Administrative Justice—
the Core and the Fringe

Papers presented at the 1999 National Administrative Law Forum

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Preface

This publication contains the edited papers from the National Administrative Law Forum, held in Canberra in April 1999. The Forum is an annual event sponsored by the Australian Institute of Administrative Law Inc (AIAL). The Forum is held each year, alternately in Canberra and in a State Capital.

This book is the ninth in the series of publications deriving from the annual Forums. The proceedings are published each year as a monograph by the AIAL. Some of the annual publications are also available on the AIAL website.

Fair and Open Decision Making, proceedings of the 1991 National Forum, staged jointly with the Institute for Public Administration of Australia (IPAA): published as John McMillan, H McKenna and J Nethercote (eds), (1991) 66 Canberra Bulletin of Public Administration

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

Administrative Law & Public Administration: Happily Married or Living Apart Under the Same Roof?, proceedings of the 1993 National Forum (held jointly with IPAA), edited by Stephen Argument

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

Administrative Law & Public Administration: Form vs Substance, proceedings of the 1995 National Forum (held jointly with IPAA), edited by Kathryn Cole

Administrative Law: Setting the Pace or Being Left Behind?, proceedings of the 1996 National Forum, edited by Linda Pearson

Administrative Law under the Coalition Government, proceedings of the 1997 National Forum (held jointly with IPAA), edited by John McMillan

Administrative Law and the Rule of Law: Still Part of the Same Package?, proceedings of the 1998 National Forum, edited by Susan Kneebone

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Administrative Justice—The Concept Emerges

ROBIN CREYKE & JOHN MCMILLAN*

Administrative law has long relied upon concepts and phrases to capture fundamental values. Accountability, rule of law, better decision-making, procedural fairness, rationality, are some familiar expressions in this genre. "Administrative justice" is similarly being used increasingly as a defining concept, internationally and in Australia.[1]

The expression "administrative justice" has, however, been in the legal lexicon for a long time. Lord Hewart used the description in 1929 in his seminal work, *The New Despotism*,[2] albeit disapprovingly, in line with the thrust of his concern about the non-accountable exercise of official power:

> To employ the terms administrative 'law' and administrative 'justice' to such a system, or negation of system, is really grotesque. The exercise of arbitrary power is neither law nor justice, administrative or at all.[3]

Should the conjunction of "administrative" and "justice" nowadays evoke a more benign response, given the intervening seventy years of administrative law development? Scepticism about the motives and lawfulness of administrative action is, of course, an established thread in legal and academic commentary. Notwith-

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1 Eg, J L Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven, CT, 1983); a conference on "Administrative Justice" at Brunel University in May 1986 (see Professor D G T Williams, "The Tribunal System: Its Future Control and Supervision" (1989) at 8); The Justice/All Souls Report, Administrative Justice: Some Necessary Reforms (Oxford, 1988); P L Strauss, *An Introduction to Administrative Justice in the United States* (Carolina Academic Press, 1989).

2 The Rt Hon Lord Hewart of Bury, *The New Despotism* (Benn, 1929).

3 *Ibid* at 44.

standing, the idea that administrative law should be anchored in a theory of justice is an appealing one. Even Wade and Forsyth, who are more cautious than many about conceding too ambitious a role to administrative law, warn that the public needs to "be able to rely on the law to ensure that all this power may be used in a way conformable to its ideas of fair dealing and good administration"; they observe that, "[a]s liberty is subtracted, justice must be added".[4]

Of late there has been serious academic interest in defining the concept of administrative justice, particularly in British and European administrative law.[5] In Australian literature and case law, the term was rarely encountered before the mid-1980s, but is now used increasingly by writers, courts, tribunals and government inquiries.[6] Further afield, in South Africa, an interesting step was taken in the drafting of the new Constitution in 1996, which enshrines a right to "just administrative action".[7] As an indication of the content of that right, clause 33 of the Constitution provides that

> "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair", and that "Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons".

Clause 33 further requires that legislation be enacted to give effect to these rights, which occurred with the enactment of the *Promotion of Administrative Justice Act 2000*.[8]

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4 H W R Wade & C F Forsyth, *Administrative Law* (Clarendon Press, 7th ed, 1994) at 7.

5 Eg, M Partington, "The Evolution of Administrative Justice in England: The Case of Social Security" in K D Ewing, C A Gearty, B A Hepple (eds), *Human Rights and Labour Law: Essays for Paul O'Higgins* (Mansell, 1994) 313; M Partington, "Globalization and Administrative Justice: Challenges and Possibilities" (paper presented at the "Conference on Best Practices in Administrative Justice", Canadian Council of Administrative Tribunals, Vancouver, Oct 1999). See also M Partington, "Restructuring Administrative Justice? The Redress of Citizens' Grievances" (1999) *Current Legal Problems* 173; and M Partington, "Taking Administrative Justice Seriously: Reflections on the Australian Administrative Appeals Tribunal" in J McMillan (ed), *The AAT – Twenty Years Forward* (1998) 134.

6 For examples of Australian use of the phrase, see H Whitmore, "Commentary" (1981) 12 *Fed L Rev* at 117; Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994) at para 13.9; A N Hall, "Administrative Justice before the Administrative Appeals Tribunal – A Fresh Approach to Dispute Resolution—Part 1" (1981) 12 *Fed L Rev* 71 at 80–81; Sir Anthony Mason, "Administrative Review: The Experience of the First Twelve Years" (1989) 18 *Fed L Rev* 122 at 131. A search of Australian court and tribunal cases on the Austlii website (www.austlii.edu.au) also shows a small number of cases in the which the phrase has been used, eg, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 37 per Brennan J.

7 Constitution of the Republic of South Africa, title to clause 33.

8 For another example of a legislative adoption of the concept, see the Indonesian *Administrative Justice Act 1986*, which is partially reprinted in R Creyke, J Disney & J McMillan (eds), *Aspects of Administrative Review in Australia and Indonesia* (CIPL, ANU, 1996) at 147–157.

What then is administrative justice? Can it be a valuable defining concept in Australian administrative law? If so what are the minimum requirements for administrative justice? Are they understood, reflected and protected in Australia, both at the core of government, and at the fringe of the public sector—a fringe that becomes more significant in an era of deregulation, privatisation and outsourcing? What role do the parliament, executive agencies, tribunals, courts and other commentators play in defining administrative justice? Should they draw upon international sources to derive a common meaning? And what performance indicators can be used to measure whether decision-makers and review authorities are achieving administrative justice?

Those issues were addressed at the 1999 *National Administrative Law Forum*, under the same banner as the title of this publication, "Administrative Justice: The Core and the Fringe". In teasing out the meaning of the concept in an Australian context, the conference was designed to bring the expression "administrative justice" to the forefront of consciousness of Australian administrative lawyers and those in public administration. The importance of doing so at a time of transformation in the system of law and government provided another dimension to the inquiry, as too did the challenge of focusing on fundamental values and objectives in Australian administrative law at the dawn of a new millennium.

Defining administrative justice—the context and setting

"Justice" as expressed in the legal system of any state is inevitably contingent, at best an approximation of a Platonic ideal. There will be shortcomings in the legal system of any country, and as many reasons to explain why. As to the administrative law component of a legal system, the singular fact that it is "administrative" processes that are under scrutiny will readily provide one explanation for the failure to measure up to any absolute standard. Not surprisingly, the preamble to the South African *Promotion of Administrative Justice Act 2000* states the need to balance "efficient administration" against administrative law rights bestowed upon the people. Those seeking a definition of "administrative justice" will thus need to recognise that the essence of the concept is tempered by conflicting (and legitimate) interests.

Other characteristics must also be grappled with before a satisfactory definition can be achieved. Administrative justice essentially applies only to administrative action within government. It is not, for example, a concept that can suitably qualify all the processes occurring within government, such as budgetary, inter-governmental and policy formulation processes. It overlaps to that extent with another legal concept—justiciability, marking the province of administrative law. Thus, it is the impact which a government administrative decision can have on the rights or interests of a person that is a key determinant of the expectation that administrative justice should be observed. In that sense, at its core, administrative justice is a philosophy that in administrative

decision-making the rights and interests of individuals should be properly safeguarded.

Another characteristic which impinges on the definitional question is that administrative justice can only be effected through and within institutions. Some account must therefore be taken of the differences between government agencies. Central government agencies, statutory authorities and private sector organisation contracted to provide government services all work in a different legal and political setting, each subject to their own cluster of laws and other imperatives. Once again, the extent to which the wellbeing of individuals is either a responsibility or a focus of each kind of agency can vary greatly.

Those variables indicate that there can be no fixed definition of administrative justice: the meaning of the concept will vary with the strength of competing interests. Yet, for any balancing exercise to work properly, it is important to identify with equal clarity the interests to be weighed on either side of the scales. If administrative justice is an integral part of the equation, it is necessary to articulate the values that will elevate the importance attached to safeguarding individual interests in administrative decision-making.

The papers in this collection are linked in that common purpose of deliberating upon the spectrum of values that infuse the concept of administrative justice. None would quarrel with the core values identified by Justice French in the opening paper, namely, lawfulness, fairness and rationality. His views are consistently reflected in the writings of others who have sought to distil the criteria that the law should strive to impart to public administration.[9] At the same time, Justice French recognised that even those values are not absolute and can be modified by interests such as efficiency and timeliness.

Another aspect of the relativity or contingency of legal values is explored in the paper by Melinda Jones. She makes the point that values, being culturally and historically determined, require continual reevaluation as social conditions change and the complexity of society is better understood. Law, including administrative law, has the capacity to redress social, cultural and historical imbalances—it can be used proactively—but before that capacity is exercised, the values law embody must first be identified.

Professor Craig emphasises a different point, that the values themselves serve a duality of functions. Administrative justice is often seen to be concerned solely with constraints on administrative action. What is often neglected is that administrative justice is also capable of empowering agencies. In order that agencies can do their jobs properly, they may need coercive or investigative powers, such

9 Eg, see M Aronson & B Dyer, *Judicial Review of Administrative Action* (LBC, 2nd ed, 2000) at 1, referring to the ideals of "openness, fairness, participation, accountability, consistency, rationality, accessibility of judicial and non-judicial grievance procedures, legality and impartiality".

as powers to obtain information or compel the presence of witnesses or the production of documents. Furthermore, depending on the model of administrative justice adopted (and Craig describes several available models), administrative justice can be linked to the achievement of social goals, such as rights associated with citizenship. Arming institutions to realise those goals impacts on both the substantive and procedural elements of the administrative justice system. In other words, legislative and social policy in part determines the extent to which administrative justice values are realised in a state.

The legal bedrock for structural and fundamental rights in a country is the Constitution. In exploring the intersection between the Constitution and administrative justice there are two issues—whether a right to administrative justice can presently be found within the Australian Constitution, and whether it should be incorporated more strongly in that document. The argument for doing so is put by Linda Kirk, drawing partly on the comparison with bills of rights in other countries, with special attention being paid to the South African Constitution and *Promotion of Administrative Justice Act 2000*. As to whether administrative justice values are presently embedded in the Constitution, Justice French and Jeremy Kirk examine the possibilities presented by the Constitution in section 75 and the constitutional requirements for the separation of judicial power and for representative democracy. For the most part, their analysis offers scant comfort to those in support of an active constitutional role, though they emphasise the traditional reluctance of courts to be denuded of their power and their role in the protection of individual rights.

A number of papers advert to the difficult issue of defining the precincts of administrative justice, that is, to which bodies and which actions does the concept apply. This issue has become the more important at present when the boundary between the public and private sectors is becoming less distinct. Those subject to administrative justice, Stephen Free argues,[10] must at least include public utilities, in line with the principle that all those involved in the exercise of public power should abide by administrative justice standards. In selecting telecommunications bodies as a case study for this contention, he points out that the legislation establishing a regulatory framework assumes that competitive forces cannot be relied upon as an adequate mechanism for the satisfaction of public policy objectives. The pressures of the private market, such as the refusal of more work or the threat of contractual penalties, are not seen to be sufficient incentives for the provision of services of a satisfactory quality.

10 The fuller version of the paper delivered by Free to the conference was published separately: S Free, "Across the Public/Private Divide: Accountability and Administrative Justice in the Telecommunications Industry" (1999) 21 *AIAL Forum* 1.

Ron McLeod echoed those views, making the more general point that the duty to provide administrative justice should apply to all official/public decision taking, and extend to those affected by statutory processes for the protection of consumer interests in privatised industries and the professions. The standards expected to be observed in government regulation of the professions is taken up also by Dr Bennett, who examines the application of administrative law standards to professional misconduct inquiries.

Professor Partington, who has written extensively on this topic, warns that it is important not to take too narrow a view. He counsels against thinking of "administrative justice" as coterminous with "administrative law"—at least when administrative law is synonymous with judicial review. To assume that administrative justice only refers to administrative review—the adjudication element of the process—is to ignore the bulk of decision-making and administration which occurs prior to that stage.[11] He stresses that administrative justice embraces a much wider variety of activity and values than simply the work of the higher courts, and encompasses, at an institutional level, all modes of dispute resolution, including matters arising under statute involving private bodies.

Partington's warnings remind us that all the institutions involved in the decision-making process must be counted within the administrative justice census. It follows that the more extensive those institutions and the broader their powers, the greater the opportunity for the expansion of administrative justice. Acceptance of that proposition implies that administrative justice will vary with the institutional and social landscape. From this it follows that there are no absolutes about the concept. In an Australian context, the well-developed panoply of courts, tribunals, administrative investigative institutions such as ombudsman, human rights and anti-discrimination and privacy bodies, and its plethora of rights—to reasons, to be heard, to consultation, to simplified procedures for review—must mean that a more expansive version of administrative justice is available domestically, comparatively speaking, than in other countries. In other words, measured against the ideal, the Australian view of the concept has, comparatively speaking, already attained a high level.

Another issue arising in this area is that of discovering whether administrative justice is in fact being achieved. Inevitably this involves some attempt at defining standards for evaluating or measuring what is occurring, as Professor Neave and Lawrence McDonald discuss. They highlight the risks involved in the measurement task. It is, for example, easier to focus on the quantity of outcomes rather than their quality, yet to concede that would be to adopt an unsophisticated approach to the task. Whether it is "adminis-

11 M Partington, "Globalization and Administrative Justice: Challenges and Possibilities" (paper presented at the "Conference on Best Practices in Administrative Justice", Canadian Council of Administrative Tribunals, Vancouver, Oct 1999) at 2–5.

trative efficiency" or "justice" which is being measured may produce different answers as well. Notwithstanding the difficulty, there is considerable expertise being developed in this realm, and McDonald's paper was a valuable exposure of the technical expertise and assessment skills, and the level of sophistication which bodies such as the Productivity Commission can bring to the task of measurement.

Reliance on objective benchmarks will never be entirely satisfactory, not least because justice as an ideal is, in some measure at least, in the eye of the beholder. In that vein, a number of the papers, including those by Sandra Koller, Andrea Malone and Marcia Neave, point to the importance of taking account of community views in any evaluative process. In doing so, as Koller points out, the imbalance of power between the citizen and government should not be ignored. The importance of citizen participation is reinforced as well by other considerations, notably the democratic ideal which, independently of any discussion of administrative justice, is regarded as a fundamental imperative within the political and legal system of the country.

In order for the citizen to become involved, mechanisms for public consultation must be built into the system, in a fashion that enables a genuine and effective dialogue to be undertaken. Examples of such consultative processes already exist in the development by agencies of service charters and codes of conduct, the establishment of user groups by the major tribunals to draw up guidelines for tribunal processes, the participation of the community in the regulatory area, the inclusiveness of parliamentary committee processes and the institution of training programs for those involved in administrative decision-making.

If administrative justice is to be effective it must be understood. Understanding involves training—of judges, tribunal members and staff, legal advisers within public administration, and primary decision-makers. The importance of developing the professionalism of those different groups in order that administrative justice can be realised is addressed directly by Dr Cronin. The same message is implicit in the examination by Judge O'Connor of the challenges arising and the choices to be made in establishing a practical and jurisprudential framework for delivering administrative justice in the establishment of a new tribunal.

Finally, some of the papers in this collection provide a practical focus by examining contemporary administrative law disputes and issues in which administrative justice questions have been paramount. The two papers by Matthew Smith and Denis O'Brien offer contrasting views on a series of Federal Court cases that involved judicial review of the inquiry process of practitioner behaviour in the medicare system. The paper by Alan Cameron examines the difficulties that administrative law can pose for corporate regulators. Dr Bennett, in an examination of administrative justice at the fringe of government, examines the application of administrative law to two areas of technical and specialist decision-making, patent certification and professional misconduct inquiries. The information

dimension to administrative law is taken up by Moira Patterson, applying a legal perspective to the "commercial in confidence" claims increasingly being made in answer to calls for public disclosure of information generated in the course of government outsourcing.

As this truncated discussion of the papers in this collection indicates, defining administrative justice is a multi-faceted task. We believe the facets are brighter and their lines more distinct as a result of the focus on the topic provided by the thoughtful contributions to the 1999 *National Administrative Law Forum* that make up this collection.

Administrative Justice in Australian Administrative Law

Justice R S French*

The statutory vehicle for the delivery of administrative justice in Australia, at the Commonwealth level, is to be found in the Commonwealth's administrative law package introduced in 1975. It impacted upon a wide range of decisions and decision-makers including departmental officials, ministers and tribunals. One important area affected by its introduction was that of social security decisions. Having been for a time a part-time member of the Social Security Appeals Tribunal, I have a particular recollection of that impact.

The Social Security Appeals Tribunal was established under administrative arrangements in 1975 to provide independent non-determinative review of decisions of the Department of Social Security. These were decisions which, *inter alia*, determined eligibility for social security benefits, applicable rates of payment and recovery of overpayments. The outcomes of Tribunal reviews were recommendations to the Director-General of the Department or his delegate. The Tribunal comprised a legally qualified person who usually acted as chairperson, someone with a background in social welfare, and a Departmental officer.

As a part-time legal member of the Tribunal in 1979 I was in the position of witnessing the way in which one of Australia's largest government departments responded to the imminent introduction of Administrative Appeals Tribunal review of Social Security Appeals Tribunal decisions. The additional level of review introduced in 1988 was to be determinative.

The change wrought by the addition of this novel external accountability was well illustrated by departmental files dealing with couples said to be living in "a bona fide domestic relationship as man

* Judge of the Federal Court of Australia.

and wife". The existence or non-existence of such a relationship affected the rate at which a variety of benefits was payable. The description was one whose application to the great diversity of human relationships led decision-makers and tribunalists into a quagmire of paradoxes and absurdities. But experienced departmental officers could cut through the nonsense. On one occasion there appeared on the relevant file a torn off piece of lined paper with the not untypical scribbled words of a field officer: "There is no way these two aren't shacked up together."

Post the advent of the Administrative Appeals Tribunal there were no more scribbled comments on bits of lined paper. Instead there were forms with boxes bearing labels such as "Evidence", "Facts Found on Evidence", "Reasons Based on Facts Found" and so forth. Administrative justice had come to town, or had it? Was the justice of administrative decision-making enhanced or was it the same product in more cosmetically appealing packaging? In addressing administrative justice in Australian administrative law it is the quality of outcomes that matters. The question of how to assess that quality against some touchstone of administrative justice is not trivial.

JUSTICE AT LARGE

The expression "administrative justice" suggests a particular application of a general concept. But the general concept is protean. It is, as Ronald Dworkin wrote, "difficult to find a statement of the concept at once sufficiently abstract to be uncontroversial among us and sufficiently concrete to be useful".[1] The difficulty has not deterred philosophical and other lexicographers. Ambrose Bierce defined justice as: "A commodity which in a more or less adulterated condition the State sells to the citizen as a reward for his allegiance, taxes and personal service".[2] As a definition it lacks concrete content, but would probably be regarded as uncontroversial.

We can, with Rawls, conceive of justice as fairness,[3] but to unbundle fairness into a menu of criteria for practical action is no less a problem than so to dissect justice. In the end any working definition is instrumental. What justice should involve, in the context of official decision-making, will derive from the proponent's perception of common values or attitudes about the way in which decision-makers should act. It will describe desired attributes of the decision and modes of behaviour of those who are required or empowered by public law to make decisions affecting the interests of others. To verbalise these *desiderata* is also to confront the question whether and if so why the principles to be applied by judges and administrative decision-makers should differ from each other. Acceptance of the functional cleavage between the exercise of

1 R Dworkin, *Laws Empire* (1986) at 74.
2 A Bierce, *The Enlarged Devil's Dictionary* (1967) at 168.
3 J Rawls, *A Theory of Justice* (1972) at 11.

judicial and executive power that is the doctrine of separation of powers does not require an acceptance of different conceptions of justice delivered by each. The formal effects of judicial and administrative decisions differ. But the drawing of qualitative, as distinct from methodological and institutional, distinctions between them is problematic. Indeed what judges do was described decades ago as "merely a specialised form of general administration which 'has acquired an air of detachment'".[4] Like most sayings, using the word "merely" it is an over-simplification but it does contain elements of truth. So at the outset there is a question whether the justice we are entitled to expect of administrative decision-makers should differ in kind from that we expect of judges after the trappings of judicial power are stripped away. Put another way, is there a meaningful distinctive concept of administrative justice?

Discussion about administrative justice in Australian administrative law should consider its nature and content, where it resides, mechanisms for its achievement or degradation and the scope of its application. The issue of scope also invites consideration of the important question of the impact of privatisation and outsourcing of government services upon administrative justice, although I will only touch on that briefly at the end of this paper.

THE CONTENT OF ADMINISTRATIVE JUSTICE

The content of curial justice could broadly be divided into two fields. The first sets standards for the quality of decisions that are made, albeit in general terms. The second sets procedural standards for the way in which such decisions are made. The two will overlap. In the first area judges are expected to apply law which they discern correctly to facts which they find accurately.[5] Rationality is implicit in these requirements. Where a judicial decision involves a discretion, it is expected to reflect an exercise of that discretion which has regard to relevant factors, disregards irrelevant factors, gives effect to the purpose of the applicable legislation or common law and can be seen in a broad sense as treating like cases alike.

In terms of process, judges are expected to act fairly. In other words they are expected to observe procedural natural justice. They are expected to be accountable by the explanation of their decisions in publicly available reasons. They are subjected to the checks and balances of formal appeal processes and informally to public comment through the media and by academics, politicians and others concerning their decisions. They are expected to dispose of their cases in a timely and efficient manner.

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4 W Robson, *Justice and Administrative Law* (3rd ed, 1951) at 14.

5 At a conference a year or so ago I heard one of the Law Lords who was critical of Lord Woolf's proposals for civil justice reform, ask flippantly—what is truth?—quite unconscious of the 2000 year old precedent he was following. So far as ordinary people are concerned "the truth is out there" and they expect the courts to find it.

The expectations of efficiency and timeliness have achieved more prominence in recent times and have shifted the courts closer to the values which contemporary government demands be observed in the administration of its departments and public authorities. At the federal level we see in the High Court, the Federal Court and the Family Court, self-administering bodies with annual budgets provided by parliamentary appropriation and audit and parliamentary reporting obligations. Their administrations are subject to scrutiny and questioning by parliamentary committees.

In the case of the Federal Court, case management processes were embedded in the rules of court from the outset with a strong emphasis on judge-controlled pre-trial preparation through directions hearings and timetabling of interlocutory steps. The case management responsibilities of individual judges have recently been heightened by a docket system under which each judge is responsible for the progress of a group of cases from initial filing to trial and disposition. Time targets for disposition have been set and protocols put in place for their achievement. The Court's time is recognised as a finite resource that requires careful management. So under order 32 rule 4A of the *Federal Court Rules*, inserted in July 1998, the Court or a judge may make directions limiting the time to hear the trial, the time for a party to present its case, the time for making oral submissions, the number of witnesses that a party may call and the time for examining, cross-examining or re-examining witnesses. Here is a recognition of community interests in the efficient and equitable use of judicial resources that is to some degree in tension with concepts of individualised justice. Beyond its rules the Court has explicitly recognised that interests served by the proper management of its resources go beyond the immediate interests of the litigants.[6]

The approaches reflected in the *Federal Court Rules* and practice are also reflected in the practice of State and Territory courts at all levels and collectively through their interest in administrative efficiencies expressed in the work of the Australian Institute of Judicial Administration. These developments have been occurring with increasing visibility over the last twenty years. Fifteen years ago the Chief Justice of the Supreme Court of South Australia put resource limitations firmly into the scale of judicial discretion when he observed that judges and magistrates—

> ... have a responsibility to ensure, so far as possible and subject to overriding considerations of justice, that the limited resources which the State commits to the administration of justice are not wasted by failure of parties to adhere to trial dates of which they have had proper notice.[7]

6 *Bomanite Pty Ltd v Slatex Corp Aust Pty Ltd* (1991) 32 FCR 379 at 387 per Gummow J and at 392 per French J. See also *Commissioner of Taxation v Brambles Holdings Ltd* (1991) 28 FCR 451 at 455 per Sheppard J.

7 *Dawson v Deputy Commissioner of Taxation* (1984) 71 FLR 364 at 366 per King CJ.

Across the seas in the House of Lords in 1987, Lord Griffiths, dealing with the question whether an amendment of pleadings should have been permitted at the close of a trial, specified as a factor that a judge must weigh in the balance—

> ... the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently.[8]

This contrasted starkly with the liberality of the approach reflected in the well known observation of Bowen LJ that there was no kind of error or mistake which is not fraudulent or intended to overreach the court ought not to correct if it could be done without injustice to the other party.[9] These observations are to be read subject to those of the High Court in *State of Queensland v J L Holdings Pty Ltd*:

> Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim.[10]

The concept of judicial time as a finite and rationed resource is well developed in the United States and particularly visible in Federal Courts of Appeal where the time available for counsel's oral submissions is marked by white and red lights on the lectern and the length of written submissions is subject to control by direction. Since 1991 civil justice reform legislation has required the preparation of delay and expense reduction plans by Federal District Courts, the formulation of performance objectives and the provision of incentives to courts leading in the development of these plans.

In Australia and in other common law jurisdictions there has been a shift in the direction of the recognition of collective economies of the kind that in another age might have been attributed to administrators rather than judges. Against that background the question can be posed, what are the elements of administrative justice and how do they differ qualitatively from the justice administered by the courts?

Assertions about what administrative justice should involve are rooted in assumptions about public values. To a degree those values are evidenced in and supported by public law. This in turn is to be found in statutes and in the common law. Additional sources may reside in administrative practice and convention. There are no doubt subjective elements in these statements and probably some wishful thinking. As Professor Roger Cotterell has observed in his critique of what he called the communitarian reasoning of some of the Law Lords in *Bromley London Borough Council v Greater London Council*,[11]

8 *Ketteman v Hansel Properties Ltd* [1987] 1 AC 189 at 220.
9 *Cropper v Smith* (1884) 26 Ch D 700 at 710.
10 (1997) 189 CLR 146 at 154.
11 *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768.

"community values tend to be products of the professional lawyer's 'artificial reason' of common law, or the legal philosophers' confident attribution of values to a population and its law".[12]

Subject to the caveat about personal perspectives and the more fundamental warning from Professor Cotterell, may I nevertheless venture, albeit unadventurously, to offer as core elements of justice delivered by administrative decision-makers:

- lawfulness
- rationality
- fairness.

These three adjectival criteria reflect basic grounds of judicial review save that the requirement of rationality, to the extent that it is reviewable in the courts, may be limited to the extreme case of *Wednesbury* reasonableness or subsumed in other headings which also go to lawfulness and fairness. Nevertheless, putting to one side the limits of judicial review in this area, the citizen is entitled to expect and would ordinarily expect administrative decisions to be based on reasons which are explicable even if the outcome is thought to be wrong. Other elements of the justice provided by administrative decision-makers on the process side are:

- accessibility and affordability by the citizen
- equitable cost to the community
- timeliness in decision-making
- intelligible explanation of decision-making.

None of these four descriptors derive a great deal of support from the common law, although the last is required at the federal level and in some State jurisdictions by statutory duties to provide written reasons such as may be found in s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). There have also been from time to time specific statutory provisions exhorting particular authorities to exercise all or some of the other virtues. For example, the statutory predecessor of the Australian Broadcasting Authority, the Australian Broadcasting Tribunal, was required by its legislation in connection with inquiries to make thorough investigations into all relevant matters, to act expeditiously and justly, to act fairly and impartially and to observe the rules of natural justice. This became a rich source of debate in the many (about fourteen) judicial review proceedings arising out of the last major inquiry of that body in 1985.

Section 109 of the *Native Title Act 1993* (Cth) modestly requires the National Native Title Tribunal to pursue the objective of carrying out its function "in a fair, just, economical, informal and prompt way". Interestingly, prior to the amendments to the *Native Title Act*

12 R Cotterell, "Judicial Review and Legal Theory" in G Richardson and H Genn (eds) *Administrative Law and Government Action* (1994) at 30. And see generally J Braithwaite, "Community Values and Australian Jurisprudence" (1995) 17 *Syd L R* 351.

there was a provision, in s 82(1), requiring that "[t]he Federal Court must pursue the objective of providing a mechanism of determination that is fair, just, economical, informal and prompt". This requirement has been dropped in the amended Act. In addition, whereas previously the Court was required by the Act to take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, the Act now provides that the Court "may take account" of such concerns "but not so as to prejudice unduly any other party to the proceeding". And whereas it was previously "not bound by technicalities, legal forms or rules of evidence" it is now "bound by the rules of evidence except to the extent that the Court otherwise orders". These changes represent a perception that "real courts" should be tougher forums than tribunals. That may reflect a popular or perhaps populist vision of the difference between curial and administrative justice.

It may also reflect another strand of difference and that is a tolerance of error in administrative decision-making not to be expected in judicial decisions. Administrative tribunals are frequently enjoined by statute to act with informality and expedition. That comes at a price, although how much of a price in terms of decisional quality would be difficult to assess. The rate at which decisions are set aside upon judicial review is only one indicator amongst the limited criteria applicable to that process. And even within the terms of reference of judicial review the courts are not to scrutinise administrative reasoning "with an eye keenly attuned to the perception of error".[13] This is a constraint upon the exercise of judicial review which goes beyond the prohibition upon reconsideration of merits. In a sense it enjoins the court against judicialising the reasoning processes of administrative decision-makers. So, too, in the content they give to natural justice the courts should not, and in general do not, impose judicial models of fair process. The demands of natural justice must be placed in balance with the exigencies of high volume decision-making. So the question whether all applicants for refugee status are entitled to an oral hearing by either the first or second level of decision-maker has been resolved in the negative.[14] And although a lot of water has gone under the bridge since the decision of the House of Lords in *Local Government Board v Arlidge*,[15] there is still force in what Lord Shaw said in that case:

> [T]hat the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are *ex necessitate* those of Courts of justice is wholly unfounded.[16]

13 *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287 per Neaves, French and Cooper JJ, approved by the High Court in *Wu Shan Liang v Minister for Immigration and Ethnic Affairs* (1996) 185 CLR 259 at 272.

14 *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384.

15 [1915] AC 120.

16 *Ibid* at 138.

A further distinctive feature of administrative decision-making is the application of administrative policy. In one sense this provides a foundation for treating like cases similarly—an essential element of fairness. There is a tension between the application of policy and consideration of individual circumstances where a statutory discretion is to be exercised. Application of policy guidelines by administrators in the discharge of their functions has nevertheless been accepted by courts, subject to appropriate consideration being given to the individual case where a statutory discretion is to be exercised. In *Minister for Immigration, Local Government and Ethnic Affairs v Gray*[17] the Court said, in a joint judgment, that there is an implied legislative contemplation that policies will be created to ensure that while each case is to be considered on its individual merits, where discretions are conferred, like cases will be treated similarly. This was qualified by the observation that such policies have to be limited to those consistent with the general purposes and requirements, express or implied, of the legislation in question. They could not be expressed to fetter the exercise of the relevant discretion. Within that framework the existence and content of lawful policy was properly to be regarded as a relevant factor to be taken into account by the decision-maker.

These suggested elements of administrative justice are broadly consistent with what Aronson has described as the guiding values of "most Australian public lawyers".[18] His list of values comprises openness, fairness, participation, accountability, consistency, rationality, legality, impartiality and accessibility of judicial and administrative individual grievance procedures. All are subsumed under the label of legitimacy in the sense that they provide legitimacy to the exercise of state power and particularly discretionary power.[19] He has identified nevertheless, as have others, a shift from these traditional values to an economic paradigm emphasising regulatory flexibility and negotiation, regulation by performance outcome and through economic incentives. This is linked to an increasing disenchantment with judicial review.[20] The role and limits of judicial review as a mechanism for the achievement of administrative justice will be further addressed below.

It would be idle to pretend that the menu of criteria of administrative justice proposed is exhaustive or that the elements of that menu are mutually exclusive. Lawfulness, fairness and rationality shade into each other. Nevertheless they are central to any just decision-making process as it would be understood in this community. The other elements tend to provide the framework within which the central features of administrative justice may be pursued.

17 (1994) 50 FCR 189.

18 M Aronson, "A Public Lawyer's Responses to Privatisation and Outsourcing" in M Taggart (ed), *The Province of Administrative Law* (1997) at 43.

19 *Ibid*.

20 *Ibid* at 44.

The essential attributes of administrative justice do not, in my opinion, differ in substance from those of curial justice, albeit the processes and trappings will differ as well as the formal effect of the decision. The application of policy is a distinctive feature but perhaps has its analogue in the judicial respect for precedent and the endeavour to ensure the discretionary decisions rest on some foundation of principle, albeit short of fettering legal constraints. Volume, speed and the comparative informality of administrative decision-making processes and the need to answer performance targets should not distract from the central values of administrative justice. And there is to some extent now an acceptance that curial justice will benefit from a greater emphasis on those elements.

SOURCES OF ADMINISTRATIVE JUSTICE

Justice is a normative and ultimately instrumental concept. It has its roots in community values conservatively identified in the law itself and constitutional instruments. But in the framework of administrative justice the question arises, where are these values to repose, to be expressed, to be transmitted and to be given effect? The answer lies probably in an overlapping and complex mosaic of laws and regulations, departmental practices and conventions, ministerial and officer attitudes, the practices and conventions of administrative review tribunals and their statutory criteria, and any prevailing judicial culture affecting the exercise of judicial review in relation to such decisions.

Constitutional sources

The guidance to be derived from the Constitution in the development of administrative justice seems at this point in its judicial exegesis, to be quite modest. There is constitutional recognition and entrenchment of judicial review of administrative decisions in the jurisdiction conferred on the High Court by s 75(v) to award prerogative and injunctive relief against "officers of the Commonwealth". To the extent that they are reflected in the grounds upon which such relief may be given, criteria of lawfulness, fairness and rationality in administrative decision-making are constitutionally supported. Interestingly, that provision was included in the draft Constitution at the insistence of Inglis Clarke who seems to have been the only one of the Convention delegates who had read *Marbury v Madison*.[21] Edmund Barton, who moved for the inclusion of the clause, observed that it could do no harm and might "protect us from a great evil".[22] The jurisdiction it confers is inalienable although the application of its remedies can be limited by appropriate legislation. Broadly, it can be said that s 75(v) confers a jurisdiction upon the High Court which cannot be limited or qualified by statute. That jurisdiction

21 5 US (1 Cranch) 137 (1803).

22 *Official Records of the Debates of the Australasian Federal Convention* (1898) at 1876.

authorises the Court to control excesses of power or failure of duty by officers of the Commonwealth. It is ambulatory to the extent that its exercise will depend upon the constitutional and statutory boundaries of the powers or duties in question. To determine those boundaries may require construction of legislation. That in turn may require account to be taken of privative provisions able to be construed as extending the powers or contracting the duties of the officers to whose decisions they apply.[23] At a practical level the availability of judicial review in the original jurisdiction of the High Court under s 75 (v) must be limited. Further, as that Court has held in *Abebe v Commonwealth*,[24] the Parliament can validly limit the bases upon which judicial review is available in the Federal Court.

There is no general principle of equality before the law to be found implied in the Constitution. There is no general implication that Commonwealth laws operate uniformly throughout the Commonwealth, nor any general prohibition against Commonwealth laws that discriminate.[25] That is subject to specific provisions of the Constitution which prohibit particular kinds of legislative discrimination.[26] *A fortiori* there is no constitutional principle which requires like cases to be treated alike in administrative decision-making.

There are some consequences for public administration arising from the constitutional quarantining of the repositories of judicial power against contamination by incompatible administrative functions. Federal judges who are now generally to be regarded as vestal virgins in the temple of judicial power, are only to be allowed out on carefully supervised and suitable administrative outings. These must not be incompatible with the performance of their judicial function. So it is all right, barely, to issue telephone interception warrants,[27] but not to conduct an inquiry and thereafter advise a minister on matters of Aboriginal heritage.[28] It is all right to be President of the Australian Industrial Relations Commission[29] or the Administrative Appeals Tribunal.[30] It is also probably constitutionally permitted for federal judges to conduct some royal commissions. It is unlikely, however, that the wavy line in the sand that is the test for incompatibility between judicial and administrative functions will have any significant impact on administrative justice in this country except to the extent that there may be a narrower zone in which judicial values and perspectives can be brought to bear directly on administrative activity.

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23 *R v Hickman; Ex Parte Fox and Clinton* (1945) 70 CLR 598; *R v Coldham; Ex parte Australian Workers Union* (1983) 153 CLR 415.

24 (1999) 197 CLR 510.

25 *Leeth v Commonwealth* (1992) 174 CLR 455 at 468.

26 Commonwealth Constitution ss 51(ii), 92, 99 and 117.

27 *Grollo v Palmer* (1995) 184 CLR 348.

28 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

29 *Grollo v Palmer* (1995) 184 CLR 348.

30 *Re Adams and Tax Agents Board* (1976) 1 ALD 251.

There is the possibility that particular administrative acts or decisions are done or made which may be impugned indirectly on constitutional grounds. So a particular act or decision may not be authorised by the law under which it purports to be made where that law is read down in accordance with constitutional limitations. The implied freedom of political communication has recently been invoked in this way, albeit unsuccessfully. An order made by the Australian Industrial Relations Commission pursuant to s 127 of the *Workplace Relations Act 1996* (Cth) prohibited union members employed by Western Power Corporation from engaging in industrial action, including picket lines, strikes, bans and limitations which were undertaken in protest against the third wave industrial legislation before the West Australian Parliament in 1997. The argument was made that on a proper reading of s 127 of the *Workplace Relations Act 1996* (Cth), consistent with the implied freedom of political communication under the Constitution, this order, which was, of course, administrative in its character, was not authorised.[31] A similar argument was made in relation to a decision of the Classification Review Board dealing with a student newspaper that published a guide to shoplifting. While the applications did not succeed for reasons particular to those cases, there is no reason in principle why such an argument could not succeed in another setting.[32] The implications of the implied freedom for public discussion of government policy or practice by government officials or more specifically for whistleblowing activities awaits development which may depend upon the efficacy of specific statutory protection for such activities.

Constitutions which incorporate bills of rights, including guarantees such as that of equality before the law, may have an impact upon both legislative and administrative action. The South African Constitution as adopted in May 1996 includes a specific guarantee of administrative justice as part of the Bill of Rights incorporated in it. Thus, clause 33(1) provides: "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair". Clause 33(2) contains an ancillary right to persons adversely affected by administrative action to be given written reasons for that action. In addition, there is an obligation on the national government to legislate to give effect to those constitutional rights.

Other sources including information law and human rights

There are potential areas of development of the common law affecting administrative justice which might be said to be constitutional in character although not found in the written constitutions of the Commonwealth or the various States. In *Wik Peoples v Queensland*,[33] Gummow J referred to the characterisation of the common law as

31 *Communications Electrical Energy Information Postal Plumbing and Allied Services Union of Australia v Laing* (1998) 159 ALR 73.

32 *Brown v Members of the Classification Review Board* (1998) 82 FCR 225.

33 (1996) 187 CLR.

"the ultimate constitutional foundation in Australia"[34] and spoke of the *Mabo*[35] decision as "a perceptible shift in that foundation, away from what had been understood at federation".[36] Other developments in the common law, while not of the magnitude of the recognition of native title, may nevertheless have significant impacts upon administrative justice. That is particularly so where the common law responds to emergent principles of international law affecting relations between subject and state.

The decision of the High Court in *Minister for Immigration and Ethnic Affairs v Teoh*[37] incorporated into the common law of procedural fairness a proposition that there is a legitimate expectation on the part of one likely to be affected by an administrative decision that the decision-maker will respect Australia's obligations under international conventions to which it is a party. This proposition generated a good deal of huffing and puffing on both sides of politics. Ministerial statements were issued to defeat the misguided belief that Australia's administrators should have regard to its international commitments. Legislation to defeat any such formulation was prepared.

The possibilities for the infusion into common law doctrines of principles emerging from international law are not exhausted. Principles of customary international law crystallise out of their repeated assertion in international instruments, their honouring in state practice and their recognition in the writing of jurists. It may well be, as Stephen J accepted in *Koowarta v Bjelke-Petersen*,[38] that a general principle against adverse discrimination on the grounds of race is a rule of customary international law. Similar arguments might be mounted about other human rights which are repeatedly asserted in the multiplicity of international instruments and national constitutions. The development of the common law effected by the High Court's decision in *Mabo* reflected in part an adoption of international norms. The common law is not beyond the development of other doctrines derived from international recognition of fundamental human rights that will have implications for administrative justice.[39] Whether such principles may attract characterisation as constitutional in the sense in which Gummow J used that word in *Wik* may be debatable. Like native title, they are subject to statutory displacement or indeed extinguishment.

The development of constitutional doctrines or human rights based common law principles supportive of administrative justice is likely to be a long term process, if it happens at all. In the meantime, what administrative justice means in practice depends upon the culture reflected in the practices and attitudes of ministers, depart-

34 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 182.
35 *Mabo v Queensland* (No 2) (1992) 175 CLR 1.
36 *Wik Peoples v Queensland* (1996) 187 CLR 1.
37 (1995) 183 CLR 273.
38 (1981) 153 CLR 168 at 220.
39 *Dietrich v The Queen* (1992) 177 CLR 292 at 306; *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 at 549; *3* (1994) 33 NSWLR 680.

ments, authorities, statutory office holders and individual departmental officers, administrative review tribunals and the courts. The vast majority of official decisions which affect people will not go to review and their compliance with standards of administrative justice will depend upon the attitudes of the people who make them. It is therefore appropriate at this point to consider the mechanisms by which administrative justice in the sense described earlier is achieved and maintained.

MECHANISMS OF ADMINISTRATIVE JUSTICE

A mechanism of primary importance for the achievement and maintenance of appropriate standards in administrative decision-making is education of decision-makers in those standards. At lower levels in official hierarchies, in government departments and authorities, there is a turnover of staff, a need to ensure that officers are educated in the basic principles of administrative justice and a need to ensure that that education is kept up to date. In-house training programs as a condition of appointment or advancement may assist in acceptance by decision-makers of the standards they are required to apply and, beyond intellectual acceptance, of the internationalisation of those standards.

Administrative justice is also supported by the systems of internal review by superior officers, external administrative review by bodies such as the Social Security Appeals Tribunal and the Administrative Appeals Tribunal, and by judicial review. I do not comment on proposals for restructuring of the AAT and other bodies into an administrative review tribunal save to say that they seem to reflect a shift in the direction of less rigorous administrative review. Other mechanisms of external scrutiny which may in some cases go beyond the resolution of particular matters are available through the ombudsman, the parliamentary member whose constituent is affected by a decision and the minister who may be the subject of direct representations. The scrutiny of decisions is also another significant factor enhanced by access to official documents under freedom of information legislation. Systemic issues will be addressed by Commonwealth and State auditors-general, although sometimes at their peril.

There would be few officials today in the field of public administration who, when they reflect upon these various mechanisms, would not feel that the world was perched on their shoulder as they formulated their decisions. This perception may induce a level of anxiety, although my own impression is that the more experienced officials have become enured to these levels of scrutiny as part of their normal working environment.

When regard is had to the many layers and mechanisms of accountability in Australia, judicial review may be seen as occupying a fairly limited territory for the implementation of appropriate standards of administrative justice. Cranston's forceful critique of the limits of judicial review has described its proponents as "sedulous and lordly" and has expressed his objection that "the attention

lawyers lavish on judicial review diverts their gaze from more fundamental, if less glamorous, mechanisms to redress citizens' grievances and call government to account".[40]

The authors of De Smith on *Judicial Review of Administrative Action* (5th ed) describe the role of judicial review as "inevitably sporadic and peripheral".[41] I respectfully agree that judicial review must be kept in perspective and regarded, particularly by the judges, with the harsh modesty that should follow from a realistic appraisal of the actual outcomes which it generates.

THE LIMITS OF JUDICIAL REVIEW

The limits of judicial review with which administrative lawyers are familiar will permit consideration by the court of questions of lawfulness and fairness and, *in extremis*, the rationality of the decision under challenge. It does not provide a forum for substituting one administrative decision for another. The term "merits review" which has been used to describe the territory forbidden to the judges has a degree of imprecision about it. A decision which is unlawful or unfair or so unreasonable as to be beyond power might well be thought bad on its merits. Nevertheless, that term as a line of demarcation has been sanctified by the High Court, which in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[42] approved the following observation of Brennan J in *Attorney-General (NSW) v Quinn*:[43]

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[44]

It is a consequence of that proposition that the court has no general power to rectify administrative injustice. So the extent of the support able to be given by judicial review processes to administrative justice is considerably circumscribed. Notwithstanding the sensitivities of some ministers to judicial trespass into merits review, the limits of judicial review have not stopped politicians in the past and will not stop them in the future from publicly characterising unsuccessful review applications by citizens as though they confirmed the merits of the decision under challenge. And for the ordinary citizen unlettered in the sophisticated distinctions of the law, the court properly observing the limits of judicial review may

40 R Cranston, *Law, Government and Public Policy* (1987) at 176.
41 De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (1995) at 19.
42 (1996) 185 CLR 259.
43 (1990) 170 CLR 1 at 35–36.
44 (1996) 185 CLR 259 at 272.

have admittedly denied him or her justice for reasons which he or she feels to be incomprehensible.[45]

Judicial review may not only yield outcomes which leave administrative injustice untouched. It may also, by the process of statutory construction, have impacts on administrative decision-making which are negative. While our Constitution does not contemplate judicial deference to administrative views on matters of statutory construction there is, in a formal sense, parliamentary deference to the constructions that the courts put upon the legislation. And this reflects a constitutional principle. As Justice Stephen Sedley has observed of the position in the United Kingdom:, "parliament is accustomed to accepting from the judges that it meant things which may never have crossed its collective mind and was certainly not meant by the departmental authors and parliamentary draftsman".[46]

A good illustration of this may be seen in the travails of the *Native Title Act 1993* (Cth) and the National Native Title Tribunal under successive judicial decisions about the construction of the Act. This is not to suggest that the decisions were wrong in law. Each can be justified by reference to the constructional choices available to the courts. But their collective impact was to make already difficult legislation open to substantial abuse and harder to administer than it might otherwise have been. Their cumulative consequences in their own way contributed to the impetus for very substantial amendments to the Act last year that went well beyond addressing the effects of the *Wik* decision.

The original vision of the *Native Title Act 1993* (Cth) as enunciated by Prime Minister Keating in his Second Reading Speech contemplated "rigorous, specialised and accessible tribunal and court processes for determining claims to native title and for negotiation and decisions on proposed grants over native title land".[47] Claims would come forward in a "sensible, organised way", coordinated by representative bodies. The Act contemplated among other things substantial preparation for the lodgment of each application, a screening process for acceptance to be applied by the Tribunal, notification to those whose interests might be affected by a determination, a conference to see whether agreement could be reached about the application, determination of unopposed or agreed applications by the Tribunal and referral of contested applications to the Federal Court. The scheme of the Act was also consistent with the common sense proposition that registration of a claim which attracted the statutory right to negotiate in respect of mining tenement grants and compulsory acquisitions would follow upon acceptance of the application.

A combination of amendments in the Senate and decisions of the High Court and Federal Court in judicial review of the processes led to different outcomes. The lodgment of applications was held to

45 This issue is discussed at greater length in R S French, "Courts under the Constitution" (1998) 8 *Jnl of Judicial Admin* 7 at 7–22.

46 Sedley, "The Sound of Silence: Constitutional Law Without a Constitution" (1994) 110 *Law Qtly Rev* 270 at 285.

47 House of Representatives, *Debates, Hansard*, 16 November 1993 at 2878.

give rise immediately to the right to be entered on the Register of Native Title Claims and thus standing for the registered claimant to invoke the right to negotiate.[48] The right, requiring only lodgment of an application, could be acquired and exercised by individuals without community consent or involvement. So developed the phenomenon of multiple, overlapping claims in which sometimes different elements of the one indigenous community or different members of the same family lodged claims to protect their negotiating position.

The acceptance process, statutorily a fairly low level screening process, was held by the High Court to be limited to consideration of materials on the face of the application and any supporting affidavit. Given the fairly minimal requirements for supporting material imposed by the Act as amended, there was very little scope for winnowing out of unmeritorious claims. And contrary to the practice of the Tribunal, notification of claims was required by judicial decision to be given individually to all persons holding proprietary interests which might be affected by a determination. This required administrative consideration of what was and was not a proprietary interest and, in some cases, notification to hundreds of interest holders.[49] In addition, consistently with the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission*,[50] the Full Court of the Federal Court held in *Fourmile v Selpam Pty Ltd*[51] that sections of the Act providing for registration of Tribunal determinations of native title in the Federal Court were invalid. The latter decision was based on constitutional grounds and the proper *locus* of judicial power. In so far as the other cases mentioned affected the Tribunal's procedures they rendered the system a good deal more difficult to administer than it might otherwise have been. It may respectfully be acknowledged that the judicial review processes which applied in those cases were flawless in logic and principle. It must be accepted, however, that principled and logical judicial review can produce outcomes which in a practical sense are antithetical to administrative justice.

Australia has no doctrine of deference to administrative agency interpretation of the law. That absence may reflect the constitutional separation of powers between judiciary and executive as it operates in this country. On the other hand the courts will not accept an advisory jurisdiction under present constitutional arrangements. So the only way to discover whether a particular application of the law is correct is to test it in court. This may have the value of constitutional principle and consistency about it. It can, however, bring administrative justice at a high cost.

Despite its limitations and deficiencies judicial review does provide, however, opportunities for the public enunciation of the accountability of the executive for the lawfulness, the fairness and,

48 *Northern Territory v Lane* (1995) 59 FCR 332, and *Kanak v National Native Title Tribunal* (1995) 132 ALR 329.

49 *WMC Resources Ltd v Lane* (1997) 143 ALR 200.

50 (1995) 183 CLR 245.

51 (1998) 152 ALR 294.

to some degree, the rationality of its actions. To that extent, albeit sporadically and in an unsystematic way, it contributes to the maintenance and achievement of administrative justice.

SCOPE OF ADMINISTRATIVE JUSTICE

The requirements of administrative justice as discussed in this paper apply to decision-making by public officials according to authority conferred upon them by public laws. To the extent that the things previously done by public officials are now done by private organisations operating other than under statutory powers, the scope of administrative justice is affected. So the contemporary phenomenon of privatisation and outsourcing of government services raises the possibility that decisions may be made affecting citizens in a legal framework that does not attract the core requirements of administrative justice or mechanisms for their enforcement. As to that there are at least two possible responses. The first is that as a condition of the right to undertake activities previously carried out by government, persons or organisations operating in what might loosely be called the "private sphere" should be subject to statutory regulation designed to maintain essential elements of administrative justice in the way they make decisions about services affecting the citizen. In that regard it is to be observed that there are statutory regulators of the market place already established which to some degree may effectively impose standards of behaviour analogous to administrative justice. A second response is the development of judicial review doctrines which can cross the public/private divide to like effect in appropriate cases. This is obviously a matter of considerable and urgent importance. There has already been substantial literature on it. More will be offered.

CONCLUSION

Administrative justice is the application in a particular context of the essentials of lawful, fair and rational behaviour that citizens and corporations or other corporate entities are entitled to expect of all decision-makers, whether they be judges or public officials. While their trappings, mechanisms and legal effects may differ, the extent to which those core elements are maintained will continue to be a measure of the rule of law in our society. Their maintenance poses practical challenges for all who are concerned about public administration.

Defining Administrative Justice—The Role of Legal Theory

Three Perspectives on the Relationship Between Administrative Justice and Administrative Law

PAUL CRAIG*

There are many differing ways in which to conceive of the relationship between administrative justice and administrative law. This paper makes no attempt to traverse the entire ground of the complex and rich literature which applies within this area. The discussion will, however, focus on three issues which are central to this relationship.

The first section of the paper will consider the ways in which differing conceptions of administrative justice can have an effect on the focus, shape and content of administrative law doctrine. This will be followed by an analysis of what I term the duality of administrative justice. This is intended to capture the idea that administrative justice must be seen as being about empowerment of agencies in order that they can properly fulfil their legislative mandate, and that it cannot be viewed as being solely concerned with constraints on agency action. The final section of the paper considers the relationship between administrative justice and the general legislative policy adopted by any particular government. This is a somewhat neglected issue, but is of considerable importance in both practical and theoretical terms.

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DIFFERING CONCEPTIONS OF ADMINISTRATIVE JUSTICE: THE IMPLICATIONS FOR THE FOCUS OF ADMINISTRATIVE LAW

It is clear from the important work done by Jerry Mashaw in the United States that differing conceptions of administrative justice can have important implications for the determination of what are the appropriate rules of administrative law.[1] Mashaw, after reviewing the extensive literature on the *disability program* in the USA, then sets out three models of justice which explicitly or implicitly, underlie this literature. The first seeks to ensure "bureaucratic rationality": true claims should be distinguished from false claims in the most efficient manner. If this were the objective then we might well focus our attention upon improving organisational safeguards within the bureaucracy, thereby ensuring a minimum of error; upon the training of personnel; specialisation of function; and internal checks to test both the accuracy and efficiency of decision-making. Extensive procedural rights for those concerned with the making of agency rules would not necessarily be of central importance, nor would they necessarily "sit" well with the other objectives mentioned.

A second vision of the disability program is based on the premise that decisions which are made should provide support or therapy, viewed from the perspective of the particular professional culture. This model of administrative justice is termed professional treatment. It is client orientated, and like bureaucratic rationality requires the collection of data. The difference between this model and the first is that in the professional treatment model the "incompleteness of facts, the singularity of individual context, and the ultimately intuitive nature of judgment are recognised, if not exalted".[2] On this view, "disability decisions would be viewed not as attempts to establish the truth or falsity of some state of the world, but rather as prognoses of the likely effects of disease or trauma on functioning, and as efforts to support the client while pursuing therapeutic and vocational prospects".[3] Attention would be focused on the organisational structure, but in a manner which is rather different from that of bureaucratic rationality. The emphasis would be on professional treatment, with the relevant professional making a judgment within the area of his or her own expertise. Considerations of efficiency, hierarchy and rules would all assume second place to the ideals of professionalism. Whereas bureaucratic rationality attains its legitimacy through the accuracy and efficiency which it engenders, professional treatment is validated by the expertise of the decision-maker who provides the service to the claimant. While the model of professional treatment would place emphasis on organisational safeguards, these would not necessarily be of the same

1 J Mashaw, *Bureaucratic Justice* (1983) at 21–41. See also P Craig, "Discretionary Power in Modern Administration", in Bullinger (ed), *Verwaltungsermessen im Modernen Staat* (1986) at 79–112.

2 Mashaw, *ibid* at 27.

3 *Ibid* at 27–28.

kind as in the bureaucratic rationality model. The persons to whom discretionary authority is originally given and the structure of controls by higher administrative bodies would both be different in the professional treatment model.

The third model which Mashaw considers is that of moral judgment. On this view, the principal objective is one of fairly determining "rights" to social welfare in ways which are analogous to the common law's determination of rights in other areas. The twin precepts of this model are some form of adjudicatory process and a resultant decision which is itself value defining.[4] The way in which we deploy the different techniques at our disposal now subtly alters. We would focus more attention upon procedural rights, both in the making of individual decisions, and in terms of the rules which guide the distribution of social welfare. Greater attention would be focused upon the ability of the individual to argue his or her case, and the ordinary courts would assume a more prominent role as arbiters of whether the conditions for the individual "entitlement" were fulfilled in a particular case.

It might well be expected that in the real world there is a compromise between these different models, either consciously or unconsciously. This is acknowledged by Mashaw who nonetheless points out correctly that the blending of models is not always satisfactory. This is particularly so where there is an attempt to incorporate aspects of the moral judgment model with the ideals of bureaucratic rationality. The hearing process does not sit easily with the bureaucratic scheme. This tension is brought out forcefully in the following quotation:

> If the ALJ [Administrative Law Judge] hearing is to be closely controlled by substantive rules, procedural routines and management oversight, then surely the ALJs are correct to wonder why a formal hearing and a neutral judge ... are appropriate. A hearing to apply objective criteria subject to management supervision has little of the legitimating symbolism of the proverbial day in court. On the other hand, if the logic of decisional neutrality and individual moral desert is to dominate the hearing stage, how is the Social Security Administration to maintain control of the program? An increasingly objective and stringent approach at the state agency level would only fuel the escalating appeal rate and exacerbate the discontinuity between the two levels of decision.[5]

There is a similar tension when we come to consider the impact of more general judicial review.[6] If the courts recognise the complexity and subtlety of the administrative system, they might be inclined to exercise restrained review which will then have only a minimal impact on the system and little in the way of precedential significance. If, however, the courts employ more searching scrutiny this may produce "unanticipated and negative dynamic effects on quality", and the transformation of an administrative into a judicial process.[7]

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4 *Ibid* at 29.
5 *Ibid* at 43–44.
6 *Ibid* at 189.
7 *Ibid*.

The way in which differing conceptions of administrative justice can have an effect on the application of more particular doctrines within administrative law can be further exemplified by focusing on a different subject matter area, *planning law* in the United Kingdom. The resolution of central issues such as the rights which third parties should have at inquiries, the amount of time which should be expended on consultation, and the extent to which we should allow discussion of policy at inquiries, will be profoundly affected by the more particular conception of administrative justice which underlies the system as a whole.

This is well brought out by McAuslan's study of planning law.[8] The author identified three different ideologies which have helped to shape the law in this area. The first sees the aim of the law as to protect private property, which is termed the traditional common law approach to the legal role. The second views the purpose of the law as to advance the public interest, even as against traditional property rights; this is called the orthodox public administration approach to the legal role. The third, that the function of the law is to aid the cause of public participation in decision-making, may be in opposition to the other two approaches. This third ideology is labelled the populist approach.[9] Which of these approaches predominates will profoundly affect the answers to the central questions posed above, and will influence the type of procedure adopted. The essence of McAuslan's argument was that the first two approaches towards planning have been dominant, albeit in varying degrees; participation was much genuflected to in theory, but pushed very much into third place in practice. He demonstrated this in a number of areas.[10]

These examples show that the type of procedure we adopt at the inquiry, the very type of inquiry itself, and the substantive rights accorded to participants will depend directly on the prevailing ideology or conception of administrative justice in that particular area. Questions as to third party rights, or the inquisitorial as opposed to adversarial method of investigation, cannot be resolved without implicitly if not explicitly adopting one of these perspectives.

Thus the private property approach to planning would tend to favour an adversarial procedure akin in broad nature to the common law model of adjudication with its rules of examination and cross-examination. Substantive rights would be restricted to the property owner who claims to be affected, and the issues that could be raised at an inquiry would be confined to the case at hand.

The public interest approach to planning would gravitate towards a less formal, more inquisitorial style of procedure. The government of the day is regarded as the embodiment and guardian of the public interest, and should be relatively free to pursue the pro-

8 P McAuslan, *The Ideologies of Planning Law* (1980).
9 *Ibid* at 2.
10 *Ibid* at Chs 1–2.

cedures of its choosing, subject to certain elementary concepts of fairness. This view finds expression in the House of Lords decision in the *Bushell* case,[11] and especially in the judgment of Lord Diplock therein. The substantive rights accorded are limited, as the example of the structure plan shows. Policy is retained firmly in the hands of the government of the day, and the public interest as thereby defined takes prominence over private property and the view of those participating in the decision-making.

The public participation ideology would require more modifications to our institutional mechanisms. An inquiry procedure would itself be modified to enable a wider variety of views to be taken into account at the formative stages of, for example, a structure plan or unitary development plan. Consultation would be a continuing process and would take place after the plan has been submitted to the Secretary of State. As seen, both pre- and post-submission consultation does indeed take place, but the reins are kept firmly in hand by the local and central government. A real commitment to the public participation ideology would entail an increase in the rights of the participator and a corresponding diminution in the control and discretion of the government. In some areas the procedure would cease to be either inquisitorial or adversarial, but be more in the nature of consultation and discussion, with broader community involvement.

THE DUALITY OF ADMINISTRATIVE JUSTICE: AGENCY EMPOWERMENT AND AGENCY CONTROL

The discussion thus far has focused on the way in which differing conceptions of administrative justice can have a formative influence on the administrative law doctrines which apply within a particular area. A related, albeit distinct, point will be considered within this section. Administrative justice is often conceived, implicitly if not explicitly, solely in terms of constraints on administration. This is a misconception. The legislative objectives which underlie a particular area must be identified. Once this has been done, administrative justice then requires the establishment of appropriate norms to effectuate those objectives. These norms may themselves be broadly of two kinds. There must be provisions which are necessary to *empower* the administrator to do its job effectively. There must also be *controls* on the administrative agency itself. This duality in the nature of administrative justice can be exemplified by considering the regulation of privatised utilities.

It has been argued forcefully by Prosser[12] that the enabling legislation which governs the privatised utilities in the UK, and the way in which the legislation has been interpreted by the relevant regulatory authorities, shows that three different tasks are being performed in this area. The first is the regulation of monopoly itself,

11 *Bushell v Secretary of State for the Environment* [1981] AC 75 at 92–104.
12 T Prosser, *Law and the Regulators* (1997) Ch 1.

which is most evident in the constraints imposed by the regulator on the prices which can be charged by the regulated entity. The second is what is termed regulation for competition. This is designed to create the conditions for competition to exist and to police it to ensure that it continues to exist. The grant of licences to firms other than the dominant firm in the area, and the fixing of conditions for the interconnection of competing but interdependent systems, are examples of this. The third task being undertaken by the regulator is social regulation. Here the regulatory rationale is not primarily economic, but social, and is linked to concepts of public service. It is exemplified by provisions made for the securing of universal service by some of the utilities. The regulatory principles laid down and applied by the regulators are therefore "not limited to those concerned with the maximization of economic efficiency ... but include those based on more egalitarian or rights-based arguments".[13]

The privatisation of utilities has been but one part of a broader development which has led to the creation of what Freedland has termed a public-service sector,[14] which is distinct from both the purely public and the purely private sectors. The essential characteristic of the public-service sector is that the state no longer assumes direct responsibility for the provision of certain services, but nonetheless retains certain secondary responsibility in these areas. This secondary responsibility is manifested through, for example, the creation of regulatory regimes which are designed to oversee the activities of the privatised utilities. An equally important feature of the public-service sector is that the citizen has a relationship both with the service provider, who has the primary responsibility for the delivery of the service, and the state itself which retains a secondary responsibility within the relevant area. The relationship therefore becomes trilateral rather than bilateral.

The aspect of administrative justice concerned with *agency empowerment* can be readily exemplified in the context of the regulation of privatised utilities. If the agency is to do its job properly it must possess the necessary *information*. As Foster notes, "a state of unbalanced or asymmetric information benefits the regulated by comparison with not only the regulator, but also actual and potential competitors and customers".[15] Regulated bodies will resort to one of a number of tactics in order to reduce the effectiveness of the regulatory machinery. They may produce too little information; they may give too much in a form which is unclear or opaque; or they may offer the desired information too slowly.[16] An effective regulatory scheme requires the production of relevant information on a periodic basis, set against the background of clear objectives as to

13 *Ibid* at 30–31.

14 M R Freedland, "Law, Public Services, and Citizenship—New Domains, New Regimes", in M R Freedland and S Sciarra (eds), *Public Services and Citizenship in European Law*, *Public and Labour Law Perspectives* (1998) Ch 1.

