). It is simply a case study for the purposes of applying the theory set out in section two.

In the fourth section, I conclude that the issues raised are worthy of further consideration for law, policy and decision makers. The analysis of European cases can be of great assistance in an assessment of the potential impact of the ICCPR on Australia. As one example, a particular area of Australian law is noted. Full-scale analysis of aspects of the Australian legal and governmental system upon which the ICCPR impacts is another task entirely, and one beyond the scope of this paper.

THE ICCPR AND AUSTRALIA

In Australia, a migration case involving the potential separation of a family, *Teoh*,[3] prompted lively and continuing discussion. The

2 European Convention for the Protection of Human Rights and Fundamental Freedoms: 213 UNTS 222. The ECHR entered into force on 3 Sep 1953.

3 *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273. [Editor's note: see the papers by M Rayner, "The Diminution of Human Rights in Australian Administration" and I Holloway, "Legitimate Expectations, Human Rights and the Rule of Law" in this volume of materials, which also discuss this decision.]

Convention on the Rights of the Child (CROC)[4] was the treaty relied upon in *Teoh*, and while it contains provisions regarding families and the rights of children,[5] the ICCPR is arguably of more significance to Australia because of its Optional Protocol.[6]

After some thirty years of discussion, the ICCPR and the Optional Protocol entered into force on 23 March 1976. Australia ratified the ICCPR on 13 August 1980,[7] but did not accede to the Optional Protocol until 25 September 1991.[8]

The Optional Protocol to the ICCPR provides a complaints mechanism whereby individuals can complain to the Human Rights Committee about breaches of the ICCPR.[9] The Optional Protocol complaints mechanism has not been used extensively by those who come under Australian jurisdiction as yet—as at 3 March 1998, there had been 27 complaints involving Australia to the Committee, 23 under the ICCPR.[10] But Optional Protocol complaints may increase as awareness of the complaints mechanism increases.

What are the relevant ICCPR provisions?

The ICCPR contains provisions which may limit the ability of contracting states to expel or deport those without legal rights to reside in the country concerned, where family life would be affected by such action.

The articles of most obvious relevance are articles 17, 23 and 24. (See appendix 1) The meanings of these articles are, however, less

4 New York, 20 Nov 1989, entered into force for Australia on 16 January 1991. Australian Treaty Series, 1991, No 4. The ICCPR could also have been relied upon in that case.

5 ICCPR, above n 1. Articles 5, 7, 8, 9, 10, and 16 relate to the relationship between parents and children, and children's rights to be with their families.

6 The UN citation for the Optional Protocol is: GA res 2200A (XXI) 21 UNGAOR Supp (No 16) at 59, UN Doc A/6316 (1966), 999 UNTS 302. Other international treaties concerning the family include: Universal Declaration of Human Rights (art 16); American Convention of Human Rights (art 17(1)); European Social Charter (art 16); International Covenant on Economic, Social and Cultural Rights (art 10). See G Cvetic, "Immigration cases in Strasbourg: the right to family life under art 8 of the European Convention" [1987] 36 *ICLQ* 647 at 653.

7 The ICCPR and its connection with Australia are summarised in *Australian and New Zealand Equal Opportunity Law & Practice* (CCH looseleaf service) at 3,181 – 3,211.

8 Ibid at 3,184.

9 *Australian and New Zealand Equal Opportunity Law & Practice*, above n 7. The Human Rights Committee has other functions such as the production of General Comments: art 40 para 4 ICCPR. General comments of relevance to the family and migration include: General Comment No 15 (adopted at the 27th session of the HRC) *Status of Aliens under ICCPR* 7/22/1986; General Comment No 16 (adopted at the 32nd session of the HRC) *Art 17, Protection of Privacy, Family and Correspondence* 3/23/1988; General Comment No 17 (adopted at the 17th session of the HRC) *Art 24, Children's Rights* 4/5/1989; and General Comment No 19 (adopted at the 39th session of the HRC) Art 23, *Protection of the Family* 7/24/1990.

10 As advised by the Office of International Law, Attorney General's Department. While the details of complaints are confidential, the outlines are tabled in Parliament and are available in Hansard.

obvious. They contain arguably competing values: the family and the state. The family is part of one's privacy and should not be unnecessarily interfered with, (article 17), and the state is charged with responsibility to protect the family, and to recognise rights to marry and found a family (articles 23, 24). Questions therefore arise about the appropriate exercise of that responsibility so that it protects but does not "interfere" with the family.[11]

Articles 2, 4 and 5 relate to the application of the ICCPR. The state must comply with the ICCPR with regard to "all individuals within its territory and subject to its jurisdiction".[12] The ICCPR is to apply even to non-citizens in Australia.[13]

The state must also, in ensuring compliance with the ICCPR, undertake "to take the necessary steps ... to adopt such legislative or other measures as may be necessary",[14] and must provide an effective remedy, "develop the possibilities of judicial remedy", and ensure enforcement of remedies.[15]

In summary, Australia's compliance with the ICCPR will require public authorities to avoid arbitrary and unlawful interference with the family, and to protect the family.

THEORY ABOUT THE FAMILY, HUMAN RIGHTS, AND THE STATE

Introduction

One can assess a state's actions towards the family through a framework which draws on elements of human rights theory and theory regarding the so-called division between the "private" and the "public" spheres.

With respect to human rights, one may ask the question: does the state properly consider *all* members of a family? I argue below that in some areas of decision making or law, one individual member of the family may be seen by the state as representative of the whole family. The individualistic nature of the state's focus on the family may therefore ignore individuals within the family who are not represented. The state may see a parental figure as representative of the whole family, and may base its treatment of the family on the status or actions of the parental figure.

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11 In addition, the child's rights (art 24) pose questions, particularly in the migration context.

12 ICCPR, above n 1 at art 2(1). See Human Rights Committee General Comment No 15, above n 9: "an alien may enjoy the protection of the Covenant even in relation to entry or residence". Also P Bailey, *Human Rights: Australia in an International Context* (1990) at 29–30.

13 Human Rights Committee General Comment No 15, above n 9.

14 ICCPR, above n 1 at art 2(2).

15 Ibid at art 2(3). Cf Australia's limitation of judicial remedies in the migration context in recent years in Migration Act 1958 (Cth), Part 8. [Editor's note: for further discussion of Part 8 of the Migration Act see the paper by M Crock, "Privative Clauses and the Rule of Law: the Place of Judicial Review within the Construct of Australian Democracy" in this volume of materials.]

With respect to the public/private distinction, one may ask the question: does the state unfairly distinguish between public and private families? Seen in terms of the private/public divide, the family with a father who complies with the traditional "private family" role model may be seen as a "private family" which is worthy of protection by the state. On the other hand, the family whose father is not so compliant is a "public family" and may be broken up by the state.

These ideas are explained further below.

What is the family which should be respected?

The Human Rights Committee has stated that the definition of "family" in the ICCPR must be broad enough to encompass the various concepts of family found in the state concerned.[16] In multicultural Australia the possibilities for different concepts of the family might be seen as endless. In this paper, though, I focus on the parent/child relationship within the family.

Human rights and individuals

> The foundations of human rights are often considered to be the claims made *for individuals* in the grand liberatory statements of the seventeenth and eighteenth centuries.[17]

One criticism of human rights theory has been its emphasis on individuals.[18] Land rights of an indigenous group, for example, do not really belong to individuals but to the group as such, (although an individual within a group can assert them).[19] The family is a group, but it is made up of individuals who each need the support the family relationships can bring. A focus on the "group rights" of the family is not without difficulty because it may be criticised as hiding and perpetrating breaches of rights of individuals within the group.[20] However, a focus on certain individuals within a family can also lead to a failure to protect the rights of others in the family.

Sometimes areas of the law tend to consider one individual as the representative of the family, so that the "representative's" behaviour is determinative of the family's fate. In this way the individualistic nature of our ideas about human rights—in the sense that one individual's behaviour determines the treatment of others—can discriminate against the unrepresented or "silent" members of the family.

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16 Human Rights Committee General Comment No 16, above n 9. "Family" is not otherwise defined in the ICCPR.

17 A Funder "De Minimis Non Curat Lex: the Clitoris, Culture and the Law" (1993) 2 *Transn'l Law & Contemp Problems* 417 at 456 (emphasis added).

18 On the individualistic nature of rights theories and alternative socialist constructions of rights see T Campbell, *The Left and Rights—A Conceptual Analysis of the Idea of Socialist Rights* (1983).

19 Bailey, above n 12 at 8–9.

20 "Group rights" may not be a "viable alternative for women", for example, as they may prevent women from claiming human rights abuses to them as individuals. Funder, above n 17 at 462, 466. Feminism has used individualism to further its causes, but criticises the concept as secretly according rights to men alone. Funder, above n 17 at 462–3.

This phenomenon has led to criticism of "individual rights" as being in practice "men's rights".[21] Certainly in migration it is often men who in practice spearhead migration applications, and may implicitly be the focus of the migration program.[22] And it may be the case that in practice it is the behaviour of an adult parent in the family group, often male, who determines the outcome of immigration decisions, even in tribunal and court review.[23]

The state and the family: public and private concepts

This section sets out the distinction in Western society between the private and public spheres, and a further distinction between the "private family" and the "public family". These concepts affect the extent to which the state may justify intervention or non-intervention in the family.

A strain of thought in Western society identifies a distinction between the private and public spheres of society. Put simply, the public sphere is that the state regulates by making laws, making decisions, and enforcing them. The private sphere is that where the state allegedly takes no interest, and where the individual or small group has dominion.[24]

Doctrines of privacy have allowed authorities to avoid intervention in family matters, through a mixed motive of protection and avoidance.[25] By leaving the family "private" and alone, the state can assert that it is really protecting the family. The courts, for example, have tended to avoid trespassing on "the sanctity of garden, castle, home, cottage ... It is free from invasion by strangers, or even law."[26]

The "privacy of the family" doctrine, however, may be criticised on the basis that it justifies state action or inaction which goes beyond mere protection of all families or avoidance of intervention.

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21 "The rhetoric of liberal individualism may serve to mask systemic discrimination": Funder, above n 17 at 454.

22 It has been asserted that immigration policy may favour economic "masculinist" criteria: R Fincher, "Women, Immigration and the State: Issues of Difference and Social Justice" in A Edwards and S Magarey (eds) *Women in a Restructuring Australia: Work and Welfare* (1995) 203 at 210–222. It has also been noted that applicants approved as refugees in Australia have been predominantly male: see "Violence and Women's Refugee Status" in Law Reform Commission, Report No 69, *Equality before the Law: Justice for Women* (1994) at 236. Government attitudes to members of families seeking to regularise status in Australia have been commented upon: see Australian Parliament Joint Standing Committee on Migration, *Australians All: Enhancing Australian Citizenship* (September 1994) at xxvi.

23 See above n 22. In the European cases reviewed by me during recent postgraduate study, men appeared to dominate as applicants.

24 The world of "state, market and politics ... is the world of men; the private realm, associated primarily with women, is the world of family." K O'Donovan, *Family Law Matters* (1993) at 23.

25 Both protection and avoidance can be arguably effected through ignoring or dismissing the family. Even feminist legal theorists have "neglected" the family, as well as motherhood: M Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (1995) at 26–7, 73 respectively.

26 O'Donovan, above n 24 at 41.

While the family is arguably "left alone", ill treatment or abuse of members of the family may be left unchallenged. Thus the state's use of the "privacy of the family" concept may support inequities in the family.[27] However, the public/private distinction can be taken even further.

The private world of the family (seen by some as typically the world of women[28]) is left without overt intervention, because it exists to support the public sphere.[29] Returning for a moment to the concept of individualism in human rights thinking; the theory of liberalism which in the seventeenth and eighteenth centuries emerged to assert equal individual rights, only asserted those rights in the public world.[30]

It can be extrapolated from this that the sorts of family which enable a woman to support the man in the marketplace may be encouraged by society.[31] Thus emerges the concept of the "private family", a model based on the traditional nuclear family. This family, which conforms to the pattern of the typically male "breadwinner" earning an income through his endeavours, and supported physically and emotionally in that role by his wife and children, is not merely left unregulated, but is granted by the state the right to be private, the right to be financially supported, and other encouragements.[32] This family is rewarded by the state because it is not reliant on the state—it does not demand public resources in the first instance.[33] It deals with its necessary and derivative dependencies privately.[34]

Families which do not conform to this pattern, such as the single mother and her child, may be seen as "public families" according to Fineman.[35] They may be discriminated against, intruded upon, and treated as deviant by the state,[36] because they may draw on public resources.[37]

Using this analysis, one could predict that the family who is seeking to migrate to and regularise its status in a new state might be

27 See J Stubbs (ed), *Women, Male Violence and the Law* (1994); Fineman, above n 26 at 157; J Dewar, *Law and the Family* (1992) at 6.

28 O'Donovan, above n 24. See also Dewar, above n 27 at 5–6.

29 Fineman, above n 25 at 187. "The invisibility of women's work, the efforts of emotional succour, enable the legal man to appear in the public world ... free of encumbrances." O'Donovan, above n 24 at 33.

30 S Parker, P Parkinson and J Behrens, *Australian Family Law in Context* (1994) at 101–2.

31 Or by the society which seeks to be or allows itself to be patriarchal. Theories about the family incorporating this point are in F R Elliot, *The Family: Change or Continuity?* (1986) at 98–114, as quoted in Parker, Parkinson and Behrens, above n 30 at 15–26.

32 Fineman, above n 25 at 177–8, 191, and generally.

33 Perhaps the payment of taxes is some implicit justification for the state's reward of the private family.

34 Fineman, above n 25 at 165.

35 Ibid at 177–8, 191.

36 Ibid at 79 and 101–142.

37 Ibid at 161. The caretaking role does not have primary importance, but is seen as a secondary or optional role: at 9, 160, 235, and generally.

categorised by the state as either a private or public family. This categorisation may be based on the structure of the family, or on the status or actions of the breadwinner in that family. If the parental figure complies with the private family role model, the state will protect and refuse to interfere with that family. If the parental figure does not comply, the family is seen as a public family which need not be protected and which can be broken up. From a human rights perspective, the right to respect for family or family life may be seen as being applied inconsistently if these categorisations determine such a right. Whether that inconsistency is justified is another question.

I will now turn to the ECHR and examine some of the cases on the ECHR where an analysis of the "private family" issues outlined above can be done. These cases appear to involve different treatment of migrating families according to whether the potential "deportee" within the family is a parent or a child, (or, more particularly, a father or a son).

ECHR CASES—THE RIGHT TO RESPECT FOR FAMILY LIFE

Introduction

In interpreting the ICCPR, particularly articles relating to privacy and the family, one will not be assisted by expansive interpretative case law. A richer source of jurisprudence which may assist in interpretation of the ICCPR is that arising out of the ECHR. Article 8 of the ECHR is very similar to article 17 of the ICCPR. It reads:

> 1 Everyone has the *right to respect* for his (or her) *private and family life*, ... *home* ...
>
> 2 There shall be no interference by a public authority with the exercise of this right ... [subject to specified exceptions].

The ECHR was originally modelled on the ICCPR, as drafting for the ICCPR commenced much earlier than 1976. Several decades of case law interpreting the ECHR has emanated from the European Human Rights Commission and the European Human Rights Court. I will now turn to a few of the European cases involving the right to respect for the family in the migration context.

Actions of family members may affect the perceived existence of family life, or the right to respect for family life

There are in essence three questions to be asked in relation to the application of article 8 of the ECHR to any given case. First, does family life (which is worthy of protection) exist? Second, is that family life under threat by a public authority? Third, can the interference with the right to respect for family life be justified? Elements of the first and third questions, and the application of the earlier theoretical material to those questions, are set out below.

The parent's perceived lack of commitment to the child can determine the right to respect for family life despite the child's dependence

There have been cases where the European Human Rights Court or European Human Rights Commission have found that the parent's lack of commitment to the child has, if not broken the tie between them, then caused the forfeiture of both the parent's and the child's right to respect for family life. Lack of commitment can be interpreted through, for example, the parent's decision to live in a separate country from the child.

As an example, the European Human Rights Court recently found that despite strong compassionate factors, there was no breach of article 8 when a child was refused entry to the country where his parents were residing. The European Human Rights Court found that the bond of "family life" between the father and son had not been broken, because the father had been able to visit his son regularly in the son's country of residence.[38] This case was *Gül v Switzerland*.[39]

It could be argued in this case that the father failed to satisfy the "private family" father ideal. The European Human Rights Court stated that it was Mr Gül who "caused the separation from his son" through fleeing allegedly persecutory circumstances which he was unable to prove.[40] It ignored the son's lack of responsibility for that decision. In contrast, the minority of the European Human Rights Court were not prepared to determine the child's fate by reference only to the father's actions.[41]

Two aspects are relevant here in the construction of the right to respect for family. The father had failed to support his family economically, neither could he prove compassionate reasons for his migration—he thus did not conform to the "private family" model and was not worthy of state support. The son's right to respect for *his* family life was determined by the father's actions in the sense that the "family life" was categorised on the basis of the father's actions. This is also an example of the individualistic nature of the decision making process denying children rights, because those rights can be determined with regard to only one representative individual: the father.

38 22 EHRR 93 at 113. No comment on the bond between mother and child was made, which is surprising (even though the mother may not have technically been an applicant) given that the evidence was that the mother's ill health made travel difficult: ibid at 115.

39 Ibid.

40 Ibid at 114.

41 Ibid. See also ibid at 122 for other factors influencing the minority's view, such as the integration of the applicant and his wife and daughter in Switzerland (which was more important than the formal status of their permit); and the fact that their daughter was in a home in Switzerland, (they being unable to care for her), and that her interests would probably be to stay in Switzerland rather than move to Turkey.

The majority of the European Human Rights Court in *Ahmut v Netherlands*[42] purported to follow the case of *Gül v Switzerland* in finding that the Netherlands did not violate article 8 when it refused a residence permit to the young son of a Netherlands resident. It also supported a determination of the right to respect for family life on the basis of the father's actions.

In *Ahmut*, the father was a Moroccan national who had moved to the Netherlands and obtained Dutch nationality. His son, the second applicant, was left in Morocco with his mother on his parents' divorce. The mother subsequently died, and the son, who visited his father regularly, sought to live with his father in the Netherlands. The complexities of the case are evident in the judgment, and include doubts about some factual matters. It appears to be a "borderline" case, as the European Human Rights Commission found that article 8 had been breached, but the European Human Rights Court found, by five judges to four, that article 8 had not been breached.

The European Human Rights Court noted that it was the father's decision to settle in the Netherlands which caused the separation with his son, and that he could continue to maintain the "degree of family life which he himself had opted for when moving to the Netherlands in the first place."[43]

One might be forgiven for finding this decision harsh on the applicants. While the father had originally decided to leave his son, he had left him in the care of the mother. It appears that it was the mother's death which eventually caused the father to seek to take care of the son by bringing him to the Netherlands. It appears that a determining factor in this case was the father's earlier decision to leave his son, and this is another example of the son's right to respect for family life being ignored or determined by the father's earlier actions.

Article 8(2) provides justifications for interference

The third question asked in consideration of article 8 is: can the interference with the right to respect for family life be justified?

Article 8(2) provides that interference is not allowed under the ECHR:

> [E]xcept such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The exceptions in article 8(2) are explicitly "public", in that they relate to the effect of any interference on the general community.

Most of the factors listed in the exception provision arguably relate to criminal offences. The criminal convictions of one family member (typically a male parent) are seen as causing the forfeiture

42 24 EHRR 62, 28 Nov 1996, appl 21702/93.
43 Ibid at 79.

of the family's right to have a private life, or, indeed, to be called private.[44] The legitimisation of state interference goes beyond situations involving criminal activity, however. If the male parent is dependent upon the state for economic support, and particularly in cases where the circumstances for this are not seen as justifiable by the European Human Rights Court, the ECHR allows the family to be separated. Again, this indicates a lack of support for the family which is not able to justify the label "private".

Criminal convictions affect the right to respect for family life[45]

It has been stated that criminal convictions of a family member can operate to deprive the whole family of their enjoyment of family life. While it may be accepted that family life exists, interference with it may be justified. In the making of value judgments about the validity or protection of family life it may be significant whether it is a parent or child who has committed the crimes in question.

The case of *Nasri v France* (*Nasri*)[46] concerned a dependent adult child who had lived in France from the age of four, was deaf and dumb, and communicated only through an individual elementary sign language. He faced deportation as a result of a series of crimes but it was found that his need for family support meant that deportation was still found to be disproportionate to the legitimate aim pursued.[47]

The fact that the applicant was not and was likely never to be an adult capable of earning a living appears to have weighed in his favour:[48] he still played the role of dependent child in his family.

The case of *Moustaquim v Belgium* (*Moustaquim*)[49] also involved an adult child. In that case the EHRCt found that despite Mr Moustaquim's numerous convictions, and despite the fact that Belgium had a legitimate aim in deporting him (the prevention of disorder), the deportation was an interference with family life which was not necessary in a democratic society.[50] Mr Moustaquim was twenty eight at the time of the EHRCt's decision.

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44 Different issues arise where the parent may be convicted of crimes of violence within the family. Their right to respect for family life may be harder to sustain, although not impossible, given the importance of family relationships to dependent children. Of course, the protection of the rights and freedoms of others would play a much more important role in such a case than for general crimes against non-family members, because while deporting the person who abuses other family members may protect them (and does not automatically put another family at risk), deporting the person who is a risk in the general community only transfers the risk to other communities. On the protection of children from abuse within the family in the international context, see G Van Bueren, *The International Law on the Rights of the Child* (1995).

45 This issue is also relevant to exception provisions which justify interference.

46 (1995) 21 EHRR 458, appl no 19465/92, series A, no 324.

47 Ibid at 477.

48 Ibid.

49 (1991) 13 EHRR 802 (A/193).

50 Ibid at 814–5.

Mr Moustaquim's case involved 147 charges of theft, robbery, assault and threatening behaviour. The criminal complainant in *Moustaquim*, was, while twenty eight years old, still a dependent son,[51] although he did not have the severe disabilities of *Nasri* as justification for this dependence. He had not achieved economic independence from his family, and for this reason, perhaps, his crimes did not cause him to forfeit his right to respect for family life. The family was still a "private family", worthy of respect, because the father in the family owned a (presumably successful) butcher shop.[52]

The case of *Moustaquim* may be conveniently compared with the case of *Boughanemi v France* (*Boughanemi*)[53] which also concerned a twenty eight year old male. In *Boughanemi*, the crimes were committed by a father of a dependent child. The father did not have close ties with his parents. Mr Boughanemi's right to respect for family life was not supported as was Mr Moustaquim's. In *Boughanemi* family life was found to exist, even though the family did not totally fulfil the ideal nuclear family model (the parents' relationship was tenuous, and the father did not provide adequately for his son). But judgments about the adequacy of the parenting occurred when it was decided that interference with family life was justified in *Boughanemi*. Mr Boughanemi had on one view by his failings as a father lost his dependent child the status of membership of a private family.

These last few cases show how decision makers can use a parent-figure, particularly the father, as the "representative" of the family who determines the family's fate. While decision makers may not analyse the decision making process in this way, it is interesting to assess the process and speculate about what analysis may be occurring, if subconsciously.

There seems to be a difference in the cases of *Nasri*, *Moustaquim*, and *Boughanemi*, albeit unacknowledged, between treatment of families whose fathers have committed some wrong, and those whose sons have committed some wrong. To put this another way, an adult male who is a parent or capable of being a parent, may be treated differently from an adult male who is not a parent or capable of being a parent. The latter is seen as someone's son, not responsible for his actions, and certainly not representative of the family. He does not have dependants. He is entitled to his family's support and should not be expelled from the country of occupation. If his family is protected by the state, it can be viewed as a private family, and this is because the father in that family is law abiding and provides for his family. The former is someone's father, responsible for his actions, and representative of the dependants in his family. He can therefore be expelled, and his family, including innocent minority dependents, must suffer the consequences. His family may be seen as a public family—no longer entitled to protection—because of the father's failure to fulfil the provider role.

51 Ibid at 808–10.
52 Ibid at 810.
53 (1996) 22 EHRR 228 at 245.

CONCLUSION

There are numerous areas of law, policy and decision making where the analyses involving the individualistic approach to human rights, and the public/private family distinction, can be undertaken.

Although this paper does not seek to review Australian law, I cite as one example the application of special benefit payments to new migrant families. Australian law allows the payment of special benefit to a migrant family within two years of their arrival only if they have "suffered a substantial change of circumstances beyond their control".[54] The question may be asked: "beyond whose control"? The responsibility is being placed on the shoulders of the parent, and the child can suffer impoverishment if a change of circumstances has occurred which was within the parent's control, while outside the child's control.[55] The legislative system allows the avoidance of consideration whether there has been "control" exercised in the process of migration by the underage dependent children.

In my view it is important that the right to respect for the family not be restricted to families whose fathers comply with the role dictated by traditional notions of the "private family". For example, if serious crimes warrant deportation because of the need to protect the society of the state concerned, (which some would question) why should the status of the criminal within their family be of significance? Indeed, if it is significant, I would argue that its significance should be different from that shown in the cases of *Nasri*, *Moustaquim* and *Boughanemi*.

The cases are examples of an analysis which protects the family if the *child* (even an adult child) commits crimes or other non-compliant behaviour. (The father in that family assures its "private family" status.) The analysis does not, however, protect the family if the father of underage dependent children commits the crimes. (The father has given his family a "public family" status.) Why is it not seen as important for an innocent dependent child to have access to their father despite his failings? While this factor might not interest the state, I would argue that it should. This, of course, was the concern in *Teoh*, which I noted at the commencement of this paper. In *Teoh*, it was found that the innocent underage child whose parent had committed crimes still needed that parent. This need, it was found, should have been recognised by the state.

