Administrative Law under the Coalition Government

Editor: John McMillan

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PREFACE

This publication contains the edited papers from the Administrative Law Forum, held in Canberra in May 1997. The Forum is an annual event sponsored by the Australian Institute of Administrative Law Inc (AIAL), in conjunction in every second year with the Canberra Division of the Institute of Public Administration Australia (IPAA). The 1997 Forum was such a joint effort.

This book is the seventh publication deriving from the annual Forums. The proceedings are published each year as a monograph by AIAL:

Fair and Open Decision Making, proceedings of the 1991 AIAL/IPAA Forum, edited by J 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 J McMillan

Administrative Law & 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 & 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

The proceedings of the 1997 Forum will also be published by IPAA in a future volume of the *Canberra Bulletin of Public Administration*.

The Directors of Studies for the 1997 Forum were Stephen Argument and John McMillan, respectively Secretary and Vice President of AIAL. They extend their thanks to the Executives of both organisations for the assistance provided in organisation of the conference; to the ANU Law Faculty, for assistance in preparation of this publication; and to Jenny Kelly, Kathy Malcolm and Chriss Giles, of the IPAA/AIAL Secretariat, for their excellent administrative assistance that, once again, played such an important part in the success of the Forum.

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ADMINISTRATIVE LAW UNDER A COALITION GOVERNMENT—KEY ISSUES

John McMillan*

The title for the *1997 Administrative Law Forum* captured the widely-held view that with the election in 1996 of a new national government in Australia there would be change to the administrative law system. The prospect of change would not in itself be surprising, given the purpose of elections in allowing voters an opportunity to install a new group of policy-makers and policies. Nor would one expect permanence or inflexibility in a system of accountability, like administrative law, that must be attuned to trends in government, law and community expectations.

There was a view, however, that more significant change was in the making. The view did not spring directly from anything said in the Coalition's election policy statements. The *Law and Justice Policy* spoke of the need to review and improve the administrative law system, but the examples of reform that were given all dealt with responding to recommendations for change that were made in reports issued under the previous government. Criticism had been building of the cost and formality that stemmed from administrative law, but the new Government Ministers had not otherwise expressed antipathy to the principles and objectives that underlie administrative law. More commonly, indeed, they had pointed proudly—as does the Hon Philip Ruddock in this conference collection—to the role of the Fraser Government between 1976 and 1982 in laying the foundation for the present administrative law system.

Why, then, was major change anticipated? Was Australia at a crossroads in administrative law development—leading, possibly, as Robin Creyke questions, to a "Sunset for the Administrative Law Industry?".

The *1997 Administrative Law Forum* examined that issue, with the benefit once again of thoughtful papers and commentaries prepared by leading academic scholars, practitioners, and administrators. They addressed six aspects of Australian law and government in which change is most likely

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to be felt—the structural framework for administrative review; the methods and techniques of dispute resolution; the protection of information rights; the framework for public sector employment; the system for review of immigration decision-making; and the privatisation and contracting out of government services. There is a full range of views expressed on those issues. At many points the authors either acknowledge or welcome the prospect of change, while there is an equal note of caution sounded about the need for thoroughgoing reflection on the institutional and subtle benefits of the present system that could be lost by a rash or ill-considered program of change for its own sake. This introduction to the conference publication will trace some of the major themes touched on by the authors.

The unifying theme in the National Forum papers is a concern with the issue of public accountability. All contributors start from the premise—implicit in some papers—that an effective system of accountability must apply to the exercise of official power and to the discharge of public functions either by or on behalf of government. Opinions differ inevitably on how best to ensure accountability, but the methods that are ultimately chosen should be selected with the objective of accountability firmly in mind. As Jenny Stewart reminds us in her paper, accountability problems cannot be wished or restructured away: they always pop up somewhere else. Governments, Robin Creyke warns, weaken the links in the accountability chain at their peril. Furthermore, as Stephen Legomsky observes, it is important that the public can remain assured that the rule of law is alive and well.

Does the Australian administrative law system provide a deficient or inefficient means of ensuring public accountability? The pressure for reform of administrative law had been building, well before the election of the Coalition Government in 1996. There were a raft of reports and recommendations to greet a new government—from the Administrative Review Council on the Commonwealth tribunal system[1] and on government business enterprises;[2] from that Council and the Australian Law Reform Commission on freedom of information and privacy;[3] from specialist inquiries on access to justice,[4] public sector

1 Administrative Review Council (ARC), *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995).
2 ARC, *Government Business Enterprises and Commonwealth Administrative Law*, Report No 38 (1995).
3 ALRC/ARC, *Open government: a review of the federal Freedom of Information Act 1982*, ALRC Report No 77/ARC Report No 40 (1995).
4 Access to Justice Advisory Committee, *Access to Justice: an Action Plan* (1994).

employment,[5] and veterans' payments,[6] and from parliamentary committees on a diversity of topics that included privacy,[7] the office of Commonwealth Ombudsman,[8] whistleblowing protection,[9] legislative instruments,[10] tribunal appointments,[11] contracting out,[12] international instruments,[13] and enforcement of human rights determinations.[14] Other inquiries were either underway—on standing,[15] and on the adversarial system of dispute resolution[16]—or were soon commissioned—on the systems for review of social security,[17] migration[18] and personnel decision-

5 Public Service Commission (PSC), *Report of the Public Service Act Review Group* (1995) (known as the McLeod Report); and PSC, *People Management and Administrative Law, State of the Service Paper No 3* (1994). See also the reports referred to below in n 22.

6 Auditor-General, *Audit Report No 8, 1992–93 Efficiency Audit, Department of Veterans' Affairs, Compensation Pensions to Veterans and War Widows* (1992); and *A Fair Go: Report on Compensation for Veterans and War Widows* (1994) (Inquiry chaired by Professor Baume).

7 House of Representatives Standing Committee on Legal and Constitutional Affairs, *In Confidence: the protection of confidential and personal information* (1995).

8 Senate Standing Committee on Finance and Public Administration, *Review of the Office of Commonwealth Ombudsman* (1991).

9 Senate Select Committee on Public Interest Whistleblowing, *In the Public Interest* (1994).

10 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Legislative Instruments Bill* (1995).

11 Joint Standing Committee on Migration, *The Immigration Review Tribunal Appointments Process* (1994).

12 Senate Finance and Public Administration References Committee, *Service Delivery: Report from the Senate Finance and Public Administration References Committee on Service Delivery by the Australian Public Service* (1995); and Joint Committee of Public Accounts, *Public Business in the Public Interest: An Inquiry into Commercialisation in the Commonwealth Public Sector*, Report No 336 (1995). See also ARC, *Administrative Review and Funding Programs*, Report No 37 (1994); ARC, *The Contracting Out of Government Services*, Issues Paper (1997); and Industry Commission, *Competitive Tendering and Contracting Out by Public Sector Agencies*, Report No 48 (1996).

13 Senate Legal and Constitutional Legislation Committee, *Report on the Administrative Decisions (Effect of International Instruments) Bill 1995* (1995). See also the Committee's later report, *Report on the Administrative Decisions (Effect of International Instruments) Bill 1997* (1997).

14 Senate Standing Committee on Legal and Constitutional Affairs, *Review of Determinations of the Human Rights and Equal Opportunity Commission and the Privacy Commissioner* (1992). See also Legal and Constitutional Legislation Committee, *Report on the Human Rights Legislation Amendment Bill 1996* (1997).

15 ALRC, *Beyond the door-keeper: Standing to sue for public remedies*, Report No 78 (1996).

16 *Eg* ALRC, Rethinking the Federal Civil Litigation System, Issue Paper 20 (1997).

17 "Review of the Social Security Review and Appeal System", chaired by Dame Margaret Guilfoyle. The Review reported in 1997, but the Report has not yet been released.

18 See Senate Legal and Constitutional Legislation Committee, *Report on the Migration Legislation Amendment Bill (No 4) and (No 5)* (1997).

making,[19] the Administrative Review Council,[20] and the application of privacy standards to the private sector.[21]

A resolve to reform, possibly to re-think, Australian administrative law was confirmed, on many issues on a non-partisan basis. The papers in this collection—those in particular by Ruddock, Creyke, Sassella, and Weeks—note the general lines of criticism that were being aired within government about the inefficient consequences of administrative law, especially the cost, formality, legalism, prolongation of disputes, and distortion of resource allocation.

But those concerns, which looked back at the system already in place, would not alone explain the pressure for change that was developing. There were other far-reaching changes occurring in the role, conception, and structure of Australian government administration.[22] It was assumed that administrative law could not stand aside from these changes that would touch all areas of government. There was a commitment to smaller government, to less regulation, and to adoption of private sector models of best practice. This was to be achieved in different ways, including the privatisation of government agencies; the outsourcing on a competitive tendering basis of government activities in fields as disparate as information technology, legal services, decision-making, and policy

19 *National Commission of Audit: Report to the Commonwealth Government* (1996); Discussion Paper, *Towards a Best Practice Australian Public Service*, Discussion Paper issued by the Minister for Industrial Relations and Minister Assisting the Prime Minister for the Public Service, November 1996; Public Service and Merit Protection Commission and Department of Industrial Relations, *The Public Service Act 1997: Accountability in a Devolved Management Framework* (1997); and Joint Committee of Public Accounts, *Report 353: An Advisory Report on the Public Service Bill 1997* (1997).

20 Senate Legal and Constitutional Legislation Committee, *Role and Function of the Administrative Review Council* (1997).

21 Attorney-General's Department, *Privacy Protection in the Private Sector*, Discussion Paper (1996); ARC, *The Contracting Out of Government Services: Access to Information*, Discussion Paper (1997).

22 Recent reports which discuss the case for a new approach to public sector management include: Task Force on Management Improvement, *The Australian Public Service Reformed: An Evaluation of a Decade of Management Reform* (1993); Management Advisory Board/Management Improvement Advisory Committee (MAB/MIAC), *Accountability in the Commonwealth Public Sector*, Report No 11 (1993); MAB/MIAC, *Building a Better Public Service*, Report No 12 (1993); MAB/MIAC, *Ethical Standards and Values in the Australian Public Service*, Report No 19 (1996); MAB, *Ongoing Reform in the Australian Public Service: An Occasional Report to the Prime Minister* (1994); MAB/MIAC, *Achieving Cost Effective Personnel Services*, Report No 18 (1995); MAB/MIAC, *2+2=5: Innovative Ways of Organising People in the Australian Public Service*, Report No 20 (1996); Productivity Commission, *Stocktake of Progress in Microeconomic Reform* (1996); Joint Committee of Public Accounts, *Report 323, Managing People in the Australian Public Service—Dilemmas of Devolution and Diversity* (1993); Joint Committee of Public Accounts, *A Continuing Focus on Accountability: Review of Auditor-General's Reports 1993-94 and 1994-95*, Report No 344 (1996); and the reports listed above in n 19.

analysis; the separation of policy implementation and program delivery;[23] reduced government regulation of the market economy, to be replaced in some instances by alternative compliance schemes;[24] and the re-definition of principles of public administration in legislation like the Public Service Bill 1997[25] and the *Commonwealth Authorities and Companies Act 1997*.[26]

Administrative law would be affected by those changes in many ways. It was problematic whether the rights conferred upon individuals by administrative law would continue to be exercisable in respect of activities of government that had been assigned either to the private sector or to State and Territory agencies. It was doubtful whether the costs attributable to dispute resolution by courts and tribunals would continue to be tolerated, preference being given instead either to simplified proceedings or to the withdrawal of jurisdiction from review bodies. The devolution of managerial authority in public sector agencies, combined with the setting of performance targets both for agencies and for employees, would also be inconsistent in the eyes of some critics with the retention of established grievance and appeal mechanisms. If the way in which government was to relate to the public was to be re-defined, there would be a need for new ways of expressing and enforcing that relationship. Orthodox administrative law solutions might increasingly be less appropriate.

The National Forum papers spell out how the proposed administrative law changes were designed to meet not only the criticisms that had been documented but also the changed agenda for government and public administration. High on the agenda are proposed reforms to the structure of administrative law. Options for restructuring the administrative tribunal system are canvassed in the papers by Ruddock, Creyke, and Sassella, with a particular focus in their analysis on the proposal to amalgamate five separate administrative tribunals into a single tribunal. Other suggestions for streamlining review procedures are noted by Kathryn Cronin.

In the different arena of information rights, the structural options are of a different kind, and extend—as discussed by Sue Tongue—to the creation of new bodies, like a Freedom of Information Commissioner, and a Public Interest Disclosures Agency.

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23 *Eg* the dissection of the Department of Social Security to form a smaller Department and Centrelink.

24 See Industry Commission, *Regulation and Its Review 1996–97* (1997); Parliament of Victoria Law Reform Committee, *Regulatory Efficiency Legislation* (1997); and Regulatory Review Unit, The Cabinet Office, NSW, *From Red Tape to Results—Government Regulation: A Guide to Best Practice* (1995)

25 Clause 10 of the Bill declares the APS Values, and cl 13 prescribes the APS Code of Conduct.

26 Sections 21-23 of the Act prescribe rules for the directors and managers of Commonwealth authorities on conflict of interests and managerial standard of care.

The restriction of judicial review rights is another proposed initiative. There are proposals to do this directly and overtly—most notably by privative clauses that would preclude review of migration decision-making, discussed by Philip Ruddock and Robin Creyke—but also indirectly and subtly—by restructuring existing schemes so that there would be less legislative prescription, and correspondingly less exposure to litigation on the ground of statutory non-compliance. Phillipa Weeks examines the plans to use that approach in removing the application of administrative law remedies to personnel management in the Australian Public Service.

Another target for administrative law reform under the Coalition Government is likely to be matters of philosophy and approach. Philip Ruddock and Michael Sassella express a dissatisfaction with the failure of administrative review tribunals to pay proper regard to government policy. Many authors similarly note that there has been a long-standing antagonism to legalism and formality by tribunals, which is said to stem not from the governing legislation but to be a procedural preference chosen by the tribunal members. In place of administrative law standards and criteria, there is a growing preference for alternative ways of setting standards and providing guidance to decision-makers. The alternatives that are being canvassed include service charters and codes of conduct (discussed by Robin Creyke), industry performance standards (Hannes Schoombee), and the declaration in public service legislation of a Code of Conduct and APS Values, to include a statement of management principles and responsibilities and performance standards for employees (Phillipa Weeks).

A contrasting theme flowing through each of the papers is the need for caution in the introduction of significant change to an established system of accountability. One commentator, Jenny Stewart, goes so far as to describe the recent changes as a giant uncontrolled experiment on Australian public administration. There is a similar note of scepticism expressed more specifically by authors in relation to the changes occurring in particular areas. As to the privatisation and contracting out of government services, Hannes Schoombee and Nick Seddon point to many shortcomings in the current legal framework for ensuring public accountability in the delivery of services via an outsourced arrangement. They discount free market competition as a sufficient means of control, noting in particular that it cannot provide a remedy to an aggrieved person for a past wrong. They argue for the development of new remedies and approaches, canvassing as possibilities a *Contracting Out Act* and hybrid public law/private law remedies.

Private sector modelling also comes in for criticism from Phillipa Weeks in her analysis of proposals to remove the safety net of administrative law from public sector employment regulation. She argues that recent initiatives are premised upon a misunderstanding of the legal model of private sector employment, and upon a failure to appreciate the valuable role that administrative law can serve in enabling employees to enforce on management the distinctive employment standards of the public service.

Information and privacy laws come in for critical analysis, with Sue Tongue and Robin Creyke noting that many of the reforms that have been proposed in this area are unlikely to be implemented. They single out for adverse comment the decision of the Government at an early stage to renege on its proposal to extend privacy laws to the private sector. Sue Tongue points as well to other unresolved issues, like the application of freedom of information laws to GBEs, and the neglected need for a review of secrecy laws. There is also a warning sounded by Jack Waterford that the right of access to government information might be downgraded progressively to a right of access to personal information. He argues that enforceable access rights should not be treated as incompatible with new arrangements: many of the reforms to public administration are an extension in fact of the transparency in government that was a product of open government laws.

Finally, it is noted that it would be premature to engage in significant reform of the system of administrative review until we have a fuller understanding of the strengths and weaknesses of the present system. For example, Kathryn Cronin points to our imperfect understanding of the role that legal representation can play in tribunal review. There is an initial response to that challenge by John Basten, who endeavours to elucidate guiding criteria to explain when the involvement of lawyers and legal processes in dispute resolution is beneficial and defensible.

Other conference issues

A valuable feature of the *National Administrative Law Forum* is that part of the Forum program is reserved each year for current and specialist topics in administrative law that do not necessarily embrace the conference theme. The Forum can thereby provide a stimulus to administrative law research and scholarship in Australia. This conference publication includes six papers of that nature.

There are three papers with a comparative law flavour, by Stephen Legomsky on administrative law developments in the United States, and by Frank Esparraga and Frank Schoneveld on European administrative law. The paper by Legomsky is valuable in pointing to similarities that

unite Australian and US developments. Two relevant themes that he discusses are the restrictions placed on judicial review of migration decision-making, and the underlying spirit of antagonism to executive power and to national government that is part of the ideological foundation for the recent containment of administrative law.

The papers by Esparraga and Schoneveld are a most welcome endeavour towards bridging one of the notable weaknesses in Australian administrative law jurisprudence, the lack of comparative appreciation of European administrative law. There are many parallels between Australian and European systems, especially the reliance placed upon specialist administrative tribunals, but the authors highlight differences that may be of interest to Australian researchers, such as the more extensive remedial power of some European administrative courts to award damages and to impose fines on public authorities.

The indefinite scope for novel approaches in public law is also an underlying theme in John Fitzgerald's paper, which breaks new ground in exploring the scope for fusing equitable and public law principles. He points to equitable notions that are capable of supplying a fresh perspective on questions to do with public governance and the conduct of public officials.

New issues are also raised in the paper by Creyke, McMillan and Pearce, dealing with the impact of judicial review on government administration. Their paper summarises the initial results from a grant-funded research project on the eventual outcome in cases in which the Federal Court had declared an administrative decision to be unlawful and had remitted the decision to an agency for reconsideration. This empirical project is the first attempt in this country to chart on a large-scale basis the actual outcome in judicial review cases and to examine the broader impact on public administration.

The remaining two conference papers deal with established areas of administrative law. Jason Pizer provides a comprehensive treatment of an aspect of Australian freedom of information laws that is practical, troublesome but relatively unexplored, namely the law relating to refusal of an FOI request. Finally, Suzanne Sheridan surveys the terrain of one of the more controversial developments in Australian administrative law, the decision of the High Court in the *Teoh* case concerning the relevance of international conventions to the criteria for legal validity in administrative decision-making.

THE BROAD IMPLICATIONS FOR ADMINISTRATIVE LAW UNDER THE COALITION GOVERNMENT WITH PARTICULAR REFERENCE TO MIGRATION MATTERS

The Hon Philip Ruddock MP*

I welcome the opportunity to address the Conference theme of the implications for administrative law of the election of a Coalition Government. To focus on the broader implications for administrative law of the change in government is very timely.

The Coalition's *Law and Justice Policy* statement in February 1996 affirmed its commitment to the principles of administrative law. That statement said:

> Administrative law exists to enhance administrative justice. It is a crucial means by which the Government and the bureaucracy are directly accountable to individuals affected by their actions.[1]

It is often not acknowledged, even forgotten, that it was the Liberal and National Party Government's initiatives that led to the freedom of information legislation, the *Administrative Decisions (Judicial Review) Act 1977*, and the establishment of the Administrative Appeals Tribunal and the Ombudsman.

As stated in the *Law and Justice Policy* statement, the Government is determined to review and improve the administrative law system. To do that effectively and fairly requires a critical appraisal of what Australia now has as its administrative law system, what Australia now needs, and what Australia can afford. This needs a holistic approach which avoids the trap of limiting critical appraisal merely to issues to do with the review of administrative decisions. Administrative law must be seen in the wider context of Government policy-making and implementation. This is particularly important in my portfolio where the majority of the direct beneficiaries of the administrative law system are not members of the Australian community.

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* Minister for Immigration and Multicultural Affairs.

1 *Liberal and National Parties' Law and Justice Policy* (www.liberal.org.au/archives/law/).

In this paper I will outline the significant broader initiatives of the Government, and concentrate on the administrative law related changes I plan to bring to the migration program which falls within my area of ministerial responsibility.

THE BROADER INITIATIVES

Government's administrative law policy

Looking at the broader initiatives, the Government does not envisage a contraction of the administrative law system. At the same time, the Government is interested in on-going reform of the system in the public interest. The notion of "public interest" extends to embrace a concern to ensure that high quality primary administrative decisions are made, and continue to be made, as a matter of routine in a cost effective and timely manner, and that aggrieved persons have access to low cost and speedy external review mechanisms, both by tribunals and by courts.

The intended introduction of a privative clause for the *Migration Act 1958* (Cth)—which is discussed below—should be seen as a mechanism to reduce the cost to the Australian community of successive appeals by non-citizens seeking to delay their lawful removal from Australia.

Reform of merits review tribunals

The Government has demonstrated its commitment to administrative law reform by recently responding to the report by the Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*.[2] The Government decided, in principle, to amalgamate the Administrative Appeals Tribunal, the Social Security Appeals Tribunal, the Veterans' Review Board, the Immigration Review Tribunal and the Refugee Review Tribunal, into a single body. The amalgamation would streamline administrative structures and enhance operations. It is envisaged that separate divisions of the proposed body would develop and maintain flexible, cost-effective and non-legalistic procedures relevant to their jurisdiction.

It is appropriate, when considering a major restructure of the merits review tribunal system, for the Government to explore ways in which the processes can be streamlined, improved and made more efficient and "user friendly". The Government has established an interdepartmental committee (IDC) to devise a strategy for implementing the decision. The

2 Report No 39, 1995.

IDC is canvassing extensively the views of other departments and agencies on these issues in the course of its deliberations.

It would be wrong for observers to conclude from this that the Government has somehow abandoned or otherwise weakened its commitment to merits review. On the contrary, we want a system that works better and are determined to achieve that objective.

Challenges for administrative law

Government policy has embraced the notion of "downsizing" and contracting out where appropriate. In a policy environment of contracting out some Government services and functions, the issue arises of the review and appeal rights which citizens would otherwise have if the service continued to be provided, in part or in full, by the Government sector.

This amongst other issues is being addressed by the Administrative Review Council. The Government welcomes the work of the Council in this area. The Government has noted the 1997 ARC Issues Paper, *The Contracting out of Government Services*, and looks forward to receiving the Council's recommendations at the conclusion of its inquiry.

THE MIGRATION PROGRAM

I will next turn to a major part of my area of ministerial responsibility, the policy implementation and management of the migration program. The administrative law changes that are proposed in this area can best be understood by looking first at the bigger picture.

Since the election in March 1996, the Government has made significant changes and improvements in the migration portfolio, particularly concerning the focus of the annual migration program. The rationale behind the major changes flows through to administrative review issues.

We live in a world where the movement of people between and within countries is occurring on a scale never before witnessed in our history. With the globalisation of world markets, increased tourism and a desire for people to live and work in different parts of the globe, the impact of human population movement is an issue governments and communities cannot afford to ignore.

In March last year the Government inherited a migration program that was seriously out of balance:

- the family stream had come to represent almost 70 per cent of the program;

- entry standards had been reduced so far that a massive pipeline of applications had been allowed to build up in some categories;
- reports of abuses of the program and sham marriages had become commonplace, reducing community confidence in the program—and the former Government was unable or unwilling to act to curb the problem; and
- people with low skill levels and poor English language ability were allowed entry under skilled categories.

In July 1996, the Government moved to address these concerns and to restore public confidence in the program. We announced a non-humanitarian planning level of 74,000, compared with 83,000 the year before. This represented a reduction to the average level of the previous four years.

Decision-making reforms have significantly increased the rigour of testing the bona rides of spouse, fiancé and interdependent applications. Early figures show that rejection rates at a number of the overseas posts have increased. There are signs of a fall-off in the number of applications, suggesting a deterrent effect on non-genuine applicants. The increased bona rides testing has been complemented by such measures as two year probationary visas for spouse, fiancé and interdependent entrants, and limitations on serial sponsorships.

Skilled migration

The Government has consciously decided to give greater priority to business and skilled migration because of the contribution such migration can make to Australia's economic development. Business migrants make a major contribution by introducing substantial capital to Australia and creating new jobs. Similarly, migrants who can fill key skill shortages can enable Australian businesses to grow, prosper and create jobs.

I have been consulting extensively around Australia in past months in relation to next year's migration program. The program is soon to be considered by the Government and announced in due course. Whilst not wanting to pre-empt the Government's decision on next year's non-humanitarian program, I do not think anyone is anticipating an increase in numbers. The Government has made it clear that it will continue to give emphasis to skilled migration while maintaining a commitment to bona fide family reunion.

Humanitarian Program

Australia has an outstanding record in fulfilling its international humanitarian obligations by bringing refugee and other humanitarian entrants to Australia and providing them with resettlement. The Government's commitment to assisting those in need is demonstrated by the fact that we have one of the highest settlement intakes of humanitarian entrants per capita of any country in the world. We set aside specific funding in the budget each year to assist humanitarian entrants; that funding is for a limited number of places, covering both offshore and onshore applicants. It is essential that the places go to those who are genuinely in need of protection.

I am particularly concerned about abuse of the onshore refugee/asylum application process. At the same time, let me make it very clear that I expect any officer of my Department and any member of the Refugee Review Tribunal to grant refugee status to a person who has met the accepted definition of "refugee" under the Refugees Convention.

We are determined to address problems of abuse, but such determination is not a code for denying protection to genuine refugees. Unfortunately, there are people who seek to abuse our generosity. I have particular concerns in relation to those who travel to Australia on a visitor visa, with the necessary documents issued by their own government to travel here, and who seek to claim refugee status in Australia.

I am gravely concerned by reports I have received that people are using the onshore protection system to obtain work rights and access to Medicare. There are people who apply to my Department asking for the $30 work visa who appear not to be bona fide asylum seekers. These applicants seek to delay their departure as long as possible knowing full well they are not refugees. This abuse costs taxpayers millions of dollars, undermines public confidence in the system and causes processing delays, which disadvantages genuine applicants.

In part, to address these problems I have recently announced a series of changes to the merits and judicial review systems in the migration area. These changes will make the protection visa processing arrangements substantially more streamlined and cost-effective. I consider this is the best way of ensuring that genuine applicants receive protection quickly, and of reducing the incentive for those seeking to abuse the system.

These tendencies to exploit every avenue of appeal and to push every aspect of flexibility to breaking point will in my view make the Government reluctant to provide mechanisms to address special circumstances. Those who exploit the system do a disservice to those

whose need is greater, by forcing the Government to more restrictive approaches to ensure control of the program.

CHANGES TO MIGRATION DECISION-MAKING AND REVIEW

I will start by outlining the Government's concerns with the merit and judicial review system that we inherited.

Merits review

Our particular concerns with the merits review tribunal system (that is, the Immigration Review Tribunal and the Refugee Review Tribunal) are firstly the length of the determination process, and secondly the potential for the Government's policy decisions to be distorted in the process.

The tribunals were established in 1989 (IRT) and 1993 (RRT) as merits review systems to ensure better decision-making and to minimise the time and resources used to challenge Departmental decisions. The intention was that the tribunals would reduce the need for judicial review. But since the introduction of the tribunals the length of the determination process has increased appreciably. Furthermore, decisions are now frequently reviewed by the tribunals *and* by the courts. This situation needs to be addressed.

I acknowledge the positive contribution that the tribunals, their members and their work have made to migration in Australia. I am concerned, however, that there has been a shift away from the original framework of the tribunals. I am concerned too about certain developments that have occurred, particularly the potential distortion of the Government's policy decisions as embodied in the migration legislation and in policy guidelines.

The *Migration Act* and the *Migration Regulations* together give a valid visa applicant the right to the grant of a visa provided the applicant meets the legal pre-conditions for the grant set out in the Act and Regulations. The legal pre-conditions are set out in considerable detail. Leaving aside some special public interest powers that I as the Minister can personally exercise, if the applicant does not meet the legal pre-conditions, the visa must be refused.

As members of independent decision-making bodies, it is the role of the members of the tribunals to be impartial and free from bias, but it is not the role of the tribunals to determine migration policy. That is the role of the government of the day. It is the duty of all members of the tribunals to fully know and understand the parameters of migration policy and to work within the legal framework.

Responding to these concerns, and in line with its pre-election policy commitment, the Coalition has reviewed migration decision-making, with particular attention being paid to the membership, role and performance of the Immigration Review Tribunal and the Refugee Review Tribunal. The major change will be to merge the current three portfolio review bodies into two review tribunals with a view to further amalgamation at a later date.

Currently, protection visa (refugee) applications are processed in a two-tier decision-making structure. A primary decision on an application is made by the Department. If unsuccessful, an applicant can seek review before the RRT. Most migration applications have a three tier merits assessment process, with a primary decision by the Department, a Departmental review by the Migration Internal Review Office (MIRO) and an independent review by the IRT. The foreshadowed changes will bring all migration processing into line so that there is a two-tier merits assessment of applications. This will mean merging MIRO with the independent IRT, while the RRT will remain a separate body dealing exclusively with review of refugee applications.

A number of other legislative and administrative measures will be introduced to make the tribunals more flexible and to improve their performance, while reducing the scope for abuse. To shorten overall processing times and to discourage frivolous applications there will be restrictions on work rights, review application periods and a change in the structure of the review application fee. A significant measure will be a post-decision application fee of $1,000 for the RRT. This will not impose a burden on bona fide refugees and will act as a deterrent for people intent on abusing the system. The $1,000 fee will only be payable if the RRT finds that the applicant is not a refugee. Applicants assessed as meeting refugee criteria will not pay an RRT fee. It is not a fine and will not affect bona fide refugees.

A number of other administrative measures will be introduced to achieve efficiencies in primary and review decision-making. My Department will take a more strategic approach to protection visa applications, giving greater priority to straightforward applications and using more streamlined methods, such as reduced documentation where appropriate. Other measures will include clearer articulation of my expectations through general policy directions to tribunal members under the *Migration Act*, and improved utilisation and reduced duplication of resources.

The changes to the structure of review bodies will take effect after appropriate legislative changes. Not only will people with bona fide

applications be given a decision more quickly, but those intent on fraud, deception or delay will not have the benefits of a delayed decision.

The changes to the migration review process are consistent with the broader Government moves, to which I referred earlier, to amalgamate merits review tribunals across all portfolios into one tribunal. However, the revamped immigration and refugee review process would remain a discrete division within the new tribunal.

Judicial review

The Government's pre-election policy commitment was that given the extensive merit review rights in the migration legislation, we would restrict access to judicial review in all but exceptional circumstances. That commitment arose from concerns about the growing cost and incidence of litigation of migration and refugee matters, as well as the delays associated with such litigation.

I recently announced that the Government is seeking to introduce a privative clause in relation to judicial review of many decisions under the migration legislation. The privative clause would replace the existing judicial review scheme at Part 8 of the *Migration Act*. Unlike that scheme, the privative clause would also apply to the High Court and not just the Federal Court.

The current judicial review scheme in relation to visa decisions was introduced by the previous Government on 1 September 1994. It brought and came with a package of changes, including:

- expanded access to merits review;
- a requirement that any review rights be exhausted prior to seeking judicial review;
- statutory codes for visa decision-making; and
- a restriction of the grounds of judicial review having regard to the access to merits review and, for example, statutory codes for visa decision-making replacing the judge-made law on natural justice.

The changes were intended to reduce Federal Court litigation and to provide greater certainty as to what was required from both decision-makers and visa applicants and visa holders. That scheme has not reduced the volume of cases before the courts. In fact, recourse to the courts is trending upwards—398 cases in 1994–95; 630 in 1995–96; and 640 so far in 1996–97. The largest single group are persons who have had the refusal of their protection visa applications affirmed by the RRT.

In 1995–96 migration matters formed approximately 65 per cent of the Federal Court's entire administrative law caseload. Based upon current litigation trends and the estimated output of the IRT and the RRT in 1997–98, it is anticipated that applications made to the courts may rise to an expected 780 applicants in 1996–97 and 910 in 1997–98. Much of the growth in applications for judicial review has come from appeals brought from decisions of the RRT to the Federal Court. The 1995–96 budget shows that litigation cost my Department $7.4 million; this does not include the cost of legal aid nor the cost of running the courts.

Migration and refugee applicants have access to a thorough merits assessment of their case and then, if they are unhappy, they are able to seek independent merits review of their case before a tribunal. Applicants have also been able to access the Federal and High Courts, giving them in effect up to three levels of review. As I have indicated, we have seen significant growth in this practice in recent years.

There are now around 590 active litigation cases before the Federal and High Courts. Around 390 of the cases relate to onshore refugee claims. From experience we know that a substantial proportion of these cases will be withdrawn by the applicants prior to hearing (around 40 per cent). Of the cases that go on to a substantive court hearing, the Government currently wins 90 per cent. There is also evidence that the delays associated with litigation are growing. Between 1993–94 and 1995–96, the average number of days from date of application for judicial review and handing down of a decision trebled for RRT decisions from 107 to 354 days, and almost doubled for IRT decisions from 259 to 488 days.

I view this high level of litigation, particularly by asylum seekers, as problematic given that increased litigation leads to increased costs and delays, and, for those in detention, to a significantly longer period of detention. I am also concerned that since about 40 per cent of applicants withdraw before hearing, there is a substantial number who are abusing the legal process in order to extend their stay in Australia.

The Government's pre-election policy commitment to restrict access to the courts in migration legislation matters to all but exceptional circumstances arose from two principal concerns with the litigation process—costs and delay. I have just demonstrated that those concerns were clearly not unfounded. Litigation can, in the migration area, be an end in itself. Given the importance attached to permanent residence in Australia, there is a high incentive for refused applicants to delay removal from Australia for as long as possible, particularly if they are enjoying privileges such as work

rights and Medicare, while they establish ties within the community which they may hope will yield entitlement to a visa through another pathway.

I asked my Department to explore options, in conjunction with the Attorney-General's Department, the Department of Prime Minister and Cabinet and eminent legal counsel, for best achieving the Government's policy objective of restricting access to judicial review. The advice I received from legal counsel was that the only workable option was a privative clause.

Because section 75 of the Commonwealth Constitution gives the High Court original jurisdiction to consider challenges to the actions and decisions of Commonwealth officers, access to the High Court cannot be legislatively restricted without a constitutional amendment. While both access to, and the scope of judicial review by, the Federal Court can be changed by legislation, simply to restrict access to the Federal Court in migration legislation matters would in practice deflect many cases to the High Court under section 75 of the Constitution. Legal counsels' advice was that a privative clause would have the effect of narrowing the scope of judicial review by the High Court, and of course the Federal Court. That advice was largely based on the High Court's interpretation of privative clauses in cases such as the *Hickman* case[3] in 1945, and more recently the *Richard Walter* case[4] in 1995, and the *Darling Casino* case[5] in 1997.

The courts have ruled that the effect of a privative clause such as that used in the *Hickman* case is to expand the legal validity of the acts done and the decisions made by decision-makers. In practical terms the clause narrows the scope of judicial review to that of narrow jurisdictional error and *male fides*.

The options available to the Government were very much shaped by the Constitution. While I accept that the precise limits of privative clauses may need examination by the High Court, there was no other practical option open to the Government to achieve its policy objective.

Other measures

The Government is pursuing other measures, including working with the courts to achieve a more effective and efficient disposition of court cases. For example, I applaud the efforts of the Federal Court to more effectively manage all cases, including migration cases. In Victoria the Federal Court has brought in additional judges to each registry to clear a backlog of cases.

3 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.
4 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168.
5 *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 143 ALR 55.

There will also be, in all Federal Court registries, the implementation of an individual docket system whereby cases are allocated to particular judges and managed by that judge from application to final disposition.

CONCLUSION

Migration decision-making is integral to the whole migration and settlement process. As Minister, I am determined to ensure that the decision-making process is effective and efficient in terms of cost, time and quality of outcomes. I want the Australian community to feel confident that when Australia has accepted refugees, they are genuinely fleeing persecution. I want the community to be confident that when skilled migrants or spouse migrants arrive, they have come to Australia for a bona fide reason or relationship and will contribute to the economic and social fabric of our nation.

The changes announced by the Government will re-establish credibility, integrity and confidence in the migration decision-making process. The planned changes to merits and judicial review are an integral part of that process. But they do not stand alone. As I have indicated, they are part of a wide range of measures, in place or to be put in place, to ensure the Government's effective management of the migration program.

In my view, the key challenge to the administrative law system and its practitioners is to avoid a focus on particular aspects of the system in isolation from the wider system. There needs to be an on-going process properly balancing the interests of individuals with the interests of the wider community.

SUNSET FOR THE ADMINISTRATIVE LAW INDUSTRY? REFLECTIONS ON DEVELOPMENTS UNDER A COALITION GOVERNMENT

Robin Creyke*

This is a period of profound change to the system of Commonwealth administrative law. The projected restructuring of the major Commonwealth administrative tribunals; the proposed radical re-development of the complaints handling process for human rights and anti-discrimination violations; the reneging on the promise to expand the *Privacy Act 1988* (Cth) regime to the private sector; and the introduction of the Bill to require public consultation for much regulation reform, are developments unlike any experienced since the Commonwealth judicial and administrative review system was first established.

If one adds to that the moves to corporatise, to privatise and to contract out government services; the proposed legislative changes to enhance the role and independence of the Auditor-General;[1] and the recent legislative and judicial restrictions on judicial review rights, it is clear that there are major changes in place or on foot for the Commonwealth framework of administrative law.

Why are these changes occurring? Whence does the impetus arise? Although not all the developments can be sourced directly to policies of the Liberal and National (hereafter Coalition) Government, the thrust of the major changes emerged from reports and policies of the current government.[2] The proposed metamorphosis is surprising given that, as recently as February 1996, the Coalition was promoting its role in creating

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1 Auditor-General Bill 1996; Audit (Transitional and Miscellaneous) Amendment Bill 1996; Commonwealth Authorities and Companies Bill 1996; and the Financial Management and Accountability Bill 1996.

2 *Eg, National Commission of Audit: Report to the Commonwealth Government*, (1996); *Towards a Best Practice Australian Public Service*, Discussion Paper issued by the Minister for Industrial Relations and Minister Assisting the Prime Minister for the Public Service, November 1996.

the present administrative law system—a part of the legal system in which they have played an innovative and pivotal role.[3]

It is clear that at least one factor which lies behind the change in attitude is a distinct preference for less regulation. There appears to be a perception that the plethora of avenues for review and complaint is too costly, is confusing, and inhibits commercial activity. Instead, the emphasis is on self-regulation, for example by means of codes of conduct. The proposals for change stem also from a move towards smaller, or less government.

These moves, which have the potential to marginalise administrative remedies and to downgrade the role of bodies that are powerful and pervasive tools of public sector accountability,[4] are a reminder that no system is immutable and that when change occurs, it is time to assess which aspects of that system proponents should struggle to retain. In other words, it forces an assessment of those aspects of existing mechanisms which are valuable and should be preserved.

This article does not attempt to canvass all these changes or proposals but will focus on the core elements of the review mechanisms, that is, the courts, the tribunal system, internal review, the investigative and reporting functions of the Commonwealth and Defence Force Ombudsman, the human rights and anti-discrimination bodies, privacy, and proposed alternatives to the current system. The article will draw out the issues by relating the proposed changes to themes which have emerged from pressures which have been building up in the system over recent years.

It is important to recognise that what is happening is, to a large extent, an experiment. Some innovations have been tried elsewhere but the different cultural, political and institutional contexts means parity of experience may be illusory. That is particularly true in relation to the Commonwealth

3 *Liberal and National Parties' Law and Justice Policy*, February 1996 (www.liberal.org.au/archives/law/), stated: "The initiatives of the Liberal and National Government in the late 1970s—freedom of information legislation, establishment of the Administrative Appeals Tribunal, the *Administrative Decisions (Judicial Review) Act*, Ombudsman have countered deficiencies in the extent to which Parliament can hold the Government accountable" (at 1). Subsequent elements of the system—the emergence of specialist merit review tribunals, human rights agencies, privacy protection to balance the more extensive investigative processes authorised by data-matching legislation—were products of periods of Labor Government power. The Legislative Instruments Bill—the vehicle for greater public participation in executive rule-making—which was originally drafted by the Keating Labor Government, is expected to be implemented by the present holders of office.

4 The other elements are the accountability of parliamentary members to their electors; the accountability of the executive to the Parliament; and the accountability of the executive for meeting their financial and other goals: B Stone, "Constitutional Design, Accountability and Western Australian Government: Thinking With and Against the "WA Inc" Royal Commission" (1994) 24 *WA Law Rev* 60.

administrative law system, which has no close counterpart in any of the common law countries which have preceded or followed Australia down the "down-size government" path. Reforms in Victoria, which has the most comparable administrative law system to the Commonwealth, appear to have had less impact on the State's administrative law bodies (with the notable exception of the role of the Auditor-General[5]) than those proposed at the federal level.

THE HARBINGERS OF CHANGE

There were indications prior to March 1996 that changes were in store for the Kerr/Bland and Ellicott model of administrative law.[6] The earlier developments touched the key elements of the administrative law system: the Federal Court's supervisory judicial review jurisdiction; and the role and operation of first and second-tier tribunals. The jurisdictional areas in which these developments occurred included the high volume areas of Commonwealth administrative law, that is, migration, social security and veterans' affairs.[7]

First portent: tribunal processes and procedural fairness

The initial warning was that the processes of administrative review in some tribunals were becoming too formal and demanding. In September 1992, at a conference of the Adelaide Chapter of the Australian Institute of Administrative Law, two eminent administrative law practitioners and a key administrative law academic presented papers asking the question "Is there too much natural justice?"[8] The theme was chosen in response to a

5 *The Australian*, 25 April 1997 at 3. Recommendations from the Audit Act Review Committee are that the Auditor-General should become an officer of the Parliament, but at the same time most of the Auditor-General's staff will be relocated to a statutory corporation, Audit Victoria, and will compete for government audit business with firms in the private sector.

6 *Report of the Commonwealth Administrative Review Committee*, Parl Pap No 144 of 1971 (Kerr Committee), *Final Report of the Committee on Administrative Discretions*, Parl Pap No 316 of 1973 (Bland Committee), *Report of Committee of Review of Prerogative Writ Procedures*, Parl Pap No 56 of 1973 (Ellicott Committee). The reports have been republished in R Creyke and J McMillan, *The Making of Commonwealth Administrative Law* (ANU, CIPL, 1996).

7 Migration cases consistently comprise about half the ADJR Act applications to the Federal Court. A similar proportion of the hearings by the Administrative Appeals Tribunal are social security and veterans' affairs matters. (Figures taken from Annual Reports of the Administrative Review Council and the Administrative Appeals Tribunal respectively.)

8 Justice Deirdre O'Connor, then President of the Commonwealth Administrative Appeals Tribunal; the Hon Justice L T Olsson, a judge of the Supreme Court of South Australia; and Professor Dennis Pearce, then Dean of the Law Faculty, Australian National University. The three papers, entitled "Is there too much natural justice? (I), (II), (III). were reproduced in (1994) 1 *AIAL Forum* 82.

criticism by Professor Disney at the 1992 Administrative Law Forum[9] of the increasing complexity of procedural fairness principles, particularly in the Administrative Appeals Tribunal (AAT). Disney saw this development as a potential impediment, rather than an aid to citizens" review rights. Although all three commentators denied that there was an overdose of natural justice, each stressed that procedures must be flexible and take account of other values such as administrative efficiency, the need for speedy conclusion of proceedings, for tribunals to be accessible, and for costs to be kept to a minimum.[10]

At the same time, Justice O'Connor, one of the panellists in Adelaide and then President of the AAT, defended elements of the AAT's processes as a product of the Federal Court's demands on the Tribunal.[11] This perceived dilemma, which has been noted by others,[12] may be overstated. With the exception of the High Court's decision in *Minister for Immigration and Ethnic Affairs v Teoh*,[13] there have not been any major High Court or Federal Court decisions on the doctrine in the last five years. In other words, the period of development of procedural fairness rules appears to have slowed down. More recently, in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*,[14] the High Court cautioned the Federal Court not to expect too much of tribunal findings and, by implication, processes.[15] These developments, albeit some of them recent, suggest that any pressure on tribunals to conform to a curial model of procedural fairness has abated.

9 J Disney, "Access, Equity and the Dominant Paradigm" in J McMillan (ed), *Administrative Law: Does the Public Benefit?* (1992) 1.

10 This period also saw amendments to the *Migration Act 1958* (Cth) Part 2, Div 3, Subdiv AB, s 476(1)(a), (f), statutorily to pare down what would be fair process for hearings of the Immigration Review Tribunal and the Refugee Review Tribunal.

11 Justice Deirdre O'Connor, "Is there too much natural justice? (1)" (1994) 1 *AIAL Forum* 82.

12 T G Ison, *The Administrative Appeals Tribunal of Australia* (1989) 13—a Study Paper prepared for the Law Reform Commission of Canada as part of its Administrative Law Series; P Cane, *An Introduction to Administrative Law* (2nd ed, 1992) 333–334; M C Harris, "There's a New Tribunal Now:" Review of the Merits and the General Administrative Appeals Tribunal Model", in M C Harris and V Waye (eds), *Australian Studies in Law: Administrative Law* (1991) 202.

13 (1995) 183 CLR 273. Despite the initial flurry of adverse comment and the moves to neutralise the effect of the decision, first by the 10 April 1995 press release and then by the proposed legislative amendment, the case appears to have had less impact than expected. In May 1996 the Minister for Foreign Affairs and the Attorney-General announced reforms to the treaty making process, including tabling of treaties in Parliament at least 15 sitting days before ratification or accession and consultation with affected States and Territories (Industry Commission, *Regulation and its Review* 1995–96 at 36).

14 (1996) 185 CLR 259.

15 *Ibid* at 271–272 per Brennan CJ, Toohey, McHugh and Gummow JJ, and 291–293 per Kirby J.

But curial demands are only part of the problem. The Administrative Review Council's report on the major federal tribunals, the *Better Decisions* report, noted that "the approach adopted by tribunals is conditioned as much by the attitude of tribunal members as it is by the decisions of the courts in particular cases."[16] The report, which appeared in 1995, exhorted tribunal members to adopt procedures "that they consider to be fair without thinking that they must operate in accordance with the same procedural rules that apply in courts".[17]

It is hard to gauge whether the warnings voiced in Canberra and Adelaide were heeded. The popular perception is that they were not. It can be argued that the failure of certain federal tribunals to adopt the approach advocated in the *Better Decisions* report accounts in part for the Coalition's moves to restructure the framework of Commonwealth tribunals.

Next portent: immigration

The next warning was directed at the judicial review jurisdiction of the Federal Court.

The most far-reaching change to the statutory and common law judicial review regime occurred, not surprisingly, in the immigration portfolio. This jurisdiction has consistently accounted for over half the cases before the Federal Court, and the migration arena has, therefore, been exposed more intensely to the Court's supervisory jurisdiction than other areas of government activity.[18] Concern within the Department at the impact of the courts" interpretation of its review powers led to the passage in 1992 of the *Migration Reform Act*, Parts 2 and 8 of which significantly restricted the judicial review jurisdiction of the Federal Court. This legislative change, which commenced operation in September 1994, codified and limited procedural fairness rules (except for actual bias[19]), and removed from the Court's jurisdiction certain grounds of review—unreasonableness, relevancy and irrelevancy, bad faith, uncertainty, abuse of power, and being otherwise contrary to law.[20] These were the grounds which had been employed most successfully, or had the potential to be so, in judicial review of migration decisions.[21]

16 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995) (*Better Decisions* report) at paras 3.4–3.32, especially para 3.11.
17 *Ibid* at para 3.11.
18 Administrative Review Council, *Annual Reports*, Table 4, "Applications to the Federal Court of Australia under the AD(JR) Act".
19 *Migration Act 1958* (Cth) Part 2, Div 3, Subdiv AB, ss 475, 476(1)(f).
20 *Migration Act 1958* (Cth) s 476.
21 Research being conducted by Emeritus Professor Pearce, Mr J McMillan and the author.

The legislative move was watched with considerable interest by other agencies which had cause to be dissatisfied with the results of judicial review cases. Indeed, it was suggested at the time that the legislative strategy, if successful, would encourage them to follow suit. Those agencies have had to wait a considerable time for the jurisdictional restrictions to be tested.

In May 1996 in *Ozmanian v Minister for Immigration and Ethnic Affairs*,[22] Merkel J found that a decision by the Minister to refuse to grant a protection visa to a person who claimed to be a refugee had been made in breach of requirements of procedural fairness. In a carefully worded judgment, his Honour concluded that although the Court was deprived by section 485(1) of the Act of jurisdiction to review a "judicially-reviewable decision",[23] the legislative amendments did not exclude review of "conduct". As a matter of statutory construction the Court must retain the ADJR Act and common law jurisdiction to review flawed administrative conduct. Merkel J reasoned that although there had been a final decision not to grant the applicant refugee status, since errors had occurred in the preliminary activity leading to that decision, that is, "conduct", these vitiated the final outcome.[24]

There were two criticisms that could be made of that finding: it flew in the face of the obvious intention behind the amendment, which was to exclude judicial review in relation to certain grounds of review; and it failed to take account of the suggestion by Mason CJ, for the majority, in *Australian Broadcasting Tribunal v Bond*,[25] that rarely would there be a need to go behind a decision once made to review the legality of agency conduct. As his Honour noted, in examining the final or operative decision, the steps leading up to that decision are also reviewable.[26] Admittedly the High Court made those remarks in a context in which both the decision and the preceding conduct could be reviewed. The situation faced by Merkel J, in which review of the decision itself was barred, had not then arisen.

On appeal, the Full Court overturned Merkel J's decision. Sackville J, who gave the principal judgment, found that the legislative intention was too plain to be subverted and confirmed the validity of the partial ouster of jurisdiction. He concluded that the language of section 485(1) did not refer in ADJR Act terms either to "decision" or "conduct," and since those terms

22 (1996) 41 ALD 293.
23 The amendment referred to a "judicially-reviewable decision" (*Migration Act 1958* (Cth) s 474).
24 *Ozmanian v Minister for Immigration and Ethnic Affairs* (1996) 41 ALD 293 at 319–321.
25 (1990) 170 CLR 321.
26 *Ibid* at 338.

were not defined in the *Migration Act 1958* (Cth), the provision was sufficiently wide to exclude review of both preliminary and final administrative action. The argument that the result was the abrogation of fundamental rights—the right to judicial review—and that the provision should be interpreted in a manner which would do least damage to those rights, was also rejected.[27] Sackville J left open the question of whether it is possible to review conduct engaged in for the purpose of making a decision once the final decision has been made. The outcome is that this experiment in partial exclusion of judicial review—at least before the Federal Court[28]—has been successful.

The success of this restriction encourages a digression to look at a further proposed restriction in the same migration jurisdiction and. If this proposal is successful, it too may encourage other agencies to follow suit.

Emboldened by the initial success in restricting judicial review, the Government has recently introduced legislation to oust almost completely the judicial review jurisdiction over migration and refugee determinations. This is to be achieved by means of a broadly worded privative clause.[29] It is clear that such a move would be ineffective against any attempt to oust the jurisdiction of the High Court under section 75(v) of the Constitution. So much was affirmed recently, albeit in *obiter dicta*, in *Darling Casino Limited v New South Wales Casino Control Authority*.[30] Nor, it seems, would such an ouster clause inhibit the High Court from intervening in cases which involve "imperative duties" or which go beyond "inviolable limitations or restraints".[31] Those expressions suggest that gross errors by a court of tribunal would not be protected from review.

Beyond that, however, there are limitations which members of the High Court may be more prepared to uphold. Gaudron and Gummow JJ have suggested that:

> … there is no constitutional reason … why a privative clause might not protect against errors of other kinds by, within the limits of the relevant legislative powers, operating to alter the substantive law to ensure that the

27 That argument was based on the High Court's renewed emphasis on the need to interpret statutes in a way which was least disruptive of such rights (*Coco v R* (1994) 179 CLR 427; *Bropho v Western Australia* (1990) 171 CLR 1).

28 It is conceded that the High Court's original jurisdiction under s 75(iii) and (v) of the Constitution remain in place for those with the will and the funds for pursuing remedies at that level (*Minister for Immigration and Ethnic Affairs v Ozmanian* (1996) 141 ALR 322 at 326).

29 See Migration Legislation Amendment Bill (No 5) 1997, s 2, Sch 1, clause 474.

30 (1997) 143 ALR 55 at 74 per Gaudron and Gummow JJ (for reasons supported by Brennan CJ, Dawson and Toohey JJ at 56).

31 *Ibid* at 74. See also *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 418 (per Mason ACJ and Brennan J).

> impugned decision or conduct or refusal or failure to exercise a power is in fact valid and lawful.[32]

That approach builds on earlier cases[33] in which the High Court suggested that the Court may be prepared to concede that its jurisdiction has been ousted, provided there are no constitutional inhibitions, the *Hickman*[34] provisos have been met, and there are ample rights of appeal.[35] This last-mentioned factor may well be relied on for the proposed ouster of review, since it can be argued that full review on the merits by the Immigration Review Tribunal (IRT) or the Refugee Review Tribunal (RRT) obviates the need for supervisory review by the superior courts. However, there is no certainty that either the High Court or the Federal Court will accept a truncated role.

A weakness in the strategy is the proposed reduction in status of the merit review bodies involved. The Coalition Government has announced that the two Tribunals will be combined and become simply a division of a proposed Administrative Review Tribunal (ART). As explained below, it is probable that the ART would operate more like the specialist first-tier tribunals.[36] If that occurs it would differ from the AAT which, for all intents and purposes, is a court in another guise. The High Court and the Federal Court may be less willing to defer to decisions of a body that is little more than a one-stop specialist first-tier review body. That is even more likely given the High Court's warning in *Craig v South Australia*[37] that it will look critically at any attempt to oust review of decisions of tribunals, particularly if the tribunal is constituted wholly or partly by people without qualifications in law. The instances in which the High Court has been prepared to accept ouster of jurisdiction have occurred mostly where the privative clauses protected the Federal Court or an industrial relations body, both of which might be argued to have special claims to immunity from review.[38] These matters suggest that there is little cause to be

32 *Ibid*.
33 See note 38.
34 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598. These principles permit ouster of a court's review jurisdiction provided the decision "is a *bona fide* attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body" (per Dixon J at 615).
35 *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 289–292 per Deane, Gaudron and McHugh JJ; *Public Service Association (SA) v Federated Clerks' Union (SA)* (1991) 173 CLR 132; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168. Although it is not a matter which has received the direct *imprimatur* of the High Court (M Aronson & B Dyer, *Judicial Review of Administrative Action* (1996) 981–983).
36 Although there is to be some flexibility in the procedures which each division may adopt.
37 (1995) 184 CLR 163 at 176–177.
38 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 (Deputy Commissioner of Taxation); *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232

sanguine about the success of any strategy that involves wholesale exclusion of judicial review.

The proposed ouster of jurisdiction is also worrying for other reasons. Tribunal review can never be formally binding. The only means of obtaining an authoritative ruling on issues within the migration jurisdiction would be to apply to the High Court: an increase in its first instance jurisdiction is not likely to be welcomed by the Court. Not only would the complete removal of jurisdiction from the Federal Court create a potentially burdensome caseload, but High Court review would add appreciably to the costs of such actions.

In addition, if it is assumed that a goal of governments is to improve the performance of public administration, a move of this kind is likely to be counterproductive. Difficult though it may be to quantify the impact on officials of judicial and administrative review, there is empirical evidence that review has improved the general quality of primary decision-making. In my limited experience, the quality of lawyering in the Department of Immigration and Multicultural Affairs is very high. I would suspect that within the agency there would be an acknowledgment that that standard had been attained because, not despite of, the input from judicial review bodies.

Another portent: veterans' affairs

The next warning arose in the veterans' affairs jurisdiction. To obtain a war pension a veteran or the dependants of a veteran must establish that the veteran's death or disability is due to service. Amendments to the veterans' legislation have taken away that key causal link question from the Veterans' Review Board (VRB), the AAT and the Federal Court and placed it in the hands of two new bodies—the Repatriation Medical Authority and the Specialist Medical Review Council. This has affected both judicial and administrative review.

The result has virtually quarantined from review a critical aspect of claims of entitlement to a pension for a service-related disability. The legislative change which produced this outcome reflects a peculiar difficulty within this jurisdiction occasioned by a series of generously worded provisions (described below) designed to test the link between incapacity or death

(Conciliation and Arbitration Commission): *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 (Full Commission of the SA Industrial Commission); *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 (Federal Court); *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 (Conciliation and Arbitration Commission).

and service.[39] The various standard of proof and causation tests to establish that death or disability is war-caused have produced a veterans' pensions system in Australia which is arguably the most generous in the British Commonwealth of Nations.[40]

There have been several attempts to devise a workable causation test for the purposes of the disability pension for war veterans. The dilemma is to devise a standard which is capable of differentiating between service-related conditions[41] and those which are the product of the normal ageing process.[42] The penultimate standard, which was found in section 120 of the *Veterans' Entitlements Act 1986* (Cth), was formulated on the basis of arguments that the stresses of service often impact on individuals long after the conflicts in which they fought have been concluded.

Section 120 provided that for those members of the Forces who had operational service—broadly speaking, those who had served in a combat zone—entitlement to a pension would be established provided there was a "reasonable hypothesis" of a connection between the members' disability, disease or death, and that hypothesis was not disproved beyond reasonable doubt. The subtleties of the interpretation of section 120 have taxed the High Court and Federal Court on frequent occasions.[43] The definitive interpretation was provided by the High Court in *Bushell v*

39 For the earlier test see C Cook & R Creyke, "Repatriation Claims and the Burden of Proof of the Negative" (1984) 58 *ALJ* 263.

40 C Lloyd and J Rees, *The Last Shilling: A History of Repatriation in Australia* (1994) at 266, 390, 399–400. See also Auditor-General, *Audit Report No 8, 1992–93 Efficiency Audit, Department of Veterans' Affairs, Compensation Pensions to Veterans and War Widows* (1992) at para 1.9.1. The justification for the beneficial approach was explained by Murphy J in *Repatriation Commission v Law* (1980) 36 ALR 411 at 412–413 as follows:

> The Australian solution to the problem of ensuring that the costs of war-related losses were borne by society rather than fall on the injured persons or their dependants was the adoption (along with other measures) of the 'onus of proof' section in war veterans legislation which requires the Commonwealth or its agency to disprove a claim rather than to require the claimant to prove it. It has been obvious that this remedial section would result and has resulted in many claims being allowed which in truth were not well-founded. This was the price of ensuring that no valid claim was rejected because of insufficiency of proof.

41 The principal diseases suffered by veterans are three of the major chronic diseases (vascular disease, excluding hypertension, respiratory diseases, and cancer) which together comprise some 39 per cent of cases, followed by hearing loss, solar skin damage and musculoskeletal conditions—in total some 70 per cent of the conditions claimed: *Audit Report No 8, 1992–93*, *ibid* at paras 3.3.7, 3.3.9 and Table 3.1.

42 The Australian National Audit Office concluded that, in addition to injuries on service, age was a factor which has substantially influenced payment of pension: *Audit Report No 8, 1992–93*, *ibid*, Appendix 6 at 120–121.

43 *Bushell v Repatriation Commission* (1992) 175 CLR 408; *Byrnes v Repatriation Commission* (1993) 177 CLR 564; *Gilbert v Repatriation Commission* (1989) 86 ALR 713; *East v Repatriation Commission* (1987) 16 FCR 517; *Webb v Repatriation Commission* (1988) 19 FCR 139; *Repatriation Commission v Owens* (1996) 70 ALJR 904.

Repatriation Commission.[44] The Court found that a reasonable hypothesis could be established if it was supported by the evidence of a medical practitioner, eminent in the relevant field of knowledge, albeit there were other contradictory medical opinions on the matter. Hence, a claim would be successful unless the factual foundation or particular circumstances of service relied on by the veteran were disproved beyond reasonable doubt.[45] The result has been that, provided a veteran could find a reputable medical practitioner or academic who would support the hypothesis, the claim succeeded unless the substratum of facts was too tenuous.

This unique statutory combination of a weak causal link with service and a reverse standard of proof to the criminal standard has undoubtedly permitted grants of pension to veterans whose conditions, on any commonsense view, are not service-related.[46] Not surprisingly, the Auditor-General criticised the statutory test.[47] Similarly, the Baume Report on Compensation for Veterans and War Widows (1994) concluded that the Act did not provide a fair means of compensating veterans for the effects of service on their life.[48] Indeed, in previous Administrative Law Forums there have been some memorable responses from those, usually economic or legal rationalists, who regarded the scheme as too generous.[49] Not

44 The "burnt out digger" concept (C Lloyd and J Rees, above n 40 at 251–55). However, the Australian National Audit Office concluded that although there was limited research on the topic, "there is no compelling evidence that World War II veterans are currently disadvantaged in terms of mortality, that is, they do not die earlier than would otherwise be expected from the normal effects of ageing and the common chronic diseases": *Audit Report No 8, 1992–93*, above n 40 at para 3.2.14.