15 C D Foster, *Privatization, Public Ownership and the Regulation of Natural Monopoly* (1992) at 226.

16 *Ibid* at 235–236.

why the information is needed.[17] The information should, moreover, be geared to the detection of the types of offences which the regulatory regime hopes to control.[18]

A second aspect of effective agency empowerment concerns the *objectives* of the regulatory regime. The powers of the regulatory authorities are set out in broad terms, coupled with the more specific proscription of certain types of activity, such as discriminatory pricing. It is clear also that a significant part of the remit of the regulatory bodies is economic in nature, whether this be in the form of protecting consumers from excessive prices or potential competitors from predation. What is less apparent is how far non-economic considerations can or should feature as part of the regulator's objectives, such as regulating pricing in a way which is geared towards those with low incomes. There are difficulties with this type of regulation. Thus Foster has argued that it may be more difficult to monitor data in relation to social offences; there may be a conflict between the pursuit of economic and non-economic goals; non-economic goals can themselves conflict; and the greater the number of divergent aims which are being pursued the more difficult might it be to develop a coherent overall strategy.[19] However, as Prosser has shown, it is clear that the regulators do in fact engage in social regulation, and that this is so even where an element of competition has been introduced into the provision of the relevant service.[20]

A third aspect of agency empowerment is that it should minimise the possibility of *regulatory failure*. This term can cover a number of differing scenarios. It may mean that the regulated industry itself is no longer capable of sustaining profitable trading because the regulatory controls do not, for example, allow it to adapt to new market circumstances such as inflation. It may mean that the regulator is no longer capable of properly fulfilling his or her remit because of governmental interference with the regime, or because there are inadequate powers in the original legislation.

A more general cause of regulatory failure is *regulatory capture*, in the sense that the regulator is captured by the very industries which are being regulated. One well known version of regulatory capture has been developed by the Chicago School.[21] The essence of the argument is that the monopolist in an industry about to be regulated has a great economic incentive to influence the content of the legislation since the regulatory regime will constrain what the monopolist can do with its monopoly profits. This same incentive will also lie behind attempts by the monopolist to influence the

17 *Ibid* at 236–238.
18 *Ibid* at 250–254.
19 *Ibid* at 316–323.
20 T Prosser, *Law and the Regulators* (1997) Chs 3–7.
21 Stigler, "The Theory of Economic Regulation" (1971) 2 *Bell Journal of Economics* 3; S Peltzman, "Towards a More General Theory of Regulation" (1976) 19 *Journal of Law and Economics* 211; R Posner, "Theories of Economic Regulation" (1974) 5 *Bell Journal of Economics* 335.

regulator once the regulatory regime has been established. In more formal terms what this means is that the monopolist will predictably be willing to expend a great amount of its monopoly profits upon influencing the regulator in order to retain at least some of these profits. A somewhat different account of regulatory capture, or bias, is provided by the Public Choice School.[22] One aspect of this theory is to draw analogies between markets for ordinary goods and the making of legislation, which is conceived of as a political market. The content of any legislation will reflect the contesting pressures of the differing interest groups who are concerned with the topic. On this view, "trade continues until the marginal value to the politicians and regulator of the obligation assumed by the regulated industry equals its marginal financial cost to the industry".[23] The theoretical and empirical assumptions underlying these models have been contested.

We should nonetheless structure the regulatory regime so as to minimise the likelihood of this occurring. Foster has provided a number of helpful pointers in this regard.[24] There should be an independent regulator who retains discretion to interpret regulatory offences; formal court procedures should be avoided since these are likely to favour the regulated industry, but there should be appropriate procedural rights, discussed more fully below, which safeguard the interests of affected parties; appeals on the merits should be provided in some instances, but preferably to another regulatory agency which has appropriate expertise; the more firms within an industry the less likely will it be that the regulator will be captured by any one firm; it is equally the case that proper scope should be given to other interested parties, including consumers, who will act as some counterweight to the power of the regulated industry itself; and the scope of any ministerial power should be defined as clearly as possible, in order that the regulated industry is not tempted to by-pass the regulator and seek to capture the minister instead.

We can now move to consider the second aspect of administrative justice as it applies in the regulatory context, which is the provision of appropriately drawn procedural and substantive norms designed to ensure that the regulatory authority itself observes the requisite procedural and substantive norms which we expect of other public agencies.[25]

In procedural terms this means that the basic principles of fair procedure apply to decisions made by such bodies, whether in the setting of prices, the grant of licences or the adjudication of offences. This does not mean that such agencies should necessarily have

22 J M Buchanan and G Tullock, *The Calculus of Consent* (1962); J M Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (1975); Becker, "A Theory of Competition among Pressure Groups for Political Influence" (1983) 98 *Quarterly Journal of Economics* 371.

23 Foster, above n 15 at 387.

24 *Ibid* at 413.

25 C Graham and T Prosser, *Privatizing Public Enterprises* (1991) Ch 7.

to operate in accordance with the full rigours of the ordinary adversarial/adjudicative conception of fair procedure, modelled as it is upon ordinary court processes. Procedural justice is a more flexible concept which can be tailored to the needs of the particular area. It is clear that some agencies have adopted ideas of informal adjudication and rule-making used by US agencies, as mandated by the *Administrative Procedure Act 1946* (APA).[26] This is particularly true in the context of telecommunications, where the Director General of Telecommunications has employed sophisticated regulatory procedures designed to elicit the views of a wide range of people when making regulations relating to price controls and conditions of fair trading. There has been a double consultation exercise with a timetable for the receipt of views from interested parties.[27] It is equally clear that not all other regulatory agencies have been as forthcoming in this respect. There is much to be said for Prosser's suggestion that the procedural obligations imposed by the APA in the United States should be required elsewhere.[28]

In substantive terms the agencies which oversee the regulated industries are subject to the ordinary principles of judicial review. There is in addition a form of internal appeal to the Monopolies and Mergers Commission on a number of issues, such as when a licence condition is to be changed. We should not, however, think that this exhausts the issue of the substantive norms which the agencies should apply. The application of the ordinary principles of judicial review will be dependent on the structure and content of the enabling legislation. This will provide the background for determining which considerations are deemed to be relevant, and whether agency action is reasonable. We have already seen that the UK agencies do undertake social regulation to varying degrees. There may well be lessons to be learned in this respect from experience in France and Italy. Prosser has provided a valuable analysis of the more structured way in which social goals of equality, impartiality, consumer choice and consumer participation have been written into the enabling legislation in, for example, Italy.[29] There has been "a fuller recognition of the plurality of regulatory goals through the establishment of a relatively sophisticated case law dealing with the social requirements of public service, and suggestions that there is something different about basic services linked to citizenship".[30] It is, moreover, important to place this issue in its broader context. The substantive norms which should be applied by regulatory agencies necessarily raises wider issues as to the way in which we conceptualise public sector service delivery.[31]

26 Foster, above n 15 at 274–275.
27 Prosser, above n 12 at 84–86.
28 *Ibid* at 277–286.
29 *Ibid* at 287–292.
30 *Ibid* at 292.
31 M R Freedland and S Sciarra (eds), *Public Services and Citizenship in European Law, Public and Labour Law Perspectives* (1998).

ADMINISTRATIVE JUSTICE AND LEGISLATIVE THEORY: THE MISSING LINK

The discussion of administrative justice within the literature is rich and varied. There is, however, an aspect of this topic which has been insufficiently considered. This is the relationship between administrative justice and the theory or policy which underlies the legislation made by any particular government. It will be the legislation passed by the government of the day, and the policy which underlies that legislation, which has the most significant effect on administrative justice. It will be the legislative policy which will have a profound affect on institutional design at the macro level, as exemplified by the general trend towards contracting out, privatisation and the like. The legislative policy will be the principal determinant of the substantive rights or interests which go to make up administrative justice. This policy will also have a profound effect on the general procedures which are required of the administration. The courts can of course choose to apply principles of natural justice or fairness to a particular area. It will, however, be the legislature itself which will decide whether to enact an American style Administrative Procedure Act, or whether to develop citizen charter type initiatives. The relationship between legislative policy and administrative justice can be exemplified by considering recent developments in the UK.

The victory of the Labour party, together with similar successes by social democratic parties on the continent, has prompted a re-think of the options available to government at the end of the millennium. The preceding years had created the impression that the neo-liberal, market-oriented vision of the Conservatives, was the only viable way forward. This was all the more so given the collapse of socialist regimes in Eastern Europe. This added fuel to the neo-liberal claim that theirs was the only option. The Labour victory, at the very least, cast doubt on the idea that continued political success was in some way inevitable for those of the neo-liberal persuasion. It also naturally prompted questions as to what New Labour would offer and whether this would really differ from its Conservative predecessors. The Labour party promised that their policies would be based on a "Third Way" which was neither old style socialism, nor the neo-liberalism which had characterised Conservative policy. It will be helpful to consider the nature and content of new Labour's policies against an understanding of what is meant by the Third Way.

Old style social democracy was based around a number of key ideas, including: state involvement in social and economic life, collectivism, Keynesian demand management, corporatism, full employment, strong egalitarianism, a comprehensive welfare state and internationalism.[32] The market-oriented neo-liberalism of the New Right also had a number of defining characteristics, *inter alia*: minimal government, a belief in the market, moral authoritar-

32 A Giddens, *The Third Way, The Renewal of Social Democracy* (1998) at 7.

ianism, acceptance of inequality, the welfare state as a limited safety net, and nationalism.[33]

Giddens has described the values which are central to the Third Way as being: equality, protection of the vulnerable, freedom as autonomy, no rights without responsibilities, no authority without democracy, cosmopolitan pluralism, and philosophic conservatism.[34] In constitutional terms this manifests itself in a commitment to "democratising democracy"[35] through decentralisation, devolution, greater transparency, increased efficiency, and mechanisms of direct democracy.[36] It also requires the re-invigoration of civil society and respect for local autonomy. The collapse of socialism as a form of economic management has meant that one of the principal divisions between left and right in politics has now gone. Capitalism is accepted as the basic form of economic organisation. There are, however, still real differences as to how far the economy should be regulated, and the centre-left still views equality and social justice as of paramount concern.[37]

This is but the barest outline of some of the values underlying the Third Way. This is not the place for any detailed evaluation of the claims made by its proponents. There will, doubtless, be those from both the left and right who are sceptical about this vision of society, either from a theoretical or from an empirical perspective. It should, however, be recognised that many of the policies implemented by the Labour government thus far do reflect the values of the Third Way, and provide more concrete evidence as to what it entails.

The major constitutional reforms introduced by the Labour government are well known. Taken together the legislation on devolution, human rights, freedom of information, and reform of the House of Lords constitutes the most significant package of constitutional reform in the UK this century. The values enshrined in this legislation sit well with those which are part of the Third Way.

The major initiatives undertaken by the Labour government in relation to quangos, service delivery, regulation and local government are less well known. Certain features of these initiatives are worthy of note.

In economic terms, it is true that there is much which is a continuation of the previous government's thinking. Efficiency, contracting out to the market, benchmarking and the like are all still there. Advocates of the Third Way are, however, not opposed to market based reforms of central bureaucracy, nor are they against efficiency being used as an important criterion for institutional design. They do oppose the belief that market-based solutions should always be regarded as best, and regard competitive-based solutions as but one of the options which should be pursued. It is interesting to

33 *Ibid* at 8.
34 *Ibid* at 66.
35 *Ibid* at 70.
36 *Ibid* at 70–76.
37 *Ibid* at 43–46.

see these ideas being worked out in the Labour policies on, for example, service delivery and regulation. Compulsory competitive tendering is being abolished and replaced by a new approach based on "Better Value". It is clear that efficiency and competition will still be important considerations in the new order, but it is equally clear that they will not be the sole considerations, nor will they be adhered to with the degree of doctrinal fervour which characterised the policy of the previous administration.

In broader social and political terms, it is clear that the Labour Government's initiatives in relation to local government, the governance of London and the like are attempting to revitalise local government in a way which has not been done for many a year. There are interesting and important proposals for enhancing local autonomy, facilitating participation and rendering local government more effective. The proposals also forge links between the elected tier of local government and civil society more generally. These reforms can properly be regarded as a concrete expression of some of the ideas found in more abstract terms in the literature on the Third Way. This is not to say that one should be complacent. More could undoubtedly be done, especially in relation to the development of social rights, including the constitutionalisation of such rights.[38]

It is clear that the legislation enacted by the Labour Government will have a profound impact on administrative law. Process rights are likely to be enhanced if the proposals for participation contained in Labour policy documents bear fruit. Judicial review itself will be fundamentally affected by the passage of the *Human Rights Act 1998*. It will be for the courts to exercise primary responsibility when interpreting difficult points of construction under the Act, and the courts will, moreover, be required to decide complex issues such as whether a particular limitation of a right really was necessary in the interests of a democratic society. The courts will also have to face new challenges as a result of the legislation on devolution. The very success of the devolution experiment will be dependent in part on the attitude which the courts take to challenges to the competence of the Welsh Assembly or the Scottish Parliament. It will be for the courts to adjudicate on the freedom of information legislation, including the all important issue as to whether a refusal to disclose information is warranted in accord with the test laid down therein. The judiciary will, moreover, face challenging issues in the legislation on service delivery, which is couched in broad, open textured terms.

38 K D Ewing, "Social Rights and Constitutional Law" [1999] *Public Law* 104.

Administrative Justice: Some Preliminary Thoughts on a (Post)Modern Theoretical Perspective

Melinda Jones*

Jurisprudence, or legal theory, is a subversive activity. It is a project concerned with the establishment of "truth" within law, and to build structures and institutions based on that "truth". Jurisprudence is not a static activity. The project of jurisprudence has traditionally been seen to ask "what is law"—and perhaps the project of administrative law theory is concerned to disclose the nature of "administrative law"—and has focused on either the drawing of boundaries or requiring consistency with legal principles. But neither this jurisprudence nor any other can be seen as projects undertaken for their own sake. Behind each school of jurisprudence, and behind jurisprudential activity, lies a conception, and perhaps a construction, of "justice" and its relationship to law.

Jurisprudence is also a critical enterprise. It provides us with tools of analysis which will allow us to understand the world-view which is elevated by our engagement. Engaging in the task of building a "theory of administrative justice", then, is not a neutral activity. It is a political act designed to promote directions in scholarship and practice that will be taken to be legitimate. It is a project that places certain questions on the agenda—thereby elevating their status, and giving priority to particular assumptions comprising the enterprise. In doing this we will be privileging some knowledge, and

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as an inescapable consequence, will devalue and delegitimise that which is excluded.

Applying jurisprudential analysis to administrative law is no easy task. First, the scope of administrative law is vast. No longer can we imagine that the province of administrative law is coincidental to the enterprise of judicial review. Administrative law is concerned with state regulation—administrative bodies and tribunals, delegated legislation, the exercise of administrative discretion, the provision of public information—and all the strategies of accountability and control which have been developed in response to the growth of the bureaucracy in any of its manifestations. Equally, the realm of legal theory is vast. Where once we could talk of jurisprudence, and assume that this would involve a discussion of the theories of legal positivism and natural law,[1] (post)modern legal theories move well beyond the boundaries established by analytic theory and its detractor. While both these theories operated within the modern state, and can be seen to reflect the dominant values of liberal capitalism, (post)modern legal theories are concerned with the potential role for law in challenging and contesting the power structures of the state. Some legal theories pronounce the "end of law" or the "expulsion of law" from political relevance, others consider that the jurisprudential project involves the transformation of law and society.

At the outset, I will begin by engaging in boundary setting. I want to differentiate between those legal theories which are "modern", in the sense that they operated within the paradigm of the modern capitalist nation-state, and those current theories which I am designating as (post)modern—that is those theories which question the ideal of "modernity". Administrative law poses a particular challenge for the project of building a (post)modern theory of justice, because administrative law is predicated on the key features of modernity—the regulation and implementation of power through bureaucratic structures; and the focus on legality, and on rational and neutral rules. Administrative law values of openness, fairness, accountability and participation are designed to facilitate modernity, by lending legitimacy to administrative action.

It would be an ambitious task, in this short paper, to do anything more than suggest a framework for a (post)modern theory of administrative justice. I propose, therefore, to raise some questions relating

1 On the rhetorical and political use of both positivist and natural law theory, see M E Tigar & M R Levy, *Law & the Rise of Capitalism* (Monthly Review Press, 1977) and J H Ely, *Democracy & Distrust: A Theory of Judicial Review* (Harvard University Press, 1980). Ely demonstrates the utility and the ideological application of natural law argument, as a discourse signalling whatever was considered to reflect the proponent's sense of what law ought to be. He notes that in the heat of controversy, opposing camps argued from different formulations of natural law in support of their cause. As such it was employed both by the pro and anti-slavery movements, in each case declaring that their own conception of "natural" was alone valid: Ely, *ibid* at 49ff.

to administrative law, justice and jurisprudence, and to suggest the direction which future research on this topic could take. To do this I will attempt to survey (post)modern conceptions of justice and to ask what a (post)modern theory of administrative justice could look like.[2] This is an important enterprise, not just because the Australian Institute of Administrative Law has dedicated a conference publication to its exploration, but because it is very easy for lawyers to become distracted by legal niceties and by the attraction of legal complexity. Submerged in black-letter activities of statutory interpretation, and of attempting to tame the unruly host of issues which present themselves under the rubric of administrative law, it is difficult to take the time to cast a jurisprudential gaze on the enterprise, and to disclose the potential for an interplay between administrative law and administrative justice.

My analysis of legal theory will self-consciously take us away from "modern" legal theories—that is, those theories that fundamentally accept the Weberian image of the modern state.[3] In particular, I do not wish to take on board the potential for a theory of administrative justice that could be derived from analytical jurisprudence or natural law theories. These theories tend to look inward at the law, and would suggest a focus on doctrinal issues of administrative law. Elsewhere I have considered the potential of administrative law principles—particularly those derived from judicial review—to operate as a code of ethical conduct for administrators.[4] It would also be possible to undertake an analysis of justice in administrative decision-making[5] or an analysis of justice in administrative law decisions.[6]

However, I believe that it is essential to first ask questions about a concept of justice which can be derived from (post)modern legal theories. I will attempt, in this paper, to bring together themes from

2 My use of post-modern here refers to theories which have as their foundation a critique of modernity, rather than legal theories which could be properly called postmodern legal theory.

3 See eg, Tigar & Levy above n 2.

4 M Jones "Human Rights Concerns in the Process of Administrative Law Reform in NSW" (1996) 34 *Law Society Jnl* 65-67. See also R N Douglas & M Jones, *Administrative Law: Commentary & Materials* (Federation Press, 3rd ed, 1999)

5 The effect of *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 is that administrators have an obligation to take into account international human rights instruments in their decision-making, or to give notice of their decision not to take the human rights law into account, in order to comply with the rules of procedural fairness. A legislative move to override the impact of the decision, the Administrative Decisions (International Instruments) Bill, has now lapsed and is probably unnecessary as decision-makers have since Teoh been obliged to comply with the High Court decision and have discovered that the process is not as onerous as it was initially believed that it would be.

6 While case such as *Roberts v Hopwood* [1925] AC 578 and *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 are considered scandalous today, there is no reason to believe other than that the sexism and racism has followed the form it now takes across society—that it is institutionalised and subtle. Only comprehensive research (which to the best of my knowledge is yet to be undertaken) will bear this out.

feminist legal thought, critical race theory, critical legal studies and deconstruction legal theories. The themes are therefore to be found in most (post)modern legal theory. There are, however, two schools of (post)modern theory that I am not including in my analysis.[7] The first of these is postmodern legal theory (properly so-called) which tends towards the reduction of law to linguistic analysis.[8] The other is the work of Foucaultian legal scholars. This scholarship accepts Foucault's analysis that there is no longer a valid linkage of power and juridical rights, and would therefore expel law from the analysis of power, preferring an analysis of the new regulatory "disciplinary" structures of the state (because the focus should be on the mechanisms of power rather than on who has power).[9]

ELEMENTS OF (POST)MODERN THEORIES OF LAW

(Post)modern theories of law take law to be fundamentally the expression of state power. Law is not simply legislation or commands of the sovereign. Law includes judicial decision-making, the making and implementation of regulations and policies. This involves not only what is included in the standard categories of law—property, contract, tort and so on—but also what is excluded from those categories. Law, then, is seen as both a brutal and a subtle mechanism of state power that impacts on state members in a wide variety of ways.

Further, law is taken to be a site of oppression. (Post)modern legal theories suggest that law's power is not simply to be found in its enforceability—in the demand that we obey the law or risk punishment—nor is it simply a matter of construction of legal rules. Rather, law is seen to reflect the values of the dominating group, and to reinforce and reinvent those values. The function of law is to incorporate, reflect or construct "common sense", which is effectively the interest of the white able-bodied middle-class man. (In this we can see the legacy to Marxist thought, which saw law as an instrument of the ruling class.)[10]

In the context of feminist legal thought, the state is described as phallocentric—organised along gendered lines, to meet the assumed needs and interests of men. Most feminist theory has, by now, moved

7 It may be that what I am referring to is actually part of one school of thought—but this is not the place to debate that issue.

8 This is clearly not the case for all postmodern legal theory; the work of Margaret Davies is one important exception—see M Davies, *Delimiting the Law: "Postmodernism" and the Politics of Law* (Pluto Press, 1996).

9 On this see A Hunt, *Explorations in Law and Society: Towards a Constitutive Theory of Law* (Routledge, 1993), and C Smart, *Feminism and the Power of Law* (Routledge, 1989).

10 Marxist legal theory comes in a number of different guises. Law can be seen as a blunt instrument of the ruling class, as hegemonic in the ability of law to legitimise the activities of the bourgeoisie, or as part of the superstructure of the state. For a general analysis of marxist theory of law, see H Collins, *Marxism & the Law* (OUP, 1984).

away from essentialism, and rejects the idea of either "woman" or "man" as being biologically determined.[11] Both men and women are taken to be socially constructed, so the analysis does not assume that, *in fact*, all men are advantaged by the system, or that all individual women are oppressed by it. Rather, a phallocentric society is designed for the holders of power who, as "benchmark men", are not only male, but also adult, heterosexual, middle-class, white, able bodied, and probably Christian and have English as their first language.[12] Critical race theory emphasises the role of law in oppressing people from minority cultures, and looks to the significance of multiple identities and multiple realities that lead to multiple grounds for and of oppression.[13] The oppressive nature of law, then, is not directed at one particular group, but can affect all of those with any of the cluster of "outsider" characteristics.[14]

Much of the scholarship from outsider perspectives has involved an examination of the ways in which law can oppress. This has included analysis of liberal legal strategies such as anti-discrimination laws that on their face are assumed to be empowering. My gross simplification of the vast work done in this area is that the most significant manner in which law oppresses is through its interplay with *normate* values which are assumed to be neutral—law constructs "normalcy" and in the process makes some people "abnormal"; law focuses on rationality, and thereby discounts the value of those assumed by law to be "incompetent"; law establishes standards such as merit, and in assuming the neutrality of the category reinforces the inferiority of those who are already disadvantaged by not complying with the dictates of "normalcy"—that is, anyone other than the benchmark male.[15]

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11 C A MacKinnon *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987); N Naffine & R Owens (eds) *Sexing the Subject of Law* (LBC, 1997); Davies, above n 8; Smart, above n 9.

12 See M Thornton, (ed), *Public and Private: Feminist Legal Debates* (OUP, 1995).

13 See M J Matsuda, *Where is Your Body? And Other Essays on Race, Gender and the Law* (Beacon Press, 1996); and K Laster & P Raman, "Law for One and One for All? An Intersectional Legal Subject", in Naffine & Owens, above n 11, who point out that even with anti-discrimination laws, "women of color" have made far less use of anti-discrimination laws, both of sex and race, than have "mainstream" women.

14 See M Minow, who in *Making all the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press, 1990), attempts to draw together the issues of outsiders.

15 Much has been written about this. Consider for example the comments by Catherine MacKinnon: "the problem with neutrality as the definition of principle ... is that it equates substantive powerlessness with substantive power and calls treating these the same, 'equality'" (above n 11 at 165); "[O]nce power constructs social reality ... the force behind sexism, the subordination in gender inequality, is made invisible," *ibid* at 166. Reg Graycar discusses this in terms of "adjectival" people, for example, women judges/lawyers etc (never "male" judges/lawyers, because it is assumed that judges will be male): R Graycar, "Equality Begins at Home" in R Graycar (ed), *Dissenting Opinions: Feminist Explorations in Law and Society* (Allen & Unwin, 1990).

IMPLICATIONS FOR A THEORY OF JUSTICE

A theory of justice suggested by (post)modern legal theory, which would also include a (post)modern theory of administrative justice, would include the following elements:

1. It would address issues of subordination through law. The (post)modern jurisprudence is deeply critical of law as an enforcer of racist and other maldistributions of wealth and power. As such, the theory of justice requires that our task involves disclosing and eliminating those aspects of law which are oppressive on the basis of race, gender, ability or age. Mari Matsuda puts it as follows:

> Tapping that source (of experience of women and of racism, poverty, disability, homosexuality) is what jurisprudence is all about: the search for justice. The search for justice in the nuclear age carries an urgency previously unknown to humankind.[16]

2. A (post)modern theory of justice would explode the myth of "neutrality" and demonstrate the values which are inherent to "neutral" analysis. A (post)modern theory of justice requires us to deconstruct "neutral" legal principles, in order to recognise the dominant and oppressive force of neutral normalcy.
3. A (post)modern theory of justice would dispel the myth of the private sphere, which plays a major role in the acceptance of insubordination. This myth is that the private sphere is hermetic—that it cannot be deconstructed—and that it is sacrosanct. The private sphere is—

> ... personal, intimate, autonomous, particular, individual, the original source and the final outpost of the self, gender neutral. It is, in short, defined by everything that feminism reveals that women have never been allowed to be or have, and everything that women have been equated with and defined in terms of *men's* ability to have.[17]

The same is true for men as well as women from minority cultures or who are classified as "disabled".

4. A (post)modern theory of justice would develop mechanisms for those who have been excluded to find their voice. The existence of women, people of colour and people with disabilities is excluded from law and legal analysis. MacKinnon's comments on this are again worth considering:

> When you are powerless, you don't just speak differently. A lot, you don't speak. Your speech is not just differently articulated, it is silenced. Eliminated, gone. You aren't just deprived of a language with which to articulate your distinctiveness, although you are; you are deprived of a life out of which articulation might come. Not being heard is not just a function of lack of recognition, not just that no one knows how to listen to you, although it is that; it is

16 Matsuda, above n 13 at 27.
17 MacKinnon, above n 11 at 99.

> also silence of the deep kind, the silence of being prevented from having anything to say.[18]

Justice requires that all participants in society have an equal voice. To achieve this may require positive action through law.

5. This suggests that a (post)modern theory of justice would be substantive in the sense that it takes law to be not only the site of oppression, but also a potential strategy for redressing imbalance. While critical legal studies proponents consider that the strategy of legal rights should be rejected as indeterminate, incoherent, and easily commandeered by those opposed to justice, it is clear that Patricia Williams speaks on behalf of most (post)modern legal theory when she says the "rights taste new in the mouths of those who have just acquired them" and should therefore be savoured.[19]

   The theoretical position I am accepting does not reject law simply because of its tendency towards oppression. It is considered that while law is oppressive, it can also be transformative and liberationist.[20] So it is accepted that we can use law to achieve social change, but that social change cannot come without first deconstructing it. Mari Matsuda has also commented that one of the significant challenges for any new jurisprudence is how to "walk the catwalk" between rights and racism.[21]

6. A (post)modern theory of justice would accept the necessity of non-neutral, asymmetrical concepts of law such as affirmative action, which address issues of power inequalities.

Martha Minow, in grappling with ideas of difference, duality, and the tantalising promise of law, has commented:

> Out of the struggle to understand the ways in which mainstream legal consciousness is white, male, Christian, able-bodied, economically privileged, and heterosexual will come a legal theory more profound than any other we have seen emanating from Anglo-American law schools.[22]

The theory of justice I have suggested clearly meets this criterion. Amongst other things, the theory of justice is not simply designed as description—it also contains praxis. Our task as administrative lawyers is to ensure that administrative justice incorporates the fundamental principles of justice noted above. In order to bring about administrative justice, then, we have a great deal of work to do:

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18 *Ibid* at 39.

19 P J Williams, *The Alchemy of Race and Rights* (Virago Press, 1993).

20 Matsuda, above n 13 at 24, comments: "Jurisprudence of color forms an uneasy alliance with neoformalists, liberal reformists, and civil libertarians in commitment to the use of the rule of law to fight racism and in an unwillingness to stand naked in the face of oppression without a sword, a shield, or at least a legal precedent in our hands. Scholars of color have attempted to articulate a theoretical basis for using law while remaining deeply critical of it.

21 *Infra*.

22 M Minow, above n 14.

- We have to critique the administrative law texts, casebooks, law review articles, and jurisprudential monographs—to show how mainstream writers fail to account for racism and the experience of outsiders.
- We have to analyse administrative law doctrine and thought, as well as the practice of administrators and those charged with the implementation of administrative law, in order to establish its consistency or inconsistency with the (post)modern theory of justice which I am proposing.
- And, we have to develop strategies to address these issues which remove the myth of neutrality and which are directed positively at redressing power imbalance.

SOME ISSUES OF ADMINISTRATIVE JUSTICE

I want to turn briefly to look at two issues for administrative justice, in order to consider the different questions that may arise should the theory of administrative justice that I have proposed be adopted. The issues I will address are the public/private debate, and the question of formality vs informality in administrative tribunals.

The public/private divide

The moves towards outsourcing administrative action and privatisation of government instrumentalities has brought the private/public debate onto the administrative law agenda. This topic has been of great recent concern to feminist scholars, but it has also been at issue on many occasions in legal history.[23] On each occasion the issue has related to questions of allocation of power. The current concern relates to the appropriate functions of the state—to where overt regulation in the public interest is legitimate. The administrative law concern is not simply one of ownership of businesses (which, along with the problem of competition and monopolies, was the concern of the Hilmer Report[24]), but of the administrative law values of openness, fairness and accountability which pertain to the operation of the public sphere, but which are considered to be inappropriate interference with the free market in the private sphere.

The drive for economic efficiency and competition has lead to the corporatisation and privatisation of many government owned business enterprises, many of which are responsible for the provision of services essential to commercial and/or social functioning. However, once an enterprise is privatised, it is outside the "public"

23 M J Horwitz, "The History of the Public/Private Distinction" (1982) *University of Pennsylvania Law Rev* 1423.

24 F G Hilmer (Chair), M Rayner & E Tapperell, *National Competition Policy* (1993), (hereafter, Hilmer report).

sphere and may be outside the reach of administrative review.[25] Furthermore, the drive towards a "level playing field" for government business enterprises may pull corporatised enterprises (especially those in competition with the private sector) further outside the reach of administrative review. As Mark Aronson has commented, "[t]he further a regulatory regime travels from the legal paradigm, the less relevant is judicial review as an accountability device".[26]

Unless specified in the legislative scheme, there will be no provision for merits review of "private" decision-making, and the ability simply to gain information or reasons for a decision will be greatly circumscribed. The operations of freedom of information legislation and the Ombudsman are both affected. Many corporatised GBEs are exempt from FOI requirements on the grounds of creating a "level playing field" with private competitors.[27] In the case of the Ombudsman the significance of privatisation and corporatisation lies in the fact that "once an entity is no longer a government authority, the Ombudsman no longer has jurisdiction to investigate its activities",[28] as the power of the Ombudsman is to investigate administrative acts of government departments and "prescribed authorities".

Several suggestions have been put forward in response to the problem of regulation of "private"-public bodies.[29]

Revive the idea of "common calling": An analogy is drawn between the common carrier and the enterprise that provides essential goods or services to the (business) community.[30] Reviving the idea of "common calling" could give judges power over essential utilities in three respects: a general common law duty may be able to ensure the provision of services to all; without discrimination; and at a reasonable price.[31] Resurrection of the common calling would make providers of prime necessities answerable to judicial review, regardless of public/private ownership. The Hilmer report discusses privatisation with a focus on competition in commerce. The report mentions the historical duties of common carriers to carry certain

25 See M Aronson "A Public Lawyer's Responses to Privatisation and Outsourcing" in M Taggart (ed) *The Province of Administrative Law* (Hart Publishing, 1997) who comments at 45, "judicial review ... tends still to be thought of as an 'indispensable accountability device'", yet "it fits so poorly with the problems raised by privatisation and outsourcing". Further, because "common law generally refuses to treat contractual power as public power ... [so] contractual power is not usually amenable to judicial review". See *R v Disciplinary Committee of the Jockey Club*; *Ex parte Aga Khan* [1993] 2 All ER 833 at 846.

26 Aronson, *ibid* at 47.

27 M Allars, "Private Law but Public Power: Removing Administrative Law Review from Government Business Enterprises" (1995) 6 *Public Law Rev* 44 at 47-52.

28 Douglas & Jones, above n 4 at 181.

29 See Aronson, above n 25; and the Hilmer report, above n 24.

30 Hilmer report, at 242.

31 Aronson disagrees with the common law power to set a reasonable price: Aronson, above n 25 at 48.

goods, as an exception to the general rule that the law imposes no general duty on a firm to do business with another. It is argued that the fundamental market concept "is not to be disturbed lightly".[32]

Rely on general anti-competitive rules: The Hilmer report points to the possibility of enforcing obligations on private enterprise to provide essential facilities via general anti-competitive rules such as s 46 of the *Trade Practices Act 1974* (Cth), which prohibits use of market power to (a) eliminate or substantially damage a competitor, (b) prevent entry into the market, and (c) deter or prevent a person engaging in competitive conduct in the market. The difficulty is that it may be difficult to prove that refusal to do business is equivalent to taking advantage of market power. Also, it is difficult for a court to decide the terms and conditions of access (such as price).[33]

Creation of special access rights: The Hilmer report also proposes the creation of special access rights via statute.[34] The *Telecommunications Act 1991* (Cth) is an example of this on an industry specific basis. The Act includes pricing principles. The Report recommends the creation of a general access scheme, applicable to all sectors of the economy. The report further recommends that this scheme should in practice be exercised sparingly, only focusing on key sectors of strategic significance to the economy. However, the Hilmer report points out[35] that an access scheme may have a negative effect on government performance of their community service obligations, as these are often funded via cross-subsidies. Without safeguards, a new market entrant may be able to target those customers charged the higher prices.

Introduce regulation through the "private" area of contract: Another possibility for ensuring the effective provision of goods and services by private organisations is through the law of contract. Aronson gives the example of *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*,[36] which pointed to legislative and common law reforms that have occurred in some jurisdictions (and is possible in others) that make it possible for governments to contract with private service providers for the provision of services to the public. This circumvents the doctrine of privity of contract, to give consumers a contractual remedy where the provider has breached their obligation.[37]

Amend the jurisdiction of the AAT: Presently, the Commonwealth Administrative Appeals Tribunal (AAT) has no jurisdiction where the decision in question was made under contract rather than under an Act. This has prompted the Administrative Review Council to look at possible extensions of the AAT's power to review decisions of

32 Hilmer report at 242.
33 Hilmer report at 343.
34 Hilmer report at 245 and 260.
35 Hilmer report at 263.
36 (1988) 165 CLR 107.
37 Aronson, above n 25 at 64.

government funded service organisations.[38] This, however, was only to provide the contractual provider with a remedy against the provider of funds, not to provide consumers with a remedy. Consumers would have to apply to the Ombudsman, and information gathered in the process would be available for the purpose of re-evaluating the contract.[39]

Expand the scope of the ADJR Act: The *Administrative Decisions (Judicial Review) Act 1977* (Cth) could be expanded to cover all decisions made under non-statutory schemes funded by parliament.[40] This was suggested by the Administrative Review Council on the basis that decisions made under contract have been excluded from the ADJR Act based on the idea that contractual decisions are "private" not "public".

Airo-Farulla suggests that it is better to approach the public/private distinction, viewing public and private as "two poles of a continuum" rather than as a simple dichotomy.[41] A key case in the area is *R v Panel on Take-overs and Mergers*; *Ex parte Datafin Plc*[42] where the court said that the important issue was not the source of a body's power, but the nature of its function. Such a shift in attitude to what types of bodies and decisions may be subject to administrative review may also ease the problems surrounding restructuring of governments.

Expanding the jurisdiction of the Ombudsman: The Commonwealth Ombudsman has made recommendations about how to expand the power of the office to cover issues arising as a result of contracting out. Philippa Smith, the then Ombudsman, commented that where government contracts out services they should not contract out of responsibility.[43] The Senate Finance and Public Administration Committee similarly recommended that if a service had been subjected to administrative law protections before its status was changed, the protections should continue.[44]

What has this to do with justice?

In some ways this whole investigation is misconceived. Much scholarship has been invested in attempting to draw boundaries between the public and private realms and in disclosing the political

38 *Ibid* at 63.
39 *Ibid* at 64.
40 Administrative Review Council, *The Contracting Out of Government Services*, Report No 42 (1998) at Recommendation 22.
41 Geoffrey Airo-Farulla, "Public and Private in Australian Administrative Law," (1992) 3 *Public L Rev* 186 at 188.
42 [1987] 1 QB 815.
43 Commonwealth Ombudsman, *Annual Report 1996-97* at 60.
44 Senate Finance and Public Administration References Committee, *Service Delivery: Report from the Senate Finance and Public Administration References Committee on Service Committee by the Australian Public Service* (1995).

and ideological interests which are involved in differentiating the spheres.[45] The myth that the state has an inherent interest and legitimate involvement in the public sphere, but that the private sphere is unregulated, has long been shattered. Fran Olsen's work on the significant role the state and the law plays in inventing, maintaining and regulating the family has led the way to introspection about the law as an agent of construction of family life, as well as to analysis of the politics lying behind the myth of the private sphere.

The comments of some scholars are of value here. Karl E Klare made the following point:

> *There is no 'public/private distinction'*. What does exist is a series of ways of thinking about public and private that are now constantly undergoing revision, reformulation, and refinement. The law contains a set of imageries and metaphors, more or less coherent, more or less prone to conscious manipulation, designed to organise judicial thinking according to recurrent, value-laden patterns.[46]

Geoff Airo-Farulla commented:

> My thesis is that a strict public/private distinction is untenable. The twentieth century has been marked by a growth of bureaucratic structures of many different types, and the diffusion amongst these of decision- and policy-making power ... Ultimately, reliance on a public/private distinction impedes the development of appropriate decision-making processes applicable to all bureaucratic structures.[47]

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45 The confusion involves the fact that, in some ways, the private sphere is devalued—it is the sphere where women work and have family responsibilities, where there is inequality and women's "different voice" is heard and the ethic of care developed—but not given value. However, feminist scholarship has pointed out that the family is highly regulated, and that the state invests in the establishment of the heterosexual middle class family. Yet the private sphere is also the sphere of man's autonomy—where each man is king, a ruler in his own realm. In this sense it is highly valued—Mill thought this was too precious to allow state interference. But we know that man's autonomy is women's oppression, and that autonomy is not only gendered but is also subject to the versiptitudes of class, race, religion and ability. It is also the sphere of the free market, which assumes a level playing field and equal opportunity. Success in the market is a sign of merit. The goal posts are fixed so that everyone knows where they stand. Failure in the market is a sign of incompetence, irrationality and moral weakness. However, we know that the market is structured to meet the needs of white, middle class, able-bodied, heterosexual men, and that merit is far from a neutral term. We know that outsiders cannot compete on equal terms, for their participation is always adjectival—always measured against the benchmark male. We also know that the market is far from unregulated—that even the concept of property is constructed by law and is a long way removed from material with which men mix their labour (per Locke). We know that regulation (including legal regulation) advantages some groups just as it oppresses others. It is the sphere is which actors are presumed to be unaccountable for their actions. While we can legitimately insist that public bodies are responsible to the people, the market is thought to have an internal morality, and is believed to be directed at the good of the whole community. Capitalism is a neutral enterprise—in which noone owes responsibility for the rule of the ruling class.

46 K E Klare, "The Public/Private Distinction in Labor Law" (1992) 130 *University of Pennsylvania Law Rev* 1358 at 1361.

47 Airo-Farulla, above n 41 at 187.

How, then, should we respond to decisions to privatise public functions or to contract them out? Can we determine the appropriate rules of accountability by focusing on the inherent public nature of an enterprise? To do this, do we need to engage in a form of forbidden essentialism—a task of analytical jurisprudence? Do we need to return to the idea of "the state", to re-discover the values of public good and public need? Or do we simply operate in a manner that begins from first principles of justice, and assume that wherever justice is threatened law can intervene?

The (post)modern theory of justice, which I recommend, would suggest that this inquiry should be reconceptualised. The conceptual confusion and the competing interests, which abound in the debate, distract us from the real inquiry—the inquiry about state responsibility for the provision of services and state accountability for any decisions it takes with respect to these services. This requires that we return to first principles and ask what theory of the state is recommended by our (post)modern theory of justice. Having established the scope of state responsibility, it should not matter what label is attached to a service, an institution or a decision-making body. If the principles of fairness, accountability and openness are essential to a just administrative system, then formal questions of "public" or "private" status should be irrelevant.

We must therefore revisit the proposals for dealing with the restructuring of formal state power, and ask of each of them whether they are or could be consistent with the principles contained in the (post)modern theory of administrative justice. In other words, we need to establish whether justice requires us to develop principles about the scope of the public sphere, and whether it is ever appropriate to replace the alternative mechanisms of administrative accountability with judicial review or judicial remedies. If not, justice requires that we address the issue to ensure that there is equality of voice and access and that the result of any decision that is taken is not insubordination of an "outsider" group.

The task can be greatly simplified by taking a leap of faith. If we refuse to accept that "public law" or "administrative law" are distinctive projects with boundaries separating them from other areas of law or social life; if we reject the idea that there are identifiable, inherent and definable characteristics of administrative law (a positivist, essentialist strategy); and if we accept instead the possibility that administrative law is a political discourse, we rid ourselves of the problem.[48] Rather than asking what follows from the "public" or

48 See M Loughlin, *Public Law & Political Theory* (Clarendon Press, 1992) particularly Chapter 1. Loughlin argues that an appropriate theoretical approach to public law would be interpretative, empirical, critical and historical. He rejects the conservative or liberal "normativism" of traditional jurisprudence, and recommends a functionalist account of law, which sees law as a guide to political action. The question for jurisprudence is not "what is law", but we need to cast our gaze inwards and ask what vision of law is the theory seeking to clarify. He concludes "Public law should adopt as its principal focus the examination of the manner in which the normative structures of law can contribute to the tasks of guidance, control and elevation in government" (*ibid*, at 264).

"private" nature of the administrative law enterprise, we can simply ask what a theory of administrative justice would demand in the circumstances.

Adopting this strategy of transcending essentialism, we can ask questions about what regulation and legal intervention is required to best approximate a non-racist, non-gendered strategy which addresses the problem of subordination. Should transparency of decision-making be preferred, should it appear that openness of administrative action protects oppressed groups from continued or created oppression, then this should be demanded as a matter of justice. Should it transpire that the threat of investigation or review of processes and outcomes would result in better and more just decision-making, then these processes should be a feature of the regulation of the activity. No post-modern critical theory would recommend faith in the competition of the free market, but equally there would be no comfort in the development of regulation via judicial review.

Tribunal decision-making: does informality lead to justice?

Much attention has been paid of late to questions about tribunal procedure and the identity of tribunals as distinct from courts. There has been some concern about whether curial justice is superior to tribunal justice, or whether tribunals are uniquely positioned with respect to justice. Bearing in mind the theoretical framework of (post)modern administrative justice, there are a number of issues to be resolved. Rather than come to conclusions on these matters, at this time I simply want to point to the range of issues that bear on administrative justice in this context:

- Is justice better served by formality or informality of procedure?
- Do tribunals in fact operate informally—or, for example, is the AAT really a court in disguise? If tribunals are uniquely placed to do justice, then is it important to ensure that tribunals act as tribunals, not courts?
- Will administrative justice be better served by an adversarial or non-adversarial approach to decision-making?
- Does legal representation in tribunals add or detract from administrative justice? On this question, attention needs to be paid to issues such as whether legal representation gives an applicant a voice, or whether lawyers deprive clients of a voice; whether an unrepresented client can realistically deal with a tribunal situation; and whether an unrepresented applicant can possibly determine what the legal issues are, including whether there is an error of law which could lead to an appeal.
- Is the administrative law system itself sufficiently accessible to "outsiders"?
- To what extent are people given a voice in proceedings? Is it possible to provide a forum in which a person can tell their story and also receive justice?

- Is there equality between the parties? It is important to recognise that, even more so than in private law litigation, there can be significant inequality of power, for example, many procedural rules assume that the government agency and the applicant are in essentially the same position.
- How can the process give a voice to those whose voices are silenced? It is important to ensure that the voices of women, children, members of minority groups, non-citizens, people with disabilities, non-English speaking persons and so on, are heard? Are children entitled to administrative justice, and if so, how will this be achieved?
- Can all people afford tribunal justice, taking account of all the costs, such as legal costs, application fees, medical reports, and other evidence that may be required?
- Are tribunal members able to hear the voice of the client—do members come from a representative range of backgrounds, do they have knowledge or training in cross-cultural issues, and have they been provided with education about communication with people from non-English speaking backgrounds or people with an intellectual disability?
- Are tribunals sufficiently adaptable to meet the needs of different applicants—are the rooms and buildings physically accessible, will the forum accept the use of alternative communication devices such as facilitated communication, and will the court provide interpreters where a person may speak non-standard English, (including indigenous people who have distinct language issues)?
- In terms of transparency of decision-making, do applicants understand the decision, the process, and the reasons for the decision?
- To what extent are applicants aided or disadvantaged by alternative dispute resolution? Again, subsidiary issues can arise concerning the problems of conciliation for outsiders, the specific communication skills that may be required to engage fairly in this process, and the application of the rules of natural justice to alternative dispute resolution.
- What ability do tribunals have to aid in the finding of facts—or, for example, should they be able to appoint assessors, as the NSW Administrative Decisions Tribunal is able to do?

This list scrapes the surface of the possible issues that could be raised in defining administrative justice in administrative adjudication. Overall, our responsibility is to ask what justice requires in the circumstances. It may be that the response is that there should be rules which can adapt to the needs of the parties, that there should be accountability and merits review processes which reject any ideas of neutrality, with its inherent consequence of oppression. It may be that if taken seriously the (post)modern theory of justice will allow us to develop a consistent strategy—which may be a strategy which varies with facts and circumstances, but ensures that tribunals and

administrative decision-makers do not stray from the recommended path of justice.

We should bear in mind Jack Waterford's comment:

> There is no justice when people cannot afford to drink at its tap because the system renders legal representation virtually essential but people are neither rich enough nor poor enough to afford it, so they simply forgo the opportunity of getting it. There is no justice when the result grinds so slowly out of the system that it is too late to make much difference. There is no justice when a system has become so arcane that it periodically spits out cases in which precedent rules over equity or when cases are resolved not according to their merit but because of form.[49]

Justice involves much more than is often assumed. The (post)modern theoretical approach, however, recommends that we return to the core of the inquiry. Principles of equality must have content; form and structures must provide a flexibility to deliver justice.

CONCLUSION

I said at the outset that jurisprudence is subversive. Administrative justice as I imagine it will demand a different sort of analysis of administrative law and process than has been undertaken in the past. This may result in a total reconceptualisation of the field. We should not be afraid to take on this task. It does not deny the importance of investigating doctrinal administrative law issues; nor does it discount the research into the operation of administrative law principles (and their battle with the ideas of managerialism). What it does is refocus some of the discussion, and allow administrative law to become an area of law that transforms the principles of modernity. Administrative justice is an important concern. What this analysis shows is that we have a lot of work to do if we can think of administrative law and practice as just. This is a matter to be treated seriously and urgently. The enterprise of justice is at the core of administrative law, and a (post)modern theory of administrative justice poses questions and promotes values which are of fundamental importance to administrative law.

49 J Waterford "Too Much Law, Not Enough Justice: Supporting the Proposition" (1991) 66 *Canb Bull of Publ Admin* at 143-144.

Defining Administrative Justice—The Role of Administrative Law Review Authorities

Administrative Justice—an Ombudsman's Perspective on Dealing with the Exceptional

RON MCLEOD*

'Administrative justice' is an extremely elusive concept. It embraces a complex web of institutions and processes, including: judicial review; tribunals and inquiries; Ombudsmen; complaints procedures and service standards implied by the Citizen's Charter; statutory processes for the protection of consumer interests in privatised industries and the professions. Arguably all official/public decision-taking should be regarded as within the scope of 'administrative justice'.

In addition, 'administrative justice' implies complex sets of values, not always mutually consistent; natural justice, participation, democracy, efficiency, fairness, transparency, cost-effectiveness among others.[1]

WHAT THE OMBUDSMAN DOES

In a formal sense, the Ombudsman discharges functions under a variety of statutes, principally the *Ombudsman Act 1976* (Cth) and the *Complaints (Australian Federal Police) Act 1981* (Cth). He is also a member of the Administrative Review Council, which may suggest something of a broader role.

The Ombudsman receives about 20,000 complaints per year and about 20,000 other inquiries. About 8,000 complaints are investigated to some extent, with mechanisms that range from an exchange of telephone calls in a single day to a full scale investigation with documents being required and people asked questions under oath. Investigations of the latter kind are, fortunately, far less

* Commonwealth Ombudsman

1 "Standing Conference on the Resolution of Citizens' Grievances", a consultation paper published by the Bristol Centre for the Study of Administrative Justice, University of Bristol.

common. The Ombudsman not uncommonly decides not to investigate a matter or to discontinue an investigation. This usually occurs because there is some other way in which the person can advance his or her complaint or because the Ombudsman forms the view that an investigation is not likely to be productive.

At the end of an investigation, if the Ombudsman forms the opinion that there has been one kind of defective administration or another, he or she may make a report to the agency and its Minister. If that is unsuccessful, the Prime Minister can be informed and a report made to the Parliament. These steps, especially the latter ones, are unusual—there have been about thirty notifications to the Prime Minister and only two reports to Parliament during the office's existence. Increasingly, major investigations are about major matters—the systemic problems that can lead to many complaints, and the Ombudsman has issued a number of reports in the past few years which deal with these major issues. The Ombudsman's Annual Report (available in hard copy or through the Internet at www.comb.gov.au) provides statistics on the Ombudsman's activities and some trends in complaint investigation.

The work of the Ombudsman can be affected by changes to the way the public sector performs its tasks. When an agency "contracts out" some element of service delivery, the Ombudsman must consider whether jurisdiction is retained over the service, or whether a legislative amendment to achieve that effect should be requested. When Parliament alters review rights by diminishing their scope, the Ombudsman must consider whether to pick up some of the slack by investigating cases where the system might have failed, or whether investigating would frustrate the clear will of Parliament. Where there is a technology-assisted "improvement" in management, the Ombudsman must consider how to respond to those left behind by it.

Whether the Ombudsman consciously states the question in those terms or not, the consideration of those points is related to an assessment of what is required to deliver an appropriate level of administrative justice. Similar questions arise and are considered by the Ombudsman as a member of the Administrative Review Council.

THE CONTENT OF ADMINISTRATIVE JUSTICE

The extract above from the paper by the Bristol University group suggests that a wide range of bodies apply a wide range of standards which together go to achieve administrative justice. That paper identified as problems the limited scope and vision of each participant in the delivery of administrative justice and the lack of a general oversight for the administrative justice system. Those problems themselves suggest that there is no universal understanding of the concept.

In an attempt to find a form which some may find attractive, I propose that administrative justice be considered as having two themes. First, it comprehends the range of entities which deliver complaint and review services and assurances of those services to the

citizen. Secondly, it comprehends the kind of resolution sought to be achieved.

The providers

In the Australian context, there is a separation of power and a fragmentation of political power between the Commonwealth and the States/Territories. That means that there is potentially a much wider and more confusing range of bodies which are entrusted with providing an assurance of administrative justice than may be the case in other countries. For the sake of convenience, these bodies can mostly be separated into two very approximate clusters dealing respectively with "complaint" and "review". I will deal with a third and residual class later.

A "complaint" is nothing more or less than an expression of discontent, ideally directed to a person who has a power to deal with it or to have it dealt with. In the Australian context, the bodies dealing with complaints are entities such as:

- statutory ombudsman with jurisdiction to investigate the actions of officials or officials within a particular class;
- industry ombudsman, with or without a statutory basis, with the role of investigating and resolving complaints within a defined area of economic or social activity, including bodies dealing with professional supervision and regulation;
- the Australian Competition and Consumer Commission and State and Territory consumer bodies, with the role of supervising commercial conduct between industry participants or between participants and consumers;
- anti-discrimination or similar investigation and reporting agencies;
- the traditional avenue of representations through members of Parliament;
- internal complaint elements of government agencies, whether mandated by Parliament or adopted with the intent of providing a speedy and economic complaint referral service;
- complaint processes established by government contractors under contractual requirements; and
- complaint and grievance processes established within commercial and community bodies. The better examples of these follow the relevant Australian Standard (AS 4269/1995).

Ideally, a complaint body is, to some extent, distant from the person or body whose actions gave rise to the complaint. The complaint body will have the power to take a fresh look at what happened and to impose or recommend a remedy if it considers one warranted. In a sense, it can operate both within and outside the "square" as it is not subject to the same limitations which affect decision-makers and reviewers.

A review body is concerned more with identifiable decisions and will have the power to confirm, vary or set aside decisions and to

direct that decisions be remade according to principles established by the review body. Some examples are:

- the courts in conducting judicial review;
- tribunals conducting merits review or dealing with allegations of discrimination; and
- internal review entities, including both those established by statute and those established to limit or control the flow of matters going to courts and tribunals.

As mentioned, there is a further class comprising other categories, with different responsibilities:

- inquiries by royal commissions, parliamentary committees and a range of advisory bodies which assist parliament and government to develop their responses to policy issues and issues in administration;
- statements and principles developed and released by bodies to establish an official response to an action, either following or in advance of that action (for example, guidelines issued by the Privacy Commissioner); and
- charters, guarantees and other material which contain undertakings of proper service. These serve the purpose of establishing the level of service a body believes it can and should provide and directing consumers of the service to the most appropriate complaint or review body.

Kinds of resolution

The range of things which a complaint, review or other body may propose is governed by the circumstances in which it may act and the action it may take. That is, when can a body be satisfied that action can be taken and what action should it take?

The courts may intervene where there is a legal error, or a legal error of a specified kind, in the making of a decision. They can set a decision aside and establish the principles to be applied when the decision is remade. Or they may affirm a decision, or do a number of other things.

A merits review body will act where it considers the "correct or preferable" decision is one other than that made by the decision-maker whose decision is subject to review. In other words, as well as an objective standard (whether the decision can be sustained as a matter of law), they apply a more subjective standard (whether that decision, or some other decision available under the law, could best deal with the factual circumstances and the application of relevant policy). Attempts to limit merits review to narrower classes are generally directed to this subjective area and implicitly or explicitly require that substantial weight be given to the fact that a decision has already been made and that something should be required to be shown before that decision is disturbed.

A complaint body, on the other hand, will typically have a wide field of possible kinds of error or defect to consider. For example, the *Ombudsman Act 1976* (Cth), provides in s 15(1) that:

> (1) Where, after an investigation under this Act into action taken by a Department or prescribed authority has been completed, the Ombudsman is of the opinion:
>
> (a) that the action:
>
> (i) appears to have been contrary to law;
>
> (ii) was unreasonable, unjust, oppressive or improperly discriminatory;
>
> (iii) was in accordance with a rule of law, a provision of an enactment or a practice but the rule, provision or practice is or may be unreasonable, unjust, oppressive or improperly discriminatory;
>
> (iv) was based either wholly or partly on a mistake of law or of fact; or
>
> (v) was otherwise, in all the circumstances, wrong;
>
> (b) that, in the course of the taking of the action, a discretionary power had been exercised for an improper purpose or on irrelevant grounds;
>
> or
>
> (c) in a case where the action comprised or included a decision to exercise a discretionary power in a particular manner or to refuse to exercise such a power:
>
> (i) that irrelevant considerations were taken into account, or that there was a failure to take relevant considerations into account, in the course of reaching the decision to exercise the power in that manner or to refuse to exercise the power, as the case may be; or
>
> (ii) that the complainant in respect of the investigation or some other person should have been furnished, but was not furnished, with particulars of the reasons for deciding to exercise the power in that manner or to refuse to exercise the power, as the case may be;
>
> this section applies to the decision, recommendation, act or omission constituting that action.

It is worth noting the range of matters about which the Ombudsman may form an opinion. It comprehends apparent legal error, but also defects in process apparently not amounting to legal error. It requires attention to concepts such as that of an action being "unjust" or "in all the circumstances, wrong". It assumes (pace *Public Service Board (NSW) v Osmond*[2]) that reasons ought to be given, notwithstanding the absence of a specific statutory requirement.

Those tests suggest a broad content for administrative justice. They suggest that what should be considered is how, after investigation and in the light of all the circumstances, the action appears to the Ombudsman. However, while the Ombudsman can thus take into account broad concepts such as "justice", the distributive effect of government programs should also be taken into account. It is recog-

2 (1986) 159 CLR 656.

nised that there are conscious policy decisions made, and given effect by Parliament, and it is not the role of any official to cut back the clear legislative intent of Parliament. The Ombudsman reports to and is ultimately responsible to Parliament.

With that said, s 15(1)(a)(iii) of the *Ombudsman Act* enables the Ombudsman to make a report, even where an action was in accordance with law or policy, but that law or policy was itself defective. There is no contradiction here—Parliament cannot be expected to be cognisant of every implication of every provision in every bill it passes. Especially in the "bulk handling" areas of public administration, it is inevitable that sometimes there will be people for whom the proper and even application of the law produces an unconscionable result. While it is easy to say that that can and should be avoided by careful development of policy and its careful expression in legislation, it cannot be expected that legislation will always deal equally aptly with every change in circumstances.

Subsections 15(2) and (3) set out the remedies which the Ombudsman may recommend:

> (2) Where the Ombudsman is of the opinion:
>
> (a) that a decision, recommendation, act or omission to which this section applies should be referred to the appropriate authority for further consideration;
>
> (b) that some particular action could be, and should be, taken to rectify, mitigate or alter the effects of, a decision, recommendation, act or omission to which this section applies;
>
> (c) that a decision to which this section applies should be cancelled or varied;
>
> (d) that a rule of law, provision of an enactment or practice on which a decision, recommendation, act or omission to which this section applies was based should be altered;
>
> (e) that reasons should have been, but were not, given for a decision to which this section applies; or
>
> (f) that any other thing should be done in relation to a decision, recommendation, act or omission to which this section applies; the Ombudsman shall report accordingly to the Department or prescribed authority concerned.
>
> (3) The Ombudsman:
>
> (a) shall include in a report under subsection (2) his or her reasons for the opinions specified in the report; and
>
> (b) may also include in such a report any recommendations he or she thinks fit to make.

It is apparent at the most cursory reading that s 15(2) enables the Ombudsman to recommend that practically anything be done to provide a remedy. Not only can the Ombudsman recommend that action be taken to amend a rule of law, enactment or policy, he or she can recommend that "any other thing" be done or that some action be taken to "rectify, mitigate or alter" the effects of a decision. The Ombudsman thus can, and does, recommend that an amount of

money be paid as compensation, notwithstanding the absence of a legal liability or the terms of any statutory or non-statutory scheme to provide compensation. A recommendation can be made that a debt not be recovered regardless of the requirements of legislation, or that an apology be given and that procedures be reviewed.

In other words, the Ombudsman's power to recommend a remedy is not limited by the statutory or legal context in which a defective administrative action occurred. The Ombudsman does not just act, as a court can, to place a person in the position he or she would have occupied had a tort not occurred. The Ombudsman can recommend that others in the same position be treated in the same way, and that the legal or policy rules that led to a problem be changed.

What does this say about administrative justice?

It can be seen, then, that the comprehensive approach to conflicts involving the public that is embodied in the term "administrative justice" is relevant to the range of matters that can be addressed and the range of remedies that can be achieved, as well as to the range of mechanisms that can be marshalled to deal with a matter and find a remedy.

There is ample authority, now quite old—for example, *Re Emery and Director-General of Social Security*,[3] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*[4] and *Nevistic v Minister for Immigration and Ethnic Affairs*[5]—to suggest that the exercise of discretionary powers should be guided by concepts of "consistency, fairness and administrative justice". Of course, the existence and breadth of discretionary statutory powers have themselves been limited in recent years, most notably in the wholesale move of the migration program to a visa-based system with less room for individual judgment and fewer opportunities for tribunals and courts to intervene. Cases that have some exceptional or unusual feature not able to be accommodated within the statutory framework can only be addressed by limited discretionary powers, exercisable (in the migration example) only by the Minister.

The Ombudsman expects agencies to have regard to administrative justice concepts in their decision-making. This means that they should act in recognition of the range of checks and controls that exist to prevent them from behaving unlawfully, from being unjustifiably discriminatory or unnecessarily intrusive and so on. Agencies should also display in their decision-making and the management of their relationships with the public, an element of objectivity and a capacity to stand back and see what result is actually achieved and whether that result is referable in a common-sense way to the matter under consideration.

3 (1983) 5 ALN N139.
4 (1979) 2 ALD 634.
5 (1981) 34 ALR 639.

The inflexible following of policy can amount to legal error; while it can assist consistency and certainty, it can also lead to unintended or unacceptable outcomes. There is little more calculated to aggravate an investigative body (apart from semantic and insubstantial quibbles about jurisdiction) than an assertion that normal policy and practices were followed in a case which clearly warranted individual consideration and where following normal practice has led to gross unfairness. Similarly, the uncritical application of legislation, when it is clear that some special handling is warranted, can lead to absurd outcomes that could be avoided or ameliorated by the exercise of a discretionary power or by following some other legislative path.

Unfortunately, there is no way of identifying in advance every case or kind of case which would warrant exceptional treatment. In some cases, the special nature of the case will be manifest at the outset but, more commonly, the fact that the general rule does not apply to it in a sensible way will not be apparent until that rule has been applied. An observant official would note and take action at that time, a machine never would. It is often not until the person has sought review or complained to the Ombudsman that the absurdity of the result is seen. A member of the public may not be expected to follow the twists and turns of reasoning that led to the result, but he or she can see usually that it is not sensible that a payment is not made or a permission not granted when that is what happens in every obviously comparable case.

Some cases have suggested that a legislative analogy approach should be taken to developing administrative justice. That is, where legislation advances in one area of administration, the common law and practice should allow other areas to develop in parallel, although adapted, ways. This approach has some attractions, but it could threaten the sovereignty of the legislature by removing responsibility to instigate change from Parliament to less accountable organs. With that said, we would all be aware of areas where analysis can be assisted by analogy—that is not the same as replacing one with the other.

PUBLIC ADMINISTRATION

Australian public administration in the 1990s, and likely beyond, is changing, probably irreversibly. It may seem absurd, but there was a time in living memory when some social security benefits were granted only after examination of the case by a special magistrate individually appointed by the Governor-General. This compares with the present requirement that a person identify the kind of benefit he or she should receive and make a claim which mostly operates on a self-assessment basis; after an initial interview in some cases, and unless something goes wrong, the decision may be practically untouched by human hands. Similar changes occur in the tax field.

These changes occur for good reasons. They result from ever improving targeting in the way government delivers its services: for example, social security payments are better and better adapted to

respond to specific and identifiable areas of need. The changes lead to greater efficiency in administration and to lower overheads relative to the amounts involved. Mostly, they represent a sensible use of information technology and a high level of commitment to the bulk, distributive elements of public administration. They are more likely to lead to consistency.

At the same time, the efforts of the public sector are ever more closely confined to its core responsibilities. If a task can be adequately performed by someone who is not a public servant, and especially if it can be so performed at a lower cost, then the view is usually taken that that is how it should be performed. Because some of the inefficiencies in public sector processing result from an excessive concern with form rather than with outcome, it will often be that the same outcome is sought to be delivered in different and more efficient ways.

There are, of course, some dangers in these developing approaches to public administration. They can produce lower levels of accountability and make it harder to attribute responsibility—but those problems can usually be addressed by careful drafting of an outsourcing contract. More importantly, from the point of view of administrative justice, they can add to the problems inherent in dealing with the exceptional case. It remains difficult to identify such cases in advance but, even where they become apparent in retrospect, there can be problems in sheeting home responsibility to rectify unintended outcomes. The contractor may have done all that is specified in the contract, but that is not enough to deal with the problems that arise when general rules are applied across large populations. If a contract requires that a broad outcome be achieved, that is all that the contractor has to do, and it is not the contractor's problem if there are a few cases that should have been handled better.