It may be the private/public distinction, the focus on individual rights, or a combination of both, which result in the rights of family members being sometimes inconsistently and unfairly determined, or in the rights of "silent" family members being determined by

54 Section 739A *Social Security Act* (Cth) 1991.

55 Cases before the Commonwealth Administrative Appeals Tribunal (AAT) indicate the concern expressed by AAT members at the plight of such migrants: *Chelechkov v DSS and Antipina v DSS* (AAT, Mathews J, 18 February 1998, unreported); *Zoarder v DSS and Khatun v DSS* (AAT, Mathews J, 18 February 1998, unreported); *DSS v Singh & anor* (AAT, P Burton, 2 March 1998, unreported); *Secara v DSS* (AAT, Mathews J, 12 March 1998, unreported); *DSS v Fomin and DSS v Fomina*, (AAT, Mathews J, 12 March 1998, unreported).

reference to representative adult family members. These issues are relevant to our treatment of migrants, but will also be relevant to a range of legal and social practices in our society which impact on the family. Support for families should occur, but as equitably as possible.

The times when the state may or should protect the family, or overstep the boundary of the privacy of the family, need to be properly considered. Our judgments of the sorts of families which are worthy of state support would benefit from closer scrutiny. Such consideration would involve first a simple acknowledgment of the issues involved, before an attempt at fair and open analysis can be achieved.[56] In relation to children, who are particularly vulnerable, "the question of the evolving role of the state ... may well be one of the basic social issues of our times."[57]

56 See J Nafziger, "The General Admission of Aliens under International Law"(1983) 77 *Am J Int L* 803. He states that the lack of acknowledgment of the rights of the individual or the family in migration law has stunted development of proper principles guiding state action or inaction which affects individuals.

57 J Himes, director of UNICEF international child development centre, in P Alston (ed) *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) at v.

APPENDIX 1: ICCPR PROVISIONS

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

Legitimate Expectations, Human Rights and the Rule of Law

IAN HOLLOWAY*

INTRODUCTION

Few, if any, of the High Court's administrative law pronouncements have attracted as much commentary as the 1995 judgments in *Minister of State for Immigration and Ethnic Affairs v Teoh (Teoh)*[1]. For the most part, reflection on the Court's administrative law work remains the province of the academic lawyer, rather than the practicing barrister or journalist. Publicity-wise, administrative law is very much the poorer cousin of constitutional law. One searches the Law Reports in vain for an Australian administrative law decision which has entrenched itself in the collective consciousness as, for example, the *Engineers* case,[2] the *Tasmanian Dams* case[3] or *Mabo*.[4]

But *Teoh* was different. It attracted a notice that stretched far beyond the compass of those ordinarily interested in the doctrine of natural justice.[5] In part, one supposes, this reflects the fact that today

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1 (1995) 183 CLR 273.

2 *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129.

3 *Commonwealth v Tasmania* (1983) 158 CLR 1.

4 *Mabo v Queensland* (No 2) (1992) 175 CLR 1.

5 A small sample of the torrent—and breadth—of commentary which followed the judgment in *Teoh* includes: M Allars, "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: *Teoh's* Case and the Internationalisation of Administrative Law" (1995) 17 *Syd L Rev* 204; R Snell, "*Kioa to Teoh*" (1995) 20 *Alt L J* 136; K Walker, "Treaties and the Internationalisation of Administrative Law" in C Saunders (ed) *Courts of Federal Jurisdiction: The Mason Court in Australia* (1996) at 204; the Hon A Nicholson, "Address to the Children First! Forum", Melbourne 1995; the National Children's Youth Law Centre, "High Court Breathes New Life into CROC" (1995) 3 *Rights NOW!* 2; B Lane "Court Upholds Obligation to Rights Treaties" *The Weekend Australian* 8 – 9 April 1995, 3.

the work of the High Court generally attracts greater attention than it did in years past. Another reason for *Teoh's* high profile, undoubtedly, is the fact that the case concerned children's rights. Yet a third reason surely must be the essence of the holding itself. In holding that the simple ratification of a treaty could give rise to legal rights, the Court was clearly introducing a significant change to the law. And in doing that, the Court was clearly altering the way in which the rule of law had traditionally been understood to operate in Australia.

In *Teoh*, as most will remember, the High Court held that the ratification by the executive of a treaty gave rise to a legitimate expectation that it would be complied with, and that if the executive intended to deviate from the terms of a ratified treaty, it first had to provide an affected person with an opportunity to argue against the deviation. As Mason CJ and Deane J acknowledged in their joint judgment,[6] until *Teoh* it was well established that the provisions of an international treaty to which Australia is a party did not form part of Australian law until they had been incorporated into municipal law by a valid Act of Parliament.[7] That was as a consequence of our constitutional system of separation of powers. For us, the separation of powers lies at the heart of the rule of law. In *Teoh*, however, the High Court held that the ratification could give rise to domestic legal consequences, quite independently of parliamentary inaction.

Both the outcome and the reasoning in *Teoh* have been subject to much comment and criticism. It is not my aim here to recapitulate that. Rather, it is my contention in this paper that regardless of whether one approves of the holding, *Teoh* represents a paradigm human rights judgment cast in the common law mould—a holding by the judicial branch that irrespective of Parliament's intention, the law must act so as to protect the interests of the powerless against the (comparatively) powerful state. In this sense, I argue, the doctrine of legitimate expectation upon which *Teoh* was based, and the broader administrative law doctrine of natural justice of which the legitimate expectation is a part, is an integral part of the rule of law as we understand it.

LEGAL CHANGE AND THE DYNAMICS OF DENIAL

One of the most interesting things about leading cases is that so often, they deny being ground-breaking. One might call this "the dynamics of denial". In *Donoghue v Stevenson*,[8] for instance, Lord Atkin stressed that his judgment was really quite restricted in its ambit. In an attempt to counter the alarm raised by Lord Buckmaster,

6 (1995) 183 CLR at 286 – 287.

7 Eg, *Chow Hung Ching v R* (1948) 77 CLR 449; *Bradley v The Commonwealth* (1973) 128 CLR 557; *Simsek v Macphee* (1982) 148 CLR 636; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Kioa v West* (1985) 159 CLR 550; *Dietrich v R* (1992) 177 CLR 292; *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418.

8 [1932] AC 562.

he made a point of saying that his views about the neighbour principle were restricted to a really quite narrow class of cases. Viewed from our perspective nearly seventy years on, it is plain just how disingenuous Lord Atkin was being—and how right Lord Buckmaster was when he wondered plaintively: "Where will it all end?"[9]

To take another example somewhat closer to home, *Ridge v Baldwin*[10] has come to represent the dawn of a new, non-formal approach to the doctrine of natural justice.[11] But in point of fact, Lord Reid's speech is pitched very much in terms of an analysis of old cases. Indeed, his chief criticism of the Court of Appeal's decision was that the judges there did not look back beyond 1911, and the decision in *Board of Education v Rice*.[12] In contrast, Lord Reid traced back a line of cases to 1615,[13] in which natural justice was held to apply to dismissal from employment. It was on that basis that he concluded that Chief Constable Ridge was entitled to a hearing before being dismissed. Notwithstanding the way in which we have come to conceptualise *Ridge v Baldwin*, there is little, if any "new property"-type analysis in Lord Reid's speech.

The very same observation can be made about *Teoh*. It is clear that the High Court was introducing a novelty into the Australian legal system. But in their joint judgment, Mason CJ and Deane J denied that this was the case. The judgment makes plain that their Honours were keen to defuse possible criticism that they had upset long-held constitutional understandings. "Legitimate expectations", Mason CJ and Deane J said, "are not equated to rules or principles of law".[15] That is why holding that ratification of a treaty could give rise to an obligation to observe natural justice did not amount to a "back-door" incorporation of the treaty.[16] Of the majority judges, only Gaudron J was willing explicitly to blaze a new legal trail.

In one sense, this is true enough. As Mason CJ and Deane J said,"[t]he existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way."[17] Rather, it simply means that "the person affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course".[18] But looked at another way, this part of the judgment seems just as unconvincing as Lord Atkin's soothing reassurance in *Donoghue v Stevenson* that the floodgates were not about to be opened, or Lord Reid's claim that it was the old common law that was the basis for the application of the requirement to observe natural justice to administrative functions.

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9 In this regard see, especially, his comments, ibid at 577.
10 [1964] AC 40.
11 See the paper by the Hon J Doyle: "Accountability: Parliament, the Executive and the Judiciary" in the present volume of materials.
12 [1911] AC 179.
13 *Bagg's Case* (1915) 11 Co Rep 93b; 77 ER 1271.
14 [1964] AC at 66 – 71.
15 (1995) 183 CLR 273 at 291.
16 Ibid.
17 Ibid.
18 Ibid at 291 – 292.

PROCEDURAL RIGHTS AS THE SOURCE OF SUBSTANTIVE LAW

Implicit in the formulation of Mason CJ and Deane J, that the implication of an obligation to observe the rules of natural justice did not amount to the introduction of a "binding rule of law",[19] is a value distinction between substantive rights and procedural rights. To require the latter, their Honours were saying, is not so serious a thing—at least not so constitutionally serious a thing—as to require the former. And requiring the latter does not amount to a change in "the law". But with respect, this is really to misunderstand the nature of substantive legal rights in the common law system. For in the common law tradition, substantive and procedural rights are so interwoven that to distinguish between the two is to draw a distinction without a doctrinal difference.

This is a critical point. The notion of rights—legally recognisable rights—in our society has a very different philosophical basis from civil law societies. In other, more positivistic, systems, rights may stem from Declarations or Charters. But in the common law system, they stem from gradualism; from the accumulation of judicial pronouncements, all of which began with the old forms of action. As Sir Henry Maine reminded us in his classic work *Early Law and Custom*, "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure".[20]

At a time when it has come to be accepted by many that it is imperative for Australia to adopt a constitutional Bill of Rights if our liberties are not to be eroded, this may sound a little jarring. But the fact is that in the common law system, procedure came before substance. One of our most venerated aphorisms in the common law is *ubi jus, ibi remedium*—"where there is a right, there is a remedy".[21] Historically, though, it is more correct to state the aphorism in the converse: in order for there to be a right, there must first be a remedy—*ut remedium sit esse jus oportet*.

Sadly, many of us today tend to be agnostic about legal history. The historical relationship between adjectival and substantive law is something that we tend to overlook in our discourse about rights. But if we consider, say, the law of *habeas corpus*—from which springs what most people would consider to be one of our most precious civil rights, we can see an example of how a substantive right—the right not to be detained without lawful authority—stemmed almost completely from the imposition of procedural obligations on the executive decision-making process.

19 Ibid at 291.
20 H Maine, *Early Law and Custom* (1883) at 389.
21 See *Ashby v White* (1704) 92 ER 126 at 136 (per Lord Holt CJ).

PARTICIPATION IN CIVIL SOCIETY AS A HUMAN RIGHT

Regardless of whatever else we might think it ought to contain, it is clear that one of the corollaries of our formulation of the rule of law is that the courts remain the final arbiters of lawfulness. In recent years, it has become fashionable to talk of what Sir Isaiah Berlin called "positive liberty"—very crudely put, the notion that we should have a legally enforceable entitlement to state benefits.[22] But for the most part, discourse over human rights remains focussed on the limitation of state power—what Berlin described as "negative" liberty. From a lawyer's point of view, therefore, the debate about human rights and the debate about the rule of law are one and the same. The rule of law is concerned with the extent to which the judicial branch will check the authoritarian tendencies of the two political branches. The law of human rights is but one particular aspect of this enquiry.

In a state founded on democratic principles, it is axiomatic that the basic human right (beyond access to the necessities of life) is the right to participate in civil society. Indeed, the very notion of representative democracy is predicated upon people exercising their civil rights.[23] It was this view that lay at the base of the freedom of political communication cases.[24]

But for democracy to be effective, or for the notion of political accountability to have any real meaning, people must not only be able to exercise their civil rights—they must also be accorded respect as individuals by the government. And that, precisely, is what the doctrine of natural justice is intended to ensure—that our importance as individuals is not overlooked by the political government. The doctrine of natural justice is both the *quid pro quo* for the rule of law and the *sine qua non* for active democracy.

The Roots Of The Administrative Constitution

It is not surprising, therefore, that much of our administrative law doctrine is rooted in the Enlightenment and in the whiggish values of the Glorious Revolution. The doctrine of *ultra vires*, and of jurisdictional control generally, is premised on the twin foundations of the separation of powers and the supremacy of Parliament, both of which established themselves in our legal vocabulary as a result of the constitutional tumult of the seventeenth century. But at the same time, the cases make it clear beyond question that in our constitutional system parliamentary supremacy only goes so far. Even in the United Kingdom with its unwritten constitution, the notion of legislative paramountcy has become highly fictionalised, and is limited by an unmistakably authoritative concept of fundamental justice. Much of what we teach in administrative law today—and that which

22 On this, see below n 40, and accompanying text.

23 I should state that while recognising that at some level they differ, in this paper I am using the expressions "civil rights" and "human rights" interchangeably.

24 *Nationwide News v Wills* (1992) 177 CLR 1; *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106.

makes it seem so confusing to our students—involves the exploration of this dichotomy: between what one might describe as the *lex* and *jus* of administrative law.

Natural justice began life as part of a doctrine of much broader reach—the idea of "natural law". In a way, natural law was the original English constitution. The notion that there were some things that one simply did not do, even if one were King, unless one wished to suffer eternal damnation, was the first limit on the power of government. And as a rhetorical device, at a time when the various organs of state were jockeying for power, judicial reference to natural law understandably could prove to be quite effective. It is not at all surprising to learn that Coke was one of its chief proponents. In *Calvin's Case*, for instance, he said:

> [T]he law of nature is part of the law of England ... [T]he law of nature was before any judicial or municipal law ... [T]he law of nature is immutable. The law of nature is that which God at the time of the creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex æterna*, the moral law, called also the law of nature.[25]

The Systemic Role Played By The Doctrine Of Natural Justice

We tend not to think about them much today, but old judgments like this are still important, for they illustrate what one might call the "spiritual aspect" of the doctrine of natural justice. While we may not know precisely what led the courts gradually to limit the reach of natural justice to a mere two-headed rump of the old natural law, the fact that the precedent upon which the courts rely in natural justice cases has its origins in the constitutional settlement era plays an important role in shaping the reach of judicial review. When we consider the appropriate role to be played by the courts in supervising the work of the executive, we ought to bear in mind the fact that the description of the doctrine as "natural" justice has endured to this century. This is not only a testament to the doctrine's roots in a view of the procedure that a Christian God would have intended be observed had he been an administrative adjudicator, but it also says a great deal about our own antipathy towards executive power.

Paul Craig has suggested that natural justice fills two complimentary roles in public law.[26] The first he describes as an "instrumental" role: "helping to attain an accurate decision on the substance of the case".[27] Professor Wade has made this same point in the course of arguing that the doctrine ought to be given a broad scope:

> The whole theory of "natural justice" is that ministers, though free to decide as they like, will in practice decide properly and responsibly once the facts have been fairly laid before them ... Arbitrary exercise of an administrative power the courts cannot control, for policy is in the last resort arbitrary. But much can be done to prevent an appearance of

25 (1608) 7 Co Rep 1 at 12b; 77 ER 377 at 391 – 392.

26 P Craig, *Administrative Law* (3rd ed 1994) at 282 – 283. See also D Galligan, *Due Process and Fair Procedures* (1996).

27 P Craig above n 26 at 282.

> arbitrariness, and since in practice it is far more likely to be accidental than intentional, a procedure which satisfies "natural justice" is the best insurance against such accidents.[28]

Stated another way, the instrumentalist view is premised on the same thing as the adversary system: that hearing both sides of a dispute will lead to "better" decision-making. In some cases, no doubt, this will be true. Yet, the instrumentalist justification for natural justice is subject to some significant caveats. An instrumentalist view may be borne out in an adversarial hearing before an administrative adjudicator, in which matters of fact are in controversy. But for many of the types of decision-making processes in which present-day members of the executive engage, an instrumentalist claim would seem to be unconvincing. In the case of a policy-laden decision which reflects the long-held political views of a governing party, for example, can one say that the existence of the policy amounts to a violation of the bias rule? Or can one say that in the case of what is sometimes described as a "polycentric" decision, a decision-maker must confer with every affected person on every aspect of the issue which affects them in order to establish the legitimacy of the decision-making process? Neither view immediately commends itself as a matter of either logic or instinct.

The other rationale for the requirement to observe natural justice which Craig offered was what he termed the "non-instrumentalist" justification. In my view, "systemic justification" is a better term, but what Craig included in the second heading are things like ensuring faith in the impartiality of the legal and political system, and promoting the dignity of the human condition. This justification, too, has its limits—should we, for instance, tailor what are often expensive decision-making processes to suit the demands of the overly sensitive—the sorts of people who in private law would be described as the "thin-skulled"?

But even taking this into account, the systemic justification for natural justice surely has much to recommend it. For one thing, it reflects a concern for one of the most critical features of our conception of the rule of law, that we do not require excessive police presence in our society, because compliance with the law is for the most part voluntary. This was a point noted made by Lord Denning. In *The Road to Justice*, he wrote that people "do not obey the law simply because they are commanded to do so; nor because they are afraid of sanctions or of being punished. They obey the law because they know it is a thing they ought to do."[29] We respect the law, in other words, because the law respects us.

The systemic aspect of natural justice also satisfies the republican aspect of our constitutional tradition. According to this view, the correctness or preferability of a decision depends not so much on whether it meets some objectively verifiable criterion of "rightness", but rather whether it has satisfied our social demand for inclusive-

28 H R W Wade, "Quasi-Judicial and its Background" (1949) 10 *CLJ* 216 at 229.
29 A Denning, *The Road to Justice* (1955) at 2.

ness in the governmental process. This view was recently explored by T R S Allan. In Allan's view:

> [T]he value of participation is not merely, or even primarily, instrumental. It is democracy's guarantee of the opportunity for all to play their part in the political process, in exercise of their moral responsibility as equal citizens, which explains the implicit connection between participation and respect.[30]

Translating this into Australian constitutional terms, the argument is that our system of representative democracy depends for its lifeblood upon the participation of the public. Anything, therefore, which is likely to increase public participation in government, or in governmental decision-making processes is a good thing per se—regardless of the merits or demerits of an individual decision. Obviously, public confidence in the institutions of government is a central concern, for without it, there is likely to be little inclination to participate. And without a public perception that one will be treated fairly by the government, it is doubtful that the confidence necessary to engender a keenness to participate will exist. It is for this reason that the doctrine of natural justice is a *sine qua non* for our system of government.

FROM EIGHTEENTH CENTURY TO TWENTIETH: NATURAL JUSTICE AND THE CHANGED CONTEXT OF PUBLIC ADMINISTRATION

As has been discussed, natural justice can trace its origins to a medieval conception of natural law. For much of its history, judges felt more-or-less free to mould and adapt the concept of natural law and "natural equity" to meet the demands of individual cases as they arose. It was only in the nineteenth and twentieth centuries that the doctrine found itself needing to engage in a serious process of self-definition, and finally began to evolve into the rule-based form that we know it in today.

For our purposes, there were certain factors which made the twentieth century the scene for real concerted conflict over the reach of natural justice in a way that its predecessor had not been.[31] One, of course, was the fact that more often in this century than at any other time since the demise of feudalism as a working system, society has been mobilised *en masse* in the interests of the state. Ours has been the century of both total war and cold war. It has also been the century of Great Depression, long-term recession and jobless recovery. The existence of a succession of perceived national crises—which stretched in a near un-broken line from about 1903[32] to the mid-1960s[33]—served to give the state a much greater claim on the private lives of the citizenry than it had previously had.

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30 "Procedural Fairness and the Duty of Respect" (1998) 18 *Ox J Leg Stud* 497 at 509.

31 These factors were discussed in W Friedmann, "Judges, Politics and the Law" (1951) 29 *Can Bar Rev* 811.

32 With the publication of E Childers' novel *The Riddle of the Sands* (1903), which first raised a popular fear in Great Britain of German imperial expansionism.

A second factor, which in fact is related to the first, is the increased trend towards urbanisation that took place in the nineteenth and twentieth centuries. Our important social myths notwithstanding, Australia is a tremendously urbanised society. Simply put, people began to live in much closer contact with one another than in the past. So even if it had been true at some point in the past that man could be an island, this became quite impossible after he forsook the bush for the city. And the inevitable offshoot of the great population shift to the cities was a growth in governmental power: both as planner of public works, and as arbiter of disputes over competing claims on public wealth.

The third cause for the expansion of government in this century is related to, and in a philosophical sense underlies, the first two. As Friedmann once described it, there has been in the modern era "an evolution of social philosophy".[34] The advent of the modern era brought about an amendment to the terms of the old whiggish conception of the social contract. Dicey discussed this in his work *Law and Public Opinion in the Nineteenth Century*.[35] In Dicey's view, in the modern era "an alteration [became] perceptible in the intellectual and moral atmosphere of England"[36]. He described this alteration as the "growth of collectivism", which he attributed to a combination of moral philanthropism[37] and perceived commercial necessity.[38] The result was a decided push towards executive-empowering legislation (which, as we all know, Dicey thought anti-constitutional[39]), away from the emphasis on local regulation that had been the feature of welfare provision up to and including the last century.

Accompanying this shift was a burgeoning desire for Sir Isaiah Berlin's "positive liberty".[40] This is the notion that if it is to have any substantive meaning, freedom must be more than the absence of external restraint. It should also include the ability actually to fulfil one's desires. "The 'positive' sense of the word 'liberty' derives from the wish on the part of the individual to be his own master", wrote Berlin.[41] Positive liberty is another offspring of the Enlightenment; of the idea that "the essence of man is that they are autonomous beings".[42]

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33 The 1960s are chosen here because viewed with the hindsight that the passage of thirty years gives, they seem to represent a sea change in the attitudes of people in the Western world to authority. Perhaps a later generation will see it differently.

34 Friedmann, above n 31 at 822.

35 AV Dicey, *Law and Public Opinion in the Nineteenth Century* (2nd ed 1914).

36 Ibid at 245.

37 Ibid at lxi:

> In truth a somewhat curious phenomenon is amply explained by the combination of an intellectual weakness with a moral virtue, each of which is discernible in the Englishman of today.

38 Ibid at 247.

39 E C S Wade (ed), AV Dicey, *Introduction to the Study of the Constitution* (10th ed 1959).

40 I Berlin"Two Concepts of Liberty", in *Four Essays on Liberty* (1969) 131 ff.

41 Ibid at 131.

42 Ibid at 136.

A craving for positive liberty is what lies at the heart of much of today's talk about "empowerment". But the realisation of positive liberty must involve coercion—most obviously a forced redistribution of opportunity-providing resources (such as property). Leaving aside the question (with which Berlin wrestled) of whether this renders the idea a self-negating proposition, it is clear that a clamour for positive liberty involved a profound change in the ideal of governance. Until recently our legal history was the story of the deliberate exclusion of the state from the sphere of private activity. From the Magna Carta onwards, the story of the common law was the story of the evolution of "negative liberty" in Berlin's terminology—liberty in the sense of being liberated from governmental interference.

"Freedom", as our passports say, meant the freedom to go about one's affairs without let or hindrance. Freedom meant the King's peace. Under a negative conception of liberty, the expectations of the state are very limited. One expects the state to provide an army to protect us from without and a police force to protect us from within, and a series of law courts in which we can resolve our private disputes in a peaceful manner. Apart from that, one wants just to be left alone. As Dicey and others have noted, however, in the nineteenth century this began to change. People began to expect the state to do a great deal, indeed. Rather than leaving them alone, people expected the state to play an active part in their day-to-day lives. They expected it to provide them with benefits if they were sick, or poor, or unemployed. They expected it to do things to make our society better; more just. In a word, they expected the state to help shape society.

Together, these three shifts drove government to increase its level of activity, and its consequent output. The state was quite willing to accede to our demands to make society better, but it demanded a quid pro quo. It demanded the ability to coerce us and to categorise us; to lump us in with others and to treat us as members of groups. Moreover, to cope with the new pressures and new demands, governments demanded the power to plan, rather than merely to react. It was at this stage that the doctrine of natural justice became truly important as a means of safeguarding human rights.

This concern was perhaps even more pronounced in Australia than elsewhere.[43] Paul Finn has written about the greater Australian tendency to make use of centrally-administered boards in the nineteenth century than was the case in England,[44] but arguably, the federation movement itself was partly a manifestation of the feeling

43 W G K Duncan, "Modern Constitutions", in *Studies in the Australian Constitution* (1933) at 10:

> [T]he whole conception of government, and governmental functions, has changed during the course of this century. The state can no longer be conceived as a policeman "keeping the ring" and enforcing a few Marquess of Queensberry prohibitions. The state must now assume an active and positive role in the regulation of the whole social process. In particular, it has been forced to undertake an elaborate network of "social services" in order to mitigate the consequences of economic and social inequality.