45 *Veterans' Entitlements Act 1986* (Cth) s 120(1), (3).

46 Tentative comparative figures suggest that the take-up rate of disability pensions in Australia for World War II veterans of 34 per cent is much higher than the 13 per cent in Canada and the 10 per cent in the United States of America: *Audit Report No 8, 1992–93*, above n 40, Appendix 5 at 118. It has also been claimed that, at the outbreak of World War II, war pensions in Australia were 50 per cent higher than Canadian pensions and 25 per cent higher than those in New Zealand with some 41 per cent of enlisted men receiving veterans' benefits compared with 5 per cent in Great Britain and 25 per cent in Canada: C Lloyd and J Rees, above n 40 at 266. As at the end of the 1996 financial year 334,955 members of the Forces, or their widows or dependants, were receiving a disability pension (advice from a departmental official); and in that financial year the Department of Veterans' Affairs spent $1,624,236,000 on disability and war widows' pensions and ancillary allowances: *The Annual Reports of the Repatriation Commission and the Department of Veterans' Affairs* (1996) at 33.

47 *Audit Report No 8, 1992–93*, above n 40 at paras 3.1.1 to 3.1.5.

48 *A Fair Go: Report on Compensation for Veterans and War Widows* (1994) at para 4.4.8. The Report was commissioned by the then Minister for Veterans' Affairs, Senator the Hon John Faulkner. The Inquiry was conducted by Professor Peter Baume, Mr Richard Bomball, and Ms Robyn Layton.

49 Sen P Walsh, "Equities and Inequities in Administrative Law" (1989) 58 *CBPA* 29; L Woodward, "Does Administrative Law Expect too Much of the Administration?" in S Argument (ed), *Administrative Law & Public Administration: Happily Married or Living Apart Under the Same Roof?* (1993) 36; P Bayne, "Who is in Charge? Do we need

surprisingly, however, the veteran community resisted any change and that community has a powerful voice.

In 1994, section 120A was added to the *Veterans' Entitlements Act 1986* (Cth).[50] The new provision, to operate from 1 June 1994, impacted on the causative link between service and subsequent injury, disease or death. Broadly, the proposal was to set up two new tribunals: the Repatriation Medical Authority (RMA);[51] and a review body, the Specialist Medical Review Council (SMRC).[52] Both bodies are incorporated.[53] The RMA and SMRC comprise eminent medical specialists appointed by the Minister for Veterans' Affairs. The task of the RMA is to develop what are called Statements of Principles, that is, generic statements based on "sound medical-scientific evidence"[54] which define those factors which will establish the medical causation element of the reasonable hypothesis test.[55] These Statements are conclusive and no other factors will be accepted.[56] The Statements are binding on all review and appeal bodies and the task for decision-makers is reduced to determining whether the factors listed in the Statements are present in the history of the veteran applying for pension. Statements are also disallowable instruments for the purposes of the *Acts Interpretation Act 1901* (Cth) s 46A.[57] In order to deflect potential criticism of the scheme, it was made clear in the Second Reading Speech that the tabling of the instruments would permit public scrutiny and objections could be raised at that point by means of normal parliamentary processes.[58]

The sophistication of the scheme in administrative law terms is that the Statements of Principles are insulated from review. That outcome has been achieved in two ways. Making the RMA and the SMRC corporate bodies prevented their decisions being reviewed under section 39B of the *Judiciary Act 1903* (Cth), or under the original High Court jurisdiction in section 75(v) of the Constitution, since it has been held that corporations are not "officers of the Commonwealth".[59] The second insulating device was the designation of the Statements of Principles as disallowable instruments.

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a Rationality Test for Questions of Law?" (1991) 66 *CBPA* 77; *Report of the Review of the Administrative Appeals Tribunal* (1991) at paras 2.30, 2.36–2.39.

50 *Veterans' Affairs (1994–95 Budget Measures) Legislation Amendment Act 1994* (Cth).

51 *Veterans' Entitlements Act 1986* (Cth) Part XIA.

52 *Veterans' Entitlements Act 1986* (Cth) Part XIB.

53 *Veterans' Entitlements Act 1986* (Cth) ss 196A(2)(a), 196V(2)(a).

54 *Eg Veterans' Entitlements Act 1986* (Cth) s 196B(5).

55 *Eg* drinking a particular quantity of alcohol over a certain period can lead to malignant neoplasm of the rectum.

56 *Veterans' Entitlements Act 1986* (Cth) s 120A(3), (4).

57 *Veterans' Entitlements Act 1986* (Cth) s 196D.

58 Second Reading Speech, *Hansard*, House of Representatives, 9 June 1994, 1673.

59 *Eg Post Office Agents' Association v Australian Postal Commission* (1988) 84 ALR 563.

Since they are legislative in character, they are not reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1).[60]

The strategy has been successful. In two cases, one in the Federal Court and one at the AAT, the argument that the Statements of Principle were not reviewable was upheld for the reasons outlined in the two previous paragraphs. In *Vietnam Veterans' Association of Australia v Cohen*,[61] Tamberlin J held that the Court did not have jurisdiction to review two Statements of Principles made by the RMA nor two declarations made on further review by the SMRC. That decision was followed in *Re Jenkins and Repatriation Commission* by an authoritative panel of the AAT.[62]

As a consequence, courts or tribunals are unable to review the service-related matters which give rise to a reasonable hypothesis in a claim for a disability pension. Hence, administrative and judicial review of the causation question is no longer possible. The only function of these bodies is to review findings of fact about service, disability or death,[63] or to assess rates of pension—a relatively limited aspect of their jurisdiction.

On the one hand, the new scheme has brought greater certainty to the determination process. But there are also dangers. Although the RMA is also charged with the task of updating the Statements of Principle, there is an inbuilt rigidity and obsolescence in the system which means that RMA findings will always lag behind medical science. And although there is a right of appeal to the SMRC for amendment to a Statement of Principle, to date there have been only a handful of appeals, few of them successful.[64] The result is that an applicant is virtually unable to advance an hypothesis outside those recognised in the Statements of Principles even if it is supported by a respectable body of medical or scientific opinion. The impact on eligibility for pension is restrictive and the opportunities for obtaining a disability pension will diminish.

The impact on the administrative review framework is also significant. The scheme amounts to a sidelining of the courts, the VRB and the AAT in

60 *Ibid*.
61 (1996) 46 ALD 290.
62 (1997) 24 AAR 494. The widow had applied for a pension following the death of her husband from carcinoma of the rectum, some 33 years after the end of the Second World War. The panel comprised Justice Jane Mathews (the President), Commodore B G Gibb (a Senior Member who frequently sits on veterans' matters), and Dr C Re (a medically qualified Member).
63 That is a limited jurisdiction indeed for the Federal Court, particularly since the High Court's warning about disguised merit review (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 136 ALR 481 at 484, 490, 491 per Brennan CJ, Toohey, McHugh and Gummow JJ, and 506 per Kirby J).
64 *The Australian*, 25 April 1997 at 2 reports a successful appeal in relation to the conditions for acceptance of osteoarthrosis.

favour of tailor-made tribunals. At the time of their establishment it was stressed that two of the reasons for setting up the new bodies was that tribunals with lay members were not able to deal consistently with medical-scientific issues and that the adversarial approach to fact finding[65] which applied in administrative tribunals was inappropriate for determining medical-scientific issues that call for detailed technical knowledge.[66] However, the substitute bodies, comprised wholly of people with medical qualifications, are equally open to criticism on the ground of narrowness and lack of transparency.

Summary

What has emerged in this period is evidence that parts of the administration have objected to the formality and stringency of the demands of administrative law. As a consequence two tribunals (the IRT and the RRT) have been given only a limited review charter, the AAT has been exhorted to be less curial in its procedures, the Federal Court has been stripped of part of its supervisory jurisdiction in migration and refugee matters (and may lose it almost entirely if the moves to introduce a comprehensive ouster clause are successful), and the VRB, the AAT and the Federal Court have lost a key part of their veterans' affairs jurisdiction. These developments have not been lost on the new Government.

At the same time there were other precursors of change: the decision in *Brandy v Human Rights and Equal Opportunity Commission;*[67] a Senate inquiry into the operation of the Ombudsman's office; and the Government's failure to implement proposed changes to the Commonwealth information privacy regime. These will be dealt with in the material which follows. Perhaps the most significant move, however, relates to the system of Commonwealth merit review tribunals. This system was the subject of the *Better Decisions* report produced by the Administrative Review Council. Implementation of that report was promised by the Coalition Government in its *Law and Justice Policy*[68] and it is that element of the system which is considered next.

65 Described as only "nominally inquisitorial": Second Reading Speech, *Hansard*, House of Representatives, 9 June 1994, at 1673.
66 Explanatory Memorandum at i—ii; and Second Reading Speech for the 1994 amending Act (*Hansard*, House of Representatives, 9 June 1994, at 1673).
67 (1995) 183 CLR 245.
68 *Law and Justice Policy*, above n 3, at 4.

NEW DEVELOPMENTS

Framework of tribunal review

Implementation of the Better Decisions report: On 20 March 1997 the Attorney-General and Minister for Justice, The Hon Daryl Williams, announced the Government's intention to amalgamate into a single tribunal, the Administrative Review Tribunal (ART), the AAT, the SSAT, the VRB, the IRT and the RRT.[69] The move represents a fundamental change to the structure of administrative review. The announcement was broadly in line with the recommendations for structural reform of the framework of review tribunals which had been developed by the Administrative Review Council in its *Better Decisions* report.

Public details of the proposal are limited. However, it is assumed that the recommendation of the report will be put into effect and that the new body will comprise seven divisions (welfare rights; veterans' payments; migration; commercial and major taxation; small taxation claims; security; and a general division exercising the residual jurisdiction of the AAT).[70] The combined output of these bodies in 1995–96 was 32,490 finalised hearings.[71] The new tribunal can, therefore, be expected to have the highest volume jurisdiction of any federal review body.

The blueprint for finetuning the amalgamation is being undertaken by an interdepartmental committee. The stated objectives are to "streamline administrative structures and enhance operations". The interdepartmental committee has a charter to reassess "the basis and scope of administrative review" in order "to reduce the number of applications," to limit "the overall costs of merits review," and to reduce "excessive legalism".[72] These criteria contain a thinly veiled criticism of the AAT in the references to "excessive legalism" and "costs", although the reference to costs suggest that the two migration tribunals may also have been targeted.[73]

The implication from the press release that the ART was not to include a review panel, a departure from the recommendations of the *Better Decisions* report, is worrying and is discussed later under "Absence of Review Panel". The advantages of retaining a second specialist tier of review to

69 News Release, "Reform of Merits Tribunals", reprinted in (1997) 48 *Admin Review* 78.
70 *Better Decisions* report, above n 16, at paras 8.10–8.19.
71 Administrative Review Council, *Twentieth Annual Report 1995–96* at 28–32.
72 News Release, above n 69.
73 The average cost of appeal in 1995–96 per application finalised was $621 for the SSAT; $717 for the VRB, $3,270 for the IRT; $4,500 for the RRT; and $3,637 for the AAT (figures largely obtained from annual reports for those bodies). The figures are generally an increase on the 1994–95 figure due to the addition of superannuation payments.

handle appeals in the high volume jurisdictions will not be discussed since they have been particularly well rehearsed in recent papers[74] and in submissions made to the Guilfoyle review of the Social Security Appeals Tribunal (discussed later under "Social Security").

Four aspects of the proposal will be considered here: its cost; whether the opportunity should be taken to bring all federal tribunals under the ART umbrella; whether the ART should be a single tier body or whether, as the *Better Decisions* report advocated, it should have a review panel for reviews by leave; and whether the decisions of the ART will continue to inject that systemic improvement needed by any healthy administrative review system.

Cost of the Administrative Review Tribunal? In view of the criticisms implied in the Government announcement, it is surprising that the decision has apparently been made without any detailed costing of the new body. These are bound to be significant. Given the projected volume of cases and the fact that representation will be introduced for several of the currently less expensive, high volume, jurisdictions, hearings will inevitably be longer and this will increase the ART's overall costs.

Moreover, even rough costings are instructive. On 1995–96 figures[75] the five existing merit review bodies cost the taxpayer about $64,616 million. The cost per hearing is directly related to the style of hearing adopted. The hearings before the AAT are largely adversarial in nature; but the other four bodies operate in a more inquisitorial fashion, often with no representation by the agency. If we assume that most hearings by the ART would be contested (a reasonable assumption if review by that body is to be the only external review available), it is also reasonable to assume that the ART's hearings will be more formal and that the cost per hearing for the ART would be more akin to the costs of the AAT. If the 1995/96 cost per AAT hearing was transposed to the 32,490 hearings by all five merit review bodies, the total would be $118,166 million.

74 For example, D O'Connor, "Effective Administrative Review: an Analysis of Two-Tier Review" (1993) 1 *A J of Admin L* at 6–8; J Disney, "Reforming the Administrative Review System" *Law & Policy Papers*, Paper No 6 (1996, ANU), Paper No 6, at 20–32; J McMillan and R Todd, "The Administrative Tribunals System: Where to from Here?" in S Argument (ed), *Administrative Law: Are the States Overtaking the Commonwealth?* (1996) 116; P Johnston, "Recent Developments Concerning Tribunals in Australia" (1996) *24 F L Rev* at 330–332; R Creyke, "Introduction and Overview" (1996) 24 *F L Rev* at 228–29.

75 Given the continuing increase in the volume of review applications, it is reasonable to assume for the purposes of these calculations that the volume of the ART cases will be at least as large as the number of hearings in 1995–96.

If an average cost per hearing, based on 1995–96 figures, were adopted the total figure for the 1995–96 volume of hearings would be $76,351 million. In other words, despite having some costly features, the current system is arguably cheaper than the proposed new structure. Indeed, the average cost model may be an underestimate of the cost per hearing of the new body.[76]

Is the Administrative Review Tribunal to be comprehensive? A second comment relates to the composition of the new body. The press release referred only to an amalgamation of the five major merit review bodies. That is consistent with the findings of the Administrative Review Council. The Council did not have the resources to undertake a comprehensive analysis of all Commonwealth first-tier decision-making review bodies and chose to concentrate solely on the high volume and high profile jurisdictions.

However, it should not be assumed that only those bodies will be included in the new external administrative review body. That raises two questions. Are existing review bodies which have not specifically been mentioned to be brought within the ART review structure? These would include, for example, the Repatriation Medical Authority and the Specialist Medical Review Council. If not, the "basis and scope" of Commonwealth administrative review will remain fragmented and the proposed changes to the system will not stem the proliferation of tribunals. If so, it must be assumed that the jurisdiction of these bodies will come within the General Division of the ART.

That raises a second question. What is the relationship of the proposed General Division of the ART to bodies for which the AAT had exercised a second-tier review function? At present there are a significant number of independent or semi-independent, often agency-specific, determining authorities.[77] Many are primary decision-makers;[78] others are review

76 Currently 61 per cent or nearly two-thirds of the total number of hearings (those involving the SSAT and the VRB) do not have agency representation. It is assumed that there would need to be agency representation at many of those hearings in the future, with a consequent increase in time and cost per hearing.

77 *Eg* the Australian Community Pharmacy Authority; the Australia and New Zealand Food Authority; the Australian Securities Commission; the Great Barrier Reef Marine Park Authority; the Export Development Grants Board; the Development Allowance Authority; the Defence Force Retirement and Death Benefits Authority; the National Registration Authority; the Spectrum Management Authority; the reconsideration by the Attorney-General of certain decisions of the Secretary of the Department of Health and Family Services; and the Conscientious Objection Tribunal. For a comprehensive list see the Administrative Review Council, *Annual Report 1995–96* Appendix 8.

78 *Eg* the Management and Investment Companies Licensing Board; the Interstate Road Transport Regulatory Authority; the Joint Coal Board; the Wheat Industry Board; and the Industrial Research and Development Incentives Board.

bodies, some reviewing primary decisions by an agency, on occasions, followed by internal review.[79] The decisions of those determining authorities can be reviewed by the AAT. For bodies which are themselves first-tier review bodies, the right of review to the ART's General Division provides a second-tier of review, a privilege denied to other citizens. To permit the General Division to be a second-tier review body for some, but not all, of its jurisdiction is anomalous and needs to be addressed.

Absence of review panel: The most startling omission from the Government announcement is the absence of any reference to a second, review tier of the ART.[80] It appears that this omission was intentional. The *Better Decisions* recommendation for a Review Panel of the ART—reduced although it was to a "by leave only" function—preserved the best aspects of an authoritative final tier of administrative review.[81] A brief discussion of the proposal follows.

The first of the three criteria for seeking leave[82]—that, in the opinion of the ART President, the case raises a principle or issue of general significance—reflected the important role performed by the AAT in providing consistency and uniformity throughout public administration. That role was to be concentrated and enhanced by the proposed Review Panel system which institutionalised the avoidance of inconsistency in decision-making. Authoritative decision-making by a few, well qualified and experienced panel members, charged with the development of principles of general application, was designed to overcome that problem. To replace it with a collection of divisions speaking in different tongues will exacerbate, not alleviate, that problem. As the *Access to Justice* report noted, the first tenet of an effective administrative justice system is that it provide

79 *Eg* the Australian Fisheries Management Authority; the Great Barrier Reef Marine Park Authority; the Development Allowance Authority; decisions by the Attorney-General on reconsideration of certain decisions by the Secretary, Department of Health and Family Services; and the Medicare Participation Review Committee.

80 *Better Decisions* report, above n 16 at paras 8.42—8.72.

81 In his Second Reading Speech on the establishment of the AAT the Attorney-General, Mr K E Enderby MP, noted: "The establishment of the Administrative Appeals Tribunal will be a significant milestone in the development of the administrative law of this country. It will provide an opportunity to build up a significant body of administrative law and practice of general application, as well as providing the machinery to ensure that persons are dealt with fairly and properly in their relationships with government": *Hansard*, House of Representatives, 6 March 1975, at 1188.

82 The two remaining criteria are: that, in the opinion of the ART President, the decision of the ART division involved a manifest error of fact or error of law that is likely to have materially affected the decision; or that new information is brought to the attention of the ART President which, in the President's opinion, could not reasonably have been discovered prior to the finalisation of the case before the ART division, and which would have materially affected the decision: *Better Decisions* report, above n 16 at paras 8.57—8.63.

"a comprehensive, principled and accessible system of merits review".[83] A coherent and consistent administrative review jurisprudence can only be developed by a body with a single and authoritative voice—not by a loose federation of specialist divisions operating according to individualised processes and developing a separate stream of rules.

One of the greatest concerns about the *Better Decisions* report was that the elevation of the specialist tribunals to become part of the first-tier body would lead to one of two outcomes—either an over-judicialisation of their processes to the detriment of their clients; or the loss of independence, stature and the high quality legal and fact-finding skills needed in complex cases.[84] That made the recommendation of the Review Panel the more attractive. If formal judicial processes, high level legal representation and a curial model could be confined to the Review Panel, that would prevent the tendency for these characteristics to develop at the first-tier of the ART.

Legalism is acceptable in the body which is seeking to achieve consensus of decision-making and to devise general principles which are to apply throughout the administration. Absent such a body, and the fears that creeping legalism will emerge in the ART divisions cannot be dismissed.[85] Retention of the Review Panel would safeguard that flexibility in procedure and informality in processes in the divisions while making it more likely that the greater speed and cost-savings of external review, which are values which emerge from the recommendations in Chapters 1–7 of the *Better Decisions* report, might be achieved.

There are other arguments in favour of having a Review Panel. The Government press release noted: "It is envisaged that separate divisions of the proposed ART would develop and maintain flexible, cost-effective and non-legalistic procedures relevant to their jurisdictions". This willingness to concede that specialist divisions should retain their specific forms of procedure and modes of operation is welcome. It marks a recognition that uniformity for uniformity's sake is an unintelligent response, especially in a modern, pluralistic society. It recognises too that the development of the specialist bodies has been carefully monitored over the years,[86] and that their individual modes of operation have been appropriately tailored to

83 Access to Justice Advisory Committee, *Access to Justice: an Action Plan* (1994) at para 13.9.

84 R Todd AM, "The Structure of the Commonwealth Merits Review Tribunal System (1996) 7 *AIAL Forum* 35 at 37–38.

85 If that were to occur it would be ironic given that the proposed abolition of the AAT has apparently been due to just those aspects of its mode of operation.

86 R Creyke, *The Procedure of the Federal Specialist Tribunals* (1994) Part I.

meet the needs of their customers.[87] However, one consequence is that retention of this degree of individuality may inhibit the interchange of personnel between the divisions which was envisaged in *Better Decisions*, thereby reducing the ability of the new body to develop general principles of good administration. In those circumstances, it is the more imperative that there be a Review Panel to perform that function.

Finally, there are significant disadvantages in terms of the status of the new body if the recommendations for a Review Panel are ignored. Although the reports of the architects of the system[88] paid little attention to the system-wide impact of administrative review, the Attorney-General at the time and subsequent observers have been more perspicacious.[89] In his Second Reading Speech during passage of the Administrative Appeals Tribunal Bill 1975 the Attorney-General, Mr K E Enderby, MP, noted:

> The President and the presidential members of the Tribunal will have the status of judges. The Bill accords them this status because it is considered by the Government to be essential to the successful operation of the Tribunal that it should enjoy a high standing in the Australian community. It will be called upon to review decisions of Ministers and of the most senior officials of Government.[90]

That point remains as true in 1997 as it was in 1975. An obvious advantage of the Review Panel is that it would possess that higher standing and enhanced authority.[91]

The question of authority raises the issue of the composition of any Review Panels. The Kerr Committee was politically astute when it recommended that the proposed merit review body should be headed by a judge. As the report noted: "The status of the Administrative Review Tribunal[92] would be raised, the judge could rule on all questions of law and the acceptability of the decisions made would be greater."[93] While not necessarily accepting that if there was a Review Panel it needs to be headed by a judge, that person should at least have qualifications in law.

87 *Eg* S Tongue, "Fairness in Administrative Decision-Making: the Immigration Review Tribunal Model" (1996) 9 *AIAL Forum* 44.
88 Kerr, Bland and Ellicott Committee reports, above n 6.
89 D Volker, "The Effect of Administrative Law Reforms on Primary Level Decision-Making" (1989) 58 *CPBA* at 112–113; S Zifcak, "Improving and Enriching Administration" *ibid* at 25; J Griffiths, "The Price of Administrative Justice" *ibid* at 34; P Walsh, "Equities and Inequities in Administrative Law" *ibid* at 29.
90 Above n 81.
91 J Disney, above n 74 at 22–23.
92 It is interesting that over a quarter of a century later, the original title for the generalist review body proposed by the Kerr Committee should be being resurrected. However, it remains to be seen whether it will be the final choice of title by the present Government.
93 Kerr Committee Report, above n 6 at 88.

This issue raises a disappointing aspect of the *Better Decisions* report. The tenor of the report is antagonistic to legalism. That has unfortunately spilled over into suggestions that there is little need for legally qualified members of the new body. The transposition is unfortunate since, as the many legally qualified but non-legalistic members of the specialist review tribunals would attest, the two issues are not synonymous. Moreover, legal members are appointed because they bring their legal skills to the decision-making function of tribunals. Although fact-finding is an inseparable part of merit review, it is in mapping out the ambit of the legal parameters of decision-making that the ART can "make its greatest contribution to the functioning of the bureaucracy".[94]

If that view is true for the general business of the ART, how much more important is it for the Review Panels? As others have argued, albeit in relation to the judiciary, the skills possessed by legally qualified individuals—"the suppression of personal idiosyncrasy; the ability to analyse and to identify cognate principles; industry in the quest for principles; a capacity to reason analogically; highly-developed fact-finding and fact-evaluative skills and an ability to marshal all these skills for the purpose of reaching the correct or preferable decision in an administrative context"[95]—are vital to the final tier of an administrative review system. If the Review Panel concept is resurrected, it should be recognised that those skills will be essential for its members and that a proportion of those members should be legally qualified. Indeed, the argument means that that recommendation applies generally to members of the ART. To ignore these principles would be to undermine the credibility not only of the Review Panel but of the entire body.

Systemic impact of the Administrative Review Tribunal: 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);[96] 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).

94 M C Harris, above n 12 at 206; Administrative Review Council, *Ninth Annual Report 1984–85* at para 61.

95 M C Harris, *ibid* at 195. See also The Hon Mr Justice F G Brennan, "Limits on the Use of Judges" (1978) 9 *F L Rev* at 3–4.

96 This is a usage of "normative" in this context which is narrower than is common.

Administrative law is not just an external, detached process. It can feed into the administration with positive, long-term, systemic effects. If the ART is to contribute to that process, steps need to be taken to ensure that there are good lines of communication between the ART and the administration and that the ART itself is a body which is respected.

Systemic effect can be measured. Although, for constitutional reasons, decisions of a merit review body can never be formally binding, that does not mean its decisions are not binding *de facto*. One of the AAT's most significant achievements is that it has laid out the broad principles of the schemes entrusted to its interpretation and determination[97] under the nearly 300 pieces of Commonwealth legislation over which it has jurisdiction. That guidance has undoubtedly been beneficial to thousands of bureaucrats and policy-makers, particularly given the few decisions affecting agencies which are handed down each year by the federal judiciary. In his insightful analysis of the benefits of the Commonwealth AAT, Professor Ison noted that:

> … the perception in the public service of statute law as a sort of decorative literature, not of any real concern to us, is probably not now widespread. Indeed, the greatest achievement of the AAT may well be that it has induced a new respect for statute law in government departments and agencies.[98]

Indeed, in my own experience, the benefits of administrative review within agencies have been subtle but measurable. For example, when the SSAT first took over student assistance appeals, the paperwork from the department was shoddy or non-existent, the quality of reasoning was often poor and gaps were discovered in the legislative framework. Performance on these fronts has improved immeasurably and, in particular, the Student Assistance Officers now generally produce professional, well-argued reasons for their decisions.

As an indicator of the growing appreciation of the beneficial effects of tribunal review, real attempts are now being made to assess its impact. The *Better Decisions* report acknowledged that the objective of the tribunal system—to ensure that agencies make the correct or preferable decision—

97 "A consequence of AAT involvement in the main area of jurisdiction, determination of the amount or rate of duty on imported goods, has been the enunciation and clarification of general principles for the guidance of both primary decision makers and importers": Administrative Review Council, *Ninth Annual Report 1984–85* at para 61.

98 T G Ison, above n 12 at 26; S F Skehill, "The Departmental Advocate's View", in *The Workings of the Administrative Appeals Tribunal* (1980) at 50.

has largely been achieved.[99] However, the report noted of the wider normative impact of tribunal decisions on government that

> … doubts have been expressed about the extent to which these changes reflect an underlying cultural change within agencies to embrace genuinely administrative review as a necessary part of the processes of public administration. And it is clear that there is room to improve the extent of the effect of tribunal decisions on the quality and consistency of agency decision-making.[100]

The report also noted submissions that "there is a level of inequity in the outcomes achieved by different individuals as a result of different approaches being taken by agencies and review tribunals, and considers that steps should be taken, so far as is practicable, to eliminate any such inequity".[101]

There is also evidence that tribunal decisions lead to changes in policy and legislation and to improvements in the processes of decision-making.[102] For example, the Department of Immigration's former internal publication, *Folk Law*, noted:

> As merits review bodies perform in many respects identical roles to Departmental decision-makers, officers should look at how the AAT and IRT go about their function. This will usually provide good examples of how good decision-makers weigh evidence and make findings of fact, the careful consideration that is given to relevant matters and the appropriate language to use. Decision-makers who show the depth of reasoning that is shown in many tribunal decisions will increase client satisfaction. Decisions made within such a framework are more likely to be well made, correct and consequently less vulnerable to be challenged.[103]

99 *Better Decisions* report, above n 16 at para 2.24.

100 *Ibid* at para 2.26.

101 *Ibid* at para 6.36. There will be a greater appreciation of the systemic aspect of administrative review following the Administrative Review Council's report on internal review.

102 *Eg* D Volker, "The Effect of Administrative Law Reforms on Primary Level Decision-making" in *Administrative Law: Retrospect & Prospect* (1989) 58 *CPBA* at 112; articles listed under the headings "Tribunal Review and the Public Benefit" and "The Impact of Administrative Law in Specific Areas" in J McMillan (ed), *Administrative Law: Does the Public Benefit?* (1992); Articles by L Woodward, "Does Administrative Law Expect too Much of the Administration?", K de Hoog, "A View from the Administration", and 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) at 36, 67, 117, respectively; C Conybeare, "The Structure of the Commonwealth Merits Review Tribunal System" (1996) 7 AIAL Forum 30. *The Department of Immigration's Annual Report 1994–95* commented that "IRT decisions provide important information for departmental officers in the assessment of outcomes of applications and in determining any need for policy and/or legislative change".

103 Department of Immigration, *Folk Law* (1991) Vol 3, Issue 2, 13.

Ensuring that system-wide improvement occurs requires steps to be taken by agencies and review bodies. Agencies need to develop organisational structures and processes to maximise the benefits of tribunal decisions.[104] The systemic impact of administrative review depends on variables such as the volume of decisions; the culture of the agency; the analysis and communication of decisions; staff training; promotion criteria; development of codes of practice and strategic plans; a commitment to policy and legislative review; and an effective monitoring mechanism (discussed later). These steps will only be undertaken by agencies in response to ART decisions which are consistent and well reasoned, accompanied by written reasons, and produced by high calibre tribunal members. Only then will the wider effects of tribunal review be realised for the benefit of citizens as a whole and, in particular, for those whose personal disadvantages mean that they are never likely to participate in any review process.[105]

Social Security

On 20 December 1996, the Government announced an inquiry into the operation of the social security review and appeals system. The terms of reference of the review[106] focused on cost, reducing the number of levels of appeal, and an enhanced place for government policy in the SSAT's decision-making.[107] The chair is Dame Margaret Guilfoyle, a former Minister for Social Security.

At first sight it appeared odd to hold another inquiry following the Administrative Review Council's *Better Decisions* report on the framework of administrative review. Moreover, findings by the Guilfoyle Committee on that issue have, to an extent, been foreclosed by the Government

104 *Better Decisions* report, above n 16, recommendation 72 at para 6.35.

105 Young people; those with limited education; people from non-English speaking backgrounds; Aboriginal and Torres Strait Islander peoples; and the unemployed: *Access to Justice* report, above n 83 at para 12.53.

106 "The number of levels of review within the Social Security portfolio; the operation of internal review; the impact of the appeals and review decision on the quality and efficiency of decision making by DSS staff; the operation of the SSAT's review processes, including the number of members required to hear an appeal, the requirement to use paper records, basis of proof for evidence rendered, and the issue of representation for appellants; whether the Department/(or the agency) should appear at the SSAT; the SSAT's membership arrangements; the SSAT's powers of review; and whether there should be a right of appeal to the Administrative Appeals Tribunal (AAT) or whether appeal to the AAT should be by leave": Terms of Reference of the "Review of the Social Security Review and Appeals System" (the Guilfoyle Committee Review).

107 The Terms of Reference note that "[t]he Government is concerned to ensure that the Social Security Review and Appeals system: is accessible to those who need access to the system; operates in an efficient and cost effective manner; consists of an appropriate number of levels of appeal; and results in decisions that appropriately reflect the intention and operation of government policy".

announcement (see earlier) of the proposed implementation of the report. Nonetheless, there is work for the Committee. The term of reference relating to the system of review and appeals requires an examination of the mode of operations of the SSAT, whether as a free-standing second-tier body, or as a first-tier division of the ART. The Government announcement about the ART noted that the various divisions of the new body are to retain a degree of flexibility in their procedure.[108] The Guilfoyle review findings can feed into the implementation of that recommendation. Indeed, the terms of reference indicated that fine-tuning the operations of the SSAT was a major reason for the inquiry.

In the compass of this article, comment will be restricted to two of the terms of reference: the number of levels of review so far as that relates to the recommendation in the *Better Decisions* report that alternative dispute resolution techniques, including preliminary conferences, should be adopted as part of tribunal operations;[109] and whether SSAT decisions should be required to take greater account of government policy.

Suggestions that the SSAT adopt a form of preliminary conference is unnecessary. At present, only three-quarters of an hour is allocated to each SSAT hearing. In those circumstances a preliminary conference process would add to, rather than expedite, the length of hearings. Even if the SSAT becomes a division of the ART, the indication in Government announcements that each division of the ART should be permitted flexibility in relation to procedures suggests that the welfare division is likely to continue to operate in much the same way as the SSAT. Hence, a preliminary conference is unnecessary, particularly given the emphasis on the speedy and cost-effective conclusion of matters. Indeed, it may be counterproductive to introduce such a process. The preliminary conference process at the AAT has become simply an occasion for the exchange of documents or information and the high settlement rate at pre-hearing processes reflects, in many cases, a desire to avoid the formality of a hearing, rather than a genuinely mediated settlement of a dispute.

The suggestion that there be an enhanced role for policy in the deliberations of the SSAT is troubling. If this indicates a move to require the SSAT to be bound by government policy, that would be contrary to long-accepted doctrine. That doctrine is based on three fundamental tenets: external review bodies should be free to determine the legality of departmental policies as well as practices; external review will only be respected if it is seen to be independent; and, in a democracy, the rules

108 *Better Decisions* report, above n 16, recommendation 5 at para 3.46.
109 *Ibid* recommendation 20, paras 3.138–3.151.

which determine citizens' rights should be formulated through parliamentary, not purely executive, processes. Enforced compliance with departmental or ministerial policies risks loss of that independence and the taint of departmental capture.

If the SSAT continues in its present form, there are ways in which policy and the wider context of decision-making can be brought to the SSAT's attention. Regular communication between senior review body officers and departmental officials is one such avenue; exchange of feedback on decisions is also valuable. If the SSAT becomes a division of the ART, departmental representatives will appear at hearings and can present a case for consideration of particular government policy. In a democracy, however, if an agency wishes its policy to be binding on an external review tribunal, the agency should embody the policy in legislative form or obtain a legislative imprimatur for the minister to issue directions so that the guideline or policy can be exposed to public scrutiny or debate.

Internal review

An emerging theme in Government policy is the need for increased emphasis on internal, at the expense of external review processes. Internal review involves a re-examination of a primary decision by another officer within the same agency, usually at a more senior level. This form of review has been little studied.[110] The Administrative Review Council briefly considered the merits of internal review in its *Better Decisions* report and recommended that this form of review should be adopted by more agencies. At the same time the report noted there were disadvantages in internal review due to the extra delay and costs of review within the agency, as well as the perceived lack of independence of internal review officers.[111]

Nonetheless, in principle, internal review is inherently valuable. At a time when accountability must be measured and the development of performance indicators has become a growth industry,[112] peer review

110 Articles by S F Skehill, "The Hidden Dimension of Administrative Law: Internal and First Tier Review—I", and T Brennan, "The Hidden Dimension of Administrative Law: Internal and First Tier Review—II" in *Administrative Law: Retrospect and Prospect* (1989) 58 *CPBA* at 137, 141 respectively. The ARC is currently undertaking an inquiry into internal review.

111 *Better Decisions* report, above n 16 at paras 6.42 to 6.67, and recommendation 75.

112 Management Advisory Board/Management Improvement Advisory Committee, *Accountability in the Commonwealth Public Sector*, Report No 11 (1993, MAB/MIAC) at 15-16, 21; Productivity Commission, *Stocktake of Progress in Microeconomic Reform* (1996) at Ch 10; Joint Committee of Public Accounts, *Public Business in the Public Interest: An Inquiry into Commercialisation in the Commonwealth Public Sector*, Report No 336 (1995) Ch 3; Joint Committee on Public Accounts, *A Continuing Focus on Accountability: Review of Auditor-General's Reports 1993–94 and 1994–95*, Report No

provided by fellow officials is a valuable aid to systemic improvement in performance.

The effectiveness of internal review has been graphically illustrated by an example drawn from the Department of Veterans' Affairs. In 1995–96, for the first time, extensive use was made of an "own motion" review provision available under the *Veterans' Entitlements Act 1986* (Cth) section 31. A team of senior Departmental officials re-examined 5,500 adverse decisions, review of which had been sought by veterans. Nearly 40 per cent (2,100) of the applications were resolved in favour of the applicants.[113] In the first seven months of the 1996–97 financial year from a total of 3,645 applications for review, the original decision was varied in 1,999, or 55 per cent of cases.[114] (These figures contrast with the outcomes in Social Security where that Department's statutorily required internal review only overturns some 25 per cent of the 32,000 decisions considered by Authorised Review Officers.[115])

Use of the section 31 mechanism provides a quick outcome for veteran applicants[116] and obviates, in many cases, recourse to the Veterans' Review Board. For those applications in which no change occurred, the opportunity remains for independent, external review.

There are other advantages in instituting a system of internal review. At a time when there are repeated calls for fiscal responsibility, internal review reduces the caseload of external review bodies, thus reducing their costs. It is wasteful of resources[117] to permit external review of claims if internal scrutiny could relatively easily uncover error.[118] However, these savings

344 (1996); *Annual Reports of the Repatriation Commission and the Department of Veterans' Affairs 1995–96* at 92–115; *Towards a Best Practice Australian Public Service*, above n 2.

113 *Annual Reports of the Repatriation Commission and the Department of Veterans' Affairs 1995–96* at 36.

114 Information supplied by the Department. The number of reviews represented some 42 per cent, or nearly half the applications to the Veterans' Review Board. It should be recognised that a significant proportion of these cases would involve no more than an increased *rate* of pension; not all consider *entitlement* questions.

115 Less than 1 per cent (0.9 per cent) of the total of some 35 million primary decisions made annually by the Department: Department of Social Security, *Preliminary Briefing on Review and Appeals System* 2. These figures were prepared for the purposes of the Guilfoyle Committee Review.

116 There is a 6 week time limit from the date of an application for the Department to provide documentation to the Veterans' Review Board. All s 31 reviews have to be accomplished within that period, otherwise the claim will automatically be sent to the Board.

117 Particularly as at present when the funding of external review bodies is principally provided by the relevant line Department.

118 L J Curtis, "Administrative Law Reform—Impact on Public Sector Management", paper presented at the National Government Accounting Convention, Adelaide (1985) 16.

must be balanced against other costs. Setting up a comprehensive internal review process involves removal of staff from other activities and retraining for their new determinative function. The dilemma in relation to internal review is whether the additional funds would better be employed in improving primary decision-making.

Further, if internal review is to add value to the decision-making process, the review officer needs to do more than reconsider the same papers already perused by the original decision-maker. It is only when the review officer has taken additional steps to obtain information and to analyse and to evaluate the information supplied that the time and effort involved will be justified. As part of that value-adding process, the review officer should personally contact the applicant. In the social security jurisdiction there is empirical evidence that where the Department's review officers speak to the applicant prior to making a decision there are fewer appeals to the SSAT.[119]

There are other values in having internal review. Being exposed to review applications gives internal reviewers an opportunity to assess how well the system is working, whether there are defects in policy or performance, and whether legislative or other changes are required, including additional staff training and improved selection processes.[120] As Professor Ison, an advocate of internal review noted: "This structure also provides an intelligence source for decisions about personnel selection, qualifications, training, the development of adjudicative criteria, and the institutional literature."[121] This opportunity for a "check-up"—internal review in its systemic sense—is more likely to occur for internal reviewers than for external review bodies because of the greater number of internal review applications.[122] That benefit, however, may not materialise when the internal review (and primary decision-making) function is contracted out or divorced from the policy-making function of an agency. Adoption of this approach is a central platform of the present Government. The opportunity to identify areas in which policy or legislative change is needed will be made more difficult unless special structures are put in place to ensure that communication occurs between the service-provider and the officials who are developing policy.

119 Social Security Appeals Tribunal, *Submission to the Review of the Social Security Review and Appeals System* (February 1997) at 13.
120 MAB/MIAC Report No 11, above n 112 at 23.
121 T G Ison, above n 12 at 63.
122 *Eg* there are more than three times more applications for internal review in the Department of Social Security than are heard by the external review body, the SSAT.

Other criticisms of internal review are that it reduces the quality of primary decision-making,[123] it contributes to review fatigue, it adds a step in the process which does little more than extend the time taken to reach external review, and it impedes informal internal review processes.[124] Unless the internal review processes can meet the objectives of greater efficiency and effectiveness, not only in relation to the individual decision, but also in its general systemic surveillance function, there is little point in having the mechanism.

Even if internal review processes avoid these problems, they can never be a substitute for external review. As Uhr noted:

> Internal review mechanisms alone lack independence and credibility. They cannot effectively ensure accountability or the avoidance of conflict of interest, nor protect individuals against abuse of power.[125]

Or as Harris commented:

> [T]o rely exclusively on the bureaucracy itself to provide appropriate remedies will inevitably prove misplaced. Misplaced first, for psychological reasons, in particular the familiar human craving for apparently disinterested review, however illusory its benefits may prove to be in reality. And second, because of the unpalatable truth that injustice may result from or be perpetrated by the bureaucratic process simply because the aims and processes of bureaucratic decision-making are to a degree necessarily and inevitably incompatible with any external review process which sets out to provide something more than merely a modified second bureaucratic opinion.[126]

On balance, therefore, although a properly set up and organised internal review framework can be a cheap and effective filter of review applications, the inherent defect—its location within an agency—means that it can never be a satisfactory substitute for external review.

It can readily be conceded that together, the internal and external review can contribute to a better performing public administration. Internal review will, however, never be sufficient on its own. People will only be confident in a system which is independent from the decision-maker; here, external review alone qualifies.[127] And, if there has to be a choice between internal and external review, for cost or efficiency grounds, external review must take precedence. It is significant that that was the direction chosen by

123 Ison noted claims that internal review promotes "sloppy or excessively automated" primary decision-making: Ison, above n 12 at 32).
124 *Ibid* at 34–35.
125 J Uhr, "Accountability Without Independent External Review?" (1997) 84 *CPBA* at 7.
126 M C Harris, above n 12 at 190–191.
127 A Doolan, above n 102 at 133.

the Minister for Immigration and Multicultural Affairs, the Hon Philip Ruddock, MP, in his recent announcement of the amalgamation of the Migration Internal Research Office with the Immigration Review Tribunal.[128]

Ombudsman

The Coalition Government *Law and Justice Policy* contained no reference to the Commonwealth and Defence Force Ombudsman. That may reflect the entrenchment of the Ombudsman concept and the fact that the Office is seen as an efficient and effective method of complaint handling.[129] In 1995–96 the Ombudsman handled a record more than 22,000 complaints. The success of the institution is attested to by the successful transposition of the concept into the private sector, which is now served by the Telecommunications Industry Ombudsman, the Australian Banking Industry Ombudsman, the Life Insurance Complaints Service and other similar complaints-handling bodies.[130]

Despite this implicit indication that the Ombudsman Office should continue unchanged, the Office will be affected by the general changes to the public sector. What role will that Office play in the new environment?

One proposal would give a new role to the Office as well as fill a gap in the existing administrative review framework. The suggestion is that there be an agency which would follow up on review decisions to ensure that they are implemented in the individual case, and that the review findings are widely disseminated within public administration. This idea owes its origin to the Western Australian Commission on Government which advocated the establishment of a Commissioner for Public Sector Standards. To quote from a paper by Peter Johnston, the far west correspondent, the Commissioner "would act as a bridge between the ART [the proposed general merit review body for WA] and the rest of the sector when assessing the decisions of the tribunal and their importance for decision-making".[131] Although the comment refers only to bridging the

128 The Hon Philip Ruddock MP, *Media Release*, "Sweeping Changes to Refugee and Immigration Decision Making" 20 March 1997.

129 The cost of the Ombudsman's Office in the 1995–96 financial year was only $8.8 million as compared with $22 million for the RRT and nearly $22 million for the AAT. In that period the Ombudsman dealt with some 22,000 complaints as compared with 4,972 hearings by the RRT and 5,956 by the AAT: J T D Wood, "Where are Complaints Going?", paper delivered at the IPAA National Conference (1996) 6; *Commonwealth Ombudsman: Public Report on Activities for 1995–96* at 1; and Administrative Review Council, *Twentieth Annual Report 1995–96* at 28–32.

130 For a list of such industry complaints services see Administrative Review Council, *The Contracting Out of Government Services*, Issues Paper (1997) Appendix D at 114.

131 P Johnston, "Recent Developments Concerning Tribunals in Australia" (1996) *24 F L Rev* at 331–332.

gap between a generalist merit review tribunal and the administration, the Commissioner's role was not intended to be limited to merit review decisions.

The function would not attract the criticisms of the partisan nature of the General Counsel of Grievances model proposed by the Kerr Committee, because it would provide no more than an institutional means for the normative, precedential and systemic effects of review to be monitored in a systematic way. It would also meet the mandate advocated in the *Access to Justice Report* for a more systemic-focused role for the Ombudsman's Office.[132]

The other role which the present Commonwealth and Defence Force Ombudsman has been seeking, is to handle complaints about private service-providers under contract to government. The Ombudsman has already encountered incidents of "buck-passing" between an agency, the contractor and the insurer.[133] At present it is not clear whether the Ombudsman has jurisdiction over complaints about a private service-provider. There are financial accountability arguments—the "follow the dollars" approach—which would suggest that the Office should perform that role as a matter of prudent fiscal policy.[134] However, it is difficult to argue that decisions made under a contract could be classified as "action" taken by a Department or a "prescribed authority" as these terms are defined in the *Ombudsman Act 1976* (Cth).[135] If the Ombudsman has no jurisdiction, then, in the absence of an industry-based complaints mechanism, the citizen is left to remedies under contract, if necessary pursued through the courts or consumer complaints bodies. These alternatives are considerably more difficult and costly for the citizen and it is hard to disagree with the comment made in the Administrative Review Council's *Contracting Out* report that these remedies "would lack the authority of an external scrutiny body such as the Ombudsman or an industry complaint-handling organisation." Nor could one quarrel with the next comment on the advantages of the Ombudsman's jurisdiction that "Public reports by the Ombudsman can also inform the Parliament and the community leading to Ministerial intervention, policy change or consumer action".[136]

132 *Access to Justice* report, above n 83 at para 12.54.
133 *Commonwealth Ombudsman: Public Report on Activities for 1995–96* at 2.
134 *Ombudsman's Annual Report 1995–96*. That suggestion was supported by the Senate Finance and Public Administration Reference Committee in its report on *Service Delivery by the Australian Public Service* (1995).
135 *Ombudsman Act 1976* (Cth) s 5(1)(a).
136 ARC *Contracting Out* paper, above n 130 at para 3.66. See also para 4.40. The ARC has previously recommended that the Ombudsman handle consumer complaints in relation to Commonwealth-funded community services programs: ARC,

There would be clear advantages in assigning this wider, private sector role to the Ombudsman in order to offer an accessible and appropriate avenue for complaints against service-providers under contract to government.

Finally, there may be advantages in relocation of Ombudsman offices. The new statutory agency to deliver income security and other services—the Commonwealth Services Delivery Agency (Centrelink)—is being set up as a "one-stop shop" in a centralised location.[137] Should the Ombudsman's Offices also be located in those premises? In 1995/96, 67 per cent of Ombudsman complaints were made against the Department of Social Security, the Child Support Agency and the Department of Employment, Education, Training and Youth Affairs. The service providers for each of those agencies will be located under the Centrelink roof. It is tempting to suggest that the Ombudsman's Office might be similarly housed, thereby further reducing leasing and other premises-related costs and providing the centralised access which is an attribute of good public administration. To the response that many complainants would not want to be associated with "dole bludgers", it is hoped that the layout of the premises will reduce that perception of Centrelink clientele.

Human rights and anti-discrimination agencies

The Coalition's response to *Brandy v Human Rights and Equal Opportunity Commission*[138] was to accept that the Human Rights and Equal Opportunity Commission should continue to promote human rights and to mediate and conciliate disputes, but that a Human Rights Division of the Federal Court would be the body with final dispute-settling authority.[139] The Human Rights Legislation Amendment Bill 1996 has fulfilled the first part of that policy but not the second. Rather than a Human Rights Division of the Federal Court, there are to be judicial registrars who will be delegated the determinative functions formerly exercised by HREOC Commissioners. The legislation also centralises the conciliation and investigative functions of the various specialist commissioners (responsible for race, sex and disability discrimination, and for human rights) by placing them in the hands of the President of HREOC. In exercising its powers under the Act, the Federal Court is not bound by technicalities or legal forms but is subject to Chapter III of the Constitution.

Administrative Review and Funding Programs, Report No 37 (1994) at paras 3.118–3.155, recommendation 24.

137 For the record, it is intriguing to note that the Coombs Royal Commission recommended a "one stop shop" assistance agency as long ago as 1976: Royal Commission on Australian Government Administration, *Report*, Parl Pap No 185 (1976) at 161–163.

138 (1995) 127 ALR 1.

139 *Law and Justice Policy*, above n 3 at 4.

The scheme is complex and deserves a more detailed consideration than is being presented here.[140] However, key features warrant comment. The new legislation reduces the complaint-handling processes from three to two stages, the second of which is the Federal Court. This is a significant increase in the formality of the process. The impact of the changes also appear to strip the individual specialist commissioners of a significant amount of their present powers. They may no longer be involved in conciliation or determination of disputes and their remaining roles appear to be educative only and, on occasions, by leave, to appear as *amicus curiae* in Federal Court proceedings. This is a loss of their considerable expertise. By contrast the President of HREOC will have an enhanced workload, discharging the role of a Chief Executive Officer responsible for undertaking the inquiry and conciliation functions and on request supplying written reports to the Court. Since, in the past, some 95 per cent of existing complaints have been settled at the conciliation stage[141] it will be interesting to see whether the President requires a significant increase in resources effectively to manage this workload.

The shift of activities from HREOC to the Court has implications for complainants. The requirement that the Federal Court act informally in its human rights legislation business may not be effective. It is noteworthy that the Bill only refers to the Court not being "bound by technicalities and legal forms"; it contains no reference to not being bound by the "rules of evidence".[142] If that omission was deliberate, it is unfortunate and would undermine this apparent attempt to ensure informal processes. Even if this was unintended, use of similar formulae did not prevent a high degree of formality developing in AAT proceedings and they are even less likely to do so within the Federal Court. Even if the bulk of matters are dealt with by judicial registrars, it is assumed that the registrars will have legal qualifications and be comfortable with judicial process. In any event, some processes provided for in the legislation are likely to be dealt with in a relatively formal manner. For example, it is only by applying for an interim injunction that an applicant may prevent the implementation of a decision, for example, to lay off an employee pending the determination of a complaint. Since rules presently exist for the handling of such applications,

140 The matter is currently the subject of an inquiry by the Senate Legal and Constitutional Legislation Committee.

141 Senate Standing Committee on Legal and Constitutional Affairs, *Review of Determinations of the Human Rights and Equal Opportunity Commission and the Privacy Commissioner* (1992) at 7; Legal and Constitutional Legislation Committee Reference, inquiry into the Human Rights Legislation Amendment Bill 1996, *Transcript of Proceedings*, 25 March 1997 at 270.

142 Human Rights Legislation Amendment Bill 1996 (Cth) clause 46P".

it is unlikely that they will be changed to take account of the need for informality in this jurisdiction.

These fears about formality are heightened by the client group, many of whom are neither powerful nor well-funded. Some concession to that powerlessness is made by the expansion of representative actions, for example, to include bodies such as trade unions who are not personally affected by the matter the subject of the complaint. There is no equivalent government body to take on that role should no private sector agency be available. This process leads to another complexity since the conditions for representative proceedings under the human rights legislation are different from those which apply under Part IVA of the *Federal Court Act 1976* (Cth).

Cost is another inhibitor against bringing proceedings at the Federal Court. Present proceedings at HREOC are free. Federal Court proceedings are not. Although there are provisions for applications to be made to the Attorney-General for legal and financial assistance,[143] and there is always a possibility of waiver of fees, in a climate of severe cutbacks of legal aid funding, one wonders how generous that support will be? These are likely to be significant disincentives to seeking redress at the second-tier.

None of these statements deals with the central question raised by this legislation. Will the use of judicial registrars offend the prohibition against the exercise of judicial power by non-judicial officers?[144] The *Explanatory Memorandum* is careful to note that only some functions will be delegated to these officials. At present it is not clear what those functions are to be. Since this is an article focusing on administrative law, not constitutional remedies, it is not proposed to deal with the issue here. However, the problem highlights the artificiality of the *Boilermakers*[145] doctrine and the restrictions it creates for administrative law.[146]

There are other matters which could be raised. For example, would it be possible to transfer the jurisdiction to a State or Territory court or tribunal? Should claimants be able to proceed direct to the Federal Court without going through the conciliation process?[147] Are Federal Court judges and

143 *Ibid* clause 46PR.
144 *Harris v Caladine* (1991) 172 CLR 84.
145 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (High Court), (1957) 95 CLR 529 (PC).
146 Senate Standing Committee on Legal and Constitutional Affairs, *Review of Determinations of the Human Rights and Equal Opportunity Commission and the Privacy Commissioner* (1992) at 13.
147 Submission by Mr J Basten to the Legal and Constitutional Legislation Committee Reference inquiry into the Human Rights Legislation Amendment Bill 1996, *Transcript of Proceedings*, 25 March 1997 at 276, 281.

the proposed judicial registrars to receive training in handling this new jurisdiction?[148]

For administrative law purposes the significance of the Bill is a move to a curial forum for settlement of disputes, a downgrading of the functions of the specialist commissioners and the loss of their expertise, a diminution of the functions and status of HREOC, a loss of accessibility by the human rights and anti-discrimination bodies, and a reduction in the opportunity for that wider systemic impact which was attracted by the work and profile of the individual commissioners, by their status as determining agents, and by the number of complaints which went on to a final determination.

Privacy

The Coalition Government's *Law and Justice Policy* was to give high priority to privacy laws, including through the holding of a comprehensive Parliamentary inquiry; the introduction of new rules in the area, possibly by implementation of the 1995 report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *In confidence*; and by ensuring an enhanced ability for the Privacy Commissioner to report directly to Parliament.[149] The policy statement was a product of two concerns: the increased threat to the right to privacy in personal affairs posed by developments in technology; and the needs of business and industry not to be locked out of international data flows. The statement noted that "A recent European Community directive will have the effect of excluding Australian entities from European community data flows unless our privacy laws are substantially improved by mid-1998".[150]

When in office, one of the earliest moves by the Government was to announce that it was proposing to extend the *Privacy Act 1988* (Cth) regime to the private sector. That suggestion, made in August 1996, was received positively by the community, and was followed by a discussion paper based on the extended privacy regimes adopted in New Zealand and Hong Kong which were apparently well received by business in those countries.[151] The thrust of the reform was a co-regulatory approach to privacy protection. That is, Codes of Practice would be developed in relation to particular matters or for particular groups and industries. Where no code was in existence the Information Privacy Principles in the *Privacy Act* would apply. That meant there would be comprehensive

148 Submission by Ms Curran, *Transcript of Proceedings*, *ibid* at 287).
149 *Law and Justice Policy*, above n 3 at 4.
150 *Ibid* at 28.
151 Attorney-General's Department, *Privacy Protection in the Private Sector*, Discussion Paper (1996) 3–4.

information privacy protection coverage while retaining flexibility in approach. Breach of a Code would be deemed to be breach of the Act and would be subject to the complaint and investigation provisions in the legislation.[152]

It was, therefore, dismaying to read in *The Financial Review* on Monday 24 March 1997 that "Howard scraps privacy plan for private sector". The move was said to be part of the Government's general policy to reduce the regulatory burden on business. A spokesperson from the Australian Consumers' Association is said to have noted that "There are some things which are just non-negotiable when it comes to red tape".[153] The announcement was followed three days later by an expression of that concern which had been predicted in the pre-election policy in relation to the European Community Directive. The newspaper heading stated "Australia now offside with Europe on privacy laws".[154] The Directive was that, from June 1998, European companies must "demand special privacy provisions in contracts with companies from nations that lack adequate privacy laws".[155]

The pulling back from this commitment to extend privacy protection to the private sector has several consequences. In order to continue to do business with their European partners, companies in Australia have two options. They can include in their private contracts provisions which would meet the standards required by the European Community; or they can hope for the enactment of State and Territory privacy laws to establish a regulatory regime which satisfies those needs.

The former, private ordering approach is likely to increase, not decrease, legal costs for business, and to slow down the approval process as each company's privacy clauses in the contract are assessed against the European standard.[156] Indeed it seems an odd suggestion alongside the Prime Minister's concern to protect business from the time and cost involved in compliance with law. The second option, a State and Territory regulatory regime, faces other objections. It has been reported that during

152 *Ibid* at 13–14, 24–28.

153 *The Financial Review*, 24 March 1997 at 10. It is a significant indication of business's concern at the announcement that almost all the subsequent media coverage has been found in *The Financial Review*.

154 The threat, which is of more direct concern to corporations than to federal administrative law, is that it would "disrupt the flow of European personal financial details to companies in Australia, impede efforts to identify European shareholders in Australian companies, hamper the operations of data-processing bureaus and complicate the transfer of European social security details": *The Financial Review*, 27 March 1997 at 5.

155 *The Financial Review*, 24 March 1997 at 10.

156 *The Australian Financial Review*, 27 March 1997 at 5.

the Premiers' Conference, the Prime Minister, asked State Premiers not to introduce their own privacy laws.[157] The reason given was that disparate privacy regimes at the State and Territory level would again place an additional burden on business. The preferred approach by the national government was that companies adopt voluntary codes. Two jurisdictions, Queensland and the Northern Territory are said to have agreed;[158] but the two largest States, New South Wales and Victoria are said to be drafting legislation.[159]

The efficacy—or inefficacy—of the voluntary codes approach is considered below under "Codes of Conduct". For administrative law, the concern focuses primarily on the fragmentation of privacy laws which are a likely consequence of the move in the absence of that universal coverage which is a product of national laws. The failure of the federal Government to embrace this opportunity to provide leadership and a blueprint for uniformity leaves Australia both economically in debit and faced with the outcome that the model for privacy protection in the private sector will apparently be based on a set of rules originating offshore—30,000 kilometres offshore to be precise—rather than an indigenous model. It also negated the considerable work which had been undertaken to create a flexible and appropriate model which would apply in both the public and the private sectors.[160] Further, to argue, as has been done that the confidentiality regime currently in place in most major businesses is far better policed and complied with than the regulatory regime introduced into the public sector, is to ignore the fact that the most insidious invasion of privacy and the one citizens fear most, is from those companies—data-gathering agencies—whose very business is the invasion of privacy, not its protection.[161]

It remains to be seen whether the voluntary codes approach will be successful and will meet the needs of business, of citizens, and of European data-sharing organisations. The more likely conclusion is that the

157 *The Australian Financial Review*, 24 March 1997 at 10.

158 That undertaking, if true, reflects a considerable backdown by the Queensland Government which, in January 1997, foreshadowed that it would introduce tough new privacy laws which would target the private sector: *The Australian*, 20 January 1997 at 5.

159 *The Australian Financial Review*, 27 March 1997 at 5.

160 M Batskos, "Complaints, Investigations and Disputes under the Proposed Privacy Act Extension to the Private Sector" (1996) 11 *AIAL Forum* 34. Flexibility, for example, was provided by the greater discretion of the Privacy Commissioner not to investigate an interference with privacy if the Commissioner did not consider it desirable to do so (at 35).

161 "Why Privacy Laws are Becoming Public Enemy Number One", *The Australian*, 31 March 1997 at 32.

Australian Government missed an opportunity to expand best practice to a willing group of private sector business partners.

WHAT ALTERNATIVES ARE PROPOSED?

Codes of Conduct

A striking feature of the current regulatory regime is the move to self-regulation. Industry standards, codes of practice, benchmarking, and codes of conduct attest to a renewed belief in the value of "putting one's own house in order".[162] The Government Service Charter Task Force is presently developing key principles to be included by public sector agencies, including the national utilities, in customer service charters.[163] As Ayres and Braithwaite have convincingly shown, persuasion, not least because it is cheap, should be the first step in an enforcement strategy and if persuasion through codes of conduct can be effective, the regulatory pyramid can stop at that point.[164]

The advantages of self-regulation are said to be that self-made rules are more likely to be observed; rules can be changed more rapidly; handling complaints within an agency provides information about the adequacy of the service, leading to improvement in performance and customer satisfaction; and the very experience of developing a charter, particularly if there is input from consumers, is a valuable aid to management.[165]

The issues are can these strategies—which are generally discussed in relation to industry—apply to public administration? If so, is self-

162 A D Rose, "Future Directions in Australian Administrative Law: The Administrative Law System" in J McMillan (ed), *Administrative Law: Does the Public Benefit?* (1992) at 217–218 (Mr Rose advocated a Citizen's Charter).