POSSIBLE ANSWERS

There are many ways in which the challenges arising from new kinds of administration can be met. One, recently proposed by the Administrative Review Council, was that the actions of contractors should be deemed for Ombudsman purposes to have been taken by the contracting agency.[6] Other proposals of the Council address the review of decisions taken by contractors. Legislation has appeared which places information held by contractors in the same position as information held by a department.

An approach to policy development conditioned by administrative justice considerations would ask:

- Should each class of interaction between the "citizen" and the state (or its agents) be subject to some degree of independent oversight, and what magnitude of concern should prompt that oversight?

6 Administrative Review Council, *The Contracting Out of Government Services*, Report No 42 (1998) at paras 4.41 – 4.43.

- Where a kind of interaction should be so subject, is it better handled under the complaint or the review model or under some other approach? In other words, is it amenable to a new decision or does the problem exist outside the scope of the decision-making regime?
- What processes and limitations should apply to the complaint or review?
- What existing or new body is best placed to conduct those processes?

Obviously, in this task, there is—as suggested in this paper—a risk that some kinds of case will slip through the cracks. An administrative justice based approach would anticipate this and allow overlaps.

In summary, I would see administrative justice as being about both what the citizen can reasonably expect in terms of outcome and about ensuring that there is an adequate range of avenues to achieve those outcomes.

Defining Administrative Justice—Perspectives from a New Tribunal

JUDGE KEVIN O'CONNOR*

CREATING AN ADMINISTRATIVE TRIBUNAL—SOME POLICY ISSUES AND OPTIONS

Commonwealth, Victorian and Australian Capital Territory (ACT) government administrations have long experience of the operation of an external merits review tribunal. New South Wales is now commencing on that path, through the new Tribunal that I head—the Administrative Decisions Tribunal of New South Wales (ADT).[1] The external merits review responsibilities of the ADT are located in

* President, Administrative Decisions Tribunal of New South Wales.

1 I have dealt with the ADT's jurisdiction and responsibilities in two recent unpublished papers, "Administrative Decisions Tribunal: Jurisdiction and Early Experience" (College of Law, NSW, Continuing Legal Education Program, 25 March 1999); and "The Administrative Decisions Tribunal—an Early Report" (PIAC Open Government Conference, 10 February 1999). For general information regarding the ADT, consult web-page *www.lawlink.nsw.gov.au/adt*. The objects, constitution and procedures of the ADT are governed by the *Administrative Decisions Tribunal Act 1997* (NSW) (ADT Act). Jurisdiction is conferred by numerous primary statutes. They are listed and hot-linked at the web-site. There has been progressive commencement of the jurisdictions conferred, with some occurring on the day of the commencement of the Tribunal, 6 October 1998, a significant number commencing on 1 January 1999, and several more on 1 March 1999. The General Division commenced on 6 October 1998, and the Community Services Division on 1 January 1999.

the General Division and the Community Services Division. There are several other Divisions.[2]

I understand that the last four Attorneys-General in New South Wales have favoured the creation of an external review tribunal of the kind the ADT represents, and that the concept has had strong support over many years by the Attorney-General's Department. Yet it took until 1996 for such a change in governmental arrangements to win the support of a Cabinet. Then over a year passed from assent (July 1997) to commencement of the Tribunal (October 1998).

The absence of an external merits review tribunal in other jurisdictions in Australia highlights the official caution which surrounds the creation of such an institution. Added to that we see a Commonwealth policy thrust to roll back the influence of external merits review, persisting over many years in the case of the immigration portfolio, and now government-wide as reflected in the proposals for a Commonwealth Administrative Review Tribunal.

The key players in establishing external mechanisms—ministers and senior public servants—are more comfortable with an institution whose focus is the adequacy of the procedures of administrative agencies, and one whose conclusions are not determinative. The office of Ombudsman fits this model. It has won wide acceptance and is part of the institutional arrangements of all governments in Australia.

On the other hand, an external review tribunal can interfere with actual outcomes, even though a decision has passed the test of procedural adequacy. The external review tribunal intrudes upon the norms of decision-making. The adherence of external review tribunals to the judicial method in making their decisions gives rise frequently to class-wide and systemic effects on administrative action and decision-making.

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2 The Equal Opportunity Division commenced on 6 October 1998 and deals with complaints of unlawful discrimination, formerly handled by the Equal Opportunity Tribunal. The Legal Services Division commenced on 6 October 1999 and deals with complaints of misconduct against legal practitioners and registered conveyancers, formerly handled by the Legal Services Tribunal. The Retail Leases Division commenced on 1 March 1999 and deals with retail lease disputes, formerly handled by the Commercial Tribunal. The Occupational Regulation Division is yet to commence, and will deal with occupational regulation matters including those currently handled by the General Division.
The Tribunal has one full-time member, the President, who is also head of the General Division. The other Divisions have Divisional Heads, except for Retail Leases where an appointment is yet to be made. The Tribunal has numerous part-time members, many exclusive to a particular division. The legally-qualified members are ranked as either Deputy Presidents (who may be Divisional Heads) or Judicial Members. The community members are referred to as Non-Judicial Members. Arrangements for the constitution of the Tribunal vary as between Divisions and sometimes as between classes of matter. In the General Division, matters are normally dealt with by a legally-qualified member sitting alone.

In the Commonwealth arena, these class-wide effects often impact financially on major Commonwealth programs, such as social security, customs or taxation. The potential for multi-million dollar financial impacts on programs are less apparent in the State arena. At this point I cannot identify any merits review jurisdiction of the ADT where decisions would be likely to impact on overall State finances in any significant way. That may change to some degree if and when the ADT becomes a review tribunal in relation to decisions of the Office of State Revenue.

External review tribunals can also impact, in a class-wide way, on social policies. In New South Wales the potential for this is apparent. We have a sensitive jurisdiction handled through the Community Services Division dealing with appeals from exercises of discretion in various aspects of the Community Services portfolio. The ADT has a number of jurisdictions to do with occupational licensing, some subject to new stricter probity standards motivated by concern in government and the Parliament over connections of the licenses with criminal activity. In our early months of operation we have dealt with many cases involving appeals from refusals of licences, mainly in relation to security guards.

External review tribunals impact on political decision-making. Cases involving freedom of information appeals as they relate to high-level policy documents and contracts often carry high political risks for government. In Victoria in particular we have seen freedom of information develop as an extra-parliamentary ground of contest between Opposition and Government. Key Opposition figures of the 1980s in Victoria exploited the opportunities provided by the Cain Government's progressive *Freedom of Information Act 1982* (Vic). The Administrative Appeals Tribunal decisions of that period are dotted with the names of Opposition Members of Parliament who were later senior Ministers in the Kennett Government. Through their Government's clear majorities in both Houses of Parliament those once active users of Freedom of Information (FOI) were able to roll back the Victorian FOI Act. Similarly, in the 1990s we see scattered through the Victorian tribunal reports, the names of the shadow front-benchers in the Labor Opposition.

The FOI jurisdiction has great potential to draw the external review tribunal into the arena of day-to-day politics. The judicial method of decision-making does not sit well with this environment. Subject to the approval of the relevant chief judicial officer, I have the power to appoint a judge to sit at the ADT.[3] I have in mind listing judges to sit in apparently politically sensitive FOI cases.

The sensitivities associated with judicial involvement in the day-to-day environment of government has, of course, been recognised by the courts. Historically the inherent jurisdiction exercised by way of judicial review was carefully circumscribed. The superior court of record only interested itself in the question of whether the outer boundaries affecting administrative decision-making had been

3 *ADT* Act s14.

exceeded—the boundaries set by statute in relation to the exercise of powers or the boundaries set by the common law in relation to natural justice.[4] In the case of procedural challenges, the courts of forty years ago essentially confined their interest to the procedures of formally established tribunals rather than the broader executive decision-making arena.

Interestingly, we have seen governments in recent years experiment with other mechanisms for dealing with FOI disputes. In two instances, Queensland and Western Australia, a special office of Information Commissioner has been created. This replicates a model popular in Canada.

The Information Commissioner in the Canadian model is a statutory office holder who specialises in hearing appeals against decisions made by administrative agencies in relation to access to information (and in the case of personal information, also deals with the range of matters protected by modern information privacy principles). At the federal level in Canada, there are two Commissioners playing this role—an Information Commissioner, enforcing the federal Freedom of Information Act, and a Privacy Commissioner, enforcing the federal Privacy Act. In the Provinces that have equivalent laws both are overseen by a single office of Information and Privacy Commissioner.

Those mechanisms, for information appeals, reflect a highly specialist response to a jurisdiction which straddles a sensitive boundary between government administration and external merits review. A sole office-holder, who (in the Canadian case at least) usually has a high degree of public visibility, is responsible for dealing with this class of business. These responsibilities are usually coupled in the Canadian case (and also in the case of the federal Privacy Commissioner in Australia) with broader proactive functions in relation to the implementation of information statutes, such as issuing guidelines and policies to assist the administration and the undertaking of audits of compliance.

In the Australian instances that I have mentioned (the Queensland Information Commissioner and the Western Australian Information Commissioner), both offices have produced a steady stream of highly instructive FOI decisions with a high level of consistency and policy coherence. In the Commonwealth arena, very many judges and tribunal members have been involved in making FOI decisions. The Commonwealth Attorney-General's Department has over many years published a commentary on Commonwealth and Federal Court FOI decisions, and that commentary has often been critical of decisions on the ground of lack of consistency. The Information Commissioner model should avoid this problem.

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4 Captured in the statement of Lord Parker CJ: "in modern Britain where no agreement exists on the ends of society and the means of achieving those ends, it would be disastrous if courts did not eschew the temptation to pass judgment on an issue of policy. Judicial self-preservation may alone dictate constraint": *Recent Developments in the Supervisory Powers of the Courts over Inferior Tribunals* (1959) 27–28.

The model's main perceived problem relates to the degree of independence of the office-holder. In my time as federal Privacy Commissioner I became familiar with the variety of arrangements that surrounded this question in other countries. One approach is for the office-holder to be given a fixed, single term of six years (this is the approach in British Columbia). Another involves guaranteeing immediate generous pension rights in the event that the office-holder is not appointed at the end of the final term (there is a two-term limit) to another office or position of equivalent status (a common approach in Germany's jurisdictions). In both of those examples, the appointment is effected by Parliament rather than the Executive Government, thereby assisting transparency in the process.

Concerns over independence underpin the pattern common to the Commonwealth, Victorian and New South Wales tribunals of having judges head them. But, as we know, a membership structure with limited term members, especially if they are part-time, allows for cost-effective and flexible use of resources. It also makes it possible to re-orient the membership list to respond to shifts in jurisdiction. It also serves the purpose of permitting the list to be replenished with members who have had recent experience of the policy environment to which the tribunal connects. For those reasons, I think it is unlikely that parliaments and governments will move to having tribunals constituted substantially by long-term, tenured members.

HOW SOME OF THOSE TENSIONS PLAYED OUT IN THE EARLY DAYS OF THE ADT

For New South Wales (outside the freedom of information area), the procedural requirements familiar to Commonwealth, ACT and Victorian government decision-making, are new. I refer in particular to the right of the individual to seek internal review of an adverse decision, and the right to a statement of reasons.[5]

There have been requests directed to the ADT to assist agencies in developing internal review structures, and in going about the task of developing adequate approaches to the provision of statements of reasons. A key objective of the *Administrative Decisions Tribunal Act* is to foster a positive atmosphere in NSW government administration towards administrative review. While, naturally, I am sympathetic to the value of agency education, I have not seen it as appropriate for the ADT to take the lead. I am willing to lend assistance to such programs, but I believe that they must be lead from within the administration.

The ADT's role, as I have seen it, does not extend to education and guideline activities of the type that may be appropriate for a

5 *ADT Act* Chapter 5, Part 2—Role of Administrators, s 48—notice of decision and review rights; ss 49–52—duty to give reasons on request; s 53 internal review; s 54 guidelines.

Commissioner. I have seen the ADT's role in fostering a positive atmosphere towards administrative review as being tied to the performance of its formal responsibilities, ranging from preliminary conferences to the use of assessors and external mediation, through to decision-making on the papers, as well as traditional hearing and determination. In taking that approach, I have broadly positioned the ADT within the judicial model of decision-making.[6]

I have been keen in the early cases that have come before me to seek to explain both to the applicant, usually an aggrieved individual, and to the administrator whose decision is under challenge, that, however difficult it may be to accept, the task of the Tribunal is to find the "correct and preferable" decision, not simply to adjudicate in an adversarial contest.[7] This, as you know, has implications for the way evidence is handled and for the way in which the proceedings are conducted. It is vital, therefore, that administrative agencies account to the Tribunal for their decision in a candid, cooperative and frank way. Tactical withholding of material is not acceptable. Equally, it is critical that it is understood that the task of the Tribunal is to scrutinise, taking account of the applicant's objections, the evidence, law and official policies which the administrator applied, or might have applied in the case of fresh evidence.[8]

Ideally, of course, an administrator should provide its reasons with its decision, including detail as to the law and the factual material that was relied upon. If this practice were to be more widely adopted so that people could see behind decisions and were therefore better informed, the administrative decision-making process and

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6 For some early observations on requirements in relation to statements of reasons, see *Haining v Commissioner of Police* [1999] ADT 7.

7 *ADT Act* s 63(1): "In determining an application for review of a reviewable decision, the Tribunal is to decide what the correct and preferable decision is having regard to the material then before it, including the following: (a) any relevant factual material; (b) any applicable written or unwritten law".

8 I have found helpful dicta in the recent decision of the Victorian Court of Appeal in *Transport Accident Commission v Bausch* (1998) 13 VAR 61 at 72–73, per Tadgell J:

> The review is in no sense to be treated as raising a *lis* or amounting to an adversarial contest in which [the administrator] is entitled to engage in curial tactics. That is not to say that there cannot be disputed issues between the parties raised for resolution, or that [the administrator] may not seek actively to support before the Tribunal its decision which is under review. If it does seek to do so, however, it is *a fortiori* imperative that its reasons for its decision, and the material that it considered in making it, should be squarely and unequivocally revealed to the Tribunal. Moreover, subject to certain exceptions which are not now relevant, the Tribunal is obliged to ensure that each party to a proceeding before it is given a reasonable opportunity to present the case ... The obligations imposed on [the administrator] by s 36(1) of the [Victorian] Tribunal Act are obviously designed to assist the Tribunal to understand how the decision under review was made and the reasons for its making. I have no doubt that the person seeking the review ... should ordinarily be entitled to the same information in order to enable the decision to be investigated and appraised. To set out the findings of fact, and the basis of them, is but part of the tripartite obligation imposed on the decision-maker by s 36(1)(a) to make a statement rendering the decision intelligible and enabling intelligent criticism of it.

public confidence in it would undoubtedly improve, and fewer applications for review would need to be lodged.

I have no interest in the ADT being seen as a "gotcha" tribunal. I want it to be seen as a place where a detached examination takes place, courteous to both the citizen and the administrator. Where possible shortcomings and deficiencies are identified, I will be looking in particular to senior administrators to work constructively to deal with them, and not to harbour the attitude, so common in times past, that external oversight mechanisms are a barrier to good administration.

Although the usual mandate of an external merits review tribunal involves ascertaining what is the "correct and preferable" decision, the ADT in its early days has encountered two classes of business where its role has been circumscribed.

Many of the applications for review of decisions to refuse to renew security guard licences relate to decisions where the administrator (the Commissioner of Police) has been statute-bound to refuse the application, most commonly on the ground that the applicant for renewal has incurred a conviction belonging to a prescribed category within the last ten years. I ruled in a case in December 1998 that the only role left for the ADT to perform is to satisfy itself that the administrator has properly established the "objective facts", in this instance that the criminal record is correct and has been correctly classified as falling within the scheme.[9] Instances of error in these regards, as one would expect, have proved to be rare.

An external review tribunal clearly has a very limited role to play in cases where the decision under review is of a mandatory character. My understanding of the situation that has applied historically in the categories of licensing that have so far come to the attention of the ADT is that the decision not to renew a licence operated upon expiry of the previous licence, which in practice often meant immediately. Similarly, a decision to revoke a current licence operated immediately. Thus people whose job depended on the licence (for example, security guard, taxi driver and tow truck operator) were rendered unemployed.

Because the ADT has a stay power pending final determination of an appeal,[10] we have become—at least in the case of security guards who have been denied renewal on mandatory grounds—the first point of application. If the stay criteria can be satisfied, as they have been in many of the cases that have presented (an isolated minor conviction several years old, a stable employment history and family responsibilities, no countervailing public interest considerations), at least the individual can win a few weeks' grace while he or she remains employed and looks for another job. The stay power is far more important to the applicant than internal review or the provision of a statement of reasons. I have allowed matters to proceed

9 *Bourke v Commissioner of Police* (General Division, 17 December 1998).
10 *ADT Act* s 60.

in the Tribunal even though those usual pre-conditions have not been met.

Another category of business that stands apart from the usual situation and one which has absorbed significant time at the ADT in its early days, relates to applications by organisations seeking to register non-government schools in New South Wales. In this area the ADT, exercising the role previously performed by the Schools Appeals Board, can re-examine the recommendation to the Minister for Education made by the responsible authority, the Board of Studies, and if it so considers make an alternative recommendation.[11] In this instance the ADT does not have the opportunity to make a final decision.

Three other aspects of the early experience of the ADT may bear mention. First, almost all of our applicants to date have appeared in person, sometimes with the aid of friends or family while, as is to be expected, administrators have usually been legally represented, either through the office of the Crown Solicitor or by legal officers within the department or agency. Given the difficulties faced by legal aid commissions, I expect this to be a long-term pattern.

The second point is the presence in the structure of the ADT of an Appeal Panel level. It is now possible for a disappointed party at first instance before the ADT to appeal the decision to the ADT Appeal Panel. An appeal "may be made on any question of law, and with the leave of the Appeal Panel may extend to review of the merits of the appealable decision".[12] So the ADT at Appeal Panel level is faced with the intricacies connected with identifying whether the aggrieved appellant has identified a "question of law". If there is no question of law identified, then there is no jurisdiction, as we have seen it, to go any further, in particular to look at any matter to do with the merits. And, of course, most appellants are aggrieved by the outcome on the merits. Moreover, in cases where the appellant is an aggrieved individual without legal training appearing in person, they may have great difficulty in identifying a question of law.

Thirdly, through its emphasis on alternative dispute resolution, the ADT Act seeks to draw the ADT away from traditional judicial dispute resolution models. The ADT Act provides for several methods of resolving a dispute short of a full-scale hearing, including: decisions on the papers; use of assessors; early neutral evaluation; preliminary conferences; and mediation.

In the case of FOI disputes where the administrator has given complete or substantial access to personal documents but the applicant wishes to contest their contents through amendment requests, I see an important role for the preliminary conference. The material is sometimes voluminous and the individual may be seeking line-by-line correction. Cases with these dimensions if fought on standard adversarial lines could take many days. I have been trying to encour-

11 See generally *Education Act 1990* (NSW) Part 10.

12 *ADT Act* s 113(2).

age parties in cases of this kind to attend a preliminary conference before a judicial member of the Tribunal. If the matter is not finally resolved, then those matters that remain in dispute are referred out, with the matter listed for hearing before another member. The conference format has the capacity in large cases to save several days of hearing time, with consequent benefits to the parties, their witnesses and the wider community through budgetary savings.

The interplay between government administration and independent functionaries such as tribunals, ombudsmen and commissioners is a continuing dynamic. Mine are early perspectives deriving from the first few months of operation of a new merits review tribunal. We have a considerable distance to travel in New South Wales before we can compare our experience with that in some other jurisdictions. We in the New South Wales Tribunal are keen to learn from those experiences.

The Constitution and Administrative Justice

Administrative Justice and the Australian Constitution

JEREMY KIRK*

In one sense the "whole of administrative law ... may be treated as a branch of constitutional law".[1] Administrative law, after all, necessarily draws on some conception of the appropriate relationship between citizens and the state. That branch of constitutional law which relates to the Australian Constitution itself interacts with administrative law in a range of ways. For example, the principle from the *Communist Party* case can require that executive decisions which operate near the limits of constitutional power must be subject to judicial oversight or review.[2]

Within this general context a more specific question usefully can be asked. That question is whether, and to what extent, the Constitution can be said to secure or guarantee administrative justice, particularly by entrenching procedures for review of administrative decisions, and/or by establishing certain minimum standards of executive decision-making. Three constitutional doctrines or provisions bear most directly on the issue: the separation of judicial power; the original jurisdiction of the High Court secured by s 75(v), as interpreted in light of the rule of law; and representative democracy.

I will provide brief observations on the first topic. It involves complex and arid jurisprudence, and has been examined in depth elsewhere.[3] I cannot do full justice here to the relevant aspects of the

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1 W Wade & C Forsyth, *Administrative Law* (1994) at 6.

2 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1; see L Zines, *The High Court and the Constitution* (1997) at 231-235, 238-242.

3 Zines, *ibid* at Chapter 10; R D Lumb and G A Moens, *The Constitution of the Commonwealth of Australia*, Annotated (1995) at 352-363.

constitutional doctrine of representative democracy, but some interesting possibilities arise which are worthy of discussion. My main focus is whether, and how, the High Court's s 75(v) jurisdiction can be regarded as giving entrenched status and protection to certain of the common law grounds of judicial review. This is a topical issue in light of the ongoing controversy over review of immigration decision-making. A credible argument can be made that the Constitution entrenches certain principles of administrative justice through s 75(v). The argument should not, however, be accepted. Broad rights relating to the standards of review of administrative decision-making should not be regarded as entrenched in Australia.

THE ENTRENCHED SEPARATION OF JUDICIAL POWER

Bradley has proposed a right to administrative justice with three elements.[4] He argues that individuals should have the right to:

- seek judicial review of executive decisions which adversely affect them (and this by reference to all the grounds of review);
- full appeal from the initial decision before it becomes operative, and thus before the occasion for judicial review arises; and
- have the *whole* issue (facts and merits) left to the determination of courts where the matters are of great importance to the individuals concerned.

The separation of federal judicial power in Australia is of particular relevance to the first and third of these points, for it partially achieves both. To explain this requires some exposition of the separation doctrine.

The Australian Constitution allocates federal legislative, executive and judicial power to, respectively, the Commonwealth Parliament, the federal executive, and the High Court and certain other courts.[5] It has been long-held in Australia that this means that only the recognised "Chapter III courts" can exercise federal judicial power,[6] and that those courts can exercise no power other than judicial power or powers incidental thereto.[7]

It has proved impossible clearly to delineate what the judicial power encompasses. The classical Australian definition is that it involves the resolution of particular individual controversies, about existing legal rights or duties, in a binding and authoritative determination.[8] In contrast, the exercise of legislative and executive power is taken to involve the creation of new rights or duties. Exercise of

4 A W Bradley "Administrative Justice: A Developing Human Right?" (1995) 1 *European Public Law* 347 at 351-353.

5 Sections 1, 61, 71, in Chapters I, II and III of the Constitution.

6 Since *NSW v Commonwealth* (1915) 20 CLR 54.

7 Since *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (*Boilermakers* case).

8 See *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ; more recently, see eg *Bass v Permanent Trustee Co Ltd* [1999] HCA 9; 161 ALR 399 at para 45.

legislative power usually produces general rules. Executive power overlaps with the judicial power in that it does usually involve applying the law to individual issues.

The key difficulty is that an exercise of power can often simultaneously be characterised in different ways. For example, the resolution of an industrial dispute by a legal order, made by reference to pre-existing legally-prescribed (if broad) standards, might well be thought to involve judicial power. Yet such industrial awards have been viewed as creating new rights to govern the parties' future relations, and thus as involving the exercise of executive power.[9]

The High Court has turned to a series of considerations to seek to resolve whether a conclusive decision on a point can only be taken by the judiciary as an exercise of judicial power. One question is whether the executive decision can be said to be "merely the incidental or ancillary determination of circumstances as a *factum* for the operation of the legislative will".[10] If so, the decision-maker's view is regarded merely as one condition for the intended operation of the law, where what hinges on the decision is merely the creation of new rights/duties by that law. However, the more significant the general potential consequences for affected individuals, the more likely it is that determination of the issue will be characterised as involving judicial power. An associated guide is whether that type of issue had traditionally been dealt with by courts.[11] Other factors include whether the decision-maker is required to employ traditional judicial processes (which makes the power more likely to be regarded as judicial),[12] and whether the decision involves the exercise of a broad discretion (less likely to be judicial).[13]

Applying this factorial approach is necessarily rather uncertain. And it still allows for significant overlap between executive and judicial power. Thus a type of decision might be such that it can be allocated both to the executive and to the judiciary. The decision whether to deregister trademarks is an example of this.[14]

In relation to the first element of Bradley's suggested right, therefore, the separation of powers does not entrench judicial review of all executive decisions, but it does have some effect. For decisions characterised as merely involving the creation of new rights then there is no need for judicial oversight. Yet if an executive action is regarded instead as involving the application of an existing legal standard to past or existing facts, then there must be the possibility of judicial control. Only the courts can *conclusively* determine the

9 *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 462-463 per Isaacs & Rich JJ.

10 *Federal Commissioner of Taxation v Munro* (1926), 38 CLR 153 at 176 per Isaacs J; see also *Waterside Workers' Federation*, *ibid* at 464 per Isaacs & Rich JJ.

11 Re both factors see *R v Quinn*; *Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 10-11 per Jacobs J for the majority; *R v Davison* (1954) 90 CLR 353 at 382-384 per Kitto J.

12 Eg *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (1959) 101 CLR 652 at 659-660.

13 Eg *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144.

14 See *Farbenfabriken* (1959) 101 CLR 652 and *R v Quinn* (1977) 138 CLR 1.

issue. Thus a customs officer can make a decision as to whether an import falls into a category of prohibited goods, but the decision must be capable of judicial control/oversight if the allocation of power is to be valid. Judicial control can be implemented in a number of ways: by only the courts being authorised to enforce the decision (the courts must have sufficient scope to re-open the decision applying the law);[15] by there being sufficient scope for judicial review of the decision itself; and/or by an appeal mechanism.[16]

Judicial control can only be excluded when the matter is characterised as involving purely executive power (creating new rights/duties). However, such a characterisation is common. As noted above, even the quasi-judicial task of settling industrial disputes by the making of orders/awards have been regarded as capable of final determination (if not enforcement) by the executive branch.

Thus the degree to which the separation of powers entrenches some degree of judicial review (or other judicial control) depends on whether the exercise of a particular allocated power is characterised as being judicial or executive in nature, a question which commonly is uncertain. This uncertainty creates room for expansion of the entrenched protection of judicial review. For the sorts of reasons given in the next section, I suggest that significant expansion of the constitutional limitation is not justified or desirable.

Bradley's third element—that all aspects of important decisions must be taken only by the courts—is also partially reflected in Australian law. As noted above, the application of federal law to individuals on issues of great consequence is likely to be characterised as involving judicial power, and thus capable of determination only by Chapter III courts. Bradley's point is that the whole issue should be left to the courts, judicial review being an insufficient degree of control for such matters. Under the Australian doctrine it is unclear what exact degree of judicial control is necessary in relation to any particular matter. The requisite degree of control is likely to depend on the significance of the issues at stake. For matters of substantial consequence, any significant restriction on the courts' ability to consider or reconsider the whole matter will raise constitutional objections.[17]

The Australian doctrine is not, I suspect, as broad as Bradley would espouse in what it regards as of great consequential significance. When this factor is mentioned by judges it tends to be linked to such matters as determining criminal guilt or civil liability for compensation in tort or contract.[18] Bradley gives as an example a

15 Cf *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.
16 Note Zines 1997, above n 2 at 188-190.
17 Eg *Brandy v HREOC* (1995) 183 CLR 245 at 261-264, 270-271.
18 Eg *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175 per Isaacs J; *R v Quinn* (1977) 138 CLR 1 at 11 per Jacobs J; *Brandy v HREOC* (1995) 183 CLR 245 at 258 per Mason CJ, Brennan and Toohey JJ, 269 per Deane, Dawson, Gaudron and McHugh JJ.

decision as to whether a person is an illegal immigrant.[19] Robin Creyke has raised the possibility that there may be a separation of powers objection to granting substantial finality to immigration decisions in Australia.[20] There is potential for this consequential factor to be viewed in a broad light. But again, for the sorts of reasons given below, caution should be exercised here. In relation to the particular suggestion, it has been held that "the decision to deport is an executive act".[21] And in 1992 in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[22] the whole Court held that it was within the executive power to detain aliens prior to deportation or pending an executive determination of any application for entry. It would be strange for the Court to now hold that although aliens can be deprived of their liberty without judicial decision for these purposes, the immigration application itself is so important as to require judicial control.

One final point should be made here about the relationship between the separation of powers and a right to administrative justice. There is a limit to how broad a discretionary power can be allocated to Chapter III courts. Open-ended discretions to make a decision as to what is in the "public interest" are characteristic of executive and legislative power, and cannot be granted to the judiciary.[23] In practice the High Court has been relatively lenient here. For example, although it has struck down a power that depended on what the court thought "just and reasonable in the circumstances",[24] it has upheld a power involving judicial assessment of what was "oppressive, unreasonable or unjust".[25] Nevertheless, this factor limits the degree to which certain decision-making powers *can* be given to courts, or, at least, it reduces the flexibility that can be attached to any such power. This needs to be borne in mind when considering whether some matters should be under the sole control of the courts.

The entrenched Australian separation of judicial power therefore does achieve some of the ends associated with notions of "administrative justice". But it does so only to a limited extent. It cannot be said to guarantee any broad right to administrative justice. It is true that the main purpose of the separation doctrine has been said to be to serve as a "guarantee of liberty".[26] It achieves this by ensuring

19 Bradley, above n 4 at 352-353.

20 R Creyke, "Restricting Judicial Review'"(1997) 15 *AIAL Forum* 22 at 24.

21 *Chu Shao Hung v R* (1953) 87 CLR 575 at 583-584 per Williams ACJ, also 585 per Fullagar J.

22 (1992) 176 CLR 1 at 10, 30-32, 46-47, 57-58, 71-74.

23 Well discussed in *R v Trade Practices Tribunal*; *Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 399-402 per Windeyer J.

24 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144.

25 *R v Commonwealth Industrial Courts*; *Ex parte Amalgamated Engineering Union* (1960) 103 CLR 368.

26 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 per Brennan CJ, Dawson, Toohey, McHugh & Gummow JJ; *R v Davison* (1954) 90 CLR 353 at 381 per Kitto J; *R v Trade Practices Tribunal*; *Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 390, 392 per Windeyer J.

that certain "basic rights" are determined only "by a judiciary independent of the parliament and the executive".[27] This purpose has never been taken to require that all governmental decisions be subject to judicial control. Indeed, as shall be seen, arguments drawn from the separation of powers itself can be employed to oppose any significant extension to judicial intervention in executive decision-making.

SECTION 75(v) AND THE RULE OF LAW

Section 75(v) of the Constitution provides that the High Court shall have original jurisdiction "In all matters ... in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". On the face of it this provision merely allocates a jurisdiction to the Court. There is, of course, a fundamental distinction between a court having jurisdiction over (that is, authority to decide in relation to) a certain type of controversy, and it having the actual power to make any particular decision or grant any remedy in any instance of that type. Thus the High Court also has original jurisdiction to hear matters "between residents of different States" (s 75(iv)), but this authority says nothing as to whether Smith of Queensland has a legal claim against Jones of Tasmania in tort, contract or so forth.

Section 75(v) is unusual, however, in making the seeking of particular remedies the very basis of the jurisdiction. This clearly implies that the Court has the power to grant those remedies. A law flatly denying the availability of those remedies against an officer of the Commonwealth cannot be valid,[28] though it may be capable of being read down. The question that then arises is whether, and to what extent, the traditional grounds for the grant of those remedies are also impliedly protected by the grant of jurisdiction. In other words, to what extent, if any, does the provision entrench a right to administrative justice?

The traditional view and beyond

Section 75(v) was inserted to avoid the result of the American decision of *Marbury v Madison*,[29] in which the Supreme Court had held that it had no jurisdiction (and could be allocated none) to grant mandamus. Yet this fact does not itself establish the reason for wanting to have such remedies available from the High Court. That purpose has been regarded as to make it "constitutionally certain that there would be a jurisdiction capable of restraining officers of

27 *R v Quinn* (1977) 138 CLR 1 at 11.

28 Eg *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd* (1942) 66 CLR 161 at 176 per Latham CJ (McTiernan J agreeing, 186), 178 per Rich J, 186 per Starke J, 192-193 per Williams J; *R v Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres Ltd* (1949) 78 CLR 389 at 399-400 per whole Court.

29 5 US (1 Cranch) 137 (1803).

the Commonwealth from exceeding Federal power".[30] This suggests a purpose of preventing the Commonwealth acting in excess of constitutional power. In fact, the Court has accepted that s 75(v) also entrenches a remedy against Commonwealth officers acting beyond the set limits of powers allocated by statute.[31] The debate in the Convention manifested a concern to provide a remedy against both constitutional and statutory *ultra vires*.[32]

The prevailing assumption in constitutional law has long been that the provision does not entrench broad grounds of judicial review beyond basic or narrow *ultra vires* (in the sense of whether the decision-maker had authority to enter into the question). The jurisdiction has been said to be "essentially an auxiliary or facultative one" enabling the Court "to hear and determine the designated matters in accordance with the independently existing substantive law"; the Commonwealth retains power to "alter the substantive law" to ensure that impugned conduct is lawful.[33]

Another view can be taken, however. Statements of the framers reveal an ambiguity inherent in s 75(v). Barton and Symon, who promoted the provision, were concerned to reassure the Convention that it "merely gives a jurisdiction", and "does not give any right to *get* mandamus or prohibition".[34] Yet both then effectively qualified this by speaking of the right to obtain these remedies not being conferred "one whit *more than at present*".[35] Barton indicated that the provision ensured that a person who was subject to a process of law had "the right to have this process of law *properly exercised*".[36] Both suggestions imply that the grant of jurisdiction carried with it some substantive content, entrenching certain common law principles which were attached to the remedies. They were right. The accepted view that s 75(v) guarantees judicial control of constitutional and statutory *ultra vires* means that the provision does have an entrenched and substantive effect. The question is *how much*, and *what*, substantive law is given constitutional status by being regarded as integrally attached to the specified remedies.

It seems that the remedies of prohibition and mandamus were singled out because, being directed to the control of jurisdictional error, they are well-suited to the task of ensuring the legality of

30 *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 363 per Dixon J.

31 Eg *R v Hickman*; *Ex parte Fox and Clinton* (1945) 70 CLR 598 at 606-607 per Latham CJ; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 192 per Brennan J, 204-205 per Deane & Gaudron JJ; *Abebe v Commonwealth* [1999] HCA 14; 162 ALR 1 at para 58 per Gleeson CJ & McHugh J.

32 *Official Records of the Debates of the Australasian Federal Convention* (Melbourne, 1898; the "Convention Debates") at 1875-1885, especially 1883-1885 per Barton.

33 Quotations from *DCT v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 205 per Deane & Gaudron JJ, see also 178 per Mason CJ, 232 per Toohey J, 241-242 per McHugh J, and authority cited by all these judges.

34 Convention Debates 1898 at 1877 per Symon (emphasis added), 1883-1884 per Barton.

35 *Ibid* at 1878 per Symon (emphasis added), 1883-1884 & 1885 per Barton.

36 *Ibid* at 1884 (emphasis added).

executive action.[37] Crucially, however, jurisdictional error can be viewed in broad terms which encompass all or most of the administrative law grounds of review.[38] Further, Gaudron J has suggested that "it may be that the grounds upon which injunctive relief can be granted are not as circumscribed as those which determine the availability of prerogative relief".[39]

It is open to interpret s 75(v) as guaranteeing that judicial review is available to ensure that executive power is "properly exercised", where this means judicial review is available for breach of some or all of the common law grounds of judicial review. These grounds could be regarded as an inherent part of the remedies made available by the provision. The possibility of such a reading was foreshadowed, and feared, by framers Isaacs and Kingston.[40] Mason CJ has said that:[41]

> The provision is not a source of substantive rights except in so far as the grant of jurisdiction necessarily recognises the principles of general law according to which the jurisdiction to grant the remedies mentioned is exercised.

This statement, whilst apparently intended to reject the type of broad view just mentioned, can be read as quite consistent with it. The key issue then is whether such a view of the section should be taken.

The recent case of *Abebe v Commonwealth*[42] concerned the validity of those restrictions in the *Migration Act 1958* (Cth) which purportedly prevented the Federal Court from reviewing certain immigration decisions on the grounds of natural justice, *Wednesbury* unreasonableness, relevant/irrelevant considerations and bad faith.[43] The High Court, by a 4–3 majority, upheld the restrictions. The minority, Gaudron, Gummow and Hayne JJ, would have held them invalid, primarily for allocating only part of the legal controversy to the Federal Court's determination. The premise of this view was that the High Court could have engaged in judicial review on at least some of the excluded grounds within its s 75(v) jurisdiction.[44] This divergence was said to mean that the legislation failed to confer jurisdiction over a "matter" (as required by ss 75–77 of the Constitution), and/or breached the separation of judicial power by preventing the Federal Court from making a final determination resolving the relevant legal controversy.[45]

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37 *Ibid* at 1885 per Barton.

38 See *Anisiminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171 per Lord Reid; *Craig v South Australia* (1995) 184 CLR 163 at 177-180 per Brennan, Deane, Toohey, Gaudron & McHugh JJ.

39 *Abebe v Commonwealth* [1999] HCA 14; 162 ALR 1 at para 103.

40 Convention Debates 1898 at 1877, 1880.

41 *DCT v Richard Walter* (1995) 183 CLR 168 at 178 (footnote omitted).

42 [1999] HCA 14; 162 ALR 1.

43 Part 8 of the Act, especially s 476(2)-(3).

44 (1999) 162 ALR 1 at paras 105-116 per Gaudron J, 157-160 per Gummow & Hayne JJ.

45 *Ibid* at paras 118-119 per Gaudron J, 164-167 & 176 per Gummow & Hayne JJ.

The case did not directly concern the scope of the High Court's own s 75(v) jurisdiction. Yet it highlights the importance of that issue for two reasons. First, a possible legislative response to the minority's views would be to address their premise. If the legislation also purported to exclude review for breach of the specified grounds by the High Court itself, there would then be no splitting of the legal issue to be addressed. The Federal Court could make a final determination of the whole, available legal controversy.

Secondly, Kirby J indicated in *obiter dicta* that the provision did provide substantive protection to at least some of the modern grounds of review, perhaps including natural justice, *Wednesbury* unreasonableness, and failure to consider relevant considerations.[46] Gummow and Hayne JJ expressly declined to consider "whether s 75(v) of the Constitution is concerned only with remedies or creates rights".[47] The argument for a broad view of the provision is therefore clearly within the realm of the possible.

The task now is to set out the argument at its highest, and then to consider the merits of that position.

An argument from the rule of law

One could seek to support the broad view of s 75(v) simply by invoking a normative argument that having a guaranteed avenue of judicial review with significant substantive content is a good, and that the Court should therefore take the opportunity afforded by the ambiguity in the section to recognise such a right. Normative and consequential considerations are not, and should not be, divorced from resolving constitutional uncertainty. Nevertheless, a simple normative assertion would not have the persuasive force and legitimacy of an argument based on deep constitutional doctrines. And such an argument is available.

The strongest version of the argument for the broad view of s 75(v) is one based on the rule of law. This foundational notion is nowhere mentioned in the Constitution. There is a possible argument that it can be invoked as a direct source of constitutional implications because it is an assumed and implicit foundation of the Constitution. It is not necessary to travel that far here, for there is little doubt that the rule of law "may legitimately be taken into account" in constitutional interpretation.[48] Gummow and Hayne JJ, in particular, appear to attribute great importance to the doctrine.[49]

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46 *Ibid* at paras 208-210.

47 *Ibid* at para 169.

48 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 196 per McHugh J, citing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J; note also *Re Residential Tenancies Tribunal*; *Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 443-444 per Dawson, Toohey & Gaudron JJ, 507 per Kirby J.

49 *Kartinyeri v Commonwealth* [1998] HCA 22; 195 CLR 337 at para 89 per Gummow & Hayne JJ; *Abebe* [1999] HCA 14; 162 ALR 1 at paras 137-9 per Gummow & Hayne JJ, note also para 220 per Kirby J.

For these purposes it is the traditional, essentially formal doctrine which is relevant, and not substantive Dworkinian visions.[50]

One fundamental component of the rule of law is the principle of legality, that is, the requirement that all government action should be supported by valid positive authority. This requirement is implicit in Dicey's principle that, as regards the government, we "are ruled by the law, and by the law alone".[51] It is this aspect which founds the invocation of the rule of law by Dixon J in the *Communist Party* case.[52] The principle of legality supports judicial review for *ultra vires* (in the narrow sense). One might question whether it is self-evident that the courts should be the guardian of basic legality.[53] The ultimate answer would place great emphasis on the substantial independence and impartiality of the judiciary in performing this role, but such issues are beyond the ambit of this paper.

The principle of legality has limited potential, if any, for supporting constitutional entrenchment of the grounds of review. It is tied to some of the common law grounds of review. Grounds such as acting for an unauthorised purpose, and taking account of relevant/irrelevant considerations, are linked to the courts' role of giving effect to statutes. The question of what considerations are relevant or not, what purposes unauthorised, depends on ascertaining parliamentary intention from the relevant statute. To seek to impose some external and overriding doctrine of irrelevant/relevant considerations would amount to the imposition of a guarantee of general legal equality, a requirement which was rejected in *Kruger v Commonwealth*.[54] Such review grounds as those mentioned, being linked to parliamentary intention, involve issues of legality. Precisely for this reason, however, these grounds are of limited pertinence to a broader view of s 75(v). The Parliament can avoid restrictions on the executive here by expressly widening the realm of what purposes are legitimate, what considerations relevant (or not). One cannot purport to uphold statutory law by overruling it.

The key grounds of review for present purposes are natural justice and unreasonableness,[55] perhaps along with such grounds as no probative evidence, exercising a discretion at the behest of another, rigidly applying a policy, and uncertainty. It would logically be possible for such grounds to apply even in the face of parliamentary exclusion. If they are to be supported by the rule of law, another aspect of the doctrine must be invoked.

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50 For a good overview of these different versions see P P Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467.

51 A V Dicey, *Introduction to the Study of the Law of the Constitution* (1939) at 202.

52 (1951) 83 CLR 1 at 193.

53 Cf *Abebe v Commonwealth* [1999] HCA 14; 162 ALR 1 at para 137 per Gummow & Hayne JJ.

54 (1997) 190 CLR 1 at 44-55 per Brennan CJ, 63-68 per Dawson J (McHugh J agreeing at 142), 112-113 per Gaudron J, 153-155 per Gummow J; cf 94-97 per Toohey J.

55 Which are both expressly excluded from judicial review of migration decisions: *Migration Act 1958* (Cth) s 476(2).

The rule of law requires that law "be capable of guiding the behaviour of its subjects".[56] If what the law requires is uncertain, or constantly changing, then citizens cannot moderate their behaviour to comply with its requirements. There cannot then be a rule of law. As Dicey famously argued, this has implications for executive discretions: "wherever there is discretion, there is room for arbitrariness".[57]

For many administrative discretions it might be argued that the decision only affects future legal rights and duties, and that therefore the requirements of the law are not rendered uncertain. Yet, as seen in relation to the separation of powers, there is no clear line between decisions determined by reference to the past and those affecting the future. For example, an executive decision whether to register a patent can be characterised as only affecting the future legal rights of the applicant. Yet that applicant is likely to have already detrimentally relied on the relevant legal criteria in developing the item/idea and presenting it for registration. Potential recipients of government assistance may have chosen to leave their employment and enter university, or may have had a child, in reliance on their understanding of the applicable rules of eligibility.

The rule of law therefore creates an imperative to limit the scope of executive discretions. Thus Raz argues that the doctrine requires that particular decision-making "be guided by open, stable, clear and general rules" which "impose duties instructing the power-holders how to exercise their power".[58] In particular, he asserts that the executive must observe the rules of natural justice, overseen by the courts.[59]

Raz is also careful to state that the rule of law is an ideal, and one which does not necessarily override other competing legitimate objectives.[60] He is quite right, as a salient example illustrates. If the law is to be capable of guiding behaviour then it should be available and understandable to all citizens.[61] Fortunately for lawyers, however, this ideal is far from being realised. There is, as yet, no recognised constitutional requirement that legal rules must be simple, clear and in plain English. The necessities of a complex society require significant compromise of the rule of law ideal in this respect. The same can be said of the need to grant broad discretionary powers to the executive.

The proponent of broad judicial review has a response available, however. The common law principles of judicial review can be presented as merely establishing certain minimum standards of good decision-making. These principles restrict the exercise of discretion, thereby increase legal certainty, and serving the rule of law. They do

56 J Raz, "The Rule of Law and its Virtue" (1977) 93 *Law Qtly Rev* 195 at 198.
57 Dicey, above n 51 at 188.
58 Raz, above n 56 at 199-200; see also J Waldron, "The Rule of Law in Contemporary Legal Theory" (1989) 2 *Ratio Juris* 79 at 88.
59 *Ibid* at 201.
60 *Ibid* at 205-211.
61 Waldron, above n 58 at 91.

not eliminate executive discretions altogether. And they are more directed to the process of decision-making than to the substantive decisions reached. In other words, the necessary compromise of the rule of law ideal can be said already to be woven into the fabric of administrative law.[62]

This type of argument from the rule of law supplies a plausible constitutional basis in Australia for the entrenchment of at least some of the broader grounds of judicial review. The argument should be rejected, however, for a series of reasons.

Any s 75(v) guarantee relates only to the High Court

Section 75(v) grants an entrenched jurisdiction to the High Court, and that court alone. If the provision protects a broad range of grounds of judicial review, and if such grounds are not available in lower courts, then the practical result is likely to be that the Court will be faced with a substantial number of applications for review. This possibility already exists insofar as such grounds are available at common law in the High Court's s 75(v) jurisdiction. Thus three of the majority judges in *Abebe* noted the immense inconvenience to the Court likely to result from the present immigration scheme of review.[63] The potential exists for the Court to be overwhelmed with applications for judicial review, distracting it from its dual primary roles as the nation's ultimate appellate and constitutional court.

Such inconvenience could result whenever the federal Parliament wished to restrict the availability of judicial review. Any broad guarantee here is thus of limited practical use, and could cause significant practical detriment.

Robin Creyke has suggested that this problem might lead the High Court to "find an implied constitutional right ... that the Federal Court, like the High Court, retain its jurisdiction in this area largely unfettered".[64] Yet ss 71 and 77 of the Constitution clearly indicate that it is for the Parliament to create federal courts beyond the High Court (or not), and to determine the jurisdiction of such courts, as it wishes.

A stronger version of such an argument would be along these lines. Chapter III of the Constitution creates the High Court, and requires its ongoing existence. When the Constitution creates or presupposes the existence of an institution, then frequently it can also reasonably be taken to protect that institution's existence and functioning. This is a standard constitutional argument. It is one which supports both the implied intergovernmental immunities and the implied guarantees protecting representative democracy. It is therefore reasonable to argue that the Constitution impliedly requires that the High Court be provided with adequate means and

62 A similar argument is made by Jeffrey Jowell, "The Rule of Law Today", in J Jowell & D Oliver (eds), *The Changing Constitution* (1994) at 73-75.

63 [1999] HCA 14; 162 ALR 1 at paras 50 per Gleeson CJ & McHugh J, 207 & 237 per Kirby J.

64 Creyke, above n 20 at 28.

resources to deal effectively with the tasks allocated to it by the Constitution. Without such, the Court would fail to achieve its allocated purposes, and thus would not function in the manner intended and required. This duty could be fulfilled in a range of ways, including by providing the necessary numbers of High Court judges, and/or providing an appropriate mechanism to remit matters elsewhere. If the constitutional duty was held to have been breached an appropriate remedy might be to remit some first instance matters to such other superior courts as could adequately perform the role (doing so in the absence of, or even contrary to, express statutory provisions). Admittedly, ss 71 and 77 indicate that it is Parliament which is allocated responsibility for determining both the number of High Court justices and the allocation of federal jurisdiction beyond that Court. Yet these powers can be regarded as qualified by the constitutional context.

This argument is compelling, but it is not the end of the discussion. It is very unusual for the Constitution to impose positive duties, requiring action rather than forbearance. Any obligation which requires expenditure raises a problem of polycentricity. How would the Court assess whether the duty had been adequately fulfilled when viewed in light of the competing demands on governmental resources? Moreover, the moribund example of the Inter-State Commission does not set a hopeful precedent.[65]

These counter-arguments do not necessarily destroy the putative constitutional duty. However, given the inherently subjective and polycentric decisions that would be involved in deciding whether any such requirement had been breached, I suspect that any such duty would be regarded as one of "imperfect obligation".[66] Put another way, the duty would not be justiciable. Although the Constitution can be regarded as meaningfully imposing such a duty, it is ultimately not one which the Court can or should seek to enforce.

In the absence of such an enforceable duty, the practical objection to the broad reading of s 75(v) remains.

The relevance of the Hickman principle

The so-called "*Hickman* principle" relates to the interpretation of certain types of privative clauses. The principle addresses the inconsistency which purportedly arises when the Parliament both grants certain limited powers to a decision-maker, and seeks to exclude judicial review of any breach of those limits by the decision-maker. The *Hickman* reconciliation, formulated by Dixon J, is that judicial review is excluded provided that an impugned decision was a *bona fide* attempt to exercise the power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the

65 The existence of which is required by s 101.

66 Cf *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 391 per Dixon J, for a possible example of such a duty.

power granted.[67] These provisos have been little explored.[68] Quite what they involve, whether and to what extent they overlap, and how they relate to the concept of jurisdictional error, are all questions without certain answers.[69] What is clear is that the principle "is a rule of construction".[70]

It is sometimes suggested that the principle also reflects the fact that the High Court's s 75(v) jurisdiction cannot be excluded.[71] If so, the principle might then represent the guaranteed minimum content of the Court's jurisdiction. Yet the *Hickman* principle is ultimately based on notions of *ultra vires*. In seeking to resolve a perceived statutory inconsistency, it necessarily aims to give effect to the parliamentary will (so far as that can be ascertained). For this reason it is difficult to see how the principle, as formulated, *can* support relevant constitutional limitations. If legislation expressly excludes certain grounds of review from applying then it is difficult, at the least, to say that a decision-maker which breaches those grounds has acted *ultra vires* of the statute. There is no relevant statutory inconsistency to resolve.

If constitutional limitations protecting the grounds of review are to be imposed then their source must be found elsewhere. Of course, any such limits might coincide with those set out in *Hickman*, though it is not self-evident why that should be the case. Furthermore, the *Hickman* principle actually stands in the way of those seeking to support the entrenchment of the grounds of review. Whatever the exact content of the principle, it seems that broad federal ouster clauses can be "effective to exclude any general judicial review".[72] Aronson and Dyer list a series of High Court cases in which the principle has been applied to prevent review of decisions affected by what would otherwise be reviewable jurisdictional error.[73] Such authority represents a hurdle for those who seek to argue that the High Court's powers of judicial review cannot be significantly limited.

The interpretational difficulty

Administrative law has fundamentally changed over the course of the twentieth century. For example, natural justice was applied to only a

67 *R v Hickman*; *Ex parte Fox and Clinton* (1945) 70 CLR 598 at 615.

68 As noted by Mason CJ in *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 249.

69 See further Sir Anthony Mason, "Judicial Review: The Contribution of Sir Gerard Brennan", conference paper, ANU Public Law Conference, 6-7 Nov 1998 at 26-28.

70 *DCT v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 195 per Brennan J. See *Hickman* (1945) 70 CLR 598 at 614, 615, 616 per Dixon J.

71 Note discussion and rejection of such views in L Zines, "Constitutional Aspects of Judicial Review of Administrative Action" (1998) 1 *CLPR*.

72 *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 427 per Deane & Dawson JJ; approved *DCT v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 180 per Mason CJ.

73 M Aronson & B Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) at 692, fn 133.

very limited range of decision-makers when the Constitution was created,[74] and was of narrower scope and content than modern conceptions of procedural fairness. The notion of *Wednesbury* unreasonableness was only clearly formulated in the late 1940s,[75] and there are some doubts as to its common law status in Australia.[76]

Such changes present an interpretational challenge to those who seek to argue that the Constitution, dating as it does from 1899/1900, encompasses and entrenches such common law. The barrier is not insurmountable. One option is to adopt a dynamic or evolutionary view of constitutional interpretation. This is the route taken by Kirby J in relation to s 75(v).[77] Another option is to assert that the Constitution relevantly involves what I call a "context-dependent criterion", whereby the essential meaning of a provision remains the same, but what this requires to be fulfilled in practice will change from time to time. In this instance it might be said that the Constitution entrenches the common law grounds of review as they exist at any time.

Both options potentially have significant merit.[78] Yet neither interpretative technique should lightly be applied. For the sorts of reasons given in the next section, I would not support taking such an approach in this context. Further, it would be quite extraordinary to give such constitutional status to the common law. Certainly, the Constitution frequently draws on the common law, and operates in the context of that law.[79] The common law itself must sometimes be moulded to reflect constitutional imperatives.[80] But it is very unusual, to say the least, for some highly fluid area of the common law to be covered by a constitutional umbrella, such that any common law development by judges would also be attributed with constitutional effect. The potential legitimacy problem is obvious. Moreover, this double-effect may actually discourage judges from taking an activist approach to development of the applicable common law principles. Thus constitutionalisation may not produce a net benefit even from the viewpoint of those in favour of broad judicial review.

74 Acknowledged *Abebe v Commonwealth* [1999] HCA 14; 162 ALR 1, para 111-12 per Gaudron J.

75 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230 per Lord Greene MR.

76 *Abebe v Commonwealth* [1999] HCA 14; 162 ALR 1 at para 114 per Gaudron J. Note *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 149-151 per Starke J, 154-155 per Dixon J, 158 per Evatt J, 159 per McTiernan J; *R v Anderson*; *Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189 per Kitto J (Menzies J agreeing at 201-202).

77 *Abebe v Commonwealth* [1999] HCA 14; 162 ALR 1 at paras 203, 209-210.

78 See J Kirk, "Constitutional Interpretation and a Theory of Evolutionary Originalism" (1999) 27 *Fed L Rev* 323.

79 Eg *Cheatle v R* (1993) 177 CLR 541 at 552 per whole Court.

80 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566 per whole Court.

Conceptual objections to constitutionalising the grounds of review

The most important argument for rejecting the broad reading of s 75(v) consists of a series of interlocking conceptual objections.

Subjectivity

It sounds attractive to argue that it is a good to reduce the uncertain scope of administrative decision-making by applying certain minimum standards of good decision-making. Yet the grounds of review are not neutral standards. The content of "reasonableness", the exact requirements of natural justice/procedural fairness, what constitutes sufficient probative evidence, what weight can be attributed to a policy, and so on—all these matters involve questions of degree, and depend on values, preferences and perceptions as to what is the appropriate role of, and behaviour by, governments. There is great potential for reasonable differences of view.

Creyke argues that it is "inherently pernicious" to exclude judicial review.[81] Would we have said the same after *Roberts v Hopwood*,[82] or the more recent English decision in the *Fares Fair* case?[83] The present debate about immigration decision-making has arisen precisely because this federal government, and the last, views the judiciary as unduly interfering in legitimate decision-making in the area. We may or may not agree. The point is that it is a legitimate type of argument.

To apply constitutional rights invariably involves significantly subjective judgments.[84] Mere subjectivity is not, therefore, an adequate objection to any particular constitutional guarantee. Yet there is a difference here. Most constitutional rights are directed to protecting some particular interest or ideal from undue government regulation: free political communication, for example, or the individual and community interest in criminal defendants having a jury trial. The interest protected by a broad reading of s 75(v) would be far more amorphous: the right to decision-making processes which are sufficiently certain, or, perhaps, to administrative decisions which are just. Such statements do very little, if anything, to delineate the content of the constitutional requirement. The concept of the (procedural) rule of law supports reducing discretion to increase certainty, but it does not specify how this end is to be achieved. The common law standards of review may provide some greater degree of detail than the bare notion of the rule of law, but these are still significantly open. Guidance would thus have to be

81 Creyke, above n 20 at 26.

82 [1925] AC 578.

83 *R v Greater London Council*; *Ex parte Bromley London Borough Council* [1983] 1 AC 768.

84 J Kirk, *"Implied Rights" in Constitutional Adjudication by the High Court of Australia since 1983*, doctoral thesis (copy held by Bodleian Library, Oxford), Chapter 3.6.

sought from some much broader theory of government and/or justice.[85]

Put another way, there is insufficient textual manifestation and legal guidance to fill out the putative implication relating to s 75(v), and it cannot be defined with sufficient precision, for it readily to be accepted as a legitimate constitutional interpretation.

Certainty

A corollary of the argument just made is that it can also be questioned whether constitutionalising some or all of the grounds of review *would* increase certainty of government decision-making, that being the base constitutional justification provided above for reading s 75(v) broadly.

The uncertainty involved in the grounds of review can be illustrated by examining procedural fairness. Myriad questions arise in relation to any particular type of executive decision even with respect to the basic right to be heard. How must the hearing be given (for example, by taking written submissions; by some oral procedure)? For how long and in what depth? To what degree must the decision-maker disclose the information held which may be relied upon? Can competing considerations prevent disclosure? Must a draft decision be issued for comment? Must reasons then be given? These issues arise before moving onto wider aspects of procedural fairness, that is, the "flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case".[87] In that regard one might ask such questions as whether the decision-maker had some positive duty to make further inquiries, and whether the decision-maker could only make adverse findings based on probative evidence.[88]

Of course, such uncertainty and subjectivity already exists within administrative law. Yet natural justice is supported in that realm by broader considerations. Providing a hearing, for instance, reflects the value of respecting the autonomy and humanity of individuals adversely affected by government decisions. Nevertheless, it is certainty which provides the main potential constitutional foundation. Thus the legal means (entrenching certain grounds of judicial review) may not achieve the relevant constitutional end.

In any case, there is a fundamental difference between the judiciary making subjective judgments at common law, or even pursuant to a statute, and doing so under the Constitution. In the former cases the Parliament can choose to override what the courts have established; for constitutional issues they cannot. Some judicial choices are inevitable in constitutional law, as elsewhere. This does

85 Note Craig 1997, above n 50 at 486.

86 Ie, the second and third of the factors I have elsewhere suggested as going to the recognition of constitutional implications: Kirk 1998, above n 84, Chapter 5.2.3.

87 *Kioa v West* (1985) 159 CLR 550 at 585 per Mason J.

88 Discussed J McMillan, "Recent Themes in Judicial Review of Federal Executive Action" (1996) 24 *Fed L Rev* 347 at 359-361.

not mean that we should readily extend the degree to which the Constitution's operation depends on such undemocratic choices.

Moreover, lack of certainty not only undermines the rule of law argument on its own terms, it raises two further objections. First, providing a broad right of judicial review itself entrenches an element of uncertainty. It inhibits reliance upon affected decisions until the avenues of review are exhausted.

Secondly, the desirability of increasing the complexity of the Constitution's operation in this area is questionable. The law here is already burdened with the indeterminate, overlapping notions of jurisdictional error and *Hickman* review. Do we wish to add a third layer to the mire by accepting that certain (and only certain) of the common law grounds of review have some degree of constitutional protection?

Reconciling constitutional doctrines and competing interests

A series of foundational constitutional doctrines have relevance to the issues at stake here, namely the separation of powers, parliamentary supremacy, representative democracy and responsible government, as well as the rule of law. A constitutional guarantee derived from s 75(v) would effectively involve the judiciary imposing limits on the federal Parliament's powers to confer power on the executive branch. It can be argued that this would constitute a breach of the separation of powers, particularly in relation to the executive power.

Judicial review of executive decisions has long been accepted as within the scope of judicial power. Yet, however historically entrenched, it is self-evident that to the extent that judicial review overturns and restricts executive decision-making it also involves some interference in the exercise of the executive power. That there are no clear dividing lines between the three types of governmental power does not detract from the force of the observation. An acceptance of the point is implicit in the well-known passage in *Attorney-General v Quin*[89] in which Brennan J warned against the courts engaging in merits review, concluding that the law "recognizes the autonomy of the three branches of government within their respective spheres of competence".

One partial answer is that if such line-crossing causes significant detriment then the parliament can moderate any conflicts between the judiciary and executive. The doctrine of parliamentary supremacy is thus one of the bases of the constitutional justifiability of judicial review of executive action. Yet this answer is no longer available if parliament's powers of moderation are overridden.

It might be argued that the separation of powers can also be cast in terms of checks and balances, in which light judicial oversight of executive action is quite justifiable. Yet this model is contrary to the accepted conception of the separation doctrine within Australian constitutional law, which involves erecting an abstract functional

89 (1990) 170 CLR 1 at 38, generally 35-38.

division between the different types of governmental power (or, at least, between judicial versus legislative/executive power).[90]

In the end, it may be unwise to place great weight on broad arguments from the separation of powers. The concept is so open as to be "ultimately of little force on either side" of such controversies.[91] But underlying such arguments from the separation of powers and parliamentary supremacy are deeper notions of respect for democratic government. In our system of representative democracy, governmental legitimacy arises substantially from the authority of the people. This has an ongoing manifestation in the popular election of members of parliament, who in turn choose the leaders of the executive branch. The executive branch is accountable to the legislature, which is accountable to the people. Of the three branches of government, it is the parliament which has the strongest claim to speak with democratic authority. And thus it is the parliament which is the primary agency for deciding upon which societal goals to pursue, in what way, and with what balancing and reconciliation of competing social interests.

One possible reason for restricting the exercise of executive power is that most officials are not elected. This may justify restricting or directing the exercise of executive power by common law principles of judicial review. But it is far from clear that this principle would support imposing constitutional law restrictions on what the *Parliament* can ultimately authorise executive officers to do. Similarly, the vast expansion in the role of the state has increased the potential for the state to inflict significant actual or relative damage on individuals. Again, this may justify the broadening of the principles of judicial review that has taken place over the century, for political processes offer limited practical remedies to affected individuals. Yet the executive is ultimately accountable to the parliament in our system of representative democracy and responsible government. The parliament remains entitled to make itself, and/or some other institution, the primary locus of accountability.

By invoking such constitutional doctrines I certainly do not mean to suggest that constitutional guarantees restricting the parliament, or restricting parliament's power to grant power to the executive, should never be recognised. Rather, before such a step is taken some sufficiently strong constitutional argument or positive imperative must be presented to justify imposing the limitation.

What, then, of the rule of law doctrine? That doctrine is an ideal. It does not take automatic priority over the various other relevant constitutional doctrines, nor over the numerous competing societal interests. And there are significant legitimate interests which may justify restriction of the grounds of judicial review. These include:

- the cost to the community of providing avenues of judicial review;

90 See J M Finnis, "Separation of Powers in the Australian Constitution" (1967) 3 *Adel L Rev* 159.

91 G Marshall, *Constitutional Theory* (1971) at 108, generally 104-109.

- the high costs for all involved in litigating in superior courts;[92]
- the delay, and concomitant reduction in certainty, inherent in providing further avenues of review;[93]
- the reduction in efficiency which potentially results from having to meet rigorous standards and procedures of decision-making (particularly in relation to high-volume areas of decision-making);
- the potential desirability of allocating responsibility for review/appeal to some body which is more appropriate or specialised, or which is not averse to the policy being implemented;
- the desirability of seeking to resolve some disputes by methods other than traditional adversarial litigation.[94]

Of course, the existence of legitimate competing interests does not prevent the recognition of a constitutional right. Guarantees are rarely construed as being absolute; they can be overridden by sufficiently important conflicting interests. But when the competing interests are numerous and significant, the question that does arise is this: is the interest at stake sufficiently important to outweigh the competing interests sufficiently often to justify recognising a constitutional guarantee? The relevant interest at stake here is increased certainty of decision-making, or perhaps the interest of individuals in having just or appropriate administrative decisions.

This question is obviously somewhat subjective. It must, nevertheless, be answered. The transaction costs of recognising constitutional rights are not insignificant. They occasion further litigation, uncertainty, cost and delay. They reduce flexibility in seeking solutions to complex problems and balancing equations. Further, a danger of recognising a "constitutional right to X" is that the very act of recognition tends to add weight to the protected interest, inflating its true value as against other competing interests.