44 P Finn, *Law and Government in Colonial Australia* (1987).

that in the modern polity, planned efficiency was more important than old-fashioned notions of individual negative liberty. In an article written just two years after federation, Harrison Moore alluded to this:

> The statute book abounds with instances not merely of new functions of administration cast upon old or new authorities, but with powers of a very far reaching kind. This is largely due to a change in the working of our constitutional forces. During the nineteenth century, the preparation of legislation has come to be one of the principal duties of the Government, and it takes its modern form from the fact that it is no longer devised by a body distinct from and jealous of the Executive, but expresses to a very great extent the views of the Executive as to the public needs. Thus we have in an ever increasing degree the delegation of a power of supplementary legislation to the Government.[45]

Looking at these shifts from the broad standpoint of the doctrine of natural justice, it is interesting to reflect on the fact that the aspiration for "natural" justice, and the competing desires for governmental professionalism and efficiency, stem from the very same values. Fortesque J once claimed that natural justice was a legacy of the Garden of Eden,[46] but this was just an instance of the search for what one might describe as the authority of antiquity. In reality, natural justice—and its parent natural law—was a creature of the Enlightenment. The Enlightenment was concerned with the liberation of humanity; of improving the human condition. But this was no less the goal of the welfare state. The tension between individual fairness and collective efficiency that has been played out in the courts in this century is almost perfect in its paradox. The humanistic goals which have driven both the executive and the judiciary have been one and the same. The problem—and this, too, is a legacy of the peculiarly English version of the Enlightenment, which we have enshrined as a fundamental principle of governance in Australia, is that the competing players were driven by constitutional design to view human interest from a comparatively narrowly confined perspective. From the perspective of the executive, of course, the rub in this lies in the fact that according to our conception of the rule of law, the courts must have the final word.

THE LEGITIMATE EXPECTATION, HUMAN RIGHTS AND THE RULE OF LAW

The notion underlying the doctrine of legitimate expectations upon which the judgment in *Teoh* was based is one not difficult to understand. As McHugh J once put it, where the state has done something to lead us to expect, legitimately, that we shall obtain or continue to enjoy a benefit or privilege, we ought to be entitled to be heard in opposition to any proposed exercise of a power which would deny us

45 H Moore, "The Enforcement of Administrative Law"(1903) 1 *Comm L Rev* 13 at 14.
46 *R v Chancellor of the University of Cambridge* ("Dr Bentley's Case") (1723) 1 Str 557 at 567; 93 ER 698 at 704.

of that expected benefit or privilege.[47] Stated in this way—at its most simple level of formulation—the concept seems merely to represent another aspect of the notion of "fairness writ large", to borrow the words of Lord Morris.[48] It is, moreover, precisely the same sort of sentiment which underlies the whole of the doctrine of natural justice. Under the theory of eminent domain, Parliament is empowered (subject, of course, to the provisions of the Constitution) to extinguish any proprietary interest. It was to temper the stark harshness of this proposition that the courts came to transform the old natural law into what we now understand to be the twin pillars of natural justice: the bias rule and the hearing rule. The courts have never denied the right of parliament to act harshly, but they have said that the interests of fairness require a prior hearing before this can take place. The basis of the concept of legitimate expectation is precisely the same—an instinctive judicial revulsion against an assertion of arbitrary power by the state. Lord Denning, who is credited with having invented the expression, has said as much. He has said that he is "sure it came out of my own head and not from any continental or other source".[49]

The case in which Lord Denning introduced the notion of legitimate expectations into the common law was *Schmidt v Secretary of State for Home Affairs*.[50] The first case in which it was applied by the High Court was the 1977 judgment in *Heatley v Tasmanian Racing and Gaming Commission*.[51] Since then, the doctrine has been discussed in several cases in the High Court,[52] and it is now accurate to say that it has come to be a tenet of Australian administrative law. A classic enunciation of the doctrine can be found in the judgment of Mason J in *Kioa v West*:

> It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[53]

Now, in evaluating the value distinction made by Mason CJ and Deane J in *Teoh*, between substantive "law" and mere rights to procedure, it is interesting to look at the cases in which the doctrine has

47 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 679. For another general description of the "common sense" basis of the duty, see *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 54 (per Dawson J).

48 In *Furness v Whangerei High Schools Board* [1973] AC 660 at 679.

49 In a letter to C Forsyth, quoted in C Forsyth, "The Provenance and Protection of Legitimate Expectations" (1988) 47 *CLJ* 238 at 241.

50 [1969] 2 Ch 149.

51 137 CLR 487.

52 Including *Salemi v MacKellar* (No 2) (1977) 137 CLR 396, *FAI v Winneke* (1982) 151 CLR 342, *Kioa v West* (1985) 159 CLR 550, *South Australia v O'Shea* (1987) 163 CLR 378, *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, *Annetts v McCann* (1990) 170 CLR 596, *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, *Johns v Australian Securities Commission* (1993) 116 ALR 567 and, of course, *Teoh*.

53 (1985) 159 CLR 550 at 582.

been relied upon by the High Court, and to contrast them with the ones in which the doctrine has been rejected. For one gets the distinct impression that rather than amounting to a strict doctrine of adjectival law—of legal procedure, in other words—whose application can be determined according to readily ascertainable principles without regard to the merits of the decision in question, it has been used by the Court as a means of redressing perceived instances of substantive unfairness. For constitutional reasons, the Court cannot directly dictate the substantive outcome of a given decision-making process. But it can, through the imposition of procedural requirements, effectively prevent the state from failing to take account of individual circumstance. It can, to put it another way, enforce the basic human right to be accorded respect as an individual.

It is telling that in each of the cases in which a plea of legitimate expectation has been successful, the plaintiff has been a disadvantaged person who has suffered obvious—and substantive—unfair treatment at the hands of the executive. *Heatley v Tasmanian Racing and Gaming Commission* involved an attempt to exclude a member of the public from race meetings without notice, and without an opportunity to respond to allegations that had been made against his personal character. In *FAI v Winneke*,[54] the issue was the refusal to renew a long-held licence to sell workers' compensation insurance on the basis of suspicions about the insurer's level of capitalisation—despite a specific request by the company to be given an opportunity to respond to any such concerns.

Kioa v West, as most will remember, involved the plight of a person who was to be deported on the basis of unsubstantiated allegations. Similarly, Mr Haoucher was a prospective deportee—who was to be deported contrary to the government's own Criminal Deportation Policy. Mr Teoh himself was another prospective deportee—who was fighting deportation in order, among other things, to protect his children's interests. In *Annetts v McCann*,[55] the Court acted to ensure that the dead were not spoken ill of. Their Honours found that in the course of investigating a death which involved possible aspersions being cast against the character of the deceased, a coroner was required to allow the deceased's parents the right to intervene to protect their dead son's reputation. So, too, in *Ainsworth v Criminal Justice Commission* did the High Court act to protect a reputational interest—the right to appear before a parliamentary committee with an unsullied reputation.

In contrast, in the two cases in which the plea has failed in the High Court,[56] the plaintiff's interests were not ones which instinctively cry out for substantive protection. In *South Australia v O'Shea*, the plaintiff was a convicted paedophile who had previously broken the conditions of his parole, and who had been picked up in circum-

54 (1982) 151 CLR 342.

55 (1990) 170 CLR 596.

56 Leaving aside for the moment *Salemi v MacKellar* (1977) 137 CLR 396. The plea failed in that case, but it was decided before the doctrine had really become accepted as a part of Australian law.

stances which led to the inference that he was planning to re-offend. And in *Quin*, the essence of the claim was made by a former magistrate that he had a right to a judicial appointment, without the requirement to have his qualifications judged according to their merits. In neither case would we feel that any sort of civil right had been denied—whereas we would in the first group of cases.

When I teach administrative law, I tell students that there are two reasons that it can be such a frustrating subject to study. The first is that while the subject matter of the disputes is largely new—there was simply no such thing as social security in our grandparents day, for instance—the rules by which the conflict is played out are very old. That is because the fora in which the disputes are resolved must be, at the end of the day, the common law courts. In some ways, I say, administrative law is like a new wine poured into an old bottle.

The second reason is that the disputes must be resolved according to conflicting criteria. On one hand, the terms of the Constitution forbid judges from engaging in a consideration of the merits of governmental action. But on the other, the accumulated judicial instinct of several centuries is to act as a bulwark against authoritarianism. In almost every judicial review case, the judge will feel both of these masters—the Constitution and common law tradition—pulling at him or her. Put kindly, this can sometimes lead to administrative law judgments having quite different texts and sub-texts, which can make them difficult to read.

The question posed by this conference was whether administrative law and the rule of law are still part of the same package. This particular session is on human rights aspects of the question. To end where this paper began, if one reads both the text and the sub-text of the High Court's judgment in *Teoh*, the answer to the conference question must surely be "Yes".

Merits Review Tribunals

Tribunal Reform: The Government's Position

RENÉE LEON*

THE GOVERNMENT PROPOSAL

In February 1998, the Federal Government announced its intention to create a new Administrative Review Tribunal (ART) by the amalgamation of the Administrative Appeals Tribunal (AAT), the Social Security Appeals Tribunal (SSAT), the Refugee Review Tribunal (RRT) and the Immigration Review Tribunal (IRT). Amalgamation of a number of specialist review tribunals in this way was recommended by the Administrative Review Council in its Report No 39 (*Better Decisions* report).[1]

The Attorney General's Department has since provided details of the proposed amalgamation to the tribunals involved, Departments and agencies with significant review jurisdictions, and a range of interested organisations, including the Administrative Review Council, the Law Council of Australia, the Australian Council of Social Services, the National Association of Community Legal Centres, and organisations representing the specific interests of tribunal users in the main jurisdictions of immigration and refugee law, social security, and veterans' compensation. The Department has sought the views of these stakeholders in order to refine its proposal where necessary.

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1 Administrative Review Council, Report No 39 *Better Decisions: Review of Commonwealth Merits Review Tribunals*, (1995) (hereafter *Better Decisions* report). The Council recommended the inclusion of the Veterans' Review Board (VRB) in the new amalgamated tribunal (see Recommendation 87). However, the Government decided to retain the VRB in its present form in recognition of the special needs of veterans for a dedicated review body.

The thrust of the Government's proposal for reform is to increase efficiency and simplicity in the merits review system, while retaining the essential elements of fairness and independence that have made Australia's merits review system such an effective tool for accountability and justice for individuals in our society.

The main elements of the Government's proposal for amalgamation reflect changes in the following areas:

- the structure and management of the new tribunal
- access to second tier review, and
- measures to improve efficiency and simplify proceedings.

The Government's proposal does not deal with a number of areas that have been the subject of some media discussion and comment. In particular, no decisions have been made to change the basis of access to merits review or to give Ministers the power to direct the ART as to the policy it is to apply when making review decisions. The Government did announce, in March 1997, that it intends to undertake a broad review of the nature and scope of merits review. That review, which will be conducted by the Attorney General's Department, will consider:

- which decisions should be subject to merits review,
- the test that should be applied in conducting merits review, and
- the role of government policy in merits review.

However, these issues are not dealt with in the present Government proposal and there are no plans to change the current arrangements on each of these matters until that broader review has been undertaken. That review will include consultation on each of these issues.

The current proposal for amalgamation of the merits review tribunals will not give portfolio Ministers any greater power than they now have to exclude decisions from merits review or to direct the tribunal as to how to decide particular matters.

STRUCTURE AND MANAGEMENT

Divisional structure

The ART will be located within the Attorney General's portfolio and will be a single amalgamated body, under the leadership of a President. The President will be a statutory office-holder, appointed by the Governor-General on the recommendation of the Attorney General, for a fixed term of up to five years. Appointment as a statutory office holder will provide the President with security from political interference or removal from office, enabling him or her to manage the ART with independence from the executive arm of government. The President will manage the financial and human resources of the ART, and will have overall responsibility for funding arrangements (discussed below) and for the allocation of resources across the ART. The President will sit on significant cases and will be responsible for developing best practice across Divisions, ensuring

efficiency and productivity in case management, and providing information on precedents to encourage consistency in decision making.

The ART will consist of a number of Divisions, reflecting the significant review jurisdictions. These will be the Immigration and Refugee Division, the Income Support Division, the Taxation Division (which will include the Small Taxation Claims Tribunal), the Compensation Division, the Veterans' Appeals Division (which will handle review of decisions by the Veterans' Review Board) and the Commercial and General Division (which will comprise the remaining smaller jurisdictions). Corporate services will be provided centrally, and will be outsourced where that is most efficient and appropriate.

Each of these Divisions will be headed by an Executive Member. The Executive Members will also be independent statutory office holders appointed by the Governor-General. They will be responsible for the management of their Divisions in much the same way as the Principal Members of each of the existing specialist tribunals. Of course, the President and the Executive Members, while being ultimately responsible for their performance and management functions, will be assisted by appropriate administrative staff, just as the President and Principal Members of the existing tribunals are assisted by Registrars and other staff. It is intended that the President, while holding the ultimate responsibility as Chief Executive Officer of the ART, will undertake his or her management role in consultation with the Executive Members leading the Divisions.

The President will need to be a person with high level professional expertise as well as leadership and management skills. There will be no requirement that the President be a judge or former judge. One of the aims of the Government's reforms is to ensure that merits review, in addition to being fair and just, is accessible, informal and efficient. Merits review should be perceived and conducted as an administrative review process, not as a quasi-judicial process. Moving away from mandated judicial involvement is consistent with that thrust, and also with the Attorney General's focus on judges being free of extra-curial responsibilities and thus better able to devote their time to their core judicial duties.

Funding

It is proposed that the ART will be funded largely by resource agreements between the President of the ART and the Departments with significant review jurisdictions, as is currently the arrangement for funding the SSAT and the Veterans' Review Board (VRB). Under these arrangements, the ART will negotiate with each Department as to the level of funding necessary to provide review of portfolio decisions within agreed standards of timeliness. As workload increases or decreases, the amount of funding that the Department is required to provide to the ART will increase or decrease.

It is expected that resource agreements will be entered into with the Departments of Immigration and Multicultural Affairs, Social

Security, Employment, Education and Youth Affairs, and Veterans' Affairs, the Australian Taxation Office, and probably Comcare. Other Departments have too small a caseload of decisions under review to justify the transaction costs of separate resource agreements with the ART. In respect of these review jurisdictions, which will be handled by the Commercial and General Division, it is likely that there will be either a single Budget appropriation or a generic agreement with the Attorney General's Department.

Concerns have been expressed in some media reports that these arrangements will undermine the independence of the ART. The Government, however, has stressed that the funding arrangements will be clearly linked to workflow and caseload and will not be used as a vehicle for executive interference in ART decision making. The Attorney General has been explicit that these arrangements will not interfere with tribunal independence.[2] It is understood that arrangements of this sort have worked to the satisfaction of the SSAT and the VRB and their portfolio Departments. Clearly, the Attorney General will be monitoring carefully the development and application of the resource agreements to ensure that these parameters are observed.

Concerns have also been expressed that portfolio Departments could starve the ART of funds, preventing the Tribunal from reviewing decisions. It must be said that it is difficult to see how this could be in the interests of portfolio Departments, which depend on effective and prompt merits review to ensure the efficient administration of their programs and to provide guidance to primary decision makers. In any event, the Attorney General will have oversight of the workability of the resource arrangements.

Members

All Members of the Tribunal will be appointed for fixed terms as statutory office holders by the Governor-General, thus ensuring their independence. Recommendations for appointment will be made to the Governor-General by the portfolio Minister responsible for the Division in which the Member is to have his or her primary duties. Cross-appointment to other Divisions will be made with the agreement of the relevant Ministers, as is now the case for appointments to various Divisions of the AAT.

It is important to note that the selection of Members will be undertaken by a transparent process designed to ensure the actual and perceived independence of ART Members. Ministers will only be able to recommend for appointment or reappointment candidates who have been determined as suitable against publicly available selection criteria, in a merit-based selection process conducted at arms length from the Minister. This approach largely aligns with that recommended by the Administrative Review Council.[3]

2 The Hon Daryl Williams, Commonwealth Attorney General "Reform of Merits Review Tribunals" News Release, 3 February 1998.

3 *Better Decisions* report, above n 1 at Recommendations 33, 34, 35, 36.

There have been suggestions that the proposed appointment of Members for fixed terms is an assault on tribunal independence. It is worth noting that all the Members of the SSAT, VRB, IRT, and RRT, and all the ordinary Members of the AAT are appointed for fixed terms. Only the Presidential and most of the full-time Senior Members of the AAT hold tenured appointments at present and it is proposed that this hierarchy of membership not be replicated in the new ART. As at May 1998, these tenured appointments represented only 32 Members out of a total of about 400 Members across all the tribunals. No suggestion has been seriously made that the vast majority of tribunal Members, who hold term appointments under the current arrangements, are not independent in their decision making.

Tenured appointments do provide a very high level of independence, and it is that degree of independence that is sought to be guaranteed in the appointment of judges to age 70. However, while independence is clearly essential in a system for reviewing government decisions, merits review tribunals are not courts and the Government does not believe that it is necessary to give tribunals all the trappings of courts in order to provide a fair and independent review right. Executive government is frequently criticised or otherwise held to account by a range of statutory office holders—for example the Human Rights Commissioner and the Ombudsman—who do not have life appointments but who nonetheless feel able to fulfil their independent mandates.

Furthermore, independence is not the only value that the Government and the users of tribunals would want to ensure in the operation of the ART. Members need to be good at what they do, to decide each case fairly, treat applicants with courtesy and helpfulness and provide decisions in a timely manner. The tribunal and its users would not be well served by a system of appointments that enabled the unfair or the inefficient Member to remain on the ART for decades.

The criteria for appointment as a Member of the ART will include the possession of appropriate skills and experience, but these need not include legal qualifications for all Members. Although much has been made of this as an alleged deskilling of the tribunal, the argument that only lawyers can decide a case fairly and knowledgeably is surely not sustainable. Indeed many current tribunal members are not lawyers.

The decisions under review in an administrative tribunal are not made by lawyers in the first instance but by administrative decision makers with expertise in the relevant subject matter. While a review decision-maker will clearly be at a higher level than the original bureaucrat in most cases it is not unreasonable to expect that, for many decisions, the reviewer might appropriately have a similar knowledge base and background to the original decision maker. The Government agrees with the *Better Decisions* report that desirable qualities in tribunal Members will include analytical skills, communication and interpersonal skills, legal skills, and attributes

such as empathy, sound judgment, flexibility, and independence. Experience in government or in administrative decision making would also be desirable.

Some cases do turn on questions of law or involve complex adjudications for which legal skills are particularly suitable, and there will undoubtedly be a good complement of lawyers amongst the members of the ART to handle all those cases for which legal skills are required. But the Government does not believe that lawyers are needed to decide all the many and varied administrative matters that will come before the tribunal.

Furthermore, the Government is keen to ensure that undue legalism and formality, which can all too often be the hallmark of proceedings in which lawyers are involved, do not detract from the ART's accessibility and timeliness. Ensuring that Members have a range of relevant skills and need not all be lawyers is one aspect of the cultural change away from the quasi-judicial model and towards greater accessibility that the Government seeks to engender in the amalgamation process.

SECOND TIER REVIEW

At present, applicants before the SSAT can, if dissatisfied with the SSAT's decision, seek further review by the AAT. This is known as "second tier review". Second tier review is not available to those whose original review right is review by the AAT.

The Government proposes that second tier review be available across most jurisdictions of the AAT (excluding immigration and refugee cases) but that it not be available automatically. The focus of the merits review system should be on promoting and encouraging the right decision at the earliest possible stage. This aim underlies the efforts of the Government and the existing tribunals to improve primary decision making by a variety of means, including communication and liaison between review tribunals and portfolio Departments. It also underlies the move away from automatic second tier review.

The ARC, in its *Better Decisions* report, recommended that second tier review not be available as of right but be available on satisfaction of specified grounds. This is largely the approach taken by the Government proposal, although it differs in some respects as to the appropriate grounds on which review should be available. Essentially, the Government aims to use second tier review to maintain a capacity within the tribunal system to set "precedents" in significant cases and to ensure fairness to users in the correction of obvious errors.

Consequently, it proposes that review by a higher level Review Panel be available, by leave of the President, where a case raises a principle or issue of substantial general significance, or where the parties agree that the decision under review involves a manifest error. A mere assertion of error by one party cannot be a sufficient ground for access to further review since clearly the party unhappy with a decision will inevitably assert that it is in error.

Appeal to the Federal Court or review under the Administrative Decisions (Judicial Review) Act 1975 (Cth) will continue to be available on the same basis as it is currently.

PROCEDURAL REFORMS

The Government proposes a range of measures designed to increase the efficiency of the ART, to stimulate a cultural change towards greater accessibility and client focus and away from unnecessary formalism and quasi-judicial approaches, and to simplify proceedings in the interests of both timeliness and accessibility.

None of these measures is intended to be applied in a blanket or simplistic fashion. The overriding message is that procedures and practices should be tailored to suit individual cases and to suit the needs of particular jurisdictions and their client groups. The Government is fully cognisant of the fact that different Divisions will and should have different procedures, just as the specialist tribunals have evolved procedures that are particularly suited to their caseload. At the same time, amalgamation into a single tribunal will afford the separate Divisions a greater opportunity to assess the procedures used in other Divisions and to adopt elements of those procedures, where this might enhance the accessibility or fairness of case handling.

Many of the reforms envisaged for the ART are indeed already in place for one or more of the specialist tribunals, and the Government's proposal simply identifies these as elements of a best practice model that could be adopted across the ART. An example of this would be measures to reduce unnecessary length and complexity of written decisions and the use of telephone or video link for appearances.

This paper will canvass a number of proposed procedural reforms that have given rise to some concern in the consultative process and seek to clarify the thrust as well as the intention of these measures.

Legal representation

The Government considers that legal representation should not be the norm in proceedings in an administrative tribunal. While legal representation may well be appropriate as a general rule in courts, the ART should not style itself on judicial proceedings and should conduct itself in a way that, in many cases, will make the involvement of lawyers unnecessary.

However, assertions made in some press reports to the effect that legal representation is to be banned are incorrect. Rather, the approach will be to consider and provide for the circumstances in which legal representation would be desirable or necessary, such as where it would facilitate the identification and resolution of the issues, or where the needs of the client require it for fairness in the particular case.

Provision for legal representation may be made in portfolio legislation (as it is now for migration matters) or in ART practice directions. It is envisaged that such practice directions would set out the factors that must be taken into account in considering whether representation should be allowed and on what terms. These might include the capacity of the applicant to represent himself or herself, the complexity of the issues, and the possible normative value of the decision.

Thus, an assumption of legal representation will not be the starting point. It may well be the outcome in any given case, but that will be because the circumstances warrant such representation rather than because the culture of the tribunal creates the need or the expectation of representation.

New evidence

The Government is concerned to see that all relevant evidence is produced to decision-makers as early as possible in the administrative decision making process. It is in the interests of government as much as the citizenry to ensure that decisions are made correctly on the basis of all the evidence. This will prevent unnecessary resort to review processes that cost everyone in time and resources.

To this end, the Government proposal envisages that new evidence produced for the first time to the ART should be referred back to the original decision-maker for consideration rather than becoming the basis for the review decision. In many cases, such a course may not be the most sensible way to resolve a particular matter and it is proposed that there should be a discretion in the tribunal to continue with a case including the new evidence where that will bring about a more efficient and speedy resolution of the matter and both parties agree.

A number of concerns, both theoretical and practical, have been raised with this proposal in the course of consultations. The Government, while keen to ensure that the review process is not used as a substitute for proper and informed primary decision making, recognises that the new procedures of the ART must be workable and effective. The objections that have been raised to the proposed treatment of new evidence will be considered carefully to see whether any refinements might be made that will alleviate concerns about workability.

Single member panels

The Government proposes that single member panels should be the norm in the ART. It considers that, in many cases, multi-member panels are being used unnecessarily, increasing costs and delays.

As with all the procedural reforms, however, this approach is not a blanket one. In some cases, multi-member panels may be necessary to ensure the representation of diverse expertise. Some jurisdictions may provide for multi-member panels via portfolio legislation where that is warranted. Practice directions could also provide guidance to

Members as to the circumstances in which a multi-member panel should be convened.

Furthermore, the President will have the capacity to convene multi-member panels for particularly significant cases, such as where a high-level decision is sought in order to provide guidance for future similar cases.

CONCLUSION

This paper has canvassed a number of the key issues arising from the Government's proposal to amalgamate specialist review tribunals and at the same time undertake a thorough overhaul of the operation of the tribunal system. It has been twenty years since the administrative review system was established. Over that time, much excellent work has been done to ensure that individuals have access to independent review of government decisions and to improve primary decision-making.

But complacency is never an ideal state, and neither the Government nor those directly involved in the tribunal system should cling without question or criticism to the status quo. The Government considers that the amalgamation of the tribunals provides an appropriate opportunity to revisit tribunal practices and functioning and to ensure that these are conducive, not inimical, to a review system that is fair, economical, informal and quick. The clients of the system deserve no less.

Tribunal Reform: A Commentary

ROBIN CREYKE*

INTRODUCTION

The Government's first response to the Administrative Review Council's Report No. 39[1] (*Better Decisions* report), was made in March 1997.[2] That report recommended fundamental changes to the Commonwealth framework for merits review. Much has happened in the intervening months.[3] There is greater clarity in the shape of the proposed Administrative Review Tribunal (ART)—the tribunal which is to substitute for the present independent specialist tribunals in immigration, refugee, veterans'[4] and social security matters, and the Commonwealth Administrative Appeals Tribunal (AAT). Indeed, there is comfort for the critics of the original proposal in the Attorney General's latest position paper, "Tribunal Reform: The Government's Position".[5] The paper indicates that the proposal will

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1 Administrative Review Council Report No 39, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (*Better Decisions* report) (1995).

2 The Hon D Williams, Commonwealth Attorney General, "Reform of Merits Tribunal" News Release, 20 March 1997; the Hon P Ruddock, Minister for Immigration and Multicultural Affairs, "Sweeping Changes to Refugee and Immigration Making and Refugee Appointments" News Release, 20 March 1997.