163 ARC *Contracting Out* paper, above n 130 at para 4.18; J T D Wood, above n 129 at 2.

164 I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) at 26, 35–6, 38, 53; Bureau of Industry Economics, *Business Licences: International Benchmarking Report 96/9* (1996) at 128; Australia and New Zealand Food Authority, "Draft policy paper on the role and use of codes of practice to support a uniform food regulatory system" (1997); Australian Competition and Consumer Commission, "An Ounce of Prevention", submission to the House of Representatives Standing Committee on Industry, Science and Technology Inquiry into Fair Trading (1996); Commission on Australian Government, *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies* (1995); Federal Bureau of Consumer Affairs and State and Territory Consumer Affairs Agencies, "Fair Trading Codes of Conduct: A Guide Prepared by Commonwealth and State and Territory Consumer Affairs Agencies" (1996); The Rt Hon John Howard MP, "More Time for Business", *Press Release*, March 1997); Standards Australia, *Australian Standard AS 4269—1995: Complaints handling* (1995).

165 Regulatory Review Unit, The Cabinet Office, NSW, *From Red Tape to Results—Government Regulation: A Guide to Best Practice* (1995) at 39.

regulation sufficient on its own? And will self-regulation oust administrative law remedies?

Even granted the advantages of self-regulatory regimes, in the context of the impact of the "charter movement" on administrative law, there are a number of points which should be made. The first is that these developments originated in the private sector and are targeted to delivery of goods and services. Administrative law concerns decisions, and these are neither goods nor services. Hence, the impact of the charter movement on the central task of review agencies is likely to be minimal. The only administrative law body which has the function of improving general agency practices is the Ombudsman. In its role of raising the general standard of public administration the Ombudsman's Office encounters examples of inadequate forms, unfriendly or inappropriate behaviour of staff, and practices which hinder, rather than assist, public access to agency services. It may well be that the introduction of charters will improve this aspect of agency business. Charters, however, are unlikely to reduce the volume of complaints about decisions.

The processes of decision-making may, however, be the subject of a charter.[166] In this respect, a charter may impinge on administrative law, since in its procedural fairness rules, administrative law also provides a code or charter of best decision-making practice. It is unlikely, however, for this to lead to duplication of administrative review mechanisms. In industries with charters which include a sanction for breach, there is a recognition that any remedy must be independent. Hence, for example, the Australia and New Zealand Food Authority noted that if there were sanctions in a code, "there must be provision for an independent appeal mechanism to review those decisions".[167] The call for an independent appeal mechanism in such cases is instructive. It suggests that use of existing external review bodies has a place even under this new regime. That has not always been recognised, however, even within public administration. The Queensland Electoral and Administrative Review Commission recommended a code of conduct for ethical obligations which was to include a Code of Principles of Good Administration for public officials.[168] However, the subsequent *Public Ethics Act 1994* (Qld) contains no sanction for breach.

166 The Standards Australia complaints handling guide notes that any complaints process must comply with procedural fairness principles: Standards Australia, *Australian Standard AS 4269—1995: Complaints handling* (1995) at 7.

167 Australia and New Zealand Food Authority, Draft policy paper, above n 164 at 24, 33.

168 EARC, *Report on The Review of Codes of Conduct for Public Officials* (1992) at para 6.106.

The analogy between the citizen/government relationship, and that between consumers and industry is an imperfect one, not least because government is more akin to a monopoly than are corporations within an industry sector. However, if the parallel is pursued, and if it be assumed that a code or charter applies to decisions, not just services, it could be argued that the kind of enforcement pyramid approach which is being advocated in relation to industry groups is already in place in government—at least in those agencies in which there is provision not only for informal or formal internal review of complaints, but also for some form of external independent review, perhaps by a body with conciliation/mediation powers.[169] That system simply needs to be preserved if industry best practice is to be observed.

However, there are dangers from a legal view in making the assumption that decisions and services are interchangeable. Codes represent best practice. To that extent defining what should be in the code is valuable. However, best practice is an ethical, not a legal concept and any attempt to provide sanctions for breach undermines that element. Indeed, Treasury has signalled that the idea of mandatory codes would be delegating Parliament's law-making role which "may not be appropriate in some cases, particularly in the absence of appeal mechanisms and other checks and balances".[170]

An example of a code which has a statutory imprimatur is found in the *Telecommunications Act 1996* (Cth). Telecommunications industry bodies are to be encouraged to develop industry codes which may be registered with the Australian Communication Authority (ACA). Compliance with a code is voluntary unless the ACA directs someone in the industry to comply. Failure of compliance is backed up by the power of the ACA to make an industry standard if the code is deficient. Compliance with standards is mandatory.

Under the Act, complaints-handling procedures must have regard to the Australian Standard on Complaints Handling (AS 4269) and also to the Commonwealth Government benchmarks for industry-based consumer dispute schemes. The complaint-handling scheme gives a member an opportunity to appeal to an independent body against a ruling, especially for suspension or expulsion and to report a breach of the code that is also illegal or to initiate proceedings in a court or tribunal.[171] This may well be

169 *Ibid* at 23–35.
170 *Ibid* at 26.
171 Standards Australia, *Guidelines for the Development of Self-Regulatory Telecommunications Industry Consumer Codes of Practice—Guidelines for Consumer Codes of Practice, Draft for Public Comment* (1997) at 13–14.

a model for other legislative schemes. If so, it is interesting to note that the code is directed to industry bodies, not government agencies; that although the scheme is a classic exponent of the regulatory pyramid, it has legislative backing; that there is a sanction if industry fails to comply; and that there is no ousting of existing remedies, including administrative law mechanisms.

Within government, how effective is the move to adopt codes or charters? In a recent survey of agencies to assess whether they had adopted a service complaints process, the Ombudsman's Office discovered that "very few had a system in place that even approached the requirements of the Australian Standard for complaints handling—AS 4269–1995."[172] The survey indicates that this is no short-term panacea. Changing the culture of institutions requires patience, education, persistence and, ultimately, as the previous discussion indicated, some "teeth".

In one of the few studies in Australia to date of an attempt to inculcate a new culture of service in an industry—the nursing homes industry—Braithwaite, Makkai, Braithwaite and Gibson analysed the impact on nursing homes of the imposition of standards.[173] Significantly, these standards are part of a regulatory regime since gross failure to meet the standards results in defunding. There is a standards monitoring program conducted by the Commonwealth Department of Health and Family Services.

One of the standards to be met includes the establishment of a residents' committee to handle residents complaints (standard 3.2). The survey concluded that "pressure from standards monitors had been instrumental in raising compliance with this standard." Evidence for this finding is that in 1986 only 3 per cent of nursing homes in Queensland, 9 per cent in Victoria, 29 per cent in New South Wales and 51 per cent in South Australia met the standard; by 1991 over 90 per cent in Queensland, 63 per cent in Victoria, 89 per cent in New South Wales and 81 per cent in South Australia did so. However, the survey noted that although residents' committees had been established, they were "generally … failing as vehicles for resident participation in formulating nursing home policies and influencing practices".[174] Even granted the restricted ability of many of the residents to make a contribution, the findings are sobering.

172 J T D Wood, above n 129 at 5.
173 J Braithwaite, T Makkai, V Braithwaite, D Gibson, *Raising the Standard: Resident Centred Nursing Homes Regulation in Australia* (1993).
174 *Ibid* at 60.

Here was a system for improving the quality of a service and enhancing consumer rights. The scheme involves a Charter of Residents' Rights and Responsibilities, a resident's contract, backed by legislation; there were standards, and a complaints mechanism; the scheme was externally monitored; and there was a pyramid of sanctions leading ultimately to removal of funding. Although the report found a substantial acceptance of the standards, and a heightened commitment to implementation of quality care, the protection of consumer rights was the least accepted and well implemented element of the program. It appears that the educative function of codes and standards is slow to take effect and is least responsive when customer complaints mechanisms are involved.

Even industry appears to acknowledge that charters or codes on their own are unlikely to be effective. The *Codes of Conduct Issues Paper* discussed at a symposium on codes in Melbourne on 22 November 1996 set out the advantages for businesses of codes and signalled an interest in promoting the wider use of codes. The paper went on: "However, should this approach not deliver the quality of goods and services to consumers that is expected then the Government is willing to consider co-regulation or regulation".[175] The Australia and New Zealand Food Authority (then the National Food Authority) also noted that civil remedies would not be adequate to regulate the industry. The Authority argued that there still needs to be public administration and enforcement of the law by means of criminal sanctions.[176] The recent public concern in relation to regulation following the salmonella outbreak and the deaths from Wallis Lake oysters have raised concern at inadequate regulatory standards in these industries.

Short of legislative enforcement, there may, in time, be enforcement at common law. Failure to take account of guidelines or codes has been accepted by the High Court as giving rise to procedural fairness obligations—at least to the extent that the individual has a right to argue that the terms of the published policy or code should be followed in his or her case.[177] However, the superior federal courts have always upheld the principle that a minister cannot be prevented from changing a policy or code.[178] To date, there do not appear to be any examples which have

175 Federal Bureau of Consumer Affairs, *Codes of Conduct Issues Paper* (1996) at 2.
176 National Food Authority, *Final Report of the Policy Review* (1993) at para 4.42.
177 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (here a code was equated with an international convention which Australia had signed and ratified); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; *Kelson v Forward* (1995) 39 ALD 303. For a similar outcome, see *R v Secretary of State of the Home Department; Ex parte Khan* [1985] 1 All ER 40. See also M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) at 143–156.
178 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; *Peninsula Anglican Boys School v Ryan* (1985) 7 FCR 415.

established that even legislatively enjoined codes or guides are binding or are relevant matters for the purposes of judicial review.[179] The no-fettering rule has taken precedence over the significance which hitherto has been given to these forms of self-regulation.

The lessons which can be learned from this survey are that the introduction of codes or charters generally relates to service provision as a whole, not decision-making, and hence their impact on administrative law agencies is likely to be limited. Even where pervasive administrative law concepts like procedural fairness are adopted in a charter, enforcement of those principles will not be effective unless there is a workable complaints-handling mechanism, and in effect that means a sanction. Without a sanction any statement of charter principles will be ineffective. Even with sanctions, improvement of public sector performance is likely to take time, and require persistence and stringent monitoring. One thing, however, is clear. There is no need for agencies to create new bodies to do the monitoring and to handle complaints, since Commonwealth public administration already has a panoply of such avenues in its administrative law armoury.

Microeconomic reform

Another area of potential growth for administrative law arises out of national competition policy. A largely uncharted but highly significant reform of the law is taking place under the aegis of the National Road Transport Commission. That body was set up to implement national microeconomic reform of road transport laws. The move was partly in response to the suggested microeconomic reforms proposed by Professor Hilmer. The changes proposed are likely to affect virtually all Australians since they cover matters such as uniform registration and driving hours rules, vehicle roadworthiness and pre-registration standards, mass and loading rules for heavy vehicles, roadworthiness standards, road rules, national bus driving hours and driver licences. The scheme involves the most significant overhaul of road transport liability and enforcement powers since federation.

Of significance for administrative law is that there is a proposal for a comprehensive scheme to review administrative decisions under the National Road Transport Law, for example, suspension or cancellation of a licence.[180] The scheme relies on the use of Commonwealth, State or Territory administrative review bodies and the key elements of a modern

179 *Apthorpe v Repatriation Commission* (1987) 77 ALR 42.
180 J McMillan and R Creyke, *Review of Administrative Decisions under a National Road Transport Law* (1995, NRTC).

administrative review framework are included in the relevant legislation. These key principles include an obligation to notify a person of review rights, a right to seek review of a decision affecting a person's rights or interests, and the right to have the decision reviewed, first by means of internal review, then externally by a court, tribunal, Ombudsman or Parliamentary Commissioner. The applicant also has a right to written reasons for a decision.[181]

At this stage, the transport ministers in the various jurisdictions have agreed to implement these reforms in the form of non-binding policies expressed in legislative form. At a later stage, when the *National Road Transport Law* has been implemented, template binding legislation will be considered.

What is significant is that elements of the administrative law framework to which people affected by Commonwealth laws have become accustomed are to be adopted nationally for decisions within this industry. Schemes such as this one may well spread to other key industries in which competition reforms are proposed such as the food industry, and for utilities such as electricity, gas and water.[182] Indeed, these moves could open the way for acceptance of practices of good public administration which hitherto have not been adopted in the States and Territories.

CONCLUSION

In its pre-election policies the Coalition stated:

> Administrative law exists to enhance administrative justice. It is a crucial means by which the Government and the bureaucracy are directly accountable to individuals affected by their actions. … The Liberal and National Parties are determined to review and improve the administrative law system, to improve administrative justice and government accountability.[183]

Let us hope that the Government meets that commitment.

After all, governments weaken the links in the accountability chain at their peril. People only have confidence in a system which is independent and impartial. Moves to reduce the importance of the courts and the tribunal system and to lessen the effectiveness of the bodies which investigate

181 *Eg* Draft "Road Transport Reform (Heavy Vehicles Registration) Regulation 1996" Part 9 ("Review Rights").

182 *Industry Commission Annual Report 1995–96* at 180.

183 *Law and Justice Policy*, above n 3 at 27. Waterford noted that Prime Minister Malcolm Fraser was reported to have described the implementation of the administrative law package "as the most significant achievement of his term of office": *The Canberra Times*, 28 April 1997 at 1.

citizens' complaints should be resisted because they are taking away important safeguards and because they are a retrograde, short-sighted approach to administrative review. It is too soon to bring down the curtain on this innovative Australian administrative law scheme; it would be a waste of the thought and effort that has gone into moulding the system to disband it at this point in our history. It is easy to abolish institutions, and undo good work—much harder to fine-tune and to tailor them. We forget these lessons at our peril.

COMMENTARY: ADMINISTRATIVE LAW—DEVELOPMENTS UNDER A COALITION GOVERNMENT

Michael Sassella*

Robin Creyke has written an ambitious and interesting paper that is effectively an assessment of the state of the health of the Australian administrative law system as she sees it in 1997. My experience and interest is primarily in the area of administrative tribunals. Coincidentally that is the scene of much action at present and receives considerable attention from Robin. I should issue the usual disclaimer and emphasise that what follows is my own view and not that of the Commonwealth or the Department of Social Security (DSS).

IMPENDING CHANGES TO THE COMMONWEALTH MERITS TRIBUNALS SYSTEM

Robin has summarised the current knowledge of proposed changes to the merits review tribunal system. She has also put that knowledge into context by relating the Attorney-General's announcement[1] to intelligence from the Administrative Review Council's *Better Decisions* report[2] and to other material. As Robin says, structurally at least, what are currently five separate tribunals are expected to be amalgamated into one. An interdepartmental committee is looking at implementation of this proposal.

Since the Attorney-General's announcement there has been understandable nervousness about the proposed changes. Community groups accustomed to having resort to the existing tribunals are concerned that they will lose something that they currently value. Other interested parties, not least the current members of the tribunals, also have concerns.

It should be remembered that the thrust for change in the tribunal landscape came from the Hon Duncan Kerr, Minister for Justice, in 1992.

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1 Press Release, "Reform of Merits Tribunals", Attorney-General and Minister for Justice, 20 March 1997 (reprinted (1997) 48 *Admin Review* 78).

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

He and other senior members of the Labor Government had begun to doubt that Australia had a rational system of administrative review. The most obvious indication that something was wrong was the proliferation of specialist tribunals. It was noted that two new tribunals, not just one, had recently been created in the immigration area. Mr Kerr considered that this proliferation, in retrospect, was at odds with the intentions of the architects of the Australian administrative law reforms of the 1970s.[3]

The Kerr Committee in 1971[4] favoured a general administrative tribunal but contemplated specialist tribunals in special situations where expertise did not exist in the general tribunal. The Bland Committee was even keener to see a single general merits review tribunal, arguing that a proliferation of tribunals would be wasteful of resources and would be inefficient. The Bland Committee said that "the fewer the tribunals there are the more likely will be the most economic use of resources and a better and more even resolution of individual issues because the members of the tribunals will not be narrowly circumscribed in their jurisdictional range".[5]

There need not, therefore, be anything at all sinister in the proposal to implement the Bland and Kerr proposals. Robin's paper helps to explain some of this. She very helpfully places this development in the context of other developments, many of which she sees as problematic. She provides some cogent arguments in this respect.

WHAT HAS BEEN GOOD ABOUT TRIBUNALS?

There have been good and beneficial effects in many jurisdictions from the existence and work of the Commonwealth tribunals. However, the best thing about tribunals, especially in the benefits areas of interest to me, has been their tendency to clarify a person's entitlement to government support. Since 1980 the Administrative Appeals Tribunal has handed down 3,717 social security decisions. We in the Department, and the welfare community, know immeasurably more now about social security law and entitlements than was the case before. I am sure this is true also in a number of other jurisdictions.

The rule of law has been better served by the incentive which these decisions, and the less public Social Security Appeals Tribunal (SSAT)

3 See the Hon Duncan Kerr, "Address to the Annual General Meeting of the Australian Institute of Administrative Law" (1993) 15 *AIAL Newsletter* 13.

4 *Commonwealth Administrative Review Committee Report*, Parliamentary Paper No 144 of 1971.

5 *Final Report of the Committee on Administrative Discretions*, Parliamentary Paper No 316 of 1973 at para 125.

decisions, have given the Department to act in accord with the law, rather than as convenience or commonsense might dictate.

Robin raises the spectre that there may not, under the proposed Administrative Review Tribunal arrangements, be a second tier review—that is, no equivalent body to the current AAT. She sees this as problematic, because consistency in decisions at the first tier level would be more difficult to achieve, a source of principles of general application would be lost, and there would be a risk of overjudicialisation in the first tier. Robin's arguments are sound and I for one would be sorry to see no second tier review, even if accessible only by leave or by reference from the lower tier.

At their best, the tribunals have also empowered individuals to relate to the State in ways otherwise not possible, and to press for recognition of their rights. It is trite to say that the AAT has had an unfortunate tendency to formalism in too many circumstances. Robin's paper says that the AAT was for all intents and purposes a court in another guise. This is a bit harsh, I think, but not without some truth. I have been pleased on many occasions to see individual members of the AAT skilfully elicit information from unrepresented individuals who were certainly not disadvantaged by the AAT's structure and procedures.

However, from the perspective of public administration, problems with the tribunals have emerged.

THE PROBLEMS

What are these problems? How have they come about? In a sense my thesis is that the tribunals do need a thorough shake-up and that they have brought this upon themselves.

The first problem is the tribunals' lack of sufficient interest in government and departmental policy and practice. Researching these matters, it becomes clear that the tribunals found this a matter of great interest in the early 1980s.

We all know what Brennan J (as he then was) said in *Drake (No 2)*.[6] He saw declared policy as conducive to attaining consistency in decision-making. Consistency was seen as desirable in public administration. He said that the AAT had therefore to apply lawful ministerial policy unless there are cogent reasons to the contrary. A cogent reason might be that application of the policy would produce injustice in the particular case.

6 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 642–645.

The problem, of course, is that there is often not a lot of ministerial policy but there is a great deal of departmental policy. Departmental policy can include such aspects as administrative criteria in a manual guiding the exercise of a statutory discretion, or a set of procedures or processes in a manual that officers are to follow. These criteria or procedures may dictate entitlement or non-entitlement. The bulk of AAT authorities on the relevance and force of these inferior policy sources date back to 1985 or earlier.

In the case of DSS the problem is often not one of policy but of the exercise of judgment. This is so, for example, in deciding how to weigh the factors that suggest whether a person is in a marriage-like relationship or whether a person has failed an activity requirement because of something beyond his or her control. It is in these cases that the SSAT and AAT often make a "preferable" decision at odds with the correct, but not so preferable (as the Tribunal sees it) decision made by DSS. This, quite frankly, is driving many administrators to distraction and is seen by some prominent Ministers to be an unacceptable subversion of government policy.

In this area of judgment the answer may be to make the decisions non-reviewable other than by the courts or by the Ombudsman. Alternatively, it may be possible to replace the tribunals' power to make the "correct or preferable" decision with a power to alter an original decision only where it is manifestly incorrect or grossly unreasonable. The presumption would be that the original decision stands unless there is something clearly wrong. As a quid pro quo, the Department would have to accelerate its efforts to ensure that primary decision-making improves.

In DSS some staff say that it is futile to breach someone for failing the activity test for Newstart Allowance because, after a lengthy period of inactivity, at the point of the breach decision, the person says he or she is about to apply for work. The tribunals then accept this story and overturn the original decision.

Returning to policy issues, the tribunals in fact scarcely ever refer to departmental policy and assess its relevance in a particular case. The emphasis tends to be on the individual decision and whether it appeals to the tribunal. The tribunals have not continued to develop seriously the jurisprudence related to the various forms of policy. As a related matter, the tribunals have tended not to explain why they do not accept and apply departmental policy as the AAT decisions used to do in the early 1980s. It would be consistent with the notion that a departure from government policy is for a cogent reason. Presumably the reasons would need to be less weighty for departure from departmental policy.

It should come as no surprise to the tribunals that a considerable number of senior administrators in the Commonwealth Public Service would like to find a way to require the tribunals to apply government policy unless there are cogent reasons for departure. Robin has referred to the introduction of the Repatriation Medical Authority and the Specialist Medical Review Council in the veterans jurisdiction. This seems to have been a highly successful innovation.

Section 499 of the *Migration Act 1958* (Cth) is another example. It permits the Minister for Immigration to give general directions in writing to a person or body having functions or powers under that Act. The person or body must then exercise those powers or functions in accordance with the Ministerial directions. The directions are a disallowable instrument. This is a more effective provision than section 1297 of the *Social Security Act l991* (Cth) which permits the Minister for Social Security to publish a statement of government policy to which DSS decision-makers and the tribunals are merely required to have regard. I believe that we will see many more examples of the use of such devices to protect the integrity of government policy in the near future.

What are some other problems? I said above that the AAT is somewhat unfairly accused of legal formalism at times. That is not to say that the AAT could not and should not have cleaned up its act in these regards long ago. The AAT, organisationally, has been far too wedded to court-like architecture in its hearing rooms and to court-like processes, for example, the tradition that all in the tribunal stand as the member or members enter. DSS has not been alone in criticising these matters in submissions related to the various AAT reviews that have occurred. I see nothing in the *Administrative Appeals Tribunal Act 1975* (Cth) that compels such an approach.

Many years ago I participated in several telephone hearings in the AAT and I was impressed to see how informal and efficient these were. Not all cases are amenable to a telephone hearing, but if a more relaxed approach is possible in those cases surely it could become more common.

The vast bulk of AAT members are serious, professional and committed in their work. However, the AAT has failed to bring the occasional less professional or more eccentric member into line. Members are entitled to be independent and to enjoy that status. There have nevertheless been cases where the antics of individuals come close to bringing the tribunal into disrepute. As an example, following a preliminary conference in a

social security matter I received the following report from a departmental advocate:

> The presiding member observed that he didn't think the Department should be allowed to appeal on questions of fact. While it's doubtful a conference is the proper forum to air (repeatedly) this view, given the customer's presence (Lord knows what the customer makes of this), this is not the reason I write.
>
> The member then proceeded to say 'Some of the Department's appeals amount to an abuse of power.'

The presiding member seems ignorant of the fact that the Department has a legislative right to appeal from a decision of the SSAT on a question of law *or fact*, just as a customer has. He also ignores the fact that the Department takes very seriously any decision to appeal to the AAT against an SSAT decision. The decision is taken by the Permanent Head of the Department, who would be horrified by the suggestion that he is abusing his power.

In another case the member issued a suppression order apparently prohibiting a relatively junior Departmental advocate from discussing the case or seeking instructions from the Permanent Head—whom he was representing—or seeking assistance from the advocate's manager within DSS.

It is noteworthy that the Administrative Review Council, in chapter 8 of the *Better Decisions* report, does not explain why it wants to call the new, all-inclusive tribunal the "Administrative Review Tribunal", rather than retain "AAT" as the title. The argumentation is presented so that it looks as if the Council will recommend that the AAT assume the jurisdiction of the other tribunals but at the last minute the Report does not do this. It could be that the Council expects the new tribunal to make a fresh start and avoid some of the errors of the AAT.

As a final observation, it seems to me that the tribunals have brought this amalgamation proposal upon themselves in yet another way. The tribunals have been far too insular and disinclined to research and apply best practices, despite this being an imperative throughout the rest of the Australian Public Service. While tribunal members are often knowledgeable about the procedures and practices of other tribunals, they seem not to see these as directly relevant to them or as containing elements that might usefully be incorporated into their own tribunal. One of the arguments in favour of the ART proposal was the improved opportunity a single tribunal would offer for adoption of best practices.

Some of my judgments may seem harsh, although I have tried to indicate that, despite their faults, we have much to thank the tribunals for. The time has come, however, to assess honestly where we are with the current system. Some sort of major change in the administrative law system in Australia has been foreshadowed by Alan Rose repeatedly in Administrative Law Forums,[7] and last year by the Public Service Commissioner, Dr Peter Shergold, at the Institute's Annual General Meeting.[8] The stakes are now too high to avoid confronting some difficult issues.

7 *Eg* A D Rose, "Future Directions in Australian Administrative Law: the Administrative Law System" in J McMillan (ed), *Administrative Law: Does the Public Benefit?* (1992) 213.

8 P Shergold, "Administrative Law in the Changing Public Service Environment" (1996) 10 *AIAL Forum* 4.

DISPUTE RESOLUTION IN ADMINISTRATIVE LAW

Kathryn Cronin*

There is a surprising preoccupation in much of the Australian administrative law literature with the character of the administrative review model. This is a particular refrain in discussions on the Administrative Appeals Tribunal (AAT), with various commentators debating whether that tribunal is in fact "a court",[1] or "a Tribunal in the judicial mould"[2] or a "social institution" that was "kidnapped at birth and raised in a community of lawyers".[3] There has been less debate about the labels given to other federal administrative review tribunals.[4] They are clearly not courts: the National Native Title Tribunal, for example, has as its principal function to mediate and conciliate between the parties on the application to the Tribunal,[5] and the Social Security Appeals Tribunal (SSAT) operates with its own distinctive, informal procedures. The exclusion of lawyers from review proceedings in the Immigration Review Tribunal (IRT) and the Refugee Review Tribunal (RRT) has been taken to stamp those as inquisitorial models.[6]

* Commissioner, Australian Law Reform Commission.

1 M Aronson, "An Administrative Appeals Tribunal for New South Wales: Expensive Legalism, or Overdue Reform?" (1993) 52 *AJPA* 208. Aronson adds: "the adjectival label 'administrative' fools very few people. An AAT is a court; perhaps (at times) a relatively informal court; even, at rarer times, almost inquisitorial. It professes to act untrammelled by the rules of evidence, but this occurs really only at the margins. On matters at the heart of the dispute, its determination to banish conjecture and act only on the evidence is unsurpassed by 'real' judges" (*ibid* at 209–210).

2 Sir A Mason, "Administrative Review: The Experience of the First Twelve Years" (1989) 18 *F L Rev* 122, 131. See also Justice D O'Connor, "Future Directions for Australian Administrative Law" (1991) 66 *Canb Bulletin of Pub Admin* 135.

3 W De Maria, "The Administrative Appeals Tribunal in Review: On Remaining Seated During the Standing Ovation" in J McMillan (ed), *Administrative Law: Does the Public Benefit?* (AIAL, 1992) 96 at 98 and 97.

4 This paper concerns the major, federal administrative review tribunals, some of which are administered by the Attorney-General's Department, others by their portfolio department. The broad range of entities, often termed tribunals—and including policy bodies styled as an "authority", "commission", "board", "council", or "agency"—are not dealt with in this paper.

5 Justice R S French, "The National Native Title Tribunal—Early Directions" (1994) *Aust Dispute Resolution J* 164.

6 See G L Certoma, "Non-Adversarial Administrative Process and the Immigration Review Tribunal" (1993) 4 *Public L R* 4.

The labelling of the different tribunals often obscures directed questions concerning tribunal decision-making arrangements, in particular whether these tribunals, designed as informal alternatives to traditional courts, satisfy the need for accessible and simple dispute resolution, and deliver justice, including for poor and disadvantaged applicants. The desire to establish simplified methods of resolving disputes and to improve access to justice is a rational response to the perceived shortcomings of the civil justice system. This is not to say that it is easy to design and operate informal alternatives to traditional courts. Tribunals sit uneasily with governments, who are the architects, paymaster, repeat respondents and overseers of the review system. Competing pressures derive from the siting of tribunals on the edges of the litigation system, with their decisions subject to court scrutiny and review. One should not be surprised to find that tribunals are concerned with their identity and suffer a certain confusion about their purpose and accountability.

A SYSTEM UNDER SCRUTINY

The administrative review system is currently under particular scrutiny and looks set for fundamental changes. The Attorney-General has indicated the Government's intention to amalgamate the social security, veterans, immigration, refugee and administrative appeals tribunals into a single tribunal.[7] This is in keeping with the Administrative Review Council view that such amalgamation would streamline administrative structures and enhance review operations.[8] An interdepartmental committee (IDC) is devising a strategy for implementing the proposal and, according to the Attorney-General, considering the basis and scope of administrative review, the overall costs and the "excessive legalism" of merits review. The social security review and appeals system is likewise subject to investigation, with Dame Margaret Guilfoyle expected to report soon on the accessibility, efficiency and cost-effectiveness of that system, and whether its decisions appropriately reflect the intention and operation of government policy. The report is to cover the operation and processes of review, the basis of proof for evidence rendered, representation of appellants and any appeal rights to the AAT. "Sweeping changes" have

7 Press Release, "Reform of Merits Tribunals", Attorney-General and Minister for Justice, 20 March 1997 (reprinted *Admin Review*, No 48, 1997 at 78).

8 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995) (hereafter "Better Decisions") Ch 8.

also been announced to immigration and refugee decision-making and review,[9] in particular:

- the merging of the internal immigration review system with the independent IRT; the IRT and RRT are set to become a discrete division within the proposed single, federal administrative tribunal;
- legislation will make the IRT and RRT "more flexible and improve their performance", with principal members empowered to give directions on the conduct of reviews; applicants prevented from delaying hearings where a prescribed notice of a personal hearing has been given; reviews expected to have reduced documentation; media and telephones used to conduct hearings; and the allocation of personal hearings to be at the discretion of the tribunal member considering an application;
- to shorten processing times and "discourage frivolous applications", the work rights of review applicants will be restricted, review application periods for those in Australia will be reduced from 28 to 14 days, and the structure of the review application fee will be changed, with IRT applicant's fees increased to $500 and unsuccessful review applicants to the RRT required to pay a "post-decision application fee" of $1,000; and
- to deal with perceived abuse of the judicial review process, the government will legislate a privative clause restricting judicial review of most decisions made under the *Migration Act 1958* (Cth).

The Australian Law Reform Commission (ALRC) is also inquiring into the administrative review system as part of its review into the adversarial system of litigation, and is investigating the advantages and disadvantages of the present system of administrative review, with particular regard to the administration of justice in tribunals, the structure and objectives of the review system, and whether any changes should be made to tribunal practices and procedures. The Inquiry also focuses on the federal civil and family litigation systems. The Commission's Inquiry is not immediately impacting on tribunal jobs and is unlikely to generate the same anxieties as the departmental evaluation. Indeed, the Commission's Inquiry provides a useful opportunity for fuller debate on the many issues arising from the anticipated and proposed changes.

9 See the paper by P Ruddock in this publication, "The Broad Implications for Administrative Law under the Coalition Government with Particular Reference to Migration Matters". The proposals outlined by the Minister were introduced into the Parliament in Migration Legislation Amendment Bill (No 4) 1997 and Migration Legislation Amendment Bill (No 5) 1997.

THE MEANING OF ADVERSARIAL

The ALRC Inquiry is into the adversarial system. The question immediately arises whether all or any of the major federal tribunals are adversarial entities. Our working definition of an adversarial system refers in broad terms to one in which the parties and not the judge or decision-makers have the primary responsibility for defining the issues in dispute and for carrying the dispute forward. The adversarial system is based in substantive and procedural law and within an associated legal culture and ethical base. It is principally contrasted with the non-adversarial or inquisitorial system in which legal proceedings operate as a continuous series of meetings, hearings and written communications during which evidence is introduced, witnesses heard and motions made; the rules relating to courtroom practice are minimal and uncomplicated; and the role of the judge or decision-maker is pro-active, directorial and "inquisitive".

The Commission is not evaluating which model provides a better dispute resolution system. Our interest is in those adversarial features which allegedly produce inefficient consequences, for example:

- due in large part to its emphasis on a trial hearing the system is about winning and losing;
- each party's responsibility for advocating its own case and attacking the other party's case puts an emphasis on confrontation;
- the lawyers' role in the adversarial system is strictly partisan with lawyers having incentives, and even obligations, to exploit any advantages that the legal system allows for their clients;
- judges are not responsible for how much evidence is collected, how many different arguments and points are put, how long proceedings take or how much they cost; and they adjudicate questions of fact and law submitted to the court, but are not responsible for discovering the truth, or for settling the dispute to which those questions relate; and
- judges are responsible for ensuring that the proceedings are conducted fairly, and this makes them sensitive about limiting issues and arguments raised by parties or putting controls on proceedings in case such intervention is considered biased or unfair.

Lord Woolfe in his recent report to the Lord Chancellor on the civil justice system in England and Wales[10] identified the defects in the adversarial

10 *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).

system of litigation as its expense, complexity and incomprehensibility to outsiders, the delays in bringing cases to a conclusion, the lack of equality between powerful, wealthy litigants and under-resourced litigants, and, in any particular case, the uncertainties about the costs and the time-frame for the litigation.

THE ADVERSARIAL TRIBUNAL

These observations about adversarial models have general relevance to the working litigation and administrative review system, although the adversarial features of the civil and administrative systems have been considerably modified in recent years. Within the tribunals system, the AAT is seen by many to operate within an adversarial framework.[11] The *Better Decisions* report commented on the Tribunal's adoption of adversarial formalities—the standing and bowing, as well as the technical point-scoring over the admission of certain evidence and in cross-examination.[12] To offset these adversarial features, the AAT points to its success in overcoming adversarial bias and utilising its investigative powers,[13] and in facilitating compromise and settlement of cases, including by mediation,[14] without the need for a hearing.[15]

The AAT dispute resolution picture is like that of the courts. It has efficient management processes, facilitative dispute resolution arrangements, and a variety of engaged decision-makers. There may be some residue of arcane legal etiquette in the hearing process, but the system is said to produce better decision-making and can attest to appropriate, high levels of client—that is, applicant—satisfaction with the process.[16] The question for law reformers is whether this is enough? Within the court litigation system

11 S Henchliffe, "Theory, Practice and Procedural Fairness at Administrative Appeals Tribunal Hearings" (1995) 13 *Aust Bar Rev* 243; F Esparraga, "Procedure in the Administrative Appeals Tribunal" in J McMillan (ed), above n 3 at 386.

12 Better Decisions, above n 8 at para 3.30.

13 J Dwyer, "Overcoming the Adversarial Bias in Tribunal Procedures" (1991) 20 *F L Rev* 252.

14 Australian Law Reform Commission, *Rethinking the Federal Civil Litigation System*, Issue Paper 20 (1997) Ch 10; J Handley, "Mediation in the Commonwealth Administrative Appeals Tribunal" (1995) 6 *Aust Dispute Resolution J* 5; W De Maria, "Mediation and Adjudication: Friends or Foes at the Administrative Appeals Tribunal" (1991) 20 *F L Rev* 276; J David, "Mediation in the Commonwealth Administrative Appeals Tribunal" (1992) 30 *Law Society J* 55.

15 For example, in the 1995–96 reporting year, the percentage of applications settled without a hearing was 73% in the General & Veterans' Divisions, 84% in the Veterans' jurisdiction, 69% in the Social Security jurisdiction, 61% in the Compensation jurisdiction, and 80% in the Taxation Division: Administrative Appeals Tribunal, *Annual Report 1995/96* at 104.

16 AGB McNair, "Administrative Appeals Tribunal Client Satisfaction Survey—Final Report", 9 October 1996, unpublished.

there are constitutional constraints limiting the reform process. There are few such constraining factors within the tribunal process.[17]

THE NON-ADVERSARIAL TRIBUNAL

There is no legal impediment to prevent a shift towards clearer non-adversarial tribunal models. Given the cues directing the IDC and Guilfoyle inquiries, it is well to consider the workings of such tribunals. My own experience in immigration practice, policy and research dispose me to feature the single member, representative-free systems of the IRT and RRT, which may serve as non-adversarial models in a new tribunal system.[18] The questions which the ALRC seek to answer are whether these alternative dispute resolution models cure the mischief of the adversarial system—whether they work better?

It is fair to say that little attention was given to the form and the workings of the immigration or the refugee review tribunals prior to their establishment. The form of the tribunals was largely dictated by cost strictures. Immigration tribunal members were assigned all the roles normally undertaken by registrars and the parties in the traditional litigation or review system. In most immigration review cases and in all refugee proceedings, a single tribunal member reviews the case. The applicant may have a representative who prepared documentation and written submissions for the tribunal and who may even be present at the hearing, but such representatives have a muted and marginal role in the hearing. The Department of Immigration's case is contained in their file on the applicant; copies of the file are sent to the tribunals. Department officers rarely attend at the hearing or give live evidence.

The tribunal members play a number of roles: they are the investigators, preparing the case prior to hearing; the neutrals in any preliminary conference directed to case preparation or settlement; the advocates examining all witnesses and parties; and the decision-makers who write

17 See A N Hall, "Judicial power, the Duality of Functions and the Administrative Appeals Tribunal" (1994) 22 *F L Rev* 13. Tribunals, of course, cannot pronounce conclusively on the legality of any decision: *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245. Sir Anthony Mason has observed that "the availability of judicial review and the partial adoption of the judicial model by the AAT have imposed a legal discipline on the administrative process": in Sir Anthony Mason, "Administrative Law: Form versus Substance", in K Cole (ed), *Administrative Law & Public Administration: Form versus Substance* (AIAL, 1996) 1 at 5.

18 As the non-adversarial system allows the partisan involvement of lawyers representing and advocating their clients' case, the non-adversarial label is not necessarily an appropriate one for these tribunals which in fact more closely resemble a departmental model of decision-making, the difference being that the applicant engages directly in the process and may have a more elaborate opportunity to present a case to the decision-maker.

up full and reasoned decisions. It is a particular feature of such review proceedings that although the applicant has a right to be heard concerning their review, the tribunal is not required to call witnesses suggested by the applicant, applicants are not entitled to examine or cross-examine any person appearing before the tribunals, and, at least before the IRT, anyone assisting the applicant is "not entitled to present arguments to the Tribunal, or to address the Tribunal, unless the Tribunal is satisfied that, because of exceptional circumstances, the assistant should be allowed to do so".[19] The resolution of the dispute is entirely dependent upon the decision-maker's varied skills in identifying issues, eliciting and evaluating information, resolving the matter and writing reasons.

The other striking feature of these tribunals is the close control which particular immigration Ministers have exercised over tribunal appointments,[20] and the Ministers' public expressions of dissatisfaction with particular decisions, particular members and concerning the numbers of tribunal decisions taken on review to the Federal Court. The legislation devolves limited discretions to the tribunals in undertaking their review role.[21] The immigration tribunals provide very telling examples of review systems kept on a tight rein by their Ministers and pressured to serve the interests of government. This is a review process which is carefully directed to a managed migration programme outcome.

NON-ADVERSARIAL PRACTICE

In any discussion on reforms to the litigation and review system, it is generally assumed, at least by those who are dissatisfied with such systems, that the problems of the system are largely produced by judges and lawyers who bring to the process excesses of formalism, legalism and (from lawyers) a confrontational style of engagement. On this analysis a cultural and system change is effected by excluding the lawyers and limiting the judges. The immigration and refugee tribunals have gone one step further and limited the participation of any representative, although lawyers and migration agents do assist review applicants in these tribunals, and with the leave of the tribunals may even have speaking parts in the hearing.

19 *Migration Act 1958* (Cth) s 366A(2); see also ss 361, 362, 366D.

20 Joint Standing Committee on Migration, *The Immigration Review Tribunal Appointments Process* (1994).

21 The actual visa criteria are drafted in concrete terms with little scope for subjective fact-finding or any expansive discretion. Certain facts such as the Australian evaluations of overseas qualifications or the health criteria may not be refuted by the tribunal.

There has been no study in Australia to determine the role of lawyers or other representatives in informal proceedings or the effect of the exclusion or restriction of such advisers. Hazel Genn's empirical study of the impact of representation on British tribunal decision-making and outcomes is now somewhat dated, but it raises interesting questions relevant to such a study. It indicates, for example, that even where rules and procedures are relaxed in a tribunal proceeding, because of the complex rules and case law which are part of the matters to be decided by the tribunal the hearing may remain inherently adversarial and legalistic. The appearance of informality in tribunals may encourage applicants to assume they can simply tell the tribunal their stories in their own way, but such accounts are all too often of little legal relevance to a tribunal whose focus of interest is dictated by legislative criteria. Administrative decision-making requires applicants to provide legally relevant and sufficient information. Applicants who have told their stories, whether irrelevant or insufficient, may feel satisfied with the process, but lose their case. They may have been able to win. In this British study, where an applicant was represented in informal tribunal proceedings the applicant was more likely to achieve a favourable outcome to the hearing than an unrepresented applicant.[22]

The Australian data on the outcomes for represented and unrepresented applicants before tribunals give rather more mixed results and deserve a careful analysis.[23] The immigration and refugee tribunals indicated to the Joint Standing Committee on Migration, during its inquiry into the migration agent registration scheme, that their members and applicants derived most assistance from the expert advice groups,[24] who were not necessarily lawyers but were experts in immigration or refugee law and practice.[25] Certainly these informal tribunal systems are no place for amateurs.

22 H Genn and Y Genn, *The Effectiveness of Representation in Tribunals* (Lord Chancellors Department, 1989); H Genn, "Tribunals and Informal Justice" (1993) 56 *Modern L Rev* 393.

23 For example, in 1994–95, the IRT reported that applicants for whom an adviser was appointed received a favourable decision in 63% of the cases, compared to 59% of all cases, indicating some statistical advantage in having an adviser. In 1994–94, the RRT reported that of affirmed cases (that is, affirming the Departmental finding that the applicant is *not* a refugee) 60% involved represented applications, compared with 86% of all cases. This also suggests some disadvantage for unrepresented applicants. See: Immigration Review Tribunal, *Annual Report 1994–95* at 8–9; Refugee Review Tribunal, *Annual Report 1993–94* at 10, 15.

24 These groups comprise the Immigration Advice and Rights Centre and the Refugee Advice and Casework Service.

25 Joint Standing Committee on Migration, *Protecting the Vulnerable? The Migration Agents Registration Scheme* (1995).

I have not directly observed immigration or refugee tribunal proceedings. My views on these proceedings have been formed by reading many tribunal and Federal Court decisions. From this vantage point there do appear to be difficulties in certain cases which may be attributable to the absence of representatives, including Departmental representatives. In deciding where to direct their inquiries, it is generally sufficient if members simply follow the legislation which dictates that the visa applicant must have particular qualifications or, for example, be in a "genuine and continuous" relationship. However, there are many cases where the issues of law or fact are unclear or where they concern matters of credit, where the facts are detailed and wide-ranging and the law complicated—in such cases, there can be real difficulties for single, unsupported decision-makers. Their difficulties are evidenced by decisions which are sometimes lengthy and poorly reasoned, by tribunal timidity or overzealousness concerning matters of credit, by convoluted or standardised recitations on matters of law, and by the various Federal Court challenges which evidence frustrated, sceptical, discourteous, even biased exchanges between tribunal members and applicants. Some of these faults could be remedied by managerial dictates which set shorter reasons or required an increased turnover of cases, but a speedy resolution is not necessarily an effective or just resolution. The tribunal excesses mentioned often indicate members' determination to wrestle issues to the ground. Management dictates may simply stop them trying to meet the challenges of administrative decision-making.

In such cases, an advocate may have helped to focus the inquiry, clarify the law or undertake the examination or cross-examination of applicants or witnesses. Such an advocate need not be attached to the applicant or the Department. In such cases it may be sensible to co-opt or adapt the French practice of utilising a *Commissaire du Gouvernement* to assist and make recommendations to tribunal members.[26]

The ALRC Inquiry seeks to raise and seek answers to the variety of problems associated with administrative decision-making and dispute resolution. In each of the areas of substantive law, the dynamic of decision-making and the processes of review are different. The immigration example dealt with today is but one, admittedly often a vexed example of the variety of administrative review practices. The Commission will be publishing an issues paper directed to many of these processes and issues in early 1998, and the Commission encourages all those with interests in,

26 See D Rowland, "Lessons and Insights from the Procedure of the Conseil d'Etat in France" in L Pearson (ed), *Administrative Law: Setting the Pace or Being Left Behind?* (AIAL, 1997).

information or views on the matters, to contribute to the Inquiry. It is in all our interests to develop processes to allow not only an informal, just, speedy, fair and economical process, but what is often referred to as the work of "serious, careful and dignified" review.

COMMENTARY: DISPUTE RESOLUTION IN ADMINISTRATIVE LAW

John Basten QC*

The published program for the conference suggests that the "simple choice between adversarial and inquisitorial methods" of dispute resolution is increasingly regarded as an inadequate frame of reference. That is doubtless correct: however, it is not only an inadequate frame of reference for a useful debate on this topic, but it also fails to describe adequately the range of dispute resolution arrangements presently in operation.

The resolution of civil disputes generally involves a tension between providing a scheme which provides fair procedures to all parties and, on the other hand, minimising costs. The resolution of private disputes ordinarily involves three participants: the two opposing litigants, and the court or tribunal. Although private litigants may establish a private dispute settlement structure, in doing so they take on themselves the cost which would otherwise be borne by the public purse. In relation to administrative decisions, there are two further principles which must be incorporated into the balance. First, there is the need to provide an adequate level of accountability with respect to government decision-making; and, secondly, the process for dispute resolution must not unduly impede the proper scope and efficient operation of government.

For administrative lawyers, a balance of these tensions is reflected in the current processes which provide aggrieved persons in some limited areas with merits review and, generally speaking, broader scope for judicial review, limited as it is to identifying legal error in the decision-making process.

A brief reflection reveals an interesting dichotomy between processes which have an inquisitorial element and those which are largely adversarial. The inquisitorial processes are directly primarily at fact finding; the adversarial processes tend to apply in relation to legal issues. Thus, a clearly inquisitorial process is that by which the Ombudsman investigates complaints by citizens about government decisions. Generally

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speaking, her activities are directed towards resolution of issues which do not involve disputes as to the law. On the other hand, judicial review proceedings are located in the Federal Court and by and large follow an adversarial form. To a significant extent, the present topic may need to focus on those intermediate tribunals which tend to deal with matters of both fact and law. The Administrative Appeals Tribunal is one such body, and its procedures fall at the adversarial end of the spectrum. By contrast, the Refugee Review Tribunal falls at the inquisitorial end of the spectrum. Which is the better model?

Clearly there is not a simple answer to this question. It requires the assessment of each model against various criteria which can be more readily identified than applied. For example, the apparently objective criterion of cost effectiveness may well be extremely difficult to assess, although I do not suggest that the attempt should not be made.

The real problem in making such assessments is to identify differences in the nature of the disputes coming before the respective bodies. For this purpose, one should obviously divide the jurisdiction of the AAT into appropriate categories. To give a trite example, one class of disputes before the AAT, namely those involving confidentiality claims under the FOI Act in respect to third party documents, may really involve a dispute between two private litigants, in which the government has no particular interest of its own. No such issue arises in relation to refugee claims.

My own view is that useful principles may be derived from concentrating on the particular functions of the dispute resolution process. Our legal system accepts in relation to the critical area of establishing serious criminal charges that non-lawyers are the appropriate people to undertake the fact finding tasks. The role of lawyers is to identify the relevant legal principles which will define the issues and, in relation to the evidence of witnesses, to test the evidence by way of cross-examination. The importance of that testing may be doubted in relation to most challenges to administrative decisions. For example, the government does not engage highly paid lawyers to cross-examine individuals in relation to their claims, before deciding whether or not there is an entitlement to a benefit. Accordingly, that process should not be required if an adverse decision is challenged on review. Similarly, the vast majority of administrative decisions are made in accordance with accepted legal principle. It is only in the exceptional case that the legal parameters of a decision are challenged. Therefore it is only in that exceptional case that legal argument before a court is appropriate.

I should finish with a word about lawyers. The role of lawyers is frequently seen as one which tends to increase costs, delay and formality. To an extent all of these claims are undoubtedly true, though, paradoxically, the converse is also true. Nevertheless, lawyers should be restricted to areas in which their skills are required, in the absence of good reason for extending their role. Their primary skills are in relation to identifying and expounding the law and cross-examining witnesses. They have secondary skills in organising evidential material and testing its relevance against legal requirements. They have no necessary expertise in assessing evidence, resolving conflicts, nor in applying legal principle in areas where the law is well defined. Despite recent reforms, their expertise is still important in areas where the law of evidence applies. However, in administrative law proceedings, it is rare that the rules of evidence serve any significant purpose.

In conclusion, may I both flatter and disparage the topic. I readily acknowledge the need to raise both professional and public awareness of different ways of doing things. Administrative law is not an obvious candidate for the rigours of competition policy, but principles of equality and accountability require that its benefits be widely available at reasonable cost. Having acknowledged that, I note the variety of dispute resolution procedures available within the broad rubric of administrative law. To some, this will demonstrate arbitrariness and inefficiency. Whilst that may be so, it provides a salutary reminder that government decisions cover a vast range of topics, involve disparate values and are amenable to a variety of processes. Broad principles will not necessarily provide a uniform scheme for dispute resolution across the ambit of government activity.

PROTECTION OF INFORMATION RIGHTS

Sue Tongue*

These are interesting times for Commonwealth protection of information rights. There is a recent report by the Australian Law Reform Commission (ALRC) and the Administrative Review Council (ARC) on *Open government: a review of the federal Freedom of Information Act 1982*[1] (the ALRC/ARC Report). The Government has recently decided not to extend privacy law to the private sector and there continue to be reports advocating Commonwealth whistleblower protection legislation. In this paper I discuss Coalition policy in relation to these issues and describe current initiatives.

An important challenge for administrative law, and particularly for freedom of information and privacy, is the response to the blurring of public/private functions. The contracting out of government functions was discussed in the ALRC/ARC FOI Report and also in the 1997 ARC Issues Paper, *The Contracting Out of Government Services*. The Senate Finance and Public Administration References Committee is also currently inquiring into contracting out.[2]

I suggest that consumers are coming to take information rights for granted in their dealings with the public sector and may increasingly make similar demands on the semi-public and the private sectors. Individuals whose quality of life is affected by a decision made by an official—whether that official is working in a public, semi-public or private sector body—generally want to be sure that the decision was soundly based on correct information. They also expect to have certain information about them kept private. Technological change, which has led to an increase in information and improvements in its availability, has not diminished these expectations and has increased expectations of accessibility of information.

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1 Australian Law Reform Commission/Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, ALRC Report No 77/ARC Report No 40 (1995).

2 The Committee's terms of reference include inquiring into whether contracts should contain standard clauses dealing with responsibility for record keeping and whether government should have access to all files.

FREEDOM OF INFORMATION

My views on freedom of information come, in particular, from my work as Deputy President at the ALRC on the FOI reference—although I did not participate in the finalisation of the report. I have also worked in two areas which receive the largest number of FOI requests—Social Security and Immigration. More recently I have supervised the processing of FOI requests in small agencies. I confess to never having been a user of FOI, unlike the commentator on this paper, Jack Waterford.

I do not intend to canvass all the recommendations of the ALRC/ARC Report but refer readers to the recommendations in that Report.[3] I have singled out five areas for discussion: contracting out; the FOI Commissioner; FOI and the private sector; secrecy; and the relationship between FOI and privacy.

The Commonwealth *Freedom of Information Act 1982* had a ten year gestation[4] and has been substantially amended three times, but the ALRC/ARC review was the first comprehensive review of the legislation since its enactment. The review drew on the States' experience, particularly the work of the Electoral and Administrative Review Commission (EARC) in Queensland[5] which resulted in FOI legislation in that State, and the Western Australian experience. In conducting the review a now well-established system of consultation was followed—a discussion paper[6] was issued and comments obtained prior to the preparation of the report.

Commonwealth FOI legislation was an initiative of the Fraser Government in 1982. Malcolm Fraser was a supporter of the legislation saying:

> If the Australian electorate is to be able to make valid judgements on government policy it should have the greatest access to information possible. How can any community progress without continuing and informed and intelligent debate? How can there be any debate without information?[7]

The Coalition's *Law and Justice Policy* issued prior to the 1996 election recognised the past contribution of Coalition governments to administrative law. It stated:

3 ALRC/ARC Report, above n 1, Appendix D.
4 *Ibid* at paras 3.2–3.7. There was significant opposition to the legislation from government departments.
5 Electoral and Administrative Review Commission, *Report on Freedom of Information* (1990).
6 *Freedom of Information*, ALRC Issues Paper No 12 (1994).
7 *The Canberra Times*, 23 September 1976 at 2, cited in ALRC/ARC Issues Paper, above n 6 at para. 2.6.

> The initiatives of the Liberal and National Government in the late 1970s—freedom of information legislation, establishment of the Administrative Appeals Tribunal, the Administrative Decisions (Judicial Review) Act, Ombudsman—have countered deficiencies in the extent to which Parliament can hold the Government accountable.[8]

Specifically in relation to FOI, the policy continued:

> A Liberal and National Government will:
>
> - not increase in real terms charges payable for access to information under the Freedom of Information Act;
> - carefully review and respond to the recent Report on the Freedom of Information Act by the Australian Law Reform Commission and the Administrative Review Council, and implement appropriate and workable recommendations.

The policy went on to say that there will be a review of the ARC report, *Better Decisions: Review of Commonwealth Merits Review Tribunals*.[9] While there has been a response to that report,[10] there has not yet been a response to the ALRC/ARC FOI Report. While acknowledging that parties in opposition are more likely to favour improvements to FOI legislation than parties in government, I suggest that the delay may simply arise from competing priorities.

Contracting out

In its *Contracting Out* discussion paper the ARC said:

> As more government services are contracted out, a question arises as to whether public rights of access to information should be extended to documents held by contractors, as well as those held by the Government. Otherwise, there is a risk that the shift to the use of contractors for government service delivery might lessen the ability of interested members of the public (including those affected by the activities of contractors) to obtain information about the services delivered by contractors. The interests of contractors would need to be taken into

8 Liberal and National Parties' *Law and Justice Policy*, February 1996 (www.liberal.org.au/archives/law/).

9 ARC Report No 39 (1995).

10 In a news release on 20 March 1997 the Attorney-General and Minister for Justice announced that Cabinet had agreed in principle to amalgamate the AAT, SSAT, VRB, IRT and RRT into a single administrative tribunal. An interdepartmental committee was devising a strategy for the amalgamation and was considering the ARC recommendations for improvements to the process and procedures of merits review tribunals. See (1997) 48 *Admin Review* 78.

> account in any such scheme, as they are now in relation to government-held information.[11]

The ALRC/ARC FOI Report found that, given the range of situations in which services might be contracted out, it was not possible to decide on an ideal approach. The Report identified three models, which were later discussed in the ARC Issues paper:[12] making the private sector body subject to the FOI Act; deeming documents in the possession of the contractor to be in the possession of the government agency (the NZ model); and incorporating information access rights into individual contracts.

The recommendations in the ALRC/ARC Report were:

> 99. If an agency contracts with a private sector body to provide a service or perform a function on behalf of the government, the agency should ensure that suitable arrangements are made for the provision of public access information rights.
>
> 100. Where a statutory scheme provides for private sector bodies to be contracted to provide services or functions to the public on behalf of the government, information access rights should generally be provided by applying the FOI Act to those private sector bodies, but only in respect of documents that relate to the provision of those services or functions.
>
> 101A.(ALRC) Where there is no statutory scheme, the contracting agency should determine the most suitable way to provide relevant information access rights, bearing in mind the guidelines issued by the FOI Commissioner.
>
> 101B.(ARC) Where there is no statutory scheme, the contracting agency should generally preserve information access rights by ensuring that documents in the possession of the private sector body are deemed to be in the possession of the contracting agency.
>
> 102. The FOI Commissioner should provide guidance to agencies on what arrangements are advisable in a particular contracting out or funding situation. The Commissioner should also monitor the contracting out of government services and functions, and the funding of private sector bodies to provide services to the public, and report on whether in all of these situations satisfactory arrangements are being made with respect to the accessibility of relevant information.

The Senate Finance and Public Administration References Committee is currently inquiring into the contracting out of government services and

11 Administrative Review Council, *The Contracting Out of Government Services*, Discussion Paper (1977) at 71.
12 *bid* at 72.

has so far received 37 submissions. The Commonwealth Ombudsman's submission to that inquiry recommended:[13]

- Contracts should specify that contractors maintain an appropriate standard of record keeping to ensure accountability and access to information;
- Commercial-in-confidence considerations should not be permitted to prevent the disclosure of information that is genuinely in the public interest;
- Contracts should include clauses specifying that data bases, collected in the course of service delivery, belong to the government agency;
- Information should generally be subject to the provisions of the FOI Act, Privacy Act and the Ombudsman Act.

The Ombudsman drew attention to the complaint by a number of small business people against Telstra, which she said "highlighted a number of aspects of defective administration … [and] the tensions between the commercial interests and the broader accountability principles of transparency".[14] The Ombudsman found that "arguments about 'commercial-in-confidence' may be more frequently pitted against an individual's right to know once competitive tendering arrangements come into play."

Government business enterprises

The Ombudsman's submission to the Senate Committee also argued that it is in the public interest for all GBEs to be subject to the FOI Act.[15] The ARC position is that if the government does not have a controlling interest in the enterprise, it should not be subject to statutory administrative law regimes.[16] The ARLC/ARC Report[17] recommended that GBEs engaged predominantly in commercial activities in a competitive market should not be subject to the FOI Act. The ALRC recommended that Telstra not be subject to the FOI Act; the ARC recommendation was that it retain its current status under the Act until such time as alternative satisfactory disclosure requirements applying to the entire telecommunications industry are put in place.[18]

13 Submission No 16 at 24 (www.comb.gov.au/publications/other_info/contracting_out).
14 *Ibid* at 23.
15 *Ibid* at 44.
16 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No 38 (1995) 7.
17 ALRC/ARC Report, above n 1, recommendation 105.
18 *Ibid*, recommendations 106A (ALRC), 106B (ARC).

Freedom Of Information Commissioner

The FOI Commissioner is clearly an integral part of the proposals in the ALRC/ARC Report[19] as a means by which FOI can be appropriately carried forward into the new era of delivery of government services and the information age. The Report drew on the experience with the Information Commissioners in Queensland and Western Australia. The role of the proposed Commissioner is discussed. Essentially he or she would: audit the FOI performance of agencies; report on FOI use statistics; issue guidelines; provide training; and provide information and assistance on FOI requests. The Report acknowledged the role that the Attorney-General's Department and the Ombudsman play in relation to the Act but concluded that something more is needed.

A common view is that in the current climate it is unlikely that the Government would establish a new body to perform this function. This is recognised in the Report. However, this should not necessarily mean that the functions would not be performed. The Report discussed existing bodies which could perform the tasks[20] and noted the desirability of close links between the proposed Commissioner, the Privacy Commissioner and the Ombudsman. A real alternative to the creation of an FOI Commissioner is to give the functions to the Privacy Commissioner, although the Report did not favour that alternative. With the recent decision not to extend privacy to the private sector (discussed below), that view might be reconsidered.

Freedom of information and the private sector

The ALRC and ARC were asked to examine whether the FOI Act should be extended to the private sector. Neither body had a fixed view on the matter; I believe the section in the discussion paper setting out the issues was balanced and concise. Nevertheless, the discussion produced a fairly hysterical reaction to what was only a discussion paper—which caused me to wonder whether it will ever be possible for the participants in representative democracy to trust our processes, even though we do not always agree with the outcome of those processes.

As I recall, supporters for the extension of the legislation to the private sector included operators of small businesses and those who sought access to medical records.

19 *Ibid*, Chapter 6.
20 *Ibid* at para 6.29.