The potential competing interests set out above are not, in my view, easily dismissed. And, as argued above, it can be questioned whether there is any significant increase in certainty provided by applying the grounds of review to administrative decision-making. Even if there was, it is doubtful that the High Court is really an appropriate place to seek to exercise such a constitutional right. For these reasons, and taking account of the various relevant constitutional

92 Acknowledged *Craig v South Australia* (1995) 184 CLR 163 at 181 per whole Court; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 37 per Brennan J; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 148 per Deane J.

93 Acknowledged *Abebe v Commonwealth* [1999] HCA 14; 162 ALR 1 at para 223 per Kirby J.

94 Acknowledged *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 147-148 per Deane J. And note Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 37: "nor is the adversary system ideally suited to the doing of administrative justice".

doctrines, there is insufficient justification to take the step of recognising a constitutional guarantee protecting some or all of the common law grounds of review. Put another way, there is no sufficient positive constitutional imperative to support the recognition of such an implication.[95]

Conclusion

A strong case can thus be made against taking a broad view of s 75(v). The section should be regarded as entrenching merely a jurisdiction which, at its ultimate core, enables control of constitutional and statutory *ultra vires* (in its narrow sense). It should not be regarded as entrenching such grounds of judicial review as *Wednesbury* unreasonableness, natural justice, rigidly applying a policy, and so forth.

To take the contrary view—that is, regarding certain of the grounds of review as entrenched, based on the rule of law—would potentially lead to the swamping of the High Court with inappropriate work. It is inconsistent with precedents following from the *Hickman* principle. It faces an interpretational difficulty, and the adoption of an evolutionary approach or a context-dependent criterion is not sufficiently justified in the circumstances. It would constitutionalise an inherently subjective, and substantially amorphous, body of principles. It may fail to achieve the intended goal of increasing certainty in any case. It would introduce a new degree of complexity to this already difficult area of law. And when viewed in light of the doctrines of the separation of powers, parliamentary supremacy, representative democracy and responsible government—in combination with the range of competing legitimate interests—then there is no sufficient constitutional or normative imperative justifying its recognition.

One final point is worth making in answer to the argument. The importance of recognising a formal constitutional guarantee is commonly overstated. The courts already go to great lengths to read down any legislation depriving them of their jurisdiction or powers of judicial review.[96] *Hickman* itself illustrates that. Very clear statutory language would likely be required for the High Court to accept that it had been significantly deprived of its powers of review. The net result is as though Australia did have a constitutional guarantee protecting the substantive availability of judicial review, but that this could be overridden pursuant to a Canadian-style "notwithstanding" provision.[97] This, in the end, may not be such a bad resolution.

95 The first of my implication factors: Kirk 1998, above n 84 at Chapter 5.2.3.

96 See eg *Anisiminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL). Note *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 160 per Dawson & Gaudron JJ, approved *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 633 per Gaudron & Gummow JJ.

97 Cf s 33 of the Canadian Charter of Rights and Freedoms.

THE REQUIREMENTS OF REPRESENTATIVE DEMOCRACY

In the *Political Advertising* case[98] and *Nationwide News Pty Ltd v Wills*[99] the High Court recognised that the Constitution entrenched a system of representative democracy (or representative government) at the federal level in Australia. The Court accepted in turn that this impliedly protected freedom of communication on political and governmental matters, such communication being an essential condition of the effective operation of representative democracy. These founding decisions, and the subsequent joint unanimous judgment in *Lange v Australian Broadcasting Corporation*,[100] opened the door for other "indispensable incident[s]" of representative democracy also to be regarded as entrenched. Various aspects of representative democracy can be argued to have relevance to notions of administrative justice, particularly in relation to citizens' access to, and interaction with, members of the executive branch. Before addressing such arguments, it is necessary to refer to a terminological dispute which may have significance here.

Representative democracy vs representative government

In the two founding cases judges tended to use the terms "representative democracy" and "representative government" interchangeably. In *Theophanous* McHugh J sought to distinguish them, asserting that the latter was the system relevant to Australian constitutional law.[101] Dawson J agreed,[102] as later did Gummow J.[103] Mason CJ, Toohey and Gaudron JJ did not adopt the distinction.[104] Deane J consistently employed only "representative government" in any case. The Court spoke just of "representative government" in *Lange*.

McHugh J argued that "representative democracy" was the "wider"' term, but it is not clear from his analysis whether he regarded it as too prescriptive or too encompassing a term. In any case, it is difficult to identify precisely how the concepts differ. McHugh J, following Birch, defined representative government as "a system where the people in free elections elect their representatives to the political chamber which occupies the most powerful position in the political system".[105] The Court reiterated this view in *Lange v ABC*.[106] The very notion of government involves the exercise of ruling power. Representative government means that such exercise is undertaken by representatives of "the people" who are chosen by

98 *Australian Capital Television Pty Ltd v Commonwealth [No 2]* (1992) 177 CLR 106.
99 (1992) 177 CLR 1.
100 *Lange* (1997) 189 CLR 520 at 559, see also 557.
101 (1994) 182 CLR 104 at 199-201.
102 *Ibid* at 189.
103 *McGinty v Western Australia* (1996) 186 CLR 140 at 269.
104 *Theophanous* (1994) 182 CLR 104 at 122-125; *McGinty* (1996) 186 CLR 140 at 198 per Toohey J; *Kruger v Commonwealth* (1997) 190 CLR 1 at 114 per Gaudron J.
105 *Theophanous* (1994) 182 CLR 104 at 200.
106 (1997) 189 CLR 520 at 559.

regular popular election. Thus Gummow J is quite right to define representative government as a system of "ultimate control by the people, exercised by representatives who are elected periodically".[107] Yet this definition is essentially the same as that for representative democracy: "government by the people through their [elected] representatives".[108]

If there is any difference here it may relate to *how* ultimate popular control is exercised and what it involves. McHugh J in *Theophanous*, and the Court in *Lange*, emphasised simply the manner of choice of representatives, that is, periodic free elections.[109] However, Mason CJ, Deane and Toohey JJ appeared to regard the requirements of representative democracy as not exhausted by electoral processes.[110] First, these judges implied that the people have some ongoing right to participate in governmental processes.[111] Secondly, the elected representatives were presented as having some ongoing relationship of accountability and responsibility to the people. Thus ongoing free political communication was said to be necessary not merely to facilitate informed electoral choices but so that representatives "take account of and respond to the will of the people".[112]

These views may be connected to the fact that all three of these judges accepted popular sovereignty as the normative basis of representative government.[113] Popular sovereignty is the idea that power should be regarded as deriving from, and exercisable for the benefit of, the people. This theory is not an essential element of their reasoning, however. Democracy has been supported on numerous philosophical bases. One need not regard power as deriving from the people to argue that *if* the people are to be able to choose their governors then there should be some ongoing duties and rights in the relationship between governors and governed.

Both additional aspects of ongoing popular control suggested by the three judges should be accepted. No-one disputes that elections are the primary form of popular involvement in the governmental

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107 *McGinty* (1996) 186 CLR 140 at 285, 284, 272; see similarly *Nationwide News* (1992) 177 CLR 1 at 70-71 per Deane & Toohey JJ.

108 From *Political Advertising* (1992) 177 CLR 106 at 137 per Mason CJ, and *McGinty* (1996) 186 CLR 140 at 201 per Toohey J; similarly *Nationwide News* (1992) 177 CLR 1 at 70 per Deane & Toohey JJ. See also J Kirk, "Constitutional Implications from Representative Democracy" (1995) 23 *Fed L Rev* 37 at 44.

109 *Theophanous* (1994) 182 CLR 104 at 200-201; *Lange* (1997) 189 CLR 520 at 557, 559-560. See also Brennan J: *Nationwide News* (1992) 177 CLR 1 at 47, 49, 51; *Theophanous* (1994) 182 CLR 104 at 150.

110 Discussed L McDonald, "The Denizens of Democracy: The High Court and the 'Free Speech' Cases" (1994) 5 *Public L Rev* 160 at 192-193.

111 *Political Advertising* (1992) 177 CLR 106 at 139-140 per Mason CJ; *Nationwide* (1992) 177 CLR 1 at 72 per Deane & Toohey JJ.

112 *Political Advertising*, ibid at 138-139 per Mason CJ; *Nationwide*, *ibid* at 72 per Deane & Toohey JJ.

113 *Political Advertising*, *ibid* at 137-8 per Mason CJ; *Nationwide*, ibid at 70 per Deane & Toohey JJ; also *Theophanous* (1994) 182 CLR 104 at 172-173, 180, 183 per Deane J.

process. Most of the constitutional provisions supporting the incorporation of representative democracy relate to electoral choice. Yet s 6, for example, requires the federal Parliament to meet at least annually, thus suggesting that the Parliament has an ongoing responsibility to consider the needs and desires of the nation.[114] As shall be seen, there is good argument and good authority—not least from McHugh J himself—supporting an acceptance of some further constitutional rights and duties relating to the ongoing relationship between government and governed.

Given this, if the difference between "representative democracy" and "representative government" relates to whether popular control is exercised only by elections, as it appears to be, then "representative democracy" is the appropriate label in Australia. In any case, the real issue at stake is drawing the line around the scope of what aspects of democratic government are constitutionally entrenched. Mere labels are of no great assistance in this task. Democratic government can be defined in multifarious ways. The Court's role is to identify the doctrine as it is entrenched in Australia. It is more than a little strange to blanch at labelling Australia, one of the world's oldest democracies, what it plainly is.

Participation in government

Turning briefly to the first aspect of ongoing popular control, participation,[115] the most important instance of this is the ability of all to stand for federal elections without unreasonable hindrance. This is consonant with authority,[116] can be supported on "genuine choice" grounds alone,[117] and was conceded by McHugh J.[118] In *Crandall v Nevada* in 1867 the US Supreme Court noted the citizens' implied constitutional right, in relation to the federal government, "to share its offices, to engage in administering its functions".[119] Griffith CJ and Barton J approved this passage in *R v Smithers*; *Ex parte Benson*,[120] the latter speaking of a general right "of due participation in the activities of the nation". Quick and Garran,[121] and Harrison Moore,[122] also spoke of the general right of all to "share" in the government of the nation.

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114 See also s 5.

115 See further Kirk 1995, above n 108 at 52, 58.

116 See *Judd v McKeon* (1926) 38 CLR 380 at 385 per Isaacs J, approved *Langer* (1996) 186 CLR 302 at 315-316 per Brennan J; *Fabre v Ley* (1972) 127 CLR 665 at 669 per whole Court.

117 That is, the view of representative democracy proposed by Dawson J, based on ss 7 & 24 of the Constitution, that electors were only guaranteed the freedom to make an informed and genuine choice of representatives: *Political Advertising* (1992) 177 CLR 106 at 187, 189; *Theophanous* (1994) 182 CLR 104 at 189-190. On this particular point, see *McGinty* (1996) 186 CLR 140 at 220 per Gaudron J.

118 *Political Advertising* (1992) 177 CLR 106 at 230-232.

119 73 US 35 (1867), 44.

120 (1912) 16 CLR 99 at 108, 109-110 respectively; approved *Theophanous* (1994) 182 CLR 104 at 169 per Deane J.

121 J Quick & R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 449-50.

122 H Moore, *The Constitution of the Commonwealth of Australia* (1902) at 329.

A relationship of accountability

Of more direct concern to the topic of administrative justice is the second aspect, that is, an ongoing relationship of accountability. This aspect itself has three main attributes.

The first two facets involve certain rights of access to governmental institutions. First, the entrenched doctrine would extend to protect physical access to the federal institutions of government. Secondly, it would also entail some right to make representations to, and to seek to influence, relevant governmental institutions.

Both facets have authoritative support. A right of physical access/movement throughout the nation was upheld by Griffith CJ and Barton J in *R v Smithers*; *Ex parte Benson*, under the influence of *Crandall v Nevada*.[123] On the facts, this did not seem confined to movement for governmental/political purposes. These *Benson* judgments have been approved by five of the recent justices, including McHugh J.[124] In relation to communicative access, the right to petition parliament is ancient and venerated.[125] Though not expressly provided for in the Constitution, it is reasonable to regard it as an underlying assumption of the Constitution's intended operation.[126] Quick and Garran spoke of an implied right to "petition the Federal authorities".[127] Dawson, McHugh and Gummow JJ appear to have accepted that representative government ensures individuals a right to make representations to members of Parliament.[128]

Both of the facets potentially have positive elements. This creates difficulties. The courts should not, for instance, entangle themselves in allocating the time of ministers or parliamentarians by requiring them to hear individual representations. Incidentally, it might be possible to construct some constitutional duty of natural justice on this type of basis. A closely-related argument is addressed, and rejected, below. These first and second attributes should be limited to entrenching such matters as the historical right to petition parliament, and negatively restricting any legislative interference in the ability of individuals to have some reasonable degree of access to, and some ability to communicate with, relevant representatives and decision-makers.

The third facet of the ongoing relationship of accountability, which overlaps with the second, relates to the nature of the public communication and interaction which is constitutionally protected.

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123 (1912) 16 CLR 99 at 108-109, 109-110. See also Quick & Garran, above n 121 at 958.

124 *Political Advertising* (1992) 177 CLR 106 at 213-214 per Gaudron J, 232 per McHugh J; *Nationwide News* (1992) 177 CLR 1 at 60 per Brennan J, 73-74 per Deane & Toohey JJ; *Theophanous* (1994) 182 CLR 104 at 166 per Deane J, 206 per McHugh J; cf *Kruger* (1997) 190 CLR 1 at 69 per Dawson J.

125 *Bill of Rights* 1689, clauses 5, 13; see R Handley, "Petitioning Parliament" (1993) 21 *Fed L Rev* 290.

126 Note J Goldsworthy, "Implications in Language, Law and the Constitution" in G J Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) at 154-161.

127 Quick & Garran, above n 121 at 958.

128 Respectively, *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 365; *Kruger* (1997) 190 CLR 1 at 142; *McGinty* (1996) 186 CLR 140 at 287.

Whilst the judges in *Lange* emphasised electoral choice as the basis of the implied freedom of political communication, they treated the freedom as extending to discussion of "the conduct of the executive branch", including even statutory authorities and those public utilities which are obliged to report to a minister or the parliament.[129] They expressly accepted that such discussion was not directly tied to election periods. They thus implicitly accepted that such bodies have some ongoing ultimate duty to account, though the issues involved may have little connection to electoral choice either in terms of proximity to an election or the degree of responsibility which attaches to the elected members of the Parliament or executive. Similarly Brennan J, along with Deane, Toohey and Gaudron JJ, had no qualms in *Nationwide News* about applying the implied freedom to the politically-independent, quasi-judicial Industrial Relations Commission.

There is good reason, therefore, to regard the guaranteed freedom of political communication, and related freedoms, as not limited to protecting discussion which might influence electoral choices. It should also protect ongoing public interaction which scrutinises, holds accountable and seeks to influence legislative and executive processes. This protection extends even to outer, partially independent sub-limbs of the executive branch.

An interesting possibility which emerges from this view is that representative democracy might set certain standards of how the executive government should interact with the public. In *Cunliffe v Commonwealth*[130] the Court upheld a federal scheme which regulated the activities of those who offered advice on immigration. Mason CJ, Deane and Gaudron JJ, in partial dissent, held that the implied freedom covered private communications between individuals and government institutions relating even to "the administration of an Act" in particular decisions.[131] Toohey J agreed, at least insofar as there was ministerial involvement in the governmental decision. However, he joined the majority because he regarded any restrictions on political communication imposed by the legislation as justifiable.[132] Brennan, Dawson and McHugh JJ held the freedom of political communication did not apply.[133]

Despite the actual result in *Cunliffe*, therefore, a majority took the view that the requirements of representative democracy extend to at least some aspects of the general administration of statutory powers, and to the taking of particular individual decisions. This position is readily open to extension. If the Parliament may not unduly impede communications by individuals to executive decision-makers, then it is but a small step to argue that decision-makers themselves have a duty to *listen* to the representations made.

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129 (1997) 189 CLR 520 at 561.

130 (1994) 182 CLR 272.

131 (1994) 182 CLR 272 at 298-289 per Mason CJ, 340-341 per Deane J, 387 per Gaudron J.

132 *Ibid* at 380-384.

133 *Ibid* at 329, 364-365, 395.

This could be said to reflect the executive's relationship of interactive accountability to the people. Such a step provides a potential constitutional foundation for the doctrine of natural justice. From there, one does not have to go much further to argue that executive decision-makers must also treat affected individuals with the respect due to them as citizens of the democracy, such that decisions which are unreasonable, or which do not take account of the merits of the particular case, or so forth, are constitutionally invalid.

The essence of the guarantee of free political communication, derived from representative democracy, is that it protects the operation of the political process (and not merely the electoral process). This encompasses public scrutiny, discussion, criticism and attempts to influence legislative and executive policy. A law should not generally attempt to prevent public discussion or criticism of individual executive decisions, for governments may rightly be judged on such bases. Nor should a law unduly restrict pre-emptive public attempts to influence a decision, for an ongoing relationship involves the ability to seek to influence government decision-making from time to time. If others can make such representations, it is difficult to argue that the affected individual should not also have the freedom to communicate to the decision-maker as he/she chooses (subject to legitimate regulation).

The constitutional protection should not go beyond this, however. Representative democracy should not be employed as a backdoor means of constitutionalising the grounds of review. The actual governmental decision reached is the stuff of ordinary administration. It may become a relevant *factum* in the political debate, and to this extent should be covered by the implied freedom of political communication. But this link to political debate does not imply that certain standards of decision-making must be met if the decision is to meet democratic requirements. The purpose and justification of the implied democratic guarantees is to protect the effective operation of the political process, not to achieve particular results (such as "good" executive decision-making).[134] Thus for the legislative branch the constitutional doctrine seeks to ensure that legislative decision-making is democratic, open and accountable. It does not provide quality-control standards to assess particular decisions reached by the democratic process. The very point of extending free political communication to cover executive decision-making is so that this can become the subject of *political* examination. This does not support the legal imposition of particular standards under the same banner.

The distinctions here may be ones of degree, yet lines must be drawn somewhere. That a particular condition or standard has a plausible connection to the operation of representative democracy is not sufficient to accord it with constitutional status.[135] If it were otherwise, innumerable issues might fall within the doctrine's ambit,

134 Note Kirk 1995, above n 108 at 44-49.
135 Kirk 1995, above n 108 at 64, 75.

such as health, education, welfare, defence and criminal justice. Any purported constitutional requirement should be practically essential to the effective operation of a modern representative democracy. The grounds of good executive decision-making are not sufficiently tied to the operation of the political process to satisfy this test.

Thus the entrenched doctrine of representative democracy does overlap with notions of administrative justice. For example, it probably guarantees some implied right not to have the ability to communicate with, and have access to, executive decision-makers unduly impeded by legislation. However, the doctrine should not be regarded as constituting an alternative basis for entrenchment of the common law grounds of judicial review.

THE CONSTITUTION AND ADMINISTRATIVE JUSTICE

The Australian Constitution does contain guarantees relevant to securing administrative justice. The entrenched doctrine of the separation of judicial power requires that many types of government decision-making are subject to judicial control or oversight, and this is especially so where matters of great consequence are involved. Through s 75(v) the Constitution ensures that executive action which is beyond the power allocated by the Constitution or by statute can be subject to judicial review. Moreover, that jurisdiction—by making available the remedies of mandamus, prohibition and injunction against officers of the Commonwealth—also generally enables judicial review of federal executive action to take place in the High Court, unless and until such review validly is restricted. And such restrictions will not readily be recognised. In another area, the constitutionally entrenched doctrine of representative democracy can and should be taken to protect certain ongoing aspects of potential interaction between the government and the governed from undue legislative interference.

All three of these constitutional bases can be seen in broader terms. In particular, both s 75(v) and representative democracy can plausibly be regarded as entrenching certain of the common law grounds of judicial review of administrative action. Such arguments should not be accepted. Seeking to ensure that the rights and duties of individual are affected only by government decisions which are procedurally and substantively just is obviously a worthy goal. But it is not a goal of such great importance, or of sufficiently clear content, as to override all other competing constitutional and societal considerations.

The Constitutionalisation of Administrative Justice

LINDA J KIRK*

One of the outcomes of the Constitutional Convention held in Canberra in February 1998 was a commitment to an ongoing process of constitutional review. The Convention resolved that, if a republican system of government were to be introduced by constitutional referendum, a further Constitutional Convention be convened in not less than three and no more than five years.[1] The agenda for the Convention would include the role of the three tiers of government and the rights and responsibilities of citizenship.

Administrative law in most legal systems has developed significantly in the past century and Australia is recognised as a country which has taken highly innovative steps to heighten executive accountability.[2] In addition to the development of common law principles, the past two decades have seen the establishment of a comprehensive legislative and institutional framework to provide for administrative justice. The "new administrative law", nationally, has been implemented by the *Administrative Decisions (Judicial Review) Act 1977* (Cth), the *Administrative Appeals Act 1975* (Cth), the *Freedom of Information Act 1982* (Cth) and the *Ombudsman Act 1976* (Cth).

Although concern for the rights of the individual has been identified as a fundamental concept of administrative law,[3] express

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1 Constitutional Convention Communiqué in *Report of the Constitutional Convention, Volume 1: Report of Proceedings* (1998) at 42.

2 H Corder, "Administrative Justice" in D Van Wyk et al (eds), *Rights and Constitutionalism: The New South African Legal Order* (1994) 387.

3 H W R Wade and C F Forsyth, *Administrative Law* (1994) 5; A Mason, "The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights" (1994) 1 *Aust Jnl of Human Rights* 3.

recognition of the principles of administrative justice is given in few bills of rights or constitutional documents. Recent proposals by the Federal Government to remove from judicial scrutiny the vast majority of migration decisions has highlighted the vulnerability of the "new administrative law" to legislative erosion under existing constitutional arrangements.[4] It has focused attention on the prevailing "rule book" vision of the rule of law which provides a theoretical justification for the exclusion of judicial review. Such developments may encourage a future Constitutional Convention to consider options for elevating the principles of administrative justice to constitutional status in a revised Constitution.

CONSTITUTIONAL LAW AND ADMINISTRATIVE JUSTICE

Administrative justice

Constitutional law needs to be understood to include more than the jurisprudence surrounding the express and implied provisions of the Australian Constitution. In its broader sense constitutional law connotes "the laws and legal principles that determine the allocation of decision-making functions amongst the legislative, executive and judicial branches of government, and that define the essential elements of the relationship between the individual and agencies of the state".[5] According to this definition, the "new administrative law" package together with the common law principles of administrative law form a part of our existing constitutional framework. Wade has observed that administrative law is a branch of constitutional law and that the "connecting thread" is "the quest for administrative justice".[6]

To determine whether this "quest for administrative justice" has been achieved in Australian constitutional law it is helpful to identify the elements which are present in a legal system which has attained this goal. In a recent analysis of developments under the European Convention on Human Rights, Bradley argued that decisions of the *European Court of Human Rights* provide "a solid basis for a new human right of immense importance to the study of administrative law"[7] which he termed "the right to administrative justice".[8] According to Bradley, this right would consist in certain minimum standards of administrative law as follows:

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4 Migration Legislation Amendment (Judicial Review) Bill 1998, discussed below at text to nn 12–25.

5 J M Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991) 29 *Osgoode Hall L J* 51 at 52.

6 Wade, above n 3 at 6.

7 A W Bradley, "Administrative Justice: A Developing Human Right?" (1995) 1 *European Public Law* 347 at 347.

8 *Ibid* at 348. Bradley argues that this right can be found in the jurisprudence surrounding Article 6(1) of the *European Convention on Human Rights* which provides: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

- the right of individuals to seek judicial review of government decisions which adversely affect them and a right to have the court apply the substantive grounds of judicial review;
- a full right of appeal from a first instance decision made by an official, to a tribunal or other judicial body *before* the operative decision is made and the need for judicial review arises; and
- that on some issues of importance to individuals there be the right for a court to review both the legality and the merits of the decision being challenged.[9]

With the possible exception of the third, which raises the difficult issue of the legality/merits distinction, it is arguable that all three of these minimum standards exist in the administrative law framework in Australia.[10] However, it is only the first of these elements which is given express recognition in the Australian Constitution. Section 75(v) grants to the High Court a constitutional jurisdiction to ensure lawful conduct by officers of the Commonwealth which cannot be overridden by a privative clause that seeks to insulate executive action from judicial scrutiny.[11] Apart from this section there is no formal constitutional mechanism to ensure that the common law and legislative provision of administrative justice is not eroded or dismantled by Parliament.

Exclusion of judicial review

Recent attempts by the Federal Government to remove from judicial scrutiny the vast majority of migration decisions has highlighted the vulnerability of judicial review under our existing constitutional arrangements.[12] Successive governments have attempted to stem the perceived tide of judicial activism in the migration area which

9 *Ibid* at 351–353.

10 See J McMillan and N Williams, "Administrative Law and Human Rights" in D Kinley (ed), *Human Rights in Australian Law* (1998) at 63, who argue that administrative justice, as a human right defined in Bradley's terms, is secured in four distinct ways in the framework of Australian administrative law—common law and statutory judicial review; merits review of administrative decisions by an administrative tribunal; complaints to an Ombudsman; and investigation and adjudication of complaints that infringe human rights by anti-discrimination and human rights agencies.

11 Section 75 of the Constitution provides:
In all matters—
(v) In which a writ of *mandamus* or prohibition or an injunction is sought against an officer of the Commonwealth:
the High Court shall have original jurisdiction.

12 These developments have been examined by a number of commentators, including M Crock, "Judicial Review and Part 8 of the Migration Act: Necessary Reform or Overkill" (1996) 18 *Syd L R* 267; M Crock, "Privative Clauses and the Rule of Law: The Place of Judicial Review Within the Construct of Australian Democracy" in S Kneebone (ed), *Administrative Law and the Rule of Law: Still Part of the Same Package?* (AIAL, 1998) 57; B Dyer, "Costs, Standing and Access to Judicial Review" (1999) 23 *AIAL Forum* 1; C D Campbell, "An Examination of the Provisions of the Migration Legislation Amendment Bill (No 4) 1997 Purporting to Limit Judicial Review" (1998) 5 *Aust Jnl of Admin Law* 135; R Creyke, "Restricting Judicial Review" (1998) 15 *AIAL Forum* 22.

extends back to the early 1980s.[13] The courts were criticised for having periodically strayed into the forbidden realm of merits review, making decisions based on policy grounds and the merits of the case instead of on a strict legal basis.[14] Amendments to the *Migration Act 1958* (Cth) introduced Part 8,[15] which seeks to restrict the grounds available for judicial review by the Federal Court by excluding, *inter alia*, breach of natural justice, unreasonableness and the "relevant and irrelevant considerations" grounds.[16] More recently, the Migration Legislation Amendment (Judicial Review) Bill 1998 (Cth),[17] sought to replace Part 8 with a broadly worded privative clause purporting to preclude review by any court of the decisions to which the clause applied.[18] The Bill also purported to completely remove the jurisdiction of the Federal Court to review certain decisions[19] and prevented the High Court from remitting matters in relation to such decisions to the Federal Court.[20]

These initiatives would compromise the minimum standards of administrative justice identified by Bradley, insofar as review of migration decisions is effectively limited to judicial review by the High Court in its original jurisdiction under s 75(v). This proposed change needs to be balanced against the fact that the exclusion of judicial review of categories of administrative decisions by way of privative clauses may promote desirable objectives in administrative government.[21] The inviolability of administrative decisions may advance "informality, simplicity, affordability, efficiency and flexibility and economy".[22] In addition, administrative decision-makers are often better placed to make decisions which involve specialist knowledge; thus, restricting review may promote better decision-making.[23]

However, the problem with a blanket exclusion of judicial review of administrative decisions as proposed by this Bill is that it removes from judicial scrutiny all decisions regardless of their subject matter.[24] In the case of the *Migration Act 1958* (Cth), the consequences of many decisions could not be more serious, going often to

13 Crock, above n 12.
14 *Ibid*.
15 Inserted by the *Migration Reform Act 1992* (Cth). Discussed in Crock, above, n 12. See also discussion in Dyer, above n 12 at 31–32. In *Abebe v Commonwealth* (1999) 197 CLR 510, the High Court held by a majority of 4:3 that the provisions of Part 8 are constitutionally valid.
16 *Migration Act 1958* (Cth) s 476.
17 For discussion of the Bill see references in n 12. The Government stated in its 1998 election policy *Immigration: Building on Integrity and Compassion* that it would reintroduce legislation "to restrict access to judicial review in all but exceptional cases".
18 Migration Legislation Amendment Bill (No 5) 1997 (Cth), proposed s 474(1).
19 Migration Legislation Amendment Bill (No 5) 1997 (Cth), proposed s 476(1).
20 Migration Legislation Amendment Bill (No 5) 1997 (Cth), proposed s 476(4).
22 Campbell, above n 1 at 151–152.
22 *Ibid* at 155.
23 *Ibid* at 153.
24 *Ibid* at 155.

the life or liberty of the person concerned.[25] It is these underlying concerns about the consequences of excluding judicial review for the fundamental human rights of individuals that give weight to an argument that there should be express constitutional recognition of the principles of administrative justice.

Constitutional rights and values

In Australia the absence of a bill of rights reflects, in part, the "rule book" conception of the rule of law[26] which resists "the notion that the rules made by Parliament must conform to super-arching values or principles".[27] As Crock has observed, the assertion of "the primacy of political control" and the associated view that courts should show deference in their review of administrative decisions "provides a theoretical justification" for the proposal to exclude judicial review of migration decisions.[28] Despite the primacy of the rule book conception of the rule of law in Australia, Crock argues that our system is "based on a more sophisticated understanding of shared values and standards" which is consistent with a "rights-based" vision of the rule of law.[29] From this perspective, the judicial review role of the courts is not only legitimate but a critical part of the constitutional system.[30]

If a future Constitutional Convention were to express a commitment to a "rights-based" vision of the rule of the law this may suggest that the incorporation of a bill of rights into the Australian Constitution is necessary to give this vision express recognition. Such a bill of rights could include an express right to administrative justice. Alternatively, administrative justice may be secured indirectly through the requirement that the decisions of administrators be made in accordance with fundamental human rights which are listed in the bill of rights. This would give constitutional expression to the Convention's belief that those elements of our (unwritten) constitutional law which regulate the conduct of administrators vis-à-vis the citizen are valued by the Australian people and should be insulated from undue legislative erosion.

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25 Dyer, above n 12 at 32.

26 Ronald Dworkin in *A Matter of Principle* (Harvard University Press, 1985) at 11, identifies the "rule book" conception of the rule of law as one which involves a theory that the power of the State should not be exercised against individual citizens except in accordance with rules explicitly outlined in a public rule book. This is discussed in K Rubenstein, "Towards 2000: An Assessment of the Possible Impact of a Bill of rights on Administrative Law in Australia" (1993) 1 *Aust Jnl of Admin Law* 13 at 18.

27 M Crock, "Privative Clauses and the Rule of Law: The Place of Judicial Review Within the Construct of Australian Democracy" in S Kneebone (ed), *Administrative Law and the Rule of Law: Still Part of the Same Package?* (1998) 57 at 77.

28 Rubenstein, above n 26 at 14.

29 Rubenstein describes the "rights-based" conception of the rule of law as "the ideal of rule by an accurate public conception of individual rights": above n 26 at 18.

30 *Ibid*.

Once a commitment is made to "constitutionalise" administrative justice it is necessary to determine what the nature of this right will be. Should it include, or go beyond, the minimum standards identified by Bradley? Issues which need to be considered include:

- how the right should be formulated;
- to and against whom the right should be available;
- the types of administrative action to which the right extends;
- whether the grounds for review should be specified;
- whether the right should be limited to judicial review of administrative action or whether there should also be the guarantee of merits review;
- whether there are circumstances in which judicial review should be permitted to be excluded in the interests of better administrative governance.[31]

The next part of this paper will examine three different approaches to the goal of giving constitutional recognition to administrative justice. It will outline these approaches and make an assessment of which method would provide the most satisfactory outcome for Australia.

"CONSTITUTIONALISATION" OF ADMINISTRATIVE JUSTICE

Express recognition

The most expansive form of entrenchment of the right to administrative justice is the incorporation into the Australian Constitution of a provision to the effect that any person aggrieved by an administrative decision should have the right to have the matter reviewed by a court or tribunal. Such a right is expressly provided for in Namibia in Article 18 of the Namibian Constitution:

> Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.[32]

This Article imposes a positive duty on the public administration to meet the requirements of legality, fairness and reasonableness in all their actions and grants persons "aggrieved" by administrative action the right to seek redress before a court or tribunal. The Article guarantees review of administrative decisions by a "competent Court or Tribunal" and appears to extend to merits review (or appeal) of such decisions.

The Namibian Constitution was influential in the drafting of the South African Constitution. A significant aspect of the "debate" about administrative justice in South Africa was that almost every key

31 Issues identified by Corder, above n 2 at 387.

32 *Constitution of the Republic of Namibia 1990*, Article 18.

participant in the negotiations for the drafting of the transitional constitution accepted without question that administrative justice was a goal worth constitutionalising.[33] That was so even if it was only in the form of the elevation to constitutional status of the rules of natural justice and the guarantee of access to the courts.[34] The political background in South Africa contributed to this strong commitment to put in place constitutional guarantees to ensure that the injustices of the past could not occur again.[35] That regime had been marked by substantial degrees of discretionary power in the hands of the executive—vital to implement the segregation and apartheid policies of successive governments.[36] In addition, the common law principles of administrative law were under-developed and there existed few mechanisms to review administrative action.[37]

While the inclusion of the right to administrative justice had overwhelming support from all sides of the political spectrum, its precise formulation provoked much discussion.[38] The essential question was whether, and if so, how, to stipulate the grounds of review in the Bill of Rights. Some argued that the grounds should not be too specific and should refer generally to grounds such as the duty to act fairly, thus allowing the courts room to develop the actual content of the right. It was also argued, given the conservatism of the courts and the law, that the courts should be encouraged to move in particular directions, in particular, review for "unreasonableness".[39] Others argued that it was necessary to stipulate the grounds of review clearly but narrowly so as to limit the potential of the courts to frustrate the intentions of a democratically elected Parliament and its responsible executive.[40]

A right to administrative justice was proposed by the African National Congress (ANC) as part of the multi-party negotiations in the drafting of the transitional Constitution of South Africa. It formed part of its *Draft Bill of Rights* (1993) and read as follows:

> Article 2: Personal Rights
>
> (26) The Right to Judicial Review
>
> Any person adversely affected in his or her rights, entitlements or legitimate expectations by an administrative or executive act shall be entitled to have the matter reviewed by an independent court or tribunal on the grounds of irregularity, including abuse of authority, going beyond the powers granted by law, bad faith, or such (gross) unreasonableness in relation to the procedure or the decision as to amount to manifest injustice.[41]

33 Corder, above n 2 at 390.
34 H Corder, "Administrative Justice in the Final Constitution" (1997) 13 *South African Jnl of Human Rights* 28, included as part of South African Law Commission, Discussion Paper 81(1999).
35 *Ibid* at 27.
36 *Ibid* at 26. See also H Corder, "Administrative Review in South African Law" (1998) 9 *Public Law Rev* 89 at 90–91.
37 Corder, *ibid* at 93.
38 *Ibid*.
39 *Ibid*.
40 *Ibid*.
41 ANC, *Draft Bill of rights* (Preliminary Revised Version) (1993).

This was accompanied by Article 17(13)-(18) which established the office and powers of an Ombudsman.

Article 2(26) is more prescriptive than Article 18 of the Namibian Constitution in that it provides a non-exhaustive list of the grounds of review. The potential problem with specifying grounds of review is that it opens the way for parliament to exclude grounds that are not listed.[42] Merits review is contemplated by the Article and, significantly, the informal review role of an Ombudsman is given constitutional status.

The effect of the inclusion of a right to administrative justice into the Australian Constitution in terms such as the ANC proposal or Article 18 of the Namibian Constitution would be to entrench the grounds of judicial review of all administrative action. Any form of administrative action could potentially be made the subject of constitutional challenge. That would amount to an "extravagant grant of power" to the judiciary over the entire administrative process.[43] There would be significant implications if this approach were to be followed in Australia.

At a practical level, even assuming that the existing avenues for judicial and merits review of administrative action would remain, there would be a constitutional right for all administrative decisions to be reviewed by the High Court. As the Court with jurisdiction to hear and determine constitutional cases, the High Court would be burdened with a substantial increase in its case load as a consequence of the incorporation of such a provision into the Constitution. The effect on the High Court's case load is one of the major criticisms of the Migration Legislation Amendment (Judicial Review) Bill 1998.[44] In order to lessen this burden on the High Court, the Constitution could be amended in terms similar to s 75(v) to give the Federal Court jurisdiction to hear constitutional challenges to administrative decisions. The High Court would retain its appellate jurisdiction over these cases but would not be involved with the process of constitutional review in the first instance.[45]

An express right to administrative justice in terms such as those in the Namibian Constitution would preclude the parliament from making use of privative clauses to exclude review of some categories of administrative decisions as is proposed by the Migration

42 This was highlighted at a workshop on the theme "Administrative Law for a Future South Africa" held from 10–13 February 1993 in Capetown. A summary of the report is contained in *The Breakwater Declaration* 1993 and is reproduced in part in Corder, above n 2 at 398.

43 J M Evans, "Administrative Appeal or Judicial Review: A Canadian Perspective" (1993) *Acta Juridica* 47 at 72.

44 Dyer, above n 12 at 34. This was noted by Gleeson CJ, McHugh and Kirby JJ in *Abebe v Commonwealth* (1999) 197 CLR 510.

45 Appellate jurisdiction under s 73(ii). The effect of inserting a clause in similar terms to s 75(v) would be to constitutionalise the Federal Court's jurisdiction granted by s 39B of the *Judiciary Act 1903* (Cth).

Legislation Amendment (Judicial Review) Bill 1998.[46] As discussed above, it is often considered desirable to limit the intensity or scope of the courts' scrutiny of the decisions of certain tribunals. That may be because of the disparate financial means of the parties who appear before the tribunal or because of the virtues of giving finality to decisions of fact made by administrators.

If all administrative action were subject to constitutional review the content of the procedural duties owed by an administrative agency would be determined by the court as a matter of constitutional law. As a consequence, parliament would be unable to amend the agency's enabling statute in order to relieve it of a procedural requirement imposed by a court as a matter of procedural fairness.[47] The procedures by which an agency must perform its statutory duties involves a judgment as to where it is appropriate to strike the balance in any given context among potentially competing objectives and values.[48] Where this balance is struck is likely to be the subject of disagreement. But the effect of entrenching a right to administrative justice in these terms would be to make the court the final arbiter on such matters regardless of the nature of the individual interests that the agency's decision may affect.[49]

In commenting on proposals to introduce such a clause into the South African Constitution, Professor John Evans said:

> [A] single constitutionally entrenched standard of judicial review applicable to all administrative action is likely to be incompatible with a more functional, contextual and differential approach to the appropriate degree of control exercised by the courts over the administration of public programmes.[50]

In summary, the entrenchment of an express right to administrative justice would place a significant burden on the courts, would unduly fetter parliament's control over the administrative process and would not guarantee that individuals were provided with more just outcomes. These reasons should cause a future Constitutional Convention to hesitate before incorporating such a provision into the Australian Constitution.

Constitutional duty on parliament to legislate for administrative justice

United Kingdom

An alternative way of making express provision for a right to administrative justice can be found in the proposals for a

46 Following the decision in *Abebe v Commonwealth* (1999) 197 CLR 510, it would appear that a privative clause would be effective to exclude judicial review by the Federal Court except, perhaps, in the case of jurisdictional error.

47 Evans, above n 43 at 72.

48 *Ibid*.

49 *Ibid*.

50 *Ibid* at 73.

Constitution of the United Kingdom.[51] Article 118.1 provides for administrative justice by casting the onus on Parliament to legislate for judicial review of administrative acts and omissions, a general duty on public authorities to give reasons for their decisions and for effective remedies. Standing is accorded to all who have a "significant interest" in the matter.[52] The Constitution creates the framework for legislative action; failure by Parliament to fulfil its constitutional duties would presumably be actionable.[53] In addition, provision is made for a Commission for Public Administration with wide-ranging investigative, review, research, remedial and reporting powers[54] and there is a duty to establish a complaints procedure which is imposed on every public authority.[55]

South Africa

A similar approach was adopted in the final *Constitution of the Republic of South Africa 1996*. Chapter 2 of the Constitution contains the Bill of Rights which includes the right to "Just Administrative Action" as follows:

> 33(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
>
> (3) National legislation must be enacted to give effect to these rights and must—
>
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
>
> (c) promote an efficient administration.[56]

This provision grants to everyone the right to administrative action which is "lawful, reasonable and procedurally fair" but restricts the right to obtain written reasons for administrative action to those "adversely affected" by it. Section 38 gives a right to approach a competent court alleging that a right in the Bill of Rights has been

51 Institute for Public Policy Research, *The Constitution of the United Kingdom* (1991) discussed in Corder, above n 2 at 389.

52 *Ibid*, Article 118.2.

53 Observation made by Corder, above n 2 at 389.

54 Above n 51, Article 119.

55 *Ibid*, Article 120.

56 *Constitution of the Republic of South Africa 1996*. Item 23(1) of Schedule 6 requires national legislation to give effect to s 33 to be enacted by no later than 3 February 2000. Item 23(2) provides that s 33(3) of the Constitution "lapse[s] if the envisaged legislation in those sections respectively, is not enacted within three years of the date the new Constitution took effect". [Editorial note: See the *Promotion of Administrative Justice Act 2000*, as published in the *Republic of South Africa Government Gazette*, 3 February, 2000.]

infringed or threatened. In addition, s 182 establishes the powers and functions of a Public Protector to investigate any conduct in state affairs or in the public administration in any sphere of government.

Section 33 replaced s 24 of the interim Constitution[57] which was considered to have unduly hampered the public administration in the first two years of the ANC Government. It led to calls for the right to administrative justice to be replaced in the final constitution by a mere reference to an obligation on Parliament to adopt legislation to regularise the basic principles of review.[58] Section 33 is a compromise in so far as it grants the right to administrative justice but places the onus on Parliament to legislate to give effect to this right.

The Draft Administrative Justice Bill 1999[59] imposes a duty on all organs of state to give effect to the rights in s 33(1) and (2) of the Constitution and provides for the review of administrative action by the courts.[60] Section 4 lays down a "closed list" of the grounds on which courts must review administrative action. These reflect the grounds of review in the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Section 7 requires the courts to grant appropriate relief and gives an "open list" of the remedies in proceedings for review. Chapter 5 establishes an Administrative Review Council with powers to investigate and report on review of administrative action and any improvements in the law. The Council is required to investigate the viability of establishing independent review tribunals and the efficacy of administrative appeals, including the possibility of specialised administrative appeals tribunals.

According to one interpretation, s 33 provides the right to just administrative action, and the requirement of national legislation is merely to make the practical implementation of the right easier and more effective.[61] That is, the national legislation provides the procedures, the statutory mechanisms, the tribunals and so forth, which are necessary to give concrete effect to the rights. Another interpretation is that the rights in ss 33(1) and (2) are suspended and have no

57 Section 24 of the interim Constitution provided:
Every person shall have the right to—
(a) lawful administrative action where any of his or her rights or interests is affected or threatened;
(b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
(d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.

58 Discussed in Corder, above n 36 at 95.

59 The Draft Bill is the product of a project committee established by the South African Law Commission and contained in its Discussion Paper 81 (1999).

60 Chapter 2, ss 3 to 8. The draft Bill extends to the Magistrates Courts the power of review which had previously been the preserve of the High Courts.

61 Corder, above note 33 at 30.

practical effect in the absence of national legislation.[62] If that is the case then there are two types of rights contained in the Bill of Rights—those which are self-executing and those which are dependent on the enactment of national legislation.

The difficulty with s 33 is that even if Parliament does legislate for review of administrative action it is left entirely to its discretion to determine the grounds of judicial review, to determine whether there will be any provision for merits review, and to exclude some grounds and categories of decision from review. If this were to occur, the right to just administrative action would be significantly compromised. As outlined above, the response to date has been to produce legislation not unlike the ADJR Act.

If such a provision were to be incorporated into the Australian Constitution there would be very little change to our existing arrangements. Other than providing a constitutional right to reasons for administrative action, which is not recognised by the common law,[63] the value of the provision would lie in its affirmation of the importance of fair and reasonable administrative decision-making and the right to pursue review of such decisions. Parliament could still limit judicial review and merits review would not be constitutionally guaranteed.

Constitutional or legislative entrenchment of fundamental rights

General

Many commentators have criticised the failure of the courts to identify the substantive grounds for judicial review.[64] In an influential article in which they expressed dissatisfaction with the test of "unreasonableness" as formulated in the *Wednesbury* case, Jowell and Lester argued:

> [T]he recognition and application of substantive principles would satisfy the need in a fast developing area of law for clarity and coherence. Far from encouraging judges to meddle with the merits of official decisions, it would, we believe, promote consideration of the proper role of the courts in the growing common law of public administration. It would also enable the courts to strengthen the protection of fundamental human rights against the misuse of official discretion without usurping legislative or executive powers.[65]

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62 *Ibid*. This is supported by item 23 of Schedule 6, to the effect that the meaning of s 24 of the interim Constitution will continue to be applied by the courts until national legislation is enacted.

63 *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656.

64 See, eg, R Cooke, "The Struggle for Simplicity in Administrative Law" in Taggart (ed), *Judicial Review of Administrative Action in the 1980s* (1986) 5; T R S Allan, "Pragmatism and Theory in Public Law" (1988) 104 *Law Qtly Rev* 422; Lord Scarman, "The Development of Administrative Law: Obstacles and Opportunities" [1990] Public Law 490; J McLachlan, "Substantive Fairness: Elephantine Review or a Guiding Concept" (1991) 2 *Public Law Rev* (Part 1) 12; and (Part 2) 111.

65 J Jowell and A Lester, "Beyond Wednesbury: Substantive Principles of Administrative Law" [1987] *Public Law* 368 at 368–369.

Rubenstein has suggested that the introduction of a bill of rights would fulfil this perceived need for a clear set of standards in administrative law.[66] The paramountcy of the constitutional guarantee of these rights would permit the courts to review administrative action on the ground that it violated a constitutionally protected right.[67] It would not be open to the parliament to override by legislation the courts' determination that the administrative action violates such a right.[68] The extent of the protection would, of course, depend on the definition of the rights specified in the bill of rights. As Rubenstein has noted, the introduction of a bill of rights would provide legitimacy to the increasing reference by judges to the impact on individual liberty when invoking the principles of broad *ultra vires*.[69] It would give full constitutional recognition to a rights-based conception of the rule of law.

Canada

In Canada the *Charter of Rights and Freedoms* entrenches the power of the courts to review the validity of statutes, delegated legislation, tribunal decisions, or any other form of administrative action by a governmental body, on the ground that there has been a violation of a right protected by the Charter.[70] Section 7 of the Charter has been of particular importance in the context of administrative law. It provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof other than in accordance with the principles of fundamental justice.

This has been applied to the right of a claimant to refugee status not to be removed to a country where she fears persecution and has even been extended to interests that have an economic aspect, for example, the receipt of social security benefits.[71] Once an individual has established that the interest adversely affected qualifies as "life, liberty or security of the person" it must be shown that the governmental action in question was not in accordance with "the principles of fundamental justice". These are not limited to matters of procedural fairness and have been held to connote "the basic tenets and principles ... of our legal system".[72] In the context of review of administrative action this has been held to include undue delay and unnecessarily vague statutory decision-making standards.[73]

66 Rubenstein, above n 26 at 25.
67 Evans, above n 43 at 71.
68 *Ibid*.
69 Rubenstein, above n 26 at 25.
70 Evans, above n 43 at 69.
71 See cases cited in Evans, above n 43 at 69–70.
72 *Reference re Section 94(2) of the BC Motor Vehicle Act* [1985] 2 SCR 486 at 512, cited in Evans, above 43 at 70.
73 See cases cited in Evans, *ibid*.

New Zealand

Taggart has analysed the impact of the unentrenched Bill of Rights on the control of discretionary power in New Zealand.[74] A public authority must comply with the Bill of Rights unless required to do otherwise by statute or where it would frustrate the purpose behind the statutory provision conferring the discretion.[75] The most critical challenges to discretionary decisions are usually concerned with the way in which a decision-maker has ordered his or her priorities.[76] The adoption of a bill of rights signals to decision-makers that they are not free to order their priorities as they see fit. Taggart argues that the Bill of rights "superimpose[s] a higher constitutional dimension on top of the traditional administrative law grounds for review of discretionary decision-making".[77] The starting point is the right allegedly infringed by the exercise of discretionary power by the public authority. Next is the inquiry into whether the right has been reasonably or justifiably limited in terms of the express qualifications on the right. If it has not, the right is a "constitutional trump" which prevents the decision-maker from exercising the discretionary power in a way that infringes the right.[78] If the effect of judicial intervention to review the decision is to challenge the wisdom of the government policy or the "merits" of the decision, then so be it.[79]

He contrasts this with the traditional administrative law approach to the control of discretionary power where there is a hierarchy of considerations which the decision-maker may or must take into account.[80] As he observes, it is not that the traditional approach is unable to recognise rights or appropriately balance them against other interests. However, judges have considerable leeway in how they approach and resolve such issues in administrative law. There is no accepted methodology that requires rights issues to be identified and approached in the same manner and sequence.[81]

United Kingdom

The United Kingdom Parliament has recently enacted the *Human Rights Act 1998* which incorporates into domestic law the *European Convention on Human Rights*. Section 6 makes it unlawful for a public authority to act in a way which is incompatible with the Convention, unless compelled to do so by statute.[82] Under s 7 a

74 M Taggart, "Tugging on Superman's Cape: Lessons From Experience with the New Zealand Bill of Rights Act 1990" [1998] *Public Law* 266; and J McLean, P Rishworth and M Taggart, "The Impact of the New Zealand Bill of Rights on Administrative Law" in *The New Zealand Bill of Rights Act* 1990 (1992) at 62–97.

75 Taggart, above 74 at 277.

76 J Laws, "Is the High Court the Guardian of Fundamental Constitution Rights?" [1993] *Public Law* 59 at 73.

77 Taggart, above n 74 at 277.

78 *Ibid*.

79 Allan, above n 64 at 443.

80 Taggart, above n 74 at 277.

81 *Ibid* at 278.

82 *Ibid* at 279. See also discussion in J J Spigelman, "Rule of Law—Human Rights Protection" (1999) 18 *Aust Bar Rev* 29.

person may bring proceedings against an authority which is alleged to be in breach of s 6. The Lord Chancellor, Lord Irvine of Lairg, has recently suggested that the Act will see a shift from form to substance in the review of administrative action.[83] To date the courts have examined whether the "rules" have been obeyed by an administrator (the right considerations have been taken into account, no irrationality, no misdirection of law and so on) in order to determine whether to uphold the administrative decision. In areas where the Convention applies, Lord Irvine predicts that the courts will "inquire more closely into the merits of the decision to see ... that necessity justified a limitation of a positive right, and that it was no more of a limitation than was needed".[84] He even suggests that the impact of the Act may spill over into non-Convention cases, such that the courts may no longer restrict judicial review to a narrow *Wednesbury* approach.[85] He concludes that the Act will—

> ...create a more explicitly moral approach to decisions and decision making; will promote both a culture where positive rights and liberties become the focus and concern of legislators, administrators and judges alike, and a culture in judicial decision making where there will be a greater concentration on substance rather than form.[86]

Australia

If Australia were to introduce an entrenched or legislative bill of rights this would advance the quest for administrative justice in Australian constitutional law. It would provide greater legitimacy to judicial review of decisions which affect fundamental human rights and would authorise consideration of the "merits" of such decisions. A constitutional bill of rights would preclude parliament from excluding from review decisions which affect these rights. This would mean, for example, that migration cases which have serious consequences for the life, liberty or security of the individual concerned could not be excluded from judicial review if this were a constitutionally protected right. In cases which do not directly concern fundamental rights the courts may be encouraged to articulate more clearly the substantive principles of judicial review and thereby promote clarity and coherence in administrative law.

The adoption of a bill of rights would identify the rights which the Australian community values and would be an affirmation of a rights-based conception of the rule of law. It is against this constitutional benchmark that the actions of administrators could be judged by courts and tribunals charged with responsibility of reviewing administrative decisions. A bill of rights would give clear direction to administrators as to how to order their priorities in decision-making, which is absent from traditional administrative law methodology.

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83 Lord Irvine of Lairg, "The Development of Human Rights in Britain Under An Incorporated Convention on Human Rights" [1998] *Public Law* 221.

84 *Ibid* at 235.

85 *Ibid* at 234. See also discussion in S Greer, "A Guide to the Human Rights Act 1998" (1999) 24 *European Law Rev* 3 at 11.

86 Lord Irvine, above n 83 at 236.

The advantage of a bill of rights over more direct constitutional entrenchment of a right to administrative justice is that it leaves within the control of parliament the determination of the most efficient means to make provision for the review of administrative action. But the bill of rights provides the safeguard that those rights identified as being of fundamental importance will be protected from violation by legislative and administrative action. This allows judicial skills and resources to concentrate on the protection of these constitutionalised rights. These are matters which a future Constitutional Convention should consider carefully in its deliberations as to the content of a revised Constitution.

Measuring Administrative Justice

In the Eye of the Beholder— Measuring Administrative Justice

PROFESSOR MARCIA NEAVE*

It is trite to observe that administrative justice cannot be measured without defining what it is. It is also stating the obvious to remark that different stakeholders in the administrative justice system are likely to have different perspectives on what is central to the achievement of administrative justice.[1] It cannot be assumed that there is agreement between administrators, tribunals, courts and members of the community on its key features.[2] This paper examines difficulties which arise in applying performance measures to the administrative law system and explores tensions between a variety of approaches to the question "What is administrative justice?" It argues that if performance measurement is to enhance administrative justice, it must encourage, instead of silencing, debate about these tensions.

PERFORMANCE MEASUREMENT IN CONTEXT

Since the early 1980s, public sector adoption of the new managerialism[3] has led to increased reliance on performance monitoring and measurement. Over the past ten years there has been an outpouring of plans, mission statements, departmental reports and other policy

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1 M Allars, *Australian Administrative Law: Cases and Materials* (1997) at 1–10.

2 G Fleming, "Administrative Review and the 'Normative' Goal – Is Anybody Out There?" (2000) 28 *Fed L Rev* 61 at 63.

3 For a useful summary of the components of this approach, see J Halligan, "Defining a New Public Sector Management: Australia and the International Context" in J Guthrie (ed), *The Australian Public Sector: Pathways to Change in the 1990s* (IIR Conferences, 1993) at 22–26. For a more detailed critique see M Pusey, *Economic Rationalism in Canberra* (1991) at 121–125.

documents, which have attempted to describe and improve the performance of the bureaucracy.

A similar trend is apparent within courts and tribunals, which are increasingly adopting mission statements and plans, setting objectives and designing performance indicators. Within courts, performance measures have usually been concerned with case management and timeliness issues, rather than with gauging public perceptions of the justice system.[4] Relatively few attempts have been made to make qualitative judgments about court performance. Notable exceptions include the 1994 *Report of the Commonwealth Access to Justice Advisory Committee* which made recommendations for reform to the Commonwealth justice and legal system to make it "fairer, more efficient and effective",[5] and the 1998 Parker Report, *Courts and the Public* which explored ways of making courts more responsive to the needs of members of the public.[6]

Commonwealth tribunals have gone further than courts in setting objectives relevant to the achievement of administrative justice. For example, the Administrative Appeals Tribunal's Corporate Plan 1996-99 adopts the goals of:

- being accessible and responsive;
- providing effective procedures for the resolution of disputes;
- providing quality decisions; and
- providing leadership in administrative review.

The Plan provides indicators by which success will be assessed. For example, provision of leadership is to be judged by presence and participation in the administrative law debate, the extent to which members and staff are invited to make addresses and give papers, and the extent to which decisions are followed and applied.[7]

Despite the adoption of these indicators, processes for measuring achievement of objectives are still relatively unsophisticated. A recent example is the Australian Law Reform Commission's Issues Paper, *Review of the Adversarial System of Litigation: Federal Tribunal Decisions*,[8] which deals mainly with issues of cost and delay and only

4 Compare the attempt made to include qualitative, as well as quantitative performance measures in the United States Department of Justice, *Trial Court Performance Standards and Measurement Systems* (1997) (see www.ncjrs.org/txtfiles1/161569.txt).

5 Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994) at xxix.

6 S Parker, *Courts and the Public* (1998), and see the other studies discussed at 54 ff of that Report. Some courts have developed service charters to improve the quality of court administrative processes (ibid at 82). The Commonwealth Administrative Appeals Tribunal has developed a charter—see www.gov.aat.au/charter.htm.

7 Commonwealth Administrative Appeals Tribunal, *Annual Report 1997–1998* (1998) at 14–15.

8 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Federal Tribunal Decisions*, Issues Paper 24 (1998) Ch 11. Cf Productivity Commission, *Report on Government Services* (1999). For another example of performance measures, see Refugee Review Tribunal Home Page: www.Austlii.edu.au/au/other/rrt/measure.htm.

briefly refers to the need to ensure that merits review is fair and just.[9] This reflects the practical difficulty of devising measures of quality which address issues such as accessibility, justice and fairness.

Quantitative measures of the efficiency and effectiveness of courts and tribunals may contribute to administrative justice, but have little relevance to the very large numbers of people who do not seek judicial or merits review of government decisions which affect them.[10] In theory, performance management by departments and agencies could result in clearer articulation of the objectives of government programs, making it easier to assess whether these goals are being met and contributing to quicker identification and correction of administrative errors. In practice, however, a number of problems need to be addressed, if measurement techniques are to enhance the quality of administrative justice.

SOME CONCERNS ABOUT PERFORMANCE MEASUREMENT[11]

Do the benefits exceed the costs?

Performance measurement comes at a price.[12] This includes both the cost of designing and applying a system of measurement and the less tangible negative effects which the system may have on work processes and staff morale.[13] If administrative justice is to be enhanced, the improvements produced by performance measurement must exceed implementation costs. At present there is insufficient information to determine whether this is the case. The Australian Law Reform Commission has commented that "evaluating the performance of tribunals by reference to cost, timeliness and other criteria is made difficult by the lack of comparable statistical information".[14] There is an even greater dearth of information which could be used to make comparisons of the cost and timeliness of primary decision-making within departments and agencies. Because such information does not exist we can only speculate about whether its collection would result in improvements in primary decision-

9 Subsequently, the Australian Law Reform Commission did examine these issues.

10 Fleming, above n 2 at 68.

11 Note that some of these problems are briefly discussed in the paper published in this volume by L McDonald, "Measuring Administrative Justice: Lessons from the Report on Government".

12 McDonald, *ibid*, suggests that costs can be reduced by using data already collected for other administrative purposes. This approach is likely to result in overemphasis on quantitative data required for performance monitoring.

13 C O'Faircheallaigh, " Conclusions: Issues and Dilemmas in Performance Evaluation and Performance Monitoring" in C O'Faircheallaigh and B Ryan (eds), *Program Evaluation and Program Monitoring* (Macmillan, 1992) at 176. For discussion of some of the workplace issues which may arise in the public sector see C Morgan and S Murgatroyd, *TQM in the Public Sector* (Open University Press, 1995) at Ch 8.

14 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Federal Tribunal Decisions*, Issues Paper 24 (1998) at 107.

making and review processes, or in achievement of other goals of administrative justice, such as community participation, transparency and government accountability.

There are several reasons why performance measurement may not be worthwhile. First, the measures which are adopted may be defective and produce misleading results. Obviously it is more difficult to decide whether complex and contested objectives, such as the achievement of administrative justice, are being met, than to develop a methodology for measuring productivity gains in, for example, a manufacturing enterprise. The problems which are likely to arise in measuring administrative justice are discussed in more detail below.

Secondly, even if the measures are appropriate, the benefits obtained by applying them may be minor or non-existent. This may be because external factors have a greater influence on outcomes of the system than the matters which are being measured. For example, in the case of merits review, settlement rates and the speed and accuracy of decisions may be affected by such factors as the availability of legal aid, the extent of legal representation and the legal rules governing tribunal procedure, as much as by the efficiency of tribunal members.

Performance measurement may not have significant benefits because it results in decision-makers redirecting their efforts towards meeting performance targets and away from activities which may be more difficult to measure but have much greater significance. This problem of "goal displacement"[15] is well-recognised in performance measurement literature, but there is a danger that it will be given insufficient weight by system administrators. For example, a focus on speedy decision-making, which results in a decrease in accuracy, may actually reduce the numbers of people who receive correct decisions about their entitlements.

Thirdly, performance measurement may have limited benefits because insufficient attention is paid to the purposes for which the information is collected, or the way in which it is likely to be used. There is debate about the extent to which new managerial approaches have actually improved public administration.[16] Performance measurement may be a time-consuming, but largely symbolic activity. For example, in the United States it has been reported that—

> ... there is a large amount of activity associated with performance measurement in public administration, but the most typical use of performance measurement is 'merely to decorate a budget document... .

15 D Corbett, *Australian Public Sector Management* (Allen & Unwin, 1992) at 180. An example is provided by the process used to distribute funding for research within universities, which provides rewards for some forms of research and disregards others. As a result academics have redirected their research activities. Whether this has improved the quality of research is debatable.

16 See for example P Smith, "The Use of Performance Indicators in the Public Sector" (1990) 153 (1) *Journal of the Royal Statistical Society* at 53 ff.

> For the most part there appears to be a paucity of substantive uses and users of performance measurement in the public sector.[17]

If performance measures are to enhance the quality of government administration (and hence administrative justice), their primary purpose must be to increase the accountability of government departments, agencies and ministers, to parliament and the public.[18] Members of the public and non-government organisations should be encouraged to use them to press for necessary systemic change. Departments and agencies should be required to consult stakeholders when they are designing performance indicators and should provide information obtained by their use in a form which is understandable by people outside the bureaucracy. Similar principles should apply to information relating to the performance of corporatised bodies and private contractors responsible for decision-making within government programs.

"Efficiency" versus "effectiveness"

Another concern is that the stated objectives of performance measurement may conceal its real purposes. Use of performance measures coincides with the trend to "smaller government" and the ascendancy of economic and technocratic approaches to public sector management.[19] James Guthrie has commented that "much of the [present] measurement is in financial/economic form".[20] Because of the emphasis placed on efficient use of limited taxpayer dollars, the discourse of performance measurement distracts attention from fundamental policy questions about the appropriate role of government. Such measures may render invisible other legitimate objectives of government administration, such as ensuring fairness, equity and community participation in government decision-making. Concern with efficiency gains can divert attention from more fundamental questions about whether the resources provided are grossly inadequate.

Achieving administrative justice necessarily requires value judgments to be made about trade-offs between competing objectives, for example, speed versus accuracy of decision-making. Performance measurement may result in such choices being made covertly, instead of being clearly articulated. Targets for performance of some objectives (for example, reducing the cost of decision-making) may prevent the achievement of others. But the discourse of performance measurement can make it easier to present these choices simply as efficiency questions. In theory, the publication of information on

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17 Quality of Life Project, *More than a Sum of its Parts. Planning For and Assessing Quality in ACT Government Services* (1999) at 22 (hereafter "Quality of Life Project") quoting from Greiner, in A Halachmi and G Bouckaert (eds), *Organizational Performance and Measurement in the Public Sector: Towards Service, Effort and Accomplishment Reporting* (Quorum Books, 1996) at 2.

18 O'Faircheallaigh, above n 13 at 170.

19 For a more detailed argument on this point, see Pusey, above n 3 at 22.

20 J Guthrie, "Critical Issues in Performance Management and Indicators" in Guthrie (ed), above n 3 at 72.

performance could make these trade-offs more visible, thus giving members of the community the opportunity to press for changes. In practice, the imperatives of performance measurement may result in a focus on "inputs" and "outputs" which makes it virtually impossible to raise broader questions about the purposes of the system.[21] It is particularly difficult for those who have failed to meet performance standards to criticise the assumptions which underpin them. For example, public servants who argue that it is impossible to provide a proper level of service to clients if they are required to make specified numbers of decisions within a particular time may be seen as inefficient or self-serving, even when their concerns are well-founded.

Yeatman has argued that public sector emphasis on generic management skills has resulted in the down-grading of substantive professional expertise. Decisions previously seen as requiring the judgment of professionals are now more likely to be made by less highly trained clerical officers. Such deskilling, particularly when combined with performance measures which emphasise efficiency, may result in loss of insights about matters which are important hallmarks of administrative justice, but which fall outside managerial paradigms.[22] This concern is reflected in lawyers' criticisms of government proposals to appoint a manager rather than a judge as President of the new Administrative Review Tribunal.