3 Eg, The Hon D Williams, Commonwealth Attorney General, "Merits Review Tribunals to Stay Independent" News Release, 13 July 1997; Commonwealth Attorney General's Department, *Reform of the Merits Review Tribunals: Government Proposal* (13 March 1998); B Barbour, "ART or Painting by Numbers" in R Creyke and M Sassella (eds) *Targeting, Accountability and Review: Current Issues in Income Support Law* (1998) at 117; R Creyke, "The Criteria and Standards for Merit Review by Administrative Tribunals" (1998) 9 *Law and Policy Papers* at 1–2.

4 The substitution in the veterans' jurisdiction is only partial since the Veterans' Review Board (VRB) is to remain an independent review body. However, appeals from the VRB will be to the ART. The exemption of the VRB was not in the original government proposal. See text at *Structure of the ART*.

5 R Leon, "Tribunal Reform: The Government's Position" included in the present set of materials.

not give greater powers to Ministers to "direct the tribunal as to how to decide particular matters",[6] that there will be further dialogue about the proposed changes, and that other concessions are to be made. To paraphrase the imagery of Bruce Barbour, Senior Member of the AAT,[7] in the outline there is now more "art" and less "painting by numbers".

The present proposal deals only with the structure envisaged for the new body. The key remaining issue—the powers of the new body—is yet to be determined. The outstanding matters include whether the ART is to be a full de novo merits review body; what decisions, if any, the ART will *not* be able to review;[8] whether the ART's jurisdiction will cover decisions now made by private sector providers but formerly made by government;[9] and whether the ART's decisions are to be limited by government policy to a greater degree than at present. These matters are at least as important—if not more so—than the structure and management of the new tribunal. To return to the borrowed imagery, these missing elements mean that the picture is not yet in the photo-realism genre. There are blank spaces on the canvas and fuzzy outlines in some areas. It will only be when these gaps have been filled in that a proper assessment of the new tribunal will be possible.

REJECTION OF A QUASI-JUDICIAL MODEL

The Government's paper represents a clear rejection of the "administrative court" blueprint for Commonwealth tribunals. The President is not to be a judicial officer, legal representation is no longer to be the norm, and the ART members are to be appointed for limited statutory terms. As this latest paper notes, there is to be a "cultural change away from the quasi-judicial model and towards greater accessibility."[10]

I have little difficulty with this aspiration. It was, after all, the vision for the Administrative Appeals Tribunal of the Kerr Committee, the body which first promoted the notion of an "Administrative Review Tribunal."[11] Moreover, the time for adopting a

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6 Ibid at 2.

7 Barbour, above n 3.

8 In his second reading speech for the Bill to introduce the Administrative Appeals Tribunal, the Hon K Enderby expressed the sentiment in these terms: "The intention of the present Bill is to establish a single independent tribunal with the purpose of dealing with appeals against administrative decisions on as wide a basis as possible." (H Reps Deb 1975, No 93 at 1186–1187.)

9 As Professor Aronson pointed out, if a distinction is made between accountability of services providers and their clients "[I]t is difficult to justify a scheme which values the provider's business interests more highly than those of its clients whom it is paid to serve" (M Aronson, "A Public Lawyer's Responses to Privatisation and Outsourcing" in M Taggart (ed), *The Province of Administrative Law* (1997) 40 at 64).

10 Leon, above n 5 at 7

11 Kerr Committee, *Commonwealth Administrative Review Committee Report* (PP No 144 of 1971) at ch 14.

quasi-judicial model has passed. When the AAT was established,[12] review of administrative decisions was seen primarily as the responsibility of the courts. Moreover, the advent of this novel creature—a generalist administrative review tribunal—was a move disliked by some and viewed with suspicion by others. In that climate the body needed to protect itself. It did so by emphasising those elements of its operations which most nearly replicated the court system[13]—a move designed to attract to the tribunal a measure of the authority and respect which the courts enjoyed.[14] Twenty-two years later, we have moved away from that vision and the tribunal model, in all its manifestations, is an increasingly popular one.[15] As a consequence there is no longer a need for tribunals to shelter behind the skirts of their better established judicial counterparts. It should now be acknowledged that tribunals do not exist in some undefined hinterland between the executive and the judiciary. They are at the apex of the administrative review system, within the executive arm of government, and their mode of operations should be fashioned accordingly.

At the same time, tribunals have not moved beyond the public into the private arena as terminology adopted in the paper suggests. To refer to the President of the ART as the "Chief Executive Officer" is worrying.[16] This is not a private sector corporation. There are no shareholders to whom the President is accountable. Simplistic models drawn from the private and corporate sectors are misleading. The calling to account of bodies such as the ART is a much more subtle and sophisticated matter. The President of the ART will be beholden to the Parliament, and to the Auditor-General for the ART's decisions and indirectly through these bodies to the electorate and the taxpayer. This complex web of responsibilities is not replicated in the corporate world. As a measure of that complexity, one has only to consider the interests of the citizen in this new body. These will vary depending on whether it is the citizen's taxpaying or applicant status that is uppermost in mind.

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12 It was established on 1 July 1976.

13 The Hon G Brennan, "Comment: The Anatomy of an Administrative Decision" (1980) 9 *Syd LR* 1 at 4–10. Brennan J concluded the "Comment" by citing with approval Lord Denning's maiden speech in the House of Lords which referred to the Franks Committee (Cmnd 218, 1969) in the following terms:

> [I]t contains and re-affirms a constitutional principle of first importance—namely, that these tribunals are not part of the administrative machinery of government under the control of departments; they are part of the judicial system of the land under the rule of law. (Footnotes omitted.)

14 That was the reason for judicial appointments to the AAT (see *Better Decisions* report, above n 1, at para 4.18).

15 The *Annual Reports* of the major Commonwealth merits tribunals indicate that they make over 30,000 decisions each year, roughly one hundred times more than are made annually by the Federal Court.

16 Leon, above n 5 at 3.

ADMINISTRATIVE REVIEW SYSTEM MODEL

Although acceptance of the proposition that the ART is an administrative, not a quasi-judicial, body means that the attempt to emulate the curial model should be abandoned, it does not produce automatic solutions to the structure or the role of the ART. These must be fashioned against the principles that desirably should operate in administrative review. The paper identifies a number of such principles when it states that the ART should be:

- efficient, informal, cost-effective and productive;
- fair, just, accessible, timely and informal;
- independent; and
- authoritative.[17]

How well do the proposals measure up?

Structure of the ART

The proponents of change have consistently argued that the amalgamation of several tribunals into a single body, the ART, will create a more efficient and cost effective merits review body. There are, however, anomalies in the proposal. One of these is the denial of second-tier review for migration matters. Another relates to review of veterans' matters. The Veterans' Review Board (VRB) has escaped the ART's canvas and is to continue as the only separate high volume first tier review body. Appeals from the VRB are, however, to be heard by the ART. A surprising element of the arrangement is that veterans' appeals are to be conducted by the ART's first—not second—review tier, contrary to the Government's earlier indications.[18]

This new development is unlikely to be acceptable to the veterans' community since the proposal downgrades veterans' appeal rights. The step also makes the continued separate existence of the Veterans' Review Board—a subject of earlier criticism[19]—the more anomalous. The ability of the final review stage to add value to the VRB process by ensuring higher quality legal reasoning or better fact-finding is unlikely to be found in first-tier ART review. The ART's first tier division is, at most, the equivalent of review by the VRB itself. The doubt that the two are even equivalent reflects the fact, referred to later, that there is a presumption in favour of single

17 Ibid at 4–8 and 10.

18 Eg, the Hon D Williams, Commonwealth Attorney General, "Reform of Merits Review Tribunals" News Release, 3 February 1998 ("The Government has decided to retain the Veterans' Review Board in its current form as a separate tribunal with full appeal rights to the ART"); and in the "Opening Address" to the *Opportunities and challenges for the AAT* conference, Coogee, NSW, 18 March 1998 the Hon D Williams also noted that: "The ART will also provide second tier review of decisions of the Veterans' Review Board" at 5; Commonwealth Attorney General's Department, above n 3 also noted: "Second-tier review of VRB cases will continue" (at 8).

19 R Creyke, "Whither the Review System" in Creyke and Sassella (eds), above n 3 at 127.

member panels for ART's first tier division. This contrasts with the three-member panels often used by the VRB.

At the same time, the bringing of the veterans' jurisdiction within the ART's first division, albeit as an appeal, is an attempt to meet the criticism which attended the initial exclusion of this jurisdiction from the first division line-up. What the move achieves, however, is that two of the high volume areas—immigration (including refugees) and veterans'—are denied second tier appellate review. The interests at stake—staying in Australia and often generous compensatory pensions—are of sufficient magnitude to warrant the same second-tier review treatment as other applicants to the ART. Granting second-tier review rights to both jurisdictions might also stem the otherwise inevitable appeals to the Federal Court and the High Court. Since future reviews of the ART are likely to look critically at anomalies of this kind, it may be sensible to reconsider this aspect of the proposal.

Terms of statutory appointments

It is proposed that the President is to have a maximum five-year term and other members' terms of between three and five years.[20] The five year term for the President is disappointing since it barely differentiates between the President and ordinary members, and provides little incentive for someone to take on the onerous responsibility of "crank-starting" this tribunal monolith. Seven year terms are commonly adopted to indicate the maximum security and hence independence of statutory bodies. The Commonwealth and Defence Force Ombudsman, whose administrative review tasks are comparable, has a term of at least seven years.[21]

An examination of what is proposed for similar bodies is instructive. The Presidents and Deputy Presidents of the New South Wales Administrative Decisions Tribunal are to be judges, and hence removable only for misbehaviour or incapacity.[22] Even assessors appointed to that Tribunal have terms of up to seven years.[23] Although in Victoria it is proposed that the Presidents and Deputy Presidents of the Victorian Civil and Administrative Tribunal are to be for a term of only five years,[24] and the same term has been recommended for the Chairperson and Deputy Chairperson of the Western Australian AAT,[25] it should be remembered that the States do not

20 Ordinary members, including presumably Executive Members, are to have terms of between three to five years (Commonwealth Attorney General's Department, above n 3 at 12, 15); the Hon D Williams, Commonwealth Attorney General, "Reform of the merits review tribunal system", an article by the Attorney General, May 1998, 3.

21 Ombudsman Act 1976 (Cth) s 22(1).

22 Administrative Decisions Tribunal Act 1997 (NSW), ss 16, 17, sch 3, cl 7. Terms of appointment may be set out in the regulations but these have not yet been promulgated.

23 Ibid, sch 4, cl 1.

24 Victorian Civil and Administrative Tribunal Act 1998 (Vic), ss 10(2), 11 (3).

25 J Gotzjamanos and G Merton, *Report of Tribunals Review to the Attorney General* (1996) recommendations 24–25.

need to be as concerned about adopting terms which will attract persons of suitable stature and competence to head their tribunals given that these positions are generally judicial appointments with commensurate security of tenure. The heavy responsibilities of the President of the ART and the need to shore up its reputation deserve recognition in a more substantial presidential term.

Funding

Funding the high volume tribunal divisions is to be determined by portfolio agencies, a matter that appears to be non-negotiable. Although there has been considerable concern at this element of the proposal, that concern may be unwarranted. As the paper points out, the income support and veterans' affairs agencies currently operate in this way.[26] Indeed, there are advantages in the arrangement. It is capable of engendering a sense of responsibility by the agency for "its" division, it tends to provide a more informed relationship between the agency and the tribunal, and it may foster a heightened degree of collegiality between the two.[27]

The paper has also emphasised that any arbitrariness in funding will not be permitted since funding will be linked to "workflow and caseload and will not be used as a vehicle for executive interference in ART decision making"[28]. Although this formula is welcome there are lingering concerns about the possibility of funds-starvation. These could be assuaged if the Attorney General's Department were to have a "hedge" fund to cover unexpected shortfalls or to respond to unexpected increases in applications. Such a fund would prevent funding being used to encourage agency-favourable outcomes. Another safeguard would be to ensure that flexibility is built into the funding formulae. Caseflow is an inherently unpredictable indicator and fluctuates for a variety of reasons, including fear of election outcomes, processing backlogs within agencies, and rumours of legislative changes or funding cuts. Averaging of caseflows over a considerable period will be necessary to counteract the effect of such imponderables. Monitoring funding will be essential to ensure that no attempts are made to achieve savings at the expense of the effectiveness of the new body.

Qualifications of members

One of the most prized features of the tribunal system is its demonstration of the value of having a mix of skills and professional backgrounds amongst its members. However, one professional group—lawyers—appears to have been singled out for opprobrium. The *Better Decisions* report[29] spearheaded this view when it signalled that legal

26 Leon, above n 5 at 4.
27 Creyke, "Whither the Review System" above n 19 at 127; see also J Disney, "Reforming the Administrative Review System" (1998) 6 *Law and Policy Papers* at 22.
28 Leon, above n 5 at 4–5.
29 *Better Decisions* report, above n 1.

qualifications were not essential for members of the ART.[30] That view was apparently given the seal of approval by the Attorney-General when he commented, early in 1998, that: "Legal qualifications will not be a formal requirement for appointment to the ART".[31]

Not surprisingly, that principle has been challenged,[32] and a less hard-line view appears to be emerging. This latest paper comments that "there will undoubtedly be a good complement of lawyers amongst the members of the ART to handle all those cases for which legal skills are required."[33] That is welcome. Having members with legal skills is essential for complex legal and technical cases, especially in the taxation, customs, social security and corporations law jurisdictions, and to provide authoritative rulings in precedential cases. It is not the possession of legal skills as such but the formalistic baggage which some lawyers acquire which has produced the earlier, anti-lawyer response. If the ART adopts appropriate and rigorous selection processes, these should obviate the development of the culture which is the target of the antagonism.

A more worrisome element of the paper is the retention of the notion that "the reviewer might appropriately have a similar knowledge-base and background to the original decision maker."[34] If this means that the reviewer should have no more skills than the administrator, I strongly disagree. There would be no point in having review if this principle is accepted. The reviewer should certainly possess all those skills but at a higher level. The advantage of a tiered decision-making system is that better quality decision-making—the value-adding concept—can occur at each stage.[35] The cost of the system, and the extra time devoted to each level would otherwise not be warranted.

In addition, if this suggestion indicates a preference for appointing people from public administration, that too may need careful scrutiny. What is needed for the ART membership is a balance of experience and background including, but not predominantly, from the public sector. A range of experience on the part of its members is necessary if a fresh perspective is to be brought to an issue and in order to ensure that the ART is perceived to be independent.

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30 Ibid at paras 4.13–4.14.

31 The Hon D Williams, Commonwealth Attorney General, "Opening Address: Opportunities and challenges for the AAT", above n 18; Commonwealth Attorney General's Department, above n 3 at 14.

32 For example, Law Council of Australia, "Response to the Government's Proposal to Restructure of the Commonwealth Administrative Appeals Tribunal and Other Tribunals", information provided by invitees to *Seminar on Government Proposals for the Commonwealth Administrative Review Tribunal*, 22 May 1998, Canberra, at para 3.2; R Creyke, "Sunset for the Administrative Law Industry? Reflections on developments under a Coalition Government" in J McMillan (ed), *Administrative Law under the Coalition Government* (1997) 20 at 40.

33 Leon, above n 5 at 7.

34 Ibid at 6–7.

35 A notion also referred to in A Doolan, "The Contribution of External Review to Personnel Management" in S Argument (ed) *Administrative Law & Public Administration: happily married or living apart under the same roof?* (1993) 117 at 131–132.

Second-tier review by leave

When the Government's proposal for the ART was first presented,[36] there was considerable doubt that the ART was to have a two-tier structure. The acknowledgment that there is to be both a first tier division and an opportunity within the ART for further review is one of the most significant advances in the intervening months. However, the concept still needs development. Leave is not available to all those with a right of action at the ART's first tier. In particular, there is no appeal from the Migration Division or the Veterans' Appeals Division, a matter referred to earlier. The prohibition on migration appeals is short-sighted, not least because judicial review rights in the migration jurisdiction have been truncated[37] and may be further reduced[38] and because the pressure on the courts could be alleviated by permitting the alternative of full rights of administrative review. If the Government has to choose between the courts and tribunals, in line with the principles outlined earlier in the paper, the choice should preferably be the cheaper and more accessible form of administrative review.

Not only are some jurisdictions denied second tier review, but the proposal is also that the remainder may only seek review with leave. The current suggestion in the paper is that leave will be granted by the President only in cases of precedential significance. The paper defines these cases as those in which the outcome has major implications for significant numbers of applicants, or those in which there is a significant question of law to be resolved.[39] At this stage it is not easy to specify clearly which cases fall within or outside those categories. As a matter of principle, they should include all the applications in which there has been an error in interpreting the legislation or in which it is claimed that a policy relied on is unlawful. In other cases—those based on a manifest error of fact, those in which there is conflict over the exercise of a discretion, where the impact of the law is harsh or unfair (unless there are a significant number of people affected), or where material new evidence has emerged—the paper indicates that leave will be granted only if both parties agree.[40] The veto power inherent in this formula is ill-advised. The original proposal in the *Better Decisions* report, that the President had the deciding vote in such cases, was fairer, less likely to lead to abuse or dissatisfaction and hence to further appeals to the Federal Court, and should be resurrected.[41]

There are other problems in this aspect of the proposal. In the first instance, a special leave requirement opens the way for jurisdictional and definitional arguments. These have the potential to be inordinately time-consuming for the President who is to handle

36 The Hon D Williams, Commonwealth Attorney General, "Reform of Merits Tribunal" News Release, above n 3.
37 Migration Act 1958 (Cth) Part 8, ss 475, 476.
38 Migration Legislation Amendment Bill (No 5) 1997.
39 Leon, above n 5 at 8.
40 Ibid.
41 *Better Decisions* report, above n 1, recommendation 97 at 179.

special leave applications, a task that must be added to that person's already significant management load. Since the President is also to sit on appeals of precedential value, there is an additional possibility of claims of bias or prejudgment to be surmounted. Finally, where it is the agency which is seeking to appeal, there is no indication that the applicant's costs will be borne by the agency, a recommendation made in the *Better Decisions* report but unfortunately not referred to in subsequent government announcements.[42]

Membership of second tier review panel

Although it is acknowledged that the President should sit on precedential cases (along with Executive Members and suitably qualified other members), there is no indication that "suitably qualified members" will be specially appointed to the review panel. It must be accepted that the President needs a pool of members on whom to draw for particular appeals. However, if the ART is truly to become the final administrative review body, with the commensurate stature which that entails, it is essential that membership of the review panel be specially chosen. In other words, there should be categories of members in addition to the President and Executive Members who should be specifically designated to sit on the second tier. That would provide a career structure within the organisation which would make it a more attractive workplace, would be consistent with proposals for such bodies elsewhere,[43] and would ensure the quality of decision-making which should be expected of such a body.

Reasons statements

The proposal recommends that in general oral, rather than written, reasons should be delivered by the ART.[44] The disadvantages of this suggestion are that it removes the opportunity to state principles to guide primary decision-makers; it obviates the discipline which the writing of reasons creates; it depletes the value of administrative review, particularly when there is no second tier appeal right; and it prevents that acceptance of the result, particularly by the losing party, which only a rational explanation for the outcome can bring.[45] Since the proposal recommends the retention of a right of appeal

42 Ibid, recommendation 102 at 180.

43 The Victorian Civil and Administrative Tribunal Act 1998 lists five categories of members for the Victorian Civil and Administrative Tribunal (the President, Vice-Presidents, Deputy Presidents, Senior members and ordinary members—ss 10–14); the Administrative Decisions Tribunal has four categories of members (President, Deputy Presidents, judicial members and ordinary members—Administrative Decisions Tribunal Act 1997 (NSW), Part 2, Sch 3, cll 7, 8). The Administrative Decisions Tribunal also has assessors but they do not have determinative powers. The proposed Western Australian model would, in effect, have four classes of members since in addition to the Chairman, Deputy Chairman, and ordinary members, there is a category of members who sit infrequently and who have lesser terms of appointment—Gotjamanos and Merton, above n 25 recommendations 24–26.

44 Commonwealth Attorney General's Department, above n 3 at 11.

45 *Ansett Transport Industries (Operations) Ltd v Wraith* (1983) 48 ALR 500 at 507.

from the ART to the Federal Court on a question of law, as well as the continuation of the right to seek judicial review,[46] the failure to provide reasons is likely to have other deleterious effects. The supporters of this aspect of the proposed operations of the ART should heed the finding of the House of Lords in *R v Home Secretary; Ex part Doody*,[47] a decision which was followed by Davies J in the Federal Court in *Yung v Adams*,[48] that, in the absence of an express statutory duty to give reasons, a court may imply such a duty, especially where an appeal lies to a court on a question of law.

None of these arguments mean that reasons in writing are required in every case. However, the practice of writing reasons does have the advantages identified by Kirby P in *Osmond v Public Service Board of NSW*[49] and summarised in Aronson and Dyer, that:

> First, it enables the recipient to see whether any appealable or reviewable error has been committed, with a view to assisting the decision whether to appeal, challenge or let the matter lie. Secondly, it answers the frequently voiced complaint that good and effective government cannot win support or legitimacy unless it accounts for itself to those whom it affects. Thirdly, it is said that the prospect of public scrutiny will provide officials with a disincentive to be "arbitrary". Fourthly, ... it is claimed that the discipline of giving reasons will make administrators more careful and more rational. And fifthly, it is said that the provision of reasons gives guidance for future cases.[50] (Footnotes omitted.)

The positive effects of these advantages should not be underestimated.

New evidence

The initial proposals for the ART indicated that there was to be a presumption against the ART hearing a case if new evidence was produced. There have been numerous criticisms of this policy: it would lead to definitional disputes about what is "new evidence"; it would be wasteful of individual and departmental resources since new evidence is often only produced part way through a hearing; it would often not be possible to obtain adequate evidence until the final stage of administrative review due to restrictions in the earlier granting of legal aid; remitting the matter would unnecessarily prolong the process, which is particularly detrimental in income support cases; it would inhibit applicants from continuing to pursue rightful appeals; and it would be inconsistent with the inquisitorial approach which is to be encouraged in the ART hearings.[51] The outcome in this latest proposal has been a welcome muting of the presumption.[52]

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46 Leon, above n 5 at 8.

47 [1994] 1 AC 531.

48 (1997) 150 ALR 436.

49 [1984] 3 NSWLR 447 at 461.

50 M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) at 579.

51 For example, Law Council of Australia above n 32 at para 3.3(e); Creyke, above n 19.

52 The paper states that "the proposed treatment of new evidence will be considered carefully to see whether any refinements might be made that will alleviate concerns about workability" at 10.

However, the permission for the ART to continue to hear a matter when new evidence is produced still remains subject to the agreement of both parties. This veto power should also be removed. It could be used as a delaying tactic by applicants—an outcome, particularly in the migration jurisdiction, which the government is anxious to avoid—or by agencies who do not want an adverse decision and who wish to test the applicant's staying power and resolve.

Single member panels for first tier division

On this issue, unfortunately, there has been no similar concession to earlier critics. The paper retains the original proposal that single member panels should be the norm in the ART.[53] Multi-member panels are said to be used "unnecessarily, increasing costs and delays". No evidence is cited for this conclusion despite the fact that the speedy turnover of decisions, for example, of the SSAT, with its three or sometimes four member panels, counters that claim. Although it is conceded, at least for the high volume jurisdictions, that the number of members to hear each matter is primarily a matter for portfolio legislation, that does not mean that there is no scope for the principle to impact on the number of members who will sit. Even in those agencies that favour multi-member panels and will provide for panel composition in agency-specific legislation,[54] the general principle will tend to create pressure for reduced numbers of members. Since the Attorney General's Department, in conjunction with the major user agencies, will determine the criteria for the resource agreements for each division, there is always the possibility of reducing funding to such an extent that multi-member panels become impracticable. If that were to occur, it would remove the better quality reasoning, greater speed in decision-making, and more comprehensive analysis of the matter which are the benefits of the peer review process when multi-member panels are used.

CONCLUSION

The latest proposals are for a model of the ART that is more acceptable to consumers. There are, however, outstanding issues, some of which have been referred to in this commentary.

The proposals, if adopted, only partially meet the Government's stated objectives, referred to earlier. Commonwealth tribunals are likely to emerge with a new identity, more closely allied to public administration than to the judicial sector. That is appropriate. However, it is unnecessary and certainly premature for this fledgling body to undertake a further metamorphosis into a semi-corporate body. The structure of the ART may well achieve some of the aims of efficiency and cost-effectiveness that have been the engine of the

53 Leon, above n 5 at 10.

54 Income support, veterans' affairs, compensation, migration tribunals and the welfare lobby—which has argued that multi-member tribunals are a protection in credibility cases since it is far harder to convince two or three people than one.

proposed changes. To the extent that collocation of premises and rationalisation of resources is achieved, there may well be cost-savings in the medium to long-term. However, the anomalous retention of the VRB will detract from overall cost advantages. At the same time, the proposed terms of appointment of members, reduction in the number of legally qualified members, and increase in membership from public administration may lead to a loss of independence which would seriously detract from the stature and hence value of the external review body. While acceptance that there is to be a second, review tier of the ART is a welcome concession, the timeliness and authoritativeness of the final tier's decisions are likely to be adversely affected by the special leave requirement and the failure to designate the best quality members for its panels. The timeliness and effectiveness of first division decisions is also deleteriously affected by the presumption in favour of single member panels. The proposal that reasons statements not be the norm is also likely to detract from the authority and effectiveness of the ART's decisions, especially if the applicant wishes to seek review by the courts. It is to be hoped that elements of the package, as the latest paper suggests, are open to further negotiation.

Choice of the President for the new body will be critical. Equally important will be the criteria that will guide its operation. These principles should include that the ART:

- provides a comprehensive, principled and accessible avenue for challenging decisions by the executive;
- enables citizens affected by decisions to obtain reasons for those decisions;
- ensures that government acts within its lawful powers;
- improves the quality of primary decision-making;
- provides final quality review of the merits of a decision;
- offers an affordable system which is consistent with fairness and justice; and thereby
- plays its part in ensuring that government is accountable.