The FOI Report made the following recommendations:

> 97. The FOI Act should not be extended to apply generally to private sector bodies.
>
> 98. If there is a need for greater disclosure of particular information in a particular area of the private sector the legislation regulating that industry should be amended, or new legislation introduced, to require greater disclosure of that information.

The *Corporations Law* can of course, also provide for greater accountability of companies.

Freedom of information and privacy

One of the issues confronted in the ARLC/ARC review was the interrelationship between freedom of information and privacy legislation. This is important because by far the biggest use of the *Freedom of Information Act* is requests by individuals for their personal information. About 36,000 requests are made each year and over 90 per cent of them go to four agencies—the Australian Taxation Office, and the Departments of Veterans' Affairs, Social Security, and Immigration.

Alan Rose has pointed out[21] that the FOI Act and *Privacy Act* are interconnected in several ways:

- Both provide for access to an individual's own personal information. The FOI Act does this by providing a right of access to all government-held information; the Privacy Act by Information Privacy Principle (IPP)6 which provides that an individual is entitled to have access to a record that contains his or her personal information;
- Both provide for amendment of personal information. The FOI Act Pt V sets out the procedures and rules for seeking the amendment of personal information; IPP 7 requires a record-keeper to take steps to ensure that personal information is accurate, relevant, up to date, complete and not missing;
- Releasing information under the FOI Act may interfere with the privacy of individuals.

When the *Privacy Act* was enacted in 1988 these interrelationships were not as felicitously addressed as they might have been. It appears that because it is simply a public sector issue in practice, the interrelationship has not really caused a problem. The previous Privacy Commissioner, Kevin

21 A Rose, "Balancing Privacy and Freedom of Information", Paper to IRR Conference on "Information Privacy", Sydney, 7-8 December 1995 at 2.

O'Connor, took the view that where the FOI Act contained an effective mechanism for obtaining access and amendment, it was the vehicle to use. There has been no indication from the new Privacy Commissioner, Moira Scollay, that she intends to follow a different practice.

The ALRC/ARC Report decided against recommending the transfer of access and amendment under the FOI Act to the Privacy regime. The Report recommended that the FOI Commissioner consult the Privacy Commissioner when issuing guidelines on access and amendment. It also recommended that the *Privacy Act* be amended to prevent the Privacy Commissioner finding that an agency has breached an IPP in respect of a decision made under the FOI Act unless that decision has been found on external review to be incorrect.

The FOI Act section 41 allows agencies to exempt documents the disclosure of which would involve unreasonable disclosure of someone's personal information. Information Privacy Principle 11 prohibits third party disclosure except in specified circumstances. The Report recommends that section 41 be amended to refer to IPP 11 and that documents should not be exempt if their disclosure is in the public interest. The Report also suggested that the *Privacy Act* be amended to protect disclosure under the FOI Act from privacy breaches. Consultation between the prospective Commissioners about this matter was recommended.

An issue that emerged from the ALRC/ARC work, and which has also been identified by privacy practitioners, is that privacy is "being mistakenly used as an excuse for secrecy or obstruction, even where there is clear legal authority for a release of information, or where one of the exceptions to the use and disclosure principles (IPPs 10 & 11) clearly applies".[22] When combined with "secrecy sanctioned by traditional practice but in ignorance of the law",[23] this produces significant barriers to the production of information under the FOI Act. Managers need to be alert to their obligations under the FOI Act and the relationship between FOI, privacy and secrecy legislative provisions.

There are synergies from the operation of privacy and FOI legislation. Often in a department the same section or person handles FOI and privacy requests from clients. I gained the impression that officers administering the FOI Act were generally well trained in FOI and knowledgeable about the aims of the legislation and equally aware of the privacy legislation.

22 N Waters, "Cross Program Responsiveness—Issues and Risks", Paper to IPPA Seminar, Canberra, September 1996 at 2.

23 A Rose, "Whose Information is it anyway", Paper to INFOTWO—the 2nd National Freedom of Information Conference, 7 March 1996 at 6.

Apparently there has been an increase in the settlement of privacy complaints as agencies have become more responsive to client complaints.[24] Certainly there are considerable efforts being made to provide information—particularly information to individuals—without the full panoply of FOI legislation being applied.

Secrecy

In addition to solving the balance between FOI and privacy legislation, a public servant must also have regard to relevant secrecy provisions. The ALRC/ARC work glimpsed the plethora of secrecy provisions in Commonwealth legislation, which are ever increasing.[25] While the inter-meshing of privacy and FOI has been exposed and dealt with, the untangling of the secrecy provisions is an important job waiting to be done. It could be part of the "statute stocktake" which is a key initiative of the Coalition's *Law and Justice Policy*.[26] Professor Finn has observed that there is no appropriate law which prevents the use of official secrecy provisions being used to camouflage government or official wrongdoing.[27]

The Committee to Review Commonwealth Criminal Law, chaired by Sir Harry Gibbs, which reported in December 1991[28] (the Gibbs Committee) considered sections 70 and 79(3) of the *Crimes Act 1914* (Cth) when it considered secrecy provisions and whistleblowing. It recommended that those sections be repealed and replaced with provisions under which the application of penal sanctions to unauthorised disclosure of official information would be limited to the specific categories of information detailed in the Report.[29]

The ALRC/ARC Report recommended that the Gibbs Committee Report recommendations be implemented and that all Commonwealth secrecy provisions be reviewed. The ALRC is currently examining the archives legislation, and it would be logical for them to examine secrecy as a third step in the exercise of dealing with the Commonwealth's regulation of information. Section 38 of the FOI Act exempts documents withheld under a secrecy provision in another Act. The FOI Report recommended the repeal of this section as the exemptions in the FOI Act cover all information that need not be disclosed. It appears that many secrecy provisions have

24 *Ibid* at 3.
25 *Ibid* at 6.
26 *Law and Justice Policy*, above n 8 at 1, 10.
27 Cited in Senate Select Committee on Public Interest Whistleblowing, *In the Public Interest* (1994) para 4.2.
28 *Review of Commonwealth Criminal Law—Final Report*, Parliamentary Paper No 371 of 1991.
29 *Ibid*, Part V.

been included in new legislation in an abundance of caution when documents were probably already secure under the FOI legislation. While it is useful to have all provisions about a subject area under one Act it is also desirable for the FOI Act to be the repository of rules about Commonwealth information. Cross-referencing to the FOI Act could presumably be put into the principal Acts.

Other recommendations

Exemptions: The ALRC/ARC Report considered all exemptions in the FOI Act. The Report enunciated general principles,[30] starting from the position that the exemptions should only be used to prevent harm to the public interest. It recommended that the FOI Commissioner issue guidelines to assist with defining the public interest. Some exemptions, it argued, are redundant and some need amendment to deal with ambiguity. The use of conclusive certificates was also closely examined.

Objects clause: Key recommendations in the ALRC/ARC Report are those dealing with giving effect to the objectives of the Act.[31] The review took into account changes in the relationship between citizens and government, views about the public interest,[32] and information technology. It also took into account experience in the Commonwealth and States with the operation of the FOI Act. The recommendations included changing the objects clause of the Act and improving senior officers' understanding of the reasons for FOI legislation.

EXTENSION OF PRIVACY RULES TO THE PRIVATE SECTOR

The ALRC/ARC Report discussed whether the privacy protection provided by the FOI Act should be provided in the private sector by means other than the FOI Act.[33] The Report recommended:

> 103. A comprehensive, national legislative scheme should be introduced to provide information privacy protection in all sectors, including the private sector and those parts of the federal public sector that are not currently subject to the Privacy Act.
>
> 104. The Attorney-General should raise the need for national information privacy protection at a meeting of the Standing Committee of Attorneys-General at the earliest possible opportunity

30 ALRC/ARC Report, above n 1, Chapter 8.
31 *Ibid*, Chapter 4.
32 *Eg* P Bayne, "Recurring Themes in the Interpretation of the Commonwealth Freedom of Information Act" (1996) 24 *F L Rev* 287.
33 ALRC/ARC Report, above n 1 at paras 15.16-15.25.

The Coalition's *Law and Justice Policy* states:

> Maintenance of the freedom of the individual requires a vigilant protection of privacy, particularly against Government intervention. … The risks of centralised information storage and distribution have long been apparent. Citizens are rightly concerned to ensure that information held about them by Government and the public and private sectors is not misused. … Unless our privacy laws are improved as a matter of priority, Australian business and industry will be locked out of international data flows. A recent European Community directive will have the effect of excluding Australian entities from European Community data flows unless our privacy laws are substantially improved by mid-1998. Reform is required as a matter of the utmost priority. A consistent Australia-wide approach is required.[34]

In 1995 the House of Representatives Standing Committee on Legal and Constitutional Affairs said it favoured a consistent national legislative framework for information privacy protection. The Committee recommended that the privacy protection provided by the IPPs be extended to all confidential third party information by way of a national privacy code.[35] The then Labor Government announced that it would establish such a scheme.[36]

In September 1996 the Attorney-General, Daryl Williams QC, issued a discussion paper, *Privacy Protection in the Private Sector*, and more than 100 people and organisations made submissions.[37] The paper discussed the desirability of not having a patchwork of privacy regimes for the private sector; most private sector peak organisations apparently agreed that this would be a nightmare.[38]

In his last speech as Privacy Commissioner Kevin O'Connor said:

> While industry has not sought regulation, it has recognised the inevitability of action in this area and those sectors most conversant with the international discussion of information privacy have sought to reposition themselves, often adopting for the first time standards or codes which explicitly address modern information privacy values.[39]

34 *Law and Justice Policy*, above n 8 at 28.
35 House of Representatives Standing Committee on Legal and Constitutional Affairs, *In confidence* (1995) para 10.1.1.-10.8.1.
36 ALRC/ARC Report, above n 1 at para 15.22.
37 For a discussion of the paper see M Paterson, "Privacy Protection in the Private Sector: the Federal Government's Discussion Paper" (1997) 12 *AIAL Forum* 1-12.
38 Waters, above n 22 at 4.
39 K O'Connor, "Recent Privacy Initiatives in the Asia-Pacific Region", Paper to Hong Kong Australia Chamber of Commerce, December 1996 at 2.

He went on to note the importance for future economic prosperity of having a positive and dynamic approach to the new information infrastructure and noted the trade value in being seen to be the country which offers legal protection to the data it handles in relation to privacy and copyright.

As the ALRC/ARC Report noted,[40] in 1980 the OECD issued guidelines that apply to personal data in the public and private sector. More recently, the European Union issued a Directive which applies to the public and private sectors and imposes a uniform minimum standard of privacy protection. From late 1998 all member states of the European Union will be required to have privacy laws to prohibit the transfer of data to any country whose privacy laws do not comply with European standards. The ALRC/ARC Report lists 22 countries which have privacy or data protection laws extending to both the public and private sector.[41] The New Zealand *Privacy Act 1993* provides for codes of practice for particular industries, agencies, professions or activities. The Act was set up to become enforceable three years after its introduction, whether or not a code of practice had been issued.

A national privacy regime requires complementary State and Commonwealth laws. The 1995 House of Representatives Committee Report recommended that the issue be placed on the agenda of the Council of Australian Governments.[42] Privacy has been an issue on the agenda of the Standing Committee of Attorneys-General (SCAG), with an officers committee working on it; the press reported recently that it was discussed at a SCAG meeting.

On 21 March 1997 at a Premier's Conference, the Prime Minister raised the Commonwealth's concerns about the proposals to implement a privacy regime for the private sector. He said that the Commonwealth opposes such proposals, which it sees as further increasing compliance costs for all Australian businesses. He indicated that the Commonwealth would not be implementing privacy legislation for the private sector and asked Premiers and Chief Ministers not to introduce legislation on this matter within their own jurisdictions. The Northern Territory and Queensland agreed. The Prime Minister offered the assistance of the Privacy Commissioner to assist business to develop voluntary codes of practice and to meet privacy standards.[43] NSW has reportedly drafted a Privacy Bill which covers both the public and private sectors; and the Victorian Government's Data

40 ALRC/ARC Report, above n 1 at para 15.21.
41 *Ibid*, Chapter 15, n 64.
42 *In confidence*, above n 35 at para 10.8.2.
43 Prime Minister, *Press Release*, "Privacy Legislation", 21 March 1997.

Protection Advisory Committee has recommended a privacy scheme.[44] The ACT government is covered by the Commonwealth *Privacy Act*.

Following the Prime Minister's announcement there have been press reports of reaction from various groups. On 7 April 1997 it was reported that a coalition of lawyers, business and consumer groups was trying to mobilise international opinion against the Government's decision.[45] The President of the NSW Law Society supported the proposal to extend privacy protection to the private sector, although he recognised that the plans would cause difficulty and costs for business.[46] One commentator has noted that an Australian company could contract to protect data originating from an EU country, with the result that EU personal data might thereby receive more protection than Australian personal data.48

In March 1997 the Privacy Commissioner said:

> The way ahead now, given the Government's decision not to legislate at this time, is to develop consistent voluntary codes. I am keen to move forward, working with business groups and consumer groups on these codes, to provide adequate levels of privacy protection with minimal red tape.[48]

The Commissioner will use as her model the Canadian "Model Code for the Protection of Personal Information", which was issued by Standards Canada in March 1996. She said this Code has been suggested as the basis for an international standard. The media reported that the privacy code could then be backed by legislation from any Australian parliament.[49]

Another interesting development, which has been reported following the Commonwealth Government's recent announcement, is that New Zealand intends to change its *Privacy Act* 1993 in relation to information about lawyers and other professionals, so that it can participate in the expanded trans-Tasman market in goods and services. Because Australian privacy law is weaker, the New Zealand law will give way.[50] I also note two other related developments: the new telecommunications legislation reportedly includes privacy protection provisions; and the inquiry into the financial system has recommendations regarding privacy.[51]

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44 V Perton, "A Privacy Act for Victoria?" (1997) 12 *AIAL Forum* 13-19.
45 *The Australian Financial Review*, 7 April 1997. In a later article it was said that this group has 20 members: C Merritt, "No Privacy", *The Australian Financial Review*, 17 April 1997 at 14.
46 *The Australian Financial Review*, 7 April 1997 at 7.
47 Letter, *The Australian Financial Review*, 9 April 1997.
48 Privacy Commissioner, *Statement*, 27 March 1997 at 2.
49 *The Australian Financial Review*, 18 April 1997 at 10.
50 *The Australian Financial Review*, 21 April 1997 at 9.
51 Letter, *The Australian Financial Review*, 22 April 1997 at 20.

The ARC issues paper on contracting out does not go into privacy issues in detail in light of the Attorney-General's discussion paper. Indeed, the ARC paper asks no questions inviting a response. In light of the Government's decision not to extend privacy law to the private sector, those responding to the ARC discussion paper may wish to address the options for protection of privacy by private contractors.

Medical records

An area on which the ALRC and ARC received several submissions was access to medical records. The previous Labor Government expressed support for a right of access to such records, but was awaiting the decision of the High Court in *Breen v Williams*.[52] The High Court decided that the patient had no proprietary right or interest in, and no right of access to, the information contained in the medical records created by the respondent. The Court found there is no movement in the law governing the relationship of doctor and patient, in the direction of a principle of personal inviolability and patient autonomy, or towards rejection of medical paternalism.

The ALRC/ARC Report thought that access to medical records could be dealt with in the context of a national privacy regime.[53]

I notice that the ACT Government commissioned a position paper on privacy and access to medical records, which was due to be put to the ACT Cabinet in April. The Paper recommended ACT legislation in line with the general privacy legislation, which supports patients' rights to their own medical records.[54]

WHISTLEBLOWERS

Legislation for the protection of whistleblowers has been passed in some States (see below), but not by the Commonwealth, despite reports recommending it. John McMillan has described whistleblower reform in Australia as "scandal or corruption driven",[55] because the issue is raised when there are large scale inquiries, such as the Fitzgerald inquiry in Queensland, the WA Commission on Government, and the NSW Independent Commission Against Corruption (ICAC) investigations into waste and corruption.

52 (1996) 138 CLR 259.
53 ALRC/ARC Report, above n 1 at para 15.25.
54 *The Canberra Times*, 13 April 1997 at 1.
55 J McMillan, cited in *In the Public Interest*, above n 27 at para 2.15.

The Coalition's *Law and Justice Policy* includes a commitment to:

- review and strengthen Commonwealth laws relating to bribery and corruption, interference with the administration of justice and the conduct of public officials;
- review laws relating to the unauthorised disclosure of information by public officers for profit and significantly increase penalties for such conduct. Where the disclosed material contains personal information pertaining to Australian citizens, we will ensure that harsher penalties are applicable;
- introduce 'whistleblowing' laws to protect public officials who expose corruption in the public service;
- expedite implementation of appropriate recommendations made in the report of the Review Committee of Commonwealth Criminal law (the Gibbs Committee) …

Ideally, as Ian Temby, a former ICAC Commissioner has said:

> What must be instilled (in an organisation) is an attitude on the part of all of trust openness, integrity and shared values. If that happens when a problem arises the natural response will be to take it up and have it resolved internally. Managers should make it their responsibility to render it unnecessary for staff to blow the whistle. That is a very different thing from repressing or discouraging that practice. A good sign of a healthy organisation is one which does not leak, because nobody feels conflict between loyalty to workmates on the one hand and the obligations that flow from living in human society on the other.[56]

All the bodies that have examined whistleblowing agree with this, but the ideal does not always happen. It has been pointed out that this sentiment is not highlighted in some State legislation which does not emphasise in-house handling of whistleblowing.[57]

The rationale for the protection of whistleblowers is usefully summarised in the Fitzgerald Report:

> Honest public officials are the major potential source of the information needed to reduce public maladministration and misconduct. They will continue to be unwilling to come forward until they are confident that they will not be prejudiced.[58]

56 I Temby, "Of Dogs and Do-Gooders; Informants and their Protection", Paper to EARC Public Seminar, 19 April 1991 at 13.
57 *In the Public Interest*, above n 27 at para 4.46.
58 Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (1989) 134.

The Fitzgerald Report recommended whistleblower protection legislation, and an accessible, independent body to which disclosures could be made.[59] It recommended that EARC work on the issue.

The 1991 EARC *Report on Protection of Whistleblowers*, which analysed the issue of whistleblower protection, resulted in the Queensland *Whistleblowers Protection Act 1994*.[60] The Act protects whisteblower disclosures by public officials and, in certain circumstances, by other persons including private sector employees. A public officer, to gain protection, must make the public interest disclosure to an appropriate entity; the Act does not confer statutory protection for public interest disclosures to the media. The reason is that the Act aims to minimise unwarranted public damage to reputations. It provides legal protections, sanctions and remedies to safeguard whistleblowers.

EARC recommended that a private employee should be protected for disclosing activity by a private sector employer that involves danger to public health and safety or to the environment. The Government did not implement this recommendation because of the cost to small business, but did provide statutory protection for the disclosure of information in certain categories. Employees of statutory government-owned corporations are required to make internal disclosures, but disclosures to external bodies are protected under strictly limited circumstances.

The Queensland Criminal Justice Commission has a whistleblower's support program, and a unit in the Public Sector Management Commission provides advice about whistleblowing.

EARC drew on the work of Professor Paul Finn's Integrity in Government Project, which addressed issues relating to the design of a scheme for whistleblower protection of public servants.[61] Finn suggested a three part model for protecting whistleblowers. First, internal resolution should be sought by the employee of a government agency by making a confidential report to a designated officer. Secondly, the Ombudsman could receive and/or investigate a confidential report about wrongdoing. Thirdly, a public officer and employee could "go public" to a parliamentary committee with any matter that could have been reported internally or to the Ombudsman.[62]

59 *Ibid* at 370.
60 There is a useful summary of the Act in the *Commonwealth Law Bulletin*, July 1995 at 706ff.
61 P Finn, *Official Information*, Integrity in Government Project: Interim Report 1, ANU (1991).
62 *Ibid* at 5-7, 47-64.

The Gibbs Committee considered the international and Australian whistleblower protection models, particularly the EARC and Finn work, and made the following two recommendations:

> 32.26 [P]rovision should be made recognising the right in the ultimate for the complainant to "go public", that is, to communicate his or her complaint to any person, including the media, but this should be qualified by the requirements that:
>
> (a) he or she reasonably believed that the allegation was accurate; and
>
> (b) notwithstanding his or her failure to avail of the alternative procedures, the course taken was excusable in the circumstances …
>
> 32.35 [T]he protection should apply where an employee or contractor of the Commonwealth or any Commonwealth agency reasonably believes that the information in question evidences:
>
> (a) an indictable offence against a law of the Commonwealth, State or Territory;
>
> (b) a gross mismanagement or a gross waste of funds; or
>
> (c) a substantial and specific danger to public health or safety.[63]

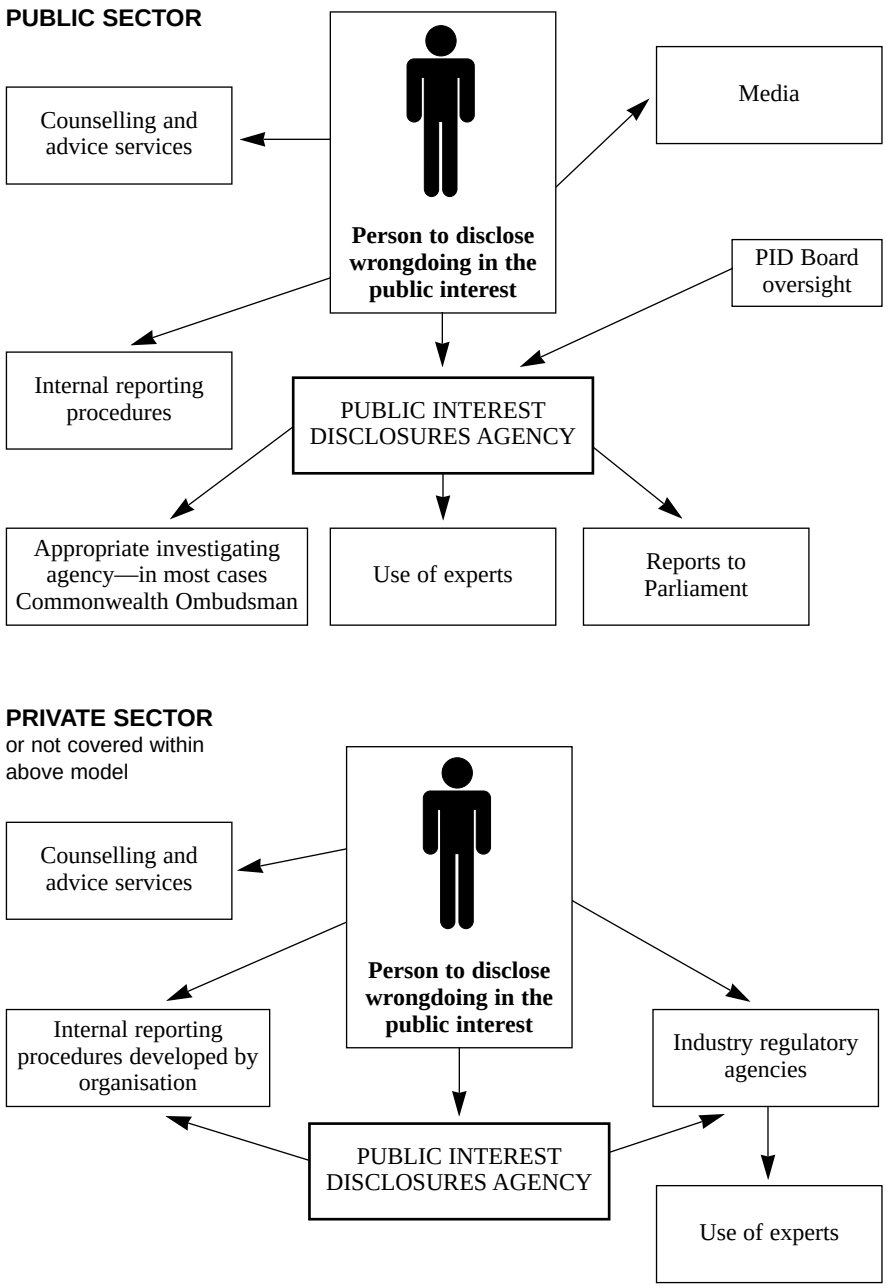
The qualification in paragraph (b), requiring "gross" mismanagement or wastage, followed the model of the United States *Whistleblowers Protection Act 1989*. EARC and Professor Finn had not seen the need for that qualification, but it was thought desirable by the Gibbs Committee.

The Senate Select Committee on Public Interest Whistleblowing in its report, *In the Public Interest*,[64] did a thorough job of taking evidence and analysing the recommendations of the Gibbs committee, EARC, and various other academics, police and other interested bodies. That Committee had referred to it a *Whistleblowers Protection Bill* which was introduced by Senator Chamarette in 1991, but which lapsed.[65] The Committee recommended public interest disclosure/whistleblower protection legislation with the widest coverage constitutionally possible in the public and private sector. It envisaged that with mutual cooperation between the Commonwealth, States and industry groups there could be reform at a national level.

In October 1995 the Senate Select Committee on Unresolved Whistleblower Cases tabled a report, *The Public Interest Revisited*. This report looked at

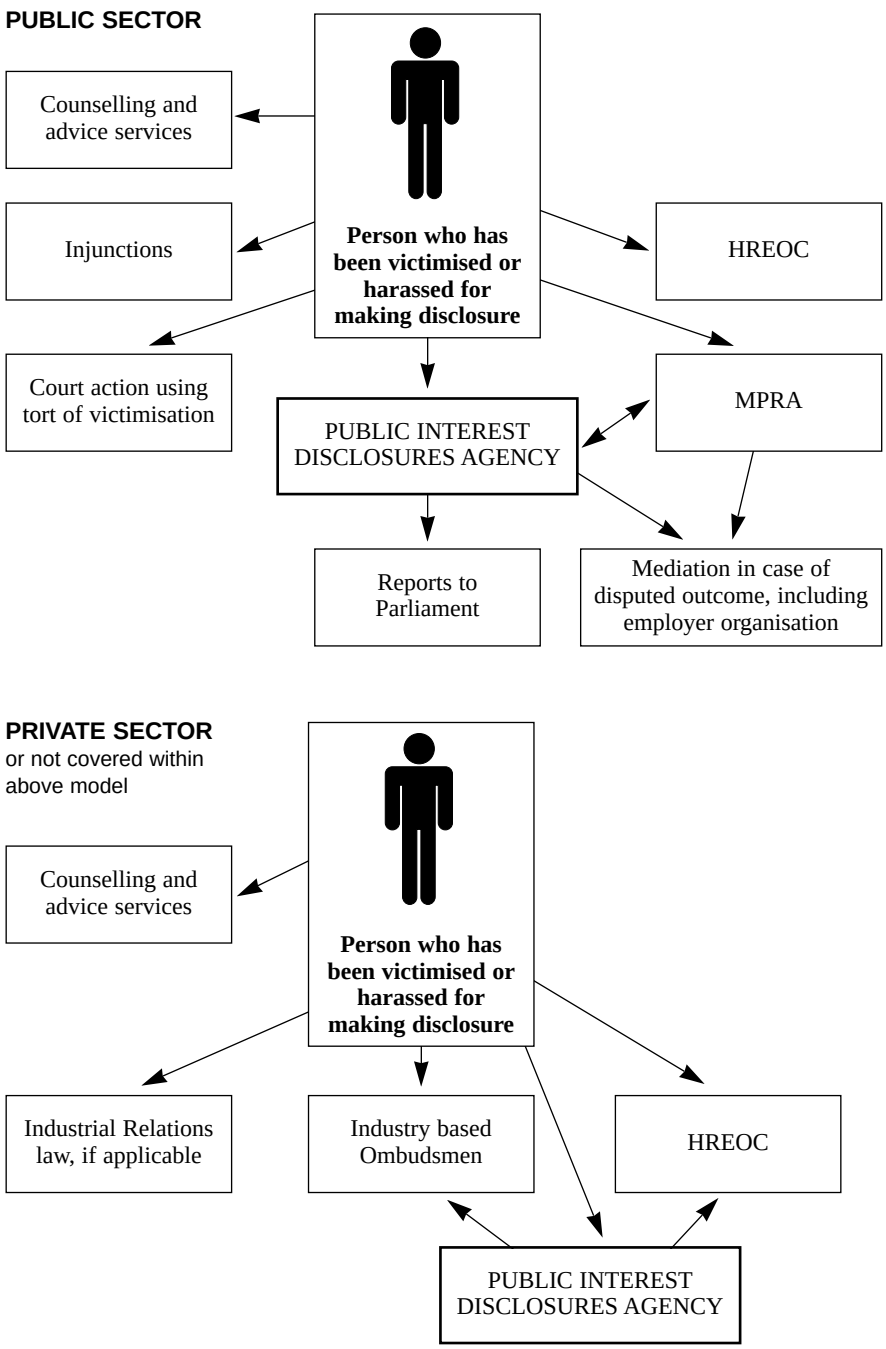
63 Gibbs Committee Report, above n 28 at paras 32.26, 32.35.
64 *In the Public Interest*, above n 27.
65 I Cunliffe, "Balancing the Risks", *Directions in Government*, June 1992 at 19.

Figure 1: RECOMMENDED OPTIONS FOR MAKING PUBLIC INTEREST DISCLOSURES



Source: Report of the Senate Select Committee on Public Interest Whistleblowing *In the Public Interest,* August 1994.

Figure 2: RECOMMENDED OPTIONS FOR PROTECTING THOSE MAKING PUBLIC INTEREST DISCLOSURES



unresolved whistleblower cases from the previous committee inquiry, and discussed the work of the CJC.[66]

South Australia was actually the first State to pass a *Whistleblowers Protection Act*, in 1993. That Act covers whistleblowing in both the public and private sectors and provides for a variety of people to whom a whistleblower can go with information.

NSW passed a *Protected Disclosures Act* in 1994. An earlier *Whistleblowers Protection Bill 1992* was widely debated[67] and criticisms resulted in the drafting of a second bill in 1992. That bill was considered by the parliamentary Legislation Committee, and subsequently an Act was passed in 1994.

ICAC are monitoring the impact of the *Protected Disclosures Act* through a four phase study—which is unusual, as it is being done concurrently with the legislation being introduced. Phase 1, which began in October 1995, was to estimate the proportion of public sector bodies which had implemented internal reporting systems and informed their staff about the Act. A questionnaire was sent to all NSW government agencies and local councils and an interim report was produced in April 1966. The conclusion was that seven months after the introduction of the Act, less than half of the NSW public sector had introduced internal reporting systems and only one third had informed their staff about the existence of the Act.[68] In June 1996 ICAC produced an interim report on phase 2, which involved interviews with NSW public sector agencies and local councils. The report concluded that organisations want to know about experiences of other agencies with the Act and need training and information. There is seen to be a need to explain the relevance of the Act. The Premier has advised ICAC that an interdepartmental committee will be convened to address the issues.[69] Phases 3 and 4 are expected to be completed late in 1997. Phase 3 involves interviews with people who have made disclosures, to discover their views about: the impact of the legislation on them; their organisation's handling of the disclosure; and ICAC's performance. The fourth phase is a survey of 1500 public sector employees chosen by random sample to discover their attitudes to corruption and their knowledge of the Act.

66 Chapter 4.
67 J Goldring, "Blowing the Whistle" (1992) 17 *Alternative Law Journal* 298.
68 ICAC, *Monitoring the Impact of the Protected Disclosure Act 1994—Phase 1*, Interim Report, April 1996 at16.
69 ICAC, *Monitoring the Impact of the Protected Disclosure Act 1994—Phase 2*, Interim Report, June 1996.

In 1996 the NSW Parliamentary Standing Committee on the Ombudsman recommended that the Act should be amended to include private sector organisations contracting with the NSW Government and its agencies and that a Protected Disclosures Unit should be set up in the Ombudsman's office to assist whistleblowers and internal witnesses/informants.[70] It has been argued that the lack of protection to private sector employees is a deficiency in the Act.[71] This proposal appears not to have been implemented by the Government.

ICAC, the NSW Audit Office and the NSW Ombudsman have issued guidelines on Internal Reporting Systems which set out the essential elements of such systems and the roles and responsibilities of employees and supervisors.

Meanwhile in Western Australia, the Commission on Government reported in December 1995 on whistleblowing. Its report outlined the existing system and examined whistleblowing as a means for the prevention and exposure of improper conduct in Western Australia. The Commission described the role of the WA Official Corruption Commission, which was established in 1989 and the recommendations of the WA Royal Commission. It proposed a Public Interest Disclosures Act.[72]

The ACT passed a *Public Interest Disclosure Act* in 1994. This originated as a private member's bill by Kate Carnell, the current Chief Minister. The Act provides a comprehensive system for disclosure and heavy penalties for victimisation of whistleblowers.

There has been activity in relation to whistleblower protection in comparable overseas countries. In 1986 the Ontario Law Reform Commission released a Report on *Political Activity, Public Comment and Disclosure by Crown Employees*, to which the EARC Report refers.[73] Legislation to give effect to the proposals was enacted in 1993.[74] In New Zealand, whistleblower protection legislation was reportedly tabled in November 1993, but I have been advised that it has not been passed.

I mentioned above the need to examine the links between FOI and the secrecy provisions in various Commonwealth Acts. At the same time the

70 *The Whistle*, January 1997 at 11 (http://www.uow.edu.au/arts/sts/ bmartin).
71 *Ibid*.
72 Commission on Government Western Australia, *Report No 2 Part 1*, December 1995, section 5.2.1.
73 EARC, *Report on the Protection of Whistleblowers* (1991) para 2.6.
74 Ontario Legislature, Bill 117 of 1993, amending the *Public Service Act*, to insert a new Part IV, "Whistleblowers Protection".

links to secrecy provisions need to be addressed, having regard to the work of the Gibbs Committee and Professor Finn. As Ian Cunliffe has said:

> The Australian and UK Official Secrets provisions have been criticised by courts and committees of inquiry over a long period in both the United Kingdom and Australia. However they still hang as a guillotine, waiting to decapitate public servants who leak, or "blow the whistle". Although they are rarely enforced, until whistleblowing legislation is in place a public servant must depend on prosecutorial discretion, public outcry and jury independence to avoid a long period as a guest of Her Majesty.[75]

The exposure of private sector corruption is just as important as public sector corruption, particularly in a community where services traditionally performed by public sector bodies are contracted out to private sector organisations. This has been recognised in some State legislation described above and needs to be addressed in any Commonwealth legislation.

Whistleblowers and FOI

The ALRC\ARC FOI Report has a section on "dob ins" under the discussion of the exemptions to protect the interests of third party information.[76] The Report acknowledged that "'dob ins' are part of the continuum of situations that range from police informers, to citizens' responses to appeals for information about breaches of the law, to whistleblowers". There is currently no government-wide protocol for how agencies should deal with these situations; such a protocol would be extremely useful. Agencies need to be vigilant about such information, particularly when it is anonymous.

I note in relation to the Immigration Review Tribunal that the *Migration Act 1958* (Cth) section 362A(2) provides:

> The applicant, and any assistant under section 366A, are entitled, subject to sections 375A and 376, to have access to any written material, or a copy of any written material, given or produced to the Tribunal for the purposes of the review.

Departmental files which come to the Tribunal sometimes include "dob in" information. Sections 375A and 376 of the Act allow for certain information to be disclosed to the Tribunal only and for Tribunal discretion in relation to disclosure of certain information.

75 Cunliffe, above n 65 at 19.
76 ALRC/ARC Report, above n 1 at para 10.20.

CONCLUSION

There has been considerable high quality analysis and extensive consultation on all the issues I have discussed. While there are also some difficult issues to resolve, such as the relationship between privacy, secrecy and FOI, and the exact terms of Commonwealth whistleblower protection legislation, the competing considerations have been clearly set out. Legislation is required to give effect to many of the recommendations that have been made, and it will be developed in the context of change.

Moria Scollay, the Privacy Commissioner, has said:

> In this information age, we find that we have less and less control over what others know about us—particularly large businesses and bureaucracies that see us as units rather than as individuals. More and more personal information is available, and its value, for both commercial and public interest purposes, is increasingly recognised. Advances in new technology are making it possible to aggregate data about individuals in ways that have never been possible before.

At the same time the role of government is changing. The Commonwealth government is reducing government functions to "core business", and government services are being outsourced. Where possible, operations are being amalgamated.

Governments have always held a great deal of information and there was, as Alan Rose has said, an "'ethos of secrecy' born of an attitude that views government-held information as the property of the government rather than of the people held in trust by the government".[77] This is changing too.

As technology is making more and more information available the challenge for freedom of information is to use the technology to make government information more accessible while at the same time drawing clear lines about privacy protection.

77 Rose, above n 23 at 7.

COMMENTARY: PROTECTION OF INFORMATION RIGHTS

Jack Waterford*

I do hope that I am not being uncharitable to Sue Tongue if I make the preliminary comment that her paper, which has amassed and presented such an array of detail on changing trends of government attitude to information rights, is somewhat restrained.

This may reflect that not only is administrative law in an entirely new and defensive mode but, for the first time in almost a generation, it has few open champions in the halls of government. It might even be dangerous to be one.

Even those who will give some grudging lip service are being quite muted—particularly those charged by the Administrative Arrangements with maintaining, defending and developing the law, such as the Attorney-General and his Department. If they will not defend the system, who else would dare? This is not only a problem with information laws, but extends across the administrative law regime.

We all know that the Howard Government has a new vision of public administration—one which is far more focused on outputs rather than on processes, which is anti-regulatory in spirit, and which is particularly interested in the opportunities of market testing and, if possible, outsourcing many traditional functions of government.

To some extent, it is inevitable that an accountability regime devised to sit alongside a previous system of administration should have to change too. Indeed, it is a fair criticism of some parts of administrative law that those who are charged with nurturing and protecting it have not adjusted as quickly as they might to some of the changing focuses of government. In particular, they have not looked at issues of efficiency as well as they might.

Be that as it may, it is a damnable lie to suggest that there is any fundamental hostility between, on the one hand, the notion of

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administrative law and a regime of public information and, on the other, the new modern meaningful and viable public service.

Indeed, one of the strongest arguments made by some of the apostles of the new models of public administration has turned upon the openness and accountability which has developed in public administration in recent decades, and the protections which this provides against abuse of power. So good have been these protections, some have argued, that there is no longer anything like the need for many of the detailed procedures of old. The argument can be seen in the relative openness to scrutiny, in many forums, of government decision-making. It can also be seen at the coalface of service delivery where, compared with several decades ago, what are now called clients have much more open access to their files, get access to detailed reasons for decisions more or less as a matter of routine, and where the policies, guidelines and general practices of agency functions, informed by a now large body of precedent and experience in administrative review, are open to public scrutiny.

Access to information about government, in short, is a servant of a more effective and efficient public administration, not an enemy of it.

For all of this we owe some debt to a conservative government of fifteen to twenty years ago: as Sue Tongue says, consumers are coming to take information rights for granted in their dealings with the public sector and, increasingly, may make similar demands on the semi-public and the private sectors.

That said, however, not much is happening at the moment which gives ground for complacency or optimism about further development. Indeed, I am beginning to suspect that we will be lucky if we can hold the line. It has been true that even while some of the apostles of change use words such as transparency, they continue to suggest that much of the panoply of administrative law, including information rights, is an expensive, inefficient and not very productive nuisance—an obstacle in the way of getting things done quickly.

In many of the agencies where this view is most widespread, the functions of the officials concerned have not involved much interaction with ordinary members of the public. Some of the more useful effects, in administrative terms, of having systems open to scrutiny and review have not been so obvious. In some cases, the openness of the new system has led some of these people into deep personal embarrassment, for example, about their travel allowance arrangements.

Another way of making the same point might be to say that the idea of FOI as a way of getting hold of documents concerned with policy formation or substantial government decision-making has never taken deep root, or had many admirers in the central government agencies. The ineffectiveness of FOI in this area has tended to be obscured by its more manifest success in giving thousands of ordinary citizens access to their own personal files and to files created while low-level and routine decisions were made about them.

It has long been remarked, and Sue Tongue has done so again today, that the enthusiasm of political parties for FOI-type legislation is strongest while they are in opposition. Whatever the protestations in its policy manifesto, the new government has already developed a pronounced cult of secrecy, the more vehement because not only does it have ambitions to change public administration, but because many sections of the government do not trust even their senior bureaucratic advisers.

When the recent Defence Efficiency Review was produced, it was first brought to Cabinet by the Minister for Defence, I am told, without its having been sighted by any bureaucrats, and without having the usual coordinating comments prepared by affected agencies. The Minister did not trust bureaucrats not to leak it. He, or some other ministers, might say that they have good reason to have such fears, though, in my opinion, the leaks from which they suffer are not much more than happens to any government.

In any event, as anyone with any experience of administration, especially from the pre-FOI days will tell you, the more one attempts to keep the lid on things, the more one creates an atmosphere of fear, suspicion, secrecy, conspiracy and recrimination. The more, not the less likely, it is that leaks will occur.

Sue Tongue has covered a wide field, too wide for picking up in every area, but I should like to pick up a few comments she has made about privacy and about information in the private sector. The relative success of FOI as a vehicle for getting access to one's own documents obscured the considerable ineffectiveness of FOI in disclosing information which might have assisted in policy debates, or in critical review of government action. Had there been a separation of personal and public information in the first place say, by putting one's personal rights in a Privacy Act and the other in an FOI Act, it is quite possible that we might still not have the latter today. There may now be some room for a bifurcation, because the relationship between a right to personal information and a right to public information

is still problematical. In some areas, it is now working to restrict access to information which should not only be public but which once was.

I could give a host of examples, but will restrict them in this paper. The public's right of access to court records, which record the public acts of police and other officials, is now seriously restricted by privacy principles. Whether this is a result of overzealous and over-safe application of supportable principles by junior officials or the implementation of what the Privacy Commissioner actually wants is not clear.

If it is the latter, then I would assert that it follows no public consensus about where the privacy line ought to fall, even though I accept that public attitudes to privacy rights—in and out of the public sector—go generally beyond what is presently in place. Professional journalists can still get access to running court files, but their capacity and that of the public to look over files is becoming more restricted. Police are now more reluctant to hand out routine details of events or incidents, and their reticence is often focused not merely on the protection of the identities of their "clients".

Some years ago, I recall my newspaper published details of an immigration review, including judgments which had named and dealt extensively with personal particulars of an individual who faced deportation. In the nature of that jurisdiction, the tribunal could only make a recommendation to the minister. Such a recommendation was made and when, in due course, we inquired of the Minister's office and the Department of the outcome, we were told that we could not be told under the privacy rules. I could not agree more with the comment quoted by Sue Tongue about privacy often being used as an excuse for secrecy and obstruction.

There are many difficulties in extending an FOI or a privacy regime into the general community, though I believe that the matter is being helped along by the debate over medical records, and by the proposal to outsource government information technology. With government IT, as with other contracting out, the principle of access must be maintained, though I have some attraction to the idea that the obligation should rest primarily upon the government agency which has done the contracting out, rather than upon the tenderer (even if that imposes some very strong contractual obligations on the parties).

Whether, in the wider field, including private sector data bases and medical records, the rights of members of the public are better protected by legislation or by voluntary regulative systems with Ombudsman-style enforcement is a matter about which one can debate. Here again, one

should separate the question of whether there ought to be privacy principles in operation—something upon which I think there is strong support—and the appropriate mechanisms for achieving it.

I must say, however, that I am uncomfortable with any idea that an access regime can simply be tacked on to an FOI Act. I think there are very important differences in principle between rights of access to official records and the records maintained by private bodies. If the principle is blurred, the effect may ultimately be to weaken official access. Without doubt, for example, some of those who argue that government is just another business and that its officials, or those to whom the work is contracted out, should be no more constrained than people in private business, will argue that FOI should be constrained to little more than a right of access to personal records. And they will find some way of compressing all of the other public interest exemption areas into a wide commercial-in-confidence exemption.

When one comes to form overall judgments, other signs must also be taken into account. The battle over the independence of Auditors-General, particularly in Victoria, raises not a few general questions of the attitude of some of the economistic zealots about transparency, and freedom of speech. The approach of the Commonwealth and the States to the very constitutional question of an implied right of freedom of political speech—and of how essential it is to proper discussion of the performance of public officials—is another which sends alarm bells ringing. I remain open-minded about some adaptation to change. One might forgive me, however, for taking as a starting point a very deep suspicion of the motives of those who are involved.

THE ROLE OF ADMINISTRATIVE LAW IN REGULATING PUBLIC SECTOR EMPLOYMENT

Phillipa Weeks*

The intersection of administrative law and employment law is a neglected field in Australian jurisprudence. Notwithstanding the size of the public sector workforce, labour lawyers have not generally pursued the distinction between public and private employment; they almost invariably treat private employment as the standard or norm, and devote just the odd passing remark to interesting variations in the public domain.[1] And public lawyers have not been overtly interested in the role of government as an employer, that is, they tend not to distinguish the employment activities of government from other administrative activities.

Against that rather barren background, then, this paper addresses the role of administrative law in regulating public sector employment under the Coalition Government.

In the employment context, as in others which are considered in this Conference publication, the concept of "public sector" is problematic. It has long embraced a range of institutional and organisational forms, but the diversity and complexity have been compounded by the contemporary wave of re-structuring. Processes such as corporatisation, privatisation, and contracting out re-shape the public sector, and remove areas of decision-making from the realm of administrative law, or reduce its impact; there are parallel effects on the work relationships involved.

These developments pose hard questions for labour law and administrative law. But hard questions are also being posed at the heart of the public sector, in the "public service", and this paper will concentrate on that area, focusing on the statement of the Coalition Government's policy in a Discussion Paper published in November 1996, *Towards a Best Practice*

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1 The notable exceptions are G Smith, *Public Employment Law. The Role of the Contract of Employment in Australia and Britain* (1987), and G McCarry, *Aspects of Public Sector Employment Law* (1988); periodical literature is scanty.

Australian Public Service.[2] A further report was issued in 1997 by the Public Service and Merit Protection Commission and the Department of Industrial Relations, *Accountability in a Devolved Management Framework*, "to set out, in broad terms, the proposed framework of a new Public Service Act",[3] and on 26 June the Government introduced the Public Service Bill 1997 into the House of Representatives.[4] This paper remains substantially as it was written—prior to the latest report and Bill—though the further developments have been noted where appropriate.

The paper begins with a brief account of the Government's policy, followed by commentary on three aspects which, through the prism of labour law, are striking: the tension between the distinctiveness of public sector employment and convergence of public and private employment law; the tension between limited employment security and the ethical values, standards and principles of public service; and uncertainty over the role and scope of administrative law.

THE COALITION GOVERNMENT'S POLICY

December 1996

The first page of the TBPAPS Paper announced that, in order to provide better government, the Australian Public Service (APS) has to undergo significant change. The change is to be performance-oriented, and performance will be measured against best practice in the private sector, which is competing with the APS for the delivery of government services. Put simply, "[t]he Government's goal is to improve the overall performance of the APS".[5]

The TBPAPS Paper then depicted "[t]he existing employment framework" as a major barrier to such improvement, and listed its manifold defects. At the top of the list was the "complex array" of outdated and rigid, cumbersome regulation through statutes, delegated legislation, awards and agreements, which "ties management of the APS in red-tape", has produced "a process-driven culture" and "an entitlement mentality", and

2 *Towards a Best Practice Australian Public Service*, Discussion Paper issued by the Minister for Industrial Relations and Minister Assisting the Prime Minister for the Public Service, November 1996 (hereafter "TBPAPS Paper").

3 Public Service and Merit Protection Commission and Department of Industrial Relations, *The Public Service Act 1997: Accountability in a Devolved Management Framework* (1997) (hereafter "ADMF Paper").

4 The Bill and the accompanying Public Employment (Consequential and Transitional) Amendment Bill 1997 were referred to the Joint Committee of Public Accounts for consideration and an advisory report. The Committee's *Report 353* was presented on 29 September 1997.

5 TBPAPS Paper at v.

is "a major inhibitor to innovation and best practice".[6] Equally condemned were the unrealistic assumptions on which the APS bases its approach to terms and conditions of employment—that the service is a uniform labour market, and that equity necessitates identical treatment of individuals—which have generated a commitment to prescription of universal and detailed rights of employees and, consequently, "a grievance mentality" and "conservative and cautious management".[7]

According to the Paper, in order that the APS embrace the best practice of contemporary management and benchmark its performance against the private sector, the Government "looks to reshape and reinvigorate" the service, and "shed the cultural baggage of the past".[8] In place of a Commonwealth-wide public service with strong centralised control, regulation of uniform conditions of employment and permanent appointment to a lifetime career,[9] the vision for the future is of a skilled, professional service in which a more flexible employment framework gives greater freedom to manage, and public servants have more autonomy and a more direct relationship with their employers, rather than being managed through rules, regulations and third party relationships.[10] The strategy is three-fold: legislative, industrial and cultural.

The first of those strategies—to re-write the legislative framework—is the most relevant to the theme of this conference publication, although there is clearly overlap with the second, the "industrial" agenda of simplifying APS awards and agreement-making processes.

The legislative strategy comprises three strands—"streamlining", "mainstreaming", and devolution.

Devolution means the transfer of responsibility from central to agency level, that is, increased powers and responsibilities for Secretaries.

"Mainstreaming" means making public service employment as much like private sector employment as possible. The language and frame of reference are transparent: the public service is distinguishable from "the wider community" and the "mainstream", and the difference is to be minimised. The TBPAPS paper signalled that provisions peculiar to the public service—including the concept of "office", so-called "permanent" employment, higher duties allowances, external review of selection

6 TBPAPS Paper at v–vi, 5–6.
7 TBPAPS Paper at vi, 15.
8 TBPAPS Paper at viii.
9 TBPAPS Paper at 14.
10 TBPAPS Paper at v, vii, viii.

processes, and mobility arrangements—warrant careful examination "to see if there are any reasons for their preservation".[11]

"Streamlining" means stripping down the regulation and prescription in the *Public Service Act*, in favour of an "enabling and facilitative" approach.[12] The Act should be "principles-based", describing and establishing the "core principles, values and characteristics which create the distinctive culture and ethos of the APS", in order to provide cohesiveness and "a clear unified framework within which the APS can carry out its distinctive roles and responsibilities".[13]

The TBPAPS Paper specified the "elements which may warrant inclusion" as:

- public service standards and ethical values;[14]
- the framework of public accountability; and
- employment principles, covering such areas as merit selection, equity, recognition of family responsibilities, participative work practices, and fair decision-making.[15]

Implementation of the new principles-based approach is to occur at two levels. First, Agency Heads will be given responsibility by the Act for maintaining the ethical standards, ensuring public accountability and promoting employment principles within their own organisations. Secondly, to balance the centrifugal force of such an arrangement, the Public Service Commissioner will set standards, by providing guidance, promoting good practice, and reporting to Parliament on the maintenance of APS values. The Commissioner will evaluate people management across the service, playing an important role in "ensuring the APS remains

11 TBPAPS Paper at vii.
12 TBPAPS Paper at 7.
13 TBPAPS Paper at 6, 7, 10; also vi.
14 Specifically, the highest standards of probity, integrity and conduct; a strong commitment to the community; responsiveness to governments; a strong commitment to accountability; a close focus on results; continuous improvement through teams and individuals; merit as the basis for achieving excellence in staffing; and the provision of fearless and independent technical advice and apolitical policy advice to the government, and impartial administration of legislation (TBPAPS Paper at 8–9). All but the last item on the list were drawn from MAB/MIAC, *Ethical Standards and Values in the Australian Public Service*, Report No 19 (1996). That Report elaborated on the content of each "value" at 35–36, and was endorsed by the National Commission of Audit, *Report to the Commonwealth Government, June 1996* (1996) at 91. The addition of the final item to the list in the TBPAPS Paper was apparently prompted by observations in a speech by the Prime Minister, reported in (1996) 80 *Canb Bulletin of Pub Admin* 1.
15 TBPAPS Paper at 7.

independent from political interference and that appointments and promotions are based on merit".[16]

The TBPAPS Paper addressed the bogey of administrative law in the context of proposing the "mainstreaming" of employment conditions.[17] Access to administrative law processes distinguishes public service workers, and while it was acknowledged that some—unspecified—avenues may be desirable, others were regarded as hindering personnel management through excess layers and overlap. Two specific problems were identified:

- because APS employment processes are spelt out in detail in the legislation, the APS is exposed to litigation on the ground that the legislation was not followed;[18] and
- internal statutory appeal rights in respect of promotion, discipline, redeployment and retirement produce a defensive, process-oriented style of personnel management; a grievance mentality focuses on the rights of individuals rather than systemic management issues.

Reform through reduced legislative prescription would reduce unnecessary and costly litigation. And the appropriateness and effectiveness of internal statutory appeal rights should be reassessed with a view to reducing the level of defensiveness and legalism, and overcoming cautious and conservative management. Merit is taken as an example: it should be a mandatory alternative to patronage, but should not be expanded into the notion of a compulsory universal search for the perfect employee.

It is appropriate to note that this approach of the Government is not radical; its provenance stretches back more than a decade to the restructuring of the employment framework under the Labor government,[19] and its immediate precursor was the McLeod Report of 1994.[20] The TBPAPS Paper is much shorter than the McLeod Report, lighter

16 TBPAPS Paper at 7, 9; ADMF Paper at 16–17.
17 TBPAPS Paper at 14–15.
18 The vice of this predicament—that government is subject to the law—was not explained.
19 Documented and evaluated in Task Force on Management Improvement, *The Australian Public Service Reformed: An Evaluation of a Decade of Management Reform, December 1992* (1993).
20 *Report of the Public Service Act Review Group, December 1994* (1995) (hereafter "McLeod Report"). There have been numerous other reports and reviews done by boards, committees, task forces and commissions in the past few years: Joint Committee of Public Accounts, *Report 323, Managing People in the Australian Public Service—Dilemmas of Devolution and Diversity* (1993); Task Force on Management Improvement (1993), above n 19; MAB/MIAC, *Accountability in the Commonwealth Public Sector*, Report No 11 (1993); MAB/MIAC, *Building a Better Public Service*,

on justification and rationale, and heavier on caricature, but it fits comfortably within the recent trends in public sector people management in the Commonwealth, and also in the States and abroad.

The Public Service Bill 1997[21]

The Bill by and large implements the policies of streamlining, mainstreaming and devolution which were proposed in the TBPAPS Paper. Measured in pages (36) and number of provisions (72), it is modishly slender. Inevitably some of the deleted matters will reappear in directions which the Public Service Commissioner is empowered to issue (albeit in simpler, less detailed form), and agencies will need versions of existing regulations and determinations made under the Act in order to deal with everyday conditions of employment.[22] To some extent, then, the streamlining is less dramatic than claimed (and imposes high transition costs). Nonetheless, in legislative style and form—and substance—the Bill breaks with tradition.

As promised, the APS Values are declared "[f]or the first time in Commonwealth public service legislation".[23] The values fall into two broad categories:[24]

- *essential characteristics of public service:* that it is apolitical, impartial and professional, accountable for its actions, and responsive to government, has the highest ethical standards (as articulated in the Code of Conduct in clause 13), and delivers services fairly, effectively, impartially and courteously to the public;
- *management principles and responsibilities:* that leadership is of the highest quality; that the service focuses on achieving results and managing performance; and that certain employment standards are adopted,

Report No 12 (1993); Public Service Commission, *People Management and Administrative Law, State of the Service Paper No 3* (1994); MAB, *Ongoing Reform in the Australian Public Service: An Occasional Report to the Prime Minister* (1994); Public Service Commission, *Report of the Public Service Act Review Group, Summary of Recommendations and Government Decisions* (1995); MAB/MIAC, *Achieving Cost Effective Personnel Services*, Report No 18 (1995); MAB/MIAC, Report No 19, above n 14; National Commission of Audit (1996), above n 14; MAB/MIAC, 2+2=5: *Innovative Ways of Organising People in the Australian Public Service*, Report No 20 (1996).

21 This section has been added to the paper as presented as presented at the Conference in May 1997 in order to keep the story up to date.

22 Public Service and Merit Protection Commission, *The Barton Flyer*, number 1997/1, 18 July 1997 advised agencies to begin preparing arrangements to take the place of the legislation and guidelines which will lose their force when the new Act is proclaimed.

23 *Public Service Bill 1997 Explanatory Memorandum* (hereafter "Ex Mem PSB") at 3.4.

24 Public Service Bill 1997 (hereafter "PSB"), clause 10.

specifically that employment decisions are based on merit,[25] that the workplace is discrimination-free, that diversity among employees is recognised,[26] that workplace relations are co-operative and based on consultation and communication, and that the workplace is fair, flexible, safe and rewarding.

Several of the Values hint at performance standards to be applied by management to employees, and these are explicitly set out in the Code of Conduct (clause 13), which is framed in terms of the obligations of "an APS employee", breach of which will render the employee liable to discipline under clause 15. The Code parallels, with some amplification, section 56 of the *Public Service Act* 1922 (Cth)[27] and regulations 8A and 8B of the *Public Service Regulations*.[28]

On devolution, the Bill provides that the primary employment relationship is between Agency Head on behalf of the Commonwealth as employer and APS employee at the agency level. Agency Heads are given "all the rights, duties and powers of an employer" (clause 20), so that they can tailor the terms and conditions of public servants' employment to the particular circumstances of the Agency and workplace.[29] As foreshadowed in the TBPAPS Paper, overarching cohesion will be principally the province of the Public Service Commissioner, who is required:

- to promote the APS Values and the Code of Conduct, and develop and promote employment policies and practices. Specifically, the

25 Specifically PSB clause 17 prohibits patronage and favouritism in engagement and other employment decisions, and PSB clause 19 prohibits ministerial interference in individual staffing decisions by Agency Heads.

26 PSB clause 18 requires Agency Heads to establish a workplace diversity program to assist in giving effect to the APS Values.

27 That provision defines, for the purposes of the discipline provisions, the grounds on which an officer is taken to have failed to fulfil the duty of an officer, including contravention or failure to comply with a provision of the regulations (including regulations 8A and 8B).

28 PSB clause 13 prescribes that an employee must in the course of employment behave honestly and with integrity, act with care and diligence, treat everyone with respect and courtesy and without coercion or harassment, comply with all applicable Australian laws, comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction, maintain appropriate confidentiality about dealings with any Minister or Minister's staff, disclose and take reasonable steps to avoid any real or apparent conflict of interest, use Commonwealth resources in a proper manner, not provide false or misleading information in response to a request for information that is made for official purposes, not make improper use of inside information or of the employee's duties, status, power or authority in order to gain or seek to gain a benefit or advantage for the employee or for any other person, behave in a way that upholds the APS Values and the integrity and good reputation of the APS, when on duty overseas behave in a way that upholds the good reputation of Australia, and comply with any other conduct requirement that is prescribed by regulations.

29 ADMF Paper at 7.

Commissioner will be required to issue Directions determining the scope and application of the APS Values (clause 11). The Explanatory Memorandum envisages that Directions will be issued "only … where it is deemed essential to establish a process framework within which Agency Heads must operate", and signals that there will be Directions issued on Merit in Employment and Fairness in Employment;[30]

- to inquire into and evaluate Agencies' performance in incorporating the Values and implementing the Code, and their employment policies and practices;
- to facilitate continuous improvement in people management throughout the APS, co-ordinate and support service-wide training and career development, and contribute to and foster leadership in the service;
- to inquire into whistle-blowing reports, alleged breaches of the Code of Conduct by Agency Heads, and any other matters relating to the APS; and
- to report on these evaluations and inquiries variously to the Public Service Minister, the Prime Minister and the Parliament, to which the Commissioner will also make an Annual Report including a report on the state of the Service.[31]

On mainstreaming, the Explanatory Memorandum for the Bill outlines the Government's policy that "the APS should operate, to the maximum extent consistent with its public responsibilities, under the same industrial relations and employment arrangements as apply to the rest of the Australian workforce".[32] Thus, public servants will be employees and will not hold offices;[33] and, as already noted, Agency Heads are given

30 At 3.7 and 3.5.4, 3.5.6. Other foreshadowed Directions concern procedures for dealing with whistleblowing reports, substantive requirements for Agencies' workplace diversity programs, employment matters relating to SES employees, internal review of employment related decisions and access to the *Commonwealth Gazette* (at 2.1.22, 3.19.3, 3.23, 4.50, 4.51). See also ADMF Paper at 12. Draft Directions were provided to the Joint Committee of Public Accounts for its consideration in conjunction with the Bill, and were discussed in the Committee's Advisory Report (above n 4).

31 PSB clauses 41–44. Other centralising mechanisms to be available include: written directions to Agency Heads by the Prime Minister relating to the management and leadership of APS employees (clause 21); Classification Rules made by the Public Service Minister (clause 23); determinations made by the Public Service Minister on remuneration and terms and conditions of APS employees (clause 24(3), (4)); and movement of excess employees from one Agency to another by the Commissioner (clause 27(1)).