The uses and misuses of performance measurement

Earlier it was suggested that performance management and measurement had the potential to enhance government accountability. However, in the context of merits review, it raises difficult questions about the proper balance between ensuring appropriate accountability and protecting tribunal members from political and bureaucratic interference. The literature differentiates between "prescriptive" measures, which set goals and targets and "descriptive" measures, which record what is being done and record change:[23]

> Prescriptive performance indicators will generally be used as a top-down management tool in a command style of management. However, the descriptive form of performance indicator operates in a more persuasive style of management involving a complicated and often highly political process of negotiation at and between levels of management and activity.[24]

The inappropriate use of prescriptive indicators could destroy the substance of independent merits review, while maintaining its illusion. For example, imposition of stringent timelines could result in tribunal members being forced to simply rubber-stamp depart-

21 For a useful discussion of the difficulties of applying private sector management techniques in the public sector, see W L Balk, *Managerial Reform and Professional Empowerment in the Public Service* (Quorum Books, 1996) at 5 ff.

22 For a useful discussion of these issues see A Yeatman, *Bureaucrats, Technocrats, Femocrats* (Allen & Unwin 1990) at 25.

23 There may also be "proscriptive" measures which describe what should not be done.

24 Quality of Life Project, above n 17 at 21.

mental decisions. Similarly, the provision of statistics to a minister on the proportion of government decisions upheld or reversed by a member of a tribunal, or the use of such statistics to determine which members should be re-appointed, could impair both the perception and reality of tribunal independence.

The argument is not that tribunals should avoid measuring matters such as the timeliness of members in writing decisions, but rather that there are dangers in using such information prescriptively. In this context it is noteworthy that the *Member Code of Conduct* for the Migration Review Tribunal requires members to "produce a target number of written review decisions each financial year as set by the Principal Member. Such decisions must be consistent with other Tribunal decisions of a like nature and of a quality acceptable to the Principal Member."[25] The danger is that such provisions may influence the way that Tribunal members decide individual cases, or, at the least, may be perceived as having this effect.

A related concern is that performance measurement can be used for political ends. O'Faircheallaigh comments that " [w]hile blatant cases of this practice may only occasionally come to light, it seems likely that evaluation results will increasingly be used, along with more traditional weapons, in fighting bureaucratic and political battles".[26] At their worst, performance measures could be an administrative means of achieving objectives which the government has unsuccessfully attempted to include in legislation.

Measuring quality

Finally, there are difficulties in using performance measures to assess achievement of qualitative administrative justice goals such as encouraging compliance with the rule of law, contributing to government accountability (by making it possible for individuals to challenge decisions which affect them), and enhancing participatory democracy. Corbett has noted that in public sector management "there seems to be a universal desire to measure program outcomes in quantitative terms".[27] For managers, quantification has the advantage of appearing "objective" or scientific, but in practice it often conceals normative assumptions.[28] Measures of "inputs" and "outputs" are unlikely to capture the complex, interlocking factors which affect the relations between citizens and government. Further, systemic failures in the area of quality may be the product of a range of different factors, making it difficult to draw accurate causal conclusions. For example, a high degree of inaccuracy in decision-making may be partly attributable to the complexity of legislative provisions, rather than to failure of administration.

In Australia work has been done on developing quality indicators for health and welfare services. Research on the quality of

25 Migration Review Tribunal Home Page: www.immi.gov.au/mrt/code.htm.
26 O'Faircheallaigh, above n 13 at 170.
27 Corbett, above n 15 at 188.
28 J Guthrie "Critical Issues in Performance Management and Indicators" in Guthrie (ed), above n 3 at 70.

justice provision is less advanced and the work which has been done has largely been concerned with client satisfaction.[29] While better information is needed on citizens' experiences in attempting to obtain access to government information or remedies for incorrect decisions, consumer surveys do not provide a comprehensive picture of the quality of administrative justice. The United States has made greater progress in measuring court performance. The trial court performance standards published by the United States Department of Justice propose means of measuring access to justice, equality, fairness and integrity, independence and accountability and public trust and confidence. Techniques envisaged include focus group interviews with court users, officials and the legal profession, and observations, as well as use of, quantitative statistical material.[30]

The Productivity Commission's recent *Report on Government Services* comments on the desirability of collecting information about the quality of service, particularly "when there is a strong emphasis on efficiency (as indicated by lower unit costs)". It suggests that—

> ... the most commonly accepted definition of quality is *fitness for the purpose*. A comprehensive assessment of this requires a range of indicators. Ideally such indicators directly capture the quality of outcomes—that is, whether the service achieves the outcomes of government. Assessment may also involve seeking the views of clients and others with a legitimate interest in service quality.[31]

That statement assumes that it is for government to set the goals of the justice system. Using the "outcomes of government" as the major criteria for performance measurement obscures the fundamental goals of controlling bureaucratic power and maintaining government accountability which lie at the heart of administrative justice.

The discussion above is intended to "problematise" the discourse of performance measurement. I have not attempted to define administrative justice, though I have referred to some of its components. My conclusion is not that it is impossible to examine quality issues or that we should abandon all attempts to make value judgements about the success or failure of the administrative law system. Rather my argument is that we must recognise the limitations of quantitative measures and pay attention to the other concerns articulated above. We need to treat performance measurement as a complex, non-linear process which takes account of the value judgments and ambiguities which arise in considering the relationships between government, the bureaucracy and the community which are the concern of administrative law. This requires recognition of the competing objectives of stakeholders in the system and

29 The Productivity Commission has acknowledged the need to measure quality. McDonald (in the paper published in this volume) comments that quality "indicators are often in an early stage of development".

30 *Trial Court Performance Report*, above n 3.

31 Productivity Commission, *Report on Government Services* (1999) at 14.

identification of the ways in which performance measurement could reflect and not silence their different perspectives.

COMPETING CONCEPTIONS OF ADMINISTRATIVE JUSTICE

Members of the community

Because the purpose of administrative justice is to benefit members of the community,[32] the most appropriate starting point is the perspective of those affected by government decisions. The vast majority of those affected by administrative decisions do not challenge them. It follows that there is a danger that administrative justice will be seen largely as a collection of processes for challenging government decisions. In practice, members of the public are likely to be more concerned with the quality of primary decision-making than with the availability and nature of rights of review. This means that performance measures for administrative justice should address the decision-making practices of the departments, agencies and private sector bodies which make decisions on their behalf. Such performance measures will necessarily be affected by the types of decisions which are being made and the characteristics of those most likely to be affected, being private individuals, small business proprietors or large corporations. For example, the kinds of performance measures relevant to social security decisions are likely to differ from those applicable to decisions about the availability of a diesel fuel rebate.

The Ombudsman's 1998 Discussion Paper, *Balancing the Risks: Providing information to customers in a self-assessment income support system*, points out that the current social security system requires members of the public to assume the risk of identifying the correct category under which to apply for income support. The paper argues that "the agency needs to reconsider how it can use its position of knowledge of programs more effectively to assess information it receives from customers, which might act as a trigger for it to take additional action to check possible eligibility for other payments."[33] This suggests that qualitative performance measures should examine the extent to which the administrative practices of departments and agencies enable members of the public to get benefits to which they are entitled.[34]

Members of the public probably assume that departments and agencies usually make correct decisions. Determining the accuracy of decision-making is central to administrative justice, though lawyers usually focus on procedures for correcting mistakes rather

32 J McMillan, "Introduction" in J McMillan (ed), *Administrative Law: Does the Public Benefit?* (AIAL, 1992) at xi.

33 See www.comb.gov.au/publications/other info/index.html, at para 3.7.

34 Johnson suggests that electronic systems could be designed to overcome this problem: see P Johnson, "Electronic Service Delivery: Achieving Accuracy and Consistency in Complex Transactions" (paper presented at National Conference of Public Administration, Hobart, 25–27 Nov 1998.)

than on improving the primary decision-making process. In the Commonwealth Administrative Appeals Tribunal, success rates on review range from 53.8% in the area of Commonwealth compensation, to 26.1% among social security.[35] Since July 1998, the success rate of refugees who appealed to the Refugee Review Tribunal is around 8%.[36] While these variations are interesting, it would be dangerous to rely upon them to draw inferences about the accuracy of decision-making in particular departments. These variations are as likely to reflect factors such as the complexity and degree of discretion in the particular legislative scheme, and the matters which can be taken into account on review. The training provided to primary decision-makers and the information provided about review rights may also affect success rates. Some of these factors are themselves indicators of the availability of administrative justice.

Regular auditing of primary decision-making is a more effective means of measuring accuracy than examining appeal rates. Johnson comments that—

> ... my experience is that agencies do not conduct audits on the accuracy and consistency of their staff's determinations. They audit performance against key indicators, but these are usually quantitative, focusing on throughput. To make some measure of the quality of primary decision-making they look to rates of administrative review and the results of those review processes. At best, this is hopeful, evincing a sense that the incidence and subject matter of reviewed cases accurately reflect underlying decision patterns. At worst it is naive or dishonest.[37]

He suggests that "if only 25% of an agency's primary decisions are wrong, then the agency is doing well".[38] Johnson argues that greater reliance on computer-based expert systems could ensure that clients were not disadvantaged because they did not understand their entitlements, and could improve the consistency and accuracy of primary decision-making.[39] Departments are increasingly using such systems to assist their primary decision-makers. Performance measures for primary decision-making will need to take account of these practices.

In addition to qualitative measures of accuracy, and quantitative measures of timeliness and cost of decision-making, members of the community are likely to be concerned about whether they are dealt

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35 Information supplied by the Australian Law Reform Commission. Note that differences in success rates between major case categories in the Commonwealth Administrative Appeals Tribunal was statistically significant. Applicants were regarded as successful if the decision subject to review was set aside, varied or remitted, either by decision or by consent.

36 Refugee Review Tribunal Home Page (www.austlii.edu.au/other/rrt/statist.htm). From the commencement of the Tribunal in July 1993, 13% of applicants gained refugee status.

37 Johnson, above n 34 at 4.

38 *Ibid*.

39 *Ibid*. See also P Johnson and S Dayal, "New Tricks Towards Best Practice in the Use of Rulebase Systems to Support Administrative Decision–Making" (paper presented at National Conference of Public Administration, Hobart, 25–27 Nov 1998).

with politely, whether relevant and understandable information is available to them, whether they can obtain access to an official who can answer their queries or explain their entitlements, whether they feel they have a practical (as opposed to a theoretical) opportunity to appeal against a decision they believe is wrong and whether they understand the reasons for decisions affecting them. The achievement of administrative justice requires consumers and non-government organisations to be involved in setting performance indicators and designing administrative processes.[40] Regular client surveys and focus groups could also provide information on how departments and agencies are performing in these areas.

In designing performance measures for primary decision-makers we do not know the priority which members of the public would give to different objectives of administrative justice. For example, if departments have to decide whether to expend funds on providing information to applicants, speeding up decision-making processes or increasing accuracy of primary decision-making, how should these objectives be weighted? One way of gaining insight into community priorities would be to involve members of the community and non-government organisations in the development of performance measures for particular areas of decision-making (this is already occurring in health and welfare to some extent). In the course of such consultation, information should be provided about resource constraints and those being consulted should be asked to express views about the balance which should be struck between competing goals of administrative justice, within the context of particular types of decisions.

This approach would identify areas where the client group's needs and expectations differ from the beliefs which administrators have about their needs and expectations. I note for example that the Administrative Appeal Tribunal's Client Satisfaction Survey ranked answering phone calls quickly, higher in order of importance than receiving clear reasons for decision.[41] I suspect that many administrative lawyers and bureaucrats would have predicted a different order of priority. I do not suggest that client preference should always determine performance measures. However, such a consultation process will often provide important information to departments and agencies. The process would be similar to that which has been used by some departments and agencies in developing service charters.[42]

Lawyers and administrators

Like members of the public, lawyers are concerned with the accuracy of decision-making, but they tend to be preoccupied with review

40 For a more detailed discussion on this point see the paper by S Koller published in this volume, "Administrative Justice—What Do Consumers Expect?"

41 ALRC Issues Paper 24, above n 8 at 116.

42 See eg, B McMahon, "The Development of a Tribunal Charter" in J McMillan (ed), *The AAT—Twenty Years Forward* (AIAL, 1998) at 227.

mechanisms and to pay less attention to administrative processes which affect consumers in their dealings with government departments. For strategic reasons administrative lawyers often argue that review helps to improve the quality of primary decision-making,[43] but in practice they tend to be less interested in the normative effects of review than in the opportunity which it provides "to dispense individualised justice".[44] Their primary concern is to ensure that those affected by government decisions are able to assert their legal entitlements. Thus their qualitative measures of administrative justice are likely to include:

- the availability of relatively broad grounds of review;
- criteria for decision-making which permit particularised inquiry, rather than requiring
- the automatic application of rules;
- procedural fairness; and
- tribunal independence.[45]

How do the perspectives of administrators differ from those of lawyers? In *Bureaucratic Justice*, Mashaw contrasted lawyers' "adjudicatory model" of justice with the "bureaucratic rationality" model favoured by government officials. Although both administrators and lawyers are concerned with the correctness of decisions, the former place greater weight on the effects of particular decisions on the departmental processes and programs. Unlike lawyers, administrators are more likely to take account of the trade-offs between preventing error and minimising the cost of processing decisions. They will pay greater attention to the extent to which achieving justice in a particular case may have the effect of reducing consistency and certainty in the administration of a legislative scheme. Lawyers tend to see review itself as a good. By contrast, administrators will be more concerned about the potential of external review by independent reviewers to undermine agency policy.[46] They will be less concerned with procedural fairness, and be more critical of formality in decision-making and of reliance on adversarial processes.[47]

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43 See eg, Sir Gerard Brennan, " Opening Address" in J McMillan (ed), *The AAT – Twenty Years Forward* (AIAL, 1998) at 12. Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995) at 10.

44 J Mashaw, " Organising Adjudication: Reflections on the Prospect of Artisans in the Age of Robots" (1992) 39 UCLA L Rev 1055 at 1056. See also J Mashaw, *Bureaucratic Justice* (Yale University Press, 1983).

45 Note the scathing comments on the legal model of justice made by 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 fn 6.

46 For discussion of three models of justice, see J Mashaw, *Bureaucratic Justice*, (Yale University Press, 1983) Ch 2.

47 For a detailed discussion of the extent to which tribunals themselves accord with "the judicial paradigm", see M Allars, "Neutrality, the Judicial Paradigm and Tribunal Procedure" (1991) 13 *Syd L Rev* 377.

Although this account grossly oversimplifies Mashaw's thesis,[48] it is only necessary to turn to the proceedings of previous conferences organised by the Australian Institute of Administrative Law to illustrate the existence of these different models of administrative justice. The 1993 National Administrative Law Forum explored the relationship between administrative law and public administration under the title "Happily Married or Living Apart Under the Same Roof?"[49] At the 1997 Forum Sassella[50] claimed that the AAT's lack of "sufficient interest in government and departmental policy and practice" was "driving many administrators to distraction". He argued that tribunal members gave insufficient weight to departmental policy, suggested that some decisions were eccentric or worse and argued for greater limits on administrative discretion.[51] Similarly, at the conference celebrating the Commonwealth Administrative Appeals Tribunal's twentieth anniversary, Tony Blunn, in a more guarded criticism of the Tribunal, commented that he could only speculate "whether any government will patiently watch a tribunal, which has very limited accountability when it comes to the expenditure of public money, exercising discretions in ways which may be inconsistent with its priorities and even at variance with the apparent intent of the legislation".[52] Some government departments have been more resistant to administrative review than others. In recent years, this resistance has been particularly apparent in the area of migration decision-making, where political and bureaucratic concerns about the management of the migration program have come into direct collision with lawyers' concerns about fairness and safeguarding the independence of tribunals.[53]

Mashaw[54] has suggested that, in the continuing conflict between adjudicative and administrative models of justice, bureaucrats usually find ways to reassert control over decision-makers who pay insufficient attention to the needs of administration. "The more delay, expense and separation from agency control we build into adjudicatory systems, the more administrators will seek to banish

48 The implications of Mashaw's thesis are also discussed by Professor Paul Craig in a paper published in this volume, "Three Perspectives on the Relationship Between Administrative Justice and Administrative Law".

49 S Argument (ed), *Administrative Law and Public Administration—Happily Married or Living Apart Under the Same Roof?* (AIAL, 1994).

50 Sassella is a lawyer, but has been a senior manager in the Department of Social Security for many years. At the time of delivery of the paper he was First Assistant Secretary, Legal Services, Department of Social Security.

51 M Sassella, "Commentary: Administrative Law—Developments Under a Coalition Government" in J McMillan (ed), *Administrative Law Under a Coalition Government* (AIAL, 1997) 65 at 68.

52 A S Blunn, " The Impact of the AAT on Social Security Administration" in J McMillan (ed), *The AAT – Twenty Years Forward* (AIAL, 1998) at 103. See also R W Cole, "The Public and Efficiency" (1988) 47 *Aust J of Public Admin* 223.

53 See Hon P Ruddock MP, "The Broad Implications for Administrative Law under the Coalition Government with Particular Reference to Migration Matters" in J McMillan (ed), *Administrative Law Under a Coalition Government* (AIAL, 1997) 9.

54 J Mashaw, "Organising Adjudication: Reflections on the Prospect of Artisans in the Age of Robots" (1992) 39 *UCLA L Rev* 1055.

adjudication to the fringes of their agencies' activities".[55] In Australia, techniques used for this purpose have included removing rights of review, substituting rules for discretions, removing the independence of external reviewers and ignoring the precedential effect of decisions.[56] Lawyers usually cry foul to such changes and I often agree with them. However, they may be predictable responses to the failure of reviewers to take adequate account of the realities faced by administrators.

CONCLUSION

This paper has not attempted to define administrative justice. Rather the goal has been to discuss the difficulties which arise in designing performance measures which reflect the perspectives of the clients, administrators and lawyers who have a stake in the administrative law system. It is probably impossible to design a system of administrative justice which satisfactorily reconciles these competing perspectives.[57] How then can this dilemma be resolved? McDonald suggests that one of the early lessons of the Productivity Commission's *Review of Commonwealth/State Service Provision* "was the importance of achieving a consensus on the outcomes expected of service providers".[58] The conclusion of this paper is different. A consensus-based approach may actually reduce the potential of performance measurement to contribute to the achievement of administrative justice. One objective of performance measures should be to make the value choices necessary in designing an administrative justice system more transparent, and to encourage debate about them. Thus, such measures should deal with contentious areas, such as tribunal independence and the quality of decision-making in both departments and tribunals. Measuring administrative justice should not be seen as a mechanistic process of identifying inputs, outputs and outcomes, but as an ongoing dialogue between the stakeholders in the system, including politicians, administrators, tribunals, lawyers and members of the public.[59]

This paper focuses on that aspect of administrative law which is concerned with decision-making. However, the conclusion is equally relevant to measures designed to give the public access to information and to protect privacy. Administrative law is intended to increase government accountability and give effect to the ideal of a participatory democracy. The approach proposed here to performance measurement is consistent with that ideal.

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55 *Ibid* at 1056.

56 Fleming, above n 2 at 11. See also G Fleming, "Review of Migration Decision-Making – Rival Goals and Values" in (1999) 10 *Public L Rev* 131.

57 Mashaw comments that any compromise is likely to appear incoherent and unjust from each one of the competing perspectives: see J Mashaw, *Bureaucratic Justice*, (Yale University Press, 1983) at 23.

58 McDonald, above n 11.

59 For some interesting proposals to improve the normative effect of administrative decision-making, see Fleming, above n 2 at 29.

Measuring Administrative Justice—Lessons from the Report on Government Services

LAWRENCE MCDONALD*

Performance measurement in the justice sector may appear to be a relatively new phenomenon, but in the United States, at least as far back as the 1950s, the best practice pursuit of justice (along with truth and the American way) was benchmarked as "faster than a speeding bullet, more powerful than a locomotive and able to leap tall buildings in a single bound". Today's performance measurement benchmarks may be a little more prosaic, but the pursuit of justice remains an almost superhuman task.

To aid this task, the Review of Commonwealth/State Service Provision, a cooperative State, Territory and Commonwealth Government exercise, has applied its framework for comparative performance measurement to court administration services (as well as to a wide range of other service areas).[1] This framework may provide some useful lessons for those contemplating measuring the performance of agencies pursuing administrative justice.

It is useful to distinguish between measuring the broad concept of "justice" and measuring the pursuit of justice by government agencies. "Justice" is a somewhat elusive concept—but in its name many agencies pursue explicit objectives using valuable community resources. The activities of these agencies may be more conducive to measurement, bearing in mind that there is some sort of link between these activities and "justice".

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1 Steering Committee for the Review of Commonwealth/State Service Provision, *Report on Government Services 1999* (Productivity Commission, 1999) (and previous editions).

WHY MEASURE PERFORMANCE?

Performance measurement aims to focus providers' and service delivery managers' attention on achieving best practice, to improve the effectiveness and efficiency of service delivery through yardstick competition, and to increase community awareness of the quality, cost and scope of government services. Performance information can also improve performance by clarifying objectives and responsibilities, by informing budget discussions, by monitoring past changes, and by providing incentives and possibilities through competition.

Clarifying objectives and responsibilities: Performance measurement encourages governments and service providers (such as courts, tribunals and other agencies) to clarify their objectives. Although setting the objectives of a government service may appear simple, one of the early lessons of the Review was the importance of reaching a consensus on the outcomes expected of service providers, for example, the balance between devoting resources to prevention activities (minimising the number of disputed administrative decisions) and response activities (the effective resolution of disputes that do arise).

Informing budget discussions: Defining outputs and allocating responsibilities allows interested parties to determine whether appropriate outputs are being delivered, and the cost of producing those outputs. This allows better—or at the very least better informed—decisions when allocating resources, for example, the notion of "demonstrated need" in the budget negotiation process.

Monitoring past changes: Information that allows comparisons across agencies and jurisdictions can encourage the spread of best practice. Service providers can share information about alternative approaches and choices, for example, the *Report on Government Services*[2] allows the comparison of traditional and managed case flow arrangements in court administration.

Providing incentives and possibilities through competition: Yardstick competition is particularly important where market forces do not operate. As well as providing information, it can strengthen incentives for improved performance where rewards (or even budgets) are linked to performance or outputs. Performance measurement and comparison can also identify opportunities for reform. The collection of time series data allows the impact of new approaches to be monitored. In addition to publishing the *Report on Government Services*, the Review publishes related research such as case studies on the implementation of reforms in government service delivery. These case studies have covered topics such as "User Charging for Commonwealth Court Reporting Services".

Costs and risks of performance management

There are, however, real limits to performance measurement. The costs and risks which should be considered include the cost of

2 *Ibid.*

collecting, analysing, and reporting data that would otherwise not be collected, although the Review does aim to have most data required for performance monitoring to be collected as by-products of administrative systems. Other information collected specifically for the Review is also useful for line management.

Another risk is the cost of mistaken decisions based on poor data. While presenting poor quality data can result in mistaken decisions, decision-making based on poor data is less likely to result in mistaken decisions than that based on no data. Over time, performance measurement generally creates incentives to improve data quality.

There is also a risk of goal displacement, whereby the goals specified by the performance management regime which are measurable overtake or displace the broader social goals which are not measurable. For example, in court administration establishing a timeliness goal (such as completing all cases within twelve months) can displace the objective of achieving just outcomes in each case according to its particular circumstances.

THE REPORT ON GOVERNMENT SERVICES

The *Report on Government Services* is the major output of the Review. It compares the performance of each State and Territory (and where appropriate the Commonwealth) in providing services to the community. As well as the justice sector (police, court administration and corrective services), the report covers most areas of significant government expenditure on services, including education, health, emergency management, community services and housing. The Report is published annually, and adopts an iterative approach. Over time it increases in scope (for example, the inclusion of new service areas), performance indicators are developed and refined, and the quality of the data reported is improved. The Report adopts a system-wide perspective. For courts, this means it focuses on the overall court system in each State, Territory and the Commonwealth, not individual courts. This is because, at the system level, performance can be measured against common objectives.

The Report is a cooperative exercise. It involves cooperation between governments, agencies and experts. In relation to governments, the Review is a COAG (Council of Australian Governments) exercise, arising out of the 1993 Premiers and Chief Ministers Conference. At the same time, line departments and service agencies provide expertise and often act as data collection vehicles for the Review. Cooperation also occurs between experts. Hence, expert agencies provide technical advice and data to the Review. For example, the Australian Bureau of Statistics National Crime and Justice Statistics Unit assists in the justice area, the Australian Institute of Health and Welfare contributes to the health and community services areas, and the Australian National Training Authority, the National Centre for Vocational Education Research, and the Ministerial Council for Employment, Education, Training and Youth Affairs contribute to the education chapters.

The Report aims to be objective and non-sensational. It does not judge performance, but hopes to contribute to informed judgments by others. The Review does not undertake benchmarking and it does not establish levels of expected performance. It is not in a position to second-guess the targets, trade-offs, budgets and priorities of users of the Report. These are imposed on the data by the reader, for example, by governments evaluating potential new policy or in the budget process.

The Report adopts a consistent methodology across service areas. There are synergies in sharing some research tasks and benefits from not having to reinvent the wheel each time. For example, the different service areas of the Review have been able to share work on framework development, asset valuations, and measuring unit costs. In particular, work on economic costs such as a user cost of capital, the treatment of accruals such as superannuation, allocating joint and common costs, and measuring equity and quality have also been shared. Those attempting to measure aspects of administrative justice may also benefit from the work already undertaken by the Review.

Related developments

The emphasis on performance measurement is coming from several different directions. A number of related developments highlight the importance of setting clear objectives and measuring performance against defined standards. For example, the Commonwealth Government is implementing an accrual-based outcomes and outputs budget framework from 1999–2000. Agencies will be required to describe and cost outputs and outcomes, specify the performance information required to measure the production of output and the achievement of outcomes, and report on performance accordingly. The Commonwealth Grants Commission also uses output focused data when determining levels of grants to the States and Territories. Service charters, a feature of courts' attempts to improve customer relations, require performance indicators on outputs and outcomes. National Competition Policy may also affect some agencies. Requirements for competitive neutrality may affect the commercial aspects of service delivery, for example, transcription services.

The overall mandate for the project comes from COAG (State, Territory and Commonwealth Governments). The Steering Committee is the primary manager or key driver of the Review. It is made up of senior central agency representatives from each jurisdiction. The Secretariat, provided by the Productivity Commission provides the day-to-day management of the Review. The Chair of the Productivity Commission chairs the Steering Committee. A Steering Committee member convenes each Working Group. Working Groups consist of line agency representatives from each jurisdiction, and sector specialists. Working Groups provide expert knowledge on service specific issues, and may also coordinate data collections. There are many common members between Working Groups and parallel exercises such as Ministerial Council groups and Australian

Bureau of Statistics expert advisory bodies, which ensures cross-fertilisation of ideas and reduces duplication of effort.

The framework for the review process

One of the strengths of the Review process has been the development of a consistent framework for measuring performance. A logical framework assists interpretation, highlights relationships between objectives and indicators and clarifies the trade-offs that may be made. The generic framework is flexible enough to vary according to the prevailing objectives and the type of activity of a service area. For example:

- Agencies with multiple areas of activity which are separately resourced, such as police activities relating to road safety, crime investigation, and community policing, have developed multiple frameworks—one for each major area of activity.
- Agencies whose activities are primarily in response to critical incidents, such as acute health care and fire brigades, have adopted a risk management framework which categorises the major outputs of the providers as prevention and response.
- Alternatively, long term service delivery agencies that have little control over the underlying demand for their services, for example, housing demand being primarily a reflection of social economic wellbeing, adopt a framework which reflects more directly the balance between appropriateness and accessibility.
- Other service areas of the Review have developed frameworks specifically tailored towards objectives. For example, the corrections working group framework is structured around the sector's key objectives of containment, rehabilitation, offender care and reparation.

Indicators

The objectives of a service area are usually expressed as desired outcomes. These are often broad in scope and may be difficult to measure directly. Therefore, a suite of indicators is developed. These indicators are related to the desired outcomes (desired or intended impacts or effects on the community) or outputs (products or services produced or delivered) of the service area.

The Review aims to produce indicators that are measurable (explicitly defined), collectable (the costs of data collection do not outweigh the benefits of collection), and comparable (across jurisdictions and over time). The indicators are grouped into those that describe effectiveness (the impact of a service) and those that describe efficiency (the resources required to create that impact).

Effectiveness indicators are typically divided into indicators of:

- Outcomes—achieving desired ends. These may be direct outcomes (for example, effective dispute resolution) or more abstract (for example, the contribution of administrative justice to enhancing social order).

- Access—the ability of people to use the service. Indicators such as timeliness, affordability and geographic access can also reflect the equity component of services. The equity component has two dimensions—horizontal equity, signifying equal access for people in the same circumstances; and vertical equity, signifying greater access for those in greater need.
- Appropriateness—suitability and targeting of services, which separates into two types of targeting errors: not providing services to those who need them, and providing services to those who do not need them.
- Quality—ensuring services meet the desired standard, for example, by measuring client and community satisfaction.

Efficiency indicators measure how well agencies use their resources in producing services, that is, the relationship between their inputs and outputs. The proxy used most is "cost per unit of output". In some service areas there are also measures of "value of assets per client or unit of service" and "staff to client" ratios. Some of these measures are limited by relating to only one output. The Review has also published work on more sophisticated tools for measuring efficiency, such as Data Envelopment Analysis.

THE COURT ADMINISTRATION CHAPTER

The standard framework of effectiveness and efficiency indicators, linked to an over-riding group of objectives, was applied to court administration. It should be stressed that, to date, the Report has focused on court administration. That is, it is about informing assessments of administration and court processes, not justice outcomes or the judiciary. Court administration covers managing court facilities and staff, case management services such as the provision of client information, scheduling and case flow management, and the enforcement of court orders by sheriffs' and bailiffs' offices.

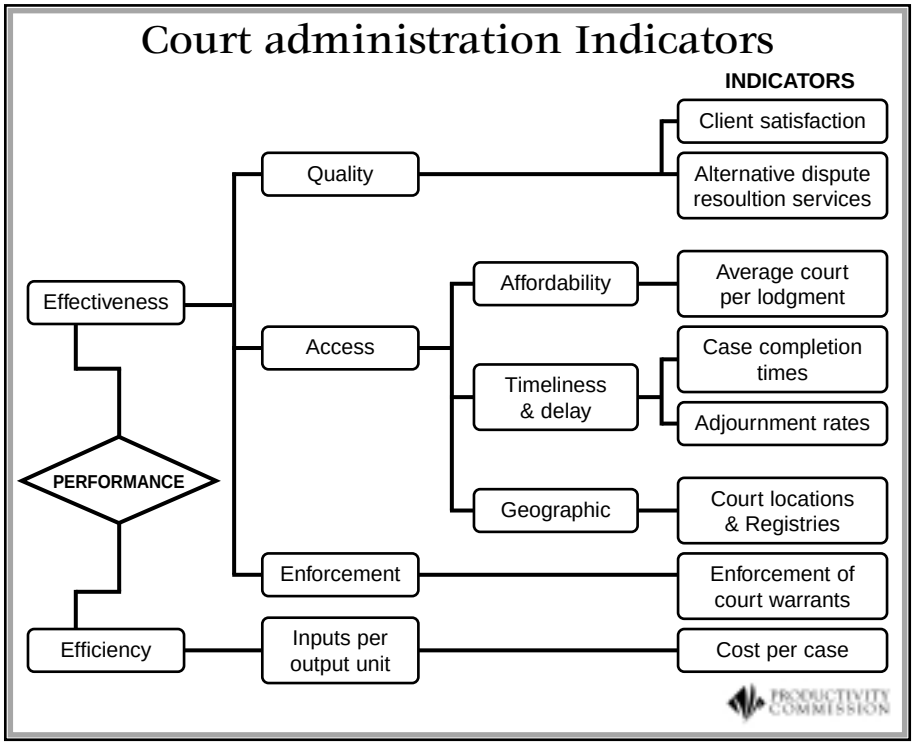
Objectives

The objectives for court administration services were adapted from a 1989 study by the United States Department of Justice Commission on Trial Court Performance Standards.[3] This work has been recognised worldwide as articulating the objectives and benchmarks for court performance. The objectives identified are that courts are:

- "open and accessible"—which includes both affordability and geographic access, with an emphasis on equity, for example, access by priority groups;
- "expeditious"—meaning that timeliness of court services aims to minimise delay, but it is recognised that individuals need sufficient time to manage their cases;

3 Commission on Trial Court Performance Standards, *Draft Trial Court Performance Standards* (National Centre for State Courts, United States, 1994).

- "due process and equal protection"—these are measures of aspects of quality, which under the rule of law means that courts provide procedural fairness and that court processes do not actively discriminate;
- "independent yet accountable"—courts are an independent arm of government, but responsible to parliament and the public for the management of their resources. Traditionally this has been through mechanisms such as judicial inauguration statements and annual reporting processes.



The development of a set of indicators linked to the objectives is an iterative process. Some indicators are yet to be developed (for example, those relating to alternative dispute resolution, appeal rates and cost per case). There may be other indicators that are yet to be identified.

The basic framework applies to all courts—criminal, civil and coronial—and the probate registries. The jurisdiction of the court does not affect their broad objectives and the Report does not attempt to weight the various indicators. An individual reader may make judgments about the relative importance of indicators in different courts and different jurisdictions. For example, timeliness may be regarded as more important in criminal courts and adjournment rates may be more important in civil matters.

Interpreting performance with descriptors

As well as the indicators themselves, environmental differences between agencies and States and Territories will influence per-

formance. Rather than weight or adjust the data, the Productivity Commission reports descriptive information to allow readers to make their own judgments about relative performance. These descriptors inform readers about contextual, environmental or jurisdictional differences. In the administrative justice sector, it would be important to map how governmental administrative review structures vary across jurisdictions. For example, variables which must be taken into account include the specific jurisdiction of the administrative appeal tribunals, the extent of development of specialised tribunals for particular areas or departments (for example, the Social Security Appeals Tribunal), legislative limitations on the opportunities for review (for example, Immigration and Refugee Review Tribunals), and the extent of "oversight" (for example, under the auspices of courts or departments, or whether the court or tribunal is entirely independent). Other variables include changes during the period which increase or decrease the workload (for example, opening or limiting opportunities for appeal or the inclusion of new areas of government activity not previously legislated), different fee structures (which may affect incentives), the onus of proof, and the extent of the obligation on departments to seek to resolve the dispute by conciliatory or non-adversarial means internal to the department prior to the matter being heard by a tribunal.

Scope

The court administration chapter has progressively increased its scope over time. The 1995 Report examined State and Territory Magistrates Courts, District Courts (as relevant) and Supreme Courts. These were selected for inclusion because of their significant role, the amount of money governments spend on them and because they had similar systems which were relatively easy to compare. The second Report (published in 1997) added Commonwealth Federal and Family Courts. The 1998 Report included Coronial Courts and Probate Registries. The inclusion of Probate Registries highlights the flexibility of the framework.

The extension of the framework beyond traditional adversarial trial-based dispute resolution processes implies that there may be future scope to include tribunals and other dispute resolution mechanisms. The incorporation of tribunals has been hampered both by difficulties in collecting data, and difficulties making meaningful comparisons where differences in jurisdictions and administrative systems are very significant. However, similar issues were addressed when we began reporting on the performance of the lower courts, particularly in the area of civil disputes, where there are significant differences in jurisdiction across States and Territories.

Existing gaps

Although the scope of the chapter has progressively increased, and there is scope for further development, the current emphasis is on addressing gaps in the information currently reported. The court

administration strategic plan is focused, in the short term, on improving the quality of the existing data collection and improving descriptive information that would assist readers to assess the performance of different court systems. An ongoing task is the development of a "jurisdiction weighting system". In theory, this system would weight different types of cases by their resource intensity, to derive a "standard" or "average" case unit for comparing unit costs. It would be analogous to the use of case mix adjusted separations when comparing the performance of hospitals. A weighting system would allow the jurisdictional differences of courts to be reflected in comparisons of data such as unit costs. There is little information on the success of innovative case flow mechanisms such as diversionary strategies for settlement through mediation and conciliation. The Family Court counselling service recently examined its performance in an extensive study and there is potential for similar work to be conducted nationally.

The Productivity Commission would also like to report more information on client groups, for example, the representation of indigenous people and people from culturally and linguistically diverse backgrounds before courts, as well as the availability of court services (such as interpreters) for target groups. To date, only pilot client satisfaction surveys have been undertaken. However, work is underway on developing a national survey. It is planned to collect information on community perceptions of different dispute resolution methods, unrepresented litigants' perceptions of fairness, peoples' preparedness to use courts as a resolution forum, sensitivity to cost, delay, language and accessibility of courts, and empathy of court staff and their clarity of communication.

In the longer term, when progress has been made on performance indicators for services currently within the scope of the Report, the Working Group may examine expanding the scope of the Report to include other forms of dispute resolution, such as tribunals. Tribunals are an important specialist component of the justice system. Most jurisdictions have tribunals in common areas, performing common functions, and so creating significant scope for performance comparison. These comparisons could be undertaken in a parallel process independent of the *Report on Government Services*. Even if tribunals are not part of the formal scope of the Report, there are some important lessons in performance measurement that can be gained from the Report experiences.

LESSONS IN PERFORMANCE MANAGEMENT

The following basic lessons have been learnt over time by the Review.

First, agree on objectives and indicators before chasing data. The availability of data should not drive the framework, although it is sensible to adopt and adapt available data where appropriate.

Secondly, there is value in working cooperatively with other performance measurement exercises and data collectors, and there are benefits in adopting a consistent methodology, indicators and data. The Review has developed a strong theoretical underpinning to its

work, and has been through a trial and error period. In addition to not having to "reinvent the wheel", the adoption of consistent indicators and data allows for a broader scope for comparisons. That means activities do not have to be part of the Report's process to be compared to the performance of services included in the Report.

Lastly, performance measurement is an iterative process. Its scope, indicators and data quality can be improved over time. Sometimes it is advisable to start with imperfect or incomplete data if they are policy relevant and can drive improvement.

As well as preparing the annual *Report on Government Services*, the Secretariat and Steering Committee are undertaking research in a number of areas. These include the theory and practical application of measures of quality. All indicator frameworks include indicators of quality, but these indicators are often in an early stage of development. The Review is concerned that users of the Report do not focus purely on costs. Efforts to reduce the cost to government should always consider the effect on quality.

In other research, the Commission is examining the use of activity surveys in police services, both to better allocate direct costs and to apportion joint and common costs. This will lead to a better understanding of the nature of police services, more accurate cost data and improved efficiency indicators. Other means of improving unit cost data include work on how to deal with accruals such as superannuation, and the inclusion of economic costs such as a user cost of capital. In addition, research has been undertaken into the use of more sophisticated measurement tools, such as data envelopment analysis.

Finally, let me close with an advertisement for the Review outputs. There is little point in undertaking performance measurement if the results are not disseminated and used. The major output of the Review is the annual *Report on Government Services*, available through Australian Government bookshops. Other research papers are available from the Secretariat (the Productivity Commission) or through the productivity Commission web site: *www.pc.gov.au*.

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Administrative Justice—The Consumer and Professional Contribution

Back From the Fringe— What Consumers Expect From Administrative Justice

SANDRA KOLLER*

ADMINISTRATIVE JUSTICE AND CONSUMERS

Administrative justice regulates the relationship between people and non-government bodies and government authorities or those delivering government sponsored services, its role a recognition of the power imbalance between government authorities and others. When a flick of the pen for one party can have severe consequences upon another it becomes important to consider what fundamental principles should comprise administrative justice and what processes need to be in place to ensure their continuing application.

In recent times Australian processes for achieving administrative justice have been under review and the extent of our commitment to administrative justice has been in suspension. At the same time the European Union and South Africa have strengthened their commitment. This may reflect the important role administrative justice plays in the protection of human rights, a lesson which has been forgotten in Australia. In Australia and the United Kingdom[1] there have been questions about the value of judicial review of administrative decisions. There have also been reviews of generalist and specialist administrative review bodies.[2] However, in the responses to this period of review some of the core rationales for maintaining processes to achieve administrative justice have been articulated and thereby reaffirmed.

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1 K J Arenson, "Rejection of the Power of Judicial Review in Britain' (1996) 3 *Deakin L Rev* at 37.

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

In respect of judicial review, Sir Gerard Brennan said that Chapter III of the Constitution brings the executive power under the supervision of the judicial power. In his words:

> This is the constitutional guarantee of equality under the law for the minority as well as the majority in their relationship with government; for the underprivileged as well as the powerful, for the unpopular as well as the mainstream.[3]

In other words, the Constitution envisages judicial supervision as a counterweight to balance the exercise of executive power and to ensure its fair application to individuals. Justice Toohey, in an aptly titled article, "A Government of Laws, and Not of Men", asked rhetorically: "Is judicial review anti-democratic?" To which he responded that—

> ... democracy need not be defined narrowly to mean no more than majority rule. Rather, it might be regarded as involving recognition of a range of fundamental principles concerning the manner in which people exercise power over each other for common purposes, of which majoritarianism is just one principle, equally fundamental with others, but not necessarily more so.[4]

Such statements serve as reminders of the importance of the maintenance of rights for minorities and less powerful individuals to our community and to our democracy.[5] They also remind us of the clear stake the community and the individual consumer have in administrative justice.

It may be that, during this period the emphasis many of us have placed on reminding the bureaucracy of the genuine benefits that administrative law processes provide to the administration, has allowed the fundamental goal of administrative law—delivery of administrative justice to the consumer—to be pushed from centre stage. Perhaps this has permitted undue weight to be given to the views of the bureaucracy about reforms to the administrative law package. Certainly, the recent deliberations about the proposed Administrative Review Tribunal have been disappointing insofar as the consultation with consumers and consumer groups has been limited. Only a small number of consumer groups have been contacted by the executive and these were not permitted to distribute the proposal for discussion. Further, as there has been no continuing dialogue it has been impossible to tell whether account has been taken of consumer views. Such an approach leaves an impression, whether warranted or not, that benefit to the consumer is not likely to receive adequate emphasis in any eventual reform. The views, expectations and needs of consumers are pertinent not only because of their legitimate interest in administrative justice, but also because they are essential participants in any administrative endeavour. Failing to recognise the role consumers play in any process intended

3 Sir Gerard Brennan, "The Parliament, The Executive and the Courts: Roles and Immunities" (1997) 9 *Bond L Rev* 136 at 140.

4 (1993) 4 *Public L Rev* 158 at 171.

5 Arenson, above n 1 at 51.

to achieve administrative justice is simply not sensible. Consumers think and act differently from the way government and bureaucrats might expect and consequently any system designed without regard to consumer interests will not operate as intended in practice.

DISCOVERING THE VIEWS, EXPECTATIONS AND INCOME SECURITY NEED OF CONSUMERS

The Welfare Rights Centre, Sydney, is a community legal centre that assists people with problems with payments under the *Social Security Act 1991* (Cth). We opened in 1983 and we currently assist over 4,000 people each year. We advise and represent clients in respect of all types of income security problems. Not only do our advocates have direct experience of dealing with the relevant government agencies and tribunals on a day to day basis but we advise persons who are representing themselves about their remaining options. What we are able to say about the views, expectations and needs of consumers in this paper is based upon this longitudinal, if unscientific, period of observation and experience. In addition, our observations are made in the overall context of social security administration and legislation.

The consumers seen by the Welfare Rights Centre are people who are more likely than the general population to be disadvantaged because of their limited financial resources, their non-English speaking background, cultural issues, physical and psychological health issues, the deterioration of social skills due to their long term exclusion from employment, their age or their youth. What our clients have in common is that they are subject to a diverse range of disadvantages. Administrative justice must be accessible to the most disadvantaged members of this group of consumers. These consumers also have in common that they have a problem with a government department, usually the Department of Family and Community Services through its service delivery agency, Centrelink. This particular government agency has a range of features which make it especially powerful in contrast with the consumers of its services.

First, the Department makes decisions which have an immediate impact on the livelihood of disadvantaged people who are likely to have no financial reserves in the event of non-payment by the agency. Secondly, the Department has extensive information-gathering powers, and demands (and holds) large amounts of personal information. Thirdly, it administers a frequently changing and highly complex program that is largely incomprehensible to consumers. Finally, the agency itself is undergoing a period of re-invention which requires both staff and consumers to deal with major changes to administration. These changes include the outsourcing of some activities (such as the job network) and a greater level of regional autonomy in the allocation of resources. These developments may result in delays and regional variations in service delivery.

In this field there are a range of formal processes in place which are clearly intended to deliver administrative justice to consumers. These include: the *Freedom of Information Act 1982* (Cth) and the *Privacy Act 1988* (Cth); legislative requirements that decisions be in writing and that certain decisions be accompanied by reasons which address the statutory criteria for eligibility; internal review by an authorised review officer; external review by the specialist Social Security Appeals Tribunal (SSAT) and by the Administrative Appeals Tribunal (AAT); and eventual judicial review. In keeping with the times, most of these processes are currently themselves under review. However, there are other aspects of the dealings between consumers and government departments in which consumers expect to be afforded administrative justice; this paper will consider these first.

Fair legislation and proportionate application of wide powers

Sometimes consumers seek administrative justice when in fact the matter that they wish to complain of is prescribed by legislation and the consumer's problem can only be rectified following changes at the political level. However, in other cases, where an administrator has wide powers these should be applied in a proportionate manner. The *Employment Services Act 1994* (Cth) included a power to penalise Newstart allowance recipients for failing to comply with agreements made between themselves and their case manager.[6] Initially the penalty was very severe, being six weeks loss of payment. Between 1995 and 1997 the Welfare Rights Centre acted for a number of clients who were subjected to this severe penalty in consequence of behaviour due to psychologically induced conditions or for trivial infringements. One man was requested by his case manager to attend two events which were to be held concurrently and when he went to inquire about the requirement he was sent away still confused. He attended one of the events only and the penalty was imposed.[7] This man and many others like him are motivated to appeal because of the lack of correlation between their action and the consequence. Consumers expect both legislation and administration to be fair and proportionate. A high rate of appeal activity may be an indicator of poor legislative or administrative policy.

Administrative systems which recognise the reality of consumer experience

The administrative arrangements for implementation of a government initiative can result in the arrangements operating fairly in some circumstances and unfairly in others. Administrative justice becomes relevant from the time administrative arrangements are first developed. Some administrative arrangements develop or change over time. From time to time these arrangements should be reconsidered to ensure that they remain appropriate. Consumers

6 *Employment Services Act 1994* (Cth) s 6.

7 *Secretary, Department of Employment, Education, Training and Youth Affairs and Ruiz* (1996) 41 ALD 627.

generally expect that an agency will operate in a fair and competent manner until they discover otherwise. Further, in a complex area of administration where large numbers of consumers are likely to be disadvantaged, consumers tend to believe that the agency will not make an error. If consumers are not entitled to rely absolutely on an agency's advice or actions, the agency needs first to consider whether this state of affairs is satisfactory and, secondly, if there is to be any transfer of the risk of an error from the agency to the consumer, this must be made abundantly clear to the consumer.

Examples from the income security field illustrate the problem. The *Social Security Act 1991* (Cth) requires the agency to forward notices to consumers which advise them of all of the circumstance in which the recipient has to provide further advice to the Department. The notices also often state the income and assets that the agency has recorded on a person's record and asks them to advise if at any time the record is incorrect. If the person does not comply with a notice and they are overpaid, the agency can recover the money usually back to the date of the failure to comply. In most cases, recovery causes difficulty because the consumer has arranged their limited finances in the belief that they have been receiving the correct entitlement.

As the social security system is very complex, the notices contain numbers of possible circumstances, the occurrence of which the person is expected to notify. The design of the notices is such that this information is contained on the reverse side of letters that contain on the front information about decisions or changes to the payment. While the front of the letter may attract the person's attention, the reverse side, containing the notice, has the appearance of a form letter. There is nothing to indicate that the information should exactly reflect a person's income and assets and that if it does not do so at any time the consumer will bear the consequences. Further, the notices are issued with monotonous regularity.

The result is that, in practice, if the agency makes an error in assessing a person's income and assets, many consumers are unable to detect it. Sometimes this is because they have been in receipt, for example, of an age pension for many years and have given up reading the reverse side since they appear to be the same. Others simply believe that the agency's records must be correct because the agency is likely to know what it is doing and the consumer believes that any difference between the material on the reverse side of the letters and their actual situation is due to the way the agency does its calculations as opposed to any actual error. Consequently, when an error is brought to their attention, consumers regularly complain that they gave the agency all the relevant information at the outset and then expected the agency to do its job properly. They perceive as very unfair that the administration is able to absolve itself from the consequences of the error by simply returning the information to consumers in a form that they do not have the capacity to digest.[8]

8 See eg, *Florence Brown and Secretary, Department of Family and Community Services* (AAT, Sydney, 5 March 1999, unrep).

At this level, administrative justice must involve the development of administrative procedures that realistically take into account consumer behaviour and capacity rather than merely providing insurance for the agency. The administration should seek genuinely to inform the consumer of any risk rather than to rely on a technical requirement, such as in this case, that enables the recovery of overpayments. Similarly, when one partner of a pensioner couple advises that he has found a job the other member of the couple is likely to think that the agency knows her partner is working and will adjust her pension as well. Yet frequently such a predictable assumption on the part of the consumer is not met with corresponding administrative action.[9] In short, consumers seek administrative procedures that are responsive to common sense.

Clear administrative arrangements

Another basic component of administrative justice is accessibility. Consumers need to be able to locate and contact the appropriate administrator. This is impeded by the long wait that can occur in making contact with a telephone officer, and by the current trend of naming a position with a modern management title as opposed to a name that reflects the function of the position. Complex outsourcing arrangements can also leave the consumer confused about who will be making decisions affecting them. The development of accessible systems that recognise consumer experience would go some way towards creating fairer decisions in the first place and is one of the aims of administrative justice. It should be noted here that Centrelink has developed plans to improve its claim and contact processes and it is hoped that adequate resources are made available for this task. However, these plans may take time to be implemented.

Another factor in administrative justice is clear communication of decisions. Often time limits for seeking review of decisions operate from the date a person is notified of a decision. Consequently, the decision must be clearly expressed and accompanied by the basic reason the decision was made, as well as information concerning any avenue for review. Without this information a person cannot know if they might wish to seek review of the decision or the avenue for exploring review rights, making review rights hollow.[10]

9 *Betty Smith and Secretary, Department of Family and Community Services* (AAT, Sydney, 16 March 1999, unrep).

10 See eg, *McAllan and Secretary, Department of Social Security* (1998) 51 ALD 792. Note that the requirement in McAllan that a basic reason be provided for proper notice of a decision to be given has been overruled in *Austin v Secretary, Department of Family and Community Services* (1999) 29 AAR 528. However, in *Austin* the Court did require that a clear statement of the particular decision be given

THE EXPECTATIONS AND NEEDS OF CONSUMERS DIFFER

Mohr and Gamble studied unrepresented persons in the AAT and Federal Court in 1996 and found patterns emerged: unrepresented persons in the AAT tended either to drop out at the beginning of a matter, often before the first conference, or to continue to a full hearing by the Tribunal. That is, unrepresented persons were less likely to use the process to obtain settlement.[11] Consumers contacting the Welfare Rights Centre do not appear to cope with the process in a uniform way and their limited use of the settlement process may reflect either that consumers do not understand its purpose, are overwhelmed by the process, or that they want something different than settlement of the matter.

More confident consumers

More confident consumers will continue to seek administrative justice where they perceive they have been dealt with unfairly and where that unfairness has serious consequences. However, it is important to recognise that some consumers are motivated to appeal not only by a desire to change the outcome of a decision but also because they believe they were not treated fairly. After receiving a copy of the decision of the AAT in her case, one client wrote to the Welfare Rights Centre and said:

> I felt that the AAT did their job properly and I say that not because 'I won' but because of the way the report was set out. It was respectful towards answering my ... questions, showing me the legislation in the front pages fulfilled one of my needs, which was to understand the law so that I could be made feel more comfortable with whatever decision was to be made.

The client went on to comment that the AAT had understood what she had been trying to say, whereas—

> [previous decision makers] had shut the issues into a tight shell which suited them yet did not represent me appropriately. This, to me, was an issue on the failings in the art of communication not a money issue nor of a client trying to shirk responsibility...

What the client is saying here is a reference to the fact that sometimes an agency's culture or special area of work can cause officers to treat consumers in a typecast manner. For example, a person who works consistently in fraud detection might lose the capacity to see social security recipients in anything other than suspicious terms. This emphasises an important aspect of external review. One of the valuable aspects of external review is that it places the agency's cultural perspectives in the framework of the wider community. This can enable facts to be seen differently. In the case of

11 H Gamble & R Mohr, "Litigants in Person in the Federal Court of Australia and the Administrative Appeals Tribunal: A Research Note" (paper presented to the Sixteenth AIJA Annual Conference, 4–6 Sept 1998, kindly provided by authors, Law Faculty of Wollongong University) at 5.

Re SRH and Secretary, Department of Social Security[12] the AAT found to be incomplete investigations carried out by the Department into whether or not a consumer was a member of a couple, and therefore not entitled to her sole parent pension. The Department had followed up evidence which might have shown that its assumption that the consumer was not entitled to the pension was correct, but it failed to follow up evidence that might have shown that the assumption was incorrect.

Another point made in the Centre client's letter was the importance of receiving a full and honest explanation about what had happened. "The AAT's report enabled me to see the view of Ms [case manager's name] which does make a difference". It had turned out that the case manager was new and had no knowledge of what would happen to the consumer once she made her report. Unaware of this, the consumer had interpreted the events assuming that certain action had been intentional rather than inadvertent which had led her to experience needless frustration.

In cases where the unfairness is quite apparent consumers can become very frustrated and angry. The opportunity to appeal to a body which is perceived by the consumer to operate fairly and independently is important not only for the administration of administrative justice but because it provides an appropriate outlet for any grievance. Finally, the client pointed out the importance of accuracy in fact finding by decision-makers. She stated that she was relieved that inaccuracies which had founded the original decision had been corrected. This reinforces the view that consumers care both about the process and the result and that one reason why consumers seek administrative justice is because they perceive that the original decision has not been made in a fair manner.

Less confident consumers

However, many consumers receive incorrect decisions and take the matter no further. Of these, some take no action because they are unaware the decision is incorrect, some because they are unaware that there is anything they can do about it, and others because they are afraid to seek review, or are cynical about the likely outcome. A 1991 Administrative Review Council survey of Vietnamese consumers in Footscray, Melbourne, and of Turkish consumers in Auburn, Sydney, found that "participants were cynical about the government's good intentions. Fear of government and possible retribution consistently featured in the interviews." One participant said: "I've acted as an interpreter many times for people who had serious complaints against Social Security. When these people get knocked back by the department and they are advised to appeal, they

12 (1996) 42 ALD 463. Note that the ALD report is an extract only. The relevant part of the decision for this purposes can be found at pp 34–35 of the unreported decision, Sydney AAT, 29 Jan 1996.

immediately shy away from the idea, which is perceived as an enormous task to undertake and a battle not worth fighting."[13]

In the experience of the Welfare Rights Centre, many consumers require considerable encouragement to proceed through the appeal system; numbers of unrepresented persons drop out of the process before their matter is resolved. There are some consumers who will never pursue review and for these consumers the accountability mechanism afforded by other consumers pursuing review so that agency's practices are, or ought to be, amended in consequence of this process, is vital. The impact of these consumers' concerns is reduced if it can be shown that the review process is completely independent and that it will not be intimidating.

In the income security field, the first level of review is internal review by an Authorised Review Officer (ARO). It is compulsory to seek internal review before seeking review by the SSAT. This means that an internal review process which is not readily accessed by consumers can block access to further review. Consequently, it is especially important that the ARO operate in an independent manner. Otherwise the role is perceived by consumers to be a "rubber stamp" and not worthwhile. It is also important that the ARO demonstrate their independence by contacting the consumer to hear their views. However, there are limitations to the degree of independence achievable by an internal review process. Anyone operating within public administration is likely to operate under certain policy constraints and historic practices, and may be affected by peer pressure or other aspects of departmental culture. These are reasons why consumers need a truly independent process of external review.

Owing to their level of disadvantage, income security consumers also require a review process that has a range of features to redress the power imbalance between the agency and the consumer. The review process should be:

- free of cost;
- easy to access;
- a straightforward non-threatening non-adversarial process;
- one which does not require the consumer to "prepare their case" or understand the complexities of the law;
- fair and independent;
- able to afford the consumer procedural fairness by way of a "hearing";
- capable of providing a speedy response in cases of hardship; and
- able to determine that the decision is wrong and to substitute a new decision to fix the problem.

13 Administrative Review Council, *Access to Administrative Review by Members of Australia's Ethnic Communities*, Report No 34 (1991) at 26–27.

The current SSAT appears to meet many of these requirements. However, it may be subject to changes recommended in the recent Guilfoyle Report.[14]

PROPOSALS TO CHANGE THE SOCIAL SECURITY APPEALS TRIBUNAL

Some recommendations in the Guilfoyle Report will cause particular disadvantage to consumers. These include the following:

The presence of an agency representative at the SSAT:[15] Although it is unclear what role or purpose is envisaged for the Departmental representative, this change will create an adversarial environment and deter consumers from attending. As noted above, consumers are cynical about bias and afraid of retribution. They are also worried about being made a fool of by someone who knows more about the process or the rules than they do. Those consumers who do attend may feel unable to tell their story in the presence of a person they are likely to perceive as an adversary. Appropriate behaviour by the agency representative will not alleviate the consumer's perception because it is built upon previous dealings with that agency and others rather than upon experience in the tribunal. Consumers are rarely repeat players.

The presence of an agency representative will also necessarily increase the complexity of procedures. Hearings processes must be planned around both parties. Consumers will need to know in advance if an agency representative is going to attend and have notice of what issues they might raise. Currently, the AAT operates on this model. In that jurisdiction unrepresented persons do poorly. In 1996 only 29.2% of unrepresented persons obtained successful outcomes as opposed to 57.1% of represented persons.[16] Should this recommendation be implemented there will be a considerable increase in the need for representation by the already over-stretched legal aid and community legal centre sector.

Shorter time limits for lodging an appeal:[17] Presently consumers have three months in which to appeal to the SSAT if they wish to receive arrears of payment; and there is no time limit for appeals which do not require payment of arrears. The recommendation proposes a reduction to 28 days for appeals from the ARO to the SSAT. The disadvantage experienced by many consumers and the limited resources of the agencies which assist them, often mean that consumers take time to realise they ought to appeal, which must be added to the weeks it takes to obtain an appointment with a person who will help them appeal. Often consumers do not realise they

14 Dame Margaret Guilfoyle, *Review of the Social Security Review and Appeals System*, A Report to the Minister for Social Security (1997).

15 *Ibid* at Recommendation 28.

16 Figures from the Administrative Appeals Tribunal, *Client Satisfaction Survey* (1996).

17 Guilfoyle Report, above n 14 at Recommendation 23.

should appeal until the agency takes further adverse action against them, such as increasing the rate of recovery of an alleged overpayment. Unfortunately, a Bill before the Senate at the time of writing[18] seeks to implement this recommendation which will reduce access to administrative review.

The change from private to public hearings:[19] This change again will deter consumers from attending the SSAT. Public hearings are unnecessary given that a second tier of external review exists at the AAT, which is open to public scrutiny. Income security cases can often involve the need to explain embarrassing and sensitive matters. This information is less likely to be made available in an open forum.

The option for fewer multi-member and hence fewer multi-disciplinary panels:[20] The multi-member and multi-disciplinary panel is important in the income security field. It ensures that irrespective of the consumer's lack of capacity to prepare their case, the relevant expertise is at hand. Moreover, a multi-member multi-disciplinary panel is a protection against the risk of the Tribunal becoming a captive of the agency and any insularity which might arise through closed hearings.

A recommendation that a procedure of remittal to the Department be followed each time a consumer provided new evidence at the Tribunal stage:[21] Anyone who has experience of the SSAT will be aware that new material is provided by consumers in almost every one of the approximately 12,000 cases heard each year. This simply occurs because the person is asked relevant questions by the Tribunal. Unfortunately, this recommendation has also found its way into the current Bill with an additional requirement that the SSAT consider whether a person had reasonable grounds for not providing the information at an earlier stage.[22] Should this recommendation become law, it will cause duplication of functions between the agency and the Tribunal, and unnecessary delay and frustration for consumers. No compensating benefit will arise from the proposal as consumers rarely appear more than once at the Tribunal. Not only will consumers be unaware of the rule requiring them to provide information earlier until they have been disadvantaged by it, but they have no capacity to comply with it because they usually have no idea what information might in any event be relevant. This is another example of policy which ignores the reality of consumers' experience.

Other recommendations of concern, but it is hoped with less currency at the present time, include:

- Reduced jurisdiction, in particular over discretionary decisions.[23] Discretionary decisions are exactly the decisions that

18 Social Security (Administration) Bill 1999, cls 128 and 142.
19 Guilfoyle Report, above n 14 at Recommendation 14.
20 *Ibid* at Recommendation 40.
21 *Ibid* at Recommendation 13.
22 Social Security (Administration) Bill 1999, cl 169.
23 Guilfoyle Report, above n 14 at Recommendation 42.

should be subject to external review because, while discretions are essential for flexibility, these decisions are the most prone to the development of inappropriate practices and the most in need of external accountability.

- No longer requiring the Department to provide the whole of the consumer's file.[24] This will either prevent the Tribunal from fully informing itself and having a capacity to respond to the consumer's needs or it will serve to delay the matter while the consumer lodges a freedom of information request in every case. In combination with the recommendation for an agency representative this creates the possibility of "ambushing" the consumer during the hearing.

Second tier external review

There is a necessary tension between the need for a simple, speedy and private review process for some cases and the delivery of a detailed and publicly accountable consideration in others. In the income security field this tension is resolved by the existence of first tier external review by the SSAT and a second tier of external review by the AAT. Although only a small number of consumers apply to the AAT each year and, as indicated above, in practice most consumers require representation to obtain a successful outcome at the AAT, the loss of the right in every case to second tier external review foreshadowed in the proposal for an Administrative Review Tribunal[25] will severely disadvantage consumers. The proposed changes to the SSAT appear to embody the more formal features of the AAT without the consumer friendly features (such as preliminary conferences). It is likely that the impetus for these changes lies in the expected loss of an opportunity for second tier external review for the agency. Should these changes be enacted there will be an even greater need for representation for consumers, not only to redress the imbalance arising from Departmental representation and the consumer's disadvantage, but also because it will be the only opportunity to correct a decision which may have serious consequences for the person's livelihood.

WHAT CONSUMERS EXPECT FROM ADMINISTRATIVE JUSTICE

Consumers do have expectations of administrative justice. They are surprised and disappointed on the first occasion when administrators appear to fail them. Thereafter, however, some have less con-

24 *Ibid* at Recommendation 30.

25 S Pidgeon, Assistant Secretary, Civil Justice Branch, Attorney General's Department, "Amalgamating Commonwealth Tribunals – The Government's Accountability Through the Proposed Administrative Review Tribunal" (paper presented to Managing Service Provider Liabilities and Accountability Conference, Sydney, 16 Feb 1999).

fidence that they will be afforded a fair process than others and for many it is the fair process that matters. A process is not necessarily made fair by treating all participants in the same manner. That is because consumers and agencies do not start out on a "level playing field". Consumers' needs and expectations differ from those of agencies. Some of the principles consumers look for in administrative justice include: access; processes that enable them to participate on a more equal footing with the administration and which enable them to properly convey their case; decision-making which can be seen to be independent; procedural fairness; and formal acknowledgment of the process, such as a report with reasons.

In order to design structures that achieve these principles it is necessary to involve consumers and consumer groups in the process. Consumers should not be left as onlookers at the fringes of administrative justice.