Although there are questionable elements of the proposed new package, on balance, if the person chosen to head the ART is imbued with the ideals which have been identified, and provided careful attention is paid to the voices of its consumers,[55] the users of the ART may yet come to appreciate the remodelling of the tribunal system, both as taxpayers and as recipients of its review services.

55 In this context the Rules Committee with its consumer representatives of the two new generalist merits review tribunals in New South Wales and Victoria is a model which might be copied.

The VCAT—The Dawn of a New Era for Victorian Tribunals

JASON PIZER*

INTRODUCTION

The Victorian Parliament recently passed a bill to establish a "Super Tribunal" known as the Victorian Civil and Administrative Tribunal (VCAT). The bill received the Royal Assent on 2 June 1998 and it is likely that the VCAT will commence operation on 1 July 1998.

The VCAT is effectively an amalgamation of a number of Victorian tribunals, including the Administrative Appeals Tribunal (AAT). It has been described as "a new beginning for tribunals in Victoria",[1] "an important step in the development of justice in this State"[2] and "a step forward for Victoria"[3].

The purpose of this paper is to provide a brief overview of the VCAT. This overview will be divided into three main parts. First, the composition, structure and jurisdictions of the VCAT will be examined. Second, certain pre-hearing matters will be considered. And third, issues relating to a hearing before the VCAT will be explored.

THE VCAT'S COMPOSITION, STRUCTURE AND JURISDICTIONS

The establishment of the VCAT will dramatically reshape the structure of tribunals in Victoria. The purpose of this reform is to provide the Victorian community with a tribunal system that is modern,

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1 Vic PD, Legislative Assembly, 53rd Parliament, 2nd Session No 5 (unbound) at 972–3 per Ms Wade.5 (unbound) at page 975 (second reading speech) per Ms Wade. Editors note: VCAT commenced operation on 1 July 1998.

2 Vic PD, Legislative Assembly, 53rd Parliament, 2nd Session No 8 (unbound) at 972–3 at 1795 per Mr Hulls.

3 Ibid at 1800 per Mr Perton.

accessible, efficient and cost-effective. This fact is reflected in the aims of the VCAT, which are as follows:

> [I]mprove access to justice for all Victorians including the business community;
>
> facilitate the use of technology, such as video link-up and interactive terminals, consequently improving access to justice for Victorians living in both metropolitan and rural areas;
>
> complement measures to increase alternative dispute resolution programs by providing a range of procedures including mediation and compulsory conferences to help parties reach agreement quickly;
>
> streamline the administrative structures of tribunals, thereby improving their efficiency;
>
> develop and maintain flexible cost-effective practices;
>
> introduce common procedures for all matters, yet retain the flexibility to recognise the means of parties in specialised jurisdictions; and
>
> achieve administrative efficiencies through the centralisation of registry functions, improvement of information technology systems and more efficient use of tribunal resources.[4]

The Composition of the VCAT

The VCAT comprises a President, Vice Presidents, Deputy Presidents, senior members and ordinary members.[5] The President must be a Judge of the Supreme Court (the first President is Mr Justice Kellam). Each Vice President must be a Judge of the County Court, each Deputy President must be a lawyer of at least five years' standing, and each senior member and ordinary member must be a lawyer or must possess special knowledge or experience in relation to "any class of matter in respect of which functions may be exercised by the Tribunal".[6]

The Governor in Council appoints all members on the recommendation of the Attorney-General. The Attorney must first consult the Chief Justice of the Supreme Court in relation to the appointment of the President and the Chief Judge of the County Court in relation to the appointment of Vice Presidents.[7] All judicial and non-judicial members are appointed for a five-year term and may be reappointed.

A member may resign from office by delivering a signed letter of resignation to the Governor.[8] The office of a judicial member becomes vacant if that member ceases to be a Judge,[9] and the office of a non-judicial member becomes vacant if that member becomes

4 Vic PD, above n 1 at 973.
5 Victorian Civil and Administrative Tribunal Act 1998 (Vic) (VCAT Act), s 9.
6 Ibid at s 14(2).
7 Ibid at ss 10(1), 11(2).
8 Ibid at s 20.
9 Ibid at s 21(1).

an insolvent under administration.[10] A non-judicial member may be suspended and removed in certain circumstances.[11]

The Structure of the VCAT

The VCAT has two divisions: a Civil Division and an Administrative Division. Both divisions will be made up of a number of lists. Each list will hear particular types of matters (the Anti-Discrimination List in the Civil Division, for example, will hear matters that were previously heard by the Anti-Discrimination Tribunal). It is understood that a Vice President will manage each division and that the Deputy Presidents will manage the lists within those divisions. A diagram setting out the likely structure of the VCAT may be found in appendix A to this paper.

The Jurisdictions of the VCAT

The VCAT has two types of jurisdiction: original jurisdiction and review jurisdiction. Original jurisdiction is defined to be the jurisdiction of the VCAT "other than its review jurisdiction",[12] and review jurisdiction is defined to be jurisdiction conferred on the VCAT "by or under an enabling enactment to review a decision made by a decision-maker".[13]

The Civil Division will exercise the VCAT's original jurisdiction. It will hear disputes between individuals in jurisdictions currently exercised by the Anti-Discrimination Tribunal, the Domestic Building Tribunal, the Guardianship and Administration Board, the Small Claims Tribunal and the Residential Tenancies Tribunal. In addition, a new jurisdiction that will hear disputes arising under the Retail Tenancies Reform Act (Vic) will be created.

The Administrative Division will exercise the VCAT's review jurisdiction. It will conduct merits review of government decisions in jurisdictions currently exercised by the AAT. In addition, this division will exercise the disciplinary functions currently exercised by the Credit Authority, the Estate Agents Disciplinary and Licensing Appeals Tribunal, the Motor Car Traders Licensing Authority, the Prostitution Control Board and the Travel Agents Licensing Authority.

As is made clear from the definition of review jurisdiction, the administrative division of the VCAT does not have a general jurisdiction to entertain administrative appeals. Rather, it has jurisdiction only when an enactment (known as an "enabling enactment"[14]) confers specific jurisdiction upon it. Moreover, the conferral of jurisdiction may be subject to certain conditions (for example, the general rule in freedom of information (FOI) cases is that an applicant may

10 Ibid at s 21(2). The term "insolvent under administration" is defined in s 3.
11 Ibid at ss 22–24.
12 Ibid at s 41.
13 Ibid at s 42(1).
14 The phrase "enabling enactment" is defined in s 3 of the VCAT Act to mean an Act or subordinate instrument under which [original or review] jurisdiction is conferred on the VCAT.

not apply to the VCAT for review unless internal review has first been sought).

It should be noted that Schedule 1 to the VCAT Act and several enabling enactments modify the powers and procedures of the VCAT in relation to specific types of matters (in both the Civil and the Administrative Divisions). This paper is designed to provide an overview of the VCAT Act and accordingly, reference is generally not made to such modifications.

Invoking the original jurisdiction of the VCAT

The original jurisdiction of the VCAT may be invoked:

(a) by a person applying to the VCAT (if they are entitled to do so by or under an enabling enactment);
(b) by the matter being referred to the VCAT under an enabling enactment; or
(c) in any other way permitted or provided for by the enabling enactment.[15]

Invoking the review jurisdiction of the VCAT

The review jurisdiction of the VCAT may be invoked:

(a) by a person applying to the VCAT for a review of a decision made under an enabling enactment (if they are entitled to do so under that enactment);
(b) by the decision-maker referring a decision made under an enabling enactment for review; or
(c) in any other way permitted or provided for by the enabling enactment.[16]

An enabling enactment may provide that a person whose interests are affected by a decision may invoke the review jurisdiction by applying to the VCAT for review of that decision. In that situation, the word "interests" is to be construed broadly to mean "interests of any kind" and is not to be limited to "proprietary, economic or financial" interests.[17] Moreover, that person may apply for review if his or her interests are directly or indirectly affected by the decision and irrespective of whether any other person's interests are also affected.

Applications and referrals to the VCAT

An application to the VCAT must be in the form and contain the particulars required by the rules established by the Rules Committee.[18] The application must also be lodged in accordance with the enabling enactment and the rules, and must be accompanied by the prescribed application fee (if any). The principal registrar may reject an application that does not comply with these requirements.[19]

15 VCAT Act, s 43.
16 Ibid at s 48.
17 Ibid at s 5.
18 The Rules Committee is established under Part 6 of the VCAT Act.
19 VCAT Act, s 71.

A referral to the VCAT must be made in accordance with the enabling enactment and the rules. The referral must be accompanied by the prescribed fee (if any) and the VCAT may refuse to continue with the referred proceedings if that fee has not been paid.[20]

The general rule is that the applicant must serve a copy of the application or referral, within the time specified by the rules, on each other party.[21] There are two exceptions to this rule. The first exception is where the principal registrar undertakes service on behalf of the applicant. The second exception is where a presidential member of the VCAT orders that the requirements of service be dispensed with (either because the VCAT is satisfied that the applicant has made all reasonable attempts to serve a person, or because the VCAT is satisfied that hearing the matter ex parte would not cause injustice).

PRE-HEARING MATTERS

Seeking a stay of the original decision (review jurisdiction only)

Unless the enabling enactment provides otherwise, commencing a proceeding for a review of a decision does not, of itself, affect the operation of that decision or prohibit action being taken to implement that decision.[22] The VCAT may, however, make an order staying the operation of a decision sought to be reviewed.

The VCAT's power to grant a stay may be exercised to preserve the status quo where the effectiveness of the review may be jeopardised if the decision in question were implemented. It may be exercised on the application of a party or by the VCAT's own motion, and may be granted subject to certain conditions (including a condition that the applicant provide an undertaking as to costs or damages).[23]

"Section 49" statements (review jurisdiction only)

A respondent decision-maker must lodge with the VCAT a detailed statement of reasons for the decision and a copy of all relevant documents (this material is likely to become known, informally, as a "section 49 statement").[24] This material must be lodged 28 days after the respondent received the notice of application or referred the decision to the VCAT (as the case may be).

The purpose of the section 49 statement is to ensure, so far as is possible, that the VCAT is placed in a position to determine the correctness of the original decision having regard to all relevant material. To ensure that this purpose is not thwarted, the VCAT has

20 Ibid at s 70(2).
21 Ibid at s 72(1).
22 Ibid at s 50(1).
23 It is unclear whether this provision impliedly empowers the VCAT to award costs or damages in *any* proceeding in which it grants a stay, or whether the power to require an undertaking may be exercised only when the enabling enactment expressly confers power on the VCAT to award costs or damages.
24 VCAT Act, s 49.

the power to order the respondent to file a supplementary section 49 statement if the original statement is deficient in any way.[25]

Compulsory conferences

Compulsory conferences are informal pre-hearing conferences. They are designed to:

(a) identify and clarify the nature of the issues in dispute in the proceeding;
(b) promote a settlement of the proceeding;
(c) identify the questions of fact and law to be decided by the VCAT; and
(d) allow directions to be given concerning the conduct of the proceeding (this would presumably include directions concerning the filing and serving of witness statements and other material documents, but should also extend to matters such as challenges to the VCAT's jurisdiction and applications to be joined as a party).[26]

One or more compulsory conferences may be scheduled before the final hearing. The VCAT or the principal registrar may require a party to attend a compulsory conference personally, or by a representative who has the authority to settle the proceeding. The conference will be heard before a member of the VCAT or the principal registrar. A party that fails to attend a compulsory conference may be struck out or may have the proceeding determined adversely to her interests.

The procedure for the compulsory conference is at the discretion of the person presiding and the conference must be held in private unless that person otherwise directs. Moreover, the general position is that no evidence of words spoken or acts done at a compulsory conference may be adduced at the final hearing unless the parties otherwise agree. Lastly, a party may insist that the person who presided at the compulsory conference does not preside at the final hearing.[27]

Mediations

The VCAT or the principal registrar may refer a proceeding or any part of a proceeding to mediation with or without the consent of the parties. The member or principal registrar who refers the matter to mediation may require a party to attend to the mediation personally or by a representative who has the authority to settle the proceeding. A party may also be required to pay the prescribed fee (if any) irrespective of whether they consented to the referral to mediation.

Subject to the VCAT Act and the rules, the procedure for a mediation is at the discretion of the mediator (who may or may not be a member of the VCAT). If the mediation is successful, the mediator must notify the VCAT that the parties have agreed to settle

25 Ibid at s 49(4).
26 Ibid at s 83.
27 See VCAT Act, ss 83–87 for the provisions dealing with compulsory conferences.

and the VCAT may make any orders necessary to give effect to that settlement.

If the mediation is unsuccessful, the mediator must notify the principal registrar that the mediation has been unsuccessful. No evidence of what was said or done at the mediation may be admitted at the final hearing unless all the parties agree. If the mediator was a member of the VCAT, that person cannot preside at the final hearing.[28]

THE HEARING

The President determines how the VCAT is to be constituted for the purposes of each proceeding.[29] Subject to the rules, the VCAT may be constituted for the purposes of any particular proceeding by between one and five members, at least one of whom must be a legal practitioner. The VCAT may be reconstituted in certain circumstances.[31]

The hearing itself is usually conducted in public but the VCAT may order that a hearing or part of a hearing be held in private.[32] The VCAT may also give directions restricting or prohibiting the publication of certain evidence or information.[33]

The VCAT may sit at any place in Victoria,[34] and it may conduct all or part of the proceeding by means of a conference conducted using "telephones, video links or any other system of telecommunication".[35] In addition, if the parties to a proceeding agree, the VCAT may conduct all or part of the proceeding entirely "on the papers" without any physical appearance by the parties or the representatives or witnesses.[36]

The parties

The parties to a proceeding involving the exercise of the VCAT's original jurisdiction are the person who applied to the VCAT (or who requested or required a matter to be referred to the VCAT), in the case of an inquiry by the VCAT, the person who is the subject of the inquiry, any person joined as a party to the proceeding by the VCAT, and any other person specified by or under the VCAT Act or the enabling enactment as a party.[37]

The parties to a proceeding involving the exercise of the VCAT's review jurisdiction are the person who applied to the VCAT for a review of a decision (or who requested or required a decision to be referred to the VCAT for review), the decision-maker who made the decision, any person joined as a party to the proceeding by the VCAT,

28 See VCAT Act, ss 88–93 for the provisions dealing with mediations.
29 VCAT Act, s 64(3).
30 Ibid at s 64(1), (2).
31 Ibid at s 108.
32 Ibid at s 101(1), (2).
33 Ibid at s 101(3)–(5).
34 Ibid at s 38.
35 Ibid at s 100(1).
36 Ibid at s 100(2).
37 Ibid at s 59(1)(a).

and any other person specified by or under the VCAT Act or the enabling enactment as a party.[38]

Section 61 of the VCAT Act provides that an unincorporated association cannot be a party to a proceeding, although a member of that association (or a person authorised by that association) may make submissions on its behalf.

Representation

The VCAT Act deals with three types of representation: representation by a "professional advocate", representation by a person other than a professional advocate and self-representation.

A professional advocate is defined in s 62(8) of the VCAT Act to mean:

(a) a person who is or has been a legal practitioner; or
(b) a person who is or has been an articled clerk or law clerk in Australia; or
(c) a person who holds a degree, diploma or other qualification in law granted or conferred in Australia; or
(d) a person who, in the opinion of the VCAT, has had substantial experience as an advocate in proceedings of a similar nature to the proceeding before the VCAT—

other than certain disqualified persons.

Section 62(1) provides that a party may be represented by a professional advocate in five situations. First, where the party is a person referred to in s 62(2)—namely, a child, a municipal council, the State or a Minister or other person who represents the State, a public authority, the holder of a statutory office, and certain credit providers and insurers. Second, where another party to the proceeding is a professional advocate. Third, where another party is permitted under the VCAT Act to be represented by a professional advocate and is so represented. Fourth, where all the parties to the proceeding agree. And fifth, where the VCAT permits the party to be so represented.

A party may be represented by a person who is not a professional advocate if the VCAT permits. If the party is a body corporate, the person must give the VCAT a certificate of authority for the representation.[39] In any other case, the VCAT may require the person to produce such a certificate of authority.

A party who is a natural person has the right to appear personally.[40] A party that is a body corporate may be represented by a director, secretary or other officer who is not a professional advocate.

Procedure of the VCAT

The VCAT has a discretion to regulate its own procedures.[41] This discretion is subject to the express direction that the proceedings must be conducted with as much expedition as possible and with as little

38 Ibid at s 59(1)(b).
39 Ibid at s 62(7)(a).
40 Ibid at s 62(1)(a).
41 Ibid at s 98(3).

formality and technicality as possible.[42] The discretion is also subject to the requirement that the VCAT must act fairly and according to the substantial merits of the case in all proceedings.[43]

The VCAT is not bound by any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures.[44] One would expect that a matter heard in the Civil Division would typically be conducted in a similar manner to an adversarial contest. One would also expect that matters heard in the Administrative Division would, at least at first, be conducted in the way in which proceedings were conducted before the Victorian AAT. A former President of the Victorian AAT stated that a hearing before that body would very often be conducted in a similar manner to a court hearing and that it was therefore appropriate in those cases for the AAT to be guided by the procedures and principles that are followed by the courts.[45] That said, in *Bausch v Transport Accident Commission*,[46] the Supreme Court held that proceedings before the AAT were inquisitorial in nature. This conclusion was confirmed on appeal, with the Court of Appeal noting that such proceedings should "in no sense" be treated as "an adversarial contest".[47]

Evidence

The VCAT must observe the requirements of natural justice, except to the extent that the VCAT Act or the enabling enactment expressly or impliedly provides to the contrary.[48] With certain exceptions, the VCAT must allow a party a reasonable opportunity to call or give evidence, to examine, cross-examine or re-examine witnesses, and to make submissions to the VCAT.[49] The obligation to observe the requirements of natural justice is an express limitation on subsections (b) and (c) of s 98(1) of the VCAT Act, which provide that the VCAT is not bound by the rules of evidence and may inform itself on any matter in such manner as it sees fit. The fact that the VCAT is not bound by the rules of evidence gives it some measure of flexibility in accepting evidence from the parties. Ordinarily, the VCAT will accept evidence that is relevant to the case at hand (although such evidence may be excluded if its reception would be unfair to a party). Evidence may be given orally or in writing, and may be given on oath or by affidavit.[50] The President or a Vice President may authorise a person

42 Ibid at s 98(1)(d).
43 Ibid at s 97.
44 Ibid at s 98(1)(b).
45 *Re Forster and La Trobe University* (1990) 4 VAR 138 at 146.
46 (1996) 11 VAR 117 at 138. For an extensive criticism of this conclusion, see *Re Wilson and Transport Accident Commission* (Victorian AAT, Macnamara DP, 22 September 1997, unreported).
47 *Transport Accident Commission v Bausch* (Supreme Court of Victoria, Tadgell, Batt and Buchanan JJA, 10 March 1998, unreported).
48 VCAT Act, s 98(1), (4).
49 Ibid at s 102(1), (2).
50 Ibid at s 102(3).

(whether or not a member of the VCAT) to take evidence within or outside Victoria.[51]

As noted above, evidence cannot be given of words said or acts done during a compulsory conference or an unsuccessful mediation unless the parties agree. It should also be noted that, in proceedings involving the VCAT's review jurisdiction, the Premier or Attorney-General may inform the VCAT that, in his or her opinion, the answering of a question by a witness would be contrary to the public interest in certain circumstances.[52] The VCAT must excuse the answering of the question where the Premier so informs the VCAT but is not bound to do so where the Attorney-General does so.[53] Lastly, s 105 of the VCAT Act provides that a person is not excused from answering a question or producing a document in a proceeding on the grounds that the answer or document might tend to incriminate that person. Nevertheless, if the person claims that the answer or the document might tend to incriminate them, the answer or document is not admissible in evidence in any criminal proceedings (other than in proceedings in respect of the falsity of the answer).[54]

The weight given to particular evidence will, of course, depend on all the circumstances. Generally speaking, unless the enabling enactment provides to the contrary (see, for example, s 55 of the Freedom of Information Act 1982 (Vic)), neither party bears a legal or evidentiary "onus of proof" in proceedings involving the exercise of the VCAT's review jurisdiction.

Powers of the VCAT

In exercising its original jurisdiction, the VCAT has the functions conferred upon it by or under the enabling enactment, the VCAT Act, the VCAT regulations and the rules.[55] When exercising its review jurisdiction in respect of a decision, VCAT has all the functions of the original decision-maker and has any other functions conferred upon it by or under the enabling enactment, the VCAT Act, the VCAT regulations and the rules.[56]

Prior to commencing or completing the final hearing, the VCAT may:

(a) grant leave to the applicant to withdraw an application or referral before it is determined by the VCAT;[57]
(b) summarily dismiss or strike out a proceeding (or part of a proceeding) that is frivolous, vexatious, misconceived, lacking in substance or otherwise an abuse of process;[58]
(c) summarily dismiss or strike out a proceeding (or part of a proceeding) for want of prosecution;[59]

51 Ibid at s 103.
52 Ibid at ss 53–55
53 Ibid at s 55.
54 Ibid at s 105(2).
55 Ibid at s 44.
56 Ibid at s 51.
57 Ibid at s 74.
58 Ibid at s 75.
59 Ibid at s 76.

(d) dismiss or strike out a proceeding if it believes that a party is conducting the proceeding in a way that unnecessarily disadvantages another party;[60] and
(e) strike out the whole or part of a proceeding commenced in the civil division if it considers that the subject matter of the proceeding would be more appropriately dealt with by another body.[61]

During the final hearing, the VCAT:

(a) may summon a person to appear to give evidence and to produce documents for the purposes of the hearing;[62]
(b) may give directions at any time in a proceeding and do whatever is necessary for the expeditious or fair hearing and determination of a proceeding (including, in matters involving the exercise of review jurisdiction, directions requiring a party to produce a document or provide information despite any rule of law relating to privilege or the public interest in relation to the production of documents);[63]
(c) may order that a non-party produce a relevant document to the VCAT or a party within a specified time;[64]
(d) must, when exercising review jurisdiction, apply government policy if the applicant was aware (or could reasonably have been expected to be aware) of the statement of policy, and if the original decision-maker relied on the statement of policy when making the decision;[65]
(e) may inform itself on any matter in such manner as it sees fit;
(f) may close hearings to the public and prohibit the publication of certain evidence;
(g) may regulate its own procedures;
(h) may grant an injunction (including an interim injunction) if it is just and convenient to do so;[66]
(i) may make a declaration;[67] and
(j) may enter and inspect any land or building either in the presence of, or without, the parties.[68]

60 Ibid at s 78.
61 Ibid at s 77.
62 Ibid at s 104.
63 Ibid at s 80. It should be noted that s 146 provides that any documents produced to the VCAT may be inspected by a party free of charge and by a member of the public on payment of a fee subject to the rules, any directions of the VCAT and other exceptions.
64 Ibid at s 81.
65 Ibid at s 57.
66 Ibid at s 123. The VCAT may require a party to provide an undertaking as to costs or damages before granting an interim injunction. It is unclear whether this provision impliedly empowers the VCAT to award costs or damages in any proceeding in which it grants an interim injunction, or whether the power to require the undertaking may be exercised only when the enabling enactment expressly confers power on the VCAT to award costs or damages.
67 Ibid at s 124.
68 Ibid at s 129(1)(a).

At the completion of a proceeding involving the exercise of the VCAT's review jurisdiction, the VCAT must make an order either:

(a) affirming the decision;
(b) varying the decision; or
(c) setting aside the decision, and either making its own decision or remitting the matter to the original decision-maker for reconsideration in accordance with any directions or recommendation of the VCAT.[69]

Where the VCAT affirms or varies the decision under review, or substitutes its own decision for that decision, the VCAT's decision is deemed to have been made by the original decision-maker and, unless the VCAT orders to the contrary, is deemed to have taken effect from the time at which the decision under review had effect.[70]

Reasons

Although an order of the VCAT must be in writing and must be served on each party,[71] the VCAT may decide to give oral *or* written reasons for its final order. If the VCAT gives oral reasons, a party may request the VCAT to give written reasons. Such a request must be made within 14 days from the date upon which the oral reasons were given and the VCAT must comply with that request within 45 days after receiving it.[72]

Enforcement of and non-compliance with orders

The VCAT Act contains provisions dealing with the enforcement of two types of orders made by the VCAT: monetary orders and non-monetary orders. A monetary order is defined in s 3 to mean an order requiring the payment of money (including a fine or a penalty) and a non-monetary order is defined to mean an order other than a monetary order.

A party may seek to enforce a monetary order by filing in "the appropriate court" (namely, a court that would have the jurisdiction to enforce a debt of the amount that remains unpaid) a certified copy of the order together with an affidavit setting out the amount that remains unpaid. On filing, the order must be taken to be an order of that court and may be enforced accordingly.[73]

A party may seek to enforce a non-monetary order by filing in the Supreme Court a certified copy of the order, an affidavit setting out the non-compliance with the order and a certificate from the President or a Vice President stating that the order is appropriate for filing in the Supreme Court. On filing, the order must be taken to be an order of the Supreme Court and may be enforced accordingly.[74]

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69 Ibid at s 51(2).
70 Ibid at s 51(3).
71 Ibid at s 116(1), (2).
72 Ibid at s 117. The President may extend the 45 day period in accordance with s 117(4).
73 Ibid at s 121.
74 Ibid at s 122.