32 Ex Mem PSB at 1.

33 "[T]he Bill is drafted without any use of the concept of office other than in relation to Agency Heads": Ex Mem PSB at 2.2.3.

comprehensive rights, duties and powers of employers. Thus, in addition to specified powers to engage persons as employees and determine the category of employment (continuing, fixed term or casual),[34] determine remuneration and other terms and conditions of employment,[35] assign duties,[36] and terminate employment,[37] the general powers will enable Agency Heads, without separate statutory authority, to establish appropriate employment and management arrangements, create administrative positions, determine arrangements in relation to resignations, require APS employees not to engage in outside employment without permission, deal with underperformance, and re-engage former employees.[38] Further specific powers may be prescribed by regulation, and it is envisaged that these will be powers "that are required to achieve consistency with the rights, duties and powers of an ordinary employer".[39]

Other mainstreaming developments include the removal of mobility provisions,[40] so that employees who wish to take up non-APS employment or statutory appointment will have to resign or seek leave from their agency,[41] and the reduced scope and incidence of external review.[42]

PUBLIC AND PRIVATE EMPLOYMENT—CONVERGENCE AND DIFFERENCE

The policy—and the Bill—contains a fundamental tension between, on the one hand, the aspiration to equate public service and private employment and, on the other, the recognition of the distinctiveness of public service work. This tension is exacerbated by an apparent indifference to, or misunderstanding of, the legal model of private sector employment.

The Government asserts the fundamental proposition that "the industrial and staffing arrangements for the public service should be essentially the same as those of the private sector",[43] so that the peculiar features of public

34 PSB clause 22. See Ex Mem PSB at 4.9.1–4.9.2.
35 PSB clause 24(1), (2). While bound by awards, certified agreements and Australian Workplace Agreements (AWAs) made under the *Workplace Relations Act 1996* and other statutes, Heads will not be further fettered by provisions such as those currently contained in the *Public Service Act 1922* and determinations made under s 82D on remuneration, fringe benefits, leave entitlements and hours of work. (See Ex Mem PSB at 4.11.1–4.11.8.)
36 PSB clause 25.
37 PSB clause 29.
38 Ex Mem PSB at 4.1–4.3, and Attachment A; also ADMF Paper at 5.
39 Ex Mem PSB at 4.4.
40 As in Part IV of the *Public Service Act 1922*.
41 ADMF Paper at 30. Transitional arrangements are proposed in the Public Employment (Consequential and Transitional) Amendment Bill 1997, and discussed in the Advisory Report of the Joint Committee of Public Accounts, above n 4 at Ch 11.
42 Discussed below, text to nn 76–81.
43 TBPAPS Paper at 5; see also Ex Mem PSB at 3.

service employment law (service-wide terms and conditions and centralised control, detailed legislation and regulations, and the overarching role of administrative law) should be stripped away. At the same time it also acknowledges "the distinctive roles and responsibilities" of the public service, supports statutory articulation of the principles and values which create the "distinctive culture and ethos" in the workers, and nominates employment principles such as merit selection, recognition of family responsibilities, co-operative workplace relations, and fair decision-making as providing a "clear unified framework" for the APS.[44]

In juggling these conflicting tendencies, the Government's strategy is to enhance management power while reducing the rights and protections of workers. Thus, a Code of Conduct is introduced, prescribing "legally enforceable"[45] obligations of employees engaged in public service, while management is liberated from prescription—the enforceable procedures for selection and recruitment, promotion, discipline, termination and so on in the *Public Service Act 1922* (Cth)—and from external appeal processes. The Bill subjects employees to sanctions for breach of the Code of Conduct, and to dismissal with or without cause, but effectively takes away the mechanisms by which employees would enforce on management the distinctive employment standards of the public service which are included in the APS Values. Agency Heads are required to "uphold and promote"[46] the merit principle, non-discrimination, consultation, fairness and flexibility, subject only to the guidance, monitoring and reporting of the Public Service Commissioner, and to toothless review on complaint by employees.[47] There is clearly a policy to render unenforceable and non-justiciable the employment principles which protect employees, while confirming the enforceability of those principles which impose duties on employees.[48]

And here is the essence of the "mainstreaming" strategy: it is not acknowledged in the Paper that in private sector employment, now the model for the public sector, there is little scope for universal enforcement—by employees or applicants—of merit, equity, participation, fairness and family-sensitivity.

44 TBPAPS Paper at 6–7; "the distinctive character of public administration" was also noted in the ADMF Paper at 8.
45 Ex Mem PSB at 3.12.
46 PSB clause 12.
47 Review is discussed in the section "Administrative law" below, text to nn 76–81.
48 It is notable that in response to the recommendation in the McLeod Report, above n 20, that certain principles of employment be stated in the *Public Service Act 1922*, the Labor Government signalled its agreement, "providing that the replacement legislation includes a legal effect clause which provides that these principles do not create or affect legal rights"—Public Service Commission (1995), above n 20 at 9.

The employment relationship is contractual. "Best practice" employers may well negotiate contracts with their employees which by express terms provide for merit-based, fair, equitable and consultative decisions about work issues. But they are not obliged to make such contracts. And terms which are implied by law in all contracts of employment tend to sanction managerial prerogative and employee subordination. These terms impose on employees duties of obedience[49] and fidelity,[50] and even perhaps a positive duty of cooperation,[51] and the obligations may extend to affect the employee's activities and self-expression beyond the workplace and working hours. That is not to say that employers are unregulated. They are bound by awards and agreements made under industrial legislation to pay certain wages and provide certain conditions, including for example, family care leave. They are also bound by other statutes dealing with working conditions like superannuation, long service leave and occupational health and safety.

Subject to minor qualifications, however, these awards and statutes do not impose on employers an obligation of fairness and do not institute merit as the basis for employment decisions.

One qualification derives from anti-discrimination statutes, enacted in the past 20-odd years, which prohibit prejudicial decisions and practices based on certain personal characteristics of the employee. Another lies in unfair dismissal law, which has recently made some inroads on the virtually unfettered power of employers to terminate employment. State industrial tribunals have been enforcing substantive and procedural fairness on employers, in discretionary arbitration mode for up to 25 years. In a brief period, from March 1994 to the end of 1996, there was under federal legislation a regime which applied generally to employees up to the wage level of approximately $60,000 per annum and conferred rights to a fair and reasonable termination. The Workplace Relations legislation has, however, converted this rights-based scheme to the discretionary

49 The duty to obey the lawful and reasonable commands or directions of the employer was recently discussed by Finn J in *McManus v Scott–Charlton* (1996) 140 ALR 625.

50 A duty to render faithful service to the employer and refrain from wilfully damaging the employer's interests. For example: "Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground for dismissal …" (*Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 81 (Dixon and McTiernan JJ)).

51 *Secretary of State for Employment v ASLEF (No 2)* [1972] 2 QB 455; *Ticehurst v British Telecommunications plc* [1992] IRLR 219.

arbitration model in which the test is "a fair go all round".[52] According to the author of that test, Justice Sheldon in the NSW Industrial Commission, this means doing "*industrial* justice", that is, weighing all the circumstances, including the employer's right to manage.[53] Termination of employment is discussed further in the next section.

A further qualification arises in common law, rather than legislation. English courts are prepared to contemplate a duty of reasonableness or respect on the employer's part as an implied term of all contracts of employment. The duty has most force in the situation of termination of employment, and has been narrowly confined in other contexts of the employment relationship.[54] Australian courts have only recently, and tentatively, recognised the duty.[55] There is no suggestion in the caselaw that a duty is owed to applicants for employment, nor that there is a duty to consult or negotiate with employees over terms and conditions, nor an obligation to provide natural justice in decisions to promote, or transfer, or to allocate duties or privileges.

In summary, private sector employment law barely recognises, still less protects, the standards and values which are regarded as essential to public sector employment, and which are enforceable only because of detailed legislative prescription and the administrative law package of merits review and judicial review.

The argument being made here is not that a re-write of the *Public Service Act* and immunity from administrative law will transform the culture, and overnight turn public sector managers into exploitative, arbitrary and tyrannical employers. Rather, the argument is that a shift to an employment regime of unenforceable "values" inevitably jeopardises the

52 Note there is still a limited scope for enforcing rights (such as the right to a specified period of notice, and the right not to be terminated for a prohibited reason), but this procedure is not expected to be of practical importance.

53 *Re Loty and Holloway and the Australian Workers Union* [1971] AR(NSW) 95 at 99, emphasis added.

54 *Bliss v South East Thames Regional Health Authority* [1987] ICR 700; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] IRLR 66; *Scally v Southern Health and Social Services Board* [1991] ICR 771; *Reid v Rush & Tompkins Group plc* [1989] 3 All ER 228. See discussion in W Creighton, W Ford and R Mitchell, *Labour Law Text and Materials* (2nd ed 1993) at 9.17–9.25; B Creighton and A Stewart, *Labour Law—An Introduction* (2nd ed 1994) at 868–870. A recent decision of the House of Lords, *Malik v Bank of Credit and Commerce International SA* [1997] 3 WLR 95, does however suggest a broader operation of the duty. It was held that the conduct of a business in a corrupt or dishonest manner is a breach of the general obligation not to engage in conduct likely to destroy or seriously damage the degree of trust and confidence the employees were reasonably entitled to have in their employer.

55 *Byrne v Australian Airlines Ltd* (1994) 120 ALR 274 at 334–337 (Gray J), but note that on appeal the High Court made no acknowledgement of this view—(1995) 185 CLR 410; *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 (Full Court, Industrial Relations Court of Australia).

values. Merit, equity, and fairness involve costs, and in an era when economic considerations dominate public policy and the public sector budget is shrinking, those values must be vulnerable to compromise, if not generally and uniformly, then in particular instances.

Of course there is no dazzling insight here, merely a revelation of the shadow behind the Government's policy, which is an employer's perspective notwithstanding the rhetoric which purports to distance government from management. Hidden from view in the bright light shone by the TBPAPS Paper, the ADMF Paper and the Bill is the impact on employees, and on the community which, as Public Service Commissioner Shergold noted in an address in late 1995, retains a commitment to a differentiated public service.[56]

EMPLOYMENT SECURITY

There is no doubt that a key characteristic of the private sector employment model which the Government covets is the freedom to hire and fire.[57] The TBPAPS Paper avoided direct and focused analysis. Instead, there was talk of "flexibility", "accessing the full opportunities available under the system which regulates employer-employee relations",[58] examining "permanent" employment carefully "to see if there is any reason for … preservation",[59] and of the possibility of introducing contracts for the Senior Executive Service with fixed term or notice provisions.[60] Current arrangements were disparaged for discouraging the development of staff skills which are marketable outside the APS, and there was a cryptic reference to "barriers to entry to the APS which discourage a more open outlook".[61] Probably the most disingenuous remark in the Paper was that those who join the APS in the years to come, after reform, will not be obliged to choose a career for life.[62] The closest the Paper came to candour was to quote from the National Commission of Audit's recommendation to the Commonwealth Government in mid-1996 that "hiring and firing arrangements … be governed by those arrangements applying to the rest of the workforce".[63]

56 P Shergold, "Integrating Traditional Values with Newer Management Approaches" (1996) 79 *Canb Bulletin of Pub Admin* 1.
57 An excellent account of legal issues relating to security of employment in the public sector is in G McCarry, "The Demise of Tenure in Public Sector Employment" in R McCallum, G McCarry and P Ronfeldt (eds), *Employment Security* (1994) at 138–162.
58 TBPAPS Paper at 16.
59 TBPAPS Paper at vii, 14.
60 TBPAPS Paper at 12.
61 TBPAPS Paper at 14.
62 TBPAPS Paper at 22.
63 TBPAPS Paper at 16.

Not only did the National Commission of Audit explicitly endorse "greater use of contract based employment, including for fixed terms, especially for senior public servants, and also for public servants more broadly", but it also openly acknowledged the objection that fixed term contract employment could lead to a less independent service.[64] Its defence was somewhat thin: it noted the lack of evidence of such problems in other jurisdictions, and expressed its faith that the strategy of specifying fundamental principles, values and characteristics for the APS in a new *Public Service Act* would reinforce the need for an apolitical service. The risks of the latter approach have been discussed above.

The ADMF Paper and the Bill reveal significant policy developments: Agency Heads will be free to appoint employees on a continuing or temporary basis, for a fixed term or as casuals, and will have power to terminate employment.[65] It is assumed that employees other than Agency Heads, SES employees, and employees terminated for machinery of government reasons, will have recourse to the termination of employment provisions under the *Workplace Relations Act 1996* (Cth).[66]

Assuming that the unfettered power to terminate set out in a later statute would, on the evidence of parliamentary intention, not be interpreted as being inconsistent with the provisions on unlawful and unfair dismissal in the *Workplace Relations Act 1996*,[67] there is nonetheless a significant hole in the safety net for public service employees which has not been acknowledged. That is, fixed term employees are excluded from challenging their termination under the *Workplace Relations Act 1996*; a fixed term employee, dismissed before expiry of the term on grounds, for example, of misconduct or redundancy, or change of government, or for no explicit reason, cannot seek redress.[68] And the category of excluded casual

64 National Commission of Audit, above n 14 at 84.
65 PSB clauses 22, 29; ADMF Paper at 24, 29.
66 Ex Mem PSB at 4.24–4.27.
67 A note to PSB clause 29 refers to the "rules and entitlements that apply to termination of employment" under the *Workplace Relations Act 1996*, and clauses 38, 52(4), 60(3), and 65(3) expressly exempt some terminations from the operation of that Act.
68 Reg 30B(1)(a), (b); the regulation previously exempted only short-term fixed term employees. Note that *Andersen v Umbakumba Community Council* (1994) 126 ALR 121 held that a contract for a specified term but with provision for earlier termination by notice is not a fixed term contract. It might be thought that the provision in PSB clause 29 allowing an Agency Head to terminate with notice at any time would have the same effect as an express contractual term for the giving of notice, but it is arguable that, according to the High Court's reasoning in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, the provisions of a statute (in this case clause 29) are not automatically imported into a contract, with the result that the Australian Industrial Relations Commission and the Federal Court, exercising jurisdiction under the *Workplace Relations Act 1996*, would be obliged to take the fixed term contract at face value and deny standing to an aggrieved former employee.

employees has been broadened. For these public servants, as well as Agency Heads and SES employees, something akin to the prerogative power to dismiss at pleasure has been reinstated by stealth.[69]

Given the importance for Government policy of creating flexibility on types of employment arrangement, and the risks for employees, it is regrettable that there has been no discussion of parameters and guidelines for the adoption of fixed term contracts and notice provisions.

It is also appropriate to note that in September 1995 a significant step towards mainstreaming occurred when review of terminations under the *Public Service Act 1922* by the Merit Protection Review Agency (MPRA) was removed,[70] leaving staff aggrieved by dismissal or involuntary retirement to pursue remedies under the then *Industrial Relations Act 1988* (Cth).[71] There is little evidence on the effects of this measure. In its 1995–96 Annual Report, the MPRA recorded an impression, based on the continuing high level of work for Disciplinary Appeal Committees, that departments and authorities may have modified their approach to discipline by imposing penalties other than dismissal in order to avoid the unfair dismissal provisions.[72] It is another matter whether the general dismissal provisions in fact would produce different outcomes, or provide preferable procedures and remedies for the dismissed employees or the Commonwealth than the specialised review mechanism.[73]

Those questions have been overtaken, however, by the changes to the unfair dismissal law made by the Workplace Relations legislation noted briefly above. Whereas under the *Industrial Relations Act 1988*, certain

69 Whether there would be a common law remedy for wrongful termination, that is, for breach of a continuing or fixed term contract by the employer, would depend on the interplay of contract, statute and possibly prerogative, and consideration of the *Suttling* litigation—*Suttling v Director-General of Education* (1985) 3 NSWLR 427 (Court of Appeal) and *Director-General of Education v Suttling* (1987) 69 ALR 193 (High Court). The Ex Mem PSB at 4.26 states: "The power to terminate at any time cannot be restricted by an agreement between the Agency Head and the employee. However, such an agreement could deal with, for example, compensation for early termination of a fixed-term engagement."

70 "Continuous Improvement in the Australian Public Service Enterprise Agreement 1995–96", clause 11(f)–(h) and Schedule 1 of Attachment F. The Agreement was a certified agreement made under the *Industrial Relations Act 1988*, and as provided in s 121, overrides inconsistent federal statutes. (At the time the definition of "Award" in s 4(1) of the Act included certified agreements.)

71 Previously public servants did had the option of pursuing relief under the *Industrial Relations Act 1988*, since the Industrial Relations Court of Australia had determined that they were not precluded under s 170ED by the availability of an adequate alternative remedy: *Maggs v Comptroller General of Customs* (1995) 128 ALR 586.

72 Public Service and Merit Protection Commission, *Annual Report 1995–1996* (1996) at 75. It was also noted that departments and authorities appeared to be happy to have involuntary retirement matters dealt with under the unfair dismissal provisions.

73 The MPRA could not, for example, order compensation in lieu of reinstatement.

terminations were rendered unlawful by virtue of clear prescriptions and prohibitions, and remedies were available as of right from a court exercising judicial power, under the *Workplace Relations Act 1996* the dominant procedure is for review of the unfairness of a termination by an industrial tribunal exercising conciliation and arbitration powers. Not only is the issue of unfairness a matter for the balancing of various factors,[74] but the availability of a remedy is discretionary, even where unfairness is established.[75] The impact of this general reform of termination law on public sector employment was not canvassed in public debate, even though the new regime provides materially less protection for employees than that in place when the initial step was taken in 1995.

Given the undermining of security of public service employment engineered by the Bill in the interests of flexibility and efficiency, there ought be explicit consideration of the inherent risk of undermining the values of independence and impartiality.

ADMINISTRATIVE LAW

The TBPAPS Paper undoubtedly favoured a contraction of the role of administrative law, or even its removal. The analysis was, however, vague and superficial, and it was not even clear what was envisaged by "administrative law" in the employment context.[76] To catalogue the various components—merits review (by the MPRA and the Administrative Appeals Tribunal), ombudsman review, access to government information and privacy restrictions on the use of information, prohibitions against discrimination, and judicial review[77]—is to expose the inadequacy of rough generalisations about "administrative law", and also to indicate the range of options which the Coalition Government might consider in its drive to replace prescriptive regulation with principles-based legislation and to curtail, if not abolish, appeal rights.

Specific proposals (over and above the removal of substantive and procedural statutory fetters on staffing decisions such as engagements, probation, promotions, transfers, redeployment, retirements, suspension, terminations, leave of absence, mobility and re-integration[78]) were advanced in the ADMF Paper:

- agencies would be required to resolve grievances at the workplace level by investigation and conciliation;

74 *Workplace Relations Act 1996* s 170CG(3).
75 *Workplace Relations Act 1996* s 170CH(2).
76 The McLeod Report, above n 20, in contrast, provided very detailed proposals.
77 See Public Service Commission (1994), above n 20 at 1–2.
78 ADMF Paper at 7.

- external review would be by way of referral of the matter to the Commissioner by an employee who remained aggrieved;
- the Commissioner would be responsible for the "streamlined external review process", and may approve independent reviewers;
- through, for example, agreement making under the *Workplace Relations Act 1996*, these reviewers might be used by agencies to carry out initial consideration of grievances and thereby eliminate one tier in the process and provide more timely resolution;
- external review would be limited to making recommendations rather than independent decision-making, but the Commissioner would have power to report on unsatisfactory cases to the Minister or Parliament;
- decisions on termination of employment would be within the exclusive jurisdiction of the Australian Industrial Relations Commission and the Federal Court under the *Workplace Relations Act 1996*;
- all existing appeal rights in the current *Public Service Act 1922* would be repealed, and accordingly the *Merit Protection (Australian Government Employees) Act 1984* (Cth) would be repealed; and
- changes to the statutory employment framework would reduce if not eliminate judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[79]

Little of this scheme has been detailed in the Bill. Clause 33(1) simply states that

> An APS employee is entitled to review, in accordance with the regulations, of any APS action that relates to his or her APS employment.

The substance of the scheme will be presented in regulations,[80] and the Explanatory Memorandum foreshadows that the new Public Service Regulations will make provision for an Ombudsman-type review scheme as outlined in the ADMF Paper.[81]

79 ADMF Paper at 20–21.

80 PSB clause 33 makes provision for the regulations to prescribe exceptions to the entitlement to review, and to provide for "the powers available to the Commissioner, or any other person or body, when conducting a review under the regulations".

81 Ex Mem PSB at 4.41.6. It also signals the categories of exclusion: frivolous or vexation applications; matters covered by dispute settling procedures under certified agreements or other statutory review processes; employment matters relating to the Senior Executive Service and Agency Heads, and locally engaged employees overseas, and to appointment of Heads of Mission; and matters currently excluded from review such as classification of positions, fixing of salary rate and terms and conditions, security, compensation or superannuation entitlements (at 4.41.5). Draft Regulations (and revised versions) were provided to the Joint Committee of Public Accounts for its consideration in conjunction with the Bill.

The Government's policy is, then, to abolish merits review. Apart from the very confined area of unlawful (as opposed to unfair) termination, there is to be no mechanism for guaranteed legal redress of substantive or procedural wrongs committed against APS employees, that is, for breach of the APS Values such as the merit principle and fairness in the workplace. Will there be ultimate, if risky and expensive, redress in the courts? The Government's expectation is that judicial review will also be curbed.

Consideration of judicial review raises profound and complex issues of administrative law, in particular:

- would decisions made by reference to "Values", "Directions" and "guidelines" set out in, or authorised by, a Public Service Act be reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), or under the prerogative writ procedures in the event that, say, employment decisions were exempted from the operation of the AD(JR) Act[82]?
- could APS employment decisions be immune from judicial review because they are contractual in nature rather than an exercise of public power?

The first question may well be answered affirmatively,[83] considering decisions such as *Chittick v Ackland* and *Mair v Bartholomew*,[84] especially in light of the status of the Commissioner's Directions as disallowable instruments, with which Agency Heads and APS employees are obliged to comply.[85] But if the legislation is construed as making the "Values", "Directions" or "guidelines" unenforceable, then it may be difficult for an aggrieved public servant or former employee to establish a ground of review, apart perhaps from breach of natural justice.[86]

The second question contemplates a transformation in the legal framework for APS employment, such that employment decisions are no longer regarded as statutory in character. While it is no bar to judicial review that the government action in issue is a prerogative or common law power,[87] it

In its Advisory Report (above n 4), the Committee expressed concern at the level of dissatisfaction with the proposed regulations and recommended redrafting (Ch 9).

82 As recommended in the McLeod Report, above n 20 at para 6.75.

83 In the case of the *Administrative Decisions (Judicial Review) Act 1977*, it would be necessary to establish that the decision was made "under an enactment" (s 3).

84 (1984) 1 FCR 254 and (1991) 104 ALR 537; but compare *Australian National University v Lewins* (1996) 138 ALR 1.

85 PSB clause 42(2), (3).

86 M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) at 143–152.

87 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 219–221 (Mason J, supported by Wilson J at 282–283); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Coutts v Commonwealth* (1985) 157 CLR 91 at 99–100 (Wilson J); *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987)

is necessary to establish that there is an issue of "public law".[88] Aronson and Dyer outline the rationale for the reluctance of courts, whether at common law or under the *Administrative Decisions (Judicial Review) Act 1977*, to supervise government contracting:

> Judicial review, it is said, lies only to supervise "public power", whose essence is its non-consensual quality. Contracts, no matter how great the inequality of the parties, establish a consensual regime of rules, a private statute.[89]

As they note, there is a body of English caselaw applying this rationale to public sector employment, in which the courts have denied judicial review where there was no statutory underpinning to the contract of employment between the public authority and the workers.[90] In contrast, judicial review was extended to engagement in the civil service and prisons,[91] where there was no statutory underpinning, but also, more importantly, no contractual relationship.

If contract were to be determinative as to the application of public law, then in the absence of statutory underpinning, employment decisions in the APS would not be reviewable—because the relationship between Crown and servants in Australia has since early days been regarded as contractual. This, like other anomalies, reveals the inadequacy of the contract/public dichotomy and necessitates the development of a more principled analysis of "public law" in the employment context.[92]

At base the issue is whether, and why, public law should apply to public employees—whether, as the TBPAPS Paper asserts, there is "less good reason" for administrative law to be available to APS employees than to Australian citizens in their dealings with government.[93] Tinkering has been underway for some time—initially with selection, then promotion, and more recently with termination.[94] The TBPAPS Paper's stance reflects

15 FCR 274; *Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121. (There are other cases noted by Aronson and Dyer, above n 86 at 157–158. Note that the *CCSU* case and *Coutts* involved employment issues.)

88 And that the subject-matter is justiciable: Aronson and Dyer, *ibid* at 156–161.

89 *Ibid* at 177.

90 The leading case is *R v East Berkshire Health Authority; Ex parte Walsh* [1985] QB 152.

91 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *R v Secretary of State for the Home Department; Ex parte Benwell* [1985] QB 554.

92 S Fredman and G Morris, *The State as Employer. Labour Law in the Public Services* (1989) at 268. The same argument can of course be made for other contexts. See Aronson and Dyer, above n 86 at 178 ff.

93 TBPAPS Paper at 14.

94 Review of selection was removed during the Fraser administration. The *Public Service Legislation (Streamlining) Act 1986* (Cth) abolished promotion appeals for positions at or above the classification of Senior Officer Grade C. On termination see n 70 above.

a mood or trend which is broadly based and influential, and which threatens the scope of administrative law available to the citizenry.[95] There are, nonetheless, some voices of resistance.

In its last Annual Report the MPRA, admittedly an interested party, put the case for maintaining external review "as both a safety valve for staff, and a constraint on capricious public sector management":

> In order to ensure continuing high standards of accountability of the Australian Public Service, the independent review role of the Merit Protection and Review Agency becomes more, not less, central to retaining the high standards of administration the Australian people are entitled to expect from their public servants.[96]

The leading legal academic commentators on English public sector employment have argued:

> It is true that in some respects, the State as employer is acting in the same way as private employers. However, there is a crucial difference. Public employers, unlike private employers, can only exercise their function as employer if empowered to do so by statute or prerogative. They are therefore exercising public powers and should be subject to the supervisory jurisdiction of the courts.[97]

From the Federal Court in a recent case has come an eloquent depiction of the special character and role of public sector employment law:

> [T]here are interests and values beyond those relating merely to bare matters of employment which the Crown has the right or the obligation to protect. … [T]he obligations imposed upon public servants and the powers given the Crown as employer do not all exist merely for employment-related purposes. Some are designed to preserve and promote other public interests. … [P]ublic service legislation served—and serves—public and constitutional purposes as well as bare employment ones. This is not at all surprising given (i) that such legislation provides for the marshalling of the human machinery to implement the exercise of executive power constitutionally vested in the Crown, and hence facilitates government carrying into effect its constitutional obligation to act in the public interest … ; and (ii) the distinctive position as public officers that public servants in consequence occupy … in our

95 Pressures to reduce the availability of administrative law to citizens generally are outlined in another paper in this publication, R Creyke, "Sunset for the Administrative Law Industry? Reflections on Developments under a Coalition Government".

96 Public Service and Merit Protection Commission, *Annual Report 1995–1996* (1996) at 69.

97 Fredman and Morris, above n 92 at 270.

> governmental order. … From 1862, Australian public service legislation has imposed strictures and limitations upon the employment and non-employment (or private) conduct and activities of public servants. … It seems clear that some number of these strictures and limitations were—and are—not designed merely to serve the purposes of the employment relationship as such. Rather, for reasons of governmental and public interest, their object includes securing values proper to be required of a public service in our system of government and, in particular, the maintenance of public confidence in the integrity of the public service and of public servants …[98]

Finally, an American scholar reminds us that retention of the public law component of public sector employment law does not inevitably undermine the mission of improving the performance of the public service:

> To many, especially those who are familiar with private sector personnel administration, it is difficult to understand why public employees should be treated any differently from private sector employees. … The answer is simple. It is because their employers are governmental entities …
>
> Some may contend that under the existing civil service regulations, it is difficult, if not impossible, to dismiss unproductive employees … [and that] due process protection … completely ties the hands of public personnel managers. There is an element of truth in this argument; the due process of law can slow down personnel administration, forcing public managers to compromise the principle of efficiency. This is not a trivial issue. Yet one should note that an equally—if not more—important value in public administration is that public employers "do it right", even if it is a little slow and costly. When government is allowed to deviate from what is right and fair, it creates a possibility of tyranny … In this sense, one should not dwell upon a view that the due process protection ties the hands of public managers, but rather find ways to improve efficiency within the [legal] framework.[99]

Much of the inefficiency, complexity and duplication in APS employment, against which the TBPAPS and ADMF Papers rail, can be addressed without dismantling the distinctive legal framework for public sector employment, in particular the "statutory underpinning" and the safety-net of administrative law.[100] As observed in 1993 by the Joint Committee of Public Accounts of the Commonwealth Parliament, there remains

98 *McManus v Scott-Charlton* (1996) 140 ALR 625 at 630, 631, 632 (Finn J).
99 Y S Lee, *Public Personnel Administration and Constitutional Values* (1992) at 25–26.
100 The term "safety-net" is deliberately chosen, but not for the sense in which it is currently being used in industrial relations and industrial law to refer to a floor of minimum pay and conditions above which bargaining will operate.

enormous scope for the modernisation, consolidation and simplification of the legislative and administrative framework for management in the APS.[101]

101 Joint Committee of Public Accounts (1993), above n 20 at 21. See also MAB/MIAC, Report No 18, above n 20.

PRIVATISATION AND CONTRACTING OUT— WHERE ARE WE GOING?

Hannes Schoombee*

"Privatisation and contracting out" has an obvious link with administrative law under the Coalition Government. The Government's thinking seems best epitomised in a 1996 discussion paper, *Towards a Best Practice Australian Public Service*[1] that stressed best practice, out-sourcing, bench-marking, strategic risk management, contestability, user pays and market testing. The move towards privatisation and contracting out began under Labor but is probably pursued with greater conviction by the Coalition.[2]

My topic is obviously very broad and to keep this paper within reasonable limits I will concentrate on some of the main questions raised in the recent Administrative Review Council (ARC) Issues Paper, *The Contracting Out of Government Services*.[3] I intend to focus particularly on the availability of mechanisms by which the public can call to account the delivery of services contracted out by a government agency to a service provider operating in a non-governmental capacity, like a commercial corporation. Where the contractor happens to be an "in house" governmental unit or entity, public law controls may apply to it by reason of its governmental status.[4] Even so, the fact that the service is delivered under a contract rather than a statute would tend to reduce the applicability of public law controls. Where the contractor acts as the agent or delegate of a government body, rather than as an independent contractor, the government can be held accountable for the contractor's actions. This would, however, be the exception rather than the rule. It is also possible that the legislation under which a function is

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1 *Towards a Best Practice Australian Public Service*, Discussion Paper Issued by the Minister for Industrial Relations, November 1996.

2 See P Shergold, "Administrative Law in the Changing Public Service Environment" (1996) 10 *AIAL Forum* 4 at 5.

3 Administrative Review Council, *The Contracting Out of Government Services*, Issues Paper (1997).

4 *Ibid*, Appendix B.

being discharged may deem the contractor a statutory authority for certain purposes, to make it subject to public law controls.[5]

Service delivery by contracting out has a strong private law flavour, because the operative instrument for the service provider is the out-sourcing contract with government, rather than a statute. Nor does the service provider have the general trappings of a governmental body. There may, nonetheless, be some statutory controls or licensing condition on the service arrangement. An example is the framework for contracted case management established by the *Employment Services Act 1994* (Cth). Sections 175 and 58 of the Act empower ESRA, the government regulator and contracting party, by injunction to enforce statutory conditions of accreditation and out-sourcing agreements.

There has perhaps been a tendency for commentators to concentrate on the position at Commonwealth level. Yet the problems raised by privatisation and contracting out may be more acute at State level, especially as in some States there appears to be little governmental concern about accountability or systematical coherence. In States like Western Australia, privatisation and contracting out also occur against the background of a State administrative law system that has neither a general administrative appeals tribunal, nor an equivalent of the *Administrative Decisions (Judicial Review) Act*. Moreover, the privatisation of prisons, which raises acute issues in the present context, has been occurring at State level only.

The accountability problems raised by contracting out have been noted in the ARC Issues Paper. To contextualise the discussion, I shall refer briefly to the main problems.

Contracting out gives rise to a triangular relationship between, firstly, the government body which does the out-sourcing and acts as a "purchaser" of the services; secondly, the party contracting with the government (referred to herein as the "service provider"); and, thirdly, the members of the public to whom the service is delivered (referred to herein as the "recipients").

Dissatisfied recipients dealing with a service provider will tend to find themselves without public law remedies against either the government agency or the service provider, and may also have very limited private law remedies against those parties. There may not be a contractual nexus between the service provider and the recipient. Or the contract between the

5 *Eg* Victorian *Corrections Act 1986* (see ARC Issues Paper, above n 3 at 68, n 109). Compare ss 38(6) and 39(8) of the *Employment Services Act* 1994 (Cth): the Employment Secretary can delegate certain powers to (private) case managers.

government agency and the service provider may be very difficult to establish if the recipient, for instance, seeks to rely on the legislation in Queensland and Western Australia that provides for the enforcement of contracts for the benefit of third parties. Even where some contractual relationship could be established (for example, where the recipient makes a payment for the service), the relationship may be skeletal and its contents ill-defined: there may be nothing explicit about when services may be terminated, or whether a duty to act fairly applies to such termination.

In some statutory contexts such as the *Employment Services Act*, the service providers (styled "contracted case managers") are required to enter into agreements (termed "case management activity agreements") but the enforceability of those agreements in private law may not be straightforward. Even where the recipient may have contractual rights against the service provider, the enforcement of an appropriate contractual remedy in court would tend to be difficult and expensive, and may well not be worthwhile for a majority of claims because of the low dollar value involved, and by reason of the fact that a recipient may often be a disadvantaged person. By contrast, the direct delivery of public services by a government agency often operates in a well-defined context which includes a user-friendly tribunal, as in the case of social security administration.

Where a failure in service delivery occurs under a contractual framework, recourse against a government agency by an affected recipient also faces formidable obstacles. There is not a contractual nexus between the government and the recipients, nor can the recipients compel the government by mandamus to enforce the terms of the head contract which it has with the service provider, to enable the recipient to get the flow on benefit. There may also simply be a lack of knowledge about the head contract,[6] and the relevant documents (for example, tender documents) may well be beyond the reach of FOI legislation because of exemptions relating to business affairs and confidentiality. Even if the failure to deliver proper services under the contractual regime breaches a statutory obligation on the government to deliver the services (either by itself or through a contractor), the obligation may be judged to create a so-called duty of imperfect obligation, not enforceable by mandamus.[7]

Nor does consumer protection legislation offer trouble-free remedies. The *Trade Practices Act 1974* (Cth) does not apply to State Crown

6 See H Schoombee, "Judicial Review of Contractual Powers", in L Pearson (ed), *Administrative Law: Setting the Pace or Being Left Behind?* (AIAL, 1997) 433 at 451.

7 See J T Schoombee, in LBC *Laws of Australia*, "Administrative Law", subtitle 2.6, para [135].

instrumentalities, and under the *Bradken*[8] doctrine will often not apply to their contractors.[9] Those entities may, however, presently be sued under the State Fair Trading Acts. But a contractor's failure to make good its publicly made promises will not per se amount to misleading or deceptive conduct under the legislation. Without more it is not misleading and deceptive conduct to say at one point that you will do something, and then later fail to do so. The area of unconscionable conduct in trade and commerce is also largely untested in relation to the termination of contracts, the failure to honour broad promises, and the failure to deliver services that may be said to be defective in some respect.

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.[10]

CONTRACTING OUT—RELATED DEVELOPMENTS AND BROADER ISSUES

This paper focuses on contracting out, but at least two other related phenomena deserve a mention because they arguably raise similar issues to contracting out in relation to matters such as accountability. The first is the public law accountability of government business enterprises (GBEs). A GBE may be defined as a public enterprise controlled by the government that has a legal personality separate from the government and that is principally engaged in commercial activities.[11] The second is privatisation in the narrow sense, that is, the process whereby ownership of a government enterprise moves from the government to the private sector—for example, from Telecom, a governmental entity, to a partially or wholly privatised Telstra Corporation Ltd.

Contracting out and privatisation (as defined), may be seen as part of "privatisation" in a broad sense where the government is utilising, operating in or transferring activities to the private sphere. In this broader sense, interconnections may be seen between the three phenomena. In the case of contracting out and the activities of GBEs, the issue arises whether

8 *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd* (1979) 145 CLR 107.
9 *Eg Woodlands v Permanent Trustee Company Ltd* (1996) 139 ALR 127.
10 See G Hodge, *Contracting Out Government Services: a review of international evidence* (1996) 55.
11 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No 38 (1995) at 14–15.

the role and involvement of the government is still strong enough to justify measures of accountability akin to those in public law. Where privatisation in the narrow sense has run its course, it may be said that the government has no further involvement and that issues of public law accountability should not arise. However, the operations even of a wholly privatised enterprise may still raise issues of public law accountability because of the government created monopoly it may enjoy, or because the private enterprise delivers what is regarded as an essential service or a service with a distinct public interest component.

For our purposes it would appear worthwhile to focus for the moment on possible interconnections between contracting out and GBEs. We may ask: is it justified to argue for a public law type of accountability in both instances, on the basis of the continued involvement of government, albeit on an attenuated and not-so-obviously-governmental basis?

This question, in turn, prompts another logically prior question: why are we in any event entitled to expect more of government than of private enterprise, even in the exercise of overtly "governmental functions"? I discussed this issue in a paper at the 1996 Administrative Law Forum, entitled "The Judicial Review of Contractual Powers".[12] There I identified five interrelated reasons for our higher expectation of government in relation to typically governmental powers conferred by statute. I pointed out, however, that the same reasons may not apply, or not apply with equal force, to the exercise of contractual powers by government, that is, to entering into a contract or exercising powers under a contract.

I would argue, both in relation to contracting out and GBEs, that a strong argument for accountability beyond that provided by private law lies in what the Commonwealth Ombudsman described as the "follow the dollars" consideration.[13] The use of public money in contracting out and in the running of GBEs should have as its counterpart a measure of accountability for affected members of the public. In relation to the imposition of public law remedies in the case of contracting out, there is the added consideration that the services may well involve a public interest component or may deliver what is regarded as an essential service (a point that is recognised in legislation dealing with community service obligations). The recipients may also be disadvantaged members of society who require a special measure of protection. An argument for the application of public law remedies is not necessarily an argument that the entire range of remedies should be available. In my 1996 Forum Paper I

12 See my discussion in Schoombee, above n 6 at 437–438.
13 Commonwealth Ombudsman, *Annual Report* 1995–96 (1996) at 17–18.

explained that an adapted doctrine of judicial review may apply in relation to the exercise of contractual powers by a GBE.

Another interconnection between contracting out and GBEs lies in the now fashionable argument that the presence of competition (for example, between service providers, or between GBEs and other commercial entities) render public law remedies unnecessary. Thus the ARC has suggested in a Discussion Paper that in relation to the delivery of public services by GBEs that face real competition in delivering the service, the administrative law package should not apply. The ARC suggested that "a GBE that faces true competition would not possess government powers".[14] It was further argued that "members of the public could shop elsewhere or rely upon private law remedies".[15] In a subsequent ARC report[16] there was no significant advance on these views, and the ARC was content to accept in respect of GBEs the relative immunity from review of commercial decisions that flows from the decision of the Full Court of the Federal Court in *General Newspapers Pty Ltd v Telstra Corporation*.[17]

The ARC's view may easily be transposed to the sphere of contracting out, but is highly questionable.[18] It overloads the notion of competition and what so-called market forces can really deliver in a competitive sphere. There is an obvious objection that rarely gets mentioned: it is unrealistic and not to the point to expect members of the public seeking redress of grievances "to shop elsewhere". They usually want satisfaction for a past wrong; it may not be their wish to change service provider, nor would such a change provide redress. The ARC's assertion about the lack of government power where a GBE faces competition assumes a very narrow and formalistic definition of "power". It is also not clear how, as a matter of logic or experience, the presence of competition removes any vestiges of governmental power, either from the GBE or from government contractors that deliver services on behalf of the government. A further objection is that it is very difficult to determine the existence of "real competition" and to use this as bench mark for the exclusion of public law remedies. At what point in time will this be determined or re-determined? Even if we assume that the existence of "real competition" can be determined at a point in time, it would not provide a guarantee against later oligopolistic behaviour

14 ARC, *Administrative Review of Government Business Enterprises*, Discussion Paper (1993) para 4.19.
15 *Ibid*.
16 ARC, above n 11 at para 4.47.
17 (1993) 117 ALR 629.
18 See M Allars, "Private Law but Public Power: Removing Administrative Review from Government Business Enterprises" (1995) 6 *PLR* 44; N Dixon, "Should Government Business Enterprises be Subject to Judicial Review?" (1996) 3 *AJAL* 198.

on the part of the main players to suit their common interests.[19] Moreover, private law remedies *are* simply inadequate to provide real accountability at the instance of recipients where services are delivered through contacting out.

We may now briefly turn to the question: what should be contracted out? Are there services that are "inherently governmental" and should thus be quarantined from the process? The Industry Commission has argued against such a categorical approach and has suggested a case-by-case approach that has much to commend it.[20] There may be constitutional or other legal obstacles to contracting out certain functions or powers (notably within the judicial branch at Commonwealth level), but these are likely to be rare. The check list suggested by the Industry Commission includes an assessment of the risks involved.[21] There may, for instance, be accountability, access, equity and other policy considerations that cannot be addressed adequately through contract specification, contract management and performance monitoring. It is also important to ask: can an inadequate contractor be replaced without major disruption? A particular negative side-effect that is difficult to assess or to quantify, and which may therefore be ignored or downplayed, is the adverse effect of contracting out on the public service and its constitutional role.[22] Hodge has also pointed out that services where procedural fairness matters most or where service performance is complex to monitor will tend to be less suitable for contracting out, and has warned against an "everything can go" approach that ignores the role of governance:

> Contracts require precise specification of deliverable services. Governance on the other hand, requires a willingness to lead whilst resolving political and community conflict through the use of more subtle and less simple notions such as democracy, fairness, openness and due process.[23]

This discussion may be concluded with a brief observation on the debated question: does contracting out actually pay? The critics of contracting out point out that intangible negative effects are often ignored (for example, the impact on the public service), and that cost savings are often achieved by getting those delivering the service to work harder for less money. Hodge came to the conclusion that the international evidence pointed to

19 See Shergold, above n 2 at 7.
20 See Industry Commission, *Competitive Tendering and Contracting Out by Public Sector Agencies* Report No 48 (1996) at 26–29.
21 *Ibid* at 28–9.
22 *Ibid* at 4; and two recent articles by M Steketee, "Public Servant or Party Slave?", *The Australian*, 5 April 1997; and "The Incredible Shrinking Public Service", *The Australian*, 7 April 1997.
23 Hodge, above n 10 at 56.

cost savings of between 9 and 14 per cent, but that some types of services showed little or no cost savings.[24] He also pointed out that the more recent and sophisticated cost savings estimates from contracting out are far more modest than those in the past.[25] I get the impression, however, that for some of the most ardent supporters of contracting out the figures do not really matter that much: they act out a "privatisation ideology" where the belief system is simply that "the private sector is more efficient than the government sector"—full stop.[26]

ACCOUNTABILITY MECHANISMS—SOME BASIC ISSUES AND CHOICES

Perhaps the first question should be: should recipients be given enforceable rights where contracting out has occurred? I would say, based on my experience in practice: Yes, definitely, and those rights must include sharp-edged remedies that can be enforced in a suitable court or tribunal. Motherhood and apple pie promises in the form of non-actionable performance standards, and soft-edged remedies such as mediation and supervision by an Ombudsman (valuable though they are) will not be enough.

Should the remedies be directed against the government or the contractor? I would suggest the contractor, otherwise a key purpose of contracting out would be undermined. A contractor who enters into a contract with the government can factor the cost of complaint handling and satisfaction into its tender price. Moreover, the more efficient and fair the contractor, the less complaints it should have to deal with, and the more profit it could show. I do not think it is feasible to impose some form of vicarious liability upon the government.

As to the type of remedies that may be available, these may be public, private or of a hybrid nature. It is important to note, however, that no remedy of whatever type could operate effectively unless there is *specificity* in relation to the obligations of the contractor, and *public disclosure* of those obligations.

Public law remedies can be applied to private contractors by providing in the relevant legislation that they are deemed to be statutory authorities for particular purposes—an example is the *Victorian Corrections Act 1986* as it applies to the operators of private prisons. This option may be suitable where a significant element of governance[27] is involved in the service

24 *Ibid* at vi.
25 *Ibid*.
26 *Ibid* at v and 55.
27 *Ibid* at 56.

delivery, as in the case of private prisons. I cannot see that this raises any constitutional problems if applied in a Commonwealth context. This is, however, not an option or model that can be widely applied to service delivery by contractors.

Another option in the remedy spectrum is to give a recipient a contractual right against the contractor to make its obligations actionable. Earlier in this paper I referred to the practical disadvantages of relying on contractual remedies. To give a recipient a contractual remedy may be artificial, and may exclude an affected person who does not fit in under even an expanded notion of privity of contract. In my view it would thus not be an answer to enact a general "Contracts for the Benefit of Third Parties Act" which is to operate in the public law sphere.[28]

In my view the most fruitful option is hybrid remedies, that is, combined public and private law remedies. Here it is instructive to refer to the regime of performance standards that is being introduced in the telecommunications industry by the *Telecommunications Act 1996* (Cth) and the *Telstra (Dilution of Public Ownership) Bill 1996* (Cth). This legislative scheme gives the industry regulator (after 1 July 1997, the Australian Communications Authority [ACA which replaces AUSTEL]), a power by subordinate legislation to specify performance standards for carriage service providers. The service providers are not government contractors, but in my view that distinction is not material. In a privatised industry they operate under a government licensing regime, so they are delivering services to the public subject to a measure of government control. The position is not very different from a scenario in which they have contracted with the government to deliver and to charge for a telecommunications service.

Under the performance standards scheme, the standards may apply generally or only in a specific context. They set out matters like customer complaint procedures and the reaction time required of a service provider upon receipt of a request for a new connection. The standards are to specify a monetary penalty for non-compliance—a sort of "fine" payable by the provider *to the customer* (for example $100 for not responding to a complaint call). The maximum penalty that can be set is $3000. The enforcement mechanism in the legislation is the Telecommunications

28 See the general discussion by the United Kingdom Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties*, Report No 242 Cmnd 3329 (1996). This report unfortunately dealt with the issue only in the context of private law, although reference was made to examples of statutory contracts for the benefit of third parties that operate in a public law sphere—see *Swain v Law Society* (1983) 1 AC 598 at 611.

Industry Ombudsman (TIO), who can investigate a complaint, then issue a certificate if the complaint is established. If the carrier, notwithstanding the certificate, does not pay the customer, the customer can sue in a court of law, with the certificate being prima facie evidence of a breach of standard and of the recoverability of the fine.

Somewhat curiously, the scheme provides for a waiver of those rights by a consumer, but only if two conditions are met: the regulator has made provision by written instrument (that is, in the delegated legislation) for a waiver of rights; and the waiver has been effected in accordance with the rules set out in the instrument.

This regime has both public and private elements. There is a strong public law flavour in the enforcement of statutory standards by a consumer without reliance on a contractual nexus, and in the use of certificates of liability issued as a result of an investigative process. By contrast, there are private law elements in providing that redress for a customer sounds in money only, and that enforceability lies in the ordinary courts of law by civil action.

This type of scheme has much to commend it and could be developed into a general model for the recipients of services that have been contracted out. An area of possible improvement may be to expand or strengthen the public law elements. Standing to enforce the standards should be given to persons affected, and not be limited by notions of privity of contract or quasi-privity. The public law element may also be strengthened by expanding the remedies beyond mere monetary payments, to include orders for corrective action to be undertaken by a provider. Where an Ombudsman's recommendation plays a central role, as it does in the telecommunications scheme, it should preferably be enforceable in a tribunal such as the AAT, or in an industry specific tribunal, rather than in an ordinary court of law.

The ARC has raised the question of how the respective rights of the government and of service recipients should be co-ordinated. I would suggest that this could be done by requiring a form of notice by the complaining recipient to the government entity involved, with possibly a preferential right for the government to take action. Alternative dispute resolution may also be viable, such as tripartite mediation before recourse to a remedy such as suing in a court or tribunal.

This brings me to the final question I wish to address: should the remedies be given to recipients on an ad hoc basis by specific legislation, or should there be what the ARC has termed a "Contracting Out Act"? My strong preference is for general legislation that can operate as an adaptable

template. In relation to such a template, there is a further choice between AD(JR) type legislation that applies generally unless excluded, or AAT type legislation that is only enlivened by a specific reference in that or another Act. In relation to contracting out, the AAT model may be more suitable. Adoption of a general Act, would force detailed consideration of how recipients' rights should be structured. Once in place, the Act would exert a powerful legal and political gravitational force, and would promote coherence and consistency in the field of contracting out. Guidelines on contracting out and on government service charters have a role to play, but matters should not be left at the non-enforceable level.

COMMENTARY: PRIVATISATION AND CONTRACTING OUT—WHERE ARE WE GOING?

Dr Nick Seddon*

INTRODUCTION

Governments of all complexions, bodies which advise them and academic experts in public administration are wedded to the use of contract as an important tool of public administration. Contracting out is virtually an unquestioned policy choice for achieving a wide range of government objectives in Australia in the nineties and will continue to be so for the foreseeable future. The same is true in countries with similar legal and governmental institutions to which Australia looks for comparison, and sometimes as models, such as the United Kingdom, Canada, New Zealand and the United States.

It is a strange phenomenon that a major policy shift is adopted from what appears to be a belief—an article of faith—and then the pros and cons are assessed later. Shoot first and ask questions later. *After* the privatisation and contracting out policy has been well and truly put in place, at federal, state and local government levels, there has been a great deal of commentary, assessment, hand-wringing, critical papers and doubts expressed from a number of different perspectives. Perhaps this is a biased perception of what is going on, but there is a discernible negative reaction from many quarters. There is also a concern which is evidenced by the number of enquiries which are, or have been, conducted by various bodies.

THE CITIZEN'S REMEDY

Dr Schoombee's paper lucidly draws attention to a number of these misgivings and, at the same time, makes some useful positive suggestions. The very interesting suggestion for hybrid remedies available to the citizen in respect of poor service delivery by a contractor raises a fundamental point—or perhaps paradox—about contracting out: in the name of de-regulation and market solutions it is necessary to introduce a quite elaborate regulatory regime to ensure that citizens have an adequate

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means of redress. I am not in a position to assess whether the cost of regulation is less or more than the claimed savings which are mentioned in Dr Schoombee's paper.

The suggested regime of hybrid remedies based on the *Telecommunications Act 1996* (Cth) and the *Telstra (Dilution of Ownership) Bill* (Cth) makes good sense. The idea of a money consequence arising from poor performance by the contractor is undoubtedly the way to go. And Dr Schoombee's urging for "hard-edged" remedies, meaning *legal* remedies rather than codes of conduct and the like, is, in my view, the way to go. It is, after all, the whole raison d'être of administrative law.

Returning to the recommendation of money consequences for poor performance, in a contract where services are delivered to the government rather than to the citizen, it is essential to have contract clauses that provide incentives to perform properly, either in the form of carrots or sticks. The "default" remedies for breach of contract—the standard common law and equitable remedies of damages, specific performance and injunction—are more or less useless in many government contracts. In most cases, damages will be the only available remedy and this is of little use if the breach has not actually cost the government anything. The fact that the failure to perform may have cost a citizen is irrelevant because of the privity principle. The suggested hybrid remedy provides the citizen with a statutory right to compensation which overcomes the privity problem.

Whether this strategy can be generalised, as Dr Schoombee suggests, is an important issue. At present, when the Ombudsman has jurisdiction, we have a generalised remedy in the form of a recommendation for an ex gratia payment. The problem, of course, is that the Ombudsman does not at present have a general right to investigate private companies. Her recommendation that her jurisdiction should be expanded would provide the generalised remedy which Dr Schoombee has suggested. However, in a proposed "Contracting Out Act" the process should be refined so that, for example, the citizen has a *right* to the payment (which is not the case at present).

There is, possibly, a more difficult aspect to the suggestion for a generalised remedy in legislation such as a Contracting Out Act, and that is that the standards expected of the service provider must be particularised. It is, after all, only fair to tell the service provider what it is supposed to be doing, just like a contract does. The suggested hybrid remedy borrows from contract in the telecommunications example given by Dr Schoombee in that the standards (for example, response time to a complaint) are

surrogate performance specifications which one would expect to find in a contract. Obviously, these performance specifications are going to be very different, depending on the type of service. Dr Schoombee suggests that the telecommunications model would provide an "adaptable template" for a generalised scheme. Detailed specifications would then have to be worked out within this template. This should not be too much of a problem because the contract should, in any case, provide for detailed performance specifications. The legislation could then simply refer to the contract.

Dr Schoombee is right to point out the weaknesses of contract, particularly when a disgruntled citizen is seeking some form of redress. Even when the citizen has a contractual relationship with the provider, as in the case of the citizen and Telstra, contract remedies may be of little use. In one case, *Telstra Corp Ltd v Kendall*,[1] Telstra cut off the telephone of a person whom they believed was conducting a brothel. This was at the behest of the Queensland police. Kendall successfully challenged this decision by Telstra in the Federal Court, first before Spender J and then before the Full Federal Court. It was held that Telstra did not have the power under the *Telecommunications Act 1991* (Cth) s 47 to disconnect the telephone and that their act in doing so was invalid. Additional grounds were relied upon by Spender J (Telstra's failure to observe natural justice; and Telstra's decision was in effect directed by the police) but these grounds were not accepted by the Full Court. The point of drawing attention to this case is to show that contract probably would not have provided a good solution. The only useful remedy would have been either an injunction ordering Telstra not to disconnect, or specific performance (or possibly mandatory injunction) ordering them to re-connect. These discretionary contract remedies are hedged around with restrictive rules which may have prevented their application (not the least of which might have been that he who comes to equity must come with clean hands!). It is not even clear that a mandatory injunction is an available remedy for breach of contract, although there is no good reason why it should not be.

Public law remedies, on the other hand, did the trick in this case. This reinforces the stance taken by Dr Schoombee (and others, including myself) in arguing that the Administrative Review Council's recommendation in *Government Business Enterprises and Commonwealth Administrative Law* that competition can sort out privatised bodies such as Telstra is an inappropriate and inadequate response to the problems generated by handing over what were previously public resources and duties to private bodies. Again, regulation was the saviour and it seems

1 (1994) 124 ALR 341 (Spender J); Full Federal Court, 31 Jan 1995, unreported.

increasingly obvious that privatisation and contracting out must be accompanied by fairly detailed regulation where the citizen's rights are affected. The detailed scheme under the *Employment Services Act 1994* (Cth), mentioned by Dr Schoombee in his paper, demonstrates this point fairly graphically.

THE LIMITS OF CONTRACT AND THE NEED FOR TAILOR-MADE REMEDIES

A lot of attention has been paid in recent times to the plight of the citizen at the hands of the contracted out service provider. The Ombudsman, the ARC, the Industry Commission (as it then was),[2] the Senate Finance and Public Administration References Committee[3] and the just-announced House of Representatives Standing Committee on Family and Community Affairs inquiry into Competitive Tendering of Welfare Services Delivery, have all been looking into the issues generated by this particular form of contracting out. It is in this area that contract specifications and contract remedies are particularly troublesome. Hence the need for innovative hybrid remedies.

If we turn to the more ordinary form of contract, involving the provision of goods or services to the government rather than to the citizen, there is still a basic problem with the use of contract, to do with the limits of contract remedies, already referred to. Contract was developed to serve the needs of entrepreneurs. The principal remedy is damages, with the other two "default" remedies of specific performance and injunction being rarely used in ordinary commercial contracts. The remedy of damages serves commerce and industry tolerably well (although at times even there it may not be of much use). But in government contracts it may be a remedy that is effectively useless. This is because non-performance may not generate a measurable loss. What is the cost to the government if furniture or a navy ship is delivered late? It may be possible to put a figure on it but in many cases this is difficult or impossible. It may be possible to terminate for poor performance, but this is a remedy of absolute last resort and is, in any case, legally hazardous.

There are measures that can be taken to make government contracts more enforceable. The key is to build into the contract measures for enhanced enforceability. An example is liquidated damages. Another is the ability to withhold payment if the contractor does not perform. But these kinds of

2 Industry Commission, *Competitive Tendering and Contracting Out by Public Sector Agencies*, Report No 48 (1996).

3 Senate Finance and Public Administration References Committee, *Service Delivery: Report from the Senate Finance and Public Administration References Committee on Service Delivery by the Australian Public Service* (1995).

tailor-made remedies must be suitable. For example, withholding payment is no use if it cannot effectively be used because it is just too big a stick. Withholding *part of* a payment, on the other hand, could be a very useful remedy. This would, in turn, require detailed drafting of contract performance requirements so that the ability to withhold part of a payment would be authorised by the contract by reference to precisely measured non-performance. All of this requires more work at the beginning of the contract. In my experience, there has not been very much of this type of innovative drafting in government contracts, although there are some exceptions, principally in the area of information technology.

VICARIOUS LIABILITY?

Returning to the type of contract where the contractor provides services to the citizen, Dr Schoombee dismisses the possibility of the government being vicariously liable for the actions of its contractors. Yet, when one stands back and thinks about what is occurring—the government is simply hiring outsiders to do what it previously did—why should the government not be responsible for what its contractors do? This of course requires an agency relationship between the government and the contractor, the latter simply being the extension of the government for the purpose of achieving some public purpose. Yet, the common practice in government contracts is to ensure by a suitably drawn clause that the contractor is *not* an agent of the government.

Various bodies and commentators have expressed the view that ("of course") the government may transfer *responsibility* by contracting out, but that this does not divest the government of *accountability*. For example, the Industry Commission expressed this view in its report on competitive tendering[4] as did the ARC in its Issues Paper on contracting out.[5] Yet this sentiment is not followed through to its legal conclusion, which is vicarious liability. Admittedly there may be argument about precisely what responsibility and accountability mean. And it may be urged that accountability does not necessarily translate into vicarious liability. I merely throw this thought into the arena because it seems to me that it is not self-evident that the government should not be held responsible (accountable?) for the acts of its contractors. If this were the case, it would immediately solve the problem of both contract and administrative law—the "run around" problems arising from the "triangular relationship" referred to in Dr Schoombee's paper and so effectively publicised by the

4 Industry Commission, above n 2 at 4–5.
5 Administrative Review Council, *The Contracting Out of Government Services*, Issues Paper (1997) 14–16.

Commonwealth Ombudsman. The citizen would be in a direct relationship with the government agency, as in the old days. I do not suggest that such a mechanism would be easy. It may not be appropriate at all if the task being performed by the contractor is not really "governmental" in character (a difficulty touched on by Dr Schoombee in his paper). But, if there could be agreement that there are at least some tasks which are government tasks, there is no reason why the government should be able to escape legal responsibility for proper performance.

ADMINISTRATIVE LAW IN THE AGE OF THE CONTRACT

Dr Jenny Stewart*

A celebrated environmentalist once said that the modern chemical industry represented a giant, uncontrolled experiment on the earth's atmosphere. In a similar way, the federal Coalition Government—like so many State governments before it—is conducting a giant uncontrolled experiment on Australian public administration.

The experiment is rationalised using the language of effectiveness and efficiency. But its driving force is undoubtedly ideological. The ideology is one that the Coalition shares with the previous Labor government, yet the Coalition embraces a much sharper and more severe version of it. It is an ideology about the size of government—less is better. While the Treasurer, Peter Costello, might wring his hands about the structural budget deficit, he would be quite disappointed were it to disappear. It is smaller government he is after, not a balanced budget.

The Coalition also espouses an ideology about the private sector, this time surrounded by even more rationalisations. The private sector is believed to embody values which the Government holds dear. Whatever the task, the private sector will perform it more efficiently, effectively and responsively than the public sector.

The belief in smaller government produces relentless cost-cutting, and privatisation of public assets. The belief in the private sector produces contracting out of public sector functions. This contracting out is not being done in a careful, discriminating way which might produce real savings. Rather, it is being done in an ad hoc fashion, often in response to political and commercial pressures and in many cases carried out by people with little knowledge or experience of contract management. As the Intergraph episode in Victoria demonstrates, there may also be questions about the probity of those involved in the process.