The Role of Legal Education in Achieving Administrative Justice

DR KATHRYN CRONIN*

> Perhaps the highest priority in this area [of member expertise and thoroughness] ... is to enhance opportunities and requirements for professional development by members after they have been appointed. ... Most legal and medical members, for example, could benefit from greater exposure to other disciplines, skills and values. Many non-lawyers would benefit from a systematic but succinct introduction to legal principles, structures, procedures and skills. Promising initiatives have been commenced in several tribunals along these lines, due largely to particular leadership which by reason of professional background or gender is less constrained by legalistic traditions and obsessions with status. These initiatives epitomise the breath of fresh air which tribunals can bring to the stuffy confines of traditional judicial systems, although it remains to be seen how far the air will be allowed to circulate.
>
> (J Disney, "The Way Ahead for Tribunals", in R Creyke (ed) *Administrative Tribunals: Taking Stock*, CIPL, ANU 1992 at 126)

INTRODUCTION

The title of this paper comprehends a vast topic. Administrative justice is ostensibly provided by many thousands of Federal and State departmental officers, investigators, regulators, case officers, registrars and tribunal members. "Legal education" can include undergraduate as well as the professional and continuing education of lawyers and administrative decision-makers. Any discussion of education necessarily involves consideration of related themes, such as performance management of administrative decision-makers. All such matters are relevant to the topic.

* Commissioner, Australian Law Reform Commission.

Inevitably, this paper is directed to selected facets of the theme of this discussion, in particular, the training of tribunal members and staff. This issue has been raised in the course of the Australian Law Reform Commission's (ALRC) inquiry into the federal civil justice and review systems. The Inquiry directed the Commission to consider the significance of legal education and professional training to the legal process and the training, functions, duties and role of judicial officers as managers of the litigation and review process. This paper briefly reviews the Commission's work to date on legal education and training relevant to administrative decision-making. The Commission is yet to finalise its recommendations.[1] Specific recommendations will be made in a discussion paper to be released in the middle of the year.[2]

This paper is concerned with how to achieve administrative justice. In the circumstances, it is well to borrow a definition concerning administrative justice coined by decision-makers. For these purposes the Society of Ontario of Adjudicators and Regulators (SOAR) has stated that, in the context of merits review adjudication, administrative justice requires:

- that the adjudicative process be accessible, understandable and transparent, lawful, fair, expeditious, efficient and affordable;
- that the adjudicative process provides an opportunity to resolve issues without a formal hearing and be as informal and non-confrontational as the law and subject matter permit;
- that persons who are unrepresented by counsel or an agent not be unduly disadvantaged in the adjudicative process;
- that decisions in the adjudicative process be consistent;
- that all persons be treated with courtesy, dignity, and respect, and with the utmost regard for the principles of equality and fundamental justice;
- that adjudicators and staff be competent, objective, impartial, accountable, and have no conflict of interests;
- that adjudicators be independent in their decision-making, and adjudicators and staff free from improper influence and interference.

Administrative justice is advanced by adjudicators and staff identifying problems and solutions respecting the governing legislation, process or structure.[3] In this paper I have taken this Canadian formulation as a helpful summary of the goals sought to be achieved through professional education.

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1 [Editorial Note: See now ALRC, *Managing Justice*, Report No 89 (1999) Chapter 2.]

2 ALRC, *Review of the Adversarial System of Litigation: Rethinking Legal Education and Training*, Issues Paper 21 (1999).

3 M Priest, "Fundamental Reforms to the Ontario Administrative Justice System" in Ontario Law Reform Commission, *Rethinking Civil Justice: Research Studies for the Civil Justice Review*, Vol 2, (Toronto, 1996) at 562–565.

THE ROLE OF EDUCATION

Education and professionalism

Much educational activity is an act of faith. It is difficult to define the role of education[4] or concretely measure its benefits. Even so, in current debates on service provision, professional competence and accountability, continuing education is taken to be a means to improve, and be seen to improve professional performance. In this context, professional education is an institutional response to public criticism of the professions. As Livingstone Armytage noted concerning judicial education: professional education "marks the transference of responsibility for competence and performance from the individual to the group" reflecting the ongoing evolution of the judiciary as a social institution.[5] This paper deals with the institutional role of professional education in the context of the developing sense of an administrative justice system.

Australia's elaborate administrative law system was not explicitly designed as an administrative justice system. Tribunals occupy a "structural heretic" status[6] associated with, but not within departments or ministries or the judicial system. A recent reform analysis in Ontario noted the primary challenge for their collective of administrative agencies was to recognise and develop a sense of itself as an administrative justice system. As the study noted:

> They are a group of agencies with individual mandates. There is, however, a commonality of procedures that has been imposed by [statute] and the common law requirements of the rules of fairness and natural justice... [and] there are common elements to case management across a number of agencies. There are common data collection needs. The agencies and their members have common concerns relating to appointments, training, evaluations, codes of conduct, and discipline.[7]

Recent changes to the Australian administrative law system, particularly the proposed amalgamation of federal tribunals and the

4 The goal of continuing professional education is classically defined by Houle as "The mastery of new theoretical knowledge and practical knowledge and skill relevant to the profession, and the habitual use of this knowledge and skill to solve the problems that arise in practice": C O Houle, *Continuing Learning in the Profession* (San Francisco, 1980) at 34.

5 L Armytage, *Educating Judges: Towards a New Model of Continuing Judicial Learning* (Kluwer, 1996) at 6.

6 The term is attributed to J E Hodgetts, *The Canadian Civil Service: A Physiology of Government 1967–70* (University of Toronto Press, 1973) cited in Priest, above n 3 at 604. The "heretical" status derives from the features which confirm dependent status within a department, such as the financial dependency of portfolio tribunals and those independent characteristics which ensure that the minister cannot determine or direct the agency decision, even though the agency maintains its relationship with its creator the legislator, through the minister. The ambiguous status is a common source of discussion concerning the accountability, role and place of administrative justice system agencies in government (at 606).

7 Priest, above n 3 at 561–569.

establishment of the New South Wales Administrative Decisions Tribunal and the Victorian Civil and Administrative Tribunal, herald a change to a more integrated administrative justice system.

The development of the notion of an administrative justice system does not have the features of a "trade union" initiative, directed to enhance the terms, conditions and status of members, nor is it a movement to impose uniformity of process. In Canada, where the Society of Ontario Adjudicators and Regulators[8] (SOAR) has spearheaded the developing concept, the Society's goal is simply the improvement of the administrative justice system. The Society was incorporated: to facilitate the sharing of professional information and experience amongst its members; to assist in the education and training of agency members and executive staff; to be a reliable source of information and consultation for government concerning the administration, development and improvement of the administrative justice system; to develop codes of ethics and conflict of interest guidelines for agencies, members and executive staff; and to cooperate with and facilitate the collaboration between agency members and staff in other Canadian provinces and related agencies with relevant fields of interest.

In 1993 SOAR issued a report on education needs of tribunals, recommending that training be centrally coordinated and a position of education coordinator be created and work under the direction of the SOAR Education Advisory Committee. An Agency Training and Education Cooperative currently coordinates the training initiatives for all administrative agencies, including an orientation programme for new members, ethics, dealing with expert evidence, alternative dispute resolution, information technology, administrative law, organisational skills and dealing with difficult clients and situations.

8 SOAR is an organisation of individuals (institutions do not qualify) drawn from all agencies involved in the administrative justice system, including: those who make decisions at first instance; merits review tribunals; tribunals that act as industry regulators (for example, the Ontario Securities Commission); as well as tribunals that determine rights between private parties. The work of SOAR illustrates the kind of contribution the body might make to augment that of government policy advisers such as the Administrative Review Council. The SOAR had prepared a range of interesting papers including: a statement of principles of administrative justice; a code of professional conduct; a service equity policy; a performance management paper; and sample rules of practice. SOAR also has an education advisory committee, and an education coordinator appointed to establish training programs for agencies: see *Society of Ontario Adjudicators and Regulators Performance Management: Towards Maintaining and Improving the Quality of Adjudication: SOAR Recommendations for Performance Management in Ontario's Administrative Justice Tribunals* (also published in *Canadian Journal of Administrative Law and Practice* (1996) at 179).

Education and change

Continuing education is also a means of managing individual and systemic change. Relevant changes to administrative justice over the past years have included:

- an increase in the number and complexity of civil and administrative legislation and disputes;
- the establishment, abolition, restructuring and proposed amalgamation of specialised courts, tribunals, investigative and regulatory agencies;
- the privatisation and contracting out of government services, affecting the framework for public sector employment and administrative review rights;
- developments in a "best practice" public service that have stressed outsourcing, benchmarking, strategic risk management, contestability, user pays and market testing;
- the public's higher expectations of, and the increased public accountability of court and tribunal services, which has seen the development of benchmarks, performance standards and government measures of efficiency for courts and tribunals;
- the development and implementation of case management;
- the "privatisation" of certain dispute resolution processes and the expanded use of alternative dispute resolution within and outside court and tribunal systems;
- The continuing technological revolution with its potential to alter dramatically the practice of law and dispute resolution and the operation of courts and tribunals;[9]
- the expansion and contraction of legal aid and the associated increase in the numbers of unrepresented parties;
- changes in the size, composition, work, competitiveness and ethos of the legal profession.

Against this backdrop of substantial reform, professional development is taken to assist practitioners and decision-makers to accommodate to change, to develop new roles and skills, and utilise technology and appropriate and effective dispute management and resolution techniques.

Education for communication

Professional education also serves as a mechanism to facilitate communication within and between organisations. The theme of education as communication is developed in several of the recent reports and reviews into the practices and processes of common law, civil

9 See eg, ALRC, *Technology – What it Means for Federal Dispute Resolution*, Issues Paper 23 (1998); R Susskind, *The Future of Law – Facing the Challenges of Information Technology* (Clarendon Press, Oxford, 1996).

justice and administrative review systems.[10] The Ontario Civil Justice Review, for example, noted that problems within the civil justice system are exacerbated by poor communication and limited cooperation between the stakeholders—government administrators, the judiciary and the Bar, whom the Review dubbed "the solitudes":

> [I]n each of these constituent groups ... there are individuals who are working hard to build bridges and to devise cooperative methods of addressing and finding solutions to the problems which have beset the system. In general, however, the Judiciary, the Administration and the Bar have maintained an individuality in their approach to the system which has precluded a sense of collaboration, co-ownership or co-responsibility for these problems. There is a tendency to view the system from the perspective of one's own constituency and to view the failings of the system in terms of the needs of that constituency. Along with this tendency goes a reluctance to admit to being part of the problems.[11]

Each of these reports and reviews envisages future civil justice and review systems as integrated arrangements, responsive to the needs of users. There is a clear recognition that whatever the jurisdictional divisions or the varied roles and responsibilities within, for example, administrative systems, such systems work efficiently and effectively if the participants have a sense of collaboration, co-ownership or co-responsibility for its workings. This is a tall order. It necessitates devising cooperative methods of addressing and finding solutions to problems that beset the system and facilitating communication and cooperation between the variety of participants. In the administrative review system this can require better ways of communicating with those involved. These include: policy makers; departmental or agency decision-makers; departmental officers providing resources and support services to administrative decision-makers; the administrative agencies and tribunals that make decisions or recommendations affecting groups, public resources and individuals; the courts, which have a role in ensuring that the administrative agency is acting within its legal mandate and that their decision-making processes are fair and lawful; as well as the

10 See eg: Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London HMSO, 1996); Ontario Court of Justice and Ministry of the Attorney General, *Civil Justice Review* (1995); Ontario Law Reform Commission, *Study Paper on Prospects for Civil Justice* (1995); Canadian Bar Association, *Systems of Civil Justice Task Force*, Report (1996); T A Cromwell, "Dispute Resolution in the Twenty-First Century" (1996); Law Reform Commission of Nova Scotia, *Reform of the Administrative Justice System in Nova Scotia* (1997); Agenda for Civil Justice Reform in America, *A Report from the President's Council on Competitiveness* (1991); American Bar Association Working Group on Civil Justice Proposals, *Blueprint for Improving the Civil Justice System* (1992); Report on the American Bar Association's "Just Solutions" Conference and Initiative, *Just Solutions: Seeking Innovation and Change in the American Justice System* (1994).

11 Ontario Court of Justice and Ministry of the Attorney-General, *Civil Justice Review* (1995) at 103.

public, who may be affected individually or collectively by administrative decisions or recommendations.[12]

Professor Parker's excellent study *Courts and the Public* focussed on one such communication strand—that often neglected dialogue with the public. He noted that training and professional development facilitates such communication by offering opportunities to reflect upon whom the clients of a court are, what they need and how their needs are to be met. He commented that training manuals such as the Queensland Department of Justice's *Courts, Clients and You*, provide exercises "to unlock the insights and knowledge which court [administrative] staff acquire through their contact with clients but which might not otherwise be passed on within the organisation".[13] The observation is apposite to the administrative review system which is likewise afflicted by poor communication within agencies as well as between primary decision-makers, tribunal members, government and review agency administrators, lawyers, respondents and applicants. The vision of refashioning the "solitudes' depends on education.

Education for competence

Continuing education is a process. It may be more or less formalised and delivered in a number of guises. Its purpose is to improve performance and the quality of justice. The administrative law system constitutes the reality of state power for the majority of citizens. There is a clear public interest in good administration, in ensuring a regular flow of consistent decisions, made, published with reasonable dispatch, and in accordance with the law.[14]

Professional education is concerned with the orientation or induction of professionals into new roles and responsibilities and their continuing education, the refreshing and updating of their knowledge and skills. The Administrative Review Council (ARC) in its *Better Decisions* report recommended that—

- review tribunals should ensure that all new members have acquired a minimum level of knowledge and skills before they commence reviewing decisions; and
- the skills and experience of review tribunal members should be developed through their participation on multi-member panels where appropriate and through training and development programs.[15]

12 Law Reform Commission of Nova Scotia, *Reform of the Administrative Justice System in Nova Scotia*, Final Report (1997) at 13.

13 S Parker, *Courts and the Public* (AIJA, 1998) at 58.

14 ALRC, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996) at 21.

15 ARC, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995) at paras 4.84 – 4.93.

In 1992, Justice O'Connor highlighted the importance of ongoing professional development of AAT members:

> Increasingly, it is being recognised that users of court systems benefit from judges who have received continuing judicial education. The notion that experienced judges have no on-going developmental needs has been discredited. Members of the Administrative Appeals Tribunal likewise have on-going developmental needs, although the nature of these needs will obviously be different to those of judges. ... [T]he Tribunal can deliver better decisions through on-going professional development of members. For instance, much has been said and written about legalism in the Tribunal. It has to be acknowledged that when members are appointed from the legal profession and other areas of the law, they are likely to bring with them a lawyer's way of doing things. ... Professional development can be a useful means of equipping members with different, non-legal techniques which they can use in conducting matters in the Tribunal. Without knowledge of such techniques, the culture of legalism cannot be changed.[16]

The ARC recommended that tribunals cooperate to develop a minimum set of core skills and abilities required of effective tribunal members—core competencies—for use in organising professional development of members,[17] and in the process of developing selection criteria for tribunal members. Generally, individual federal tribunals provide induction training for new appointees and varied, ongoing professional development training programs for members including seminars, members' conferences and training in decision-making, mediation, case management and cultural and gender issues. Members also are encouraged and assisted to attend external seminars and conferences including those of particular relevance organised by the ARC, the Australian Institute of Administrative Law, and the tribunals and courts conferences organised by the Australian Institute of Judicial Administration. Manuals and publications on procedural and substantive matters and relevant recent decisions are available to members.

Representations to the ALRC have identified the need for tribunal members to receive additional training to deal with unrepresented applicants. This can require training in witness questioning, in using appropriate language and focussed, short questions. This training is particularly important in those jurisdictions where decision-making frequently turns on matters of credit. The task of a single decision-maker dealing with unrepresented parties in such circumstances can be fraught.

Further, the Commission has heard much concerning training in investigative skills. Again, such issues particularly arise in cases where applicants are unrepresented. A variety of studies of unrepresented applicants have made clear their difficulties in identifying legally relevant information and issues and preparing and presenting such evidence. Members' training should feature the tasks and limits of investigation and the need for members dispassionately to

16 D O'Connor, "Future Directions in Australian Administrative Law: the Administrative Appeals Tribunal", in J McMillan (ed), *Administrative Law: Does the Public Benefit?* (AIAL, 1992) 194 at 199.

17 *Better Decisions*, above n 15 at Recommendation 31.

evaluate the evidence found through their own investigations. It should have no higher value than that presented by the parties. The scope, ambit and limits of tribunal investigation have been canvassed in a number of migration and refugee cases before the Federal Court.

With some exceptions, administrative decision-makers see the benefits of education. In the education needs analysis commissioned by the AAT in 1992, members rated a variety of benefits which they hoped to derive from professional development, including, "confirming that you have missed nothing", "a sense of public responsibility, "exchanging experience with peers and socialising with colleagues", as well as the acquisition of skills in hearing and caseflow management and knowledge of principles of ethical conduct.[18] Members' assessments of their educational needs varied, depending on their particular skills and experiences.[19]

THE PROVISION OF EDUCATION

The difficulty with professional education lies not so much in featuring its benefits, but in securing its provision. It is expensive. It takes time away from decision-making, and tribunals are conscious of the need to demonstrate their productivity to governments. There are direct costs associated with members' travel, the production of materials and, in some tribunals, the salaries of education support staff. In many agencies and tribunals the decision to provide members' conferences, seminars or educational material is one for the Principal Member or President. Educational offerings to tribunal members vary, and, depending on the disposition and interest of such senior person, may be generous or sparse.

As stated, there has been some recognition in Australia of the need for peak bodies in administrative review to liaise with each other, exchange information and ideas and secure common training and education of tribunal members and staff. The ARC recommended the establishment of a "Tribunals Executive" comprising at least the principal members of each review tribunal to undertake these varied functions.[20] There is considerable merit in such a proposal and with the amalgamation and expansion of administrative review agencies, such an initiative seems a real possibility. Principal

18 L Armytage, *AAT Continuing Professional Development Needs Analysis: Final Report and Recommendations* (1992, unpublished) 15–18.

19 *Ibid*. For example: new, established, lawyer, non-lawyer and full and part-time members rated different benefits they sought from education. Part-time members rated as significantly more important than full-time members, the exchange of experiences with peers that education sessions can provide. Legally trained members rated as significantly more important then non-lawyer members, "confirming that you have missed nothing, keeping abreast of recent developments and enhancing professional competence": *ibid* at 16–17.

20 *Better Decisions*, above n 15 at Recommendation 85. The Tribunals Executive would have the function of identifying areas appropriate for cooperation between the tribunals, planning that cooperation and where appropriate arranging for the providers of services common to all tribunals.: *ibid* at para 7.49.

members are explicitly undertaking responsibility to ensure the quality of members' work, via performance standards and performance evaluations or, as in the *Migration Legislation Amendment Act (No 1) 1998* (Cth), have express authority to give directions to apply "efficient processing practices".[21] There is therefore an argument for extending their involvement across jurisdictions so that executive or senior members not only facilitate the education and training for their tribunal members and staff, but assist in facilitating such education across tribunals or between tribunals and primary decision-makers. Some of these initiatives are already happening, but not in any coordinated way. The Commission has no firm views concerning whether such arrangements are best undertaken via a tribunals executive or, as in Ontario, by SOAR, a broad society of tribunal members and primary decision-makers. The role of the ARC in such a system likewise needs consideration.

CONCLUDING COMMENTS

There is no doubt that education can assist in the delivery of administrative justice. It is a critical agent for change and the administrative review system is changing dramatically. The changes herald a new system where the demarcation between primary decision-makers and tribunals is diminished. As primary decision-makers are encouraged to avoid and manage disputes, so tribunals manage and resolve those disputes. The changes also undercut hierarchies and modify work practices within tribunals. The advent of case officers within the Migration Review Tribunal, for example, initiates new cooperative arrangements between registry staff and members. Leaving aside questions concerning the efficacy of these changes,[22] the new arrangements do call for better communication between participants within the administrative justice system (refashioning the "solitudes") and open debate and discussion to afford understanding and acceptance of new practices. The changes can seem threatening. They can be seen to undercut traditional notions of the independence of adjudicators. They challenge notions about where tribunals fit in our justice system—on the edges of the judicial system; outside the portfolio departments? The changes do require new skills, and members and registry staff require education to assist in developing such skills.

We are creating an administrative justice system but as an incident to change, not with deliberate intent. Education can supply the aspiration and theoretical underpinning for such change. If the working system is to change, it requires education concerning the current benefits and ambit of that change.

21 *Migration Act 1958* (Cth) s 353A(2).

22 The Commission has received evidence critical of certain arrangements relating to the changed practices.

Administrative Justice at the Fringe of Government

Administrative Justice at the Fringe of Government—Corporate Regulation

ALAN CAMERON, AM*

The purpose of this paper is threefold:

- to provide an update on the Australian Securities and Investments Commission's (ASIC, formerly the Australian Securities Commission) experiences with respect to administrative law review of its decisions, in particular by the Administrative Appeals Tribunal (AAT) and the Federal Court and to provide an insight into the impact this scrutiny has had on ASIC;
- to highlight some of the challenges that arise in maintaining the relevance and effectiveness of the administrative law regime as a result of complex legal and policy issues associated with rapid changes in information technology; and
- to discuss proposed legislative reform which affects administrative law review under the Corporations Law.

ADMINISTRATIVE LAW REVIEW OF ASIC DECISIONS

Overview of administrative law review

ASIC is subject to the Commonwealth administrative law package, which comprises the *Administrative Appeals Tribunal Act 1975* (Cth), the *Administrative Decisions (Judicial Review) Act 1977* (Cth), the *Freedom of Information Act 1982* (Cth), the *Ombudsman Act 1976* (Cth), and the *Privacy Act 1988* (Cth). ASIC welcomes being subject to this administrative law regime, which has promoted accountability

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and transparency in all aspects of ASIC's work. However, it is naive to think that these protections do not come at a cost. For example, the speedy and decisive investigation of breaches of the law is not assisted by attacks on the investigation process itself. There is a real danger that applying administrative law concepts to steps in the investigation process may lead to fragmentation of the investigative process.

Perhaps the most recent example of judicial concern with the fragmentation of the criminal process through use of civil litigation occurred late in 1997 in an interesting case before the Victorian Court of Appeal, although ASIC was not involved. The case was concerned, in part, with the undue length and excessive time involved in determining "white collar" criminal proceedings.

In *Director of Public Prosecutions Reference (Vic) No 2 of 1996*,[1] the Court was asked to decide twelve points of law that arose during the trial of six businessmen. On 29 January 1996, after three or four years of preliminary proceedings, the National Crime Authority (NCA) initiated proceedings against the six men. In response to charges of theft, fraud, dishonesty and giving false and misleading evidence the accused each pleaded not guilty. After several months had passed and the judge heard and determined a number of questions, no jury was empanelled. By orders made in July and August 1996, the judge directed that a verdict of not guilty be entered for all counts against each accused. The Director of Public Prosecutions (DPP) referred the case to the Court of Appeal for its opinion on certain matters.[2] Delivering the Court's judgment, Justice Brooking attacked the recent trend towards excessive and unnecessarily litigious criminal proceedings. Referring to a decision of the trial judge to require a large number of documents to be produced by the NCA (under compulsion of a subpoena) despite objections on the grounds of legal professional privilege, Justice Brooking expressed his concern that criminal proceedings "in (Victoria) are in some respects out of control".[3] His Honour bluntly expressed his disapproval of tactics that delay trials, and the trend for cases to become increasingly lengthy, arguing that the time used for final addresses in criminal cases would have been sufficient for the whole trial twenty years ago.[4] Justice Brooking also drew attention to the use of civil proceedings to hinder criminal trials:

> Nowadays actual or contemplated criminal proceedings spawn civil proceedings, and as a result quasi-criminal cases, civil in form but really concerned with criminal liability, which were unknown not so long ago, now occupy our lists.[5]

1 (1997) 96 A Crim R 519.

2 Such as the scope of the NCA's power to compel evidence on a matter relating to alleged criminal activity and whether evidence given in unlawful hearings is involuntary and inadmissible.

3 (1997) 96 A Crim R 519 at 523.

4 *Ibid*.

5 *Ibid* at s 24.

Even before the trial, there had been applications to the Federal Court, the Full Federal Court, and the High Court to prevent the laying of charges. During the trial there was further recourse to the Supreme Court, totalling six sitting days, and another application to the High Court. Legal proceedings had lasted four years concluding in late 1997 with the DPP reference, concerning events which ended in 1988. Justice Brooking observed: "I cannot regard as satisfactory a criminal justice system which can permit what has happened here".[6]

These issues are not new. The New South Wales Law Reform Commission in 1987 identified various factors contributing to delay in criminal trials.[7] Included in these factors was the deliberate tactics adopted by defendants (or their legal representatives) with the aim of delaying a case in the belief that this would benefit the defendant.[8] Delaying a trial may be beneficial to a defendant for a number of reasons. They may be in a better position to plea bargain, there is the possibility of a reduced jail sentence because of the time taken to get to trial, the prosecution case may weaken because the evidence is no longer fresh, the accused may be able to manipulate evidence, witnesses may lose their confidence in their recollection of events, and there is the (supposed) psychological advantage of postponing the day of judgment.[9] Former Commonwealth DPP, Mark Weinberg QC, as he then was, has expressed his understanding of the constant attacks which government agencies may be forced to counter:

> Even the humble search warrant can produce an array of challenges which can tie up the investigators for months, if not years. Judicial review has become a major thorn in the side of those hoping to complete their investigations in a timely manner.[10]

In some instances recourse to civil remedies does appear to be designed primarily to distract the investigator and frustrate the processes of justice. For example, in June 1997 ASIC issued a notice to a businessman to give him the opportunity to show cause why he should not be banned from managing a company in accordance with s 600(3) of the Corporations Law. The hearing into this matter was scheduled to commence on 20 October 1997. On 14 October 1997 an application was lodged in the Federal Court seeking review of the conduct of ASIC officers in issuing the notice to show cause under s 600(2) of the Law[11] and interlocutory relief to restrain ASIC from proceeding. The Federal Court had previously held that the decision to issue the notice to show cause was not a reviewable decision under the ADJR Act.[12] Justice Spender confirmed the decision of Drummond J in *Neate v ASC*[13] and held that the decision to issue the

6 *Ibid*.
7 NSW Law Reform Commission, *Criminal Procedure: Procedure from Charge to Trial*, Discussion Paper No 14 (1987) at para 3.2.
8 R Fox, "Criminal Delay as Abuse of Process" (1990) 16 *Mon L Rev* 64.
9 *Ibid* at 84.
10 Quoted in NSW *Criminal Procedure* report, above n 7 at para 12–11, 12–12.
11 *Collie v Behan, Binstead & ASC* (1998) 25 ACSR 644.
12 *Neate v ASC* (1995) 60 FCR 518.
13 *Ibid*.

notice to show cause was not a reviewable decision under the ADJR Act and that therefore conduct anterior to that decision was also not reviewable. In dismissing the application his Honour also observed that the delay in the applicant seeking relief was "truly unexplained and quite extraordinary". He went on to state:

> Given the history of the correspondence from the solicitors for the present applicants against the chronology of the filings in this court, it is almost impossible to avoid the conclusion that these proceedings were delayed until death knock. It seems to me that the delay is unacceptable and has been embarked upon with at least one purpose of achieving forensic advantage. In my opinion, the applicants have not come to the court in a mantle of candour.[14]

In the first years after the creation of ASIC there were several challenges to the exercise of its investigative powers, in particular ADJR applications challenging decisions by the ASC's delegates to issue notices to appear for examination under s 19 of the *Australian Securities and Investments Commission Act 1989* (Cth) (still known as "the ASC Law"[15]), or notices requiring the production of books to assist in an investigation under ss 30 and 33 of the ASC Law.[16] After that initial wave of challenges, there have, fortunately for the speedy completion of our work, been fewer ADJR applications concerning ASIC's investigative powers or the validity of notices relating to investigations.

In ASIC's experience, apart from a few marked exceptions, the number of challenges to ASIC's discretion in conducting its investigations has decreased as ASIC's powers have been defined by the courts and legal practitioners and ASIC's knowledge of their parameters has improved. The statistics on administrative review since ASIC commenced operation support this observation. However, it appears that the challenges now taking place may seek to pre-empt some investigatory findings, rather than contribute to fair and efficient decision-making.

The expansion of ASIC's functions as a result of it acquiring additional responsibilities on 1 July 1998 under the *Superannuation Industry (Supervision) Act 1993* (Cth), the *Retirement Savings Account Act 1997* (Cth), the *Life Insurance Act 1995* (Cth), the *Insurance Act 1973* (Cth), the *Insurance (Agents and Brokers) Act 1984* (Cth), and the *Insurance Contracts Act 1984* (Cth) will inevitably result in more administrative decision-making and probably an increase in administrative law challenges. It will be interesting to monitor developments in this regard over the coming years.

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14 (1998) 25 ACSR 644 at 649.

15 Although the name of the Commonwealth Act changed with the change of name of the Commission as from 1 July 1998, the expression ASC Law refers to the State, Northern Territory and Commonwealth laws operating jointly, and will not change without legislation being passed in each place.

16 See eg, *McDonald v ASC* (1994) 120 ALR 515; *Stockbridge v Olgivie* (1993) 43 FCR 244.

ASIC's experience of review of decisions of ASIC under the AAT Act

The conferral of jurisdiction on the Commonwealth Administrative Appeals Tribunal (AAT) to review decisions made by ASIC under the Corporations Law was made by way of general grant, with a limited number of exemptions.[17] This position contrasts with other jurisdictions where particular sections or decisions are specifically stated to be subject to review by the AAT.

The decisions which are excluded from AAT review are set out in s 1317C of the Corporations Law. The right of review does not exist in relation to:

- a decision under a few select sections of the Corporations Law;
- decisions in respect of which an appeal or review is expressly provided; or
- decisions that are declared by the Law to be conclusive or final or are embodied in a document declared by the Law to be conclusive evidence of an act, fact, matter or thing.

The conferral of jurisdiction on the AAT under s 244 of the ASC Law is more limited. The AAT is only authorised to review decisions made under ss 72, 73, 74 and 75(1) of the ASC Law which are ASIC decisions in relation to the failure to comply with the exercise of ASIC investigatory powers. The AAT does not have jurisdiction to review decisions to commence investigations, or decisions to exercise ASIC's compulsory powers to obtain books and records or to conduct private examinations.

From July 1995 to 30 March 1999 ASIC has been subjected to 147 AAT challenges. When one considers the number of decisions made by ASIC,[18] the number of applications to the Tribunal is relatively small. It should also be borne in mind that ASIC decisions appealed to the AAT are frequently appealed by another party in commercial dispute with the original applicant to ASIC. These are not cases of faceless bureaucrats being challenged by powerless citizens. In the 1995-1996 and 1996-1997 financial years, 40 applications were lodged as compared to 19 in the 1994-1995 financial year and 18 in the 1993-1994 financial year. In the 1997-1998 financial year 38 applications were lodged. In the first 9 months of the 1998-1999 financial year 29 applications were received.

As in the other areas of administrative law review, applications tend to fall into particular categories. The majority of applications relate to decisions affecting a person's livelihood. For example, a prohibition on a person acting as a director under s 600; licensing decisions under ss 829 and 837; a decision to, or not to, modify the Corporations Law under ss 728 and 730 relating to takeovers; accounting relief under s 313; and/or extension of time for lodging an Annual General Meeting or for lodgment of documents. As dis-

17 Section 244 of the *ASC Act*, s 1317B of the Corporations Law and for exceptions see Corporations Law 1317C.

18 Estimated in the hundreds every week.

cussed later, the legislative reform initiatives may affect the role of the AAT with respect to the review of decisions concerning modifications or refusals to modify the Corporations Law in its application to takeovers.

Interesting issues involving AAT review

A case which had the potential to have a significant impact on ASIC's regulatory work was *ASC v Kippe*.[19] It is interesting for a number of reasons, not the least being that it is one of the few cases in which ASIC has commenced its own action for review of an administrative decision.

ASIC had conducted a hearing in accordance with s 837 of the Corporations Law to determine whether Mr Kippe should be banned from acting as a representative of a dealer or an investment adviser. During the course of that hearing the delegate had relied on evidence obtained in an examination undertaken in accordance with s 19 of the ASC Law. Mr Kippe had claimed privilege for a number of responses he made in the examination. Section 68(1) of the ASC Law expressly abrogates the privilege against self-incrimination. The exceptions to the general abrogation arise only where the proceedings in question can properly be characterised as being for the imposition of a penalty within the meaning of s 68(3)(b) or a "criminal proceeding" within the meaning of s 68(3)(a). Mr Kippe argued that ASIC could not rely on the statements made by him as the banning hearing was, for the purposes of s 68 of the ASC Law, a proceeding for the imposition of a penalty within the meaning of s 68(3)(b).

ASIC relied on the evidence in the transcripts. Mr Kippe was banned for three years. He lodged an application in the AAT to review ASIC's decision. The AAT decided that neither ASIC nor the AAT should take the statements made during a s 19 examination into account as proceedings under s 837 of the Corporations Law were proceedings for the imposition of a penalty within the meaning of s 68(3)(b) of the ASC Law. It followed, in accordance with s 68(2), that the statements made were not admissible. ASIC lodged an application for review under the ADJR Act, challenging the decision of the AAT. The Full Federal Court held that the AAT had erred in law. It considered that the purpose of the banning order under s 829 of the ASC Law was protective and not punitive. It was not a proceeding for the imposition of a penalty within the meaning of s 68(3)(b). Accordingly, evidence obtained in a s 19 examination which is subject to a claim of privilege is nevertheless admissible in a licensing hearing conducted under s 837 of the Corporations Law.

Another very interesting case is the Full Federal Court's decision in *DB Management Pty Ltd v Australian Securities and Investments Commission*.[20] The history of the matter is that on 24 May 1996 Southcorp Wines Pty Ltd (Southcorp) made a takeover offer for all the shares in Coldstream Australasia Limited (Coldstream), together

19 (1996) 137 ALR 423.
20 (1999) 162 ALR 91.

with separate offers to acquire 50¢ and 72¢ listed Coldstream options. The takeover offer closed on 30 July 1996. At the close of the offer period Southcorp was entitled to over 97% of Coldstream shares. On 31 July 1996 Southcorp commenced the compulsory acquisition of the outstanding shares in accordance with the procedures set out in the Corporations Law.

With respect to the 50¢ options, which were due to expire in 20 December 1996, there had been acceptance of more than 99% by more than 97% percent of the shareholders. Three hundred remained outstanding. With respect to the 72¢ options, which were due to expire on 8 October 1998, at the close of the offer period Southcorp had achieved 88% acceptance by over 97% of the holders, so that 207,755 remained outstanding. The outstanding options then represented less than one and a half of the total issued shares and options as at the commencement of the offers. On 22 August Southcorp applied to ASIC for a declaration under s 730 of the Corporations Law so as to permit the compulsory acquisition of shares issued by Coldstream on the exercise of the outstanding options.

On 1 October 1996 ASIC made its decision to modify s 701 of the Corporations Law. The effect of the decision was that Southcorp could compulsorily acquire shares in Coldstream which would be issued on the exercise of options after the close of Southcorp's takeover offer. DB Management, a dissenting shareholder, sought review in the AAT of this decision. The AAT affirmed ASIC's decision. An appeal was lodged to a single judge of the Federal Court. That appeal was dismissed. However, the Full Federal Court, by majority, upheld DB Management's subsequent appeal. DB Management had submitted that the s 730 modification was invalid as it was, among other things, beyond power or, even if within power, was manifestly unreasonable in the *Wednesbury*[21] sense.

As noted above, s 701 of the Corporations Law permits an overwhelmingly successful offeror to acquire, at the close of the offer, shares in the relevant class of shares which remain outstanding. As McLelland CJ in Eq in *Peninsula Gold Pty Ltd v Australian Securities Commission*[22] has observed:

> Section 701 reflects a clear policy on the part of the legislature to facilitate the acquisition by an offerer under a takeover scheme of all the relevant shares in the target company ... where there has been a sufficiently high level of informed acceptance of the offer ..., subject to prescribed safeguards against unfairness ...[23]

Under s 730 of the Law the Commission is empowered to modify the Law with respect to takeovers as set out in Chapter 6. The discretion conferred is wide and has been considered by the courts on a number of occasions. As the Full Federal Court observed in *Otter Goldmines Ltd v Australian Securities Commission*:[24]

21 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948]1 KB 223.
22 (1996) 21 ACSR 246.
23 *Ibid* at 249.
24 (1997) 25 ACSR 382.

> The power of modification conferred by s 730 ... is expressed in wide terms and in language that offers little support for any implied limitation on the scope of the power conferred under it ... Subject to the matters referred to in s 731 the ASC's discretion is confined only by the subject matter, scope and purpose of the relevant statutory provisions in the Law ... For the detailed code in Ch 6 to be workable, broad discretions of exemption and modification are necessary and desirable, inter alia, for 'ensuring that the acquisition of shares in companies takes place in an efficient, competitive and informed market' ...[25]

However, O'Connor and Dowsett JJ held that s 730 did not authorise the modification made by ASIC in this case. Their Honours noted that there were express provisions dealing with the compulsory acquisition of outstanding shares. However, there was no provision dealing with acquisition shares which were not the subject of the original offer. These facts supported their contention that s 730 did not authorise ASIC to make a declaration permitting the compulsory acquisition of shares issued after the close of the offer period. They went on to state:[26]

> Even more compelling are the provisions of s 730 itself which simply do not authorise the abrogation of the property rights of third parties. The section purports only to authorise the Commission to vary the Law as it applies "in relation to a specified person or persons, or a specified class of persons", clearly referring to the person or persons making the application for a declaration ...*The section says nothing about affecting the rights of other parties. Had Parliament contemplated that such rights might be affected, it would surely have dealt with the matter expressly.* The absence of any provision in Pt 6.9 providing notice to persons whose property rights are to be affected by a proposed declaration, or conferring on them a right to be heard, points in the same direction ...

It is interesting that their Honours have referred to the absence of a statutory right to be heard as supporting their view that the legislature could not have intended to authorise ASIC to make decisions which affect third parties' rights. Their Honours make no reference to the common law obligations imposed by rules of procedural fairness with respect to affecting third parties' rights, or indeed to the practice of ASIC, both generally and in this case, to afford affected parties the right to be heard. In the light of this decision, ASIC has sought and obtained special leave to appeal to the High Court.

ASIC's experience of review of decisions under the ADJR Act

From July 1995 to 30 March 1999 ASIC has been subjected to 31 applications for review under the ADJR Act. In the 1995-1996 financial year 10 applications were received compared to 3 in the 1994-1995 financial year. In the 1996-1997 financial year there were 8 applications lodged, while in the 1997-1998 financial year 9 applications lodged. In the first 9 months of the 1998-99 financial year 4 applications had been lodged.

25 *Ibid* at 387–388.

26 (1999) 162 ALR 91 at 103 (my emphasis).

As noted above, initially, the majority of applications related to decisions to issue notices to compel the provision of documents or books under ss 30 and 33 of the ASC Law (two in 1994-1995 and five in the 1995-1996 financial year). However, in the 1996-1997 and 1997-1998 financial years the challenges have tended to fall back into the types of challenges ASIC encounters under the other administrative law statutes, namely those affecting livelihood (s 600 and licensing decisions) or concerning modification of the Law. A few of the more significant issues, not only for ASIC but for other agencies, which have arisen during the reviews of ASIC's decisions are discussed below.

Meaning of "decision" under the ADJR Act

While at first blush the meaning of "decision" may appear uncontroversial and straightforward, determining precisely what is meant by the term poses a number of ongoing difficulties for the courts, ASIC and affected persons. These difficulties are well illustrated by challenges to decisions to commence litigation. For example, in *Deloitte Touche Tohmatsu v ASC*,[27] Lindgren J held that a decision to commence proceedings under s 50 of the ASC Law was a decision within the terms of the ADJR Act. Under s 50 the Commission may, if it appears to be in the public interest, commence litigation for the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct, committed in connection with a matter to which an investigation or examination under Part 3 of the ASC Law related. ASIC may also institute proceedings for the recovery of property. Section 50 proceedings are not brought in the Commission's name but in the name of a person, with that person's written consent, or in the name of a company, with or without consent. Lindgren J's finding was not considered on appeal before the Full Federal Court, although subsequent Full Court decisions have taken a different view of similar decisions.[28] Recently, it has been held that:

> The decision to sue is itself but one step in the recovery process. There is nothing in the decision which removes a benefit or exposes the applicants to a detriment which they are not already subject to ...[29]

Other decisions also highlight the difficulty of determining what is a "decision". In *Mercantile Mutual Life Insurance Co Ltd v ASC*[30] Gummow and Lockhart JJ said, obiter, that ASIC's decision to authorise a person to apply to the Court for a summons to examine persons under s 597 of the Corporations Law (as it was prior to its amendment on 23 June 1993) was justiciable in the sense of being a final and operative decision. This *obiter dicta* was picked up and applied by O'Loughlin J in *Worthley v ASC*[31] in relation to a similar

27 (1996) 136 ALR 453.
28 *Hutchins v Commissioner of Taxation* (1996) 65 FCR 269; *Salarno v NCA* (1997) 75 FCR 133.
29 *Golden City Car & Truck Centre Pty Ltd v DCT* (1999) 99 ATC 4131 at 4135.
30 (1993) 10 ACSR 140 at 153, 171–172.
31 (1993) 41 FCR 376.

decision. It is, however, difficult to see how this decision fulfilled the *Bond* test[32] as it does not involve a substantive determination in that it only allowed an application to be made to the Court for an examination summons. It does not determine any issues in relation to the summons, because it is the Court which has a discretion in ordering a person to attend for examination.

Denial of procedural fairness

Procedural fairness is a concept which pervades ASIC's day-to-day conduct as it conducts investigations and makes decisions modifying the Corporations Law or affecting persons' livelihoods. ASIC has extensive powers to release information it has gathered which may adversely affect interests and continually engages in assessment of what procedural fairness requires in each situation. The primary case which ASIC relies on in this area is *Johns v ASC*.[33] However, other cases have arisen including *Aboriginal Legal Service Ltd and Paul Coe v ASC*,[34] *Boucher v ASC*,[35] and *Oates v Attorney-General (Cth)*.[36]

In *Oates*, ASIC obtained the consent of the Minister under s 1316 of the Corporations Law prior to laying charges against the appellant in respect of alleged breaches of the then Companies Code (WA). Section 1316 provides that proceedings may be instituted more than five years from the date of the alleged contraventions with the Minister's consent. The appellant challenged the validity of the consent on the basis that the Minister had failed to afford him the opportunity to make submissions before granting consent to ASIC.

The appellant was living in Poland and extradition proceedings had been commenced to have him brought to Western Australia to face a committal in respect of the charges laid against him. The Court held that in contrast to a decision to prosecute (which is generally not reviewable as the criminal law has adequate processes to ensure that the accused will receive a fair trial and, therefore, there is no duty to accord procedural fairness to the accused before making the decision), a decision to grant the consent has the effect of removing the bar to a prosecution of the accused, thereby depriving the accused of a legal right. Such a decision would not be considered during the course of the criminal trial. On that basis, the consent given by the Minister under s 1316 was found to be void on the ground of denial of procedural fairness. However, the High Court subsequently upheld the Attorney-General's appeal from the decision of the Full Court of the Federal Court, concluding that s 1316 did not require the Minister's consent to the bringing of prosecutions against the respondent for offences under the Criminal Code (WA). The High Court did not go on to consider the issue of procedural fairness.[37]

32 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.
33 (1993) 178 CLR 408.
34 (1996) 14 ACLC 1, 698.
35 (1996) 15 ACLC 100.
36 (1998) 156 ALR 1.
37 *Attorney General (Cth) v Oates* [1999] HCA 35; 164 ALR 393.

Obligation to act expeditiously in taking protective action

The decision of Heerey J in *Emmanuel Spiros Kardas v ASC*[38] is also important as it emphasises the need for agencies, such as ASIC, which are empowered to take protective measures, to do so in an expeditious manner. This case involved a challenge to a decision of ASIC to ban Mr Kardas under s 600(3) of the Corporations Law from acting as a director for two years. ASIC's decision to ban Mr Kardas was set aside. However, in so doing his Honour clarified a number of important issues with respect to ASIC administrative hearings. His Honour also emphasised the need for protective action to be taken promptly. He stated:[39]

> Once a liquidator's report in respect of a second 's 600 company' triggers the power of disqualification, that power, if it is to be exercised at all, should be exercised with reasonable promptness. A person potentially the object of that power should not be kept in an indefinite state of uncertainty. More importantly, since the purpose of a s 600 disqualification is prophylactic rather than punitive, there should be as little delay as possible in taking steps to protect the public.
>
> What is a reasonable time will depend on the circumstances.

In this matter a period of three years and eight months had elapsed since the filing of the second liquidator's report to the issue of the notice of prohibition. His Honour noted that during the hearing there had been no analysis of why this matter had taken over three years to conclude and conceded that some of the delay in the hearing may have been attributable to Mr Kardas but nevertheless considered that this elapse of time was "well beyond the bounds of reasonableness".[40]

ASIC's experience with respect to applications for access under the FOI Act

From July 1995 to 30 March 1999, ASIC received 210 applications under the *Freedom of Information Act 1982* (Cth). In the 1996-1997 financial year the ASC received 55 FOI applications. In the 1995-1996 financial year 71 were received, in the 1994-1995 financial year 54 were received, while in the 1997-1998 44 applications were received. In the first 9 months of the 1998-99 financial year 40 applications had been received. It remains the case that the majority of applications relate to investigations. Usually the applications are lodged by those who are, or have been, the subject of the investigation.

There are a number of important exemptions under the FOI Act which exempt disclosure of certain documents whilst an investigation is on foot. In particular, s 37 of the FOI Act states that a document is exempt if its disclosure could reasonably be expected to prejudice the conduct of an investigation, or prejudice the enforcement or proper administration of the law in a particular instance.

38 (1998) 16 ACLC 1695.
39 *Ibid* at 1704.
40 *Ibid*.

The section also provides that disclosure is exempt if it would reveal the existence of a confidential source of information, prejudice the impartial adjudication of a particular case, or disclose procedures for investigating breaches of the law. Section 40(1)(d) is also relevant. This provision effectively states that a document is an exempt document if its disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.[41] The frequent use of FOI requests to discover ASIC's progress with a particular investigation, either ongoing, or completed, has not to date had a substantial impact on ASIC's functions in enforcing the Corporations Law. This could, however, change if there was any substantial amendment to the exemption provisions of the FOI Act.

ASIC's experience with respect to complaints to the Ombudsman

Complaints to the Ombudsman fall primarily into two main categories, decisions not to investigate, and document lodgment issues, particularly the imposition of late lodgment fees. In the financial year 1995-1996 the Ombudsman investigated 17 formal complaints. Of these, 11 related to decisions not to investigate. One related to the manner in which the ASIC conducted an investigation. In the 1996-1997 financial year the Ombudsman investigated 22 formal complaints.[42] Of these, 11 related to decisions not to investigate. An additional 4 related to the appropriateness/adequacy of an ASIC investigation. Five complaints related to the imposition of late lodgement fees. In the 1997-1998 financial year, 16 formal complaints were received. Of these, 9 related to decisions not to investigate, 4 related to decisions to release or not release information, 2 related to the manner in which ASIC corresponded with complainants and 1 related to a takeover matter. This financial year, to 30 March 1999, 15 complaints have been lodged. Of these 8 relate to decisions concerning investigations, 5 to decisions with respect to waive late lodgment fees, and 2 were about licensing matters.

Review by the Commonwealth Ombudsman

ASIC considers that the Ombudsman plays an invaluable role in ensuring that the decision-making processes of government are transparent and that it is accountable for its actions. A recent example of a significant matter which was investigated by the Ombudsman related to complaints arising from the collapse of the Growden Group of companies (Growdens) in South Australia. The collapse of Growdens was widely publicised in the media and led to allegations of negligence and defective administration on the part of ASIC in granting a class order exemption to the members of the Finance Brokers Institute of South Australia (FBI). The history of the

41 Section 40(1)(d) applies to documents throughout all stages of ASIC's investigation and litigation.

42 The statistics appearing in the Ombudsman's annual reports are higher. The statistics in the report include all contact with the agency including telephone enquiries.

matter is explained briefly before turning to the conclusions of the Ombudsman following the investigation.

In March 1992 the then Australian Securities Commission held a public hearing under s 51 of the ASC Law relating to pooled mortgage investments in Australia (mortgage investments). At that time, under the South Australian *Land Agents, Brokers and Valuers Act 1973* (the 1973 Act), persons who were defined as mortgage financiers were entitled to offer pooled or mortgage investments. The 1973 Act provided for auditing and registration of mortgage financiers by the South Australian Office of Business and Consumer Affairs. The Act also provided a guarantee fund to those persons affected by unlawful actions. However, in 1994 the South Australian Parliament passed legislation which repealed the 1973 Act.[43] It did not incorporate equivalent provisions in relation to mortgage financiers. Without an exemption, finance brokers in South Australia would have been required to produce a prospectus and trust deed in relation to each investment. The costs involved in complying with the prospectus and approved deed requirements of the Corporations Law would have effectively meant that finance broking in South Australia would cease to exist. This would have removed a source of finance which had been well established over a number of decades in South Australia.

The FBI initially sought an exemption on 12 May 1992 under s 1084(2) of the Corporations Law from the fundraising provision requirements.[44] The application received substantial consideration over an extended period of time as ASIC had concerns, among other things, about whether the FBI was a self regulatory organisation with the requisite capacity to oversee the conduct of its members and the adequacy of its indemnity fund.[45] When inquiries were made as to the structure of the fund it was found that insurance companies were unwilling to provide fidelity insurance of a similar nature to professional indemnity insurance. Consequently, ASIC required the FBI to ensure that its rules specified that a fidelity bond was required by each of its members. Commercial reality dictated that the amount of the bond would have to be an amount that an insurance company was willing to cover. As with the law society funds which accumulate from members trust accounts, it was determined that a fidelity fund could be created which would accumulate from levies on members transactions.

In the seven years prior to the granting of the exemption to FBI there appeared to be no reason for concern within the industry.[46] A regime of audit and professional indemnity insurance had been in place for many years under the Department of Consumer Affairs and ASIC was not made aware of any significant claim on the fidelity

43 *Land Agents Act 1994* (SA) which came into operation on 1 June 1995.

44 Divisions 2 and 5 of Part 7.12 and s 1078 of the Corporations Law.

45 G C Growdens Pty Ltd was a member of FBI at the time of its liquidation on 18 April 1997.

46 There had been large defaults in 1988.

fund during that period. The exemption was only granted in May 1995 after ASIC was satisfied that the FBI had established an appropriate administrative process to oversee the conduct of its members, as well as ensuring that it met the professional insurance arrangements required under the *Land Agents, Brokers Act and Valuers Act 1973* (SA) and had established a satisfactory fidelity fund. However, as a result of the collapse of Growdens in October 1996 claims were made against FBI's indemnity fund.[47] Unfortunately, the initial provision for default by members of the FBI was inadequate to cover the claims that were made so soon after the establishment of the fidelity fund.

Lenders who suffered loss as a result of the collapse of Growdens complained to the Ombudsman. After undertaking an investigation the Ombudsman formed the view that the regulatory regime imposed on the FBI at the time the exemption was granted was adequate to cover circumstances that could reasonably be foreseen and that, in providing the exemption, ASIC took proper account of prior payments from the State Indemnity Fund. In addition, the Ombudsman considered that there was no basis on which to conclude that ASIC had not acted reasonably or properly in accordance with the relevant legislative provisions and therefore no basis on which to recommend payment of compensation to the affected parties.

The outcome of the investigation was, no doubt, a disappointment to the complainants. However, the fact that they had a right to complain and have their concerns investigated by an independent authority should not be undervalued. The scrutiny of actions by the Ombudsman is an essential element in ensuring open and accountable government. Review by the Ombudsman requires an agency to assess and take stock of its actions. Self assessment, as well as an independent assessment, is vital if agencies are to continue to strive to adopt best practice.

ADMINISTRATIVE LAW REVIEW MEETING THE CHALLENGES POSED BY INFORMATION TECHNOLOGY[48]

The past decade has seen explosive growth in new products, new technology and cross border financial activity. Cyberspace has now become a powerful forum for the conduct of business, and is regarded by some as a vast unregulated marketplace, with a number of significant advantages over other media, including speed of access, relatively low cost and immediacy of response. The cyber-world has made dramatic changes to the way the financial services industry operates.

Of all of the technological innovations we have seen over the last decade, the Internet is arguably the most profound. I will highlight

47 G C Growdens Pty Ltd was a member of FBI at the time of its liquidation on 18 April 1997.

48 This part is based on the paper "Cyber enforcement in the financial sector" by Mr J P Longo, National Director, Enforcement, ASIC at the Global Conference, Sydney on 9 November 1998.

some of the issues which the Internet poses for ASIC and, in some way, for those who are charged with the responsibility of reviewing ASIC decisions. Use of the Internet is largely unlimited, restrained only by the imagination of those who use, manipulate, and in some cases, abuse it. In the financial markets context it leaps international boundaries in a single bound and provides extraordinary access to information of varying reliability and individuals of varying credibility, in a way which had not previously been possible on such a broad scale. A recent study on the Internet domain growth has revealed that the Australian commercial sector increased its presence on the Internet by 90% in 1998, on average, registering .com.au domains at nearly 2,400 per month.[49]

Mr Geoff Huston, Secretary of the Australian Internet Society has acknowledged that the flow of information through the world's publicly owned computer networks is impossible to control. He said:

> You can no more trace the path of a water droplet through the world's oceans as trace the information on the Internet. ... The network doesn't respect legislative borderlines. It is very hard to know who is doing what, where.[50]

This lack of knowledge (or is it control?) is of the greatest concern to many of the organisations that are delaying their entry to electronic commerce generally and to the Internet specifically. Their concerns are shared by regulators and law enforcement agencies worldwide. Ira Magaziner (United States President Clinton's senior Internet adviser) said in December 1997, during an interview with the President of Australia's Internet Industry Association:

> What we now understand and we have gone away from, is that even if it were desirable to censor the Internet, which we don't believe it is, but even if it were desirable, it is impossible, and life is too short to spend so much time on doing things that are impossible.[51]

ASIC maintains more than a keen interest in the Internet and electronic commerce primarily because, as the Australian regulator of the securities and futures markets and being responsible for consumer protection in the financial services sector, ASIC must ensure consumer confidence, commercial certainty, efficiency and market integrity. ASIC's general approach to developments in information technology, and an essential part of the philosophical basis for developing its approach to enforcement issues, is:

- Technology is a positive development—a tool for changing and improving the current market structures.
- ASIC is facilitative of market innovation, and pro-active in accommodating changes in the markets as a result of the interrelated forces of globalisation and enhanced technology.
- ASIC supports law reform developments and believes that legislative reform ought to be based on achieving regulatory out-

49 M Hamilton, "Domain Growth" in *Internet World*, Jan/Feb 1999.
50 "Controlling info a tangled web", *The Australian Financial Review*, 12 Jan 1996.
51 "Futility in internet code", *The Australian Financial Review*, 27 Jan 1998.

comes. We recognise that efficient regulation requires a shift away from inflexible, prescriptive legislation.

- The same types of regulatory mischief that occur in the electronic environment, occur in the traditional markets.

Appropriate and effective regulation and, if required, enforcement action in respect of the Internet is difficult and frequently complicated by a number of matters. Without going into detail these include:

- the diminution of national borders in an increasingly global business community;
- the multiplicity of responsible regulatory agencies that all have jurisdiction over particular aspects of what happens on the Internet;
- the jurisdictionally limited and slow pace of law reform which is largely unsuited to the demands of a rapidly advancing technological environment;
- the evidentiary limitations of traditional enforcement: no "smokin' gun", no paper trail, no "eyewitness" testimony; and
- the vexed question of whether regulation ought to focus on the provider or the user of the offending information.

As has been said, "Internet regulation is all very difficult, but when you are trying to regulate the most revolutionary method of communications since the invention of the printing press that's not surprising".[52] The policy and legal issues which use of the Internet raises are varied. One of the most fundamental is that the laws which may need to be applied with respect to Internet transactions, for example, the laws of copyright, were developed well before the introduction of the Internet.

As noted above, ASIC is subject to the entire administrative law regime. It is making decisions in an ever-changing and complex commercial environment where the transactions which it may be required to regulate occur virtually instantaneously. When one considers the traditional remedies available under the administrative law regime the fundamental question arises: are these remedies appropriate in such an environment? This question is not one which administrative lawyers alone must face. It is one which all within the law must confront.

In all likelihood, the Federal Court and the Ombudsman will be required to review decisions made by ASIC with respect to the Internet at some stage in the future.[53] The ability of the courts to respond quickly and appropriately to urgent applications for relief will, no doubt, be tested. The sheer pace at which transactions occur means that, to be useful, relief must be granted very quickly. At the same time decisions made on the substantive issues will also need to

52 D Ingvarson and M Deeble, "The Writings on the Wall: Regulation of Publishing on the Internet" in (1995) 1(11) *Internet Australia*.

53 As noted above the AAT does not have jurisdiction to review enforcement related decisions taken by ASIC under Part 3 Divisions 1–3 the ASIC Act.

be dealt with expeditiously. Further, in undertaking any review it will be interesting to see whether the courts and the Ombudsman will have regard to the practicalities of ASIC decision-making in a complex legal and commercial environment where ASIC must act quickly and decisively if it is to have any regulatory impact. I am confident that they will.

LEGISLATIVE PROPOSALS WITH RESPECT TO ADMINISTRATIVE LAW REVIEW UNDER THE CORPORATIONS LAW—ADMINISTRATIVE LAW REVIEW OF DECISIONS OF THE CORPORATIONS AND SECURITIES PANEL

The Corporations and Securities Panel (the Panel) is empowered to, among other things, make a declaration and various orders if it is satisfied that "unacceptable circumstances" have occurred in the acquisition of shares.[54] Since 1991 three matters have been referred by the Commission to the Panel in accordance with s 733 of the Corporations Law. Decisions of the Panel are not currently subject to review by the AAT but are reviewable by the Federal Court under the ADJR Act.

Under the *Corporate Law Economic Reform Program Act 1999* (Cth) a reconstituted Corporations and Securities Panel was established. The Panel has the power to:[55]

- review on its merits decisions of ASIC to exempt or modify the takeover rules in Chapter 6 (currently the AAT has jurisdiction to review these decisions); and
- declare circumstances to be unacceptable and make a wide range of orders, including stopping a takeover bid.

Other interesting features of the proposed law reform include:

- once a takeover bid has been proposed only ASIC or another public authority of the Commonwealth or State will be able to apply to the court to stop or affect the takeover bid;
- any interested person, including the bidder, target and ASIC, will be able to apply to the Panel (currently only ASIC is empowered to apply to the Panel under s 733 of the Corporations Law);
- an "interested person" may apply to the Panel for review of an ASIC takeover decision; and
- the Panel will have the power to award costs.

Takeovers are, typically, large scale commercial matters where the commercial interests of the target company and the bidder are often diametrically opposed. Parties to such a dispute may, therefore, have a powerful incentive to use any and all tactical devices available to them, including review in the AAT and the courts. The takeover area is one where speed and certainty of outcome is not only com-

54 Corporations Law s 733.
55 Corporations Law, Part 6.10, Division 2.

mercially desirable, but is a regulatory necessity. Decisions made to modify the Corporations Law may potentially affect not only the interests of the applicant and the rival entity but the market generally as well as the broader economy.

In the Explanatory Memorandum to the Bill it is made clear that the proposed amendments reflect the need to address such issues.

> Target companies often resort to litigation in hostile takeover bids, sometimes for tactical reasons. This can result in bids being delayed and, where a final hearing cannot be held within the bid period, the courts having to decide between disrupting the bid by granting an injunction without the benefit of full evidence and allowing the bid to proceed even though it may later be found to be defective.
>
> To meet these concerns, a reconstituted Panel will take the place of the courts as the principal forum for resolving takeover disputes under the Corporations Law, with the exception of civil claims after a takeover has occurred and criminal prosecutions. This will allow takeover disputes to be resolved as quickly and efficiently as possible by a specialist body largely comprised of takeover experts, so that the outcome of the bid can be resolved by the target shareholders on the basis of commercial merits. Other benefits of an effective panel for dispute resolution include the minimisation of tactical litigation and the freeing up of court resources to attend to other priorities.[56]

ASIC has been concerned that the AAT may have been used in what is essentially a commercial dispute, that dispute being fought out in the AAT under the guise of a merits review application. The standard of decision-making by the AAT in these matters is not in question. However, there are broader policy considerations which include the appropriateness of merits review by a non-specialist body whose practices and procedures may not be suitable for the conduct of such matters. If the proposed reform proceeds in the form as currently drafted there will be significant changes in the roles of the courts and AAT with respect to takeover matters. It will be interesting to observe how the Panel will undertake its reviews and meet the challenges which revised jurisdiction will, no doubt, pose.

CONCLUSION

ASIC considers that the administrative law regime has had an important role in ensuring that government is open and accountable for its decisions. However, there is a real risk that this role may be diminished if the administrative law regime and those administering it fail to keep pace with developments in the law as well as the social and economic changes in our society. I remain confident that the challenges which we face can be met provided that our expectations of what the administrative law regime can achieve are not unrealistic and that we also understand that the protections afforded come at a cost.

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56 Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998, at 38.

Administrative Justice at the Fringe of Government—Aspects of Private Sector Regulation

Dr Annabelle Bennett, SC*

There are many aspects of administrative action that have considerable impact in the private sector and, indeed, are used by the private sector in pursuit of normal commercial interests. One of the areas of growing commercial interest is intellectual property. The appreciation of the importance of intellectual property rights and the commercial necessity of protecting those rights has led to an increased use of litigation in areas such as patent protection. The first body that decides the existence and scope of patent protection is a Commonwealth government agency, IP Australia. This can be said to be an administrative body that operates at the "fringe of government" in the sense that it is a statutory body that fulfils its functions in the absence of day-to-day government action.

The practice of a profession is a matter far removed from the activities of government. It is, however, regulated by statutory bodies that make important decisions bearing upon that practice. Importantly, it is often left to those bodies to determine whether or not a practitioner is guilty of professional misconduct in the practitioner's relationship with the client—a relationship that is by its nature private.

Common to both patent-recognition and professional misconduct is the use of tribunals as a regulatory tool. Importantly, these tribunals consist of or include persons with scientific or relevant technical expertise in the area under investigation. In the case of IP Australia, the officers conducting examinations and hearings are scientifically and technically qualified in the subject matter of the patent. In the case of professional conduct boards, to the extent that scien-

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tific or technical matters are the subject of investigation, the tribunal is constituted to include persons with that expertise. In the latter case, not all matters require the application of specific expertise.

This paper looks to the workings of administrative justice in the spheres of regulation of intellectual and industrial property ownership and professional discipline. The administrative bodies in these areas are largely outside the traditional focus of most administrative lawyers. IP Australia and the disciplinary boards operate within statutory frameworks, making administrative and quasi-judicial decisions. For the Patent Office, a principal question is whether a patent application should proceed to be a granted patent. For the boards, a principal question is whether particular conduct constitutes misconduct in a professional respect.

THE APPLICABLE STATUTORY FRAMEWORK

The administration of the grant of letters patent

The Australian Patent and Designs Office is part of a body now known as IP Australia. IP Australia forms part of the Department of Industry, Science and Resource portfolio, but operates independently from the Department.[1] In Australia, patents, trade marks, designs and copyright have been Commonwealth functions since federation. Some intellectual property rights are automatic and some are only granted after application and successful examination.[2] IP Australia administers patents, trade marks and design rights with an examination and registration process.[3]

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1 The Australian Intellectual Property Organisation changed its name to IP Australia from 25 February 1998. IP Australia administers its responsibilities through five business units: Patent and Designs Office, Trade Marks Office, Corporate Strategy, Informational Technology Services, and Business Services.

2 The Commonwealth Attorney-General's Department administers the legislation for automatic rights to copyright and circuit layout rights. Plant Breeder's Rights Australia, Department of Primary Industries and Energy administers the plant breeder's rights which also has a registration and examination process. Other legislation affecting intellectual property includes trade practices. Legal action can be taken under common law for infringement of trade secrets, passing off, trade marks and confidentiality agreements.