Section 133 of the VCAT Act provides that a person who does not comply with a non-monetary order is guilty of a criminal offence. The section applies as from the time the non-monetary order is made (unless the operation of the order is deferred) or served (where the order was made in the absence of a person). It would seem that the fact that a non-monetary order may be enforced in the Supreme Court does not affect the conclusion that non-compliance constitutes a criminal offence.

The precise scope of s 133 is unclear. It certainly extends to orders by way of final or interim relief (the word "order" is defined in s 3 to include interim orders) and may extend to procedural orders (the Act usually refers to "directions" in this context but contemplates that procedural orders may be made: see s 131) and even to orders against non-parties (the VCAT has the power in s 81 to order a non-party to produce a document to the VCAT or a party).

Costs

The general position is that each party to a proceeding will bear its own costs.[75] The VCAT may, however, order that a party pay all or part of another party's costs if "it is fair to do so" having regard to all the circumstances of the case.[76] Such circumstances include the nature and complexity of the proceeding, the relative strengths of the claims made by the parties, and the way in which the proceeding was conducted.

The VCAT may also order that a representative of a party pay all or part of the costs of another party.[77] It may only do so, however, if it considers that the representative was responsible for conducting the proceeding in a way that unnecessarily disadvantaged another party, or for unreasonably prolonging the time taken to complete the proceeding, and if the representative has been given a reasonable opportunity to be heard.

The Act also contains provisions dealing with offers of compromise in matters involving the exercise of the VCAT's original jurisdiction.[78]

The VCAT may fix the amount of costs itself or order that costs be assessed or settled by the principal registrar.[79]

Appeals

A party to a proceeding may apply to the Supreme Court for leave to appeal from an order of the VCAT in relation to a question of law. Such an application must be made within 28 days of the VCAT's order, unless the Court grants an extension of time in which to make the application.[80] If leave is granted, the appeal must be instituted no later than 14 days after the day on which leave is granted, unless the

75 Ibid at s 109(1).
76 Ibid at s 109(2).
77 Ibid at s 109(4).
78 Ibid at ss 112–115.
79 Ibid at s 111.
80 Ibid at s 148(2).

Court grants an extension of time in which to institute the appeal.[81] The Court of Appeal will hear the application for leave and the appeal itself if the VCAT's decision was made by the President or a Vice President; otherwise, the application for leave and the appeal itself will be heard by the Trial Division of the Supreme Court.[82] It is contemplated that the President, in his or her capacity as a Supreme Court Judge, may hear appeals from the VCAT.[83]

The VCAT may specify that its order comes into effect on a particular day in the future or it may stay the operation of its order pending the determination of any appeal that may be instituted by the losing party.[84] Either course should be adopted in cases where to allow the VCAT's order to be implemented would render the appeal nugatory.

After hearing the appeal, the Court may affirm, vary or set aside the VCAT's order, or make an order that the VCAT could have made in the proceeding, or remit the matter to the VCAT to be heard and decided again in accordance with the Court's directions, or make any other order that the Court thinks appropriate.[85]

CONCLUSION

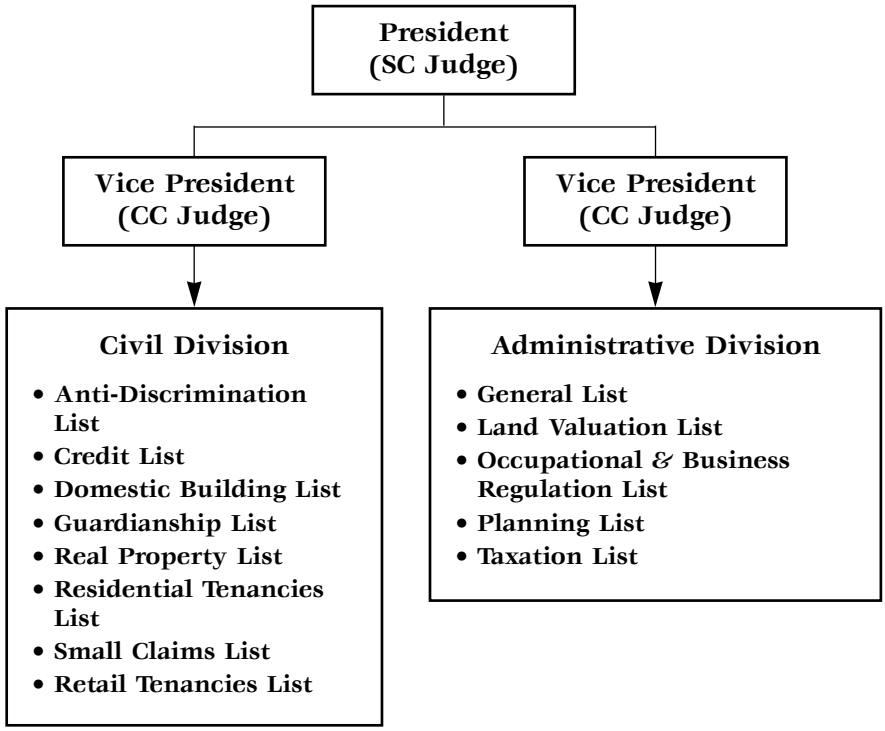
The aim of this paper has been to provide a brief overview of the VCAT, focussing in particular on its structure, procedures and powers. This overview reveals that the VCAT has been clothed with many of the trappings of a court. This, of course, is an interesting development that may eventually undermine the traditional rationale for the creation of tribunals in the first place: namely, to provide a cheap, quick and informal alternative to litigation in the courts.

As noted at the outset, the VCAT has been described as "a new beginning for tribunals in Victoria". This is an apt description: the VCAT Act revolutionises the tribunal system in Victoria. What remains to be seen, of course, is whether this revolution will lead to the modern, accessible, efficient and cost-effective system that the Attorney-General has foreshadowed.

81 Ibid at s 148(3).
82 Ibid at s 148(1).
83 Ibid at s 10(5); Vic PD, above n 1 at 974.
84 Ibid at ss 118(1), 149.
85 Ibid at s 148(7).

APPENDIX A

STRUCTURE OF THE VCAT



Comment: An Inside View of the Role of the Refugee Review Tribunal

PETER BLAIR

Editor's note: The following is an extract from a much longer paper presented by Peter Blair who at the time was a member of the Refugee Review Tribunal (RRT). Unfortunately I was not able to publish the entire paper due to a shortage of space, other than the following valuable comments which related to the then Migration Legislation Amendment Bill (No 4) 1997. This Bill was split into two parts in an attempt to assist its passage through the Senate. The Migration Legislation Amendment Bill (No 5) 1997, the "judicial review" Bill, lapsed with the prorogation of Parliament in September 1998. It was then resurrected as Migration Legislation Amendment (Judicial Review) Bill 1998. These Bills, which attempt to broaden the privative clause effect of Part 8 of the Migration Act 1958 (Cth) are discussed in the paper by Dr Mary Crock, "Privative Clauses and The Rule of Law: The Place of Judicial Review Within the Construct of Australian Democracy" in this volume of materials. In this extract, Blair summarises his views on the changes to Part 8 of the Migration Act and their effect upon the RRT.

1. As the Tribunal is a fact finding body, the outcome of this Bill would be that Parliament is attempting to vest in the RRT the ability to determine questions of law with regard to the meaning of the Refugees Convention[1] in Australian law and to make those interpretations binding. The High Court has clearly stated that it is not the legitimate role of the Tribunal to make such determinations.
2. The Tribunal in its present form would not have the expertise or capacity to make such legal determinations.

1 Australia acceded to the 1951 Convention Relating to the Status of Refugees (Refugees Convention) in 1954.

3. The courts are the proper place for the law to be interpreted: not the Tribunal which is created by statute and exists as part of the administrative system.
4. The RRT has benefited greatly from having judicial review; but without the guidance and clarity offered by the courts the decisions of the Tribunal could be open to criticism on the grounds of arbitrariness or inconsistency.
5. 15.8% of applicants succeed in having their cases remitted to the Tribunal for reconsideration by the courts[2]—this is a significant number. This suggests that the law with regards to the Refugees Convention is not settled (and possibly never will be) and that serious injustice may be caused to a number of people if appeal to the courts for judicial review is removed.
6. Decisions of the courts bind and direct the Tribunal to apply the correct law to individual cases. Without greater clarity and direction, which is currently supplied by the courts, the Tribunal may be inclined to be less strict in applying the correct law to applicant's cases.
7. Without court supervision, there is a real danger that the Tribunal will be more prone to the subtle pressures and policies of the executive or the bureaucratic decision-makers and hence lose their independence. The courts are already sensitive to this scenario, as in a recent refugee matter before the Federal Court, where the judge stated:

   > So zealously does the Australian Parliament desire to implement its United Nations Treaty obligations to assist refugees that it has enacted legislation specifically to ensure that it is acceptable for a decision on refugee status to be made by the Tribunal which not merely denies natural justice to an applicant but also is so unreasonable that no reasonable decision-maker could ever have made it. At least in this Court, although not in the High Court, the grounds of judicial review are narrowly confined.[3]

8. The Federal Court also implies that the quality of Tribunal decision-making has already suffered due to the removal of the right to seek review on the grounds of natural justice or unreasonableness. The Court's decisions suggest that full review rights should be restored to applicants rather than removed.[4]
9. Non-citizen refugee applicants are being denied their review rights to the Federal Court by the proposed Bill. While the increasing cost of the system and attempts by people in some cases to dishonestly remain in Australia are legitimate concerns, the fact is that the Refugees Convention deals with people who claim they fear serious harm in their country of

2 Refugee Review Tribunal, *Annual Report 1997–98* (1998).
3 *Eshetu v Minister for Immigration and Multicultural Affairs* [1996] 142 ALR 474 at 480 per Hill J.
4 Bills Digest No 19, 1997–1998, Migration Legislation Amendment Bill (No 4) 1997.

nationality for a Convention reason.[5] As such it is of the utmost importance that justice not only appear but also actually be done. Australian citizens would expect the right to "have their day in court". Should non-citizens who may be in grave danger in their home country not be given the same opportunity?

10. Under the original jurisdiction of the High Court,[6] applications for review will merely be diverted from the Federal Court to the High Court as first court of review. This will cause a significant drain on resources and place great strain on the High Court, which is not equipped to deal with the potential of so many applications.
11. The executive itself benefits from a system permitting judicial review of tribunal decisions. A Minister, faced with making a politically unpopular decision, may leave it to the courts to decide according to the law, thus giving the appearance that it is the decision of the "umpire" and so relieving the Minister of responsibility. All ministers, of all political persuasions, use this effectively for their political benefit from time to time. For instance the decision of the courts to dismiss claims by Chinese nationals to be refugees on account of having suffered persecution due to implementation of the "one child policy".[7] In this instance the courts struck down a decision of the Tribunal (challenged by the Department of Immigration under the current review rules) which had found that such people were in fact refugees under the Convention, despite Federal Government policy being to the contrary. If it had not been for the courts, the decision to refuse a person protection under the Convention on these grounds would have embroiled the Minister in a political and social controversy; any attempt to force the Tribunal to reverse or change its decision in such similar circumstances, without resort to the courts, would jeopardise the Tribunal's independence and integrity.

In light of the above comments any reduction in the right to appeal to the courts in administrative matters must be viewed as a step backward. It is still a cogent argument that review by independent courts is an essential ingredient in protecting and enforcing the rights of the citizens against the arbitrary application of decision making power. As government becomes increasingly complex, and the powers conferred upon decision makers become increasingly wide (and vague) it is important and comforting to know that there is a resort to some protection in the event of wrong doing or error of law by executive decision-makers. We have not come so far or have become so secure that the concept of the rule of law should be dis-

5 Refugees Convention, above n 1, article 1(A).
6 Commonwealth Constitution, s 75(v).
7 *Applicant A & Anor v Minister for Immigration and Ethnic Affairs & Anor* (1997) 71 ALJR 381.

missed as unnecessary, nor should we believe a separate and independent judiciary is dispensable when considering the protection of the rights of citizens against arbitrary abuse of power by administrative decision makers or the executive. Without the courts, it may be concluded that instead of an independent review system, we end up with a rubber stamping mechanism for the decisions of the bureaucracy.

This indeed would be contrary to hundreds of years of legal development. It would also be a direct contradiction of the administrative review system as it was envisaged in the 1970s. We already have veered from the way the system was meant to be in creating so many specialist tribunals. Ironically, a return to a unified system is now being touted as a virtue. However, if within a unified or a fragmented system tribunals are to become the sole source of review for applicants aggrieved by government decisions, then potentially the system will be debased via the arbitrary abuse of power to the detriment of the rights of the individual with no effective means for such a person to have that wrong set right. Such a move would be regressive in terms of administrative law and would bring into serious doubt the doctrine of the rule of law. As stated in 1910 per Farwell LJ, concerning the issue of ministerial responsibility:

> If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression.[8]

8 *Dyson v Attorney-General* [1911] 1 KB 410 at 424.

Skills Sessions

Writing Reasons For Decisions

SUE TONGUE*

INTRODUCTION

There is a children's book featuring a creature called "Push-Me Pull-You" which has two heads and is constantly being drawn in different directions although it actually has one body and one central purpose.[1] It is an image which springs to mind constantly in tribunal work and inevitably arises when writing reasons for decisions. Tribunals must respond to the needs of individual applicants who appear before them. They are part of the executive yet strongly influenced by the judiciary. They are pushed and pulled in different directions. The separation of powers under the Constitution is a sound principle but tension at the interface is felt in tribunals—particularly in the migration jurisdiction.

> It is not a simple task to reconcile the place of review tribunals as part of the executive arm of government with their role of providing merits review that is, and is seen to be, independent of the agency whose decision is under review, and that is undertaken according to processes and procedures that are fair and impartial.[2]

So while the topic of "Writing Decisions" is a straightforward subject I am compelled to "unpack" it because in order to describe tribunal decisions it is necessary to consider the context in which they are made. It is also timely to do this in light of the changes to some Commonwealth tribunals, including the Immigration Review Tribunal (IRT), announced by the Federal Government.

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* Principal Member, Immigration Review Tribunal. Thanks to Gabriel Fleming, Joe Metledge and Chris Rose for their helpful comments on this paper.

1 Hugh Lofting, *Dr Doolittle* (thanks to Gail Radford for knowing the origin of this allusion).

2 Administrative Review Council Report No 39, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (*Better Decisions* report) (1995) at para 2.51.

In this paper I outline the purpose of the review process and of written reasons by considering the audience and their different needs. I then make suggestions for meeting those needs based on lessons learned. To complete the record I include a section on the context in which decisions are written. Several excellent papers and articles have been written about writing decisions, and related subjects and I draw on them. While I concentrate on the IRT my comments may have relevance to other tribunals.

PURPOSE OF REASONS

The purpose of review by Commonwealth tribunals is to conduct merits review which is:

> [T]he process whereby an administrative decision of the government is reviewed "on the merits"; that is, the facts, law and policy aspects of the original decision are all reconsidered afresh and a new decision—affirming, varying or setting aside the original decision—is made. Merits review is characterised by the capacity for substitution of the decision of the reviewing person or body for that of the original decision-maker. Merits review is often described as a process by which the person or body reviewing the decision "stands in the shoes" of the original decision-maker.[4]

Tribunals such as the IRT, when they conduct such a review, are required by statute to give reasons and failure to do so is a breach of statutory duty. The Migration Act 1958 (Cth) (the Act) at s 368 provides:

> (1) where the Tribunal makes its decision on a review, the Tribunal must, subject to paragraph 375A(2)(b)[5], prepare a written statement that:
>
> (a) sets out the decision of the Tribunal on the review;
>
> (b) sets out the reasons for the decision;
>
> (c) sets out the findings on any material questions of fact; and
>
> (d) refers to the evidence or any other material on which the findings of fact were based.

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3 P Bayne, "The inadequacy of reasons as an error of law" (1992) 66 ALJ 302; K Bell, "Challenging Tribunal Decisions—What to Look For When Preparing a Judicial Review Application" paper presented to AIAL Victorian Chapter, *The Balancing Act: Immigration Decision Making: the Department, the Tribunals and the Courts*, 12 November 1997; M Buck, "The Recording of Tribunal Decisions" (1994) New LJ at 1559; H Katzen, "Inadequacy of Reasons as a Ground of Appeal" (1993) 1 *AJ Admin L* 33; The Hon M Kirby, "On the Writing of Judgments" (1990) 64 ALJ 691; The Hon M Kirby, "Ex Tempore Judgments—Reasons on the Run" (1995) 25 *WALR* 213; A Robertson SC, "Writing Reasons for Decisions" ARC Tribunal Conference 1996; The Hon GFK Santow, "Transition to the Bench" (1997) 71 *ALJ* 294; T Thawley "An Adequate Statement of Reasons for an Administrative Decision" (1996) 3 *AJ Admin L* 189; J W Tinnion, "Principles in Practice: The Statement of Reasons" (1995) 2 Trib 9.

4 *Better Decisions* report above n 2 at paras 2.2,2.3.

5 Section 375A(2)(b) relates to material in relation to which the Tribunal must do all things necessary to ensure that the document or information is not disclosed to any person other than a member of the Tribunal as constituted for the purposes of the particular review.

Whether common law also requires tribunals to provide written reasons is unclear.[6]

It is settled that a failure to comply with an obligation to give reasons is an error of law.[7] In *Yung v Adams*[8] Davies J said, in relation to a tribunal:

> In the present case the tribunal has given written reasons but those reasons are quite inadequate. An inference can be drawn that the tribunal made an error of law as to the issues which it had to decide. Otherwise its decision would have dealt fairly and properly with the issues before it. In these circumstances the decision must be set aside.[9]

Poor decision making by a tribunal can lead to errors of law which cause embarrassment and increase public expense.

By giving reasons a tribunal is accountable—to the applicant, the Minister, the department and the community. The giving of reasons "puts a brake on the arbitrary exercise of power. It facilitates appeal and judicial review which might not otherwise be possible."

An often quoted statement of the purpose of reasons is in Sheppard J's decision in *Commonwealth v Pharmacy Guild of Australia*[11]. He first discussed the fact that reasons allow for the correction of error and continued:

> [A] prime purpose is the disclosure of the tribunal's reasoning process to the public and the parties. The provision of reasons engenders confidence in the community that the tribunal has gone about its task appropriately and fairly. The statement of bare conclusions without the statement of reasons will always expose the tribunal to the suggestion that it has not given the matter close enough attention or that it has allowed extraneous matters to cloud its consideration. There is yet a further purpose to be served by the giving of reasons. An obligation to give reasons imposes upon the decision-maker an intellectual discipline. The tribunal is required to state publicly what its reasoning process is. This is a sound administrative safeguard tending to ensure that a tribunal such as this properly discharges the important statutory function it has.

Most recently Finkelstein J in *Comcare v Lees*[13] considered the obligation to give reasons and the principles to be borne in mind in determining whether the obligation has been discharged. He favoured requiring the tribunal to provide adequate reasons rather than setting aside the tribunal decision in cases where inadequate reasons have been given. Similarly Sackville J in *Total Marine Services Pty Ltd v Michael Kiely*[14] sets out the relevant principles for the application of s 43(2B) of the Administrative Appeals Tribunal Act 1975 (Cth) regarding the giving of reasons by that Tribunal.

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6 Thawley, above n 3 at 191; see also Katzen, above n 3 at 33. See also *Public Service Appeals Board of NSW v Osmond* (1986) 159 CLR 656.
7 *Dornan v Riordan* (1990) 95 ALR 451.
8 (1997) 150 ALR 436.
9 Ibid at 464.
10 Kirby, above n 3 (*WALR*) at 218.
11 (1989) 91 ALR 65.
12 Ibid at 85.
13 (1998) 151 ALR 647.
14 Federal Court of Australia, Sackville J, 4 March 1998, unreported.

In *Comcare v Parker*[15] Finn J[16] adopted a dictum of Gray J when he said:

> The adequacy of the reasons will depend upon the circumstances of the case. But the reasons will be inadequate if (a) the appeal court is unable to ascertain the reasoning upon which the decision is based; or (b) justice is not seen to have been done.[17]

The explaining of the basis on which the decision is made is part of procedural fairness.[18] It is "fair play in action".[19]

The giving of reasons should also improve the quality of decision making—not only by the review decision-maker but also by the primary decision-maker. "Reasons should be fuller and more informative as the appellant progresses along the review structure."[20] Giving reasons imposes a discipline on the decision-maker and should "have a corrective influence on impulsive, capricious or unconsidered decision making."[21] It assists with consistency and quality in decision making which is a hallmark of good administration. It also facilitates "action other than taking review proceedings, for example complaining to the Ombudsman or making a complaint to a Member of Parliament".[22]

THE AUDIENCE

Tribunal members must have regard to their audience when writing decisions. In writing decisions, as in their other work, they are meeting the objective of tribunals in being simple, affordable, timely and fair. They are writing for the applicants, the appeal court and, through Ministers, the departments. The ability and desire of these groups to fully understand the reasons of the tribunal varies but they all have in common a desire to see the findings of fact, the evidence on which it was based, the tribunal's understanding of the applicable law and the reasoning process that lead the tribunal to the conclusions made.[23]

The Applicants (and others associated with their applications)

Applicants to the IRT have, in the majority of cases, expended money (currently $850.00) and significant energy (emotional and other-

15 Federal Court of Australia, Finn J, 2 August 1996, unreported.
16 *Sun Alliance Insurance v Massoud* [1989] VR 8 at 18.
17 *Comcare v Parker*, Federal Court of Australia, Sackville J, 4 March 1998, unreported, quoted in Robertson, above n 3 at 2.
18 *MIEA v Pocchi* (1980) 44 FLR 41. [In this paper I have abbreviated the title of the Minister for Immigration in case citations to MIEA (Minister for Immigration and Ethnic Affairs), MILGEA (Minister for Immigration, Local Government and Ethnic Affairs) and MIMA (Minister for Immigration and Multicultural Affairs].
19 *Osmond v Public Service Board of NSW* [1984] 3 NSWLR 447(CA) per Kirby P.
20 Administrative Review Council, *8th Annual Report* (1983–84) at 17.
21 Thawley, above n 3 at 190 citing the Franks Committee Report, para 98.
22 J Anderson, "Something Old, Something New, Something Borrowed ... The New South Wales Administrative Decisions Tribunal" (1998) 5 *AJ Admin L* 97 at 110.
23 This list is taken from s 49 of the Administrative Decisions Tribunal Act 1997 (NSW).

wise) to get before the Tribunal. In about 80% of cases before the Tribunal the applicant has already gone through the internal departmental review by the Migration Internal Review Office (MIRO).[24] They have often waited some weeks to read the decision.

Many IRT applicants are not keen for a delay in the Tribunal's decision to enable them to remain onshore while awaiting a decision. Onshore applicants can be very keen to have the matter resolved. Many have "appeal fatigue" and are tired of having their lives "on hold". Offshore applicants invariably have relatives and friends in Australia—many of whom are Australian citizens—and all are anxiously awaiting the outcome of the Tribunal's deliberations. Obviously a decision which affects the place where a person will live her life and bring up her children is of vital importance to her.

It is a common assumption that the reasons for decision are most important to the losing side.[25] Thus, in the current financial year in the IRT it might be said that the tribunal's decision is most important in 53% of cases as 47% of the department's decisions are currently reversed. According to this theory the reason for the increased interest is the applicants' need to know whether to appeal and understand why they lost. It is sometimes said that applicants to the Tribunal do not bother to read the decisions once they know they have won.

It has been suggested to me that there is no point in spending undue time on reasons in decisions where the applicant wins. This is because in such cases no one has "lost" because the primary decision-maker does not have a stake in the outcome—they are applying the law and another decision-maker on review is applying it differently. Reference is made to the small number of times the Minister has appealed against decisions of the Tribunal, that is, against decisions in favour of applicants.[26] It is argued that from an economic efficiency point of view the Tribunal need not linger on these decisions. After all, the department makes in excess of 100,000 decisions a year and the Tribunal makes 2776.[27] These decisions are merely another step in the sifting process which culminates in the High Court. There is an oft quoted example of a Tribunal decision of sixty pages finding for the applicant, which is generally regarded as excessive.

While understanding the basis of this argument I reject it because it misunderstands the purpose of administrative review, debases the work of Tribunal members and ultimately devalues the importance of the process to all parties. It suggests that tribunal decisions are part of a factory production line and there is no need for quality inspection of some products because the customers of those products will not quibble about the quality. Every decision produced by a tribunal is important because the tribunal is part of a system of administration of justice. A tribunal is judged by its

24 Immigration Review Tribunal, *Annual Report* (1996–97) at 10.

25 Kirby, above n 3 (ALJ) at 692.

26 The Minister appealed against one tribunal decision in 1996/97: above n 24 at 13. To date this financial year he has appealed against 6 decisions.

27 Ibid at 8.

decisions and it is through its decisions that improvements can be made in primary decision making. Every applicant benefits from participating in a process which is valued and respected by all participants in that process and the wider community. In saying this I recognise that tribunals are being expected to improve their efficiency. However there must be a point at which it would be better to have no merits review than to have a system which is so superficial that it is a sham.

In the current debate on the future shape of Commonwealth tribunals[28] comments about the reversal rates of tribunals and the quality of tribunal decisions have had a negative impact on the perception of tribunals. Departmental decision-makers are well acquainted with tribunal decisions with which they disagree and departmental officers have better access to the ear of government than statutory authorities and consumers. Mistakes or inadequacies in tribunal decisions reduce the capacity of tribunals to maintain credibility and to fulfil their important role of improving primary decision making. Respect for a tribunal can only be achieved through quality, consistent decisions made by well qualified, properly resourced decision-makers and it is only when respect is achieved that the government and taxpayers get full value from tribunals.