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There is a yawning gap opening in terms of accountability. Unless expressly provided for in legislation or in a contract, an independent contractor's decisions will not be subject to administrative law constraints. The Ombudsman can investigate the circumstances in which a contract is let and can make recommendations, but cannot formally investigate complaints from a member of the public about a contractor's decisions or actions.

I would suggest that this bypassing of administrative law by the Government is quite deliberate. 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 bolster that fairness.

But it is an expensive apparatus, in the sense that government agencies must formalise their procedures to comply with it. The government is loath to add to its regulatory load by extending the reach of administrative law to the private sector. To do so would be to make the private sector, with all its real and imagined advantages, just like the public sector.

So far, at least, the Coalition sees administrative law as part of the problem in the public sector, not as part of the solution. It is particularly sensitive about the impact of administrative law on its own costs as an employer. This is because virtually all decisions the government makes about its own employees are reviewable by the courts, and in employee compensation matters by the Administrative Appeals Tribunal.

In fact, one quarter of the AAT's case load in 1995–96 was taken up with Comcare matters. Review arrangements for private sector employees in relation to workers' compensation are much patchier, and the costs of the system are mostly borne by the private sector and by State governments, providing another powerful argument, from the Commonwealth's point of view, for down-sizing and for contracting out.

For those public servants who remain in Commonwealth employment, the Government has made it very plain that the legal framework governing their employment should be as similar as possible to that applying in the private sector. For those not on contracts, there will be a stripped down *Public Service Act* operating in tandem with an agency-based industrial relations framework. The departmental secretary, rather than the public service, will effectively be the employer.

For those employed on contract, the situation will in some ways be more clear cut because expectations will normally be set out in a performance agreement, but there will not be any guarantees as to how the performance

agreement will be interpreted and applied. At the very least, a change of government will produce a certain nervousness, particularly for any chief executive who is seen as having been too zealous in carrying out the previous government's wishes.

As employment practices become more ad hoc and less formalised, there will be diminished scope for external review mechanisms. Administrative law was not designed to deal with contracts, which by definition are instruments of exchange, rather than of command. It is possible for a performance agreement to stipulate criteria as a basis for impartial review, but this alone is insufficient unless there is a review machinery and a will to use it.

The ultimate test of these changes, however, is a political one. The rights of public servants are not of great interest to the general public, even though some 25 per cent of the workforce is employed by government. And politicisation, of itself, is hardly a major concern in the electorate. So the Coalition is on fairly safe ground. Service delivery is not as straight forward. Even if cost savings are achieved by contracting out, will the public believe that foregoing at least some of its rights of complaint is a fair price to pay?

It seems more likely that cost savings will be insubstantial, or non-existent. The proponents of contracting out forget that the success of the process depends on the skill with which it is undertaken. The efficiencies created by competition are not available to the purchaser if he or she lacks information about the marketplace and if firms which should have been asked to tender are overlooked. We know from areas where contracting out has always been the norm, such as defence purchasing, how difficult it can be to manage the public sector/private sector relationship. The difficulty of contract management is continually underestimated by those who have little to do with it, including, it would appear, many members of the Department of Finance.

My own experiences of being a contractor to government may be instructive. Some public servants are ideal purchasers—they know what they want, they act fairly to all concerned, and they even pay promptly. Others fall well short of the ideal. Many public servants have a deep-seated suspicion of the private sector, and will attempt to impose contracts which give them the right to act arbitrarily, but hold the contractor to all kinds of impossible terms and conditions. Others will pay thousands of dollars for advice which it is perfectly plain they have no intention of following—easy for the contractor but a bit rough on the taxpayer. In other cases,

purchasers will engage in "selective tendering", which simplifies life for them, but overly restricts the field.

My feeling is that, over time, contracting will produce more, rather than less administrative law. The general public will want to be reassured that contractors are subject to the same processes of review that apply to decisions made within an agency. Moreover, I think contractors themselves will eventually demand some form of review process for public sector purchasing, to ensure that procedural fairness is followed. That would be an ironic result, given the motivations I have described as underlying contracting out. But accountability problems cannot be wished away or restructured away. They always pop up somewhere else. This suggests a continuing and even expanded role for administrative law.

TRENDS IN UNITED STATES ADMINISTRATIVE LAW AND THEIR IMPLICATIONS FOR IMMIGRANTS AND REFUGEES

Stephen H Legomsky*

As a newcomer to Australia, I have little to contribute to a conference theme on the state of administrative law under the Coalition Government. My task, rather, is to outline some parallel administrative law developments in the United States. Since my own area of concentration has been migration and refugee law, and since that subject is as topical in Australia as it is in the United States, I plan to rely on it frequently for illustrations. In the process, I shall offer some comparative observations.

The federal government of the United States, like that of Australia, depends on a vast network of administrative agencies. It is fair to say that most of those agencies have almost always been under periodic attack from one or more large groups that dislike an agency's substantive mission, or believe that the agency has been either too zealous in advancing its mission or not zealous enough, or think the agency has been captured by opposing interest groups, or regard the agency's methods as draconian. And then, of course, there are people who just plain don't like government, or at least don't like the *federal* government.

Administrative agencies will always attract criticism, some justified and some not. Today, in the United States, the anti-government sentiments seem unusually powerful. Moreover, certain components of government have borne the lion's share of the public's discontent. The public seems to have become anti-*federal* government more so than anti-State. The public has also become anti-bureaucracy, which tends to translate into anti-executive branch agencies. And the public has almost always been anti-judicial activism, in part because it thinks of judicial activism as undemocratic.

I would like to examine how those sentiments have been reflected in some of the broad trends that have emerged in US administrative law generally and in immigration and refugee law in particular. In doing so, I believe that

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I will be touching on many of the same issues that other papers in this Conference publication have highlighted in the Australian context.

It seems that most of the specific recent developments in US administrative law can be synthesised into two broad trends. The first trend, which has been especially evident since 1994 and is specifically linked to the election of a Republican Congress, has been a steady erosion in the powers, responsibilities, and activities of the federal government. This trend has three basic components. The first is deregulation—a transfer of power from the federal government to the free market. The second is simple downsizing.[1] And the third has been federalism-driven—a transfer of both power and responsibility from the federal government to the States. This shift has been most notable in the welfare area, where some of the major federal welfare programs have been replaced with discretionary block grants to the States.[2] The combination of these three elements—deregulation, downsizing, and delegation of power to the States—has significantly reduced the role and the size of the federal government.

As with most administrative law trends, there are both ideological and political explanations. I believe that most of the developments that comprise this first trend are the product of genuine ideological values. Most of the Republicans in Congress, especially in the House of Representatives, truly believe that a lessened governmental role in regulating industry is appropriate, and that intervention stifles innovation and risk taking. They also believe that it is good policy to reduce spending and reduce taxes, leaving more responsibility with the private sector. And certainly many genuinely believe it both morally right and practically more effective for the federal government to do a smaller proportion of the work that government has to do, and for the States to do a correspondingly higher proportion of that work.

At the same time, one cannot realistically dismiss the political motivations for these decisions. Deregulation is very popular with the large industries on which so many legislators depend for campaign contributions. Downsizing is popular with those who want to see taxes lowered. States' rights are always a popular theme because the idea feeds into populism and local control of local problems.

1 Immigration law has been a rare exception to downsizing. At a time when federal agency budgets are being pared, Congress has dramatically increased its appropriations to the Immigration and Naturalisation Service (INS), particularly with respect to law enforcement functions. The INS now has about 25,000 employees and an annual budget of well over $1 billion.

2 See generally the *Personal Responsibility and Work Opportunity Reconciliation Act* 1996, Public Law 104–193, 110 Stat 2105, 104th Cong, 2d sess (22 Aug 1996).

The second broad trend is one that has been evident, in my view, for at least fifteen to twenty years. Within the recently shrinking sphere of federal activity, I believe power has steadily become more concentrated in the legislative branch than was the case in former times.

I cannot think of a good word to describe this phenomenon, so I shall call it "congressionalisation"—and apologise for using a word so long and ugly. My view is that this modern "congressionalisation" reflects the interaction of two sub-trends. One sub-trend has been an increasing tendency for Congress to micro-manage the executive branch—an issue I take up below. The other sub-trend has been for Congress to restrict the powers of the courts. If you combine these two sets of constraints—one on the executive branch and the other on the judiciary—you end up with a legislative branch that commands an increased share of federal decision-making power.

Let me first say a few words about Congress's intensive management of the *executive* branch. Without a doubt, the US Congress has *generally* been more micro-managerial than its counterparts in most of the parliamentary democracies, including Australia. The US Congress gives the executive branch much less leeway than most parliaments do. Parliaments often will expressly delegate to the government powers that by American standards would be regarded as sweeping. Even where express delegation has not occurred, the same result is often accomplished by legislation cast in such broad, general language that as a practical matter the executive branch has to make policy just to apply the law. I acknowledge that many counter-examples exist, but I think that, for the most part, broad delegation of power to the executive branch is much more common in Westminster-style democracies than it is in the United States.

All of this is to be expected, and for many reasons. Most of those reasons stem from the closer relationship that exists between the legislature and the executive in parliamentary systems. In the United States, first of all, the two branches comprise two non-overlapping groups of public officials. Members of Congress do not serve in the Cabinet, as parliamentarians do. In addition, the President of the United States is independently elected by the people,[3] and the President then names the Cabinet. Therefore, the composition of Congress in no way determines who the President will be or who the President's Cabinet members will be, except for the Senate's limited role in confirming Presidential appointments.

3 Admittedly the election is indirect, through the electoral college.

Similarly, the US Congress cannot oust the President or the President's Cabinet members, except for impeachment in the case of serious misconduct. Nor, of course, will the same political party necessarily control both the legislative and the executive branches in the United States, a feature to which I return in a moment.[4] Even when the same party does happen to control both branches in the United States, there is no guarantee that the two branches will work together harmoniously, because party discipline is not nearly as tight in the United States as it is in Australia and most other parliamentary democracies. In fact, on almost every piece of controversial legislation in the United States, the President can virtually count on a split within his or her own party—a situation that would be unheard of in the United Kingdom or Australia or New Zealand, other than on conscience votes. For all these reasons, therefore, the legislative and executive branches in parliamentary countries are much more likely to be on the same page than is the case in the United States. In the US, we consider ourselves fortunate if they are in the same library.

None of this is startling news. I mention these things only to make the point that the gulf—sometimes rising to the level of out-and-out distrust—between the two branches in the United States seems to be one likely explanation for Congress's tendency to micro-manage the executive branch.

Perhaps there is a further structural reason that Congress is generally more inclined than its parliamentary counterparts to put the executive branch on a tighter leash—namely, the way decisions are made *within* the executive branch. Even though the executive branch as a whole has much more power vis-a-vis the legislature in parliamentary countries than is true in the US, power *within* the executive branch is more dispersed in parliamentary countries than it is in the United States. In the US, when the President disagrees with the Attorney-General or the Secretary of State or even the whole Cabinet, there is no question who wins. The boss wins. And I say the boss because, in the United States, the executive branch is organised along explicitly hierarchical lines. We have nothing analogous to the principle of collective Cabinet accountability, in which decisions at least theoretically are made by consensus. I do not mean to exaggerate this difference; the Prime Minister, of course, is more than just another minister. Again, though, the degree of the hierarchical separation is much greater in the US executive branch. Possibly this relatively greater concentration of executive power in one person, the President, makes Congress less willing to gamble with a blank cheque. But I admit this is sheer speculation, and in

4 I acknowledge that in Australia the Senate can create complications.

any case the strength of all these observations will vary from one parliamentary system to another.

Suffice it to say that the US Congress has more reason to micro-manage the executive branch than Westminster-style parliaments do. My main point is that Congress in the last fifteen to twenty years, if anything, has begun micro-managing the executive branch even more.

It has done so in several ways. First, I believe the federal statutes that are enacted nowadays tend to be more detailed than they used to be. Details that in the past would have been left to the administrative agencies to work out, through either regulations or the case law of administrative tribunals, are increasingly decided by Congress itself and embodied in the legislation. This has been true in numerous areas, ranging from national defence to environmental regulation. It has been especially true in immigration. I shall offer just a few examples.

In the 1980s, Congress enacted a broad amnesty program for aliens who had lived unlawfully in the United States for a specified length of time.[5] Most of the pre-existing humanitarian relief provisions took the form "If A, B, and C, then the Attorney-General [who has delegated this authority to subordinate agencies] has the discretion to grant relief".[6] In contrast, the amnesty provision was mandatory. There was no discretion reserved for the Immigration and Naturalisation Service (INS).

Other examples abound. Under pressure from growers, Congress in 1986 specified the procedures by which the INS was to process applications for temporary agricultural worker visas.[7] In the past, the procedures had been a matter for INS discretion. Also, aliens in the United States can be deported on any number of grounds, including conviction of certain crimes.[8] In the past, the INS had the discretion to decide how to allocate its limited law enforcement resources. In the 1980s, though, Congress sharply curtailed that discretion, requiring the INS to prioritise the deportations of those aliens who had been convicted of crimes.[9] The INS also used to have the discretion to decide which individuals to detain while deportation proceedings were pending; Congress has now enacted specific rules making detention mandatory in certain cases.[10] At the same time, while the INS has a limited discretion to refrain from deporting certain alien criminal

5 8 USC § 1255A.
6 *Eg* 8 USC §§ 1158, 1254, 1255, 1258, 1259.
7 8 USC § 1101(a)(15)(H)(ii)(A).
8 8 USC § 1227.
9 8 USC § 1228.
10 8 USC § 1251(a)(2).

offenders, Congress has enacted a series of statutes constraining the exercise of that discretion.[11]

In the past year, Congress has accelerated its efforts to constrict INS discretion. It has enacted several provisions further limiting INS discretion to waive deportation in compassionate cases.[12] It has made certain criminal activity an absolute bar to political asylum, rather than leave it to the INS to exercise its discretion.[13] Congress has become very specific with respect to law enforcement strategies; it has required the INS to keep detailed records of aliens' departures from the US[14] and to create a computerised file of all authorised workers in the US.[15] One provision enacted in 1996 specifically requires the INS, by a certain date, to build three parallel fences, separated by a prescribed distance, between two specific points on the US-Mexican border.[16] In the past, Congress had provided broad guidance on these issues and the INS had the discretion to work out the details, but no more.

The increasingly detailed legislation is only the beginning of it. In recent years, Congress has also required various administrative agencies, including the INS, to prepare an endless stream of reports on various activities and then to submit those reports to congressional committees. Congressional committees are also holding increasingly aggressive oversight hearings and requiring agency officials to testify in great detail. The agencies have no choice but to be highly co-operative, because every year these committees decide how much money to appropriate to the agencies. A 1996 law, entitled the *Small Business Regulatory Enforcement Fairness Act*,[17] imposed a series of cumbersome obligations on two particular federal agencies—the Occupational Safety and Health Administration, which monitors workplace safety, and the Environmental Protection Agency. These new obligations attach whenever those agencies propose new regulations. The same law also requires a wide range of federal agencies to submit all significant final regulations to Congressional scrutiny, and to defer applying them for sixty days so that Congress will have an opportunity to disapprove or modify the regulations before they go into effect.[18]

11 8 USC §§ 1250A(a)(3), 1250A(b)(1)(C), 1250B(a)(1), 1259.
12 8 USC § 1250A.
13 8 USC § 1158(b)(2)(A)(ii,iii).
14 *Illegal Immigration Reform and Immigrant Responsibility Act* 1996, Public Law 104–208, 110 Stat 3009, Div C, 104th Cong, 2d sess (30 Sept 1996) (hereafter cited as IIRAIRA), § 110.
15 IIRAIRA, *ibid* §§ 401–405.
16 IIRAIRA, *ibid* § 102.
17 Public Law 104–121, 110 Stat 857 (29 March 1996).
18 See generally J S Lubbers, "The Administrative Law Agenda for the Next Decade" (1997) 49 *Administrative Law Rev* 159 at 163–164.

My purpose is not to critique this trend. My own view is that some of these developments are quite sensible, while others are not. My only point is that they have occurred. One question is why?

In one sense, precisely the opposite trend might have been expected. The more technically complex society's problems and legal solutions to those problems become, the more one might expect Congress to happily delegate decisions to administrative agencies with specialised expertise. Often, too, it can be tempting for politicians to delegate controversial decisions to others in order to avoid taking stands on tough issues. The real question, therefore, is why Congress would systematically reclaim decision-making responsibility at precisely the time that heightened technical complexity and heightened controversy—especially in the immigration field—would seem to make delegation highly inviting.

Probably the most obvious reason for this resurgence in Congressional activism in the 1980s and 1990s is partisan infighting. During this period there has been almost no time when the legislative and executive branches have been in the hands of the same party. The only exception was 1992 to 1994, when the Democrats controlled both branches; except for that two-year respite, the two branches have been at each other's throats since 1980. Under those circumstances, Congress has an added incentive to make important policy decisions itself rather than let the other party make them. This of course is one of the most striking differences between the Westminster system and the US congressional/presidential system.

In the case of immigration, there are other possible explanations. More and more members of Congress have become interested in immigration and personally more knowledgable about it. The same is even truer of their staffs. In addition, the INS—rightly or wrongly—has never been an agency that has inspired either affection or confidence, and thus Congress might be especially inclined to give it less discretion than it otherwise would. Finally, with the success of sound-bite politics in the US, legislators can get great political mileage out of tough-sounding measures that are couched in absolute language, rather than more guarded measures that leave administrators with discretion in selected categories of cases.

I mentioned earlier that the executive branch is not the only branch of the federal government that has been losing strength. The judiciary has also come under fire in the immigration area.

Generally, US federal courts have had the power to review administrative agency decisions ordering aliens deported, or denying asylum claims, or

taking other action that significantly affected an individual.[19] But 1996 was no ordinary year in American politics. That was not only an election year, but also a year in which anti-immigrant groups continued to evolve into a major political force. Each of the two major political parties in the US fought hard to capitalise on that sentiment, principally by persuading the public that, of the two parties, it would be the toughest on immigration. Cultivation of that image was thought to be necessary to capturing the State of California, which alone holds more than ten per cent of all the electoral votes. The candidate who carries California is already twenty per cent of the way to the White House. Judicial review of deportation decisions became a particularly attractive target, because Congress saw the courts as, first, too activist, and second, as a source of delay in executing administratively final deportation orders. I know that both those themes have recently been sounded in Australia as well.

So in 1996 Congress enacted a series of provisions that eliminated the jurisdiction of the courts to review a whole range of administrative decisions in the immigration context. An alien who is ordered deported on the basis of a criminal conviction in most cases is no longer able to obtain judicial review of that order.[20] A person who is denied asylum upon arrival at a port of entry in most cases similarly will have no opportunity for judicial review.[21]If a person applies for almost any of the many discretionary remedies provided by statute, and is denied, again there is generally no judicial review, even for abuse of discretion.[22] In fact, depending on how the courts ultimately interpret the statutory language, Congress also appears to have prohibited courts from reviewing even the administrator's determination whether an alien meets the statutory prerequisites to discretionary relief.[23] Congress also placed various restrictions on actions for injunctive relief and on class actions, which in the US are common devices for challenging widespread INS practices on ultra vires or constitutional grounds.[24]

These assaults on judicial review pale in comparison to those recently mounted in Australia,[25] but I find them troublesome nonetheless. Judicial review has real value, not only in avoiding injustice in isolated cases, but also in assuring the public that the rule of law is alive and well. More than

19 *Eg* 8 USC § 242.
20 8 USC § 1252(a)(2)(C).
21 8 USC § 1252(a)(2)(A).
22 8 USC § 1252(a)(2)(B).
23 *Ibid*.
24 8 USC §§ 1252(e)(3), 1252(f)(1).
25 See M Crock, "Judicial Review and Part 8 of the Migration Act": Necessary Reform or Overkill?" (1996) 18 *Syd Law Rev* 267; see also Migration Legislation Amendment Bill (No 4) 1997 (Cth).

that, however, judicial review sends a message to administrators *before* the fact. The message it sends is: "We know you're busy, but before you make an important decision, think it through carefully and be prepared to articulate your reasons. You owe the individual at least that much."[26]

26 A more detailed account of the benefits (and costs) of judicial review appears in S H Legomsky, "Political Asylum and the Theory of Judicial Review" (1989) 73 *Minnesota Law Rev* 1205.

DEVELOPMENTS IN EUROPEAN ADMINISTRATIVE LAW

Frank Esparraga*

> "Now, in a sense, a comparative lawyer is bound to be superficial; he would soon lose himself in the sands of scholarship. It is hard enough to comprehend even the master subjects of a single modern system of private law, such as property, contract and torts; they seem unfathomable and in constant flux. Anything like the same intimate sense of a second system must seem almost impossible to acquire; and if one extends one's studies to other laws of different families, one is indeed in danger of knowing very little of a great many things."
>
> Professor F H Lawson, First Professor of Comparative Law, Oxford University, 1949.

BACKGROUND

This paper is presented with the above warning, but there is some compensation in that Professor Lawson went on to say that: "One of the greatest justifications of the comparative method when applied to law is that each part of each system is but a facet of law as a whole." In 1966, Professor Otto Kahn-Freund, who succeeded Professor Lawson to the Oxford chair, referred to the "heightened expectations which the legal profession everywhere attached to the study of comparative law … and with the shrinking of distances, comparative law has long ceased to be a purely academic pursuit."

In late 1996, I had the privilege of being the inaugural recipient of a Postgraduate Travel Scholarship through the Department of Veterans' Affairs. This allowed me to undertake overseas research as part of my ongoing PhD research into comparative aspects of administrative law. During October and November 1996, whilst primarily based at the Law School at Oxford University—which is one of the official European Union Document Depositories—I also had the opportunity to visit a number of European institutions, including the British Institute of International and Comparative Law in London, the European Institute of Public

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Administration in Maastricht, the Netherlands, the European Centre for Judges and Lawyers in Luxembourg, the European Court of Justice in Luxembourg, the European Parliament in Luxembourg, the European Institute in Florence, the Conseil D'Etat in Paris and the Constitutional Court in Madrid.

This paper is based primarily on discussions which took place and, in part, on the research undertaken during this time. It is to the officials and staff of those and other institutions who were generous in their time and interest that I extend my thanks. Not only did they persevere with what at times must have been my incessant questioning in *Franglais* and *Italoinglese*, but they also showed genuine interest in the achievements of Australian administrative law and sought closer future ties with Antipodean administrators and administrative lawyers.

INTRODUCTION

I am not the first to emphasise that any comparative study, though open to outside influences, must be severely restricted in scope. As such, this paper presents a thumbnail sketch of the following European administrative courts and tribunals:

Belgium	Conseil D'Etat
European Union	Court of Justice
France	Conseil D'Etat
Germany	Bundesverwaltungsgericht
Greece	Symvoulion Epikratias
Italy	Consiglio di Stato
Luxembourg	Conseil D'Etat
The Netherlands	Conseil D'Etat
Spain	Tribunal Supremo
Switzerland	Tribunal Federal.

In particular, this paper examines three aspects: the powers of the administrative judge; the effects of administrative court decisions; and the enforcement of administrative court decisions. The picture that emerges is that although there are wide variations in the operational running of each administrative court and the role which they play in the organisation of the State, there are nevertheless certain parallels which have developed. For ease of discussion, the multi-purpose terms "administrative judge" and "administrative court" are used throughout. An initial point to note is that the European countries discussed all have separate systems of administrative courts, and that administrative matters are primarily adjudicated upon by such courts instead of by the ordinary courts.

BELGIUM

The Belgian legal system is patterned to a large extent upon that of France. During the 19th century, the Belgian ordinary courts worked out a system of substantive *droit administratif* similar to the French system.

In Belgium, the Constitution requires that the judicial courts hear disputes over civil and political rights. Citizens' rights with respect to administration are held to be included in these rights, except when they are specifically withdrawn from the jurisdiction of the courts by statute and placed within the jurisdiction of the administrative courts.

The Conseil D'Etat, established in 1946, is the highest administrative body, with several specialist administrative courts. The lower courts known as *la Deputation Permanente du Conseil Provincial* also have jurisdiction in certain administrative matters, such as taxation. The Conseil D'Etat has five divisions, each with five members. Two of these handle cases in French; two handle cases in Dutch; and one is bilingual.

The laws relating to the Conseil D'Etat empower the administrative section of the court to set aside a decision (a term which covers all acts and regulations of administrative authorities) made by an administrative authority or court. This power is also limited by the general jurisdiction of the judicial courts. The Conseil D'Etat may quash a decision and undertake full judicial review under a number of conditions.

The powers of the administrative judge

Power to quash or vary: The Conseil D'Etat has the power to quash decisions dealing with disputes with the administration. However, Belgium does not have lower administrative courts. For administrative matters, the Conseil D'Etat is the place of first and last resort.

The most important cases that the Conseil D'Etat can deal with are those which involve the quashing of acts and regulations of administrative authorities. Such cases are of general interest and are brought to ensure that the law as opposed to individual rights is respected. The Belgian Conseil D'Etat lacks competence when the applicant has the possibility of taking action before the judicial body which is empowered to hear problems involving personal rights, with the exception of disputes over certain political rights which are reserved to the administrative courts. However, an application to quash an administrative regulation always falls within the jurisdiction of the Conseil D'Etat, since such applications are of a general nature and independent of whether or not an individual right has been interfered with.

Belgian law makes a sharp distinction between personal applications to have an administrative measure quashed, and objective applications where the application is made independently of whether or not individual rights have been interfered with. The former applications are generally heard in the judicial courts and the latter in the administrative courts.

Power of full judicial review: This is a very restricted power and is only available for a limited number of specific cases laid down by statute and essentially dealing with electoral matters. The jurisdiction of Belgian administrative courts, as will be seen, is quite narrow when compared with administrative courts of other countries.

When it comes to substituting a decision, the principle of separation of administrative and judicial functions prevents the Conseil D'Etat from further activity than quashing the decision. Consequently, when requested to vary or substitute an administrative act that is being challenged before it, the Conseil D'Etat must declare itself incompetent.

As to fines, the controversial question of whether or not the Belgian Conseil D'Etat was entitled to impose a fine was answered in a 1990 statute which granted the Conseil D'Etat the right to impose a fine on an administrative authority that had failed to act on a judgment to set aside a decision.

With regards to damages, the Conseil D'Etat does not have the authority to attach an order to pay damages to its judgment to quash. Persons subject to public law are subject to tort liability and an applicant must turn to the judicial judge to enforce performance ordered in judgments of the Conseil D'Etat. As to compensation, the Conseil D'Etat determines requests for damages brought against the State or public bodies for injury sustained as a result of measures taken by them. The procedure is rare and the Conseil D'Etat only determines it when no other competent court is found.

Referral before an international court: Having signed the EEC Treaty, the Belgian Conseil D'Etat is therefore obliged by virtue of Article 177 of the Treaty, as a court of last resort, to submit all questions raised by it that involve interpretation of European Union law to the European Court for preliminary ruling.

The effects of decisions of administrative courts

Any decision emanating from the Conseil D'Etat which quashes an administrative act has retrospective effect, although this is limited, given the considerations of equity, public utility and certainty. When an administrative act is quashed, the decisions taken by virtue of that act also lose their legal basis. Because it has an absolute binding effect, a decision

ordering that an administrative act be quashed creates a precedent binding on all courts. In theory, the Conseil D'Etat is not bound by the decisions of other courts, but in fact it takes them into account.

The enforcement of decisions of administrative courts

In Belgium, some laws force public persons and public bodies subject to public law to register in their accounts, should the case arise, the debts that result from adverse judgments handed down by administrative courts.

An applicant may, in the case where the Conseil D'Etat decision has not been granted, apply to a non-administrative court to obtain reparation for the loss suffered and may also request the annulment of the new administrative decision. In 1991, a law was introduced which allows the Conseil D'Etat to suspend the carrying out of a particular act or decision by the administration if the act or decision would be likely to cause the applicant serious loss or damage of a kind which would be very difficult to repair once it had occurred.

THE EUROPEAN UNION

The powers of the administrative judge

Power to quash or vary: By virtue of Article 173 of the EEC Treaty, any act of an institution of the European Union may be challenged with a view to it being set aside. This power is quite extensive and covers acts which affect individuals or communities as a whole.

In actions brought to control the legality of a measure, particularly actions requesting the quashing of the measure, the European Court of Justice has the power of judicial review into the legality of all legal acts taken by European Union institutions, be they general or individual. Under Article 173, there are four grounds on which the European Court of Justice may exercise its power to quash a decision: lack of competence; infringement of an essential procedural requirement; infringement of the Treaty; or any rule of law related to the implementation of the Treaty or misuse of powers. Overall, the European Court of Justice takes a broad view of what are considered infringements of the Treaty.

Power of full judicial review: Article 172 of the Treaty only allows the Court the unlimited jurisdiction of full judicial review when considering cases involving sanctions provided by the regulations set up by the Council. The Court, as an international court, also hears cases transferred from national courts for preliminary hearings, and in so doing can use its power to assess an act or measure of a European Union institution and control the

conformity of national rules with the executive rules of the European Union.

The European Court of Justice does not have the power to impose a fine on or to award an injunction against the body that has issued the administrative act that is being challenged.

The effects of decisions of administrative courts

A decision of the European Court of Justice quashing an act of a European Union institution has an absolute effect in that the act is considered to have disappeared from the legal order. However, for reasons of certainty, the consequences of such a decision may be limited to the particular applicant. The Treaty of Rome also empowers the European Court of Justice to limit the effects of its decisions to quash, either over time, or when it quashes regulations, by leaving such of the provisions of the regulation intact as are necessary to preserve certainty in litigation.

The enforcement of decisions of administrative courts

The enforcement of the European Court of Justice's decisions has not posed any problems, since European Union institutions have always taken the necessary steps to ensure compliance. Article 176 of the Treaty compels the institution concerned to take all necessary steps for the proper application of the Court's decisions. Should the institution concerned not take the necessary steps, the applicants affected by such an action may apply to the European Court of Justice for reparation of any damage or loss suffered as a result. Attachment orders and orders affecting the property belonging to the European Union institution may be made.

FRANCE

Administrative law has evolved as a special branch of law in France with a three tier system of general administrative courts. The first tier has the *Tribuneaux Administratifs*; the second tier has five *Cours Administratives d'Appel*; and the highest administrative court is the Conseil D'Etat to which leave to appeal is required, although in some instances the Conseil D'Etat may be a court of first instance.

The powers of the administrative judge

Power to quash or vary: In actions brought involving abuse of power, the judge is informed of arguments which challenge the legality of administrative acts. A judge in the French Conseil D'Etat may pronounce the contested decision quashed, if it turns out to be unlawful, but there are no further powers to annul.

Power of full judicial review: In full judicial review, questions involving the recognition of personal rights and which are attached to an individual legal situation are in principle referred to a judge. In such cases, the judge may order the payment of money, or reverse the decision, and in certain cases may even substitute a decision. The extent of the powers actually varies with the subject matter.

Appeals against judgments made after full judicial review are heard by the administrative courts of appeal and only go before the Conseil D'Etat on further appeal. Cases concerning abuse of power are appealed before the Conseil D'Etat, but since 1992 appeals involving abuse of power lodged against individual administrative decisions have been progressively assigned to the administrative courts of appeal.

Additional powers: In actions against abuse of power and in actions for full judicial review, the administrative judge is not enabled to issue an injunction against the administration, nor may the administration be ordered to pay a fine.

It is a basic principle of French Public Law that the administrative judge is careful not to interfere with the activity of the administration or to give orders to the administration.

Referral before an international court: As France is part of the European Union, French administrative courts must transfer all questions involving the interpretation of European Community law to the European Court of Justice for preliminary hearing. In matters of international law outside the scope of the European Community, the French administrative court is under no such obligation.

The effects of decisions of administrative courts

In France, the effect of a court decision varies. In most cases it is only relative, but may be absolute if the decision quashes the administrative act as ultra vires. Once administrative acts have been quashed, they lose all legal effect and can no longer be enforced, either by the administration itself or by any other court. Acts quashed as ultra vires are deemed to have never existed and they disappear with retrospective effect from the country's legal framework.

The enforcement of decisions of administrative courts

The majority of decisions of the administrative courts are applied in France, although in recent years there has been an increase in the number of applications claiming that decisions have not been applied. Putting aside bad faith on the part of those involved, the principal cause is due to

the complexity of the decisions and the lack of legal knowledge of many persons and bodies subject to administrative decisions.

A Decree dating back to 1963 provides a mechanism that aims to prevent administrative court decisions being ignored and to encourage their application. There is a separate division of the Conseil D'Etat which ensures that this aim is attained. Two Acts of Parliament, in 1980 and in 1987, reinforced this aim and added coercive measures. These Acts empower the Conseil D'Etat to impose periodic penalty payments by compelling fines on persons or bodies subject to public law and, in more general terms, on private persons or bodies charged with running public services.

GERMANY

Administrative law in Germany is concerned primarily with the validity or revocability of administrative acts and the right to administrative action. There is a tendency towards codification with large parts of German administrative law being codified.

There are five jurisdictional branches in Germany, each with its own court organisation: the general courts; the administrative courts; the tax courts; the social courts; and the labour courts. There is also a Constitutional court. In addition to the general administrative courts, the tax courts and the social courts are also considered to be administrative courts in certain instances.

There are 35 general administrative courts of first instance—*Verwaltungsgerichte*; 10 appeal courts—*Oberverwaltungsgerichte*; and the Supreme Court, the Bundesverwaltungsgericht.

The powers of the administrative judge

Power to quash or vary: The administrative judge in Germany has the power to quash a decision in two ways. The first, which is most often used, is intended to protect a personal right or interest by quashing the contested act. Since the object of this action is the protection of rights or interests of individual persons, the judge must restrict considerations to the part of the act that appears to be unlawful.

The second form of action is the direct review of rules and regulations. This enables the administrative judge to revoke certain executive rules which do not have the authority of law. This right to review may be exercised over certain local planning regulations and the law of the "Lander", on condition that the Land has incorporated this review procedure into its law.

The German administrative judge also has the power to obtain an administrative act from the administration, but cannot issue an administrative act in the place of the administration. However, the administrative judge can quash any decision which refuses to grant a request and can oblige the administration to come to a new decision which takes into account the grounds for the decision. In some instances, the judge can oblige the administration to issue the act requested by the applicant. Another possibility open to the German administrative judge is to order that a measure be served or withheld. This involves full judicial review, but is reserved to certain well defined matters and is intended to get the administration to pay out a certain sum of money.

Additional powers: In the case of the quashing of an administrative act that has already been carried out, the administrative judge may decide in what manner the administrative authorities should restitute the previous situation. The judge cannot, however, substitute himself for the administration to do this. Judicial courts, in principle, have jurisdiction to order the payment of damages. This is the case when the State acts as a private person, in the case of State liability as a result of administrative acts governed by administrative law, or in the case of compensation of private persons in expropriation for public purposes.

Administrative courts determine State liability resulting from contracts entered into by the administration and, likewise, the State's liability towards its public servants. The orders or judgments and decisions of these courts may be carried out in accordance with the rules of the Code for Civil Procedure involving the State. The court can appoint a competent authority to carry out its orders in accordance with the orders of the court when the administration is inactive.

The provisions of the Code of Civil Procedure to force performance are applicable to the decisions of the administrative courts. However, it is indeed rare that steps have to be taken to force the administration to apply or carry out an order. On most occasions, the court's decisions or orders are obeyed.

Referral before an international court: In the case of conventions dealing with refugees and stateless persons and in the case also of the European Convention for the Protection of Human Rights, the German judge will apply international conventions on condition that these conventions have been incorporated into domestic law. The general rules of international law take precedence over domestic laws and directly create rights and obligations for all citizens.

Article 177, paragraph 1 of the EEC Treaty requires courts of last resort, from which there is no appeal, to transfer all questions to which European Union law may be applied, to the European Court of Justice for preliminary ruling. German administrative courts are bound to take account of the judgments of the European Court of Justice.

The effects of decisions of administrative courts

Judgments given in administrative cases have relative authority and are subject to challenge. They only bind the parties in relation to the matter concerned. This relative effect stems from the fact that the object of the action is not to decide whether the administrative act is unlawful, but to pass judgment on the applicant's claim. The subjective nature of an action to have an administrative act quashed explains the fact that the decision only has relative binding authority.

Third parties are, however, bound by the fact that the administrative act has been quashed. Decisions quashing regulations are final and these decisions are published. Any administrative act which is quashed is made retrospectively invalid and, if possible, is deemed never to have existed. A decision declaring that a regulation is unlawful takes effect ab initio unless this would cause legal uncertainty.

The enforcement of decisions of administrative courts

In general, the administration respects the principle of the rule of law and applies the decisions of administrative courts without direct outside pressure. Problems of enforcement only really occur in those cases where the application brought before the court does not have the effect of suspending the act or decision challenged. In such cases, when the administrative court declares an act or decision annulled, the court may, upon the application of an interested party, specify the way in which the administration must apply its judgment.

The administrative courts may oblige the administration to take a decision or carry out an act that it had previously refused so to do. Such a court order may be accompanied by the imposition of a periodic fine. As a general rule, the Code of Civil Procedure may be relied upon even in administrative matters to ensure that the decisions and judgments of the administrative courts are enforced. The Code of Civil Procedure provides a specific measure to be used to encourage the administration to comply voluntarily with the decisions of the courts. The court, before deciding on what enforcement measures to adopt, must inform the administration of the decision it intends to pronounce and accord a specific time limit in which the decision should be applied.

GREECE

The Greek judicial system draws a distinction between the judicial courts and administrative matters, the latter being covered by the Conseil D'Etat (Symvoulion Epikratias), the Court of Auditors and the administrative courts. A distinction also needs to be made in the Greek system between actions brought for administrative ultra vires actions and actions brought before the administrative court for full judicial review.

The powers of the administrative judge

Power to quash or vary: In the case of an administrative judge hearing an action brought against an administrative act or decision for abuse of power, if the court finds the act or decision to be implicitly or explicitly unlawful, the judge is empowered to quash all or part of the challenged act or decision. The judge is not empowered to infer even the most direct consequences of this decision to quash.

Power of full judicial review: The type of action brought will determine the powers of the judge hearing a case for full judicial review. In the case of an action brought against an enforceable administrative act or decision, independently of any personal right having been interfered with, not only may the judge quash all or part of the administrative act or decision, but the judge may also vary and in some instances substitute the decision for that of the administration.

In the case of an action brought relating to contracts entered into by the administration or an action brought to establish the tort liability of the administration where it is held that a personal right has been interfered with, the judge may order the administration to pay compensation or may quash a decision made unilaterally by the administration in violation of one of the clauses in a contract.

Additional powers: When dealing with an application to quash a decision or dealing with full judicial review, the administrative judge is not allowed to order the administration to pay compensation, nor to order the administration to act on the decision under the pressure of a periodic fine. However, the administrative judge is not prevented from including in the judgment an indication worded in such a way as to put the administration under considerable pressure to comply.

Referral before an international court: As a member of the European Community, Greece is bound by Article 177 of the EEC Treaty to transfer cases from its court of last resort to the European Court of Justice for preliminary ruling, if the questions raised require application of European Union law.

The effects of decisions of administrative courts

Judgments which quash administrative acts take effect retrospectively and the act is considered never to have existed.

The enforcement of decisions of administrative courts

In theory, public authorities are bound to apply the decisions of administrative courts; if this does not occur, it constitutes an unlawful use of power and will incur liability. However, no proper study has been carried out and it is not possible to determine whether the decisions of administrative courts are applied.

ITALY

In Italy, the Regional Administrative Tribunals and the Conseil D'Etat (Consiglio di Stato) in appeal cases, are the courts of first instance for administrative justice. They have general powers as judges, and hence may decide on actions brought against acts or decisions of administrative authorities by persons whose rights have been affected by abuse of power or by breach of law. Such acts or decisions of administrative authorities must be seen to interfere directly with an individual claimant's rights, to enable the claimant to bring an action; otherwise, the claimant must wait until the decision in question is applied before an action can be commenced.

The powers of the administrative judge

Power to quash or vary: The Italian system provides the administrative courts with an additional power known as "*di merito*" (on the substance), as opposed to "*di legittima*" power (on the legitimacy), which is intended to give the administrative judge extended powers. With this additional power, the administrative judge may decide cases involving lack of competence, ultra vires, infringement of law, and may assess the advisability of an administrative act or decision. The administrative judge may also examine whether the administrative authority has acted in the most useful fashion in the public interest and in the least prejudicial way for the interests of the private individual.

The administrative judge may also quash totally or in part any administrative act or decision that is brought before the court, and may be allowed to substitute a decision.

Additional powers: The Conseil D'Etat has the power of full judicial review over cases involving the public service. In actions heard with full judicial review or in quashing, the Conseil D'Etat is enabled to stay the

implementation of an administrative act or decision or to take special measures.

Referral before an international court: The same principles used in the non administrative courts are used in the administrative courts to implement international conventions. As a member of the European Union, Italy has undertaken to apply Article 177 of the EEC Treaty and refer matters to the European Court of Justice.

The effects of decisions of administrative courts

A judgment which quashes an administrative act has retrospective effect and the illegitimate administrative act is deemed never to have existed.

The enforcement of decisions of administrative courts

In cases where a third party's rights may be affected by administrative decisions of the Conseil D'Etat, such decisions set precedents and are taken into consideration by the administration. In some instances, the principles espoused in these precedents may be adopted in law. However, there is insufficient data available which would enable an accurate picture to be drawn on the actual success rate of the enforcement of decisions of administrative courts.

LUXEMBOURG

The powers of the administrative judge

Power to quash or vary: In Luxembourg there is a distinction between actions that are brought before the courts involving the administration to have a decision quashed, and those that are brought to have a decision varied or to be given full judicial review.

Article 31, paragraph 1 of the statute of February 8, 1961, allows the Comite du Contentieux (committee dealing with contentious matters) of the Conseil D'Etat, to deal with actions brought for lack of competence, ultra vires, or infringement of the law or other regulations intended to protect the interests of the individual. When hearing actions to quash an administrative decision, the Comite du Contentieux has the right to examine the existence and the accuracy of the material facts on which the contested decision is based and to verify that there are sufficient legal grounds to contest the administrative decision. The Comite du Contentieux is also able to appraise a case on its merits and to substitute a decision for that of the administration, but only if the decision involves the interference with individual rights.

Additional powers: While the Comite du Contentieux does not have the power to issue an injunction against the administration, it is able to lay down the principles that the administration must follow in its new decision. The Comite du Contentieux does not have the power to order payment of damages, as this is reserved for the courts. The Comite du Contentieux does have the power to hear disputes between the Government and the Chambre des Comptes (Audit Office).

Referral before an international court: The Comite du Contentieux may transfer cases for preliminary ruling before the European Court of Justice and the Court of Justice of Benelux, with the object of any referral being to ensure that domestic courts apply the laws of international treaties in a uniform fashion.

The effects of decisions of administrative courts

The ratio of judgments of the Comite du Contentieux are binding on the ordinary courts and, in many cases the ordinary courts delay their decision until the administrative court has heard the case. On the other hand, decisions of the ordinary courts have no binding effect on the decisions of the Conseil D'Etat. The Conseil D'Etat does take their decisions into account.

The enforcement of decisions of administrative courts

A law passed in 1986 dealing with the enforcement of the decisions of the Comite du Contentieux, gives this court the discretion to empower a special commissioner to take the decision required to ensure that a decision quashing an administrative act is complied with. The Litigation Committee of the Comite du Contentieux may use this discretionary power if the applicant makes a request to that effect and if the administrative body concerned refuses or fails to comply with the Litigation Committee's judgment.

THE NETHERLANDS

The powers of the administrative judge

Power to quash or vary: In the Netherlands, the Conseil D'Etat only examines the legality of an administrative act or decision in a broad sense, but is thereby able to decide if an administrative act or decision is ultra vires, unreasonable, or if the principles of good administration have not been followed.

Additional powers: First tier administrative courts are allowed by statute to order the payment of damages, but this power is rarely used. The Conseil

D'Etat of the Netherlands has the right to award an injunction backed by a periodic fine, but this can only be done using a special additional procedure. Alternatively, this procedure may be used to order the payment of damages. The first tier administrative courts are also responsible for the enforcement of administrative decisions. In some cases, refusal to apply a decision may itself be considered to be an administrative decision, and as such, action against it may be brought before the Conseil D'Etat.

Referral before an international court: Questions on the application of the EEC Treaty or of the Benelux Economic Union must be transferred for preliminary ruling to the European Court of Justice.

The effects of decisions of administrative courts

The decisions of the Conseil D'Etat are retrospective; even if legal rules change the decisions will remain unchanged.

The enforcement of decisions of administrative courts

The refusal to comply with the decision of an administrative court is deemed to be an unlawful use of power which may give an applicant the right to appeal before the Conseil D'Etat. There are complicated enforcement mechanisms in place, and Dutch law also provides for a special additional procedure which allows an injunction, accompanied by a periodic fine, to be imposed in order to force compliance with a court order.

SPAIN

Article 117 of the Spanish Constitution of 1978 provides for a single court system. The judicial power divides all legal institutions into four jurisdictions, and cases are allocated amongst them according to subject matter. One such jurisdiction concerns administrative acts. However, administrative judges and those of other courts are all members of a single unified profession.

Spanish administrative courts have jurisdiction over various government bodies. Administrative remedies before these courts have to be exhausted before any action through the normal courts can be brought. There are also a number of bodies which may make decisions and may also be challenged in the courts. Among the more important ones are the tax courts, the Court for the Protection of Competition, and the Administrative Claims Court.

The powers of the administrative judge

Power to quash or vary: The Spanish legal system does not draw any distinction between applications to have an administrative act quashed

and petitions for full review. The objective of proceedings is to settle the claims of the parties. Whilst in any administrative case the administrative judge is required to decide whether the law has been breached, this duty is not limited to certain types of action. Any action is based on the illegal nature of the administrative act.

Thus, administrative courts have both the power to quash an administrative act and the power to review the matter fully, without any formal distinction being drawn between the two types of cases.

Additional powers: If an administrative act is decided in favour of an applicant, the unlawful administrative act will be totally or partially quashed. An administrative judge, having decided that the applicant has standing under administrative law, may take any measure deemed necessary in order that the applicant's rights are enforced. In such a case, the administrative judge has the power not only to quash an administrative act, but also the power to vary it or substitute it. The administrative judge also has the power to order the payment of damages if this has been requested.

Referral before an international court: The Spanish Constitution expressly recognises the competence of both the European Court of Justice and the European Court of Human Rights. The jurisdiction of these two bodies is directly applicable in Spanish administrative courts.

The effects of decisions of administrative courts

Decisions reviewing the lawfulness of an administrative act generally has retrospective effect but for reasons of legal certainty, the administrative act may be left in force. However, administrative acts which take the form of rules are considered valid and have full legal effect until they are invalidated or quashed, no matter the nature of the illegality. A subsequent administrative act may remedy the illegality of the first.

The enforcement of decisions of administrative courts

Technically, the enforcement of court judgments, whether administrative or otherwise, falls to the judge who has jurisdiction to order whatever measures are considered necessary to obtain compliance. However, there are enforcement difficulties including the prerogative which prevent the administration's funds, goods and property from being seized. The administration also often moves very slowly to accept compliance, by hiding behind the time-limits set for compliance. The administration is also known to have developed the habit of taking the same decision which has been previously quashed, but under a different legal form.

SWITZERLAND

Due to its federal structure, Switzerland has an autonomous system of administrative courts. Their jurisdiction covers all cantons except Uri and Appenzell. There is also a Federal Administrative Supreme Court which hears cases arising under federal public law and ensures that measures taken in the cantons respect the Federal Constitution. The Swiss system also draws a distinction between specialised administrative courts dealing with particular areas of administrative law, and general administrative courts dealing with "other" areas.

The powers of the administrative judge

Power to quash or vary: In general terms, the Swiss administrative judge has full discretion to vary or substitute an administrative decision, so long as reasons are given for the decision. There are some limits on this power, for example, the administrative judge cannot vary a decision so as to make it less favourable to an applicant, nor can the administrative judge annul a law on the ground that it is illegal or unconstitutional.

Additional powers: Some first tier administrative courts are empowered to hear cases between the State and individuals, particularly in relation to finance matters. At the federal level, the Federal Administrative Supreme Court has the power of full review.

Referral before an international court: Swiss administrative judges do not have the power to refer cases to an international court. Switzerland is not part of the European Union, and hence the European Court of Justice has no jurisdiction over Swiss law.

The effects of decisions of administrative courts

The law applicable to the question in dispute and the nature of the decision applied for will determine the effects under Swiss law.

The enforcement of decisions of administrative courts

As a general rule, the decisions of the administrative courts are complied with. Not only are there financial penalties imposed if compliance is not forthcoming, but the administrative judge may also make orders with regard to administrative action to be taken.

COMPARISON

The powers of the administrative judge

The above comparison shows that great differences exist between the powers of judges in different administrative courts. A power which they all

have in common is the power to decide whether an administrative act is unlawful. In most cases, this power can only be exercised when a personal or individual right is affected. Many systems allow a general right of action which challenges the administrative right itself, quite independently of its effects in any particular case.

In those countries which have a separate system of administrative courts, the judge's power to vary administrative acts and the power of full review are often only available in a limited number of cases. In certain countries, the principle of the separation of powers between the judiciary and the executive means that administrative judges cannot make decisions in the place of the administration or "in the shoes of the decision-maker".

Quite a number of the countries examined have a system whereby the ordinary courts have a general jurisdiction, and the administrative courts are only competent in cases for which the law declares them to be so. This explains the fact that in some countries the administrative courts do not have the power to order the payment of damages; to issue an injunction, or to impose a fine.

These features, however, are not present in countries which have a single system of courts and where administrative law is merged with private law. It is clear that in such countries administrative law is gaining a certain degree of autonomy, due to an increasing level of interaction between the administration and citizens. Those countries with single court systems have allowed for this autonomy, either within the context of the ordinary courts or by establishing a separate system of administrative courts with limited jurisdiction in narrowly-defined areas of administrative law.

The effects of decisions of administrative courts

In all the countries considered, administrative judges have jurisdiction to make decisions with regard to administrative acts or decisions, to the extent that they affect individual rights. In many of these countries, this jurisdiction may be extended so as to cover rules and regulations of a legislative nature.

As a general rule, it can be said that if an act is quashed, it disappears from the date of the legal order which declares it, irrespective of whether the act challenged is regulatory in nature and therefore general in character, or is merely an administrative act or decision which effects individual rights only.

The fact that some legal systems are divided into separate administrative and non-administrative courts has no effect on the general principles explained above. One may also assert as a general rule, that with only a

few exceptions, all the countries examined respect the rules of international law, irrespective of whether they are actually recognised as a source of law in the national system itself.

The enforcement of decisions of administrative courts

The manner by which the decisions of administrative courts are applied depends on the legal or other methods available to those relying on the judgment. The efficiency of these methods is dependant on the degree of legal protection that the countries concerned allow their citizens in their relations with public authorities. However, it can be said that in the countries examined, public authorities generally apply the decisions of the courts.

If the authorities concerned are reticent to comply with the courts' judgments, there are often procedures available, notably periodic fines, which may be used to persuade proper compliance. In some countries, administrative authorities may be challenged before the courts should an administrative court judgment be ignored.

Final comments

The question has frequently been asked as to what can be achieved by comparing different systems of administrative law. There are those (Schwarze) who say that administrative law is a technical field which is a fruitful source for finding "functional equivalents" and that it can readily be compared. I would suggest from this paper that different systems of administrative law are influenced to varying degrees by political, constitutional and historical experiences and choices. I do not suggest any correctness in the view of sceptics who say that administrative law is the clearest expression of the national character of a people. The convergence of the different European systems of administrative law will lead to an even greater harmonisation of law.

Any comparative study will also serve a variety of purposes. By providing perspective, comparative study will help us better to understand our own administrative law, to stimulate our minds as to possible weaknesses, and to assist legal reform to find creative solutions for problems.

The purpose of this paper was one of sharing my experience and to give a sense of the similarities and differences of some of the European administrative law systems. If there has been a whetting of the appetite for more analysis of these systems, the purpose has been well served.

Endnote

This paper was primarily based on discussions the author had with numerous people in many European institutions during October and November 1996 as part of preliminary research for a PhD dissertation. The selected bibliography which follows may assist readers with an introduction to the areas covered in the paper.

Selected Bibliography

E Alvarez Conde, *El Regimen Politico Espanol* (1988, Tecnos)
I Barnes, *The European Community* (1993, Longman)
K D Borchardt, *The ABC of Community Law* (1994, OOEC
A R Brewer-Carias, *Judicial Review in Comparative Law* (1989, CUP)
L Brown, *French Administrative Law* (3rd ed, 1983)
N Brown, *The Court of Justice of the EC* (S & M 1989)
G Casanova, *Teoria Estado y Derecho Constitucional* (1983, Vicens)
P Craig, *EC Law: Text, Cases and Materials* (1995, Clarendon)
R Dehousse (ed), *Europe After Maastricht* (1994, Law Books)
Lord Hailsham, *Law Of the European Communities* (1986, Butterworths)
D Lasok, *Law and Institutions of the European Union* (1994, Butt)
F H Lawson, *A Common Lawyer Looks at the Civil Law* (1953, Greenwood Press)
H J Liebesny, *Foreign Legal Systems: A Comparative Analysis* (1981, George Washington University Press)
D McIntosh, *Civil Procedures in EC Countries* (1991, Lloyd's of London Press)
L Martin-Retortillo, *Derechos Fundamentales y Constitucion* (1988, Civitas)
D Medhurst, *A Brief and Practical Guide to European Community Law* (1990, OUP)
J H Merryman, *The Civil Law Tradition* (1985, Stanford University Press)
Z M Nedjati, *English and Continental Systems of Administrative Law* (1978, North-Holland)
S Prechal, *Directives in EC Law* (1995, Clarendon)
J Schwarze, *European Administrative Law* (1992, Sweet & Maxwell)
J Shaw, *European Community Law* (1993, Macmillan)
M Sheridan (ed), *EC Legal Systems: An Introductory Guide* (1992, Butterworths)
M Smith, *The Development of European Law* (1928, Columbia University Press)
J Steiner, *Enforcing European Community Law* (1995, Blackstone)
S Weatherill, *Cases and Materials on EC Law* (1994, Blackstone)

COMMENTARY: DEVELOPMENTS IN EUROPEAN ADMINISTRATIVE LAW

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This commentary focuses on four of the issues raised in Frank Esparraga's discussion of ten European jurisdictions. These are:

- the power to impose fines on a public authority;
- the power to declare a regulation or decision unlawful, yet to allow its enforcement for conduct up to the day of judgment;
- the powers to vary and substitute any decision of a public authority; and
- respect for the rules of international law.

POWER TO IMPOSE FINES

One of the most interesting features of European administrative law is the power of some administrative courts to impose a fine on a public authority. This is possible in Germany, the Netherlands and Switzerland, although it is apparently rarely used. In France and Belgium fines have been threatened as a means of coercing the administration to comply with an order of the court. The power to fine does not exist in Spain, Greece and Italy or in respect of the European Union's administrative bodies. It might be pointed out, however, that under the European Union Treaty, the European Court has the power, under Article 171, to fine one of its member states for failure to comply with its judgments.

Indeed, the European Court has found another way to enforce its judgments. This is by recognising that individuals have a right of action against a member state for failure properly to implement a directive, and a consequent right to be granted damages for this failure to implement the directive.[1] The European Court placed three conditions on any award of damages for failure to implement an EU directive:

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1 *Francovich v Italy* [1991] ECR 5357.

- the directive had to grant a direct right to individuals;
- the content of such a right must be identifiable from the directive itself; and
- there had to be a causal link between the member state's breach of duty and the individual's damages.

DECLARATION OF ILLEGALITY BUT THE DECISION REMAINS ENFORCED

Another point which is of comparative interest is the power of some administrative courts to declare a regulation unlawful, but then to allow the unlawful regulation to have full effect where to not do so would cause uncertainty. This is the case in the jurisdictions of Germany, the European Union and Spain.

The issue arose in a famous case in which the different age limits of men and women for retirement and pension entitlements in the United Kingdom were declared illegal on the ground of sex discrimination.[2] The European Court, realising that retrospective application of equal treatment would potentially cost billions of dollars, declared that its ruling was limited to the individuals who took the action and would only have prospective effect for any future claims. Needless to say the United Kingdom Government quickly increased the pensionable age for women rather than drop the age for men.

POWERS TO QUASH, VARY AND SUBSTITUTE DECISIONS

The different powers of administrative courts in various jurisdictions to vary and substitute as well as quash a decision of an administrative authority are also worth considering. As Frank Esparraga mentions, Spain, Switzerland and Greece give very wide powers to an administrative court to vary and substitute decisions while a country like Belgium allows only a strict power to quash a decision. This naturally raises two categories of question: under what circumstances should an administrative court review both the facts and the law; and what constraints, if any, should there be on a judge to vary and substitute a finding of the original decision-maker?

RESPECT FOR THE RULES OF INTERNATIONAL LAW

Another aspect of an emerging harmonisation of European administrative law is the universal respect, amongst most European jurisdictions, for the rules of international law. As Frank points out, this respect for the rules of international law is "irrespective of whether they are actually recognised as

2 *Barber v GRE* [1990] ECR 1889; 1990 (2) CMLR 513.

a source of law in the national system itself". It may be that this approach had some influence on the High Court in its *Teoh* decision.[3] If *Teoh* had been heard in any of these jurisdictions it is very likely that the United Nations *Convention on the Rights of the Child* would have been given due consideration, and the same or a very similar decision would have resulted.

Given these developments in Europe and elsewhere, it is clear that a greater understanding of alternative approaches to administrative law, particularly in the civil law system countries of continental Europe, is likely to be a valuable source of ideas for issues emerging in Australia.

3 *Minister for Immigration and Ethnic Affairs v Teoh* (1985) 183 CLR 273.

THE ROLE OF EQUITY IN PUBLIC LAW

John Fitzgerald*

EQUITY IN PUBLIC LAW—WHY IS THE TOPIC INTERESTING AND TIMELY?

In this paper I discuss a topic which has until recently been overlooked or regarded as unimportant. A discussion of the topic is timely for reasons of both public law policy and strategy in litigation.

The public policy reason comes from a recent and regrettable development: child abuse in public institutions. In the State of New South Wales considerable public disquiet has been provoked by the Woods Royal Commission Report on Child Abuse[1] and subsequent revelations about the actions of the NSW Department of Community Services. Nationally, the Human Rights and Equal Opportunity Commission (HREOC) report on the "Stolen Children" has also provoked public disquiet.[2] What those developments have in common is concern about the ethics of action or inaction of public officials charged with protection of vulnerable people. Standards of integrity in public governance are seen as unfulfilled by systematic infliction of grave harm upon children. Those standards are also seen as unfulfilled by systematic failure to prevent recurrent abuse by aberrant public officials. Systems of governance, whether public or private, in which standards of integrity are seen as unfulfilled will quickly encounter problems of compliance or co-operation.

In the relation between a child who is a ward of the state and the agency which is the guardian, fiduciary responsibilities apply. Might not one way to restore perceptions of integrity in the system of public governance dealing with the child be the stricter application of equity? Equity supplies standards of ethical behaviour by private individuals which the common law does not otherwise require. Could not equity do likewise in connection with the exercise of powers and duties given to public officials who are dealing with children?

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1 Royal Commission into the NSW Police Service, *Final Report: The Paedophile Inquiry* (1997) Volumes 1–V1.

2 Human Rights and Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

Another reason is the change in the *modus operandi* of public administration called "contracting out". In the relations described by this rubric the parties to the relation base it upon an explicit agreement: one party to the relation decides what services or goods are provided to themselves or their clients and the other party decides how to produce the good or service, and supplies that good or service. A shift from a conventional relationship for the exercise of discretions and powers, to one governed by contracting out and employment of the purchaser/provider split, sets up a different target for remedies. The employment of contracts attracts contractual remedies not previously available at all and equitable remedies not previously readily available. Since contracting out presupposes a market, at least in principle, the formation of contracts and their administration attract trade practices law and the remedies available under that body of law.

The extension of trade practices law has an added significance to the application of equity to public governance. This arises from section 51AA of the *Trade Practices Act 1974* (Cth) (TPA), which provides in effect that if in trade or commerce there is an interest which equity would recognise, then the set of remedies available to protect that interest is extended by the statutory remedies under the TPA. Section 51AA is an added inducement for attempts to have an interest involved in a system of public governance recognised by equity.