3 The Acts and regulations administered by IP Australia are: *Patents Act 1990* (Cth), *Patents Regulations* (Cth), *Designs Act 1906* (Cth), *Designs Regulations* (Cth), *Trade Marks Act 1995* (Cth) except Part 13 which is administered by the Australian Customs Service, and *Trade Marks Regulations* (Cth). These Acts and their subordinate regulations supply the legislative basis for the patent, trade mark and design systems of Australia. They include provisions for: administering each distinct Office, including the powers and functions of the Commissioner of Patents and Registrars of Trade Marks and Designs; establishing and maintaining the registers of patents, trade marks and designs; making and processing of applications for grant of a standard or petty patent or registration of a trade mark or design; charging of fees; publishing of journals; prescribing the means to take infringement proceedings to protect or enforce rights in patents, registered trade marks or registered designs; registering patent attorneys and prescribing rights of practice; prescribing the right of review of decisions of the Commissioner and Registrars by the Administrative Appeals Tribunal; and prescribing the jurisdiction of courts in appeals against decisions of the Commissioner and Registrars.

The patent system in Australia is regulated by the *Patents Act 1990* (Cth) as supplemented by the *Patents Regulations* (Cth). An invention may only be patented if it satisfies the requirements set out in s 18 of the *Patents Act*.[4] An invention which fulfils all the requirements of s 18(1) is considered to be a "patentable invention" provided that the subject of the invention is not " [h]uman beings, and the biological processes for their generation": s 18(2). Whether or not an invention is a "patentable invention" is first assessed by the Patent Office at the time of examination of the application for a standard patent.[5] In most circumstances, any person may file an application for a patent (s 29) but only a particular class of persons is entitled to the grant of a patent (s 15); that is, the inventor or one who derives title from the inventor. The patent system has broad standing provisions. Any person may notify the Commissioner of Patents of reasons why an application for a standard patent should be refused;[6] opposition is open to "the Minister or any other person".[7] Routinely, however, a competitor is the opponent to a grant of patent. The Commissioner must accept an application for a standard patent if there is no lawful ground of objection to the application (s 49). Opposition to the grant of a standard patent can be based on any ground specified in s 59 of the *Patents Act 1990* (Cth), but no other. Dismissal of an opposition of an application for a standard patent follows from a finding that the grounds of opposition are clearly untenable and cannot possibly succeed.

It is clear that the grant of patent is an administrative act, such that determinations by the Commissioner as to whether the conditions for the making of grants are satisfied are exercises of administrative and not judicial power. The fact that the exercise of this principal power may involve determination after a contested

4 A patent is a monopoly of a limited duration granted to a patentee by the Crown. The patent grants the patentee the exclusive right to exploit an invention during a specified period of time: *Patents Act 1990* (Cth) s 13(1). Standard patents are for terms of twenty years; petty patents are for a term of twelve months which may be extended to a total of six years: ss 65, 67, 68.

5 Only the requirements of s 18(1)(a) regarding manner of manufacture, s 18(1)(b)(i) regarding novelty, and s 18(1)(b)(ii) regarding inventive step, together with certain "internal" requirements of s 40 of the Act concerning the content of the patent specification, are examined at this stage. These are also grounds upon which an application for a standard patent may be opposed by any person within three months after advertisement of acceptance of the application. An additional ground for opposition is that the applicant is not entitled to the patent: s 59(a).

6 *Patents Act 1990* (Cth) s 27. The only grounds of invalidity which can be alleged are lack of novelty and lack of an inventive step.

7 The specified grounds of opposition are: (1) the nominated person is not entitled to grant of a patent; (2) the invention as claimed is not a manner of manufacture within the meaning of s 6 of the *Statute of Monopolies* 1623, 21 James I c 3 (UK); (3) the invention as claimed is not novel; (4) the invention as claimed does not involve an inventive step, that is, it is obvious; (5) the content of the complete specification is not in accordance with the requirements of s 40(2) of the *Patents Act 1990* (Cth); or (6) the claims are not clear and succinct or not fairly based on the matter described in the specification in accordance with the requirements of s 40(3) of the *Patents Act*.

opposition hearing *inter partes* is not sufficient to make such power judicial in nature.[8] Consistent with the grant of patent being an administrative act, proceedings before the Commissioner of Patents are essentially inquisitorial. Thus, the Commissioner may require the production of documents or articles that could be relevant to proceedings.[9] The power to issue such a summons is, in its nature, administrative; s 210 does not provide the Commissioner with the power to order "discovery" of documents. Thus, in the recent decision of *G S Technology Pty Ltd v Commissioner of Patents*,[10] it was held that the Commissioner does not lose his administrative character because the circumstances demand that, exercising the power, the Commissioner must act judicially.[11] The Commissioner of Patents is not bound by the rules of evidence and may, for example, admit hearsay.[12] Nonetheless, the Commissioner must decide on the basis of relevant and logically probative evidence, and cannot require a witness to answer questions the witness would not be required to answer in a court of law (that is, where privileged).[13]

The parties to an opposition of an application for a standard patent are entitled to appear at a hearing to explain their respective cases (s 60). In all matters before the Commissioner, the hearing officer is obliged to ensure that no party is denied natural justice. The *Australian Patent Office Manual of Practice and Procedure* describes the "chief rules" of natural justice as follows:[14]

- a party must have notice of the case they have to answer;
- each party must have the opportunity of adequately stating their case (including sufficient time to prepare their case), and correcting or contradicting any relevant statement prejudicial to their case (Note: there is no requirement for the Commissioner to ensure a party takes advantage of that opportunity);
- a party must not be heard behind the back of the other party;

8 *Stack v Commissioner of Patents* (1999) 161 ALR 531 at para 37, discussed below.

9 *Patents Act 1990* (Cth) s 210, reg 22.14. As to the principles for determining relevance, see *Wellcome Foundation Ltd v VR Laboratories (Aust) Pty Ltd* (1980) 29 ALR 261 at 264.

10 *G S Technology Pty Ltd v Commissioner of Patents* (1998) 39 IPR 583 (Beaumont J, FC).

11 Historically, there have been very few requests for a Commissioner's notice requiring the production of documents. Indeed, the *Australian Patent Office Manual of Practice and Procedure (APO Manual)* suggests that the first notice was not issued until 1992 (*Paracel Holdings v McIlwraith McEachern* (1992) 23 IPR 177). See also *Emory University v Biochem Pharma Inc*, 14 Sept 1998: *APO Manual*, Vol 3 – "Oppositions, Courts, Extensions and Disputes" (August 1998 release) at para 5.1.

12 As Lord Denning MR commented in *T A Miller Ltd v Minister for Housing and Local Government* (1968) 1 WLR 992 at 995: "A tribunal of this kind is master of its own procedure, provided that the rules of natural justice are applied. Most of the evidence [is] on oath, but that is no reason why hearsay should not be admitted where it can fairly be regarded as reliable. Tribunals are entitled to act on any material which is logically probative and even though it is not evidence in a court of law".

13 *APO Manual*, vol 3 at para 1.2.6.

14 *Ibid* para 2.4.1.

- relevant documents which are looked at by the hearing officer should be disclosed to the parties;
- a hearing officer must not be a judge in their own cause—so that a hearing officer must declare any interest they have in the subject matter of the dispute (Note: this may (*inter alia*) disqualify a hearing officer from hearing a substantive s 59 opposition where that officer was directly involved in the examination of the application);
- the hearing officer must act fairly, in good faith, and in a judicial temper.

An interesting development in the Patent Office is the evolving practice of requiring an opponent to give further and better particulars of a ground of opposition as a way of overcoming the limited effect of the dismissal procedure.[15] There is no express provision in the *Patents Act 1990* (Cth) or the *Patents Regulations* (Cth) concerning further and better particulars, and the onus of adopting this procedure rests with the applicant.

The Commissioner of Patents must grant a patent if there is no lawful ground for refusing to do so.[16] The practice of the Patent Office in examination and opposition stages is not to refuse acceptance of an application unless it appears "practically certain" that the invention is not a patentable invention.[17] Appeals can be made to the Commonwealth Administrative Appeals Tribunal or the Federal Court (see further below).

Unlike many administrative actors, the Commissioner is obliged to give reasons. This generally involves a full assessment of the facts and the law. This is consistent with what J S Forbes[18] has noted is "one of the fundamentals of good administration"[19] and a valuable "intellectual discipline".[20] It is accepted in Australia that even if a patent is granted where doubts about its validity exist, the patent grant is still open to attack in proceedings for revocation.[21] Thus, in infringement actions, it is common for the defendant to counterclaim (frequently successfully) for the revocation of the plaintiff's patent. These actions take place in the courts. Commonly, proceed-

15 See *Mobay Corporation v Dow Chemical Co* (1992) 24 IPR 379 (Patent Office), Delegate Barker at 392.

16 In the case of an application for a standard patent, grant of a patent also follows acceptance (s 49(1)), but is subject to absence of opposition by a third party (ss 59, 61(1)(a)) or if there is opposition, a decision by the Commissioner or a court dealing with an appeal arising out of the opposition that a patent should be granted (s 61(1)(b)).

17 *Commissioner of Patents v Microcell Ltd* (1959) 102 CLR 232 at 245.

18 J S Forbes, *Disciplinary Tribunals* (2nd ed, 1996) at para 13.2.

19 *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 at 191 per Lord Denning MR; *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 668 per Gibbs CJ.

20 *Commonwealth v Pharmacy Guild of Australia* (1989) 91 ALR 65 at 88.

21 Proceedings for revocation of the patent can be based upon any of the grounds which would support rejection of the patent application at examination or opposition stage, and in addition, can be based upon s 18(1)(c) of the *Patents Act 1990* (Cth) for a lack of utility, s 18(1)(d) for secret use, s 138(3)(d) for fraud, false suggestion or misrepresentation in obtaining the patent, and s 138(3)(c) in respect of the patentee's contravention of a condition in the patent.

ings to set aside the judgments and orders of inferior courts on the ground that they have been procured by fraud have been by way of application for *certiorari* to quash the judgment or order of the inferior court. Nonetheless, there appears to be "surprising little judicial authority on the question of whether fraud or misrepresentation by a party invalidates an administrative decision in relation to that party".[22]

The *Patents Act 1990* (Cth) provides an explicit answer to this problem. It is a ground for revocation of a patent that the patent or an amendment of the patent request or the complete specification was obtained by fraud, false suggestion or misrepresentation.[23] Section 138(3)(e) of the Act provides:

> After hearing the application the Court may, by order, revoke the patent, either wholly or so far as it relates to a claim, on one or more of the following grounds, but on no other ground: ...
>
> (e) that an amendment of the patent request or the complete specification was made or obtained by fraud, false suggestion or misrepresentation ...

Objections to validity based on fraud, false suggestion or misrepresentation have developed from the common law writ of scire facias, which was "a writ directing the sheriff to notify a person to show cause why a judgment should not be enforced".[24] In *Prestige Group (Aust) Pty Ltd v Dart Industries Inc* Lockhart J observed that the words "false suggestion" or "misrepresentation" are of wide import, and are "based on equitable notions of good faith, fairness, conscionable conduct and honesty".[25] The Federal Court has stressed that false suggestion or misrepresentation is a developing concept that should not be narrowed or circumscribed by judicial decision.

All patent grants in Australia pass through the Patent Office, a number are opposed prior to grant, as are procedural decisions. Patents are examined, hearings are conducted, and decisions are given. Further, the subject matter is frequently in the international arena with proceedings running concurrently. The decisions made in Australia may have impact outside this country.

Administration of professions

The regulation of professions in Australia is largely conducted pursuant to State legislation. In New South Wales, examples include the *Medical Practice Act 1992* (NSW), the *Legal Profession Act 1987* (NSW) and the *Pharmacy Act 1964* (NSW). The key sections in the *Legal*

22 E Campbell, "Effect of Administrative Decisions Obtained by Fraud or Misrepresentation" (1998) 5 *Aust J Admin Law* 240 at 245 (considering the decision of the Full Court of the Federal Court in *Leung v Minister for Immigration and Multicultural Affairs*), quoting de Smith, *Judicial Review of Administrative Action* (1980) at 408–409, Sykes et al, *General Principles of Administrative Law* (1997) at 1306–1307.

23 M Gething, "Patents Obtained by Fraud, False Suggestion or Misrepresentation" (1994) 5 *Aust Int Prop J* 152.

24 *CCH Macquarie Dictionary of Law* (1996) at 156.

25 (1990) 26 FCR 197 at 198.

Profession Act (as amended) are in Part 10 ("Complaints and Discipline"), in the *Medical Act* in Division 1 of Part 4 ("Complaints etc about Medical Practitioners") and Division 4 of Part 4 ("Disciplinary Powers of Committees and Tribunals"). Section 4 (1) of the *Medical Practice Act* provides:

> The Tribunal may by order suspend a person from practising medicine for a specified period or direct that a person be deregistered if the Tribunal is satisfied (when it finds on a complaint about the person):
>
> (a) that the person is not competent to practice medicine; or
>
> (b) that the person is guilty of professional misconduct.

Section 37 provides:

> For the purposes of this Act, 'professional misconduct' of a registered medical practitioner means unsatisfactory professional conduct of a sufficiently serious nature to justify suspension of the practitioner from practising medicine or the removal of the practitioner's name from the Register.

Section 36 relevantly provides:

> For the purposes of this Act, unsatisfactory professional conduct of a registered medical practitioner includes each of the following:
>
> **Lack of skill etc**
> Any conduct that demonstrates a lack of adequate knowledge, skill, judgment or care, by the practitioner in the practice of medicine.
>
> **Other improper or unethical conduct**
> Any other improper or unethical conduct relating to the practice of medicine.

Section 127(1) of the *Legal Profession Act 1987* (NSW) provides that "professional misconduct" includes:

> (a) unsatisfactory professional conduct, where the conduct is such that it involves a substantial or consistent failure to reach reasonable standards of competence and diligence; or
>
> (b) conduct ... occurring otherwise than in connection with the practice of law which, if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit or proper person to remain on the roll of legal practitioners; or
>
> (c) conduct that is declared to be professional misconduct by any provision of the Act.

Section 127(2) defines "unsatisfactory professional conduct" to include—

> ... conduct ... occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.

Complaints of professional misconduct may be made within the meaning of s 19D(1)(c) of the *Pharmacy Act 1964* (NSW) against pharmacists registered in New South Wales. The Pharmacy Board may order that the name of the pharmacist be removed from the Register of Pharmacists for New South Wales (s 20(1)).

It is significant that the tribunal in professional disciplinary hearings is invested with scientific or technical expertise. For the purposes of conducting an inquiry into a complaint, the Pharmacy Board is to consist of three members of the Board (including a barrister or solicitor) appointed by the president.[26] In Medical Board matters, the President of the Board often sits with one of the members, and lay members are included to be representative of general community attitudes.[27] In *Kalil v Bray*[28] a finding of "misconduct in a professional respect" was made by a disciplinary tribunal constituted under the *Veterinary Surgeons Act 1923* (Cth). The tribunal comprised five veterinary surgeons and a District Court judge as Chairperson. The New South Wales Court of Appeal held that the tribunal presiding in a misconduct case was both by its constitution and its executive power an expert professional tribunal. The Court decided that such a tribunal was entitled to draw upon its own expert resources in reaching its conclusions. The tribunal formed its own view as to whether the respondent was guilty of wrong diagnosis and wrong treatment and as to whether the impugned conduct could be regarded as disgraceful, by other veterinarians of good repute and competency.[29]

The Pharmacy Board is required to give written statements of decisions.[30] The Board conducting the inquiry is to sit as in open court unless it determines otherwise[31] and the person against whom the complaint is made is afforded an opportunity of defence either in person or by a barrister or solicitor "or another adviser".[32]

REVIEW OF ADMINISTRATIVE TRIBUNALS

Judicial review

Unlike an appeal by way of re-hearing (see further below), judicial review should not involve a reconsideration of the merits. The essential question is whether there is a legally sustainable conclusion, not whether the court would evaluate the facts differently. A case for judicial review is made out by showing some relevant invalidity or impropriety in the decision-making process and not by merely attacking the correctness of the decision. The search, especially in the States, is for errors of law, including breaches of natural justice, which indicate a basic absence or loss of jurisdiction ("jurisdictional

26 *Pharmacy Act 1964* (NSW) s 19H.

27 Thus in *In the Matter of Dr Winifred Childs*; *Walton v Childs*, Medical Tribunal of New South Wales (9 April 1990, unrep), Judge Staunton, Chief Judge of the District Court, was chairperson of the Tribunal and was assisted by one lay member and two expert members.

28 [1977] 1 NSWLR 256 at 261.

29 As discussed by C J Whitelaw, "Proving Professional Misconduct in the Practice of Medicine or Law: Does the Common Law Test Still Apply" (1995) 13 *Aust Bar Rev* 65 at 84, fn 56.

30 *Pharmacy Act 1964* (NSW) s 21A.

31 *Ibid* s 19H(1)(a); cf the investigation stage (s 19G).

32 *Ibid* s 19H(1)(b).

error"), or for other errors of law ("non-jurisdictional error") appearing on the face of the record.[33]

In practice many cases concerning disciplinary tribunals do involve issues of jurisdictional error.[34] A writ of certiorari may lie to quash an unlawful administrative decision involving a denial of natural justice, absence of jurisdiction, excess of jurisdiction and other errors of law by an administrative tribunal. In *Craig v South Australia*[35] the High Court observed:

> Where available, certiorari is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and "error of law on the face of the record". Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for certiorari can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it. In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to the 'record' of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record. ...

In considering what constitutes 'jurisdictional error', it is necessary to distinguish between, on the one hand, the inferior courts which are amenable to certiorari and, on the other, those other tribunals exercising governmental powers which are also amenable to the writ. Putting to one side some anomalous exceptions, the inferior courts of this country are constituted by persons with either formal legal qualifications or practical legal training. They exercise jurisdiction as part of a hierarchical legal system entrusted with the administration of justice under the Commonwealth and State constitutions. In contrast, the tribunals other than courts which are amenable to certiorari are commonly constituted, wholly or partly, by persons without formal legal qualifications or legal training. While normally subject to administrative review procedures and prima facie bound to observe the requirements of procedural fairness, they are not part of the ordinary hierarchical judicial structure.

The Court restricted the well-known passage in Lord Reid's speech in *Anisminic Ltd v Foreign Compensation Commission*[36] as applicable only to administrative tribunals rather than to courts of law. In *Anisminic*, Lord Reid had said:

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33 *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338, unless the application is a proceeding under the *Administrative Decisions (Judicial Review) Act 1977* (Cth); s 5(1)(f) of the Act abolishes the rule that non-jurisdictional errors must be on the record.

34 J S Forbes, *Disciplinary Tribunals* (2nd ed, 1996) at para 2.8.

35 (1995) 184 CLR 163 at 175–176

36 [1969] 2 AC 147.

> [T]here are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.[37]

In that regard, the High Court in *Craig* emphasised that it is important to bear in mind a "critical distinction" that exists between administrative tribunals and courts of law:

> At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law. That point was made by Lord Diplock in *In re Racal Communications Ltd* [1981] 1 AC 374 at 383:
>
> > Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so.
>
> The position is, of course, a *fortiori* in this country where constitutional limitations arising from the doctrine of the separation of judicial and executive powers may preclude legislative competence to confer judicial power upon an administrative tribunal. If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.
>
> In contrast, the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the inferior court. Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was,

37 *Ibid* at 171.

> as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error.[38]

Illustration of judicial review of decisions of the Patent Office

There are six avenues of appeal from decisions of the Commissioner of Patents or the Registrar of Designs:

- the Federal Court under the *Patents Act* or *Designs Act*;[39]
- the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth);[40]
- the Federal Court for a writ of prohibition or mandamus or for an injunction under s 39B of the *Judiciary Act 1903* (Cth);
- the High Court for a writ of prohibition or mandamus or for an injunction under the High Court's s 75 (v) constitutional jurisdiction;[41]
- the Supreme Court of the Australian Capital Territory for a writ of prohibition or mandamus or for an injunction under the Australian Capital Territory *Supreme Court Act 1933* ss 34A, 34B.
- the Administrative Appeals Tribunal;[42]

In *Stack v Commissioner of Patents*,[43] an issue was whether the power to order costs was beyond the legislative power of the Commonwealth as an impermissible conferral of judicial power upon the Commissioner. Drummond J disagreed, the power to order

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38 *Craig v South Australia* (1995) 184 CLR 163 at 179.

39 *Patents Act 1990* (Cth) s 60(4); *Designs Act 1906* (Cth) s 22B. See also *Patents Act 1990* (Cth) s 160 (appeal is in the nature of a rehearing): *Kaiser Aluminium & Chemical Corporation v The Reynolds Metal Company* (1969) 120 CLR 136 at 142–143; *Acushnet Co v Spalding Australia Pty Ltd* (1989) 17 IPR 136, (1990) 18 IPR 364 (FC).

40 The availability of an AD(JR) Act proceeding in the Federal Court enables the possibility of achieving most of what would otherwise be achievable in the High Court through a prerogative writ or injunction.

41 As in *R v Ashton*; *Ex parte Farbenfabriken Bayer Aktiengesellschaft* (1965) 113 CLR 520. There, a hearing was held but no decision was issued until after a new *Trade Marks Act 1995* (Cth) came into force, when the Registrar purported to make a decision under the new Act. The full bench of the High Court found the appeal to be incompetent, but made absolute an order of prohibition to restrain the Assistant Registrar from proceeding with his decision: *APO Manual*, para 21.3.

42 *Patents Act 1990* (Cth) s 224, reg 22.26; *Designs Act 1901* (Cth) s 40K. A recent illustration of the limited scope of AAT review is the decision of *Re Croner Trading Pty Ltd and Commissioner of Patents* (1994) 37 ALD 235; 31 IPR 504 where the AAT held that a decision by a delegate of the Commissioner of Patents directing that particulars could not be relied on in an opposition to amendment of patent application was not reviewable by the AAT. Interestingly, in *Warrallo v Hales & Hales* (1992) AIPC 90–933 concerning an appeal against a decision to restore a patent, the parties underwent mediation following a direction pursuant to s 34A of the *Administrative Appeals Tribunal Act 1975* (Cth) for the purpose of negotiating a licence under the patent, as distinct from seeking a different decision on the restoration.

43 (1999) 161 ALR 531.

costs under s 210(d) being ancillary to the principal powers of the Commissioner which he can only exercise after hearing the persons who have opposing interests in the exercise of that power.[44] His Honour further observed:

> It is unnecessary, for present purposes, to determine whether each of the many decisional powers conferred on the Commissioner by the *Patents Act* and *Regulations* are, in truth, administrative in character. It is sufficient to identify some of these powers which are, in my opinion, plainly of that character. They include the powers of the Commissioner to determine oppositions to the grant of a standard patent (ss 59 and 60); opposed applications to amend patent applications (s 104) and opposed requests to amend entries in the Register (reg 10.7). All involve proceedings in respect of which the Commissioner has power to award costs under s 210(d).[45]

Drummond J also discussed the principles applicable to ADJR Act review of Patent Office decisions:

> ADJR review is concerned only with whether administrative action is within the limits of the power under which that action is taken and with whether proper processes of decision-making have been followed, not with whether the correct or best decision has been made. See *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35–36, cited in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272. I also regard the invitation to embark upon the two factual inquiries I have referred to in order to determine whether the delegate ignored relevant considerations in exercising the power of summary determination as infringing the prohibition against turning a review of the decision provided for by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) into a reconsideration of the merits of the decision: the assumption implicit in the applicants' contention that the Court should investigate these two matters is that if facts may exist which would require a different decision from that made, that is sufficient to obtain review by the Court of the decision.
>
> Moreover, it is well-established that s 16(1) the *ADJR Act* confers upon the Court a wide discretion whether or not to grant relief. This discretion extends not only to the form of relief where relief is appropriate but also to whether or not to grant relief, even where a basis for a relief is established: *Lamb v Moss* (1983) 76 FLR 296 at 312; *Seymour v Attorney-General* for the Commonwealth (1984) 4 FCR 498 and *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 338. Even if it were properly open to this Court to make the factual inquiries urged on it by the applicants, I would, in the exercise of this discretion, decline to do that here.
>
> What is sought to be reviewed is a decision refusing summary dismissal of an opposition. Such a decision, while no doubt a decision to which the ADJR Act applies, is not determinative of the rights of either of the parties to the proceeding before the delegate. Notwithstanding the dismissal, the applicant is free to pursue its claim for the extension of time sought in the final hearing provided for by reg 5.12. The applicants have full opportunity in the final hearing to which they are entitled to pursue all the arguments they wish to raise against the sustainability of the notice of opposition, including those they have raised for the first time in this Court. Even if the continuing pendency before the Commissioner of the applicants' claim for the extension of time does not enliven the special discretion conferred on the Court by s 10(2)(b) of the ADJR Act, I consider that the policy con-

44 *Cominos v Cominos* (1972) 127 CLR 588 at 591 and cf *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 10.

45 *Stack v Commissioner of Patents* (1999) 161 ALR at para 34.

> siderations underlying that provision and which were referred to in *Bragg v Secretary, Department of Employment, Education and Training* (1995) 59 FCR 31 at 34 are of relevance in the circumstances of this case to the exercise of the more general discretion conferred on this Court by s 16(1) the ADJR Act. There is no reviewable error in the decision made on the only issues on which the applicants relied to seek summary dismissal by the delegate. There should be no encouragement to an applicant for summary determination in proceedings of the kind provided for by reg 5.5 to treat it merely as a step that has to be taken, without any need for careful thought about the arguments that can be advanced, before presentation of that party's full case in an application to review the delegate's decision refusing summary relief. These considerations are sufficient to justify the exercise of the general discretion to refuse relief without there being an investigation by this Court of the new grounds of challenge to the delegate's decision which would involve factual inquiry and which were raised by the applicant for the first time in this Court.
>
> Different considerations might arise if the delegate could be shown to have made a decision infected with an error of law fundamental to the sustainability of the second respondent's opposition: that might well justify the grant of review under the *Patents Act 1990* even though the delegate had not been required to consider the point and even though the decision in question was only one refusing summary relief.[46]

APPEAL FROM DECISIONS OF ADMINISTRATIVE AUTHORITIES

Appeal by way of rehearing

A number of statutes explicitly provide for an appeal from a decision of an administrative authority by way of hearing *de novo*. In any event, where a statute provides for an appeal from an administrative authority to a court there is a strong presumption that the appeal authorises a fresh hearing by the court in the exercise of an original rather than an appellate jurisdiction.[47]

In *Builders Licensing Board v Sperway Constructions (Sydney) Pty Ltd*[48] Mason J said:

> Where a right of appeal is given to a court from a decision of an administrative authority, a provision that the appeal is to be by way of rehearing generally means that the court will undertake a hearing 'de novo' although there is no absolute rule to this effect.

His Honour went on to state the reasons for this and said:

> The nature of the proceeding before the administrative authority may be of such a character as to lead to the conclusion that it was not intended that the court was to be confined to the materials before the authority. There may be no provision for a hearing at first instance or for a record to be made of what takes place there. The authority may not be bound to apply

46 *Ibid* para 13–15.

47 *Ex Parte Australian Sporting Club Ltd; Re Dash* (1947) 47 SR (NSW) 283; *Builders Licensing Board v Sperway Constructions Pty Ltd* (1976) 135 CLR 616; and *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267 at 273–274.

48 (1976) 135 CLR 616 at 621.

> the rules of evidence or the issues which arise may be non-justiciable. Again, the authority may not be required to furnish reasons for its decision. In all these cases there may be ground for saying that an appeal calls for an exercise of an original jurisdiction or for a hearing *de novo*. ...
>
> But in the end the answer will depend on the examination of the legislative provisions rather than upon an endeavour to classify the administrative authority as one which is entrusted with an executive or quasi judicial function, classifications of which are too general to be of decisive assistance. Primarily it is a question of elucidating the legislative intent, a question which in the circumstances of this case is not greatly illuminated by the Delphic utterance that the appeal is by way of rehearing.[49]

Where an appeal is by way of rehearing, what the nature of such jurisdiction requires varies in accordance with the manner in which the proceedings are conducted by the parties, including the evidence which is placed before the relevant tribunal. It is helpful to categorise the types of appeals that may be undertaken where the statute provides for a *de novo* hearing:[50]

- A full reconsideration *de novo* in which the court must make its own determinations of fact and law. Where the appeal is from an expert or specialist decision-maker, due weight is to be given to the determination below.[51]
- Where evidence tendered by the parties in the appeal is limited to the evidence before the tribunal below, the court is normally required to defer to findings on credibility of the tribunal which saw and heard the relevant witnesses; the court is not to depart form the findings below except within the limits open to an appellate court.[52]
- Where the evidence and findings of the tribunal below are relied upon by the parties and, in addition, fresh evidence is also adduced, the appellate court is required to determine the weight to be attached to the findings of the tribunal below and where the appeal is from a specialist expert tribunal, great weight should normally be attached to its findings.[53]

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49 *Ibid* at 621–622.

50 Submissions of the claimant dated 14 April 1999 in *Health Care Complaints Commission v Beck & District Court of NSW* [1999] NSWCA 236.

51 *Workers Compensation (Dust Diseases) Board v Veksans* (1993) 32 NSWLR 221 at 240.

52 *Uranerz Aust Pty Ltd v Hale* (1980) 30 ALR 193; and *Barendse v Comptroller-General of Customs* (NSW CCA, 20 Dec 1996).

53 *Georgoussis v Medical Board of Victoria* (1957) VR 671; *Aavelaid v Dental Board of Victoria* [1999] VCS 54; *Council of the Law Society of NSW v Foreman* (1994) 34 NSWLR 408; and *Law Society of NSW v Bannister* (1993) 4 LPDR 24. Note that appeals from the Legal Services Tribunal to the NSW Court of Appeal are no longer by way of a new hearing (*Legal Profession Act 1987* (NSW) s 171F(f), repealed by the *Courts Legislation Further Amendment Act 1995* (NSW) with effect from 8 March 1996).

An appeal from a decision of the Commissioner of Patents to the Federal Court is "in reality and in law a proceeding in the original jurisdiction of the court, not a proceeding in its appellate jurisdiction".[54]

Interestingly, an appeal to the New South Wales Supreme Court against the exercise of the Medical Tribunal's disciplinary powers under Division 4 of Part 4 of the *Medical Practice Act 1992* (NSW) is not limited to questions of law and is a rehearing. The appeal court is not entitled to question the factual findings of the Tribunal in relation to the complaint or complaints.[55]

Illustration of appeal from Pharmacy Board of New South Wales

The nature of the appeal can be considered by taking, as an example, the New South Wales Pharmacy Board. The Pharmacy Board in dealing with complaints to it under the *Pharmacy Act 1964* (NSW) is an expert specialist tribunal exercising executive power analogous to the position of the Medical Tribunal[56] and the Veterinary Surgeons Tribunal.[57] The Board conducting the hearing (under s 19H of the Act) comprises two members of the profession and a lawyer. As was said by Street CJ in *Kalil v Bray*:

> The purpose of setting up the Tribunal, with its membership drawn from the ranks of veterinary surgeons, is to enable it do the very thing that either a Bench of Justices or a Jury may not do, that is to say, to draw upon its own expert resources to resolve such questions of expert science as might emerge from the objective or lay facts proved in evidence before it. In so doing it will, no doubt, give due weight to such expert evidence, if any, as may be placed before it. But the ultimate responsibility for forming an expert view upon which the disciplinary powers will be exercised or withheld is with the Tribunal itself. This is a responsibility to be discharged by drawing upon its own internal resources of knowledge of veterinary science.[58]

Section 22 of the *Pharmacy Act 1964* (NSW) provides for an appeal against orders made by the Pharmacy Board under s 20 of the Act.[59] Subsection 22(2) provides: "Any such appeal is to be made in accordance with rules of court and will be in the nature of a new hearing at which new evidence may be given". Subsection 22(3) provides: "The District Court may make such orders as it thinks fit, which is final and without appeal." The rehearing is conducted in

54 *Acushnet Co v Spalding Australia Pty Ltd* (1989) 17 IPR 136, (1990) 18 IPR 364 cited with approval in *Genetics v Johnson & Johnson* (1998) 39 IPR 125 at 130 (Northrop ACJ). See also *Kaiser Aluminium & Chemical Corp v Reynolds Metal Co* (1969) 120 CLR 136 at 142.

55 *Bannister v Walton* (1993) 30 NSWLR 699 at 734–735.

56 *Re Anderson and the Medical Practitioners Act 1938–1964* [1967] 2 NSWR 357 at 361, 365.

57 *Kalil v Bray* (1977) 1 NSWLR 256 at 261–262.

58 (1977) 1 NSWLR 256 at 262, quoted with approval in *Bowen-James v Delegate General of the Department of Health* (1992) 27 NSWLR 457 (NSWCA).

59 These provisions were recently considered by the NSW Court of Appeal in *Health Care Complaints Commission v Beck & District Court of NSW* [1999] NSWCA 236.

accordance with rules of court,[60] in contrast to the hearing before the Board where the rules of evidence do not apply.[61]

Sugerman JA in Re Anderson and the *Medical Practitioners Act 1938-1964*[62] emphasised that—

> ... it must be recognised that appeals of this present character are appeals from an expert tribunal composed of eminent members of the medical profession. Such a tribunal necessarily has an advantage over the Court, not merely in the assessment of expert evidence of medical opinion, but also as to the implications in a medical sense of ordinary factual evidence.

In *Johnson v Walton*,[63] the District Court of New South Wales considered s 20(3) of the *Pharmacy Act 1964* (NSW), which provides:

> The Board is not to suspend a person's registration or remove a person's name from the register for having committed an offence if, having regard to the nature of the offence or the circumstances under the which it was committed, the Board is of the opinion that it does not render the person unfit in the public interest to be registered as a pharmacist.

Blanch CJ formulated the question in that appeal as being whether the Court is of the opinion that the appellant is unfit in the public interest to be registered as a pharmacist at the time of the hearing by the Court. The question was not whether the Board was correct in its finding at the time it heard the matter or whether the pharmacist was unfit at the time the breaches occurred.

In *Filo v Pharmacy Board of New South Wales*[64] it was held that the Court was required to give great weight to the views of the Board as to whether conduct constituted "misconduct in a professional respect" and to its views as to the gravity of the misconduct. Thorley DCJ said relevantly:

> Clearly, the Board is comprised, apart from the legal representative, of persons who have an intimate knowledge of those considerations which would govern the standards to be observed in the practice of pharmacy and an understanding of the implications of any departures from those standards. In that background, it appears to me that the expressed view of the Board not only as to what is or is not a matter of 'misconduct in a professional respect' as that phrase appears in s 209(1)(b), but also its views as to the gravity of the breach, is to be given great weight. Since the nature of the appeal in front of this Court is a rehearing, the Court is not bound by the view of the Board.
>
> But a long list of cases has laid down that, in broad terms, the professional Board, to which is entrusted the responsibility of saying how the questioned conduct should be regarded, is better equipped to decide such a matter than a court which, in its turn, should be slow to disagree. *Bhattacharya v General Medical Council* [1967] 2 AC 259; *Mercer v Pharmacy Board of Victoria* [1968] VR 72; *Re Thom; Ex parte the Prothonotary* (1962) 80 WN (NSW) 968; Re Vernon; *Ex parte Law Society of New South Wales* (1966) 84 WN (Pt 1) (NSW) 136.

60 *Pharmacy Act 1964* (NSW) s 22(2).
61 *Ibid* s 19H(5) and Schedule 2, cl 1(1).
62 [1967] 2 NSWR 357 at 365.
63 District Court of New South Wales, Blanch CJ, 20 June 1996, unrep.
64 (1975) 3 NSWDCR 269.

> Thus for my part, I freely accept the views of the Board as I have quoted them above, not only as demonstrating that the conduct of the appellant is capable of being regarded by his professional brethren as misconduct in a professional respect, not only that I should equally so regard it, but also to indicate the Board's view that, in degree, it was grave misconduct. Likewise I adopt the Board's view that, in degree, it was grave misconduct. Likewise I adopt this view of the gravity of the conduct. Quite apart from the view of professional brethren, it is trite to say that in our present community unauthorised dealings with drugs of addiction are regarded by all with dismay.[65]

This reasoning perhaps goes further than most courts in a rehearing. However, it is apparent that, in technical matters that lie peculiarly within technical expertise, the decision of the Board may carry due weight.

The importance of the professional boards in dealing with professional misconduct is obvious. It is valuable that decisions are made by a body that includes professional peers. It is important that such oversight of professional activity be maintained. The real advantage is that the parties can be satisfied that their cases are determined by persons who have the expertise to understand what may often be complex technical issues. There is, of course, the availability of judicial review, but it is enlightening to note how few appeals take place from decisions, for example, by IP Australia in patent oppositions.

ADMINISTRATIVE JUSTICE AND GOVERNMENT AT THE FRINGE—CONCLUSION

It is not within the scope of this paper fully to canvass the structure or proceedings of administrative tribunals. It is apparent, however, that they operate within well-defined parameters that are adapted to the subject matter and, as such, can deliver informed appraisal of questions that arise. In practice, there is final disposition of many of the matters on which decisions are made, with substantial savings of time and expense. The commercial framework can provide both an incentive and a hindrance to the delivery of administrative justice. However, well formed administrative bodies and administrative justice can work in the private sector.

65 (1975) 3 NSWDCR 269 at 276–277.

Digital Television Regulation—Administrative Justice and the Public Interest

ANDREA MALONE*

In a recent newspaper article, Phillip Adams argued that in the process of shifting to a digitalised broadcasting environment in Australia, public interest issues were completely marginalised.[1] He compared Australia unfavourably to the United States in this regard, where, he says, there is an "advisory committee on public interest obligations for digital television broadcasters". In Australia, Adams bemoans, "nobody is raising the public interest issue".

Adams makes these points in the context of planning being undertaken to convert the broadcasting spectrum from analog transmission to digital transmission for television broadcasting in Australia. He argues that the decision by the Australian Government to grant the existing free-to-air television broadcasters access to digital spectrum at no cost is to maintain a "decidedly unlevel playing field" which will ensure that new players are frozen out of the new digitised broadcasting world. This maintenance of the existing "oligopoly", Adams argues, is contrary to the public interest.

In my view, this is an oversimplification of what is presently occurring in the regulation of digital television conversion. While it is true that the free-to-air broadcasters, including the two national broadcasters, will have access to the digital spectrum for free, Adams's argument overlooks the public interest in ensuring that the current free-to-air broadcasting industry can continue to provide a high level of service in the new digital world. In reality, the main game for both the industry interests and the public interest is in how

* Legal Section, Australian Broadcasting Authority.

1 P Adams, "Our Narrower Spectrum", *The Weekend Australian*, 17–18 April 1999, at 31.

the new digital spectrum is to be planned and allocated in the longer term.

The Australian Broadcasting Authority (ABA) has a wide-ranging regulatory role and a substantial element of that role concerns its planning powers. The ABA is responsible for planning and licensing that part of the radiofrequency spectrum set aside for the purposes of broadcasting.[2] It has recently been given the task of planning for the conversion of analog television broadcasting to digital television broadcasting.[3] The legislation governing the change, the *Television Broadcasting Services (Digital Conversion) Act 1998* (Cth), commenced on 27 July 1998 and essentially adds a new Schedule 4 to the *Broadcasting Services Act 1992* (Cth) (the Act). Among other things, the ABA is required to develop two schemes for digital television conversion: the first for the commercial television broadcasters and the second for the national services. These schemes are disallowable instruments.

ADMINISTRATIVE JUSTICE AND THE PUBLIC INTEREST

In terms of the theme of this conference, "Administrative justice—the core and the fringe", the regulation of television broadcasting conversion from analog to digital transmission is clearly at the fringe. The regulatory obligations placed on the ABA mean that "administrative justice" must be provided for the broadcasting industry interests through the conversion schemes and the whole focus of the regulatory regime is on the existing broadcasters. "Administrative justice", in this context, is therefore focused on the major industry players, as opposed to the individual.

However, administrative justice must not be achieved at the expense of the public interest. The ABA has a statutorily defined regulatory policy goal that requires it to address public interest considerations in a way that avoids the imposition of "unnecessary financial and administrative burdens" on television broadcasters.[4]

In this paper, I argue that in the process of making the delegated legislation which governs the spectrum planning and digital conversion procedures, the ABA is looking beyond the immediate interests of the broadcasting industry to the public interest issues. It is probably largely true to say, as Adams suggests, that the policy debates in relation to digital planning for television have not yet excited the public imagination to an extent where there is any real

2 The terms "digital spectrum" and "analog spectrum" are often used. However, it should be noted that in the broadcasting context, this is a reference to the broadcasting services bands spectrum designated primarily for broadcasting and referred under s 31 of the *Radiocommunications Act 1992* (Cth) to the ABA for planning.

3 *Television Broadcasting Services (Digital Conversion) Act 1998* (Cth). The ABA also has responsibility for the planning of digital radio broadcasting services, but there is no legislation specifically covering this process.

4 *Broadcasting Services Act 1992* (Cth) s 4.

discussion outside the broadcasting industry itself. This places a heavy burden on the ABA in terms of its obligation to regulate in a way that "enables public interest considerations to be addressed".[5]

I propose to consider, in this context, how the rules for conversion have been developed and applied through the process of making the delegated legislation.[6] I argue that, despite the apparent resistance of some Commonwealth agencies to the requirement to undertake extensive public consultation procedures, public consultation is the key to good legislative and administrative decision-making and one of the few means of gauging where the particular, and the public, interests lie.[7]

ADMINISTRATIVE JUSTICE THROUGH GOOD RULE MAKING

The ARC report on "rule making" provides a comprehensive assessment of the state of rule making as it existed in Commonwealth agencies in 1990 and makes a series of recommendations with a view to improving the quality of delegated legislation. One of its key recommendations was for new Commonwealth legislation to bring some consistency into rule making. The Legislative Instruments Bill was subsequently conceived in 1996, but has languished in the Parliament ever since. This Bill goes some way towards implementing the recommendations of the ARC's report, but falls short in significant ways, particularly with regard to the consultation requirements.[8]

One important difference between the ARC report's recommendations and the Bill is in the approach to consultation. The ARC adopted a broad interpretation of consultation. Despite submissions from agencies arguing against a legislative consultation regime, the ARC took the view that there should be "mandatory public consultation before any delegated legislative instrument is made".[9] The Legislative Instruments Bill, on the other hand, confines the consultation obligation on Commonwealth agencies to legislative instruments "likely to have a direct, or a substantial indirect, effect on business".[10]

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5 *Broadcasting Services Act 1992* (Cth) s 4.

6 Administrative Review Council, *Rule Making By Commonwealth Agencies*, Report No 35 (1992).

7 *Ibid* at para 5.27.

8 The ARC recommended mandatory public consultation, but widespread opposition from agencies saw this watered down to a requirement to consult only for those legislative instruments which directly affect business. See Attorney-General's Department, "Policy Perspective of the Legislative Instruments Bill 1996", *Legal Practice Note*, No 12, 31 Oct 1996. Also, Legislative Instruments Bill 1996 subpara 17(1)(b)(i).

9 *Rule Making* report, above n 6 at 38, Recommendation 9. The report also enumerated a series of exceptions to this rule, including, among others, an exception where the empowering statute already provided for comparable consultation requirements.

10 Legislative Instruments Bill (1996) subpara 17(1)(b)(i).

The *Broadcasting Services Act 1992* (Cth), either by accident or design, contains a number of the key elements of the ARC's recommendations, including the requirement for mandatory public consultation for most of the delegated legislation the ABA makes.[11] The ABA is therefore very accustomed to undertaking wide public consultation when making legislative instruments during the planning process.

Elements of good rule making

The ARC report identifies a number of broad elements that encourage or support good rule making. These include: (i) quality drafting done under the auspices of the Office of Legislative Drafting; (ii) mandatory public consultation; (iii) parliamentary scrutiny of the delegated legislation; (iv) sunsetting of delegated legislation; and (v) access to the delegated legislation through notification and publication. In one form or another, all these elements have been included in making the digital conversion schemes.[12]

However, it is the consultation processes that arguably have the most significant effect on openness, transparency and good decision-making in the development of the subordinate legislation and the administrative processes which flow from it. This is critical, in my view, to the ABA's obligation to protect the public interest.

WHAT IS THE PUBLIC INTEREST?

In the context of digital conversion, the public interest lies in ensuring, as far as possible, that neither the policy nor the legal decisions have the effect of derogating viewers' current access to television services. It also lies in ensuring that the benefits of the new technology are passed on to the viewers. This latter aspect is complicated by the fact that there are many policy choices to be made about how those technological benefits might manifest themselves. The public interest is therefore not always immediately apparent. Indeed, as Aronson and Dyer point out, doubt surrounds the very notion of *the* public interest,[13] and in this case competing commercial interests all claim that a public interest aspect is relevant in arguing to support their proposals for access to the spectrum. For example, the incumbent free-to-air broadcasters claim a public interest in maintaining a continuing high quality service for existing viewers. The aspirant datacasters, on the other hand, claim a public interest in providing new services that will be made available through the new technology.

The ABA has a statutory obligation under the new Schedule 4 of the Act to plan the spectrum efficiently. The issue for the ABA, when it comes to protecting the public interest, arises predominant-

11 The shift towards a requirement for greater public consultation is acknowledged in D Pearce & S Argument, *Delegated Legislation in Australia* (2nd Edition, 1999).

12 The Commercial Television Conversion Scheme 1999, together with an Explanatory Paper, is available on the ABA's website.

13 M Aronson & B Dyer, *Judicial Review of Administrative Action* (1996) at 666.

ly from the need to implement the policy objectives contained in the primary legislation and to do so in such a way that the transition for the public is as simple and inexpensive as is practicable, while ensuring that the opportunities to benefit from the innovations that the new technology can offer are maximised. There are a number of critical points during the planning process where the different elements of the public interest begin to align themselves with the competing industry interests.

Industry interests and the public interest

One of the central points of conflict arises from the scarcity of the radio-frequency spectrum and the fact that the free-to-air commercial broadcasters have received the spectrum free. This has led to intensive lobbying by the other participants or aspirant participants in the broadcasting industry.[14] The planning focus is on the way in which digital channels will be allotted and assigned to broadcasters for the transition from analog to digital over the mandatory eight year period, to begin on 1 January 2001 in the metropolitan areas of mainland Australia.[15] Aspirant broadcasters or datacasters fear that the existing commercial broadcasters will try to absorb as much of the scarce spectrum as possible by arguing that they need more channels for the conversion process than is strictly necessary. The incumbent broadcasters, on the other hand, fear that, in the absence of any reliable data on how digital signals will operate in practice, they will be left with insufficient channel capacity to fulfil the legislative requirement to achieve the same level of coverage in digital as they have in analog. Each side can legitimately point to the ways in which their needs coincide with the needs and interests of the public they serve, or wish to serve.

Policy issues and competing public interests

As almost every Australian household has at least one television set, the shift from analog transmission to digital transmission for television will have a greater impact on the community as a whole, than did the similar shift involving mobile telephones. The essential benefit of digital transmission is that it can carry dramatically greater amounts of data in a more compressed form. Further, the digital signal is a better quality signal than the analog. For the viewers, as Malcolm Long recently predicted, television has the potential to be transformed into a multimedia terminal, providing high quality pictures and interactivity in the style of the internet.[16] Within these broad parameters there are a number of policy options, each with potential benefits. In these early stages, it is very difficult to predict what options the public will ultimately prefer.

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14 A new lobby group, known as Digital Convergence Australia, includes Cable and Wireless Optus, News Corporation, OzEmail and Telstra, among others. John Fairfax Holdings has also entered the debate: see "Digital TV lobbying heats up", *The Australian Financial Review*, 9 April 1999 at 7.

15 *Broadcasting Services Act 1992* (Cth) Schedule 4, cl 6(3)(a).

16 M Long, "Datacasting TV's new dawn", *The Australian*, 13 April 1999 at 53.

The United Kingdom and other parts of Europe, the United States, Japan and parts of Asia are in the process of shifting to digital transmission. For once, Australia has not waited twenty-odd years to catch up with the global trend. The benefits to industry in the global economy are apparent. The incumbent broadcasters have argued, successfully, that the enormous costs of converting from analog to digital transmission require that they should be afforded certain protections to ensure that their investment in new equipment and public education is safeguarded during the transition period. The incumbent broadcasters have been granted spectrum for conversion at no cost and the ABA is prevented by law from allocating any new commercial television licences before 31 December 2006.[17]

The spoils of the newly digitised world, Long argues, will go to those industry players able to think about television in bold new ways. However, as he also acknowledges, this will have to be done within the context of significant regulation. In Long's view, as a result of lobbying by every sector of the media and communications industry, Australia will have the most regulated digital television in the world. The regulation is designed to balance the need to protect the existing strengths of the television commercial broadcasting industry, while at the same time protecting also the fledgling pay TV industry and making room for new players, such as aspirant datacasters and ultimately a fourth commercial service.[18] There is a public interest in all of these goals, and it is the ABA's role to ensure that the public interest outcomes are the best possible.

There are two major policy developments which embody these public interest outcomes: the question of High Definition TV (HDTV) versus the potential for multi-channels; and the potential for new datacasting services to be introduced through the medium of television.

HDTV versus multi-channelling

In Australia, each television channel is a 7MHz bandwidth. One single television channel in the existing analog mode is equivalent to about five separate channels in digital mode, when broadcasting in the standard picture quality (standard definition). Alternatively, by using the full 7MHz bandwidth to broadcast just one digital service, broadcasters will be able to transmit the programs in high definition format (HDTV). HDTV provides a picture of cinema quality. In Australia, the government has mandated HDTV for commercial broadcasters, although the question of how much of the programming must be transmitted in HDTV is still under review and will be determined by regulation.[19]

Aspirant broadcasters and the existing pay TV operators, are concerned that if the incumbent free-to-air broadcasters are permitted to use their additional spectrum to provide multi-channels,

17 *Broadcasting Services Act 1992* (Cth) s 28.
18 Long, above n 16.
19 *Broadcasting Services Act 1992* (Cth) Schedule 4, cl 37.

they will be able to use some of those channels to provide services that pay TV supplies, thus opening up significant competition to the pay TV industry when it is still struggling to establish itself. The aspirants for a fourth commercial television service fear that the incumbents will gain a monopoly on the remaining spectrum and there will therefore be no spectrum available in the major markets for a fourth commercial service for many years to come. Thus, partly as a trade-off for receiving the spectrum for free, the legislation mandates that the regulations must determine format standards that require incumbent broadcasters to meet specified goals for digital transmission of programs in HDTV format.[20] This means that for at least some of the time, incumbent broadcasters will have to use the whole 7MHz channel for transmission of programs and will not have spare channel capacity at those times.

Datacasting

Datacasting is to be permitted under the new amendments to the *Broadcasting Services Act 1992* (Cth),[21] and while the definition of "datacasting" and timing of its introduction are still under review,[22] aspiring datacasters are looking for any spare 7MHz channels in the spectrum to establish a new, accessible service through the mass medium of the television. Datacasting services can be anything from text and graphics through to full-motion video and audio. That is, datacasting has the potential to look like broadcasting, while also being fully interactive. It is this latter potential which incumbent broadcasters fear will provide unfair competition.

The question of how datacasting is to be legally defined is currently under review by the Minister for Communications, Information Technology and the Arts. While a definition of a "datacasting service" has been included in Schedule 4 of the Act, there has been widespread criticism in the industry that it is too broad and therefore will allow datacasting services to be broadcast that are largely indistinguishable from a broadcasting service.[23]

The aspirant datacasters form a new interest group which has emerged largely through the activities of the internet. They, too, have fears that all available spectrum will be completely used up by the incumbent broadcasters. According to Malcolm Long, three things will spur the growth of datacasting: access to spectrum, the lack of a mature cable television market; and the existence of a number of sophisticated new industry players.[24]

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20 Explanatory Memorandum to the Broadcasting Services (Digital Conversion) Bill 1998, cl 37.

21 *Broadcasting Services Act 1992* (Cth) s 34(3), as amended.

22 *Ibid* Schedule 4, para 59(1)(dd).

23 *Ibid* Schedule 4, cl 2: "**datacasting service** means a service (other than a broadcasting service) that delivers information (whether in the form of data, text, speech, images or in any other form) to persons having the equipment appropriate for receiving that information, where the delivery of the service uses the broadcasting services bands".

24 Long, above n 16.

The three issues he identifies are fundamental to how the new digital spectrum is planned and therefore to precisely who will have access to this limited and sought-after resource. As noted earlier, the ABA needs to take into account public interest issues when formulating the delegated legislation which will regulate the future shape of the digital broadcasting and datacasting industry. These processes are now underway and the detail of how the radiofrequency spectrum should be planned and allocated for digital conversion is currently being determined under powers conferred on the ABA by the digital conversion schemes.

THE DIGITAL CONVERSION SCHEMES

As indicated above, the enabling legislation requires the ABA to formulate two conversion schemes: one for conversion for commercial television and one for the national services. The Commercial Television Conversion Scheme 1999 was determined on 22 March 1999 and gazetted shortly thereafter. The National Television Conversion Scheme is almost finalised. These schemes will govern the detailed processes the broadcasters must follow to achieve conversion from analog mode to digital mode in line with timetable and policy objectives set out in the enabling legislation.

Essentially, the conversion schemes provide for the ABA to make a digital channel plan for allotting channels for conversion; requirements for broadcasters to prepare and submit implementation plans for the ABA's approval; provisions for varying implementation plans; provisions for issuing transmitter licences; provisions for determining simulcast periods for regional broadcasters; and some enforcement provisions. In addition, there are provisions governing testing and early commencement of digital transmissions in regional areas.

Key provisions of the enabling legislation

The primary legislation authorising the making of the conversion scheme was drafted in eighteen days.[25] Perhaps as a consequence, the enabling legislation is rather unusual in that, although it prescribes twelve policy objectives,[26] it essentially leaves the ABA to determine the conversion procedures and to include in the schemes the legislative and administrative powers which it believes it will need to regulate conversion.

An important point to note is that the objectives provide that a broadcaster must, as soon as is practicable after the start of the simulcast period and throughout the remainder of that period, achieve the same level of coverage and potential reception quality in digital mode as is achieved by the transmission of the service in analog

25 Many of the powers conferred on the ABA by the commercial scheme will also be common to the national scheme when it is finalised. For the purposes of this paper, however, I will only deal with the commercial conversion scheme.

26 *Broadcasting Services Act 1992* (Cth) Schedule 4, cl 6.

mode.[27] In other words, the policy objective is aimed at ensuring that viewers who presently receive the analog commercial television broadcasting service will also be able to receive the digitally transmitted service before the analog service is finally switched off. This is an important public interest issue and Australia is so far the only country in the world to mandate this objective. Paradoxically, however, this objective may also be the means by which other public interest aspects, such as ensuring sufficient spectrum for new services, could be defeated. I discuss this further later in the paper.

A second key feature of the legislation is that the empowering provision to make the subordinate legislation is widely expressed. It provides that the ABA must, in writing, formulate a scheme for the conversion, over time, of the transmission of commercial television broadcasting services from analog mode to digital mode. The legislation expressly provides that the conversion scheme may confer on the ABA the power to make decisions of an administrative character[28] and expressly states that the conversion scheme may contain "such ancillary and incidental provisions as the ABA considers appropriate".[29] For delegated legislation that is primarily regulatory in nature, the scope of the empowering legislation is broad.[30]

The legislation also requires the ABA to consult with the following interest groups:[31] the public; holders of commercial television broadcasting licences; national broadcasters; the Australian Communication Authority (ACA); and the owners and operators of broadcasting transmission towers. The "public" specifically includes potential datacasters, and the consultation period must provide an adequate opportunity for comment.[32] In this context, the intention to include "datacasters" as part of the public suggests that the Parliament acknowledges some public interest element to the potential for datacasting services to be provided as part of the conversion process.

As a small agency, the ABA has relied heavily on these public consultation requirements to ensure that it received as much information as possible from as many relevant interest groups as possible in order to make the most informed planning decisions. The industry interest groups referred to in the legislation have the resources and the knowledge base to contribute effectively and expeditiously to the process. However, "the public" tends to be less well informed about the issues and less well resourced. This means that the ABA's obligation to uphold the public interest is a heavy one. In formulating the conversion schemes, only one submission was received

27 *Broadcasting Services Act 1992* (Cth) Schedule 4, para 6(3)(f).
28 *Ibid* Schedule 4, cl 7.
29 *Ibid* Schedule 4, cl 12.
30 For a discussion of empowering provisions see Pearce & Argument, above n 11, especially chapters 14 & 15.
31 *Broadcasting Services Act 1992* (Cth), Schedule 4, cl 18.
32 Explanatory Memorandum to the Broadcasting Services (Digital Conversion) Bill 1998, clause 18.

from an individual member of the public,[33] and none from organised lobby groups representing the public interest in media and communications.[34] Lack of resources and, in some cases, lack of detailed knowledge, makes it very difficult for public interest groups to contribute effectively.

Administrative justice under the conversion scheme

In formulating the conversion scheme, the ABA has built in a large number of discretions for its administrative decision-making. During the statutorily required consultation process, these discretions came under considerable scrutiny by the broadcasting industry, which was keen to have more certainty in the scheme. The ABA responded to industry concerns by requiring itself to undergo a wide consultation process before making a number of decisions affecting broadcasters, either individually or as a group. In addition, there are now a significant number of discretionary decisions in which, through the scheme, the ABA has subjected itself to the jurisdiction of the Commonwealth Administrative Appeals Tribunal. However, in terms of analysing the administrative justice aspects of the scheme in relation to the public interest protections, I propose to focus on the ABA's powers under the conversion schemes to make digital channel plans. The digital channel plan is the point at which competing interests of industry and the public are most apparent.

The Digital Channel Plan

A digital channel plan (DCP) must allot the channels that are to be used for conversion to digital transmissions, assign individual channels to broadcasters, explain any technical limitations on the use of a channel and whether the use of the channel is in any way contingent. Subsections 9(2)-(8) of the scheme set out the matters to which the ABA must have regard when making the digital channel plan.

Since the DCP will determine who gets access to the spectrum, the nature of that access and how the limited spectrum may be used for years to come, the DCP is the site at which the competing interests of the various sectors of the broadcasting industry are focused. The DCP is also, therefore, the decision which will help shape the outcome of the competing public interests.

Although the legal status of the DCP has been questioned,[36] in my view the cases do not support the view that a court would find the plan to be of a legislative, rather than an administrative, character. However, to ensure that the process encouraged rigorous decision-making, the ABA imposed a further round of consultation on itself

33 P L Twomey, submission, 23 November 1998.

34 Twelve submissions were received altogether on the commercial conversion scheme and are publicly available.

35 This is in addition to the provision for AAT review of certain decisions as set out in the enabling legislation (cl 62).

36 H Raiche, "The Digital Channel Plan: Administrative Action or Law?" (1999) 18 *Communications Law Bulletin* 5.

before making the instrument. Nevertheless, to avoid all doubt, the Parliament recently passed legislation which provides an express power, in the primary legislation, for the making of DCPs.These provisions commence on 3 February 2001, unless proclaimed earlier.[39]

The conversion scheme empowers the ABA to make a digital channel plan, but only after it has put out a draft DCP for consultation. The ABA must have regard to any comments it receives.[40] In practice, the ABA is working very closely with all sections of the industry to develop the digital channel plan. The ABA chairs an industry advisory group which provides advice on channel allotment options. This peak advisory body has a number of subcommittees comprised of industry engineers, including ABA engineers, who have worked co-operatively to try and find the most effective solutions to some intractable problems in planning new channels in areas of crowded spectrum. However, the newness of the digital technology is such that not even the engineers are sure just how robust digital transmissions will be, how subject to interference they will be and how far they will travel before dropping out completely, leaving the viewer with a blank screen. Many of the arguments over spectrum planning are therefore taking place in a theoretical context rather than a real one. Backing the competing arguments with hard evidence is virtually impossible at this early stage and the ABA must thus adjudicate, through its decision-making processes, as best it can.

The ABA has a legal obligation to structure the spectrum efficiently. When planning the spectrum, it must also have regard to its power to allocate spectrum for datacasting services. This means that the ABA, in formulating the spectrum planning phase of the scheme, can provide mechanisms to identify spectrum which would be suitable for allocation for datacasting.[41] Consequently, the ABA stated that, wherever possible, it would try to plan for eight channels in each market. This would provide one channel for each of the five existing broadcasters (including the two national services); and three channels for other uses, including datacasting. In submissions, the incumbent broadcasters argued that the primary goal of the digital conversion legislation is to achieve conversion of the existing broadcasting services. Therefore, they submitted, in markets where spectrum is difficult to find, the ABA should focus on finding the minimum five channels for conversion purposes, since this is the fundamental legal requirement. Further, they submitted that any additional capacity that is found may also be required for the con-

37 Eg, *Austral Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 37 FCR 463; *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615; and *Commonwealth v Grunseit* (1943) 67 CLR 58.

38 The legislation also retrospectively validates all DCPs made to date: *Broadcasting Services Amendment (Digital Television and Datacasting) Act 2000* (Cth), Item 95 (new cl 7A), Schedule 1, Item 144 (transitional provisions).

39 Commercial Television Conversion Scheme 1999, s 12.

40 Explanatory Memorandum to the Broadcasting Services (Digital Conversion) Bill 1998, cl 13.

41 Federation of Australian Commercial Television Stations, Submission, 7 December 1998.

version process, so the ABA should not be allocating channels for any other use at this time.[42]

These arguments have recourse to the public interest in the sense that broadcasters are legally obliged to achieve the same level of coverage in their licence areas with their digital transmissions as they currently achieve with their analog transmissions. The public interest issue underlying the objective lies in trying to ensure that those viewers who presently receive a television service will also be able to receive the service when it is transmitted in digital mode. The incumbent broadcasters argue that they may need all the available spectrum to meet that obligation, since, on the one hand, they may have to operate at reduced power during the simulcast period to avoid interfering with their own or others' analog services, and on the other hand, still transmit some programs in HDTV format which is spectrum-demanding.

These are the arguments that have led the lobby groups for datacasters and other aspirant interests to suggest that the incumbent broadcasters are trying to absorb all the spectrum in order to lock out any new entrants. The aspirant groups submit that there are numerous efficiencies to be gained from careful planning of the spectrum and that there will be capacity for new entrants if the ABA takes advantage of the technology to plan effectively. Datacasters argue that the new technology allows channels to be re-used, unlike the analog technology, and therefore the ABA should be taking advantage of this potential in its planning.[43] The public interest underlying this argument is that the public would have the opportunity to gain access to the new digital services that datacasting can offer.

CONCLUSION

The ABA has recently released the first draft digital channel plans for full public consultation. It has already consulted widely and worked closely with representatives of all the industry groups, including the national broadcasters, the metropolitan commercial broadcasters, the regional commercial broadcasters, the Federation of Australian Commercial Television Stations, the Australian Subscription Television and Radio Association, aspirant datacasters and the aspirants for a new commercial television licence. The digital channel plans are trying to address the competing claims that arise between industry lobby groups and the public interest claims to which the ABA must have regard.

First, the ABA has to make a series of decisions in which it must provide administrative justice to the incumbent broadcasters by ensuring it facilitates digital conversion and is directed towards achieving the policy objectives of the enabling legislation. It must do so in a way that avoids imposing unnecessary financial and administrative burdens on the providers of broadcasting services.

42 This is a reference to the use of "single frequency networks", an engineering concept that has yet to be proven for widespread use in Australia.

This means, among other things, that the ABA must ensure that sufficient spectrum is made available to the broadcasters to enable them to achieve the same level of coverage in digital mode as they achieve in analog, as soon as practicable after the start of the simulcast period. It must also take account of potential costs for broadcasters and ensure that its administrative decision-making is properly reasoned and substantiated with evidence.

Secondly, the ABA is required to plan the spectrum efficiently and have regard to its power to allocate spectrum for the purposes of datacasting and other potential uses (including community television). This means that the ABA will try to plan to maximise the number of channels available in each area.

Thirdly, the ABA is required to address the public interest. This includes meeting both the above objectives, in addition to ensuring that costs and disruption are minimised; that current analog channels are not moved if this would result in direct costs to viewers; and that no major changes are made to existing services without consultation with the viewers who would be affected.

The level of consultation the ABA is committed to undertaking is considerable. The cost to the agency, in terms of time and resources, is significant. However, the making of delegated legislation and the decision-making which is vested in the ABA under that legislation is of major importance and will have profound effects on the way broadcasting services operate in Australia for years to come.

The consultation undertaken by the ABA goes further than that which may ultimately be required if the Legislative Instruments Bill ever passes through Parliament. This consultation process is, in my view, critically important to ensuring that the procedures for supporting "administrative justice" in decision-making are included in the legal instruments. It is also a key measure for ensuring that all the information needed to make informed decisions is available to the ABA. In these ways, the obligation to consider the public interest is made both more transparent and more accessible to the public whose interests are are stake.