Tribunal members are acutely aware of the impact of their decision on the people who appear before them. Tribunal hearings and meetings are relatively informal and there is little physical distance between the decision-maker and the applicants. Frequently this is the first time an applicant has spoken in person to a decision-maker. Often it is a challenge for the member to contain the taking of evidence to the taking of relevant evidence because there is a story to be told and the story tellers are very keen for someone in authority to hear it. Members hear outrage about the injustice of less deserving people have gained entry to Australia. They invariably try to explain the law and the decision in terms which applicants and their families and colleagues will understand. Often they must explain that the decision has nothing to do with a judgment about whether the applicant is a good and honourable person or whether the nominator has paid Australian taxes for several years. They explain that the law must be applied to the facts before them. It is probably true that tribunal members take special care with decisions which go against the applicant because they know the effect their decision will have and the fact that it will increase the chance of appeal.

Members sometimes write having regard to the Minister's power under s 351 of the Act to substitute a more favourable decision, although I understand Ministers have had different views on whether the Tribunal should refer applications to them. In cases where a member considers compassionate circumstances are strong they may take extra care to state those circumstances. A member may

28 See discussion at "Changes to tribunals" below. [Editor's note: see also R Leon, "Tribunal Reform: the Government's Position" in this volume of materials; R Creyke, "Tribunal Reform: A Commentary" in this volume of materials.]

sometimes consider that an agent's negligent or improper behaviour should be referred to the Migration Agents Registration Board and will set out the reasons in their decision. In circumstances where a member has grounds for suspecting maladministration those grounds will be set out in the decision so that it may be referred to the Secretary of the Department or the Ombudsman. It is also useful in decisions to draw attention to policy which needs to be re-examined because it apparently has an unintended consequence or is inconsistent with the legislation.[29] These inclusions in decisions are appropriate because the Tribunal is part of the executive and has a role in improving decision making.

In 1996/97 an adviser was appointed by applicants to the IRT in 66% of cases. In 34% of cases last year the applicants alone were responsible for deciding whether to apply for review, presenting their arguments, reading and understanding the decision.

In the Tribunal's last client survey in 1995 a majority of survey respondents indicated that they fully understood the reasons for the Tribunal's decision.[30] This was significantly higher than a similar survey in 1992 which showed 59% fully understood the reasons for decision. The survey also showed that 21% of applicants believed the Tribunal was part of the Department of Immigration.

Federal Court of Australia

The Federal Court is also an obvious audience of the Tribunal. Although in the last financial year there were only 173 appeals against IRT decisions to the Federal Court, which represents an appeal rate of 7.1%, the court nevertheless is omnipresent. (The appeal rate last year was a significant increase on the appeal rate in 95/96 of 4.7%).

To complete the picture I note that last financial year 90 appeals to the Federal Court were disposed of, as follows:

- 39 were withdrawn (meaning the Tribunal's decision was unchanged);
- 30 were dismissed (meaning the Tribunal's decision was unchanged);
- 2 were upheld and the matter remitted to the Tribunal for reconsideration;
- 19 were settled and the matter remitted to the Tribunal for reconsideration.

The "settled" category includes those cases in which, if there is a possible error of law detected by the Minister's litigation advisers, the matter is remitted back to the Tribunal where the case is reconstituted to a new member.

It appears that the numbers for this financial year will be somewhat similar although an overall increase in the number of appeals

29 Eg, *Shannon*, Unreported IRT Decision No 10314; Padmaperuma, Unreported IRT Decision No 10405; see discussion of "policy" below.

30 AGB Mc Nair Report, *IRT Applicants and Consultants Study* (August 1995).

against Tribunal decisions is expected and there has been an increase in the number of appeals upheld. In part this is due to the flow through to the Federal Court of applications for judicial review of Tribunal decisions in the 1 November class of cases.[31] The figures will be contained in the Tribunal's annual report.

In *Minister for Immigration v Wu Shan Liang*[32] the High Court said:

> [T]he reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.[33]

In the same case, Kirby J explained the purpose of looking at judicially reviewable decisions as follows:

> 1 The reasons under challenge must be read as a whole. They must be considered fairly. It is erroneous to adopt a narrow approach, combing though the words of the decision-maker with a fine appellate tooth-comb, against the prospect that a verbal slip will be found warranting the inference of an error of law.
>
> 2 This admonition has particular application to the review of decisions which by law, are committed to lay decision-makers ...
>
> 3 Specifically, the reviewing judge must be careful to avoid turning an examination of the reasons of the decision-maker into a reconsideration of the merits of the decision where the judge is limited to the usual grounds of judicial review, including error of law...
>
> 4 Nevertheless, the reasons for the decision-maker will usually provide the only insight into the considerations which were, or were not, taken into account in reaching the decision which is impugned. It is therefore legitimate for the person affected, who challenges those reasons, to analyse both their language and structure to derive from them the suggestion that a legally erroneous approach has been adopted or erroneous considerations taken into account or a conclusion reached which is wholly unreasonable in the requisite sense.[34]

The Federal Court had previously made similar comments[35] but these statements by the High Court provided further clarity. This approach is being generally applied by the Federal Court[36] although judges do find that, even taking this approach, reasons are sometimes inadequate.[37]

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31 This refers to the applications regarding the categories of permanent visas created by the Federal Government under concessions announced on 1 November 1993. See M Crock, *Immigration and Refugee Law in Australia* (1998) at para 9.7.4.

32 (1996) 185 CLR 259.

33 Ibid at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ.

34 Ibid at 291–292 per Kirby J.

35 *Muralidharan v MIEA* (1996) 136 ALR 84; *Politis v FCT* (1988)16 ALD 707; *Broussard v MILGEA* (1989) 21 FCR 472.

36 *Eg, Secretary, Department of Social Security v Hales* (1998) 153 ALR 259 at 269; *Santok Mally v MIMA* (Federal Court, 9 April 1998, Finn J, unreported).

37 Eg, *Jessop v Broken Hill Pty Ltd* (Federal Court, 2 October 1997, Branson J, unreported); *Australian Trade Commission v Underwood Exports Pty Ltd* (Federal Court, 17 October 1997, Mansfield J, unreported).

Both tribunals and courts have a responsibility to ensure that review of tribunal decisions does not become part of a game where clever lawyers try to persuade a court to overturn a tribunal decision on a spurious point. The players in such a game may lose sight of the point of the process—to apply Australian law fairly. A possible outcome of such a game could be that tribunal decision writers would write for the purpose of making their decision unappealable, rather than for the purpose of honestly conveying the reasons for their decision. The more the process becomes a game the more the system of justice is brought into disrepute.

Since Federation at various times there have been "atmospherics" between Commonwealth governments and Commonwealth courts. Sometimes this is caused by court's anger at the resources made available to them[38] and sometimes for other reasons. I suggest that tribunals are sometimes unfairly caught up in the atmospherics.

The following points are relevant:

- While tribunals are part of the executive arm of government they play virtually no part in the law making process. They are not normally consulted about laws or policies introduced by governments, with the degree of consultation varying depending on the portfolio department. Like the courts, the tribunals apply the law which is given to them.
- Tribunal members have, quite properly, no involvement in appeals against their decisions. Once the decision is made the tribunal is functus officio. In the IRT's case when an appeal is lodged its files and hearing tapes, are sent to the Australian Government Solicitor (AGS) who acts on behalf of the Minister. It plays no role in briefing AGS or counsel for the Minister. It is questionable whether the Minister is actually "defending" the tribunal's decision before the court.
- As I noted above, the IRT does not have the benefit of counsel appearing before it. It receives the departmental file and submissions from the applicant and undertakes its own investigation. It rarely receives (legal) argument from the Department of Immigration and Multicultural Affairs (the Department). Although it may be contrary to the adversarial tradition of not admitting any weakness before the court, acknowledgment should be made of the limits of the non-adversarial method which is used by the tribunal successfully in many cases, but not all. As I have said before[39], some cases decided by the IRT should be "fast tracked" to the Federal Court so that the tribunal has the benefit of the Court's interpretation of key legal issues which may be before the tribunal in scores of cases. It is most regrettable that the system allows for the tribunal to consider hundreds of cases—for example, in the 1 November group of

38 G Winterton, *Judicial Remuneration in Australia* (1995) at 1–2.

39 S Tongue, "The IRT: Contemporary Problems and Available Options" paper presented to *Immigrant Justice: Courts, Tribunals and the Rule of Law* Conference, Sydney, 6 June 1997.

cases[40]—in the absence of clear authority from the Court. Only now, when the tribunal has almost finished its consideration of this group of cases, is clear interpretation of the law emerging from the Court. In *Ranatora v MIMA*[41] a Tribunal decision which followed the law at the time of the decision[42] was remitted back to the Tribunal because it is now clear that the previous interpretation is not the favoured interpretation[43]. Similarly, there are currently over 80 applications before the Tribunal in relation to a point of law which is the subject of an appeal to the court against a previous decision of the Tribunal. Ideally the Tribunal would have the benefit of the court's decision before progressing those cases. However, the better view appears to be that a tribunal should not wait for a court's decision, unless it is imminent,[44] although it is possible that once that court decision is made all the cases which have gone on appeal will probably be remitted back to the Tribunal for reconsideration.

- I am not aware of any decision where an IRT member has been found to have been biased although allegations of bias have, from time to time, been made against individual members. In the decision of the Federal Court in *Sun Zhan Qui v MIMA*[45] where the ground of unintended actual bias was identified[46] Justice North noted that too often:

> [A]pplicants file applications and subsequent contentions which make broad allegations of error under s 476 but do not provide details of the alleged errors.[47]

That case involved a decision of the Refugee Review Tribunal (RRT) although appointments to the IRT were discussed. None of the judges, in their detailed analysis of the law of bias, adverted to bias in a tribunal in favour of the applicant.[49]

The Minister and his Department

The *Better Decisions* report drew attention to the potential role for tribunal decisions to have a broader more long term effect than merely the resolution of an individual case. First, particular decisions could be reflected in other similar decisions and secondly,

40 See above n 31.
41 Federal Court, Hill J, 6 April 1998, unreported.
42 *Subraju v MIEA* (1996) 68 FCR 313.
43 See the different interpretation of "trade" in *Pillay v MIEA* (1997) 47 ALD 12 which was subsequently followed in *Tanchiatco v MIEA* (Federal Court, 20 August 1997, Branson J, unreported); *Rahim v MIEA* (Federal Court, 28 August 1997, Sackville J, unreported) and *Tay v MIEA* (Federal Court, 16 December 1997, Foster J, unreported).
44 *Sun Zhan Qui v MIEA* (1997) 151 ALR 505 at 546 per Wilcox J.
45 Ibid.
46 See the Hon S Kenny, "Recent developments in Administrative Law: The Law relating to Bias" (1998) 18 *AIAL Forum* at 23.
47 *Sun Zhan Qui v MIEA* (1997) 151 ALR 505 at 563 per North J
48 Ibid.
49 The Hon P W Young, "Tribunals" (1997) 71 *ALJ* 658 at 659.

the agency could take tribunal decisions into account in the development of agency policy and legislation.[50]

The IRT has, in the past, expressed "frustration at the Department's apparent lack of interest in its decisions, citing that the Department 'is not committed to making changes in its practice or policy or to seeking changes to legislation as a result of views expressed in IRT decisions'".[51] When Tribunal members find inconsistencies or inaccuracies in departmental policy they include it in their decisions.

I understand that recent changes in the Department have improved the monitoring of Tribunal decisions and thus the capacity of the decisions to have an impact on policy development and decision making. One of the reasons Tribunal decisions may lack impact is that there are so many of them and it is difficult to distinguish the ones which apply well established law to individual facts in a fairly routine way from those that address new issues of law, discuss the interpretation of policy or comment on departmental practice. The digests on Tribunal decisions sift the decisions but there is understandably a delay in this. The volume problem will increase with the advent of the MRT which is expected to decide about three times the number of current IRT decisions. The singling out of significant decisions requires resources but ultimately there is little point in committing resources unless there is a commitment to find value in the decisions.

Migration agents

In many of the applications before the Tribunal a migration agent is involved. The better agents keep abreast of Federal Court and Tribunal decisions.

Not infrequently, although the Tribunal is not bound by the precedent of its previous decisions, an agent will refer to a previous decision which supports their client's argument. It has been argued that in such cases the Tribunal member should explain why they do not agree with a previous decision because a failure to do so "allows, if not invites, an unacceptable inconsistency and lack of intellectual rigour in tribunal decision making". Addressing the reasoning in the previous decision with which they disagree assists a member to clearly articulate their reasons for decision. It can also highlight possible deficiencies in drafting or policy which allow different interpretations.

Other tribunal members

Members of the IRT have ready access to each other's decisions and can word search the database to find a decision on a similar point to the one before them. Although the members are in six locations, they are in regular contact. By reading colleagues' decisions members can clarify their own thinking and achieve consistency.

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50 *Better Decisions* report, above n 2 at ch 6.

51 F McKenzie, "The Immigration Review Tribunal and Government Policy: To Follow or not to Follow?" (1997) 4 *AJ Admin L* 117 at 119.

SUGGESTIONS FOR WRITING DECISIONS

The following lessons are drawn from: my own experiences; my reading of Federal Court decisions and case notes on matters in which the Minister has withdrawn from litigation because of possible or probable error by the IRT; discussions with tribunal members; and articles and papers. I note that this part of my paper is based on decision writing in non-adversarial jurisdictions.[53]

Justice Kirby has referred to "brevity, simplicity and clarity" as "the blessed trinity of good judgment writing", including by tribunals. However, clearly some decisions require more detail than others.

Hayley Katzen sets out a good list of preferable practices:

> Statutory and case-law requirements should be set out.
>
> When discussing legal principles it is preferable to state the proposition, the authoritative case and its page reference, rather than incorporating principles by reference to other cases.
>
> Evidence which is material to the deliberations and all findings of fact on material questions should be set out clearly and unambiguously.
>
> All material issues, even if they are not addressed by the parties, should be discussed.
>
> On vital issues, where evidence conflicts, clear findings as to which evidence is preferred should be made.
>
> If concessions have been made, the tribunal should indicate whether it is satisfied such concessions are correctly made.
>
> Parties should be given an opportunity to deal with evidence and make submissions.
>
> All submissions seriously advanced should be considered.
>
> The connections between evidence, facts as found and conclusions reached should be indicated.[55]

Three points are aptly explained by Sir Frank Kitto[56] and cited by Alan Robertson:

> Perhaps the most common case of an insufficiently disciplined judgment is one which recites the facts—in a degree of pedestrian detail that scorns to discriminate between those that really bear on the problem, those that may interest a story-lover but not one possessing the lawyer's love of the relevant, and those that are not even interesting but just happen to be there—which identifies the question to be decided, and then, without carefully worked out steps of reasoning but with a "blinding flash of light" (as has been said), produces the answer with all the assurance of a divine revelation.[57]

52 Ibid at 120.
53 See below.
54 Kirby, above n 3 (*ALJ*) at 691.
55 Katzen, above n 3 at 46–47.
56 Sir F Kitto, "Why Write Judgments?" (1992) 66 *ALJ* 787 at 792.
57 Robertson, above n 3 at 3.

The following suggestions, which are listed in no particular order, emerge:

Concentrate on the point in issue.

A decision-maker cannot avoid confronting the difficult issues in a case and the sooner they are faced up to the better. For a case to get to a tribunal there is at least one issue in contention—an unfairness or error perceived by the applicant.

In most matters before tribunals, there are issues on which there is no dispute. It is desirable "to identify at an early stage the issues which the tribunal has to decide, which elements are agreed, and which are in dispute. The wise member (and hopefully, the parties) will then have clearly in mind what considerations are relevant to those issues."[58] Sometimes tribunal members do this automatically and fail to record the process but ideally the agreed points are briefly identified in the decision.

Some Federal Court judges and tribunal members who use headings[59] include a heading such as "Issue" or "Contention" to isolate the focus of the dispute. Readers appreciate this. However headings should be used thoughtfully and care taken to put written statements under the proper heading. In *Simpson v MIEA*[60] a tribunal's reasons were "close to the border of legal inadequacy" because the findings of fact were under the heading "Evidence" and also the word "finding" was used loosely.

Give the reasons for the decision.

Probably the hardest part of decision writing is setting out the reasons for reaching the conclusion. Sometimes decisions are produced "with a blinding flash of light" rather than a careful exposition of why the conclusion was reached.

A study of IRT decisions in which departmental policy was not followed led to the criticism that the Tribunal did not explain its departure but rather adopted a sleight of hand to reach a decision opposite to that previously reached.[61] If this happens it can lead to a suspicion that a member is predisposed, or even biased.

> What the parties, the court and the public want are the real reasons for a decision ... stating the real reasons may well involve both honesty and courage.[62]

Avoid cluttering the decision with details of minor importance.

Perhaps this is sometimes done to give the applicant a sense that their story was heard. Sometimes it may be done to "cover all the bases". However it is unnecessary, wastes time and resources and gives the impression of a decision-maker whose mind is cluttered

58 Lord Archer of Sandwell "Cutting Humility Down to Size" (1997) 4 *Trib* 3.
59 Kirby, above n 3 (*ALJ*) at 701.
60 Federal Court, 29 August 1994, unreported.
61 McKenzie, above n 51 at 121.
62 Robertson, above n 3 at 2.

and who cannot distinguish between relevant and irrelevant material.

Think clearly before the writing process starts.

This point was made by Alan Robertson who argues that "the clearest reasons will follow from clear thinking before the writing process starts and clear writing will often involve spelling out continually the significance of what is being said."[63]

While I agree with the need for clear thinking at the start I wonder whether, as a practical matter, the strict separation of thinking and writing has been somewhat overtaken by technological changes. With the advent of desktop computers, databases and word processors the writing task has changed. Years ago judges would probably read and ponder then call in a secretary to take dictation and their decision would gradually take shape. I do not know how much that happens in courts but it is rare in tribunals. The strengths and pitfalls in this change need to be recognised.

As in courts, so it is in tribunals that the sooner the first draft of reasons is prepared, generally, the easier is the task of its ultimate completion.[64]

When I was appointed to the IRT some of its more productive members told me that they invariably write up a first draft of their reasons as soon as possible after the taking of oral evidence is completed. I have found this helpful. Indeed for me the difficulty of the writing task increases in direct proportion to the length of time since the taking of evidence. Related to this is the need to manage time by not re-reading a file except for checking.

I have found it helpful to get up on the computer uncontested facts, the law and the policy pertaining to a decision prior to the taking of oral evidence. Since a first step in considering an application is checking the relevant legislation on a database it is sensible to copy it over to a document straight away. This process enables clarification of essential facts and focussing of questions when oral evidence is taken. Thorough preparation prior to questioning of witnesses is invaluable.[65] Following the hearing the notes need to be carefully checked to see that they are correct and they can be copied into the decision. They form the genesis of the decision.

Keep the decision record simple and as brief as is necessary.

Brevity can be achieved in part by limiting the recitation of facts to the key facts and clarifying the issue in contention, as discussed above. Similarly, as discussed below, it is not necessary to set out all the words of a legislative provision if the decision turns only on certain parts.

However, it is sometimes necessary for a tribunal to give a detailed decision. For example, if an application for review involves

63 Ibid at 3 citing GVV Nicholls "Of Writing by Lawyers" (1949) 27 *Can BR* 1209 at 1220; Lord McMillan "The Writing of Judgments" (1948) 26 *Can BR* 491 at 492.

64 Kirby, above n 3 (*WALR*) at 214.

65 J Metledge, "Conduct of IRT Cases" *IRT Training Paper*, 3 January 1990.

a new visa class or a new legal argument not previously considered by a member of the tribunal it is helpful if the tribunal sets out detailed reasons.[66] Similarly a multi-member panel may be constituted to consider a "test" case with the purpose of having detailed examination of the general issues. In such cases longer reasons are justified.[67] Arguably shorter decisions can be expected in time limited review applications while longer decisions may be needed in relation to some visa cancellation applications.

Avoid paraphrasing legislation and use synonyms carefully.

IRT decisions have been overturned on occasions because a member applied a synonym or definition other than the words of the statute. Sometimes this has been due to unfortunate phraseology by a member which suggested that they were applying a set of words other than those contained in the statute. Sometimes errors can be made when attempting to turn convoluted drafting into words an applicant can understand. Particular care must be taken with words which have been frequently interpreted by the courts and then, as discussed below, the court's interpretation needs to be included.

Having taken care to identify the relevant section(s) of the Act(s) or regulation(s) also take care in setting them out.

A mistake in identifying the relevant sections of legislation is a fairly obvious mistake and is likely to result in the matter being settled and remitted back to the tribunal rather than going on to the Federal Court.[68] Mostly in such cases the member considered the relevant part of the legislation but did not make it obvious in the written decision.

Tinnion[69] argues in relation to UK tribunals that a tribunal can fail to appreciate that the words of the provision applied have been given a special or "technical" meaning by the statute itself. I suggest this is less of an issue in Australia but should be borne in mind.

There are different views on whether to include the legislation in the body of the decision or as an attachment. It is argued that applicants find it confusing to have long pieces of legislation in the text. On the other hand that is the material on which the decision is based. Certainly attention needs to be paid to the relevance of all parts of the legislation quoted as it may be unnecessary to include some parts.

Indicate the influence of government policy on the decision.

One of the government's criticisms of tribunals is their failure to take into account government policy. The law on tribunal's consideration of policy is well established.[70] The IRT has regard to the Department's Policy Advice Manual (PAM) which is now much more accessible to

66 Eg, *Re Qing Mei Fu* (Unreported IRT decision No 4388, 20 September 1994).
67 Eg, *Re GRY* (Unreported IRT decision No 8209, 3 December 1996).
68 Bell, above n3.
69 Ibid at 10.
70 Eg, *Drake v MIEA* (No 2) (1979) 2 ALD 634.

the tribunal.[71] The departmental primary and review decisions invariably cite relevant sections. If the policy is being followed, or not followed, this should be explained in the reasons.

Always keep up to date with relevant authorities.

All those involved with administrative law must sometimes feel daunted by the amount of material to be absorbed. The Federal Court hands down at least one decision on migration law every week and decisions in other fields are also of relevance to issues before the Tribunal. The Department's PAM incorporates changes to the law but this can take some time and not all court decisions are reflected in the PAM. It is good practice before writing a decision to check if there have been recent developments in the area—even if you are regularly writing on the subject.

Weigh the evidence.

A common error in the statement of reasons is the finding of a fact which has no evidence to support it, or reliance on a point on which there has been no comment by the parties. There are two fundamental questions which must be answered in every case. First, what evidence proves a point, and secondly, how much weight should be given to it.[72]

The IRT is not bound by the rules of evidence but the weight and probity of evidence must be considered. Members have to decide how much weight to give evidence.

Listing of relevant documents and other evidence is useful. Some members recite the actual words of an applicant which has the advantage of allowing applicants to see that their argument was heard. The essential step is, as Katzen stated, relating the finding to the evidence.

Expert evidence must also be weighed. Experts do not always agree and there is a tendency for experts paid by one side to produce a view favourable to that side.[73] The cost and delay to a tribunal of taking evidence from independent experts is prohibitive in most cases but the obtaining of expert evidence by a tribunal has been upheld by the Federal Court.[74] Care must be taken in rejecting expert evidence in the absence of contrary expert evidence.[75]

Similarly the genuineness of documents before the tribunal must be considered.[76]

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71 See below.

72 J Metledge, "Evidence" *IRT Training Paper*, 6 February 1990.

73 Australian Law Reform Commission (ALRC), *Review of the Adversarial System: Federal Tribunal Proceedings* (Issues Paper No 24, April 1988) at 79.

74 *XYZ v MIMA & RRT* (Federal Court, Carr J, 11 March 1998, unreported).

75 *Sun Zhan Qui v MIEA* (1997) 151 ALR 505.

76 See discussion of *Balwir Singh v MIMA* (Federal Court, Full Court, 14 November 1997, unreported) in the text below and *Jayasinghe v MIEA* (Federal Court, Goldberg J, 25 June 1997, unreported).

Discuss credibility.

Tribunals hear oral and written evidence from applicants which are self serving claims and assertions. They may have many sources including recollections, reconstruction or fabrication or a combination of these. The tribunal must consider these claims and assertions in the context of the whole of the evidence before it. It must decide what weight, if any, should be given to them. It must explain why it has given, or not given, weight to the claims.

> A lack of credibility in relation to one aspect of a ... claim does not necessarily mean the claimant is to be disbelieved in relation to others. Nonetheless, any loss of faith in a witness' integrity will almost inevitably affect the decision-maker's willingness to accept uncorroborated claims in relation to other matters.[77]

When writing a decision the need for natural justice must always be kept in mind.

Decision-makers must be ever vigilant that they have no actual or perceived bias. They must listen fairly to the parties. If a new point arises it should not take the parties by surprise. In the case of the IRT, where the Department is mostly present only through its file, the Tribunal must give due regard to the material on file. Sometimes it is appropriate to summarise the reasons for the primary decision although this may not be possible if the reasons are scanty. It is useful if new evidence is before the tribunal—as it often is—to briefly highlight the new evidence.

Justice Kirby has written that a judgment "must have integrity and carry with its words the evidence of the manifest impartiality and intellectual honesty of the writer".[78] The same is true of tribunal decisions. Although tribunal members may not be part of an "elite band" with "ancient lineage" they are fulfilling an important role which imposes responsibilities upon them.

Avoid being an appeal court.

Administrative decision-makers are not judges. A person who reads court decisions can absorb the language and style of the courts but tribunal members should remember that their job is administrative review.

There is arguably no place for humour, irony or asides in tribunal decisions. Given the different audiences for the decision these have the potential to strike a discordant note.

Avoid gratuitous remarks or disparaging comments about primary decision-makers.