One powerful reason in favour of extending the application of equity in schemes of public governance is the absence from our legal system of prescribed standards of ethical behaviour unique or peculiar to public officials. In the notorious case of *Greiner v Independent Commission Against Corruption* a member of the majority stated: "The law has always set high standards for official conduct".[3] No authority for this sweeping statement was made. The grounds of review for prerogative relief and their statutory cousins under the ADJR Act[4] provide some ethical standards, especially procedural fairness. Apart from this there is little Australian authority. From the early part of this century there are some High Court cases concerning conflict of interest by elected officials,[5] but they remain uncited

3 (1992) 28 NSWLR 125 at 180 per Priestley JA.

4 The "bad faith" ground of review is rarely used because of the latitude that courts have traditionally given to public officials in acting in "good faith": see the NSW Court of Appeal's decision in *Chief Commissioner for Business Franchise Licences (Tobacco) v Century Impact Pty Ltd* (1996) 40 NSWLR 511 at 523.

5 *Wilkinson v Osborne* (1915) 21 CLR 89; *Horne v Barber* (1920) 27 CLR 494; *Wood v Little* (1921) 29 CLR 564; and *R v Boston* (1923) 33 CLR 386. These and nineteenth century authorities are discussed in detail by Justice Finn in a number of extra-curial contributions: (with K J Smith) "The Citizen, the Government and Reasonable Expectations"(l992) 66 *ALJ* 139; "Public Trust and Public Accountability" (1994) 3 *Griffith Law Rev* 224; "The Forgotten Trust: The People and the State", in M Cope, *Equity Issues and Trends* (1995) 131–155.

and neglected. There is also the "model litigant" rule. The rule is that a government agency when a party to litigation should act to assist the court in reaching a just decision, not pursue or protect its own interests.[6] I am aware of only two authorities where the rule has been cited other than in connection with the conduct of civil litigation.[7] In other words, it is a rule of civil procedure, not public administration.

Another rule is the so-called "rule in *Ex Parte James*[8]". This is a rule about the conduct of public officials who have been paid money under a mistake of law. It originated in the situation where the payee was an officer of the court, such as the Trustee in Bankruptcy or an Official Receiver or Manager. Such persons were expected to be "bound to be even more straightforward and honest than an ordinary person in the affairs of every-day life".[9] The rule has now been extended beyond officers of court to revenue collecting agencies in connection with decisions about restitution of revenue paid under a mistake of law.[10]

In the law concerned with regulation of natural resources, including land and waterways, there is a concept named the "public trust doctrine". Well recognised in United States jurisprudence, the concept has only belatedly been recognised in Australia.[11] It holds that the control and regulation of natural resources such as waterways, public reserves and fishery stock is for use by the public at large. The exercise of these public powers is similar to but is distinct from the private trust.

However, even where higher ethical standards are implied into the list of considerations for the exercise of a statutory discretion, the limitations of remedies persist. This is so because the rights and duties are characterised as "public", not "private". Where rights are characterised as "public" there is no protection other than statutory remedies or the usual options for relief in judicial review of administrative action. Take the example of the "public

6 *Dyson v Attorney-General* [1911] 1 KB 410 at 421, 422; *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342; *P&C Canterella v Egg Marketing Board* [1973] 2 NSWR 366 at 383–384; *Sims v Planning Appeal Tribunal* (1992) 57 SASR 325 at 336 per Debelle J.

7 *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537 at 558; and *Building Services Corporation v International Pools (Australia) Pty Ltd* (Supreme Court of NSW, 23 May 1996, unrep).

8 (1874) LR 9 Ch 609.

9 *Re Tyler; ex parte Official Receiver* (1907) 1 KB 865 at 871 per Farwell LJ.

10 *R v Tower Twin Hamlets London Borough Council; ex parte Chetnik Developments Ltd* [1988] AC 858 at 877; *Commissioner of State Revenues (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 5; *Collector of Customs v LNC (Wholesale) Pty Ltd* (1989) 19 ALD 341; and *SCI Operations Ltd v Commonwealth* (Federal Court, Full Ct, 28 Aug 1996 unrep).

11 *Hornsby Council v Roads and Traffic Authority of New South Wales* [1997] 41 NSWLR 151 at 153 per Mason P, and commentary cited therein.

trust" doctrine which operates in the administration of natural resources. The right to fish in public waterways is not proprietary in nature.[12] The duties of an agency in control of land set aside for use by the public are not a "trust" in the sense recognised by equity[13] unless the agency controls the land under an express private trust,[14] a trust expressly created by statute,[15] or a trust necessarily implied from the terms of the statute.[16] This returns us to the same kind of problem of the limitations upon the usual remedies for enforcement of "public" rights and duties.

EQUITY AND THE TYPES OF RELATIONS IN SYSTEMS OF PUBLIC GOVERNANCE

In answering the question—"can a role given to a public sector agency by a system of public governance and/or the agency's conduct in that role give rise to grounds for relief in an equitable jurisdiction?"—one might first ask if the system employs a relation where there are legal interests traditionally protected by equity. If so, there should be no reason, statute apart, for equity not to protect the interest. Even if the interest and the relation originate in legislation, canons of statutory interpretation allow equitable remedies to enforce rights and duties created by statute.[17]

There are only a limited number of examples of systems of public governance with these relations. In the State jurisdictions, child welfare legislation empowers a child to be made a ward of the state and the relevant minister or agency is made the guardian. Like the normal relation of parent to child, where the parent is guardian of the child, the statutory relation has fiduciary incidents.[18] Another example, from the Australian Capital Territory, is where a public agency provides a medical service. In the doctor-patient relation involved in provision of medical services, the patient has the same equity of confidentiality to information given by them to the public sector doctor as in private sector health care.[19]

12 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 330; *Bienke v Minister for Primary Industry* (1996) 135 CLR 128 at 144.
13 See *Hornsby Council* case, above n 11.
14 *Williams v Attorney-General (NSW)* (1913) 16 CLR 404.
15 The NSW *Crown Lands Act 1989* contains a scheme for local government bodies, among others, to become "trustees" of Crown lands set aside for public usage.
16 It is possible for a statute to impliedly impress a trust in the strict sense upon a public agency: *Registrar of the Accident Compensation Tribunal v Commissioner of Taxation* (1993) 178 CLR 145.
17 *Minister for Lands and Forests v McPherson* [1991] 22 NSWLR 687 at 698–702 per Kirby P.
18 Dicta from the High Court in *Bennett v Minister of Community Welfare* (1989) 176 CLR 408 at 412 and 426–427; and by a majority of the NSW Court of Appeal in *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 at 511.
19 *Slater v Bissett* (1986) 85 FLR 118.

THE COMPATIBILITY OF EQUITY WITH PUBLIC LAW

Whatever the means by which equity applies to the discharge of powers, rights and duties in a system of public governance, the requirements of equity must be compatible with public law. Since most systems of public governance are governed by legislation, a fundamental tenet of public law is that rights, duties and powers originating in legislation must be exercised within the scope of the legislation. It is fundamental to statutory interpretation that the statute should be interpreted without regard to *a priori* ideas about what is fair.[20] Courts in this country have not given relief from statutes based upon equitable grounds. Nor have courts in the United Kingdom done so for at least a century.[21]

Whilst these tenets of statutory construction cannot be doubted, there is an argument that a statutory discretion should be exercised with regard to ethical standards. Take the example of the rule in *Ex parte James*. The position at least in the United Kingdom is that the rule applies generally, statute permitting.[22] In Australia no court has affirmed this extension of the rule in *Ex parte James* so generally. A second example relates to the natural resources "public trust" doctrine. In *Willoughby City Council v Minister Administering National Parks and Wildlife Act*,[23] Justice Stein of the NSW Land and Environment Court in a case concerning the proposed usage of land within a national park emphasised the application of the "public trust" doctrine in a statutory regime regulating land usage within a national park. This required decision-makers to give paramountcy to preservation of the land for public use and enjoyment and required decision-makers to guard against land usage that inhibited public use and enjoyment. A third example concerns the exercise of power under Crown lands legislation by a public agency to create Crown land tenure in derogation of any common law native title interests held by Aboriginal inhabitants. In the Native Title Tribunal claim of the *Wadi Wadi People*, Justice French observed about the exercise of these powers that principles analogous to those governing fiduciary relationships may inform the exercise of statutory power as a mandatory relevant element for consideration.[24] In summary, ethical standards for behaviour can fall within the scope and purpose of powers, rights and duties from legislation.

20 *Colon Peaks Mining Co No Liability v Wollondilly Shire Council* (1911) 13 CLR 438 at 445 per Griffiths CJ.
21 *Craies on Statute Law* (7th edition) at 101–102; *Halsbury's Laws of England* (4th edition) vol 44, reissue 1, para 1442.
22 *Halsbury's Laws of England*, *ibid*.
23 (1992) 78 LGRA 19 at 26.
24 *Re Wadi Wadi People's Native Title Application* (1995) 129 ALR 167 at 187.

Aside from the limitations upon the remedies for enforcement of "public" rights, duties and powers guided by ethical standards, recourse to those standards by the route of trust or fiduciary relation impressed upon the right, duty or power meets the obstacle of the traditional attitude of courts. It is that where a statute employed the word "trust" it was an expression of political responsibility assumed in connection with matters of public governance rather than an expression of a trust relation recognised by equity.[25] There are otherwise no principles of general application to indicate whether fiduciary incidents attach to a relation in a system of public governance. However, there is a line of authority concerning whether the equity of confidence can attach to information given to a public agency by a private individual. Initially the courts acknowledged this possibility,[26] but later expressed reservations,[27] and later still expressed a preference for the question to be decided by interpretation of the legislation controlling the relation, not equity.[28]

An argument which avoids this obstacle is that although the terms of the legislation do not necessarily impress a trust or fiduciary incident upon a relation, the history of the relation does do so. The first requirement for this result is that the legislative scheme permits or allows the public agency to conduct itself in the relation in a manner which is ultimately held to impress the trust or fiduciary incidents upon the relation. An example of this requirement is the decision of *Castrol Australia Pty Ltd v EmTech Associates Pty Ltd*.[29] In that case information had been volunteered in confidence by an advertiser to the Trade Practices Commission (TPC) for the purpose of ascertaining the TPC's attitude to a proposed advertisement. The TPC indicated it did not object to the advertisement, but later the TPC changed its mind and used the information for the purpose of investigation and prosecution of the advertiser for breaches of the TPA. The Court held[30] that the role of the TPC in regulating the market for advertising allowed it to assist persons such as the plaintiff to determine whether a proposed advertisement breached the *TPA*. In fulfilling this role, the Court found that the TPC could take upon itself an

25 *Kinloch v Secretary of State for India* (1887) 7 App Cas 619; *Tito v Waddell (No 2)* [1977] Ch 106; *Aboriginal Development Commission v Treka Aboriginal Arts and Crafts Ltd* (1984) 3 NSWLR 502.

26 *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39.

27 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 191 per McHugh JA; *Smith Kline & French Laboratories (Australia) Ltd v Secretary to the Department of Community Services and Health* (1991) 28 FCR 291 at 304.

28 *Johns v Australian Securities Commission* (1993) 178 CLR 408. The High Court has preferred the statute to equity on an earlier occasion: *R v Toohey; ex parte Attorney-General (NT)* 145 CLR 374 at 387.

29 (1980) 33 ALR 31.

30 *Ibid* at 46–47.

equitable obligation of confidence in respect of information supplied to it. The Court found on the facts that the TPC had expressly given that obligation about the information provided by the plaintiff.

Assuming that the conduct in question is in fulfilment of some feature of the legislative scheme, one must identify that feature and its significance to the conduct.[31] A recent example of this analytical step is *Pedashenko v Blacktown City Council*.[32] The respondent, using its statutory powers of voluntary acquisition, contracted to purchase a block of land from the plaintiff. During the period of negotiations the respondent learnt that a new town planning zoning scheme would shortly come into force. The proposed zoning would substantially increase the value of the property. The Court found that in the course of negotiations the respondent represented to the plaintiff that it would be in their interests to sell the block of land but the Council did not disclose the existence of the proposed zoning to the vendor/plaintiffs. The Court found that the vendor/plaintiffs were not aware of the proposed zoning. The property was sold at an undervalued price. The plaintiffs claimed the deficit on the basis of a fiduciary relation. To decide this claim the Court asked itself this question: did the purchaser/Council undertake to act in the interests of the vendor/plaintiffs in supplying information about the town planning development potential?[33] In answering this question in the affirmative, the Court relied upon, among other things, the role performed by the Council under legislation for town planning:

> [I]nformation about actual zoning of the land was peculiarly within the Council's knowledge; the Council had a practice of supplying that information to inquirers, in the knowledge that it would be relied upon for serious purposes; information about the prospective zoning was entirely within the Council's knowledge; alterations to the zoning were to a substantial extent within the Council's control …[34]

The assumed fiduciary duty of candour about town planning information, actual and prospective, was based in part upon the Council's role of providing such information in the circumstances of the transaction assumed or carried out in its fulfilment of responsibilities under the legislative scheme for town planning.

That a fiduciary duty can originate from a responsibility under legislation has been acknowledged in dicta from the recent High Court decisions in

31 The simple fact that a public agency has a statutory duty to act does not necessarily turn that duty into a "fiduciary" one: *Tito v Waddell* (No 2) [1977] Ch 106.
32 (1996) 39 NSWLR 189.
33 *Ibid* at 203B.
34 *Ibid* at 203C.

Mabo [No 2][35] and *Wik*.[36] The impact of a fiduciary duty in connection with the administration of the Crown lands title system so far as the survival of native title is concerned was discussed by Brennan CJ, briefly in *Mabo [No 2]* and at length in *Wik*. Justices Dawson and Toohey also discussed the issue in *Mabo [No 2]*.

Brennan CJ in *Mabo [No 2]* observes[37] in the space of two sentences that native title could be surrendered, and that if the act of surrender was made in reliance upon an expectation that the native title interest would be "swapped" for Crown land title tenure, then a fiduciary duty, akin to an estoppel, to so exercise any discretionary power of granting tenure under the Crown lands legislation, would impress upon the public agency exercising that power. In *Wik* Brennan CJ considered whether the fiduciary duty could preclude the exercise of the power of granting tenure under the Crown lands legislation.[38] The Chief Justice had earlier in his judgment concluded that the grant of a Crown land lease necessarily extinguished the native title interest. Such a decision would necessarily be adverse to the holders of the native title interest. This vulnerability of the holders of the native title interest to extinguishment of their interest was not enough to create a fiduciary duty upon those exercising the power to make a grant. The supposed fiduciary had to first conduct themselves in some way to make it reasonable for the supposed beneficiary to assume the fiduciary would act in their benefit. In addition there is a contradiction in the assertion that the vulnerability alone created a fiduciary duty: as the only power which could be the subject of a fiduciary duty was one necessarily prejudicial to the beneficiary, how could the power ever be exercised in discharge of the duty? The existence of the supposed fiduciary duty precludes the exercise of the power. The Chief Justice went on to concede that it would be possible for the public agency to be bound by a fiduciary duty to fulfil an expectation that after the initial grant of Crown land title, later administration of the Crown land tenure would be for the benefit of or with regard to the interests of the original native title interest holders.[39]

The only other Justice of the High Court to traverse the issue in *Wik* was Gummow J who simply observed that he held against the plaintiffs.[40] Justice Toohey in *Mabo (No 2)* reasoned contrary to the later dicta of the Chief Justice in *Wik*. The vulnerability of the holders of the native title interest was itself enough to create the fiduciary duty. His Honour thought

35 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.
36 *Wik Peoples v Queensland* (1996) 141 ALR 129.
37 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 60.
38 *Wik Peoples v Queensland* (1996) 141 ALR 129 at 160–161.
39 *Ibid* at 161.
40 *Ibid* at 220.

that the vulnerability of the holders of native title interests to extinguishment of their interests was "extraordinary"[41] and attracted a fiduciary duty. Toohey J did not address the contradiction seen by the Chief Justice in the later dicta of *Wik*. He pointed out that the history of dealings between the native title interest holders and government provided ample evidence for the holders to believe that government would protect their interests.[42] Justice Dawson held that if any fiduciary duty had once existed it ceased when the native title interest was extinguished.[43]

THE PUBLIC LAW PERSPECTIVE—HOW IS INTEREST GROUP PROTECTION IN THE PUBLIC INTEREST ?

It is a basic tenet of public law that powers given to public agencies are to be used in the public interest. How compatible are the ethical standards of equity with this requirement?

Take the case of the statutory guardianship in a relation between a ward of the state and the public agency caring for the ward. The basic fiduciary duty not to allow the interest of the fiduciary or a third party to conflict with the duty of the fiduciary to the beneficiary means the public agency must act by giving paramount consideration to the child. In so acting the public agency is also acting in discharge of its responsibility to act in the public interest. The public interest will always require a parent to act in the best interests of the child, even more so where the "parent" is a public agency exercising powers for a public purpose.

Take the equity of confidence cases. The test was stated in these terms:

> Public and not private interests, therefore, must be the criterion by which Equity determines whether it will protect information which a government or governmental body claims is confidential.[44]

How can a restriction upon the legitimate dissemination of information acquired by a public agency pursuant to an equity of confidence be justified on public interests grounds? The answer is provided in a recent case concerned with the use of confidential information, *Consolidated Press Holdings Ltd v Federal Commissioner of Taxation*.[45] This was a natural justice case arising from the use of information supplied by the taxpayer for the purposes of tax assessment. The Commissioner provided the information to a third party expert contracted to assist the Commissioner in the

41 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 203.
42 *Ibid* at 201.
43 *Ibid* at 162.
44 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86at 191 per McHugh JA.
45 (1995) 129 ALR 443.

assessment of the taxpayer's affairs, without first consulting the taxpayer. The taxpayer claimed breach of the fair hearing rule through failure to consult before disclosure. The Court agreed with the taxpayer. The Court found that the taxpayer's legitimate expectation to be consulted arose from the terms of the enactments dealing with taxation administration, and from the need to preserve public confidence in the tax system stemming from the vulnerability of taxpayers generally caused by their disclosure of sensitive information about their affairs. Had the case been argued on equity of confidence grounds rather than procedural fairness grounds, the argument would have been made that the public interest in preserving confidence in the system of public governance was served by impressing an equity of confidence.

Take the conveyancing case, *Pedashenko*.[46] The requirement of the fiduciary duty was the reverse of the equity of confidence cases: dissemination of information, as opposed to restriction upon dissemination was necessary. Dissemination served the public interest in several ways. First, as stated in the judgment, the Council had a public duty to disseminate relevant information about town planning changes. Keeping the information secret contradicted that duty. Secondly, as noted in an earlier decision whose facts had some similarity,[47] the public interest in preventing the Council from manipulating transactions with private individuals by use of its special governmental position is served by dissemination of relevant information. Had that case and *Pedashenko* been argued on judicial review of administrative action grounds, as opposed to breach of fiduciary duty grounds, the argument would have been made that the actions of the Council were undertaken for an ulterior purpose (monetary gain) and hence in bad faith. There is an obvious public interest in having public powers exercised for the purposes for which they are intended, and no others.

The dicta of the Justices of the High Court in *Mabo (No 2)* and *Wik* are more difficult to reconcile with public law. One author[48] has described the difficulty in terms of a "Gordian knot". The basic requirement of a fiduciary is to avoid conflict between the beneficiary's interest and the interest of anyone else. A public agency in a relation with fiduciary incidents to one group—native title interests holders—must use powers given for the public interest in a way that does not allow the interests of the broader public to be preferred to the native title interest holders. Does this

46 *Pedashenko v Blacktown City Council* (1996) 39 NSWLR 189.
47 *Blacktown City Council v Huxedurp* (1990) NSW Conv R 55–551 at 59,076.
48 D Tan, "The Fiduciary as an Accordian Term: Can the Crown Play a Different Tune?" (1995) 69 *ALJ* 440 at 450.

prevent any decision where the public agency must compromise the native title interest holder's welfare to the broader public good? There will of course be many situations where, happily, the best interests of the native title interest holder's group and the public interest will coincide. But there will be just as many situations where only the best interests of one, not both, can be paramount.

Chief Justice Brennan's views seem less fertile with this conflict than Justice Toohey's. The "expectation" route to a fiduciary duty has parallels with the jurisprudence on the operation of estoppel in public law.[49] The contradiction pointed out by the Chief Justice in the "vulnerability" approach taken by Toohey J also leads to the possibility that the power could never be exercised—which would be contrary to its existence.

CONCLUSION

New challenges to systems of public governance and new ways of conducting public governance call for a reappraisal of the hitherto limited role of equity in public law. Equity is capable of supplying fresh perspective's on the rules and ethical standards for behaviour in systems of public governance. For equity to lend itself to public law it must be shown that the public interest, not just private interest, is assisted.

49 *Attorney-General (NSW) v Quin* (1990) 93 ALR 1 at 40 per Mason CJ.

REFUSAL TO PROCESS A FREEDOM OF INFORMATION REQUEST—A PRACTITIONER'S GUIDE

Jason Pizer*

"*To process or to refuse to process*"? That is a question that an agency must consider after receiving a freedom of information request.[1]

If the agency decides to process the request, it must carry out two main tasks. The first task requires the agency to identify, locate and collate the documents that fall within the terms of the request. The second task requires the agency to decide whether to grant, refuse or defer access to those documents. Put more colourfully, the first task requires the agency to carry out a hunting and gathering exercise, and the second task requires the agency to decide what to do with the fruits of its labours. If, however, the agency decides to refuse to process the request, it is not required to carry out either of those tasks.

The aim of this paper is to explore the circumstances in which an agency may legitimately refuse to process an FOI request. I will be focusing on three areas:[2]

- refusal to process a request that is not validly made;
- refusal to process a request that is voluminous; and

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1 For the purposes of this article, a freedom of information request (or "FOI request") is a request for access to documents held by an "agency", as that term is defined in the various Freedom of Information Acts. The relevant Acts are as follows: *Freedom of Information Act 1982* (Cth); *Freedom of Information Act 1989* (ACT); *Freedom of Information Act 1989* (NSW); *Freedom of Information Act 1992* (Qld); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1991* (Tas); *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1992* (WA). Requests received by Ministers will not be considered separately in this paper.

2 For convenience, I have assumed for the purposes of this paper that the agency that receives the request is not exempt from the operation of the Act, either as a whole or in relation to certain types of documents. I have also assumed that the agency is the correct agency to have received the request, so that the issue of transferring the request to another agency does not arise. Lastly, it should be noted that there are other grounds for refusing to process a request that I do not consider—such as refusing to process a "repeated" request within the meaning of s 24A of the Victorian Act.

- refusal to process a request that is described in such terms that all of the documents sought are clearly exempt.

THE REFUSAL TO PROCESS A REQUEST THAT IS NOT VALIDLY MADE

The *Freedom of Information Act* of each Australian jurisdiction provides that a request for access to documents will not be valid unless certain conditions are satisfied. Although the precise conditions of validity vary from one jurisdiction to another, three conditions must usually be satisfied:

- the request must be in writing;
- the request must be accompanied by an application fee; and
- the request must provide such information concerning the documents sought as is reasonably necessary to enable the agency to identify those documents.[3]

What can the agency do if any of those conditions is not satisfied?

Request not in writing or not accompanied by an application fee

The position is fairly straightforward where the request is made orally or without the application fee. A request has not been made in accordance with the Act and the agency may refuse to process it. But that is not the end of the matter. In most jurisdictions, an agency is under a general duty to take reasonable steps to assist an applicant to make a request that complies with the requirements of the Act.[4] Accordingly, as a practical matter, the agency should inform the applicant that, for the matter to proceed as an FOI request, a fresh request must be made in writing and the application fee must be paid.

Request not sufficiently specific

The position is more complicated where the agency believes that the request does not provide sufficient information about the documents sought to enable them to be identified. In all jurisdictions except Western Australia, agencies have a specific duty to consult the applicant if the request does not provide such information.[5] More importantly, an agency must not refuse to process a request on the ground that it is not sufficiently

3 Cth Act s 15(2); ACT Act s 14(1),(2); NSW Act s 17; Qld Act s 25(2); SA Act s 13; Tas Act s 13(1),(2) (no application fee is currently payable in Tasmania, although that will change if the Freedom of Information Amendment Bill 1994 is passed in its current form); Vic Act s 17(1),(2A); WA Act s 12(1).

4 Cth Act s 15(3); ACT Act s 14(3); Qld Act s 25(3); Tas Act s 13(4); Vic Act s 17(3); WA Act s 11. See *Re Borthwick and University of Melbourne* (1985) 1 VAR 33 at 35.

5 Cth Act s 24(6); ACT Act s 23(3)(a); NSW Act s 19(1); Qld Act s 25(4); SA Act s 15; Tas Act s 13(5),; Vic Act s 17(4).

specific without consulting the applicant first. The aim of the consultation process is to assist the applicant to make a fresh request that complies with the Act.[6]

Does the requirement to consult arise?

The requirement to consult only arises if the documents sought are not described in such a way as to enable the agency to identify the documents. A precise description of the documents is not necessary: an applicant need not refer to a file and folio number, nor give the precise dates and authors of the documents. In other words, imprecisely expressed requests are not, by definition, invalid requests.[7] However, ambiguous or uncertain requests are potentially invalid.[8]

The distinction between imprecision, on the one hand, and ambiguity or uncertainty, on the other, is best illustrated by two examples. Suppose that an applicant wrote to the Victorian Department of Human Services requesting access to a Departmental document on salmonella food poisoning. Suppose also that the request stated that the existence of the document was hinted at (but not confirmed) in an article in the *Age* newspaper on 1 March 1997. In that situation, even though the document was not identified with precision, it is likely to have been described with sufficient specificity to validate the request.

Take the contrasting example where the applicant has written to the same Department requesting access to documents concerning *the* recent incident of salmonella food poisoning. Since there have recently been a number of salmonella food poisoning incidents in Victoria, the request does not provide sufficient information to enable the Department to identify the documents sought. In that situation, the Department's FOI officer is obliged to provide the applicant with a reasonable opportunity of consultation to enable the applicant to make a request in a form that complies with the Act.

6 In the *Penhalluriack* case, Lazarus J observed that the Act "appears to give little encouragement to any idea that a bad request may be made good, for instance, by the furnishing of particulars; rather it appears to envisage that where a bad request has been made, the avenue will be opened to the applicant to make a good one thereafter, with agency guidance and assistance": *Penhalluriack and The Department of Labour and Industry* (Vic County Court, 19 Dec 1983, unrep) at 8.

7 See *Re Russell Island Development Association Inc and Department of Primary Industries and Energy* (1994) 33 ALD 683 at 692.

8 For examples of requests that were held not to contain a sufficiently precise description of the documents sought, see *Re Schorel and Community Services Victoria* (Vic AAT, 10 Oct 1989, unrep) at 35; *Re Redfern and University of Canberra* (1995) 38 ALD 457 at 461–462.

What is a reasonable opportunity to consult?

Not surprisingly, what is a "reasonable opportunity to consult" will depend upon all the circumstances of the case. There is no prescribed format for the consultation. It may be in writing, it may be oral, or it may be partly written and partly oral. In the above example of the salmonella food poisoning request, it would be a simple case of the Department's FOI officer contacting the applicant either by telephone or in writing requesting that the applicant state the precise incident with which he or she is concerned.

From a practical perspective, the FOI officer must ensure that he or she keeps detailed records of any conversations with the applicant and that all relevant correspondence is kept on file. Failure to do so may adversely affect the department's position if the matter proceeds to external review.

The effects of the consultation process

In the *Penhalluriack* case, the Court held that an invitation to consult was, by itself, a "decision refusing to grant access to a document in accordance with a request".[9] In my view, it is difficult to accept the correctness of this decision. The invitation to consult should not be characterised as a *decision* refusing access, but rather an indication that the agency *intends* to refuse to process the request.[10] What action is taken by the agency depends upon the success or otherwise of the consultation process.

If the consultation process is successful—that is, the applicant is willing to describe the documents sought with more precision to enable the agency to identify them—the agency should encourage the applicant to make a fresh request for access. If such a fresh request is made, the agency must process it in the usual course unless a further ground for refusal is available. If the consultation process is unsuccessful—that is, the applicant has been given a reasonable opportunity to reformulate the request and is unwilling to provide any or sufficient further information to enable the agency to identify the documents sought—the agency may refuse to process the request. The applicant may seek a review of that decision, and such a review should focus on whether the agency was justified in refusing to process the request.

From a practical perspective, the agency should ensure that it makes a decision on whether to process the request as quickly as possible. This is because the applicant may hold the view that his or her request is valid,

9 *Penhalluriack and The Department of Labour and Industry*, above n 6 at 6–13.

10 In the Cth Act, the invitation to consult is expressly characterised as an intention, rather than a decision to refuse access: s 24(6)(c).

and may claim (in all jurisdictions except the Commonwealth[11]) that time began to run when the agency received the request. This means that the applicant may apply for a review of the agency's deemed refusal to provide access to the documents if the time allocated for processing a valid request has expired.

From this brief overview of the circumstances in which an agency may refuse to process an invalidly made request, three main points should be noted;

- a request will not be valid unless certain conditions are satisfied;
- although an agency may refuse to process an invalid request, it has a general duty to assist an applicant to make a valid request; and
- an agency has a specific duty to consult an applicant before deciding to refuse to process a request on the ground that the request is not sufficiently specific.

REFUSAL TO PROCESS A VOLUMINOUS REQUEST

Each FOI Act has a "voluminous request" provision that provides that an agency may refuse to process a request if:

- the agency considers the request to be voluminous in the relevant sense; and
- the agency has given the applicant a reasonable opportunity of consultation.[12]

The purpose of each voluminous request provision is to "curb unreasonable demands on agency resources".[13]

What is a voluminous request?

A voluminous request is a request the processing of which would substantially and unreasonably divert the resources of the agency from its other operations. In all jurisdictions except Queensland, Tasmania and the ACT, an agency need only consider two issues before forming the view that a request is voluminous.

11 *Cf* Cth Act s 24(7).

12 Cth Act s 24; ACT Act s 23(1),(3); NSW Act s 25(1)(a1); Qld Act s 28(2),(4); SA Act s 18(1),(2); Tas Act s 20(1),(4); Vic Act s 25A; WA Act s 20. The consultation process is a "condition precedent" to the refusal to process the request: *Re Newnham and Victoria Police* (1995) 9 VAR 260 at 269.

13 *Eg* Victoria, *Parliamentary Debates*, Legislative Assembly, 7 May 1993 at 1737 (Second Reading Speech).

The first issue to consider is what resources would be required to process the request. It is impossible for the agency to resolve this issue with certainty because this would require the agency to process the request, which is exactly what the section is designed to avoid. This means that it is only possible for an agency to *estimate* what resources would be required to process the request.

The second issue to consider is the impact that processing the request would have on the agency, having regard to the estimate referred to in the previous paragraph. More specifically, the agency must consider whether processing the request in accordance with the estimate would substantially and unreasonably divert its resources from its other operations.

In Queensland, Tasmania and the ACT, a third issue must also be considered—the form of the request. The request must be "expressed to relate to all documents, or to all documents of a specified class, that contain information of a specified kind or relate to a specified subject matter".[14]

The first issue: what resources would be required to process the request?

As mentioned above, the agency must estimate the level of resources required to process the request before forming the view that the request is voluminous. In some jurisdictions, the relevant Act provides some guidance as to what the agency may and may not take into account when carrying out this task. The cases also provide some guidance on this question.

The estimate: what may be taken into account?: In Queensland, Tasmania and the ACT, the agency may only have regard to the number and volume of the documents, and to the work required to identify, locate and collate the documents. In other words, the agency may have regard to the work involved in hunting for and gathering the documents, but not to the work involved in deciding what to do with the fruits of its labours.[15]

14 In my view, it is difficult to justify this limitation. The form of the request should not be critical: what matters is whether processing the request would be unreasonably burdensome to process. See Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Operation and Administration of the Freedom of Information Legislation* (1987) at para 7.57 (hereafter "Senate Committee Report").

15 This was also the position under the Cth Act before that Act was amended in 1991: *Re Timmins and National Media Liaison Service* (1986) 4 AAR 311; *Re Cullen and Australian Federal Police* (Cth AAT, 16 Aug 1991, unrep); *cf Re Shewcroft and Australian Broadcasting Corporation* (1985) 2 AAR 496. See also *C and Department of Treasury and Finance* (Tasmanian Ombudsman, 10 April 1995, unrep); *B and Glenorchy City Council and Anor*, unreported (Tasmanian Ombudsman, 19 July 1995, unrep).

In the other jurisdictions there is no such limitation. In Victoria and the Commonwealth, for example, the Acts expressly provide that the agency may have regard to the work involved in identifying, locating and collating the documents, and also to the work involved in deciding whether to grant, refuse or defer access to the documents either as a whole or in part.[16] More specifically, the agency may have regard to the resources that would have to be used in examining the documents to determine their exempt status, consulting with third parties, making a copy or an edited copy of the documents, and notifying any interim or final decision on the request.

The Victorian and Commonwealth Acts also provide that the agency is not to have regard to any maximum amount, specified in the regulations, payable as a charge for processing the request, and that the agency must not have regard to any reasons that the applicant gives for requesting access, or to the agency's belief as to what those reasons are.[17]

The cases indicate that other factors beyond those stipulated in the legislation also influence an agency's estimate. In particular, the number, type and volume of documents falling within the scope of the request will clearly affect the agency's estimate of the level of resources required to process the request.[18] In addition, the complexity of the request will typically be a relevant factor. For example, it may be that only a limited number of people may be competent to identify the documents relevant to the request.[19] Similarly, it may be that only those people who are familiar with the documents will be able to determine whether the documents are exempt as a whole or in part.[20]

The estimate—reasonableness: The cases indicate not only that certain factors may be taken into account when determining the level of resources required to process the request, but also that the agency's estimate must be reasonable. In the *Swiss Aluminium* case, for example, the Commonwealth Administrative Appeals Tribunal emphasised that the methods used to estimate the work involved in processing a request "must not be such as to allow substantial error to enter into the estimate".[21] More specifically,

16 Cth Act s 24(2); Vic Act s 25A(2).
17 Cth Act s 24(3),(4); Vic Act s 25A(3),(4).
18 *Re Shewcroft and Australian Broadcasting Corporation* (1985) 2 AAR 496 at 498, 502; *Re Timmins and National Media Liaison Service* (1986) 4 AAR 311; *Cunningham and Rural Adjustment and Finance Corporation* (WA Information Commissioner, 27 May 1996, unrep); *R and Department for Family and Children's Services* (WA Information Commissioner, 25 July 1996, unrep).
19 *Re Swiss Aluminium Australia Ltd and Department of Trade* (1986) 10 ALD 96 at 101.
20 *Cunningham and Rural Adjustment and Finance Corporation*, above n 18; *R and Department for Family and Children's Services*, above n 18.
21 (1989) 10 ALD 96 at 100.

where the work involved in processing the request primarily revolves around the identification (rather than the location or the collation) of documents, "a basic requirement … will be that the agency make some count of the number of folios contained in files which could potentially contain material answering the terms of the request."[22]

In the *Swiss Aluminium* case, the Department refused access under section 24(1) of the Commonwealth Act on the basis that it would take at least 140 man days to process the request. This estimate was based upon the fact that the Department had identified 220 files that would need to be examined in order to identify, locate and collate relevant documents. Each file contained a maximum of 200 folios per file and the Department assumed that every file would contain that number of folios. The AAT considered that this estimate may have been in error. The Department should have counted the number of folios contained in the files that could potentially have contained material falling within the terms of the request. The Tribunal noted that such a task should not require the involvement of staff having experience with the subject matter of the files. Knowing the number of folios that were potentially relevant would not remove all uncertainty involved in the estimate, but it should provide a sufficiently sound starting point.

Where the work involved in processing the request revolves around the collation of the documents, the agency may wish to consider carrying out a sampling process to estimate the workload involved in collating the documents and to keep fairly detailed records of that process. Evidence of such a sampling process was led, for example, in the *Shewcroft* case.[23]

It follows from the above that the agency would be well advised to keep fairly detailed records of how it arrived at the estimate for the amount of work that would be involved in processing the request. If the agency decided to refuse to process the request and the applicant sought external review of that decision, the agency may have difficulty in establishing that its estimate was "reasonable" in all the circumstances of the case without such evidence.

The second issue: what impact would processing the request have on the agency?

After estimating the level of resources that would be required to process the request, the agency must then consider the impact that processing the request in accordance with that estimate would have on its resources. It is

22 *Ibid* at 101.
23 *Re Shewcroft and Australian Broadcasting Corporation* (1985) 2 AAR 496 at 499–500.

important to emphasise that the question is what impact would processing the request have on the agency's resources *at that point in time*. For example, an agency cannot refuse to process a request on the basis that processing it would create a precedent that would result in a flood of similar requests.[24]

Thus, the agency must consider whether processing the particular request at hand would "substantially and unreasonably" divert its resources from its other operations. This raises two interesting questions of interpretation; what is meant by the phrase "substantially" divert the resources of an agency; and what is meant by the phrase "unreasonably" divert the resources of an agency?

The meaning of "substantially" divert the resources of an agency: The words "substantial" and "substantially" are inherently imprecise and ambiguous. In every case, the meaning of the word used depends upon the context in which it appears[25] and upon the policy behind the relevant section of the Act in question.[26]

The adjective "substantial" and the adverb "substantially" can have the same range of meanings. In an appropriate context, the word "substantial" can mean "real or of substance as distinct from ephemeral or nominal",[27] and the word "substantially" can bear the corresponding meaning.[28] The word "substantial" has also been interpreted to mean "considerable, solid, or big",[29] "large, weighty or big",[30] and "serious or significant",[31] and the word "substantially" can bear the corresponding meanings.[32]

In the present context, having regard to the policy behind the voluminous request provisions, it would seem that the word "substantially" is used in the sense of "considerably" or "seriously" or "significantly". This conclusion is strengthened when one considers the principle that any ambiguity in the interpretation of a section should be resolved by preferring the interpretation that would better further the object of the relevant FOI Act. To interpret the word "substantially" as "significantly, seriously or considerably" would better further that object because it would reduce the scope of the voluminous request provision, which in

24 *L v Tasmania Police* (Tasmanian Ombudsman, 17 May 1993, unrep) at 4.
25 *Eg Secretary, Department of Social Security v Wetter* (1993) 112 ALR 151 at 158.
26 *Eg Polypacific Pty Ltd v Comptroller-General of Customs* (1993) 45 FCR 238 at 262.
27 *Eg Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1980) 27 ALR 367 at 382.
28 *Eg Arnotts Limited v Trade Practices Commission* (1990) 24 FCR 313 at 343.
29 *Eg Palser v Grinling* [1948] AC 291 at 317.
30 *Eg Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1980) 27 ALR 367 at 382.
31 *Re Heaney and Public Service Board* (1984) 6 ALD 310 at 321.
32 *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 62 FLR 437 at 445.

turn would extend the right of the community to have access to information in the public sector.

In addition, it is clear that the word "substantially" is used in a relative sense. In other words, regardless of whether it means considerably or significantly, on the one hand, or real or of substance as distinct from ephemeral or nominal, on the other, it is necessary to know something of the nature and resources of the relevant agency before one can say that processing a particular request would substantially divert the resources of that agency.

In the *Re SRB and SRC* case, the Commonwealth AAT confirmed that the word "substantially" is used in a relative sense:

> The resources of the agency … must be the resources which the respondent had at the time the request was lodged or had as at the date of the hearing. It cannot mean resources which the respondent might be able to obtain or even resources constituted by the filling of establishment positions. It also cannot mean the whole of the resources of a large Department of State. To find this would make the section meaningless. We consider it means the resources reasonably required to deal with an FOI application consistent with attendance to other priorities.[33]

Similarly, in *R and Department for Family and Children's Services*, the WA Information Commissioner confirmed that the answer to the question of whether processing a request would substantially divert the resources of an agency depends upon a number of factors, including the "usual work of the agency".[34] In that case, the applicant sought access to all documents that related to her children, who were wards of the State. The respondent informed the Information Commissioner that approximately 1,800 documents maintained on eleven separate files fell within the terms of the request, and that processing the request "would require an officer of the [respondent] to be dedicated full time to the task of reading and editing the requested documents, and consulting with third parties over a period of approximately 10 days". The WA Information Commissioner upheld the respondent's decision to refuse to process the request on the basis that to do so would substantially divert the respondent's resources, after "having given consideration to the number of documents involved, the number of other access applications with which the [respondent] is currently dealing, the resources available to the [respondent] agency to deal with the complainant's access application in its current form, including the limited

33 *Re SRB and SRC and Department of Health, Housing, Local Government and Community Services* (1994) 33 ALD 171 at 179.
34 *R and Department for Family and Children's Services*, above n 18 at 2.

number of staff with the necessary knowledge to make an informed judgement about the granting of access."[35]

Accordingly, when considering whether processing the request would substantially divert its resources, the agency may have regard to a number of factors, including its nature and size, the level of funding it receives for handling FOI requests, the number of other FOI applications that the agency is currently processing,[36] and the number of employees who are capable of processing the request and the other responsibilities of those employees.[37]

The meaning of "unreasonably" divert the resources of an agency: The *Oxford English Dictionary* (2nd ed, 1989) contains two definitions of the word "unreasonably": "in a manner at variance with reason; without due observance of reason or good judgment"; and "to an unreasonable extent; excessively, immoderately".

It may be argued that the second definition should be adopted, so that processing a request would "unreasonably" divert the resources of an agency if it would "excessively or immoderately" divert the resources of that agency. In my view, whilst there is some merit in this argument, it is unlikely to be accepted. There are five reasons for this view.

First, it may be argued that, if the interpretation referred to in the previous paragraph were adopted, the word "substantially" would effectively be superfluous, which does not accord with the statutory presumption that words used in a statute must, where possible, be given some meaning and effect.[38] The word "substantially" is effectively superfluous under that interpretation because an excessive or immoderate diversion of resources would almost certainly be a considerable or significant diversion of resources. Put another way, it may be said that if processing the request would "unreasonably" (in the sense of excessively or immoderately) divert the resources of the agency then it is almost certain that processing the

35 *Ibid*.

36 There is a difference between having regard to other FOI applications when considering the impact that processing a request would have on the agency on the one hand, and treating related FOI applications as a single request on the other. In *Re Shewcroft and Australian Broadcasting Corporation*, the Commonwealth Tribunal held that the "spirit of the Act" called for a "multitude of virtually contemporaneous" related requests to be treated as a single request for the purposes of s 24 of the Cth Act: (1985) 2 AAR 496 at 498. The correctness of this decision may be doubted: see Senate Committee Report, above n 14 at paras 7.49–7.55.

37 See *Re Shewcroft and Australian Broadcasting Corporation* (1985) 2 AAR 496 at 499; *Re Swiss Aluminium Australia Ltd and Department of Trade* (1986) 10 ALD 96 at 99; *Cunningham and Rural Adjustment and Finance Corporation*, above n 18 at 2.

38 *Eg Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 110 ALR 97 at 102.

request would "substantially" (in the sense of considerably, seriously or significantly) divert the resources of the agency.

Second, the meaning of the word "unreasonably" is ambiguous. It could also be interpreted as requiring a balancing of the predicted impact of processing the request on the agency's resources against the object of the Act to extend as far as possible the right of the community to have access to information in the public sector. More specifically, this balancing of interests would require a consideration of all the circumstances, including the public interest in the subject matter of the request and the steps taken by the respondent outside the Act to inform the public about the subject matter of the request. Since the meaning of the word is ambiguous, an interpretation that would better further the object of the relevant Act should prevail, namely an interpretation that would potentially reduce the scope of the voluminous request provision, and thus extend the right of the community to have access to information in the public sector.

Third, this approach has been adopted by the Commonwealth AAT. In the *Re SRB and SRC* case, the six applicants belonged to a group of 2,100 people who had received pituitary growth hormone under the National Pituitary Hormone Program, which had been administered by the respondent. The applicants requested and were provided with access to their personal files held by the respondent agency. They also requested a further 600 policy files. The respondent refused to process this request on the basis of section 24(1) of the Commonwealth Act. The AAT held that there was no doubt that processing the request would substantially divert the resources of the agency. It then considered, as a separate matter, whether that diversion would be unreasonable in the circumstances, stating:

> In administrative review it is not necessary to show … that the extent of the unreasonableness is overwhelming. It is this tribunal's task to weigh up the considerations for and against the situation and to form a balanced judgment of reasonableness, based on objective evidence.[39]

According to the Tribunal, the factors in favour of the argument were, essentially, that release of the policy files would be consistent with the public interest and the objectives of the FOI Act. The factors against the argument were: the respondent had done a great deal in making available knowledge, guidance and treatment for participants in the program; there was an independent inquiry into the program and copies of all the policy files had been provided to the person conducting that inquiry; a large

39 *Re SRB and SRC and Department of Health, Housing, Local Government and Community Services* (1994) 33 ALD 171 at 179–180. See also *Re Swiss Aluminium Ltd and Department of Trade* (1986) 10 ALD 96 at 101.

number of documents had been made available by the respondent in the course of discovery in various Supreme Court actions; and the respondent was providing each affected person with their personal file and was providing a counselling service and inquiry hot-line for interested persons.

The Tribunal concluded that it would be "unreasonable to require the undoubted substantial diversion of resources that would occur if the processes of the FOI Act were followed to completion". The Tribunal continued:

> If the department had simply 'sat on its hands' and taken the view that attending to the request was simply too difficult, we would have taken a different view. However in addition to providing this information and service outside the FOI Act, the respondent has already gone to extraordinary lengths to respond to the requests as far as it can. … Another factor in our conclusion that the diversion would be unreasonable, is also the refusal on the part of the applicants, through their advisers, to narrow the language of their requests. [40]

Fourth, the interpretation set out above is consistent with general authority, where the word "reasonable" has often been declared to mean "reasonable in all the circumstances of the case".[41] The real question, in many cases, is to determine what circumstances are in fact relevant.

And fifth, the interpretation above is consistent with the approach adopted by the Commonwealth Senate Standing Committee on Legal and Constitutional Affairs. In its 1987 report, the Standing Committee rejected the submission that agencies should be able to refuse to process requests solely on workload grounds, without having regard to the public interest in the documents being made public. The Committee opposed the removal of the words "and unreasonably" from the present test of "substantially and unreasonably" diverting agency resources, primarily because those words ensured that the public interest will be taken into account.[42] Thus, the Committee assumed that the word "unreasonably" should be interpreted in the manner set out above. The Committee did not regard it as necessary to spell out which factors should be considered when deciding whether the processing of a request would be "unreasonably" burdensome, although it did note that if there was a public interest in granting access, this should be considered "without inquiry as to whether the particular applicant claims to be acting in that interest".[43]

40 *Re SRB and SRC*, *ibid* at 181.
41 *Eg Opera House Investment Pty Ltd v Devon Buildings Pty Ltd* (1936) 55 CLR 110 at 116. See also *Re Shewcroft and Australian Broadcasting Corporation* (1985) 2 AAR 496 at 501.
42 Senate Committee Report, above n 14 at para 7.41.
43 *Ibid* at para 7.47.

In summary, it is likely that the phrase "unreasonably divert the resources of an agency" does not mean "excessively or immoderately" divert the resources of that agency. Rather, that phrase is likely to be interpreted as requiring the agency to balance the predicted impact of processing the request on the agency's resources against the object of the Act to extend as far as possible the right of the community to have access to information in the public sector. This balancing exercise would require the agency to consider all the circumstances, including the public interest in the subject matter of the request and the extent to which the information in the documents in question has been open to public scrutiny.

The consultation process

As mentioned above, an agency cannot refuse to process a voluminous request without giving the applicant a reasonable opportunity of consultation. The aim of the consultation process is for the agency to assist the applicant to reframe the request so that the reframed request is not voluminous in the relevant sense. The agency must ensure that the applicant's opportunity to consult is reasonable in all the circumstances of the case. There is no prescribed format for the consultation. It may be in writing, it may be oral, or it may be partly written and partly oral.

If the applicant does not respond to the agency's invitation to consult, the agency must wait for a "reasonable" time before making a decision to refuse to process the request. In *Thwaites v Metropolitan Ambulance Service*,[44] for example, the Tribunal found that six weeks was a reasonable time in the circumstances of that case.[45] If, however, the applicant does respond to the agency's invitation to consult, the agency's officer must not behave in an unreasonable or obstructionist manner. So to act may lead to an argument that the applicant was not given a reasonable opportunity to consult, which in turn may invalidate the agency's purported decision to refuse to process the request.

As a practical matter, the agency must ensure that, as far as is reasonably practicable, it provides the applicant with any information that would enable the applicant to reframe the request so as to remove the ground for

44 Vic AAT, 19 July 1996, unrep, at 22.

45 Each Act provides that an agency must make a decision on a request within a certain period of time and that the agency will be deemed to have refused access after that time. The Victorian and Commonwealth Acts expressly provide that time "stops running" during the consultation process: Vic Act, s25A(7); Cth Act, s24(7). Query whether an agency in the other jurisdictions will be deemed to have refused access if the consultation process continues after the period within which the agency was required to make its decision, or whether time implicitly "stops running" during the consultation process.

refusal.[46] The nature of the information (if any) that should be provided will depend upon the nature of the request and upon all the surrounding circumstances. Generally speaking, the officer should explain why the request is voluminous and offer positive suggestions as to how the request may be narrowed. In addition, the officer should generally provide sufficient information on the structure of the agency's file-holdings to enable the applicant to reframe the request.[47]

This last point can be illustrated by a couple of examples. Suppose, for example, that the applicant wrote to the Victorian Department of Human Services requesting access to all documents relating to food poisoning scares in the past ten years. If the Department considered this request to be voluminous in the relevant sense, the Department's FOI officer should suggest that the applicant give some thought to limiting the request to relevant documents produced in the last year. Alternatively, suppose that the applicant wrote to the same Department requesting access to all documents relating to salmonella food poisoning in the last five years including, but not limited to complaints relating to salmonella food poisoning, responses to such complaints, departmental protocols and other documents relating to the investigation of such complaints, and departmental protocols and other documents relating to compensating victims of salmonella food poisoning. In this example, if the Department considers the request to be voluminous in the relevant sense, the FOI officer should suggest that the applicant give some thought to reducing the number of categories and to defining the remaining categories more narrowly.

The effect of the consultation process

Not every process of consultation and negotiation between an agency and an applicant will lead to the applicant reframing the request, let alone reframing the request in a manner that overcomes the agency's objection to volume. If the reframed request does meet the agency's objection, the agency must process the reframed request in the usual manner. The agency should take care to emphasise to the applicant during the consultation process that the exemption provisions will still apply to the reframed request.

If the applicant does not accept the agency's invitation to consult within a reasonable time, or if the applicant refuses to modify the request after having a reasonable opportunity to do so, the agency may then decide to

46 Victorian and Commonwealth agencies are under a duty to provide such information: Vic Act s 25A(6)(c); Cth Act s 24(6)(e).
47 Senate Committee Report, above n 14 at para 7.80.

refuse to process the request. Similarly, the agency may refuse to process the request if the agency considers that the request as reframed by the applicant is voluminous, and do so without consulting the applicant again.[48]

In summary, two points should be noted about voluminous requests:

- in order to determine whether a request is voluminous, an agency must estimate the resources required to process the request and then consider the impact that processing the request in accordance with that estimate would have on its resources; and
- an agency cannot refuse to process a request on the basis that it is voluminous without giving the applicant a reasonable opportunity of consultation.

REFUSAL TO PROCESS A REQUEST WHERE IT IS APPARENT THAT ALL DOCUMENTS ARE EXEMPT

In all jurisdictions except New South Wales and South Australia, an agency may refuse to process a request where:

- it is apparent from the face of the request that *all* of the documents sought are exempt; and
- certain other (jurisdiction-specific) conditions are satisfied.

The purpose behind the "all documents are exempt" ground for refusal is to enable the agency to avoid unnecessary work where it is clear as a matter of logic that all the documents sought are exempt.[49] The agency is not required to identify any or all of the relevant documents, nor (except in Tasmania[50]) is it required to specify the exemptions claimed for each document. Importantly, however, if there is some doubt as to whether *any* of the documents sought are exempt, the agency cannot refuse to process the request on this ground.

The jurisdiction-specific requirements referred to in the second point above are as follows. In Victoria,[51] the Commonwealth, Western Australia and

48 *Re Swiss Aluminium Ltd and Department of Trade* (1986) 10 ALD 96 at 102.

49 See Commonwealth Attorney-General's Department, *New FOI Memo No 19—Preliminary and Procedural Points* (Dec 1993) at para 8.20.

50 Tas Act s 20(3).

51 In *Hulls and Victorian Casino and Gaming Authority*, the Victorian AAT held that an agency cannot refuse to process a request under s 25A(5) of the Victorian Act unless a further condition is satisfied namely, that "it is apparent from the nature of the documents described in the request that they will not or cannot be released pursuant to the public interest override in section 50(4)": Vic AAT, 11 Feb 1997, unrep. The Authority has appealed from this decision. The correctness of the Tribunal's decision is an issue that lies beyond the scope of this paper, but for a criticism of the decision see (1997) 67 *FOI Review* 6.

the ACT, an agency may not refuse to process a request on the "all documents are exempt" ground unless there would be no obligation to provide the applicant with an edited copy of *any* of the documents (or unless it is apparent from the request or as a result of consultation with the applicant that the applicant would not wish to have access to an edited copy of *any* of the documents).[52] As a general rule, where it is reasonably practicable to edit an exempt document by deleting the exempt parts, the agency must provide the applicant with a copy of the edited document.[53] It may be prudent for an agency in the first instance to consult with an applicant to gauge whether he or she is interested in seeking access to an edited copy.

Further, in Queensland, Tasmania and the ACT, an agency may not refuse to process a request on the "all documents are exempt" ground unless the request is "expressed to relate to all documents, or to all documents of a specified class, that contain information of a specified kind or relate to a specified subject matter". This requirement that the request be expressed in this particular form is unlikely to create too much difficulty because, as a practical matter, an agency is most unlikely to invoke this ground for refusal unless the request related to a class of documents.

Examples

The way in which the "all documents are exempt" ground of refusal works in practice is best illustrated by a few examples. Suppose that the Commonwealth Department of Social Security received a request for access to documents relating to any disciplinary action taken against officers of the Department as a result of complaints made by the applicant.[54] It would be clear from the face of such a request that all of the documents sought would be exempt as documents relating to the personal affairs of the officers concerned. However, it may well be possible to edit some if not all of the documents sought so as to avoid disclosing such personal information. Thus, unless the applicant made it clear that he or she would not be satisfied unless the agency provided unedited copies of the documents, the Department could not rely on the "all documents are exempt" ground to refuse to process the request.

To take another example: suppose that the applicant applied to the Victorian Department of Human Services seeking access to all confidential legal advice provided by the Department's legal advisers on the recent

52 Vic Act s 25A(5)(b); Cth Act s 24(5)(b); WA Act s 23(2)(b); ACT Act s 23(2).
53 Cth Act s 22; ACT Act s 21; Vic Act s 25; WA Act s 24.
54 This occurred in *Coulthard and Secretary, Department of Social Security* (Cth AAT, 17 May 1994, unrep).

salmonella food poisoning outbreaks. It would be clear the face of the request that all of the documents sought are exempt under the legal professional privilege exemption.[55] Again, however, it may well be possible to edit some if not all of the documents sought so as to avoid disclosing privileged information. However, the Department may argue that it is clear from the face of the request that the applicant is not interested in seeking access to edited copies (because the applicant is seeking access to the exempt legal advice), although the Department may consider consulting the applicant about the issue.

A final example is where the Western Australian Attorney-General's Department received a request for "all Cabinet briefings (in their entirety) on the Claremont serial killer". It would be clear from the face of this request that all of the documents are exempt under the "Cabinet documents" exemption. It is also clear from the face of the request that the Department would not be required to provide the applicant with an edited copy of the documents sought.

CONCLUSION

In this paper I explored three grounds upon which an agency may refuse to process an FOI request:

- refusal to process a request that is not validly made;
- refusal to process a request that is voluminous; and
- refusal to process a request that is described in such terms that all of the documents sought are clearly exempt.

It may be said that the fact that an agency may refuse to process an FOI request appears to sit uncomfortably with the fact that one of the main aims of the FOI Acts is to promote "open government" by fostering government accountability.[56] "Open government", however, is a relative concept. This fact is reflected in the Acts themselves, which are intended to "strike a balance between competing interests in secrecy and openness".[57] It is also reflected in the fact that the community has a further competing interest in government agencies being able to use their resources efficiently and "in the most beneficial manner" possible.[58]

55 See *MMI Limited and Police Force of Western Australia* (WA Information Commissioner, 13 Aug 1996, unrep).
56 *Eg Re Eccleston* (1994) 1 QAR 60 at 81–86.
57 *Ibid* at 74.
58 See *Re Borthwick and University of Melbourne* (1985) 1 VAR 33 at 36.

In my view, each ground of refusal to process contains inbuilt safeguards to ensure that an agency does not unjustifiably and unreasonably slam the bureaucratic door in an applicant's face. Put another way, each ground contains inbuilt safeguards to ensure that an appropriate balance is struck between the competing interests involved. So long as the duties imposed on agencies are treated seriously and sensibly in practice, there is no reason why an agency's refusal to process a request should be stigmatised as anti-democratic, anti-open government or otherwise contrary to the spirit of freedom of information.

LEGITIMATE EXPECTATIONS—WHERE DOES THE LAW NOW LIE?

Suzanne Sheridan*

Since its election in 1996 the Coalition Government has responded to the decision of the High Court in *Minister for Immigration and Ethnic Affairs v Teoh*[1] *("Teoh")* by issuing a Joint Ministerial Statement which attempts to negate the effect of the decision. Questions arise as to the effectiveness of the Statement, and its justification in any event. Before considering these matters it is necessary to consider the decision in *Teoh* and the legal context in which it was made.

MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS V TEOH

The facts

Mr Teoh, a Malaysian citizen, came to Australia in May 1988. He was granted a temporary entry permit, and in July 1988 married Ms Lim. She was the de facto spouse of Mr Teoh's deceased brother, and an Australian citizen. When the Teohs married, Mrs Teoh had four children. One child was the product of her first marriage, and the other three were children of her de facto relationship with Mr Teoh's deceased brother. Subsequently, Mr and Mrs Teoh had three children of their own.

Mr Teoh was then granted a further temporary entry permit. Prior to its expiry in February 1989, Mr Teoh applied for a permanent entry permit, known as a grant of resident status. He was convicted in November 1990 of six counts of being knowingly concerned in the importation of heroin and three counts of being in possession of heroin. At this time, his application for resident status was still pending. He was sentenced to six years imprisonment including a non-parole period of two years and eight months. It was accepted by the sentencing judge that Mrs Teoh's heroin addiction partially explained Mr Teoh's actions.

In January 1991, Mr Teoh was informed that his application for the grant of resident status had been refused. The Minister's delegate had determined

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1 (1995) 183 CLR 273.

that the policy requirement of "good character" was not met by an applicant who had a criminal record. The decision was reviewed by the Immigration Review Panel, which recommended that the delegate's decision be affirmed. It was stated by the Panel that:

> All the evidence for this application has been carefully examined, including the claims of Ms Teoh. It is realised that Ms Teoh and family are facing a very bleak and difficult future and will be deprived of a possible breadwinner as well as a father and husband if resident status is not granted.
>
> However, the applicant has committed a very serious crime and failed to meet the character requirements for the granting of Permanent Residency. The compassionate claims are not considered to be compelling enough for the waiver of policy in view of [Mr Teoh's] criminal record.

A delegate of the Minister subsequently accepted this recommendation. On 17 February 1992 another delegate made an order under section 60 of the *Migration Act 1958* (Cth) that Mr Teoh be deported. He challenged this decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), arguing that three errors of law were involved in the delegate's decision: denial of procedural fairness in failing to allow Mr Teoh to contradict the finding that he was not of good character, failure to take relevant considerations into account, and failure to have regard to the merits of Mr Teoh's case. French J, in the Federal Court, rejected the challenge.

The decision of the Full Federal Court

The Full Federal Court granted leave to amend the application, to raise two additional submissions. The first alleged that the delegate had not appropriately investigated the hardship to Mr Teoh's wife and children. The second submission stated that the Court erred in finding the hardship of Mrs Teoh and her children had been taken into account as a relevant consideration. It was not until the hearing before the Full Court that an argument utilising the Declaration of the Rights of the Child and the United Nations Convention on the Rights of the Child "seems to have surfaced".[2] Mr Teoh argued that there was a fiduciary duty on the delegate to investigate the impact the deportation would have upon the children. While this argument was unsuccessful, the Declaration and the Convention, along with the legitimate expectation concept, underlined the judgments of Lee and Carr JJ.

2 *Ibid* at 298.

Lee and Carr JJ considered the impact of the U N Convention, Article 3 of which provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

In emphasising the effect of the Convention, Lee J held that a duty of inquiry existed. He held that ratification of the Convention amounted to a statement to the national and international community that the Commonwealth accepted the Convention's principles. Furthermore, it "provided parents and children, whose interests could be affected by actions of the Commonwealth which concerned children, with a legitimate expectation that such actions would be conducted in a manner which adhered to the relevant principles of the Convention".[3] Lee J therefore found that persons exercising delegated administrative powers were to apply the broad principles of the Convention, so long as the national interest and the statutory provisions did not provide otherwise. In Mr Teoh's case, there was a legitimate expectation that appropriate inquiries would be conducted as to the children's welfare. Such inquiries, his Honour held, were not performed.

Carr J similarly imported the concept of legitimate expectation. He found that the children had a legitimate expectation that their father's application for permanent resident status should be dealt with by the Minister in a manner consistent with the Convention. As such, the delegate was required by procedural fairness to consider the consequences of family disruption, and to make the appropriate inquiries in this respect.

Black CJ held that the Minister's delegate had failed to consider properly the effect of the family break-up. The Minister had conceded, "that in a case such as the present the breaking up of a family unit is a consideration of major significance and one which the decision-maker was relevantly bound to take into account".[4] His Honour held that the delegate had failed to make adequate inquires regarding the children's welfare in the light of the proposed deportation.

Ultimately, the Court ordered that the decision to refuse Mr Teoh's application be set aside, and that the application be referred to the Minister for reconsideration according to law. A stay was ordered until the Minister had reconsidered the application.

3 (1994) 121 ALR 436 at 449.
4 *Ibid* at 440–441.

The decision of the High Court

The Minister's appeal was dismissed by a majority. Mason CJ and Deane J gave a joint judgment, with which Toohey J was in substantial agreement. Gaudron J agreed in the result but took a different approach, and McHugh J dissented.

Mason CJ, Deane and Toohey JJ: Mason CJ and Deane J, with the agreement of Toohey J (and Gaudron J with respect to this point), began by clarifying the position of treaties in domestic law. Their Honours affirmed that international conventions do not become part of Australian law unless they are implemented by legislation. It was clear that the provisions of the Convention in question had not been so incorporated into Australian law. Mason CJ and Deane J further affirmed that international conventions may assist in the interpretation of a statute or subordinate legislation which is ambiguous. Their Honours held that "the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party".[5] This is premised, in their Honours' view, on the assumption that Parliament "intends to give effect to Australia's obligations under international law".[6] As will be seen later, the bi-partisan political response to the *Teoh* decision indicates Parliament in fact intends otherwise.

In addition, Mason CJ and Deane J held that treaties may guide the judicial development of the common law. They cautioned against the possibility that this be seen as a "backdoor means"[7] of incorporating conventions into Australian law without the authority of Parliament.

Although the decision thus has important ramifications in the international law sphere, these must be left aside. For the purposes of this paper, it is the ability of international conventions to breed legitimate expectations that is of most relevance. Mason CJ and Deane J held that ratification of an international convention can be the basis for a legitimate expectation. They did so in the following terms:

> [R]atification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evinces internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the Executive Government to the world and to the Australian people that the Executive Government and its

5 (1995) 183 CLR 273 at 287.
6 *Ibid*.
7 *Ibid* at 288.

> agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention …[8]

Toohey J agreed that—

> … by ratifying the Convention Australia has given a solemn undertaking to the world at large that it will: 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies' make 'the best interests of the child a primary consideration'.[9]

Gaudron J: Gaudron J reached the same result as the other members of the majority but reasoned the case on a different basis. She held that a common law human right can found a legitimate expectation. One such common law human right is that the best interests of children will be taken into account as a primary consideration in decision-making. Her Honour considered that the children's status as Australian citizens meant that—

> … any reasonable person who considered the matter would … assume that the best interests of the child would be a primary consideration in all administrative decisions which directly affect children as individuals and which have consequences for their future welfare.[10]

Gaudron J's notion of legitimate expectation was therefore based on the fact of the children's citizenship, as opposed to ratification of the Convention, which in her view was "only of subsidiary significance in this case".[11] The Convention's importance lay in its expression of the fundamental human right that is already recognised in Australian society. The interests of the child had not been treated as a primary consideration by the Minister's delegate. Procedural fairness required that Mr Teoh be informed of this.

McHugh J: McHugh J, in dissent, held that as a result of *Kioa v West*[12] and *Annetts v McCann*,[13] "a question must arise as to whether the doctrine of legitimate expectations still has a useful role to play".[14] Although McHugh J favoured abandoning the use of legitimate expectation, he recognised that the doctrine continues to be applied by the High Court. He considered that the doctrine would have to be extended beyond its present recognised

8 *Ibid* at 291.
9 *Ibid* at 301.
10 *Ibid* at 304.
11 *Ibid*.
12 (1985) 159 CLR 550.
13 (1990) 170 CLR 596.
14 (1995) 183 CLR 273 at 311.

sources in order for Mr Teoh to succeed. He held that ratification of a treaty does not result in a legitimate expectation residing in Australians that decision-makers will act in accord with the terms of the treaty.[15] His Honour held that ratification does not amount to a statement to the Australian community.

Furthermore, he held that procedural fairness would not necessitate notifying Mr Teoh that Article 3 of the Convention was not to be applied. The basis for this was that the delegate had not induced Mr Teoh to believe that it would be applied.[16] In contrast to the majority view, McHugh J held that a person's state of mind is relevant to the existence of a legitimate expectation. He reasoned thus: "A person cannot lose an expectation that he or she does not hold".[17] For these reasons, McHugh J held that the appeal should be allowed.

His Honour also discussed other problems with the respondent's contentions. In considering the effect a convention would have if the extended doctrine of legitimate expectation was accepted, McHugh J pointed to the practical effects on decision-makers, and the problems associated with implementing treaty obligations. He also held that the express terms of the policy of the Department of Immigration and Ethnic Affairs were inconsistent with a legitimate expectation.[18] His Honour further held that Article 3 would not apply when the decision was directed at a parent of the child, rather than the child.[19] In concluding, McHugh J held that, assuming a "legitimate expectation of compliance with the terms of the Convention, the substance of the expectation was not denied. Accordingly, no denial of procedural fairness occurred."[20]

The scope of the decision

Two important points can be drawn from the majority's decision. The first is that a legitimate expectation does not bind the decision-maker to decide in a particular way. All that is required is that persons who have a legitimate expectation be accorded a hearing before a decision inconsistent with the expectation is made. This is consistent with previous decisions which clarified that procedural fairness does not compel a decision-maker to reach a particular substantive outcome. Mason CJ and Deane J were in fact critical of the position taken by Lee and Carr JJ, which suggested that the Minister was in some way bound to apply Article 3.1 of the

15 *Ibid* at 313–315.
16 *Ibid* at 313.
17 *Ibid* at 314.
18 *Ibid* at 318.
19 *Ibid* at 319.
20 *Ibid* at 320.

Convention, with a corresponding obligation to initiate inquiries.[21] Their Honours held instead that the only consequence to flow from finding a legitimate expectation was that the requirements of procedural fairness must be met. Thus, the protection given by a legitimate expectation is procedural only.[22] By not affording any substantive protection, it is argued, the doctrine of legitimate expectation does not infringe the principle that non-incorporated conventions do not have the force of municipal law.[23]

Although clearly based on earlier authority, this aspect of the judgment has given rise to considerable comment. It has been argued that the position taken by the majority in effect compels decision-makers to take treaty obligations into account, unless there is a plausible reason for doing otherwise. Taggart, writing in the *Law Quarterly Review*, makes the following comment:

> [T]he majority invoked procedural fairness by stretching legitimate expectation doctrine to do by procedural means what they were unwilling to do by the substantive means of mandatory relevant considerations, to practically require decision-makers to apply the Convention principle.[24]

McHugh J commented that the use of legitimate expectation would mean that, "the Executive Government of the Commonwealth would have effectively amended the law of this country".[25] Bayne also took the issue up in evidence to the Senate Legal and Constitutional References Committee:

> [I]n practical effect, the Court was coming very close to saying that decision-makers must have regard to the terms of a convention when they exercise an administrative power. If there is no act of the legislature or the executive or if there is no action of the executive which displaces the convention, then as a matter of practical effect decision-makers will have to have regard to the terms of the convention in order to determine whether they should give a hearing to a person in respect of whom they propose not to apply the convention … That comes very close to a rejection of the basic legal principle that conventions do not have the force of law in Australia unless adopted by relevant local legislation.[26]

21 *Ibid* at 290.
22 See *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.
23 Allars, "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government" (1995) 17 *Syd LR* 204 at 231.
24 Taggart, "Legitimate Expectation and Treaties in the High Court of Australia" (1996+) 112 *LQR* 50 at 53.
25 (1995) 183 CLR 273 at 316.
26 Senate Legal and Constitutional References Committee, *Transcript of Proceedings*, 1 May 1995, at 110. See also Twomey, "*Minister for Immigration and Ethnic Affairs v Teoh*" (1995) 23 *FL Rev* 348 at 352.

Walker and Mathew respond to this charge in the following way:

> The legitimate expectation doctrine no more involves the executive in amending the law than does the formulation of governmental policy or the entry into contracts by the executive. Both these events can have legal effects, but do not involve amending the law, just as ratification leading to a legitimate expectation has legal effects but does not involve any amendment of Australian law.[27]

I believe that the *Teoh* decision must be regarded as one that is technically correct. Their Honours correctly reasoned from previous authority that legitimate expectations produce procedural consequences. This finding is firmly within the accepted grounds of both administrative and international law. It must also be accepted that there may in practical terms be a substantive effect, but this does not provide a reason for criticism of *Teoh*. The same criticism could be levelled at earlier decisions involving policy and legitimate expectations. It could equally have been argued in those cases that a finding that a legitimate expectation existed amounted in practical terms to a finding that a policy was a relevant consideration. Nonetheless, policy cases such as *Haoucher v Minister for Immigration and Ethnic Affairs*[28] and *Attorney-General (Hong Kong) v Ng Yuen Shiu*[29] have received judicial and critical endorsement. It is suggested that *Teoh* should be treated similarly.

The second important point to draw from the majority decision is that a legitimate expectation does not have to be personal to the applicant. That is, the person claiming the legitimate expectation need have no expectation in fact. Rather, as Toohey J pointed out, "legitimate expectation in this context does not depend upon the knowledge and state of mind of the individual concerned".[30] Mason CJ and Deane J agreed that it is an objective rather than a subjective test, though the expectation must be reasonable. This aspect of the judgment is well supported by previous authority. Toohey J in *Haoucher*[31] expressly stated this to be the case, and this position was implied in the judgment of Mason and Deane JJ in *Kioa v West*.[32] Brennan J, by contrast, has consistently rejected this approach, maintaining that legitimate expectation is a subjective concept. As such, he

27 Walker and Mathew, "*Minister for Immigration v Ah Hin Teoh*" (1995) 20 *MULR* 236 at 248.
28 (1990) 169 CLR 648.
29 [1983] 2 AC 629.
30 (1995) 183 CLR 273 at 301.
31 (1990) 169 CLR 648 at 670.
32 (1985) 159 CLR 550.

has refused to apply the notion of legitimate expectation in a number of cases.[33]

DOES *TEOH* INVOLVE A DRAMATIC SURGE FORWARD?

The plethora of discussion about *Teoh* could easily lead one to assume that the decision is a lightening rod in administrative law. It is my belief, however, that its impact is much less spectacular, more an incremental change to the law that is well justified by previous authority.

The preceding law of legitimate expectations[34]

Lord Denning in *Schmidt v Secretary of State for Home Affairs*[35] initiated the use of the phrase "legitimate expectation". The Court of Appeal held that the Home Secretary was not obliged to hear two scientology students before refusing their application for an extension of their expired entry permits. Lord Denning MR stated:

> [A]n administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.[36]

Australian courts have subsequently used the concept. For example, in *Heatley v Tasmanian Racing and Gaming Commission*[37] a majority of the High Court considered that a person could have a legitimate expectation of being granted admission to a public racecourse upon payment of the appropriate charge. Furthermore, in *FAI Insurances Ltd v Winneke*[38] the High Court held that the licence-holder in that case had a legitimate expectation of renewal. The licence-holder had provided workers' compensation insurance for many years, and although there was no statutory right of renewal, nor any express statutory criteria, had regularly obtained the relevant approval from the Governor-in-Council. The legitimate expectation of renewal meant that natural justice had to be observed before a decision was made not to renew the licence. The

33 *Kioa v West* (1985) 159 CLR 550; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; *Annetts v McCann* (1990) 170 CLR 596; and see Walker and Mathew, above n 27 at 247.

34 A comprehensive discussion of the history of legitimate expectations in Australia is provided by Williams, "Legitimate Expectations—Beyond *Teoh*" in L Pearson, *Administrative Law: Setting the Pace or Being Left Behind?* (1996, AIAL) 401.

35 [1969] 2 Ch 149.

36 *Ibid* at 170.

37 (1977) 137 CLR 487.

38 (1982) 151 CLR 342.

legitimate expectation doctrine has also been applied in the immigration context.[39]

There have, however, been threats to the doctrine from various corners of the High Court. In *Kioa v West* Brennan J was critical of the doctrine:

> The notion of 'legitimate expectations' is of uncertain connotation and, in my opinion, it may be misleading if it be treated as a criterion for determining the application or content of the principles of natural justice.[40]

That case concerned two Tongan citizens, Mr and Mrs Kioa. Mr Kioa had entered Australia on a student visa, followed later by Mrs Kioa. Each was granted a temporary entry permit. After the expiry of his permit, Mr Kioa sought an extension for holiday purposes. However, before the application was fully considered, Mr Kioa changed his address and began working. Mrs Kioa's permit expired and she sought no further permit. During their stay in Australia a second child was born, as an Australian citizen. Mr Kioa was later arrested as an illegal immigrant, and his application for an extension of his temporary entry permit was denied. One of the Minister's delegates, on a recommendation from an officer of the Immigration Department, ordered that Mr and Mrs Kioa be deported. Certain prejudicial comments regarding Mr Kioa were contained in the recommendation to the delegate. The Kioas then sought review from the Federal Court of the orders made, and of the refusal of their applications for further temporary entry permits and permanent entry permits.

Both Brennan and Mason JJ considered that the Kioas were entitled to be accorded a hearing prior to the deportation orders being made, to enable them to answer the prejudicial matters raised in the deportation recommendation. In reaching this conclusion, Brennan J felt that the legitimate expectation doctrine was of no relevance. His Honour considered that, as a matter of statutory interpretation of the *Migration Act* 1958 (Cth), the exercise of the power was conditioned on the observance of natural justice.[41]

Mason J also considered that the *Migration Act* carried with it an obligation to follow fair procedures.[42] His Honour also considered the principle of legitimate expectation:

39 *Eg Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, and *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629.
40 (1985) 159 CLR 550 at 617.
41 *Ibid* at 626.
42 *Ibid* at 586.

> 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.[43]

In *Attorney-General (NSW) v Quin*,[44] Brennan J's criticism of the doctrine of legitimate expectation surfaced again. This case concerned the replacement of the New South Wales Courts of Petty Sessions, constituted by stipendiary magistrates, with Local Courts, constituted by magistrates appointed by the Governor. A policy existed whereby the former stipendiary magistrates who applied would be appointed to the new courts unless they were considered unfit for judicial office. In earlier proceedings the NSW Supreme Court declared that the Attorney-General's decision not to recommend the appointment of Quin and some other former stipendiary magistrates was void. The basis for this finding was that they had not been given an opportunity to respond to certain allegations about their suitability. The Attorney-General then claimed that Quin's application would be treated on its merit, just as any other application would be treated. He indicated he would not take into account the earlier allegations without providing an opportunity for the applicant to answer them. The former stipendiary magistrate subsequently sought to compel the Attorney-General to consider his application without reference to other applications made in the meantime. A majority of the High Court held that the Attorney-General was not so obliged.

Although ultimately reaching the same result in this case, Mason CJ and Brennan J employed different reasoning. Mason CJ considered the doctrine of legitimate expectation, but rejected its application in the circumstances. His Honour held that the plaintiff in that case was seeking substantive protection, as opposed to merely procedural relief, which was not warranted. Mason CJ used the opportunity in *Quin* to point out that, notwithstanding the criticism levelled at the concept, it has been accepted and adopted by the Court. After citing a number of cases where the doctrine had been applied, his Honour added:

> It is the presence of a legitimate expectation which conditions the existence of a claimant's right to procedural fairness and the corresponding duty of the decision-maker to observe procedural fairness in the treatment of the claimant's case. The content of that duty is

43 *Ibid* at 582.
44 (1990) 170 CLR 1.

> dependent upon the circumstances of the particular case, but its existence is determined by reference to legal principle.[45]

Brennan J adhered to his views expressed in *Kioa v West* that the doctrine of legitimate expectation has no role to play in determining whether the exercise of a power must be conditioned by natural justice.[46] To hold otherwise, he felt, would mean "the notion would become a stalking horse for excesses of judicial power".[47]

Later in the same year in *Annetts v McCann*[48] the High Court revisited the notion of legitimate expectation, and was again divided. The majority considered that the parents of a deceased boy had a legitimate expectation, resulting from the grant of representation at the coronial inquiry, that the coroner would not make an adverse finding to their interests without giving them the opportunity to oppose that finding. Mason CJ, Deane J and McHugh J held as follows:

> It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.[49]

Brennan J again reiterated that the doctrine of legitimate expectation does not provide the test for implication of procedural fairness requirements:

> The origins of an expectation may assist in determining the content of the requirements of natural justice in a particular case … but I respectfully dissent from the notion that, if legitimacy depends on the origin of an expectation as to the manner in which a power will be exercised, legitimacy determines whether the requirements of natural justice condition a valid exercise of the power. The only sound foundation for judicial review is, in my opinion, the statute which creates and confers the power, construed to include any terms supplied by the common law.[50]

What then can be said about the law prior to *Teoh*? Certainly, the position held by the doctrine of legitimate expectation was at least unclear. It was being applied in High Court decisions although at the same time there were consistent objections to its utility.

45 *Ibid* at 20.
46 *Ibid* at 38–39.
47 *Ibid* at 39.
48 (1990) 170 CLR 596.
49 *Ibid* at 598.
50 *Ibid* at 606.

Was *Teoh* justified by previous case law?

It is certainly clear that the *Teoh* decision stipulates a new scenario, ratification of an international treaty, where the doctrine of legitimate expectation will apply. However, in taking the doctrine into this new terrain the High Court nonetheless stayed within foreseeable bounds. An analysis of the earlier case law demonstrates this to be so.

In *Attorney-General (Hong Kong) v Ng Yuen Shiu*[51] a representation was made by an immigration official to the effect that illegal immigrants from Macau would be dealt with in a certain manner. The Privy Council held that before a decision-maker could depart from that representation the applicant must be given an opportunity to be heard, as a legitimate expectation had been created. This case was approved by the High Court in *Kioa v West*.[52] The later decision in *Haoucher v Minister for Immigration and Ethnic Affairs*[53] was along similar lines. The High Court there decided that a Minister's criminal deportation policy gave rise to a legitimate expectation. The "published, considered statement of government policy"[54] stated that a decision of the Administrative Appeals Tribunal would only be overturned on a deportation issue in "exceptional circumstances" and where there was "strong evidence" to justify this. This policy was held to have founded an entitlement to a hearing before a decision inconsistent with the policy could be made.

Essentially then, whilst *Ng Yuen Shiu* concerned a representation by government, *Haoucher* involved a published, considered statement of policy.[55] Mason CJ, Deane and Toohey J all seemed to consider in *Teoh* that ratification of a treaty was not far removed from these situations. In fact, Mason CJ and Deane J held that "ratification of a convention is a positive statement by the Executive Government of this country to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention."[56] Toohey J held similarly that ratification of a convention is "a solemn undertaking to the world at large".[57] Allars maintains that "the decision in *Teoh's* case was inevitable if existing principle was to be applied consistently by the High Court".[58]

51 [1983] 2 AC 629.
52 (1985) 159 CLR 550.
53 (1990) 169 CLR 648.
54 *Ibid* at 654 per Deane J.
55 Allars, above n 23 at 221–224.
56 (1995) 183 CLR 273 at 291.
57 *Ibid* at 301.
58 Allars, above n 23 at 226.

Williams, however, claims that there is in fact a large shift from the judgment in *Ng Yuen Shiu* to the *Teoh* decision. He argues that *Ng Yuen Shiu* involves a clear and specific promise to people in the position of Shiu, whereas *Teoh* involved "a statement which was made only to foreign states".[59] In my view, such a distinction adopts an artificial separation of what the Executive says to foreign states, and what it says nationally. It would arguably be a reasonable (that is, legitimate) view for Australians to hold that their Executive would not "sign off" on something internationally that it is not prepared to support nationally. If the signing of an international convention is accepted as something which speaks also to Australians, it is a short step from accepting policy as generating a legitimate expectation to accepting ratification as giving rise to expectations.

While there is no radical shift evident in the judgments of Mason CJ and Deane J, and Toohey J, somewhat of a "doctrinal leap"[60] is found in the judgment of Gaudron J. Her Honour found that there existed a common law human right of a child as a citizen to have his or her best interests seen as a primary consideration. Sourcing a legitimate expectation on a human right existing at common law is a more radical suggestion. The case of *Department of Immigration and Ethnic Affairs v Ram*[61] indicates that the prospects of acceptance of this suggestion are limited. Hill J in the Federal Court said he felt he must "follow the views expressed by the majority of the High Court rather than the dicta of Gaudron J."[62]

THE AFTERMATH OF *TEOH*

The practical effect on decision-makers

One of the largest areas of criticism of the judgment was said to be its perceived failure to take account of the impact it would have on administrative decision-makers. Commentators intoned that administrative decisions would be lost in the quagmire of international treaties, such that decisions would be unduly delayed. McHugh J raised the issue that there are more than 900 international treaties to which Australia is a party, and this figure is often bandied around as an apparent indication of the absurdity of the decision. Snell for example, claims that "Teoh may now have given us a flashing amber approach to regulating administrative decision making. Decision makers will now have to look left, right and then take a punt that there is no applicable Convention

59 Williams, "*Teoh*—A Perspective From the Bar" (1995) 5 *AIAL Forum* 1 at 3.
60 Allars, above n 23 at 225.
61 (1996) 41 ALD 517.
62 *Ibid* at 522.

hanging around".[63] And, again, McMillan bemoans that "the validity of decision making in Australia can be dependent hereafter on the knowledge which individual officials have of the opaque terms of international conventions that may be difficult to identify or locate".[64]

It is suggested that this is an overreaction to the majority's judgment. Certainly, decision-makers must be acquainted with any relevant international conventions. The reality, however, is that only a few of the 900 treaties will impact on a particular area of decision-making.[65] There is no doubt that government departments will have to include international instruments in departmental manuals, and "undertake a general review of decision-making procedures to ensure compliance with the requirements of Teoh".[66] That is not, however, an insurmountable problem, being undertaken already by some decision-makers in accordance with legislative requirements.[67] The *Australian Postal Corporation Act 1989* (Cth), for example, provides that Australia Post is to act consistently with Australia's obligations under any Convention to which Australia is a party. The *Australian Maritime Safety Authority Act 1990* (Cth) instructs the relevant Authority to function consistently with Australia's obligations under any agreement between Australia and another country. Furthermore, the *Broadcasting Services Act 1992* (Cth) provides for Australia's obligations under any convention to which Australia is a party to be taken into account. Having regard to international conventions has not sounded the death knell for those institutions. It is submitted that there is no reason to suppose it will for any others.

However, it is recognised that in including international instruments in departmental manuals difficulties may arise because conventions often contain wide general statements of principle. The examples proffered by McHugh J as illustrative of this problem include whether a public authority must make the best interests of a child a primary consideration in determining whether to acquire compulsorily the property of a parent, or whether the Commissioner of Taxation must consider the best interests of a child in exercising powers under the *Income Tax Assessment Act 1936* (Cth). Ultimately, it will be a matter for the decision-maker in the exercise of his or her discretion and common sense.

63 Snell, "*Kioa* to *Teoh*" (1995) 20 *AHLJ* 136 at 137.
64 McMillan, "*Teoh*, and Invalidity in Administrative Law" (1995) 5 *AIAL Forum* 10 at 14.
65 Ludbrook, "Youth Affairs" (1995) 20 *AHLJ* 247.
66 Walker, "Who's the Boss? The Judiciary, the Executive, the Parliament and the Protection of Human Rights" (1995) 25 *UWAL Rev* 238 at 241.
67 Roberts, "*Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*: The High Court Decision and the Government's Reaction to it" (1995) 2 *AJHR* 135 at 145.

The Government's response to *Teoh*

At the time of the *Teoh* decision the Labor Government's response to the majority decision was not a favourable one. Shortly afterwards a Joint Statement was issued by Senator Evans, the Foreign Affairs Minister, and Mr Lavarch, the Attorney-General, seeking to reverse the effects of the *Teoh* decision. The Joint Statement indicated an intention to pass legislation which would reinforce the Statement and clarify the status of unlegislated international obligations. In July 1995, the Administrative Decisions (Effect of International Instruments) Bill 1995 was given its first reading. Owing to a lack of Parliamentary time, and the subsequent election, the Bill was never passed. The Coalition Government, which had in opposition expressed concern at the *Teoh* decision, have more recently released a Joint Statement. On 25 February 1997 a Statement was issued by the Minister for Foreign Affairs, Alexander Downer, and the Attorney-General and Minister for Justice, Daryl Williams. Like the previous Joint Statement it seeks to negative the effect of *Teoh* and indicates an intention to introduce legislation to overturn the *Teoh* decision.

WHERE DOES THE LAW NOW LIE?

As discussed earlier, there is some debate as to the position the doctrine of legitimate expectation should occupy. However, as McHugh J in *Teoh* recognised, despite this debate the concept has been continually used in High Court decisions. Putting aside any qualitative judgments on the utility of the doctrine, the question then becomes, "what is the position following the making of the joint statements"?

Are the Joint Statements effective?

The question must necessarily be asked whether the Joint Statements would be effective to negate the influence of *Teoh*. It is my opinion that their effectiveness is, at best, doubtful. At base level, one wonders why both Governments felt that legislation implementing their Joint Statements was necessary in order to consolidate their position. This certainly raises the suspicion that the Labor and Coalition Governments alike have concerns as to the effectiveness of their respective Statements.

Furthermore, both Statements seek to rely for their effectiveness on the majority's decision that legitimate expectations may be defeated by "statutory or executive indications to the contrary".[68] Toohey J indicated that "there can be no legitimate expectation if the actions of the legislature or the executive are inconsistent with such an expectation".[69] It is my view

68 (1995) 183 CLR 273, at 291.
69 *Ibid* at 302.

that the Joint Statements arguably do not fall within the majority's contemplation of an executive indication to the contrary. To do so, I believe that an executive statement must be issued which indicates a particular convention, and stipulates that neither the act of ratification, nor the circumstances surrounding it, can produce a legitimate expectation that the provisions of that convention will, in any way, be considered by a decision-maker. Allars questions the level of generality involved in the Labor Statement and notes that the treaties and conventions to which it seeks to apply are not listed. Its effectiveness with regard to a particular convention is therefore not beyond doubt.[70] Although her criticism concerns the Labor Statement, the Liberal Statement is similarly general. Allars also raises a pertinent question, "Is the Joint Statement capable of defeating a legitimate expectation when it is conveyed in a form which is not commensurate with the means by which the legitimate expectation was initially generated, in terms of its formality, public dissemination, [or] tabling in Parliament?" [71]

That the effectiveness of the Statements is dubious is reinforced by the judgment of Hill J in *Department of Immigration and Ethnic Affairs v Ram*.[72] A decision of the Administrative Appeals Tribunal that the Labor Government's Statement was ineffective had been appealed to the Federal Court, which commented:

> When, in *Teoh*, Mason CJ and Deane J refer to 'executive indications to the contrary', it may well be that their Honours intended to refer to statements made at the time the treaty was entered into, rather than to statements made years after the treaty came into force.
>
> When initially referring to executive comments, their Honours do so in the context of the act of ratification, an act that speaks both to the other parties to the Convention and to the people of Australia as well as to the world. I doubt their Honours contemplated a case where at the time of ratification, Australia had expressed to the world and to its people its intention to be bound by a treaty protecting the rights of children, but subsequently, one or more Ministers made statements suggesting that they at least had decided otherwise.[73]

It is noteworthy that the AAT in *Re P W Adams Pty Ltd and Australian Fisheries Management Authority (No 2)*[74] seems to have endorsed the opposite view, and upheld the effectiveness of the Statement. Perhaps nothing more about this can be said than that grave doubt exists as to

70 Allars, above n 23 at 240.
71 *Ibid* at 241.
72 (1996) 41 ALD 517.
73 *Ibid* at 522–523.
74 (1995) 38 ALD 435.

whether a court would consider a ministerial press release effective to negative a High Court judgment, when such executive action was not within the Court's contemplation.

Further, even accepting that the Statement takes the law back to its pre-*Teoh* status, the terms of a ratified international convention may still provide decision-makers with what is effectively a relevant consideration that must be taken into account. In *Teoh* it was conceded by the Minister that the effect of the break-up of the family was a matter that the delegate was bound to take into account.[75] Due to that concession, the question of relevant considerations of the decision-maker was not a matter primarily in issue before the High Court. Relevantly, however, the majority commented that—

> … the status of the Convention in Australian law reveals no intrinsic reason for excluding its provisions from consideration by the decision-maker simply because it has not been incorporated into our municipal law.[76]

Even McHugh J in dissent held that "the terms of the convention were matters which the Minister or his delegate could take into account".[77]

It would seem then, that an international convention would remain effectively a relevant consideration. Thus, despite the Joint Statement, the problem exists for decision-makers as to which of the 900 conventions they must turn their mind to. The problems raised by McHugh J would be as applicable to this situation as they would be to a finding that a legitimate expectation resulted from ratification of a convention.

Is the Government's Position Justified?

In the Coalition's Statement the tenuous distinction is drawn between a treaty and "considered statements of public policy". The Government thus does not seek to alter the previous law, which provided that a statement of policy could breed a legitimate expectation. Rather, the Statement seeks only to apply to "the act of entering into a treaty". It seems an odd stance to maintain that adverting to policies is conducive to good administration, while bearing treaties in mind is singularly destructive. This aspect of the decision was discussed earlier, when I expressed the opinion that *Teoh* is justified on the basis of previous authority. The cases of *Haoucher* and *Ng Yuen Shiu* were given as indications of this. As I then explained, there is no great leap from acknowledging that policies may give rise to procedural

75 (1995) 183 CLR 273 at 282.
76 *Ibid* at 288.
77 *Ibid* at 315.

consequences to accepting that treaties may have the same effect. It is suggested that the Government's statement to the contrary is playing with semantics.

Questions about the Government's position may also be raised in the light of proposed legislation. The Labor Government's draft bill will be taken as a guide for the purposes of this discussion, as the proposed Coalition Bill was not available at the time of writing. The scope of Labor's Administrative Decisions (Effect of International Instruments) Bill 1995 was not wide, as was noted by the Minister for Justice at the time of the Second Reading Speech. Mr Kerr claimed that it was in fact "very narrowly focused". The Explanatory Memorandum to the Bill explained that its purpose was—

> … to eliminate any expectation which might exist that administrative decisions, whether at the Commonwealth, State or Territory level, will be made in conformity with provisions of ratified but unimplemented treaties, or, that if a decision is to be made contrary to such provisions, an opportunity will be given for the affected person to make submissions on the issue.

The Bill does not affect other uses of international law, so that treaties can still be used, for example, in the interpretation of ambiguous statutes, or as an influence on the development of the common law. The Bill further provides that international instruments are not rendered an irrelevant consideration in making an administrative decision. The Explanatory Memorandum also indicated that the Bill would remove the possibility of expensive litigation challenging administrative decisions.

During the Second Reading debate the Coalition (then in Opposition) indicated their support for the specific aim of the Bill. It was noted that they believed the Government had entered into treaties without due consideration being given to the consequences of doing so. As such, they recommended an amendment to the Bill in the following terms:

> [W]hilst not declining to give the Bill a second reading, the House condemns the Government for its failure:
>
> (1) to ensure that the Parliament, the States and the wider community are given proper and timely involvement in international law-making by the Government;
>
> (2) to legislate to require that treaties be tabled and debated in Parliament prior to ratification;
>
> (3) to establish a Treaties Council as part of the Council of Australian Governments (COAG) in conjunction with a general strengthening of the consultative procedures of COAG;

(4) to work with the States to ensure that, where possible, domestic legislation is in place prior to the ratification of treaties; and

(5) to establish a Joint Treaties Committee to provide a detailed analysis of the implications of any prospective signing or ratification of any international treaty by Australia.

This proposed amendment may give an indication that any legislation brought in by the present Government will have a wider focus than Labor's Bill. It could well be expected that the system of ratification of treaties may undergo some change. As far as legitimate expectations are concerned, however, it seems clear that the legislation will operate to return this part of administrative law to the pre-*Teoh* position.

It is my view that, should the Government legislate in line with their proposed amendments to the Labor Bill, there would be even less cause for "turning back the clock" on *Teoh*. If the Government endorsed greater consultation prior to ratification of treaties, and their public tabling in Parliament, any expectation that they would be heeded by administrative decision-makers would be all the more "legitimate". Where such a considered process is undertaken prior to ratification, it would certainly be fair to expect decision-makers to accord persons affected by their decision an ability to respond should the Convention be deemed inapplicable.

CONCLUSION

In the final analysis, what are we left with? I believe that three notable aspects can be drawn from the *Teoh* fray. Firstly, a decision-maker would be well advised to consider whether any conventions are relevant to a decision at hand. If so, and the decision-maker intends to depart from its terms, a person affected by the decision should be informed. An opportunity to make submissions on the intended departure should also be given to the person affected. At the very least, no criticism could be directed towards a decision-maker who considers as relevant to their deliberation the terms of a ratified treaty.

The second factor arising from *Teoh* is the possibility of successfully challenging a decision relying on the legitimate expectation doctrine and ratified conventions. Despite Government attempts to nullify this possibility, the likelihood is that a court presented with the Joint Statements would nonetheless find itself free to consider the terms of a ratified treaty.

Finally, I believe, quite simply, that the Government response is not warranted. Any changes made to the law by *Teoh* were far from sensational, especially as it is arguable that pre-*Teoh* ratified conventions

were matters to be taken into account by decision-makers. Its practical effects are manageable, provided the Executive takes the responsibility when ratifying conventions of properly informing decision-makers. In my opinion, *Teoh* highlighted the willingness of governments to commit Australia to international obligations while at the same time deeming them unworthy of domestic effect.

Editorial Postscript

The Coalition Government introduced the Administrative Decisions (Effect of International Instruments) Bill 1997 into the House of Representatives on 18 June 1997. The Bill was referred to the Senate Legal and Constitutional Legislation Committee, which reported in October 1997, and by majority favoured the enactment of the Bill without amendment.

SUCCESS AT COURT—DOES THE CLIENT WIN?

Robin Creyke, John McMillan, Dennis Pearce*

Did Karen Green receive unemployment benefit?[1] Are the Kioa family still in Australia?[2] Did the Bond group keep its television licence in Queensland?[3] The answers are No, Yes and the issue became irrelevant.

After every successful application to a court to review an administrative decision this sort of question is usually left open. Ordinarily a court cannot substitute a new decision, and the case will usually be remitted to the agency for reconsideration. Among the options open to the agency are to reinstate the earlier decision, effectively negating the win at court. It is possible, on the other hand, that not only will the plaintiff be given the changed decision that he or she is seeking, but also that legislative or administrative reform will ensue.

Surprisingly little is known as to which of those options occurs. There is no public record to which one can turn to follow the story. There is no procedure defined, either by courts or by agencies, for reporting what occurs subsequent to a court decision. Nor does any official have the function of following up on court decisions. We know from published law reports of the contribution that judicial review makes in defining principles of administrative decision-making, but we know very little about the impact of judicial review on the interests and fortunes of the two parties engaged in the litigation, the plaintiff and the government agency.

It is important that our knowledge of judicial review should rise above the level of anecdotal history. Hence, in 1994 the three authors decided to apply for a large Australian Research Council grant for a three-year empirical research project entitled "The Impact of Court Decisions on Government Administration". The application was successful and research on the first phase of this project was undertaken during 1995–1997.

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1 *Green v Daniels* (1977) 13 ALR 1.

2 *Kioa v West* (1985) 159 CLR 550.

3 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 1.

The most ambitious element of the project—and the subject of this paper—is a study covering a ten-year period of the eventual outcome for people who were successful in a federal judicial review action. The study is not completed, but it is appropriate in this paper to give a preliminary sketch of some initial conclusions and impressions from the research data. An appendix describes how we have gone about the project and some of the qualifications and limitations on what is presented in this paper. We are pleased to note too that the research will be ongoing, as we have been fortunate to receive a further Australian Research Council large grant for the 1998–2000 triennium to extend the lines of inquiry and analysis.[4] Some of the issues to be covered in the additional research are mentioned at the end of this paper.

STUDYING THE OUTCOME OF SUCCESSFUL JUDICIAL REVIEW APPLICATIONS

In the years 1984–1993 a little over 3,300 applications for judicial review were made to the Federal Court. Most applications were made under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and a small number were made under s 39B of the *Judiciary Act 1903* (Cth). A great many of those applications were not resolved by a judgment of the Court, but by settlement between the parties, withdrawal by the plaintiff, or by other circumstances. Our analysis revealed that 11.2% of the cases (371) that proceeded to a hearing resulted in a judgment favourable to the plaintiff. It was those cases that became the subject of our study, though reduced eventually to a figure of 302 (9.1% of the total) to take account of cases that became impossible to trace (for example, the files, or the legal representatives, could not be traced). Migration cases constituted a little over half the cases studied.

For each case in our survey we wrote (and usually spoke as well) to the solicitors on the record for the plaintiff and to the defendant agency, asking whether the decision had been reviewed by the agency as directed by the Court and the eventual outcome of the case. The picture which is clearly emerging is that a successful judicial review application usually produces a beneficial result for the plaintiff. That outcome is probably contrary to anecdotal belief, which often speculates that an agency, having committed its resources to a defence of a decision, will be disposed to achieving its desired result by the back door, if needs be.

4 For a similar UK study see M Sunkin, L Bridges and G Meszaros, *The Public Law Project—Judicial Review in Perspective: an Investigation of Trends in the Use and Operation of the Judicial Review Procedure in England and Wales* (The Public Law Project, 1993).

The good news, both for litigants and for law and public administration, is that judicial review frequently does work in the way hoped for by a plaintiff. Our preliminary count shows that in at least 61.6% of cases an applicant is ultimately successful in obtaining a decision in his or her favour. The figure is probably much higher, since results are still being followed in 25% of cases, and in only 2.3% of cases on the figures to date does the agency reinstate its initial decision. The figures are also relatively uniform across agencies, particularly in the three fields (migration, customs, and taxation) that constitute the bulk of the successful judicial review applications.

The percentage of cases in which an agency re-instates its original decision is surprisingly low. That suggests that in practical terms a very large number of plaintiffs who are successful in a judicial review application eventually receive the entry permit, visa, licence, concession or other determination which inspired their court application. The main note of caution which must be sounded in stating that conclusion is that there are many different paths to a favourable administrative decision, and litigation may traverse only one of them. In migration matters, for example, an entry permit may later be granted for reasons unconnected with the facts of an earlier judicial review application, and our study was not always able to pick up these ambiguities in administrative history.

DIGGING DEEPER

The preliminary statistics that we have collected raise as many questions as they answer. Why do agencies so frequently concede a decision which they have arduously defended—in deference to the Court's decision, through a change of heart, or in pragmatism or exasperation? Will a court decision have a wider or systemic impact on policies and decision-making in an agency? Is it possible to predict which challenges are more likely to succeed in court?

Questions of that kind are a continuing focus in our study, though we will never provide a complete answer. Before outlining a few ideas, it is worth recording that our first and most pleasing finding—made well before any meaningful statistics were received—is that it was possible to undertake an empirical study of the kind we had proposed because of the level of willing co-operation by government agencies, law firms, and litigants in person. They could have stymied this research, by intransigence or reliance on privacy or legal professional privilege, but rarely did that occur. The level of co-operation has seemingly stemmed from a like desire on their part to see this study undertaken. Dissatisfaction with the information vacuum on the impact of judicial review is a feeling shared by many.

The observations that we have so far made in our analysis of the responses are by no means novel, but for us their significance lies in the fact that they are the issues which stand out amongst a multitude of possible ideas and reactions. To the extent too that a conclusion is grounded in empirical research it has added significance.

Judicial review in context

The first observation is that judicial review is far more than an exercise in dispute resolution. Whatever meaning the Court's judgment has for the plaintiff, it usually has a great deal more meaning for the plaintiff's lawyers and for the defendant agency. With notable frequency the response to our inquiry would place the dispute in a broader context, pointing out that there was a general issue of administrative policy, practice or style that lay at the root of the dispute.

The decision to litigate (in non-immigration cases particularly) was at times explained in terms that reached beyond the particular dispute and revealed the solicitor's or client's contemplation of wider issues. Not surprisingly, examples were frequently given (often from less-renowned administrative law cases) of administrative changes that stemmed from the litigation, on matters as varied as the placement of information on the child support database, the Australian Taxation Office practice on default assessments, the formula for calculating values affected by overseas price fluctuations, the negotiation of pharmacy agreements on benefit remuneration, OH&S standards for the lead industry, vocational registration of foreign-trained medical practitioners, and disclosure of privileged information.

Those examples can, of course, be supplemented by an even more important list of judicial review cases that have articulated the basic groundrules for administrative decision-making, on issues like procedural fairness, relevance of international conventions, and reliance on government policies.

Satisfaction levels

A number of respondents volunteered the view that the judicial review action had been worthwhile. To some extent this would be a predictable response from those who had been successful at court, but their evaluation of the benefits of judicial review was more comprehensive. One strand of thinking referred to the changes in administrative practice described earlier, while another described judicial review as an effective step in establishing a dialogue or negotiation with an agency, perhaps extending beyond the particular dispute.

There have equally been some dismissive remarks about judicial review, often to do with the depth of action required to obtain a change in a decision, or to do with the failure of the court's decision to resolve an ongoing conflict. As befits an adversarial system, there were colourful comments made to us (from both sides) on the integrity and sincerity of the opponents. A tentative reaction is to say that a negative evaluation of the potential for judicial review to move a government agency was more likely to be expressed in respect of customs, taxation, and personnel management decisions. Particularly in relation to personnel management decisions, there was confirmation of the view, which most of us would probably reach intuitively, that a successful judicial review action will do nothing to settle the conflict and will usually provide only a window of opportunity for the aggrieved person to seek relocation to another job.

After the court's decision

As implied in the foregoing points, as much can occur after a court decision as occurs before. That is, the court decision is not the end of the matter—as the published judgment often suggests—but merely one step in a much longer administrative history. This was particularly striking in a few immigration cases for which we have been doing a separate case study analysis. For example, in cases like *Kioa* there was a file or two leading up to the High Court judgment, but about ten files created after it. That observation is of interest in a few respects. Whilst acknowledging the danger of generalisation, our limited data illustrates that court decisions are taken seriously by agencies; that the decisions often prompt an administrative reaction and evaluation; that judicial review is part of the continuum of decision-making within the fabric of government; and that a judicial declaration of invalidity can markedly affect the work of an agency and accordingly should be a well-considered and justifiable judicial outcome.

We were also keen to note whether the agency analysis of a court judgment traversed the same range of legal and policy implications that often figure in public and academic analysis. On this score we have to record that we have so far been very impressed by the professionalism and sophistication of the analysis on the agency file. And, though a file can only tell so much, there have been no signs of intransigence or antagonism. This prompts a slight digression, to express regret that departmental legal officers are not more actively engaged in public discussion of the impact and sensibility of judicial rulings. We know that agency officials disagree with what courts do, because they often initiate legislative changes to overturn the court rulings. It would be helpful to all of us, judges included, if there was a more informed public discussion of the impact of judicial review. After all,

in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[5] the High Court ruled that the Department's reading of an earlier High Court decision, *Chan Yee Kin v Minister for Immigration and Ethnic Affairs*,[6] was to be preferred to that of at least three differently-constituted Full Benches of the Federal Court.[7] What better encouragement could there be for being "outed"!

Consent cases

We deliberately excluded settled and consent cases from our study, believing that they were explicable on their own terms. We have since come to doubt that view, believing instead that the importance of consent cases to an evaluation of administrative law has been greatly underrated. The proportion of consent cases is itself surprisingly high, and apparently increasing. While government lawyers often pointed to this as an encouraging sign, plaintiff lawyers were often quite critical and drew different meaning from the figures.

There are broader issues of principle as well. Does a private concession deny the opportunity for executive accountability in respect of a more general weakness in administrative procedures or legislative structures? Do settlements occur more in some key decision-making areas than in others? Should more be recorded or reported as to what is happening? These are issues we plan to address in the next phase of this project.

Responding to court decisions

Our next observation throws a slightly different light on some of the earlier points. It is that our study has been considerably more difficult than we had anticipated, chiefly because the filing system of agencies does not by and large track the outcome of individual cases. That is not intended as any criticism, but rather as a prelude to a wider point, namely that our legal and administrative framework does not fully acknowledge the important role that judicial review plays as part of the processes of government.

To facilitate external review of government decision-making we have elaborate legal codes that define how litigation is commenced, documents are served, and time limits are imposed. Why do we not have similar

5 (1996) 185 CLR 259.
6 (1989) 169 CLR 379.
7 Apart from criticising the judgment of the Federal Court in *Wu* (Sheppard, Lee and Carr JJ), the High Court drew attention to two other cases in which a Full Bench had adopted the same reasoning as in *Wu: Minister for Immigration, Local Government and Ethnic Affairs v Mok Gek Bouy* (1994) 127 ALR 223 (Black CJ, Lockhart and Sheppard JJ); and *Chen Ru Mei v Minister for Immigration and Ethnic Affairs* (1995) 130 ALR 405 (Northrop, Spender and Lee JJ).

administrative codes that come into operation the day after a court gives a decision, requiring an answer or reconsideration in so many days, notification of administrative action to the plaintiff, central recording of what happened, and cross-referencing to legislative and administrative changes prompted by the decision? The purpose in doing this would partly be to safeguard the interests of a plaintiff, but partly also to acknowledge the potential importance that individual decisions can have for law and government. It is interesting to note in this respect the Western Australian proposal for a Commissioner for Public Sector Standards, who would have a role in following-up the implementation of tribunal decisions.[8]

Our knowledge of judicial review

This brings us back to the point at which we started, which is that we know very little about judicial review. Courts discharge a core legal function ensuring executive accountability and protecting individual rights, but little is known of what really happens beyond the published decision. What happens before or after a decision is published is largely blurred or hidden. Even on points that are part of the public record there is little that is known—such as the proportion of plaintiffs who are individuals, or corporations; the proportion of parties who are legally aided; which grounds of review figure most prominently; how frequently standing is denied; whether patterns change after important cases like *Bond* or *Wu*; and whether the identity of the judge has any bearing on whether administrative action is likely to be declared unlawful.

These issues are interesting and important in their own right, but they are also critical if we are serious about maintaining the separation of powers as a feature of Australian government. There is always the risk that judicial review will be perceived as an external intrusion, the most cumbersome of a range of different dispute resolution options. That is not to say that reforms in court process and the adversarial process are not needed,[9] just that the benefits of independent legal review can be more important yet more subtle than is sometimes appreciated. Recognising that an independent and external framework of administrative law review is a part of and not separate from the process of decision-making is a first step in that re-awakening.

8 P Johnston, "Recent Developments Concerning Tribunals in Australia" (1996) 24 *FL Rev* 331–2.

9 *Eg* ALRC, *Rethinking the Federal Civil Litigation System*, Issue Paper 20 (1997).

APPENDIX—PROJECT DESCRIPTION

This appendix describes the methodology adopted in the project, "The Impact of Court Decisions on Government Administration". Research for the project was undertaken during 1995–97, with the assistance of grant funding from the Australian Research Council. The analysis of the research data was incomplete at the time that this paper was prepared, and to that extent the figures presented in this Appendix are an interim presentation of research findings. Some of the lines of research will also be continued and refined with the assistance of a further grant from the Australian Research Council to fund research in the period 1998–2000.

Methodology

To keep the project within bounds and to take advantage of our research proximity to Commonwealth government agencies, we chose to confine the study to Federal Court and High Court decisions on applications for judicial review made under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) and s 39B of the *Judiciary Act 1903* (Cth). A finite research period had to be selected, which in this case was 1984–1993. By 1984 there was a reasonable number of ADJR Act applications before the Courts. The applications commenced during this period would mostly have been resolved by 1995 when our study commenced.

The first step was to identify the cases to be studied. A list of ADJR Act and s 39B applications was obtained from SCALE, the Attorney-General's Department data base. This showed whether an application proceeded to judgment, was withdrawn or whether judgment was entered by consent. Thereafter, we needed the co-operation of the Federal Court registries to access files of the Court where judgment had been entered on behalf of the applicant. This was readily forthcoming in all but one registry, where it was suggested initially that to grant access would constitute an invasion of privacy. After further negotiation limited access to files was granted by the registry. The Court registries were generous with their time and we were able in particular to obtain information about cases where judgment was entered by consent. The consent cases will be taken up in the 1998–2000 phase of the project.

The information obtained from the case files enabled us to identify the decision sought to be reviewed, the agency respondent, the order of the Court and the solicitors for the applicant. From this information we conducted a pilot study by sending a questionnaire to the agency respondents and to the solicitors for applicants of cases commenced in the ACT Registry of the Federal Court.

From this experience we devised a simple questionnaire asking:

- Was the Court's direction that the decision be reviewed complied with?
- What was the outcome of the reconsideration by the agency?
- Did any changes of a legislative, policy or systemic nature flow from the reconsideration?
- Were there other aspects of the case that impinged on this study project?

This questionnaire was sent, together with an outline of the project, to the solicitors on the record for the applicants in all the cases that were identified as falling within the ambit of the study. We indicated to the solicitors that we did not expect a written response but would contact them by telephone to follow up the questions asked.

We were looking at cases up to twelve years old and that gave rise to problems in identifying the solicitors who knew the cases. Firms had amalgamated; solicitors had been struck off or ceased practice; and some big firms had problems finding the cases as the solicitor in charge at the time had left. However, we obtained information in the majority of cases. Only a few solicitors raised what we thought might be a problem of privilege or privacy. That issue was more likely to be raised in commercial cases than those involving individuals.

The overwhelming reaction of solicitors was of interest in the project and encouragement to pursue it. Some were anxious to describe problems they had encountered with agencies after the Court's intervention.

We then turned to the agencies and again have received considerable co-operation. The same questionnaire was sent to them as had been sent to the solicitors for the applicant. We did this to enable us to compare the perceptions of both parties and to supplement gaps in the record.

What rapidly emerged was that few agencies have in place systems that allow ready tracing of the outcome of a referral of a case by a court for reconsideration. In the main, reconsideration is undertaken by the line area concerned with the decision in question. The central area of an agency, to our surprise, did not always concern itself in the subsequent administrative history of a case. That said, some agencies had quite elaborate mechanisms for informing all officials of the outcome and reasoning in all seminal cases.

Size and accuracy of sample data

Our initial estimate was that we would be studying about 600 cases decided between 1984 and 1993 in which the judgment had been adverse

to an agency. Our study of Federal Court records identified 3,325 applications to the Court during that period. We checked this figure by comparing it to the number of Federal Court judicial review applications recorded in the statistics published by the Administrative Review Council (ARC) in its *Annual Reports*. The resulting figures are recorded in Table 1, with the project (or Court registry figures) given first, followed by the ARC figures in brackets.

Table 1: APPLICATIONS FOR FEDERAL JUDICIAL REVIEW 1984–1993

Year	*Research Project Cases*	*(ARC Figures)*
1984	301	(248)
1985	304	(264)
1986	330	(303)
1987	327	(287)
1988	307	(291)
1989	263	(245)
1990	309	(260)
1991	338	(257)
1992	329	(295)
1993	517	(425)
TOTAL	**3325**	**(2875)**

The discrepancy between the project and the ARC figures is to be explained principally by two points. The project figures from the Federal Court lists include s 39B applications, whereas the ARC figures from 1987 do not. The Judiciary Act applications account for eight per cent of the complete sample of 3325 cases (see Table 2). The Federal Court lists also include a high proportion of cases which have not gone on to judgment or for which a costs order has not been made, including cases dealt with at directions hearings/lists (including telephone direction hearings), mediation conferences, taxation lists, mentions, part heard cases, Full Court callover cases, notices of motion, ready for hearing cases, judgment reserved cases, cases settled (plus a mysterious series of Z coded cases!). Some of those cases are unlikely to be included in the ARC figures, which are built from initial judicial review applications.

A second point to note is that the increase in ADJR Act applications over the decade has not been marked and growth has not been constant. The 1993 figure appears to be an anomaly since the comparable figures for 1994, 1995 and 1996 were 287, 331 and 343, respectively. The 1993 figure probably represents a one-off increase in applications for judicial review of

migration decision-making due to the influx of Chinese people seeking refugee status following the Tiananmen Square incident.

Table 2: BASIS FOR FEDERAL JUDICIAL REVIEW APPLICATIONS

Year	*Judiciary Act*	*ADJR Act*	*TOTAL*
1984	44	257	301
1985	25	279	304
1986	26	304	330
1987	14	313	327
1988	8	299	307
1989	9	254	263
1990	35	274	309
1991	71	267	338
1992	14	315	329
1993	31	486	517
TOTAL	**277**	**3048**	**3325**

Selecting a study sample

Each of the 3,325 project cases was examined to determine whether it should be included in the study sample, that is, whether the outcome of the Federal Court adjudication was adverse to the agency or, to put it another way, a positive outcome for the applicant. A working sample of 371 cases was extracted, representing 11.2 per cent of the original 3,325 cases in the survey. This included a small number of cases in which the outcome was a consent order with costs awarded against the agency.

The study sample was further reduced—to 302, or 9.1% of the total—after the removal of some other categories: cases which had been overturned on appeal to the Full Court of the Federal Court, or by the High Court; cases in which either the agency or the private practitioner had lost/destroyed the files; cases in which there was a claim of legal professional privilege; cases in which the agency or private practitioner firm had been transferred/disbanded/gone out of business and there could be no follow-up of the files; cases culled because they could not be located on the SCALE database or in hard copy; and cases culled from the survey as not worth pursuing (for example, due to the reluctance on the part of a Federal Court Registry or an agency to undertake the work involved in a complete examination of the files).

The study sample is much smaller than we had originally estimated. Apart from the reasons set out above, the principal explanation is that a far higher proportion of judicial review cases are settled than we would have

expected. For example, a background figure given to us by departmental officials and some practitioners is that as many as eighty per cent of migration cases (which constitute over fifty per cent of our project) are settled before a hearing, often by means of a consent order. We chose initially to exclude all consent cases, on the basis that they would not reveal anything about the impact of a court order on a government agency. We later tempered that exclusion, to include some consent orders in which an order for costs was made against an agency. As explained earlier in this paper, we have steadily come to regard consent cases as of considerable significance to an understanding of federal judicial review and we plan to pay more attention to them in the next phase of this project.

Another point to make about the significance of the study sample is that the total figure of 3325 is taken from applications made to the Court, not from cases that proceeded to judgment. The latter figure would be a more appropriate base figure for deciding the proportion of cases that are decided favourably to an applicant. This again is a refinement that we will pursue in further analysis.

Subject areas in judicial review

Table 3 shows the breakdown of judicial review cases by subject area for the period covered by our project. The striking figure is the high proportion of immigration and refugee cases, constituting 55.1 per cent of the total number of cases in the survey. The pattern is consistent with the figures used in a comparable British empirical survey of special leave applications for judicial review—the Public Law Project[10]—covering a three year period between 1987–89, in which migration cases represented 44.4 per cent of the total in 1987, 29.1 per cent in 1988, and 27.7 per cent in 1989.

Table 3: APPLICATIONS FOR FEDERAL JUDICIAL REVIEW BY SUBJECT AREA 1984–1993

Principal subject area	*%*
Migration	55.1
Customs	6.0
Tax	5.5
Health services	6.5
Primary industry	3.2
Veterans' affairs	2.3
Broadcasting	3.3

10 See n 4 above.

Federal patterns in judicial review

The use of judicial review is not uniform across Australia. By far the greatest number of federal judicial review actions are commenced and heard in New South Wales. In the sample of 302 cases studied in this project, over half were decided in that State—see Table 4. The presence in New South Wales of some of the larger immigrant detention centres accounts, in part, for the high figure. The other State with a surprisingly large proportion of cases is Western Australia, and this again is attributable to the high number of migration actions commenced in that State.

Table 4: STATE/TERRITORY BREAKDOWN OF CASES IN STUDY SAMPLE

State or Territory	*Number of judgments delivered*
ACT	23
NSW	164
VIC	59
TAS	1
QLD	15
WA	32
SA	4
NT	3
TOTAL	**301**

Outcome for the applicant—preliminary figures

A central purpose of our research is to discover whether a successful judicial review application leads to a successful outcome for the applicant. The picture that is presented below in Tables 5 and 6 is tentative, as the acquisition of information from agencies and practitioners is not complete, and some further cross-checking and analysis of responses is required. Importantly, too, the statistics that are given are taken only from the first two questions in our survey, which asked whether the Court's direction had been complied with and, if so, the outcome of the reconsideration by the agency. We have a considerable amount of additional information—perhaps the most interesting part of the survey—on the systemic impact on public administration of judicial review, in response to questions three and four of our questionnaire. Some broad impressions from those responses was presented earlier in this paper.

With those qualifications stated, the figures nevertheless show quite clearly that applicants quite commonly achieve a favourable outcome after a

judicial review action. The tentative figure from the cases that we have presently analysed is that an applicant is ultimately successful in obtaining a favourable decision in at least 52% of cases—a figure that is likely to be higher when the statistical analysis is complete. In as few as 13.7% of cases the agency reinstates the decision that was set aside by the Court. That does not necessarily mean that an agency almost invariably concedes that its initial decision was wrong or should be vacated, as it is difficult at times to draw a direct correlation between a favourable court decision and a favourable administrative decision. That is particularly so with migration cases, where a visa may subsequently be granted to a person on the basis of submissions that have been made or information that has come to light since a court decision. For our purposes it is appropriate to include cases of that kind in the favourable outcome category, for the reason that after court action a person has ultimately received a benefit which they had earlier been denied and in respect of which the necessity of court action had been resolved. The strength of the link between court action and subsequent administrative action is nevertheless a factor that will require further analysis as our study proceeds.

Table 5: OUTCOME OF APPLICATIONS FOR FEDERAL JUDICIAL REVIEW FOR ALL AGENCIES 1984–1993

Outcomes	*%*
Favourable decision	52.05
Decision re-instated	13.7
Matter discontinued by applicant	2.7
Matter ongoing	5.1
Reply yet to be received/evaluated	26.03
Consent order	0.68
Legal professional privilege claimed	1.0

Table 6: FAVOURABLE OUTCOME OF APPLICATION FOR FEDERAL JUDICIAL REVIEW BY AGENCY 1984–1993

Agency	*% with favourable outcome*
Immigration and Multicultural Affairs	52.2
Customs	50.0
Tax	52.9
Health and Family Services	45.4
Primary Industries and Energy	66.6
Veterans' Affairs	85.7
ATSIC	50.0

Thirty-five separate Commonwealth agencies are covered in our survey, including most central Commonwealth departments of state. Some agencies regularly receive a large number of judicial review applications, while others have received only one or two over the ten year period of our survey. Table 6 lists the agencies that have featured in a significant number of cases.[11] In the ultimate analysis the percentage of favourable outcomes is likely to be far higher, when the figures for a remaining 25 to 30 per cent of cases are processed.

Directions for further research

The analysis of federal judicial review being undertaken in this project will be continued, with assistance from a further Australian Research Council grant for 1998–2000. An objective in the extended project is to provide a compendium and analysis of statistics on federal judicial review, covering matters like the following:

- patterns in federal judicial review by applicant, by agency, and by jurisdiction;
- the pattern of reliance on grounds of review, and the success rate with particular grounds;
- whether some judges are more or less likely to declare a decision invalid;
- the use by agencies of consent orders;
- the proportion of applicants/respondents who are individuals/companies; and
- the changing patterns in use of judicial review.

11 Other agencies that are included within the project include the Departments of Attorney-General, Defence, Environment, Employment and Education, Foreign Affairs, Transport, Treasury, and the Australian Electoral Commission, Australian Industrial Property Organisation, Australian Securities Commission, Health Insurance Commission, Human Rights and Equal Opportunity Commission, National Crimes Authority, Telstra, and ACT Fire Commissioner.