Justice Kirby, in writing about appellate courts, has made the point that "the expression of error detected can be frank without the

77 *Sun Zhan Qui v MIEA* (1997) 151 ALR 505 at 535 per Wilcox J

78 Kirby above n 3 (ALJ) at 695.

hurtfulness which causes unnecessary offence."[79] He argues there is reason for appellate courts to have "intellectual modesty and the avoidance of arrogance or insensitivity of expression"[80]. Different minds can reach different conclusions, there may be a simple error or the law may be obscure.

Similarly when a tribunal reviews the decision of a departmental officer it needs to bear in mind the pressures under which such officers work and the inconsistencies and uncertainties of the law. Sometimes human beings just make mistakes.[81] In their decisions on appeals against tribunal decisions the Federal Court rarely refers to the tribunal member by name and the same courtesy should be extended by the tribunal to primary decision-makers. However, occasionally a tribunal member hears or sees something to which they want to draw attention. This should be done without righteous indignation and without jumping to conclusions about motives.

Take care with "standard" or "precedent" decisions.

Increasingly in high volume jurisdictions decision-makers are using precedents or "shells" as a base for constructing reasons for decisions. This can be sensible and efficient and the Federal Court has not objected as long as the decision-maker is applying their mind to the facts before them. Anyone using a precedent needs to be aware of "the need to adapt precedents to the circumstances of the particular case."[82] In addition "standard form decisions create an impression of prejudgment and policy application which has to be dispelled by the application of care and concern that the precedent does not detract from the fairness of the hearing (and) accuracy of the decision."[83] It is particularly important to ensure that current law is applied.

This is important as increasingly members are fully computer literate. The danger with the technology is that the claims in the individual case will be overlooked. Another danger with technology is overlooking the need for brevity, clarity and simplicity.

State early in the decision the key points of the case and provide pointers.

Given that the audience of a decision includes a range of people and given the number of administrative decisions, as a practical matter it is useful for a reader to be able to quickly come to grips with the essence of a decision. I have already discussed the use of headings above.

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79 Ibid.

80 Ibid.

81 For example, *Wang v MIMA* (Federal Court, 13 February 1997, Merkel J, unreported) in which the IRT was described as "Kafkaesque" when a junior IRT staff member inadvertently gave wrong advice.

82 Tinnion, above n 3 at 13.

83 Ibid.

Use words which people understand and which do not offend.

It is generally thought that using Latin in tribunal decisions is a bad idea.[84] Similarly, if your audience is likely to include people for whom English is not a first language it is undesirable to use words that appear to come from the "Increase your Word Power" section of the Readers Digest.

OTHER ISSUES

There are other issues which are currently arising in decision writing in the IRT. Often they result from the constant balancing between efficiency and fairness. They are worthy of further debate.

Investigation

Tribunals have the power to investigate. This derives in part from the disparity in resources between the parties and the fact the parties are not adversaries.[85] The IRT (and RRT) may obtain such evidence as they think necessary.[86] It has been argued before the Federal Court that a failure by the tribunal to discharge its "duty" to investigate constitutes grounds for judicial review.[87] In *Sun Zhan Qui v MIEA*[88] the Federal Court undertook a detailed analysis of a review undertaken by an RRT member. The Court found there had been a failure to inquire into certain aspects of the case. In *Balwir Singh v MIMA*,[89] which concerned the authenticity of a document, the Full Court ruled that if there is cogent evidence on which the tribunal is entitled to form a conclusion it may act on that conclusion without being obliged to take steps of its own to investigate the authenticity of the document.

At some point a tribunal has to make a judgment on how many more resources should be devoted to the review. To a certain extent the applicant has a responsibility to provide evidence in support of their case although there is no burden of proof.[90] The issue for tribunal members is the extent to which they should disclose the extent of their investigative actions and the reasons for those actions in their reasons for decision having regard to the need to be efficient in the production of reasons.

Nondisclosure of documents

In *Gilson v MIMA*[91] there were "dob in" documents on the departmental file. The tribunal did not refer to them in its reasons and the

84 Kirby, above n 3 (*ALR*) at 702.
85 ALRC, above n 73 at ch 6.
86 Migration Act 1958, ss 360(1)(b) and 425(1)(b).
87 ALRC, above n 73 at 71–72.
88 (1997) 151 ALR 505.
89 Federal Court, Full Court, 14 November 1997, unreported.
90 Ibid at 61–62.
91 Federal Court, Lehane J, 21 July 1997, unreported. The Minister has appealed the decision and the decision in *Eshetu v MIMA* (1997) 14 ALR 621 on which, in part, it was based.

applicant was unaware of them until the commencement of litigation. The Court held that if the material was before the Tribunal it should have given the applicant to comment on it in accordance with the *Kioa* principle.[92]

The scope of operation of s 375A of the Migration Act was not considered in *Gilson* and has not been considered in detail by the Court.[93] The Tribunal is taking care to record the disclosure and nondisclosure of material where relevant in its decisions.

CONTEXT OF DECISION WRITING

Changes to Tribunals

The Federal Government has announced that the AAT, IRT, RRT and Social Securities Appeal Tribunal (SSAT) will be merged into one Tribunal to be known as the Administrative Review Tribunal (ART).[94] It is intended that the merits review process will be streamlined. It is proposed that written decisions will be simplified. The ART President and Executive Members are expected to issue practice directions to reduce unnecessary length and complexity in tribunal written decisions. They will provide advice to members and case officers[95] on the appropriate level of information for parties while minimising documentation. It is also proposed that guidelines be developed to encourage members to deliver oral decisions, providing reasons only where appropriate. Written reasons would be available if requested by either party within a prescribed time limit.

Support for these proposals has varied. While oral decisions can be suitable, in some cases, particularly complex cases, there is sometimes a need for detailed explanations. The giving of oral reasons requires special training and skill and preparation by the member.[96] Written decisions allow the exposition of principles and provide a discipline. The guidelines will no doubt take into account that in some cases there will be a need for written decisions to explain the decision to the applicant, contribute to the improvement of decision making, assist advisers to determine whether an appeal is warranted and contribute to the development of jurisprudence in the field.[97] It will be important that a balance be retained between writing reasons with a view to an appeal and writing to inform applicants and improve government decision making. Reasons written in response to a request can often favour the former purpose.[98]

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92 *Kioa v West* (1985) 159 CLR 550.

93 *Re Moon* (Unreported IRT decision No 11497, 19 March 1998); *Re Arias* (Unreported IRT decision 10920, 16 December 1997); *Re PB01275* (Unreported IRT decision 10246, 19 August 1997).

94 The Hon D Williams, Commonwealth Attorney-General, "Reform of Merits Review Tribunals" *News Release*, 3 February 1998.

95 It is intended that case officers will assist members in preparing reasons for decision

96 Kirby above n 3 (*WALR*).

97 These issues were raised before an AIAL seminar in Canberra on 22 May 1998 at which the Government's proposals were discussed.

98 A Cornwell, "Trouble with government decisions" (1997) 22 *Alt L J* 182 at 186.

Prior to the government's announcement the Immigration portfolio tribunals had already initiated changes in response to the review of migration decision making which was conducted within the portfolio and reported to the Minister for Immigration and Multicultural Affairs, the Hon Philip Ruddock, in September 1996. The Tribunals examined their processes during the course of the review to find ways to improve their achievement of their objective. Key concerns for the Minister are the length of time taken by the determination process and the potential for the Government's policy decisions to be distorted in the review process.[99] The Minister considers that insufficient attention has been paid by the IRT to ensuring quick and efficient review processes.[100] The Government's decision to merge the IRT with MIRO into a Migration Review Tribunal (MRT) was announced by the Minister on 20 March 1997[101] and legislation is currently before the Senate to give effect to this.[102] It is expected that the MRT, like the ART, will use case officers to assist members in the preparation of decisions.

The government, which has stated its commitment to independent merits review[103] is clearly serious about improving the efficiency of tribunals and one way this can be done is through close attention to the efficient production of decision records. This must not be done at the cost of the provision of adequate reasons or through compromising correct decision making procedures. For example, the preparation of a draft decision by a case officer for consideration by a member must not transgress the requirements of administrative law. The challenge for the new MRT and the ART will be to meet the government's demands while complying with the established requirements of administrative law and I expect that the officers in portfolio departments who are developing the new tribunals are aware of this principle.

Members

There will be varying skills in writing within a tribunal, given the "empire of individualists"[104] which characterisises a tribunal. Even the skill of the same member of the tribunal may vary from day to day. However, a tribunal, like a court, is only as good as its worst member on their worst day. For this reason every member of a tri-

99 The Hon Philip Ruddock, Minister for Immigration and Multicultural Affairs, "Proposed Changes to the Administrative Review Scheme" AIAL Victorian Chapter Conference *The Balancing Act: Immigration Decision-making* above n 3 at 2.

100 Ibid at 6.

101 The Hon Philip Ruddock, Minister for Immigration and Multicultural Affairs, "Sweeping Changes to Refugee and Immigration Decision Making and Refugee Appointments", News Release, 20 March 1997.

102 Migration Legislation Amendment Bill (1997) No 4. *[Editor's note: this legislation has now been enacted as the Migration Legislation Amendment Act (No 1) 1998 (Cth)].*

103 See Ruddock, above n 101. *[Editor's note: the Migration Legislation Amendment Act (No 2) 1998 (Cth) gives effect to these measures].*

104 This expression is drawn from Justice Kirby's description of judges, above n 3 (*ALJ*).

bunal has an obligation to make every decision as good as it can be given the constraints. Ultimately it is the responsibility of the person making and signing the decision to ensure it is accurate.

In the IRT a number of members are non-lawyers and there are single member panels in the majority of cases before the Tribunal. It is intended that there will be single member panels in the MRT and the ART. Legal skills are not expected to be a formal requirement for MRT or ART members. However, there is agreement with the ARC's identification of analytical skills as one of the desirable qualities for tribunal members. This includes the capacity to interpret legislation, possession of conceptual and analytical skills and judgment, the ability to analyse and apply relevant law, the ability to apply administrative law principles and the capacity to analyse evidence.[105]

It will be essential for both the MRT and the ART to provide adequate and effective training for members, as recommended by the ARC.[106] This requires responsiveness from members and sufficient funds to cover the costs of training which include the cost of member and staff time.

Time pressure

There is already pressure on tribunals to produce decisions quickly and this pressure will not dissipate. The IRT, like other Commonwealth tribunals, has the objective of providing review which is "fair, just, economical, informal and quick".[107] The general view appears to be that Commonwealth tribunals have performed well on the first two objectives but less well on the last three. Monthly reports on the number of decisions produced by each IRT member and "old"[108] cases before a member are circulated to each member and provided to the Minister. Complaints about delays in decision making can be made to the Commonwealth Ombudsman.[109] The Minister has urged the Tribunal to increase its output. In order to produce a sufficient number of decisions each month it is necessary for members to carry a significant case load. In the IRT there has been debate about the ideal number of cases to achieve maximum productivity and the preferred load is around 60 cases. In 1996/97 the Tribunal's productivity rose by 22% over the previous year[110] and it is expected that this will be sustained this financial year despite the loss of full time members.[111]

Non-adversarial procedures

I have already discussed the need for some cases before tribunals to be "fast tracked" to the courts. The IRT process is non-adversarial

105 *Better Decisions* report, above n 2 at para 4.12.
106 Ibid at para 3.46.
107 Migration Act 1958 (Cth), s 353(1).
108 "Old" cases are considered to be cases over nine months old since constitution
109 The AAT is not subject to Ombudsman review, presumably because it is headed by a judge, but it is expected that the ART would be subject to this scrutiny.
110 IRT, *Annual Report*, above n 24 at 8.
111 Six full time members have resigned since April 1997.

and its is expected that the MRT and the ART will also adopt non adversarial procedures. In an adversarial system the day in court assumes greater importance. In a non-adversarial process there is a continuum series of meetings, hearings and exchange of correspondence[112]—an investigative phase, the taking of oral evidence and supplementation with written evidence at any stage.[113]

The IRT conducts the investigation. The Tribunal does not have the benefit of opposing counsel drawing its attention to facts, points of law or relevant cases. In 1996/97 applicants had advisers in 66% of cases.[114] This was an increase of about 10% over the three previous years.[115] The quality of advisers varies markedly and tribunal members have referred the conduct of some agents to the Migration Agents Registration Board. It is too soon since the demise of that Board to determine the effect of the new system of self regulation.

Frequently the only articulation of the applicable law by a party to the proceedings which is available to the IRT is the statement of law prepared by the primary decision-maker or MIRO officer. The Tribunal has the Department's file before it—not selected documents—and it is extremely rare for anyone from the Department to appear before the Tribunal. Migration law changes frequently and time and effort is required to keep abreast of changes.

There have been recent technological developments which have been of considerable assistance to the Tribunal. The first is the introduction of the Department's LEGEND database which allows access to the legislation (since 1994) at a specified date. The second is access to the High Court and Federal Court home pages on the Internet which allows the Tribunal much faster access to recent decisions. Over the past year the Tribunal has concentrated on improving members' access to resource material via their desk top computers and I would expect that this trend will continue in the MRT and ART making the provision of adequate information technology resources essential for these bodies.

Resources

While appreciating that there is no point in bleating about limited financial (and staffing) resources I cannot ignore the subject, especially in light of the changes to funding envisaged for the ART. Like every government organisation the IRT has limited resources which it applies (thinly) to operations in six locations. Members do not have associates, the Tribunal's research capacity is severely limited and there are no staff dedicated to training. The changes to tribunals mooted over the past two years have had an inevitable impact on morale although, to the Tribunal's credit, not on productivity. Some organisational paralysis can be expected when future planning cannot occur. The statistics on funding for all tribunals are contained in

112 ALRC, above n 73 at 21.
113 L Certoma "The Non Adversarial Administrative Process and the Immigration Review Tribunal" (1993) 4 *PLR* 4.
114 Ibid at 11.
115 Ibid.

the Australian Law Reform Commission's Issues Paper Review of the Adversarial System of Litigation: Federal Tribunal Proceedings.[116]

CONCLUSION

"Justice in tribunals is every bit as important as it is in the courts".[117] It has been said of courts that:

> Public trust and confidence requires not only integrity and restraint in the judicial process and sensitivity in its expression. It also demands that the courts work efficiently and creatively to ensure that disputes are fairly and economically resolved: through processes adapted to the needs of litigants, rich and poor.[118]

The same is true for tribunals. They must grapple with a "central dilemma ... namely, how to reconcile the need to achieve institutional fairness and distributive justice with the applicant's demand that justice be done in the instant case".[119]

At this time tribunals cannot afford to ignore the message that they must continue to maintain integrity in their processes, improve their efficiency and have the respect of participants in their processes. The main beneficiaries of such efforts are the applicants who have access to affordable and simple review and the community who have better administration. A tribunal's work is on public display in its decisions and they must be as good as the individual members and the organisation can make them.

116 ALRC, above n 73 at 109.
117 Lord Woolf "Foreword" (1997) 4 *Trib 2*.
118 Santow, above n 3 at 304.
119 L Maher "The Australian Experiment in Merits Review Tribunals" in G Mendlesohn and L Maher (eds) *Courts, Tribunals and New Approaches to Justice* (1994) at 85.

Advocacy Skills Before Tribunals

MURRAY MCINNIS*

INTRODUCTION

Advocacy skills before those tribunals which either permit or encourage representation are essential both in order to represent a client and to assist the tribunal. In most cases tribunals are bound by an oath of office to "faithfully and impartially perform the duties of that office."[1]

The value of good advocacy and representation of parties has been recognised by courts and tribunals in many cases. Usually it is noted by courts or tribunals where one party is unrepresented. This makes the task of the tribunal more difficult because there is a need to ensure that the unrepresented party has a fair hearing. At the same time there is a need to avoid any suggestion of bias by the represented party who may be aggrieved by the level of assistance being offered by the tribunal to the other side.

It is important to keep in mind that advocacy before administrative tribunals involves addressing an extremely wide diversity of tribunal members and issues. The skilled advocate should know the forum and have a clear understanding of the background and experience of the presiding members. Not all tribunals have legally trained members. Some have non-lawyers whilst others combine a legally trained presiding member with other expert or lay members. Accordingly it is important for any advocate to appreciate the background and experience of the tribunal members as this will determine the manner in which the advocate presents the case.

A great deal of time and effort is wasted in debating the relative values of adversarial and inquisitorial review systems. Often debate is meaningless as a result of a failure on both sides to understand the objective and role of the adversarial system compared with the inquisitorial approach. The adversarial system can be quite com-

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1 Administrative Appeals Tribunal Act 1975 (Cth), Sch 2.

patible with the administrative law review process and indeed can complement the more flexible approach adopted by tribunals in the course of the hearing and issuing of directions prior to the hearing. For example, advocates should fully utilise the pre-hearing discovery process available before the Administrative Appeals Tribunal.[2]

The adversarial system is not simply about winning and losing. To suggest, for example, that the lawyer's role in that system is strictly partisan fails to appreciate the duty that a lawyer has to the court or tribunal. Of prime importance is the duty not to knowingly mislead the tribunal either in the presentation of the facts or reference to relevant law.

It is also necessary to understand that the advocate's role may extend beyond the tribunal as the case may give rise to an appeal to a superior court. It is particularly important, where proceedings are often transcribed, to understand the consequences of any failure by an advocate to properly perform the advocate role. A significant obstacle to a successful appeal may be that the appellate court finds the advocate failed to discharge the duty to call or test evidence or make relevant submissions. That is not to say that an appeal court will not allow an appeal where an error of law occurs due to the approach taken by the appellant's counsel.[3]

The advocate's role before tribunals should not be compromised in any way simply on the basis that most tribunals are not bound by the rules of evidence or that the proceedings are conducted with as little formality and technicality and with as much expedition as the requirements of the legislation permit.[4] It must be remembered that all tribunals have a duty to comply with the rules of natural justice and procedural fairness. For most tribunals there is a statutory obligation to ensure that every party is given a reasonable opportunity to present his or her case.[5] Reasonable opportunity includes observance of the requirements of natural justice both at the hearing and in directions.[6] Whilst the tribunals are usually not bound by the rules of evidence, it should also be remembered that the rules of evidence do assist the tribunal in determining the weight which may be given to particular evidence.[7] Procedural fairness and natural justice do not, in my view, require one party to reveal all of its material which may be used against the other party. For example, surveillance material which may be held by one party and which is to be used in cross examination does not have to be disclosed as to do so would detract from one party's opportunity to present the case.[8]

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2 Ibid at s 40(1B).

3 *Burston v Melbourne and Metropolitan Tramways* (1948) 78 CLR 143 at 167 per Dixon J; *Kuswardana v Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 186; 54 FLR 334.

4 Administrative Appeals Tribunal Act 1975 (Cth), s 33.

5 Ibid at s 39.

6 *Re Health Insurance Commission and Hobbes* (1990) 21 ALD 229.

7 *Kirkpatrick v Commonwealth* (1985) 62 ALR 533; 9 FCR 36.

8 *Australian Postal Commission v Hayes* (1989) 23 FCR 320.

WHAT IS ADVOCACY?

Advocacy is defined as being, "the art of conducting or presenting proceedings before a court. An advocate's work comprises argument or making speeches, questioning witnesses and preparation and planning for these tasks."[9]

It is important to remember that where a legal practitioner appears as an advocate then that practitioner has professional obligations which relate to the advocacy role and in particular has an overriding duty as an advocate not to mislead the tribunal. That duty may in some circumstances be in conflict with the advocate's duty to advance the interests of the client. For the purpose of this paper on advocacy skills it is assumed that those skills are exercised by a legal practitioner who has a duty to the tribunal to ensure that material is properly presented and that evidence is not knowingly led that is in any way be misleading or inaccurate. That ethical standard is often overlooked by those who seek to diminish the role of lawyers in the administration of justice. It provides one of the essential foundation stones of our system of justice and the rule of law.

BASIC ADVOCACY SKILLS

Advocacy skills, like any other skills, can be taught and learnt. In my view it is a myth to suggest that good advocates are somehow gifted or that advocacy skills cannot be acquired, developed and applied. Advocacy skills, once acquired and practised, can be effectively applied by any person with a reasonable intelligence and aptitude.[10]

Obviously the advocate needs to feel confident in the preparation and presentation of submissions and in questioning witnesses. It is often the testing of evidence by questioning that appears to be the most daunting task of the advocate. Conversely good cross-examination in my experience is usually the most satisfying aspect of advocacy.

Good cross-examination does not always occur as even the most experienced advocates can lose sight of the original objective of cross-examination or pursue without success lines of cross-examination thus providing very little assistance to the tribunal.

The basic principles of advocacy which apply to courts have equal application to tribunals.

In my view the following are essential ingredients for good advocacy:

- Identify the objective.
- Identify the evidence which you need to prove to achieve the objective.
- Identify the evidence which needs to be disproved in order to achieve your objective.

9 P Nygh and P Butt, *Butterworths Concise Australian Legal Dictionary* (1997) at 15.
10 D Napley, *The Technique of Persuasion* (2nd ed 1975).

- Having identified your objective and the evidence which you need to prove or disprove to achieve that objective, undertake preparation which includes:
  - Thorough reading of all relevant material;
  - Cross referencing of evidence in relation to relevant topics;
  - Preparation of a chronology of events and cross reference to source material;
  - Careful preparation of opening and closing addresses with written outline if appropriate;
  - Prepare a list of topics for cross examination before the hearing commences and ensure that it is updated upon the receipt of any further documentary material and during the hearing;
  - Prepare a list of prior statements by witnesses in relation to key topics which can then be used in cross examination during the course of evidence to identify inconsistencies; and
  - Research all relevant law.
- Maintain self control and control of witnesses.

In relation to tribunals some adjustment may need to be made in relation to the manner in which the case is presented having regard to the following:

- The tribunal membership;
- The experience and background of the tribunals;
- The jurisdiction dealt with by tribunals;
- The nature of the issue under consideration; and
- The voluminous documentation which legislation often requires parties produce to the tribunal.

If, for example, the nature of the issue concerns a narrow interpretation of a section in a particular piece of legislation then obviously after identifying the objective a great deal of time and effort will be devoted to researching the law and preparing an outline of submissions in a form which would be readily understood and of assistance to the tribunal. There will be little scope for development of advocacy technique of a kind which would usually be used when testing the credit of a witness.

Conversely where an issue of credit arises before a properly constituted tribunal which has to determine the facts impartially then a great deal more emphasis will be placed upon the preparation of cross-examination. Likewise, the presentation will differ even where the tribunal members are legally trained and have considerable experience as a fact finding tribunal.

ADDRESSES

Where possible addresses should be carefully formulated and obviously provide an appropriate structure which would at least maintain the interest of tribunal members. The submissions need to be relevant and focus on the original objective. It is not helpful, how-

ever, to simply recite a script which has been prepared before the case commences and which pays little regard to the evidence which has been adduced at the tribunal hearing.

Outlines of submissions are useful but should not be too detailed and should not unduly interfere with the natural "flow" of the presentation by the advocate. The outline, however, is a convenient method of providing citations for cases and other references to which the advocate may wish to refer.

In a closing submission it is my view that the advocate by the end of a case should have a clear perception of the major issues which have developed during the course of the hearing. Those issues should be identified and given priority in the closing address rather than rely on a preconceived view of the relevant issues before the evidence has been heard.

Tribunals present special problems in terms of the volume of material which is often required to be produced. For example, the duty imposed upon parties under s 37 of the Administrative Appeals Act 1975 (Cth) can often be quite onerous. The documents produced can be voluminous requiring careful consideration and analysis. Hence, a summary of documents and/or detailed chronologies with reference to source material are useful aids for the advocate which help to ensure that a complete working knowledge of the material has been acquired.

CROSS EXAMINATION

After thorough preparation and cross-referencing in the material to all relevant statements, the cross-examination should be relatively easy.

In addition to careful preparation it is necessary to make an assessment of the demeanour of a witness during the course of evidence and to be aware of the physical surroundings which may have an impact on the manner in which questions are asked and responses given. Advocates should make adjustments to presentations having regard to the tribunal's surroundings which may be far less formal than those of superior courts. That does not mean that questions should not be asked with a degree of vigour or that in the appropriate cases evidence should not be tested thoroughly. Most tribunals administer an oath or affirmation and it is the responsibility of the advocate to ensure that the witness does not give false evidence.

It is important in cross-examination to maintain the momentum so that the tribunal's interest is maintained and relevant questions are pursued. This is more likely to occur if the material has been thoroughly prepared in advance and the advocate has a complete working knowledge of all documents and statements prior to commencing cross-examination. In tribunals this is made somewhat easier by the provision of statements and documents usually made available pursuant to tribunal directions. Nevertheless careful attention has to be given to the answers of witnesses which may often

depart from written statements or documents. Accordingly progressive amendments need to be made to the cross-examination notes.

At the end of cross-examination brief notes should be made of those answers which may be relied upon and emphasised in the final address. It needs to be remembered that a "running" transcript will not always be available to all parties before tribunals. The advocate must ensure that the person instructing clearly understands that detailed note taking will be valuable. Cross-examination should not commence without the assistance of an instructor to ensure that accurate notes are taken.

CONCLUSION

At all times the advocate should endeavour to maintain control. That does not mean that some questions may not be put with a degree of aggression or vigour in appropriate circumstances.

If confronted with an apparently hostile or even biased tribunal the advocate should persist and not be overwhelmed to the point where the client's interests are abandoned. It has to be remembered that there are appeal rights and that the client expects the case to be properly presented. At the same time the advocate must always show respect for the tribunal.

As indicated at the outset all tribunals have a duty to adhere to the principles of procedural fairness and natural justice. It is the advocate's role to ensure that the client receives the benefit of those principles.