Other Conference Papers

Judicial Responses to a Streamlined Inquiry—A Medicare Case Study

MATTHEW SMITH*

Solzhenitsyn describes how many people were sent to the Gulags by an OSO, special boards within the Soviet Ministry of Internal Affairs which applied simple criteria, such as "counter-revolutionary activity," in speedy proceedings and without the need to confront an accused person face to face. He tells us that "it turned out to be the most convenient kind of hamburger machine—easy to operate, undemanding, and requiring no legal lubrication. ... The OSO did not claim to be handing down a *sentence*. It did not sentence a person but, instead, *imposed an administrative penalty*. And that was the whole thing in a nutshell."[1]

The Commonwealth does not have a Ministry of Internal Affairs, but it is not immune from the attraction of streamlined procedures for imposing administrative penalties. The present case study shows how one such attempt came to grief in the Federal Court, not by running foul of the separation of powers doctrine (which operates erratically in this area), but by miscalculating the concern of Australian courts for fairness to the individual.

THE PROFESSIONAL SERVICES REVIEW SCHEME

Amendments to the *Health Insurance Act 1973* (Cth) made by the *Health Legislation (Professional Services Review) Amendment Act 1994* (Cth) were enacted to "give effect to the undertaking given in the budget to introduce new measures to combat overservicing in the

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1 Alexander Solzhenitsyn, *The Gulag Archipelago* (Collins/Fontana, 1994) Vol 1 at 283–285 (his italics).

Medicare program".[2] A medical practitioner is liable to sanction if he or she offends against a simple criterion: to have "engaged in inappropriate practice in connection with "rendering or initiating services for which Medicare benefit was payable to a patient".[3] "Inappropriate practice" is defined without specificity as "conduct [that] would be unacceptable to the general body" of practitioners in the relevant type of practice.[4] One Health Insurance Commission adviser described the concept simply: "inappropriate practice basically means not doing what one's colleagues are doing".

Practitioners suspected of this conduct, typically when the Medicare computer discovers that their billings depart from the pattern of the statistically "normal" practitioner, may find themselves the subject of a reference by the Health Insurance Commission to a Director of Professional Services Review. The Director can appoint a Professional Services Review Committee to conduct a hearing.[5] The committee's function is to report on "whether the person under review engaged in inappropriate practice in connection with the referred services", but not to address what should be the consequences of an adverse finding.[6] Instead, the penalties are imposed by officials of the Health Department called determining officers, who do not hold a hearing and are empowered to direct a reprimand, counselling, repayment of Medicare benefits, or disqualification for up to three years from providing services for which Medicare benefits will be paid.[7]

The procedure leading to a determination would seem easily to be characterised as "disciplinary", since its foundation is a finding of professional fault and its potential consequence is a liability to pay hundreds of thousands of dollars and the ruin of a practitioner's livelihood. However, in the first case which reached the Federal Court the determining officer strenuously but unavailingly opposed this label.[8] The denial reflected the failure of the Medicare regulators to anticipate that the Court (or a majority of its judges) would seek to apply the same standards of relevance of inquiry, particularity of charge, probative evidence, and reasoned decision-making as are appropriate to the disciplining of a member of an honourable profession.

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2 Second Reading Speech, House of Representatives, *Parliamentary Debates*, 30 September 1993 at 1555.

3 *Health Insurance Act 1973* (Cth) (the Act) s 82.

4 *Ibid* s 82.

5 *Ibid* ss 86, 89, 93.

6 *Ibid* s 106L.

7 *Ibid* s 106U; as to disqualification see ss 19 and 19D.

8 *Yung v Adams* (1997) 80 FCR 455 per Davies J at 455E, 459G, 460C, 467B (hereafter referred to as *Yung*); approved on appeal by Burchett and Hill JJ, Beaumont J dissenting, in *Adams v Yung* (1998) 51 ALD 584 at 626 (hereafter referred to as *Adams*). The Court had taken a similar view of the previous scheme when pointing to the need to find personal fault: *Tiong v Minister for Community Services and Health* (1990) 93 ALR 308, and *Minister for Health v Peverill* (1991) 29 FCR 262; cf *Butler v Fourth Medical Review Tribunal* (1998) 82 FCR 304 at 307.

That said, the opinion that a more cursory approach is permitted has superficial support in the legislation. It imposes inflexible short periods for a practitioner to present his or her case: 14 days to respond after notice of referral, 14 days notice of a hearing before a committee, and 14 days to make written submissions to a determining officer on penalty.[9] Those periods are expected to be fitted into statutory "deadlines" which allow the Director 28 days to decide whether to set up a committee, the committee 120 days to report, and the determining officer 35 days to make a final determination.[10] The Act also curtails other rights. A practitioner may be compulsorily examined by a committee and, although he or she is permitted to be accompanied by a lawyer or "another adviser", the committee can refuse to allow an adviser to ask questions or make submissions and is bound to refuse this assistance if the advisor is a lawyer.[11]

Although the amendments maintained a right of merits review by a Professional Services Review Tribunal, that right is hedged with restrictions. The Tribunal is limited to considering the material collected by the committee, and cannot receive fresh evidence from either of the parties before it.[12] It even cannot take account of material forwarded with the doctor's submissions on penalty to the determining officer.[13] The Tribunal's inquiry is limited to the grounds stated in the application for review, which cannot be amended.[14] A live issue was whether the Tribunal could examine the merits of the committee's report at all,[15] and it was also doubtful whether it could remedy a failure of procedural fairness before either the committee or the determining officer.[16] Finally, there was no express obligation on the Tribunal to provide any reasons for its decision.[17]

When I was invited by the Medico-Legal Society to examine the new legislation shortly after it commenced in 1994, my conclusion was pessimistic. I said:

> The new legislation provides a recipe for injustice. The changes subject medical practitioners to an indeterminable test of culpability, decided by officials with little guarantee of independence from the government prosecuting authority, under procedures distinctly less fair than those normally

9 *Health Insurance Act 1973* (Cth) ss 88, 102, 106S.
10 *Ibid* ss 89, 106M, 106T.
11 *Ibid* s 103, entitled "rights of persons under review at hearing".
12 This was confirmed by Davies J In *Yung* at 478C, who was upheld on appeal by all members of the Full Court in *Adams* at 620 and 632.
13 See *Determining Officer v Lusink* (1998) 79 FCR 433; cf Davies J in *Yung* at 471G.
14 *McIntosh v Minister for Health* (1987) 17 FCR 463 at 465; *Yung* at 477.
15 Davies J decided that it could in *Yung* at 476; Burchett and Hill JJ agreed in *Adams* at 633. Beaumont J in *Adams* dissented at 619.
16 Based on statements of Davies J in *McIntosh v Minister for Health* (1987) 17 FCR 463 at 466, and in *Tiong v Minister for Community Services and Health* (1990) 93 ALR 308 at 311.
17 However, in *Yung* at 481 Davies J found an implied duty to provide adequate reasons, and his opinion was upheld in *Adams* by Beaumont J at 620 and Burchett and Hill JJ at 633. It may be noted that their reasoning, as in *Attorney-General v Kennedy Miller Television Pty Ltd* (1998) 43 NSWLR 729, provides a substantial qualification to *Public Service Board v Osmond* (1986) 159 CLR 656.

> expected before a citizen loses his livelihood, and with rights of appeal which are largely illusory.[18]

My predictions met mixed success. The first cases which emerged from determining officers in 1996 and 1997 revealed that, indeed, I had underestimated the unfairness and superficiality with which committees and determining officers would go about their tasks. However, the right of appeal, or at least that to the Federal Court, proved more effective than I could have hoped. The cumulative outcome was that in May 1998 the Medicare regulators discovered that numerous proceedings[19] in which they had hoped (and presumably promised the Treasury) to recoup millions of Medicare dollars[20] had miscarried, and had miscarried irremediably.

After setting up the new structures, the Health Insurance Commission launched attacks on some of the highest generators of Medicare payments. The Commission's referrals suggested that "unacceptable conduct" could be established by inference simply from the statistical abnormality of the numbers and types of services rendered when compared to the average general practitioner. It was suggested that this proved that the practitioners under scrutiny had not given "sufficient clinical input" in the course of rendering many thousands of different services during a twelve month period.

When these references came to a committee, it thought that it could find "unacceptable conduct" without methodically examining the referred services and making findings as to which of them were tainted by an identified fault. Indeed, given the brevity of its hearings the committees were usually incapable of making any findings specific to all or any of the services. Necessarily, the doctors summonsed to appear were never formally charged with any particular inadequacies either before, during or after the hearing. The committees' investigations often consisted of a brief but wide ranging interview with the doctor about how he or she practised medicine in general, sometimes in the context of a glance at one day's medical records. The committee then reported sweeping general criticisms, including on such things as the doctor's general competence, his or her philosophy of medicine, the comprehensiveness of the doctor's records, the approach to home visits or after-hours services, and the doctor's waste disposal methods, in support of a conclusion that there had been "unacceptable conduct" on unspecified occasions during the year's services. On such findings, a determining officer proceeded to require the doctor to repay a large proportion of the Medicare benefits paid to his or her patients during the year and to administer substantial periods of disqualification.

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18 "New Approaches to Medifraud and Overservicing" in *Proceedings of the Medico-Legal Society of NSW* (1994) Vol 11, No 3.

19 The Full Court was told in January 1998 that the outcome of the appeal in *Adams* would have serious implications for 115 matters at various stages of the professional review process.

20 Cf *Professional Services Review Annual Report 1997–98* at 2: "it was anticipated that … repayments would be more commensurate with the actual extent of moneys involved". The agency cost $1.2M in 1996–1997, and $1.6M in 1997–98.

YUNG V ADAMS

These features of committee investigations were prominently exhibited in the first case given public exposure. This concerned Dr Yung, a likeable and unassuming general practitioner whose efficiency and competence appeared to be confirmed by his attracting a multitude of satisfied patients to an extended-hours medical clinic in which he was employed for many years, working sixteen hours for three days in each week and shorter hours on other days. Sweeping criticisms of the doctor's competence and practice were made by a committee, but the merits of these were not upheld by the Professional Services Review Tribunal, and indeed they were expressly rejected by the only member who addressed them. The Tribunal's unexplained decision to affirm a six month disqualification was therefore mystifying, particularly since the doctor had felt so intimidated by being brought before a committee that he had left the medical clinic and set up an impeccably "normal" sole practice in a different suburb.

Judicial examination of what had happened occurred on an application to the Federal Court by way of appeal "on a question of law only" from the Tribunal's decision.[21]

At first instance, Davies J gave rulings on many legal issues which I shall not attempt to explain. However, his Honour responded principally to failures to provide procedural fairness to Dr Yung throughout the processes which led to the decision of the Tribunal. Since, in his Honour's opinion, the proceedings were disciplinary, "the law required substantial procedural fairness, that is to say, that the medical practitioner should be given adequate notice of the findings which might be made against him and a fair opportunity to respond".[22]

This required the committee "to translate the general criterion stated in the Act into quite precise findings",[23] and to particularise its concerns to the practitioner. Davies J found nothing in the legislation which expressed a statutory intention contrary to the implication of the principles of procedural fairness.[24] His Honour commented that—

> In a complex case such as the present, where 17,331 services were the subject of the referral, it would be very desirable that, at some stage, the issues and the grounds being investigated should be formulated in writing so that there be no misunderstanding about them.[25]

Turning to what had happened in the case before him, Davies J thought—

> Dr Yung would have been unable to glean from the referral what were the details of inappropriate care which he ought to answer. … Unless examples of cases in respect of which it is alleged that the medical practitioner has failed to provide a sufficient level of clinical input are pointed to, so that

21 *Health Insurance Act 1973* (Cth) s 124A.
22 *Yung* at 455E.
23 *Yung* at 456G, applying Burchett J in *Romeo v Asher* (1991) 29 FCR 343 at 362.
24 *Yung* at 458A.
25 *Yung* at 458F.

> the medical practitioner can analyse and explain what occurred and thereby respond to the allegation of inappropriate practice, it is almost impossible for a medical practitioner to deal with the matter.[26]

This problem was not rectified by the committee. Indeed, the problem was compounded when the committee addressed general concerns which were not mentioned in the Health Insurance Commission referral and were not formulated in writing by the committee for Dr Yung to answer. "It is no wonder that Dr Yung had difficulty in dealing with the inquiry".[27] Moreover, the only patient records which the committee commented upon were those for only one day, and it examined them only after the hearing had concluded.[28] Davies J went on to note that—

> [A] feature of the committee's report is that there was no finding made of inappropriate practice in relation to any identified patient and there was no suggestion that any patient had ever complained of Dr Yung's treatment.[29]

How should the Tribunal have responded to the committee's failure to accord procedural fairness? Davies J placed the consideration of procedural fairness during the committee's investigation at the heart of the Tribunal's merit review function:

> The function of a Professional Services Review Tribunal is to decide the matter for itself although on the papers and after hearing addresses. It ought not make a finding against a medical practitioner unless it is satisfied that the medical practitioner has had adequate notice of the relevant allegations and an adequate opportunity to meet them. It is fundamental to the validity of the decision of a Professional Services Review Tribunal, which has the power and function to review the matter for itself, that its decision is based on findings in respect of which the principles of natural justice have been satisfied.[30]

The crux of this reasoning is that the Act had limited the Tribunal's powers to that of examining the record of evidence produced below, and had prevented both parties from leading further evidence to remedy any deficiencies. It was not open to the Tribunal to remedy a failure of procedural fairness at an earlier stage of the proceedings by giving a fresh opportunity to answer allegations. It was therefore the Tribunal's duty to set aside the determination of the determining officer unless on the material coming to it "there is a proper basis on which to make a finding of inappropriate practice"[31] The lack of such a proper basis included not only that material was not sufficiently probative of an allegation, but also that the practitioner had not had a fair opportunity to answer it when he was before the committee.[32]

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26 *Yung* at 463G.
27 *Yung* at 469G.
28 *Yung* at 470A.
29 *Yung* at 470A.
30 *Yung* at 483B.
31 *Yung* at 484D.
32 Cf *Yung* at 476B.

His Honour's analysis is, with respect, compelling. It also underlines the desirability and convenience of not confining a merits review tribunal to the "papers" produced at the preceding stage in the decision-making. In a true *de novo* merits appeal, such as is provided by the Administrative Appeals Tribunal as we currently know it, a failure of procedural fairness at earlier stages is entirely irrelevant.[33] Both parties have the fullest opportunity before the Tribunal to rectify the deficiencies of a previous investigation, both by adducing further evidence and by enjoying a full opportunity to answer evidence. The present case is a reminder that administrators, as well as citizens, benefit from having the ability to patch up deficiencies in their case when a matter reaches a review tribunal. Everyone benefits when the tribunal is unconcerned with the legality of what happened at earlier stages, but can focus entirely on reaching the correct or preferable decision on up-to-date material.

ADAMS V YUNG

The consequence of the limited power of the Professional Services Review Tribunal was that Davies J, when remitting the present case for rehearing, had doubt whether the Tribunal would be able to find a "proper basis" in the material for any finding adverse to Dr Yung.[34] On appeal, the majority in the Full Court, Burchett and Hill JJ, went further and thought that, because of the miscarriage of the proceedings of the committee, the Tribunal could reach no conclusion other than that the determination should be set aside.[35] They accordingly considered that a remitter to the Tribunal would be futile and, in effect, ordered the doctor's acquittal. They said:

> [T]he proceedings before the committee miscarried, not so much because it failed to particularise various matters against the doctor in respect of conclusions which it reached, or that it failed to indicate adverse conclusions which might be reached, although both these matters occurred. Rather, it failed to confine itself to the very reference which was before it. It also failed to consider the issue in that reference which related to conduct in respect of the referred services by only considering the one day which it did.[36]

Thus, although their Honours approved of what Davies J had said in relation to procedural fairness,[37] they preferred a second line of Davies J's reasoning. This was that the Act implied that the committee and the Tribunal must be able to relate their adverse findings to particular services identified from among those referred by the

33 *Otter Gold Mines Ltd v Australian Securities Commission* (1997) 26 AAR 99 at 109; *Walker v Secretary, Department of Social Security* (1997) 75 FCR 493 at 498, 507.

34 *Yung* at 484D.

35 *Adams* at 634. Beaumont J at 620 would have upheld Davies J's order on the ground of the inadequacy of the Tribunal's reasons.

36 *Adams* at 631.

37 "Without reservation": see *Adams* at 629. Beaumont J dissented at 615–616, saying that Dr Yung was treated procedurally fairly, and that it was "legally appropriate" for the Committee to make "global" findings.

Health Insurance Commission.[38] In reaching this interpretation, Davies J again drew support from his characterisation of the proceedings:

> [A] committee established under the Act is not concerned to discipline medical practitioners with respect to the general nature of their practice. The Act is concerned with medical benefits. The Act provides for disciplinary action and for proceedings to be taken in relation to services in respect of which medical benefits were paid or payable. Having regard to the provisions of the Act as they read at the time, I would have expected in the present case that any finding of inappropriate practice in the nature of insufficient care and attention would be related to identified services, save where it was appropriate to adopt a proportion, as where a sampling process was undertaken in accordance with ss 106G to 106K of the Act, in which case the sampling procedure adopted would identify the class or proportion of cases to which the findings drawn from an examination of a sample could be applied.[39]

Burchett and Hill JJ agreed with this reasoning. They thought:

> In a case where the allegation of conduct is failing to give appropriate care to patients, having regard to the number of services the doctor has performed, a committee if it is to consider the totality of the services referred must, on the legislation presently under consideration, of necessity engage in a proper sampling procedure.[40]

In effect, their Honours pointed out that while a statistical abnormality might give rise to a suspicion of inappropriate medical care, it was the task of the Committee to test that suspicion by examining the practitioner's actual conduct when rendering each of the referred services or a valid sampling of them. Their reasoning seems to accord with, although it does not invoke, the requirement of procedural fairness that a serious adverse finding should be based on probative evidence.[41]

Their Honours also developed Davies J's suggestion that the Committee and Tribunal must confine the inquiry to a matter related to the referred services.[42] They held that the ambit of the inquiry was confined to the concerns which were expressed in the body of the Health Insurance Commission reference, and concluded that the reference is not intended to open up for consideration by a committee ultimately convened any aspect at all of the referred person's conduct in the referral period.[43]

In a situation where this limitation did not emerge clearly from the words of the Act, one of the reasons for arriving at their interpretation is relevant to the theme of this paper:

> This conclusion is reinforced by the legislative requirement that the practitioner conduct the hearing without real assistance from a legal adviser. Whilst it is true that a legal practitioner may advise the practitioner, given the fact that the legislature has seen fit to exclude a legal practitioner from

38 See *Yung* at 470C, and also at 460A, 467B, 480G, 482F.
39 *Yung* at 467B.
40 *Adams* at 630.
41 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356, 366.
42 *Yung* at 464C, 468F, 476A.
43 *Adams* at 629–630.

> either examining witnesses or making submissions, it must follow that the intended subject matter of the procedure before a committee be manifest to the practitioner prior to the time the committee meets to consider it.[44]

ADMINISTRATIVE JUSTICE IN PROFESSIONAL SERVICES REVIEW

I have addressed those aspects of the reasoning of the majority judges which reflect a "core" concern of administrative justice. It is one to which our courts often strive to give primacy: that an individual subjected to a penal procedure should receive a fair hearing—whether by a judicial or by an administrative agency. It was this value which guided the majority judges when deciding what the legislation required in relation to the ambit of investigation and procedural fairness. I respectfully suggest that the standards of fairness they applied were those normally expected in the Australian community.

I do not think that the outcome of the case, nor the reasoning of Davies, Burchett and Hill JJ, can or should be dismissed as an aberrant response of a liberal bench to an outrageously unfair proceeding in one case. Instead, I suggest that the story sketched above carries an important message for Australian legislators and administrators tempted by administrative penalty schemes, whether as a budgetary control device or for some other purpose.

Whether the message will be heard, even in the Medicare area, is another thing. In his 1998 annual report the Director of Professional Services Review concluded that "it is unfortunate that we have hit a legal reef".[45] However, he seems to suggest using dynamite rather than a change of course, since he advises: "given the major impact the findings have on a 'peer review' model of enquiry, it seems evident that legislative amendment is necessary to allow the PSR Scheme to function properly".[46]

If this advice is accepted, I suspect that the Commonwealth may discover further reefs beyond those exposed by Dr Yung.

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44 *Adams* at 630.
45 *Professional Services Annual Report 1997–98* at 19.
46 *Ibid* at 6.

Judicial Responses to an Inquiry Procedure—A Medicare Inquiry Case Study

DENIS O'BRIEN*

The recent decision of the Full Court of the Federal Court in *Adams v Yung*[1] raises the issue of how one best balances the interests of the professional autonomy of individual medical practitioners in providing services that attract Medicare benefits and the public interest in ensuring proper cost containment within the Medicare system. The decision also raises a question about how administrative justice should be secured in a scheme in which the key judgments about practitioner behaviour are made by the peers of the practitioner.

From its very beginning in 1974 the *Health Insurance Act 1973* (Cth) (the Act) has contained provisions for the conducting of medical inquiries into practitioner behaviour and for repayment of Medicare benefits where appropriate.[2] It is perhaps true to say that the original scheme and the variations which have followed it have not managed to resolve the tension between, on the one hand, issues of accountability in the expenditure of public moneys and, on the other hand, issues of professional medical practice. The decision of the Full Federal Court in which Dr Yung successfully challenged decisions adverse to him made under the Professional Services Review scheme (PSR scheme) shows that the tension remains alive and well.

It cannot be expected, however, that the Government will walk away from some mechanism for cost containment to protect a system of universal access to medical services. The danger for the profession is that, if the present mechanism will not work, the Government will simply seek to introduce caps on the number of

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1 (1999) 51 ALD 584.

2 See Divisions 3 and 4 of Part V of the *Health Insurance Act 1973* (Cth), as originally enacted.

services a doctor can claim. The Australian Medical Association (AMA) recognises this danger.[3]

Both the Government and the AMA therefore have an interest in an effective PSR scheme and it was not surprising that, in response to the *Yung* decision, the Minister for Health and Aged Care, Dr Michael Wooldridge, established a committee to advise him on the legislative and other changes necessary to enhance the effectiveness of the PSR process. That committee comprised representatives of the AMA (chair), Professional Services Review, Department of Health and Aged Care, and Health Insurance Commission. It has now reported and it is envisaged that amending legislation will be introduced in the Parliament later in 1999.[4]

PSR SCHEME

The PSR scheme was established, with the support of the AMA, under Part VAA of the Act. It involves a peer review mechanism to deal with inappropriate practice in relation to the rendering or initiating of services that attract Medicare benefits. It has been the subject of consideration at a previous AIAL conference.[5]

The scheme came into effect on 1 July 1994. Dr John Holmes was appointed as Director of Professional Services Review later that month. About 160 medical practitioners have been appointed by the Minister to be members of the PSR Panel from which committees are constituted from time to time to examine whether practitioners have engaged in inappropriate practice. The Minister must consult the AMA before making appointments. Certain of the Panel members have been appointed as Deputy Directors of Professional Services Review. The Deputy Directors serve as chairpersons of the committees.

"Inappropriate practice" is defined in s 82 of the Act. Basically, a practitioner engages in inappropriate practice if the practitioner's conduct in connection with rendering or initiating services for which Medicare benefits are payable is such that a PSR committee could reasonably conclude that the conduct would be unacceptable to the general body of the peers of the practitioner.

The steps in the scheme are as follows:

- If the Health Insurance Commission (HIC) suspects that a particular practitioner has engaged in inappropriate practice, the HIC can refer the conduct of the practitioner to the Director of Professional Services Review (s 86). In practice, referrals are not made by the HIC unless, after counselling of the practitioner by the HIC, it continues to have concerns about the practitioner's practice.

3 See remarks of AMA President, Dr Brand, as reported in Australian Doctor, 12 June 1998 at 33.

4 Postscript: see *Health Insurance Amendment (Professional Services Review) Act 1999* (Cth)

5 D O'Brien, "Regulation of Medical Practice under Medicare" in S Argument (ed), *Administrative Law: Are the States overtaking the Commonwealth?* (AIAL, 1994) 231.

- The HIC sends a copy of the referral to the practitioner inviting the practitioner to make a submission to the Director stating why the Director should dismiss the referral (s 88).
- The Director either dismisses the referral or sets up a committee to decide whether the practitioner has engaged in inappropriate practice (s 89). This decision must be made within 28 days after receiving the referral from the HIC.
- The Director must give the practitioner and the HIC notice of the decision either to dismiss the referral or to set up a committee (s 94). If the Director decides to set up a committee, the notice must be accompanied by a notice of the instrument that sets up the committee.
- The chairperson of the committee convenes a meeting of the committee (s 97).
- If, following due consideration by the committee, it considers that the practitioner may have engaged in inappropriate practice, the committee must hold a hearing (s 101).
- If the committee proposes to hold a hearing, it must give to the practitioner a written notice of the time and place proposed for the hearing (s 102).
- At the hearing, the practitioner is entitled to question any person giving evidence and to address the committee (s 103).
- The committee reports its findings to a determining officer appointed by the Minister (s 106L). Presently the determining officer is a senior officer of the Department of Health and Aged Care.
- The determining officer must give a copy of the committee's report to the practitioner (s 106R).
- If the report contains a finding that the person under review has engaged in inappropriate practice in connection with rendering or initiating some or all of the referred services, the determining officer must make a draft determination relating to the practitioner and give a copy of the draft determination to the practitioner and to the Director of Professional Services Review (s 106S). The practitioner is invited to make written submissions in relation to the draft determination (s 106S(2)).
- A final determination is made by the determining officer (s 106T).
- Determinations may include one or more sanctions against the practitioner, including a reprimand, counselling, disqualification from the Medicare system (for up to three years) or repayment of Medicare benefits (s 106U).
- The final determination takes effect within 28 days unless the practitioner seeks a review of the determination by a Professional Services Review Tribunal (PSRT) (s 106V).
- The practitioner may request the Minister to refer the determination to a PSRT (s 114).

- The PSRT conducts a hearing in which the parties are the practitioner and the determining officer.
- The PSRT reviews the matter on its merits and may affirm or set aside the determination.
- Either of the parties to a proceeding before the PSRT may appeal, on a question of law only, to the Federal Court (s 124A).

The whole peer review process is conducted in private (s 106ZR). Even the final determination made by the determining officer is not a public document. Only if a practitioner appeals to a PSRT do the matters before it become public.

BACKGROUND TO THE SCHEME

The PSR scheme was established following a report by the Commonwealth Auditor-General on fraud and overservicing under Medicare. The Auditor-General was critical of the process then in existence under which suspected cases of excessive servicing were examined by Medical Services Committees of Inquiry (MSCI). The MSCI process involved investigations by committees of inquiry administratively attached to the HIC. They were concerned solely with the question whether the practitioner had engaged in excessive servicing.

In responding to the Auditor-General's report, the then Department of Health, Housing and Community Services said:

> While it is accepted that the level of recovery for both fraud and overservicing is minimal in terms of the levels of activity that some practitioners actually indulge in, this is a product of the courts' refusal to accept generalised evidence. Thus each and every allegation relating to a medical service must be proven. In practical terms, this is not possible.

The HIC, in its response to the report, proposed that consideration of suspected overservicing and the determination of any sanction should be part of the administrative process within the HIC and that decisions made by the HIC should be subject to appeal to the Administrative Appeals Tribunal.

The AMA was opposed to the HIC proposal on professional grounds. It wrote to the Minister of Health and said:

> If it is necessary to examine a patient's medical records, it should only be done by a professionally accredited group of the doctor's working peers; if the Commission considers that personal patient information must be examined either to verify claims or to consider charges of 'overservicing', it should be done by a group of doctors who have no allegiance to anything other than to proper medical standards and ethical behaviour.[6]

Following further consideration of the structure and processes that needed to be put in place to address the concerns of the Auditor-General, the PSR scheme in its present form emerged.

A significant change from the previous MSCI process was to replace the concept of "excessive servicing" with the concept of

6 Quoted in a paper by the then Secretary-General to the AMA, Dr Bill Coote, *Proceedings of the Medico-Legal Society of New South Wales* (1994) Vol 11, No 3.

"inappropriate practice". In commenting on the change, the Minister's Second Reading Speech said:

> A major factor in the inability to impose penalties commensurate with the extent of a practitioner's overservicing is the current lack of power to make decisions on the extent of overservicing on the basis of generalised evidence. At present judgments about overservicing can only be made on the basis of individual services, that is, recovery of benefits and the imposition of penalties can only be made in respect of each service separately determined to have been excessive. ...
>
> A significant change in the Bill is the replacement of the concept of excessive servicing with one of inappropriate practice. Whereas excessive servicing is currently defined as the rendering or initiation of services not reasonably necessary for the adequate care of the patient, the concept of inappropriate practice goes further. It covers a practitioner engaging in conduct in connection with the rendering or initiating of services that is unacceptable to his or her professional colleagues generally.[7]

THE PROCEEDINGS IN *YUNG*

Professional Services Review Committee No 1 was set up by the Director of Professional Services Review following the consideration by the Director of a referral made by the HIC of the conduct of Dr Yung. The committee was set up, as required by the Act, to consider whether Dr Yung had engaged in inappropriate practice in connection with the referred services. Dr Yung's case was the first to be considered under the new scheme.

The committee conducted a hearing and reported to the determining officer (at the time, Dr Tony Adams, a Deputy Secretary in the Department of Health). Dr Adams made a draft and then a final determination. Dr Yung sought review by the PSRT and then appealed to the Federal Court from the decision of the Tribunal. In the Federal Court, Davies J set aside the decision of the Tribunal on the basis that Dr Yung had not been accorded procedural fairness at the committee stage or at the Tribunal stage.[8]

From the decision of Davies J, the determining officer appealed to the Full Court of the Federal Court. The Full Court (Beaumont, Burchett and Hill JJ) handed down its decision in Sydney in May 1998. Two of the judges (Burchett and Hill JJ) found in favour of Dr Yung. Beaumont J, in a strong dissenting judgment, found in favour of the determining officer.

The majority judges found that the committee proceedings had miscarried in two ways:

- the rules of procedural fairness were breached when the committee inquiry went beyond the terms of the HIC referral; and
- the committee erred in law by not relating its conclusion as to Dr Yung's conduct to specific services.

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7 House of Representatives, *Parliamentary Debates*, 30 September 1993 at 1550 – 1551.

8 (1997) 150 ALR 436.

Unfortunately, by the time the case was heard, committees had made reports in several other cases and there were some eleven cases awaiting review by the PSRT. The *Yung* decision had severe implications for a number of those cases and, as it turned out, some of them were either not contested by the determining officer or resulted in a decision by the PSRT that it had no option, in the light of *Yung*, but to set aside the determination of the determining officer.

THE HIC REFERRAL IN *YUNG*

The referral from the HIC in Dr Yung's case stated that, in the year concerned, he had rendered 17,331 services at a particular practice location, which corresponded to an average of 106 services on each of the days he worked there.

As mentioned above, a referral by the HIC to the Director of the conduct of the practitioner does not in practice occur unless the HIC discerns no appreciable change in a practitioner's servicing patterns or in other aspects of his or her practice following counselling by an HIC investigator. Counselling had occurred in Dr Yung's case. At the counselling meeting Dr Yung was apparently told of the HIC's concerns that, because of the large numbers of patients he was seeing on a daily basis, "he might not be able to maintain appropriate levels of clinical input".[9]

The referral from the HIC expressed the concerns of the HIC "that Dr Yung would not be able to provide an appropriate level of clinical input when consistently rendering high numbers of services or when regularly working excessively long hours at his Kirrawee practice". There was a variety of material within the referral discussing the consultation times needed to allow quality care.[10]

Having regard to the terms of the referral, it is difficult to accept the view of Davies J at first instance that a breach of procedural fairness had occurred because the committee proceedings failed to give Dr Yung reasonable notice of the matters it was to consider. On appeal, Burchett and Hill JJ did not refer to this as an issue. However, they considered that the rules of procedural fairness were breached when the inquiry of the committee went beyond the terms of the referral. Their Honours found that the committee trespassed outside the ambit of the referral. It "failed to confine itself to the very reference which was before it". They said:

9 (1999) 51 ALD 584 at 588.

10 Matthew Smith says in his paper (in this publication) that the HIC referrals suggest that unacceptable conduct can be established by inference from the statistical abnormality of the numbers and types of services rendered when compared to the average general practitioner. I do not agree with this view. The HIC referral merely raises a matter for consideration. When it reaches the PSR Director, he may dismiss it (as he sometimes does); and, if he decides to establish a committee, it is for that committee to decide, in the light of the doctor's evidence and an examination of his records, whether the doctor has engaged in inappropriate practice.

- the referral "provides the framework in which ... inquiries are to be held";[11]
- "the reference is not intended to open up for consideration by a Committee ... any aspect at all of the referred person's conduct in the referral period";[12]
- the Director "could hardly dismiss a referral if the possibility was that a committee could roam outside its terms";[13] and
- a committee "is limited to considering the matters that are the subject of the referral".[14]

In general terms, one may accept the thrust of these comments. Certainly, if a person in Dr Yung's position is facing an inquiry which may lead to sanctions against him, procedural fairness requires that he be confronted with the case he is to answer. However, there is nothing in the legislation and, in my view, no principle of procedural fairness which would prevent a committee from dealing with matters which emerge in the course of an inquiry, provided that they relate to the referred services. Procedural fairness would require the committee to draw the matters concerned to the attention of the practitioner and to give him or her the opportunity of dealing with them. And perhaps in Yung the committee did not do this properly. However, that was not something on which the decision of the majority judges turned.[15] They simply said that the rules of procedural fairness were breached when the committee went beyond the terms of the referral.

Interestingly, in his dissenting judgment, Beaumont J clearly considered that matters that were the subject of specific observations of the committee (such as inadequate patient records and overclaiming of level B consultations) fell within the framework of the referral:

> Similarly, some of the specific observations of the committee, eg Dr Yung's failure to provide an after hours service, should also be viewed in the more general context of the committee's opinion that the extreme number of hours worked (7am to 11pm) must have impacted on aspects of Dr Yung's practice. Clearly, if Dr Yung was seeing patients up to 11pm, he was then not in a position to provide an after hours home visit.[16]

PROCEEDING ON THE BASIS OF A STATISTICALLY VALID SAMPLE

The majority judges held that, when the allegation of conduct is failing to give appropriate care to patients having regard to the

11 (1999) 51 ALD 584 at 629.
12 *Ibid* at 629 – 630.
13 *Ibid* at 630.
14 *Ibid* at 630.
15 Their Honours said that they accepted "without reservation" the view of Davies J that, in proceedings of this kind, the rules of procedural fairness require that the practitioner under review be given an opportunity to respond to findings that may be made against him or her. However, they made no findings that in this case there had been a breach of procedural fairness in this regard.
16 (1999) 51 ALD 584 at 616.

number of services the doctor had performed, a committee, if it is to consider the totality of the services referred, must of necessity engage in a proper sampling procedure. The majority judges held that it was not enough for a committee to do what it did here, namely, to consider the services rendered in one day (even though it did ask the doctor questions about treatment over a period of some of the patients revealed by that one day snapshot)[17] and to make a finding of inappropriate practice in relation to all the referred services. The Full Court held that, although inferences could be made from a sample to a totality of services, that did not take away from the requirement of the ultimate conclusion to relate the issue of conduct either to some or all of the referred services.

This aspect of the majority judgment is, with respect, less than helpful. It gives no guidance as to what type of sampling is sufficient. Their Honours refer to a need for a committee to make a "useful sample analysis" but they do not say what this means. The requirement is, of course, of particular difficulty when what is in issue before the committee is ordinary consultations, as distinct from a particular surgical procedure. This is the most difficult aspect of the Yung decision in terms of how committees should proceed. Clearly, if the main concern about a practitioner's conduct is the inability of the practitioner to provide appropriate care to patients because of the high volume of services rendered, it is not practicable for a committee to identify particular services in respect of which the practitioner's conduct is regarded as inappropriate. On any sensible view, it is the whole of the practitioner's conduct that is in issue.

Again, the minority judgment of Beaumont J provides a counterpoint to the majority. His approach was more consonant with the apparent intention of the Parliament when the PSR scheme was introduced. He said that the Act requires a consideration of the practitioner's conduct in relation to the referred services. However, in his view, the committee did this:

> In this kind of context, 'global' findings of the type made by the committee were, in my view, legally appropriate as a matter of approach. ... [T]he committee was not bound to make findings in respect of individual patients in its report. Its duty was to report on Dr Yung's conduct in relation to all of his Kirrawee patients over the year in question.[18]

His Honour considered that the committee had properly discharged its duty in this case.

THE CASES SINCE *YUNG*

It is instructive to refer briefly to what has happened in a couple of cases since *Yung* because they illustrate the difficulties to which the

17 Matthew Smith says in his paper that the patient records were examined only after the hearing had concluded. So far as I can see, the transcript of the hearing in fact shows that Dr Yung was questioned at the hearing about the services rendered by him to a selection of the patients whose records were before the committee.

18 (1999) 51 ALD 584 at 616.

case has given rise. One is a PSRT case, *Gad*,[19] and the other a Federal Court case, *Retnaraja v Morauta*.[20]

Dr Gad

The HIC referral concerning Dr Gad identified 3 matters of concern: his high level of services; his high number of services per patient; and his high level of initiation of pathology services. The committee found that he had engaged in inappropriate practice. The determining officer made a determination in relation to him. He appealed to the PSRT.

The Tribunal specifically commented that a group of medical practitioners with extensive experience of general practice could, from the material before the committee, draw an overall picture of the conduct of Dr Gad's practice and discern its essential features. The committee would also be able to consider how the general body of general medical practitioners would view that conduct. In particular, having regard to the high number of consultations and frequency with which those consultations took place in a substantial number of patients, the Tribunal considered that the committee could reasonably conclude that Dr Gad did not provide, at every consultation, a level of clinical input which was adequate for the proper care of his patients.

However, the Tribunal found the *Yung* case to be an insuperable problem. It said that, in light of the *Yung* judgment, it could only conclude that the committee did not satisfy the statutory test of inappropriate practice because its report did not contain sufficient detail to identify which services (or what proportion of services) constituted the inappropriate practice. The determination was therefore set aside.

Dr Retnaraja

The HIC referral concerning Dr Retnaraja identified few matters of concern: his high number of services per patient; his high proportion of long consultations; his high level of home visits; and his high number of services per patient. On the last point the referral noted that, over the twelve month referral period, one patient (who was his receptionist) received 612 services. The committee found that Dr Retnaraja had engaged in inappropriate practice. The determining officer's determination was upheld by the PSRT. Dr Retnaraja appealed to the Federal Court.

Von Doussa J upheld the determination in part. For present purposes, I refer only to what his Honour said about one of the central planks of the *Yung* decision, namely, that the findings of a committee must identify particular services in respect of which the practitioner engaged in inappropriate practice. In referring to the judgment of Burchett and Hill JJ, his Honour said:

19 Professional Services Review Tribunal No 2 of 1997, 15 July 1998, Hon A R Neaves, President, Professor D Tiller, Member, Dr N McH Ramsey, Member.

20 (1999) 56 ALD 187.

> I do not understand their Honours to mean that the ultimate conclusion of the committee must relate the issue of conduct to individual services to identified patients. ... [T]he committee was entitled to reach its ultimate conclusion that the practitioner had engaged in inappropriate practice by relating the conduct constituting the inappropriate practice to its finding that some of the services referred would be unacceptable to the general body of the members of the specialty in which the practitioner was practising at the relevant time.
>
> In my opinion, the committee was not required to relate its finding of inappropriate practice to specific services or to the provision of services to specific patients. The committee was entitled to approach its task by making more general findings of the type which it did make in relation to each of the categories of service about which the Commission expressed concern in the referral.[21]

All of that, it seems to me, sounds very like the dissenting judgment of Beaumont J in *Yung*.

LOOKING AHEAD

So where do matters go from here? There are two matters in particular that the legislature may need to address. The first is the insistence of the full Federal Court in *Yung* that a committee can only deal with matters identified in the referral from the HIC. This is a difficult requirement in the context of the scheme of the Act because it is only at a stage after the referral, namely, at the committee stage, that the doctor's records can be examined, thus allowing a proper assessment of his or her conduct. This, in my view, is one of the characteristics which distinguish PSR proceedings from disciplinary proceedings—or, at least, disciplinary proceedings in the normal sense—because the initiating document cannot do more than raise concerns about conduct. Substance, or a lack of substance, to any concerns can only be found when the doctor's peers access the patient records.

The second aspect of *Yung* that may require legislative attention is the Court's requirement that the findings of the committee identify particular services in respect of which the doctor has engaged in inappropriate practice. It is unclear in the light of *Retnaraja* precisely what committees are required to do but certainly, when the allegation of inappropriate practice is the sheer volume of services, it is not practicable to require findings of conduct to be related to particular services.

Of course, whatever is done by way of legislative amendment, I agree wholeheartedly with Matthew Smith (and with the Federal Court in *Yung*) that, in proceedings under the PSR scheme, the rules of procedural fairness require committees to put to the practitioner under review the findings that may be made against him or her and to give him or her an opportunity to respond. Administrative justice will not be delivered, and proceedings under the scheme will be the subject of further challenges, unless procedural fairness is observed in this regard.

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21 (1999) 56 ALD 187 at 200–201.

Commercial in Confidence Claims, Freedom of Information and Public Accountability— A Critique of the ARC's Approach to the Problems Posed by Government Outsourcing

Moria Paterson*

"Commercial in confidence" is an expression which has come to be used as a convenient short hand expression to summarise those exemptions in freedom of information legislation that might apply to commercially sensitive information.[1] The expression is, however, potentially misleading when used to justify denial of access. This is because it lacks any clearly defined legal meaning and wrongly suggests that a document must be treated as confidential simply because it contains business information or because there is some exemption which protects information simply on the basis that it is of a commercial nature or commercially sensitive.

A claim that a document is subject to a commercial in confidence claim raises two different issues that are dealt with in separate exemption provisions in the *Freedom of Information Act 1982* (Cth) (FOI Act). The first, which is dealt with in s 43, is the issue of commercial sensitivity. Section 43 requires that a document for which exemption is claimed must contain a trade secret or information having a commercial value that could reasonably be expected to be diminished by disclosure.[2] Alternatively, in the case of informa-

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1 Administrative Review Council, *The Contracting Out of Government Services*, Report No 42 (1998) at para 5.59 (hereafter *Contracting Out report*).

2 Section 43(1)(a) and 43(1)(b).

tion concerning the affairs of a business organisation or undertaking, s 43 provides that a document must contain information the disclosure of which could reasonably be expected either to unreasonably affect that body in respect of its lawful affairs or to prejudice the future supply of information to the Commonwealth.[3]

The second issue concerns obligations to treat information as confidential and is dealt with by s 45, which provides that a document is exempt if its disclosure under the Act would result in an actionable breach of confidence. This test imports into the FOI Act the common law test for breach of confidence. The three elements of this cause of action are that the information must be of a confidential character in the sense that it is not generally known, it must have been imparted in circumstances where it was received on the understanding that it would be treated as confidential, and there must have been a threatened (or actual) misuse of it.[4]

CONVERGING INTERESTS IN NON-DISCLOSURE

Commercially sensitive materials relating to business dealings between agencies and businesses, including contracting out and tendering, create difficulties because they may relate simultaneously to the affairs of agencies and third parties. These materials fall within a category of information that is traditionally treated as secret in the private sector but have an important public dimension insofar as they shed light on the activities of the public sector. As noted in the ARC Issues Paper, *The Contracting Out of Government Services*, information held by contractors may give rise to issues of accountability in relation to the services provided to individual recipients, as well as to broader questions of public interest relating to the evaluation of the performance of contractors.

> A service recipient may seek access to information in order to provide evidence of service delivery problems or to support a view as what the contract requires. Access to information by members of the public in general and service recipients in particular may enable a broader evaluation of the performance of contractors.[5]

Furthermore, there may be a convergence of interests in ensuring the non-disclosure of documents, particularly in the context of contracting out. A private contractor will usually be accustomed to operating in an environment where commercial information is kept secret, while the agency itself may be operating in an unaccustomed environment which is both new and subject to political controversy. The contractor, who regards secrecy as the norm, will have a natural inclination to disclose as little as possible and may be unsure as to the precise commercial consequences of disclosure. The agency should be more accustomed to transparency, but may nevertheless

3 Section 43(1)(c)(i) and 43(1)(c)(ii).

4 For a comprehensive discussion of this area of law, see R Dean, *The Law of Trade Secrets* (Law Book, 1990).

5 Administrative Review Council, *The Contracting Out of Government Services*, Issues Paper (1997) at para 5.42.

prefer to avoid scrutiny of its activities either because disclosure is perceived to be time consuming and costly, or because it might reveal some aspect of its operations that has a potential to cause political controversy or embarrassment. This is more likely to be the case where the agency is operating in an unfamiliar commercial environment and wishes to avoid unwelcome public scrutiny of its role as purchaser.

Sections 43 and 45 of the FOI Act, like the personal privacy exemption in s 41, are designed to protect essentially private interests (that is, the interests of natural persons and businesses as opposed to governmental and agency interests). Such provisions sit well with the objectives of the legislation, where the documents in respect of which exemption is claimed are essentially non-governmental in character or do not shed any important light on the activities of government. One such example is information about an identifiable individual or business that has been supplied to an agency in the context of an application for some benefit.

These provisions, however, create more difficulties in contexts such as contracting out, where private information is inextricably bound up with government information. A contract that contains sensitive business information about a contractor will also shed important light on the activities of the contracting agency, which remains accountable not only for the delivery of the contracted service but also for the expenditure of public money in relation to the contract. Access to contractual information is, for example, arguably necessary for an assessment of the propriety of the tendering process and of whether the agency obtained value for money in relation to any contracts ultimately entered into. In such cases there will be a strong public interest in disclosure and it is arguable that the rationale for the legislation will be undermined unless there is some mechanism for balancing the competing interests for and against disclosure. However, as discussed below, it is still unclear whether s 45 imports any of the public interest qualifications that might apply in respect of the common law action for breach of confidence and whether only one sub-paragraph of s 43(1) contains a public interest type balancing test.

SECTION 43

Section 43(1) of the FOI Act, the provision that is principally, but not solely, designed to protect the commercial interests of third parties, imposes four different criteria for exemption. The section provides:

> (1) A document is an exempt document if its disclosure under this Act would disclose—
>
> (a) trade secrets;
>
> (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or
>
> (c) information (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his or her

> business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, being information:
>
> (i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
>
> (ii) the disclosure of which under this Act could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

Apart from para (a), which provides a blanket exemption in respect of "trade secrets", the criteria for exemption under s 43 are defined in terms of the likely consequence of disclosure. The phrase "could reasonably be expected to" has been interpreted by the Full Court of the Federal Court as requiring a judgment to be made as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous.[6]

While paragraphs (b) and (c) both require the demonstration of a reasonable likelihood of some specific adverse effect, paras (b) and (c)(ii) differ from (c)(i) in that they do not require any assessment of the weight of those adverse effects.[7] In contrast, para (c)(i) imports a requirement of unreasonableness which has been interpreted as requiring a balancing of the interests for and against disclosure.[8] Important considerations are the likely consequence of disclosure to a business competitor, which must be balanced against the public interest in furthering the democratic objective of the legislation (including the objective of enhancing government accountability for its expenditure of public revenue).

As has been pointed out in the minority report which concludes the chapter on "Access to Information" in the ARC Report, the tests in s 43(1), other than that in s 43(1)(c)(i), are premised on the assumption that the harm resulting from the disclosure of information which falls within the criteria for exemption will always be such as

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6 *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at 190.

7 S 43(1)(b) contrasts with the position in Tasmania, where information having a commercial value which would be diminished or destroyed by disclosure is exempt only if it also satisfies a separate public interest test: *Freedom of Information Act 1991* (Tas) s 31(2). Likewise, an equivalent provision in the *Freedom of Information Act 1982* (Vic), s 34(1)(b) is potentially subject to the public interest override in s 50(4). On the other hand, equivalent provisions in other Australian jurisdictions follow the Commonwealth approach: see C Finn, "Getting the Good Oil: FOI and Contracting Out" (1998) 5 *Aust J of Admin Law* 113 at 119. It is less easy to draw comparisons with s 43(1)(c)(ii), as any equivalent provisions vary in their wording.

8 *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111. This approach is consistent with that taken to the criterion of unreasonable disclosure in s 41 by the Federal Court in *Colakovski v Australian Telecommunications Commission* (1991) 100 ALR 111: see M Paterson, "Freedom of Information and Privacy: A Reasonable Balance?" (1992) 66 *Law Inst Jnl* 1001.

to outweigh any public interest in disclosure. In other words, there is an assumption that the protection of third party trade secrets, the protection of the commercial value of information relating to businesses, and the protection of the supply of information to government agencies, should always take precedence over the interest in public accountability. This means, for example, that information that reveals evidence of corrupt dealings between a contractor and a government agency may be withheld on the basis that its disclosure will result in the disclosure of a trade secret (however minor) belonging to the contractor.

The expression "trade secrets" in s 43(1)(a) has been interpreted broadly as having its ordinary English meaning as opposed to some narrower technical meaning deriving from the common law protection of trade secrets. This means that the expression encompasses any confidential informational asset of a business including "past history and even current information, such as mere financial particulars", although such information must be such that it is used or useable in the trade.[9] This test does not impose any threshold requirement and therefore potentially may operate to protect information of a trivial character (at least, as assessed from the standpoint of the third party) in circumstances where the agency has an interest in non-disclosure. There is a similar difficulty with s 43(1)(b), which likewise lacks any minimum threshold requirement.

Finally, it should be noted that para (c)(ii) differs from the other parts of s 43(1) in that it is designed to protect the interests of government agencies in maintaining an uninterrupted flow of business information. Therefore, it is arguable that it belongs better in s 40, the provision which is specifically designed to protect the efficient operation of agencies; if so, it would be subject to an overriding public interest test.[10]

While it cannot be disputed that contractors should in general be able to do business with government agencies without jeopardising valuable business assets, it is difficult to see why there should be any blanket exemption in respect of such matters. By way of comparison, s 33A which seeks to protect the relationship between Commonwealth and State governments and their respective agencies, is subject to an overriding public interest test. It is should also be pointed out that even where agencies are not in principle opposed to the disclosure of documents they are more likely to err on the side of caution in the case of commercial documents. It is relevant in this

9 *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 121.

10 An alternative public interest test appears in ss 33A(5), 39(2) and s 40(2), and provides that the exemption does not apply to a document "in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest". This formulation has been interpreted as allowing the prima facie conclusion that a document is exempt; the conclusion can be displaced, but in effect an onus is placed on the applicant, despite the operation of s 61— *Re Mann and Australian Taxation Office* (1985) 3 AAR 261. See also *Re Angel and Department of Arts, Heritage and Environment* (1985) 9 ALD 11; *Arnold v Queensland* (1987) 6 AAR 463.

regard that officers are indemnified only in respect of the disclosure of documents that they believe are required to be disclosed under the Act.[11]

SECTION 45

Section 45 of the FOI Act was amended in 1991 to make it clear that it applies only to situations where an action would lie in equity for breach of confidence. The section provides that a document is an exempt document if its disclosure under the Act "would found an action, by a person other than the Commonwealth, for breach of confidence". The now generally accepted test to be applied in considering the application of s 45 of the Act is that set out in the dissenting judgment of Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)*, where his Honour said:

> It is now settled that in order to make out a case for protection in equity of allegedly confidential information, a plaintiff must satisfy certain criteria. The plaintiff:
>
> (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question; and must also be able to show that
>
> (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge);
>
> (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence; and
>
> (iv) there is actual or threatened misuse of that information.[12]

The requirement that information must have the necessary quality of confidentiality means that, as well as being to some extent secret, it must be identified with sufficient specificity[13] and must not be of a "trivial" nature.[14] The second requirement focuses on the issue of whether that information was disclosed on a confidential basis and for a limited purpose. Finally, while there is some division of opinion concerning the necessity to establish some specific detriment to the person who has confided the information,[15] a plaintiff must at least be able to demonstrate that disclosure or publication of the information constitutes a purpose other than that for which it was provided.

In the case of actions that are brought by governments to protect their own information there is an additional requirement for the plaintiff to establish that disclosure will be contrary to the public interest. It was established in *Commonwealth v John Fairfax & Sons*

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11 FOI Act, ss 91 and 92.

12 (1987) 14 FCR 434 at 443. See also *Re Bartl and Secretary, Department of Employment, Education, Training and Youth Affairs* (1998) 28 AAR 140; and Re *Kamminga and Australian National University* (1992) 15 AAR 297.

13 *O'Brien v Komesaroff* (1982) 150 CLR 310 at 327–328.

14 *Coco v Clark (Engineers) Ltd* [1969] 2 RPC 41 at 48.

15 See L Tsanakis, "The Jurisdictional Basis, Elements, and Remedies in the Action for Breach of Confidence: Uncertainty Abounds" (1993) 5 *Bond L Rev* 18 at 21.

Ltd[16] that it is necessary for a government plaintiff to demonstrate that the harm to the public interest that is likely to result from disclosure outweighs the public interest in keeping the community informed and in promoting discussion of public affairs.[17] This principle was subsequently extended by the High Court in *Esso Australia Resources Ltd v Plowman*[18] to a situation where confidential information in the possession of a government agency was provided by a third party. The Court stressed that the approach outlined in the *John Fairfax* case should also be adopted in the case of information relating to statutory authorities, on the basis that there is a need in the public sector "for compelled openness, not for burgeoning secrecy".[19]

Actions by non-governmental plaintiffs are not subject to this additional requirement, but the question of public interest may still be an issue. There have been a number of cases in which plaintiffs have been denied relief for breach of confidence in circumstances where there is a public interest in the disclosure of the information in question. However, the exact nature of this more limited public interest test remains unclear. It has variously been categorised as a matter that operates to deny the existence of a duty of confidence, a defence and a discretionary bar to obtaining equitable relief.[20]

The line of authority which establishes that public interest may be a relevant factor in the case of an action for breach of confidence by a non-governmental plaintiff originates in *Gartside v Outram*.[21] Wood VC's statement in that case that there can be no confidence in the disclosure of iniquity suggests that public interest affects the duty of the confidee rather than operating as a separate defence. This approach was endorsed by Gummow J in *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health*.[22] On the other hand, in *Corrs Pavey Whiting & Byrne v Collector of Customs*,[23] the Federal Court, while agreeing that public interest affected the content of any duty of confidence, took a narrower approach to this issue. The Court expressed the view that, if there was some principle of general application inspired by *Gartside* other than that a court would be unlikely to imply a contractual obligation to keep secret details of an employer's gross bad faith to his customers, it was no wider than one that information will lack the necessary attribute of confidence if the subject-matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a

16 (1980) 147 CLR 39.
17 See also *A–G (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86.
18 (1995) 183 CLR 10.
19 *Ibid* at 32 per Mason CJ, Dawson and McHugh JJ agreeing.
20 See J Pizer, "Public Interest Exception to Breach of Confidence Action: Are the Lights About to Change" (1994) 20 *Mon U L Rev* 67 at 90–91.
21 (1857) 26 LJ Ch 113.
22 (1990) 95 ALR 87 at 125.
23 (1987) 14 FCR 434.

third party with a real or direct interest in redressing such a crime, wrong or misdeed.[24]

However, in *Beloff v Pressdram Ltd*,[25] in a formulation that has since been approved in Australia,[26] Ungoed-Thomas J stated that what he referred to as the "defence of public interest" clearly covered but did not extend beyond—

> ... disclosure ... justified in the public interest, of matters carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity.[27]

More recently, in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd*[28] (the Australian "Spycatcher" case) the High Court proceeded on the assumption that the public interest, where relevant, operates as a defence.

The third option is that the existence of iniquity or wrongdoing, while not relevant in a substantive sense, may affect a court's discretion as to whether or not to grant equitable relief. For example, in *Weld-Blundell v Stephens*,[29] it was suggested that Wood VC's statement in *Gartside v Outram* was merely an expression of opinion against the exercise of the equitable jurisdiction to award an injunction. Likewise, in *Church of Scientology v Kaufman*,[30] Goff J implicitly endorsed this view when he described the public interest as a factor "weighing against the grant of an interlocutory injunction".

Section 45, as amended, is open to interpretation as allowing for a consideration of public interest only if this constitutes an element of the action. While there has been some difference of opinion on this issue,[31] it is by no means accepted that decision-makers should consider the question of public interest in examining claims for exemption under s 45. As a result, there is a real possibility that documents containing information that satisfies the elements of the action may successfully be claimed to be exempt even in circumstances where they reveal evidence of some wrongdoing. Furthermore, s 45 is potentially open to abuse in the sense that there is an incentive for agencies to structure interaction with contractors

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24 For a useful discussion of these issues, see R Dean, *The Law of Trade Secrets* (Law Book, 1990) at 104–137 and Ch 6; D A Butler, "Is there a Public Interest Defence to a Breach of Confidence" (1990) 20 *Qld Law Soc Jnl* 363.

25 [1973] 1 All ER 241.

26 See *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1980) 33 ALR 31. In that case Rath J of the NSW Supreme Court commented that what was particularly important in this formulation was the emphasis on the gravity of the conduct that might give rise to the defence.

27 [1973] 1 All ER 241 at 260.

28 (1988) 165 CLR 30 at 40.

29 [1919] 1 KB 520 at 534 per Warrington LJ.

30 [1973] RPC 627 at 631.

31 Contrast the approach taken in *Re Sullivan and Department of Industry, Science and Technology (No 2)* (AAT No 10889A, 6 June 1997, unrep) with that taken in *Re Western Desert Puntukurnuparna and Aboriginal And Torres Strait Islander Commission* (AAT No 11964, unrep).

in such a way as to give rise to an understanding that any information received from contractors (and also tenderers) will be treated as confidential.

THE ARC REPORT

General principles

The ARC Report contains a separate chapter on "Access to Information". It commences with a statement of two general principles for guiding the relationships between members of the general public, government agencies and contractors.[32] The first is that rights of access to information relating to government services should not be lost or diminished because of a contracting out process. The other is that the government, rather than individual contractors, should normally be responsible for ensuring that rights of access to information currently provided by the FOI Act are not lost or diminished as a result of contracting out.

Mechanisms for preserving public information rights

The chapter of the ARC Report continues with an examination of the five options for ensuring proper accountability in contracting out situations that were suggested in the ARC's 1997 Discussion Paper.[33] These were:

- the extension of the FOI Act to apply to contractors;
- the deeming of specified documents in the possession of contractors to be in the possession of the relevant government agency;
- the deeming of documents in the possession of contractors that relate directly to the performance of their contractual obligations to be in the possession of the relevant government agency;
- the incorporation of information access rights into individual contracts; and
- the establishment of a separate information access regime.

The Council also considered an additional suggestion that government contracts should become public documents able to be accessed directly by the public without recourse to the FOI Act.[34]

The extension of FOI to contractors was, in the Council's view, problematic in that it might produce a situation in which agencies came to see the maintenance of access rights as the responsibility of the contractor rather than of government. Such an outcome was at odds with the general principle that rights of access to information relating to government services should not be lost or diminished because of a contracting out process.[35]

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32 *Contracting Out report*, above n 1 at para 5.2D.

33 Administrative Review Council, *The Contracting Out of Government Services; Access to Information*, Discussion Paper (1997) Ch 5.

34 *Contracting Out report*, above n 1 at para 5.22.

35 *Ibid* at paras 5.24–5.29.

The Council also rejected the option of deeming specified documents as being in an agency's possession. This was problematic, in its view, due to the danger that access to relevant information could be lost unless sufficient skill and foresight was exercised at the time of contracting, to identify the documents which contractors were obliged to create and provide to contracting agencies.[36]

Consistently with the approach taken in the Discussion Paper, the Council favoured the alternative option of deeming documents in the possession of the contractor that related directly to the performance of their contractual obligations to be in the possession of the government agency.[37] The Council pointed out that this option overcame the problem of identifying specific documents at the time the contract was signed. At the same time, the preferred option struck an appropriate balance in terms of excluding those documents relating to the contractor's business that did not bear on the delivery of the service.

The suggested incorporation of information access rights into individual contracts was rejected on the basis that this approach would leave access rights entirely dependent on the terms of a contract that ultimately would be enforceable only by the contracting agency.[38]

Finally, the option of establishing a separate information access regime, and the concept of a separate disclosure regime, were rejected principally on cost grounds. The former was rejected on the basis that it would involve an unnecessary duplication of the existing FOI regime.[39] The latter would, in the Council's view, have imposed costs on agencies that were not warranted by the limited use that was likely to be made of such a regime. The Council pointed specifically to the existing requirements on agencies to publicise details of their contracts and the availability of access to contracts under the FOI Act.[40]

The Council accordingly recommended that the FOI Act should be amended to provide that all documents in the possession of a contractor that relate directly to the performance of its obligations under the contract should be deemed to be in the possession of the government agency.[41] The Council also recommended that the FOI Act should be further amended to require contractors to provide these documents to the contracting government agency when an FOI request is made.[42]

The FOI exemptions

While members of the Council were in agreement as to the general principles concerning access and the adoption of the deeming

36 *Contracting Out report*, at paras 5.30–5.38.
37 *Ibid* at paras 5.39–5.45.
38 *Ibid* at paras 5.46 – 5.47.
39 *Ibid* at paras 5.48–5.49.
40 *Ibid* at paras 5.50–5.51.
41 *Ibid* at para 5.54, Recommendation 15.
42 *Ibid* at para 5.54, Recommendation 16.

option, they were divided over the need for amendment of the exemptions in the FOI Act. The majority decided that, provided the existing exemptions were appropriately applied by agencies, they would not prevent the disclosure of information that should be available about contracted services. They concluded therefore that no changes were required at this stage, although they made a number of recommendations concerning the training of staff and the issuing of guidelines to assist them in the interpretation of ss 43 and 45.[43]

On the other hand, a minority of the Council consisting of four members,[44] whose views are summarised in the concluding section of the chapter,[45] concluded that both sections required amendment so as to include public interest type balancing tests.

Consultation procedures

The Discussion Paper that preceded the ARC Report contained a suggestion that it might be appropriate for contractors to state their position with regard to the release of specific documents at the time of providing them to agencies. Such a course would have avoided the need for agencies to consult with contractors as currently required under s 27 in the case of documents to which access was sought and which might be exempt under s 43. However, the Council refrained from recommending this course in its Report because of the potential for blanket claims, an effect which would inevitably increase rather than decrease delays in dealing with requests for access.[46]

Oversight functions

The Council also made recommendations concerning the need for staff training and the issuing of guidelines to assist FOI officers. In this context, it reiterated the recommendation previously made in the Council's FOI Report for the establishment of an FOI Commissioner with a range of functions, including the auditing of agencies' FOI performance, provision of training to agencies, and the provision of information, advice and assistance in respect of FOI requests.[47] Such a body, as the Council pointed out, would be the ideal mechanism for providing training and advice in the context of contracting out, as well as more generally.[48]

Voluntary disclosure

Although the Council did not go so far as to make any specific recommendation concerning voluntary disclosure, it stressed that none of the proposals which it had examined should preclude con-

43 *Contracting Out report*, at para 5.102, Recommendations 17–18, and para 5.111, Recommendation 19.

44 Professor Marcia Neave, Justice Jane Mathews, Ms Jill Anderson and Professor Ian Lowe.

45 *Contracting Out report*, at paras 5.112–5.124.

46 *Ibid* at para 5.98.

47 Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, Report No 40 (1995).

48 *Contracting Out report*, at paras 5.99 – 5.102.

tractors from supplying information on request where it was legally appropriate for them to do so. However, while it encouraged both contractors and agencies to make information available informally, the Council noted that provisions dealing with such disclosure might need to be provided for specifically in contracts. It also referred to a couple of scenarios where contractors might need to be restrained from voluntary disclosure.

Guidelines

The final recommendation in the chapter on "Access to Information" concerned the development of guidelines that would set out the circumstances in which agencies are to treat information provided by contractors as confidential.[49] As explained by the Council, this measure would be designed to ensure that agencies did not too readily agree to treat contractors' documents as confidential, a practice which had the potential to affect other forms of release of information, including release to parliamentary committees. Such guidelines might also, in the Council's view, serve a valuable purpose in restricting the range of contexts in which it would be possible for agencies and contractors to claim that information had been exchanged on a confidential basis (and therefore to qualify for exemption under s 45).[50]

CRITIQUE

General principles

The concept of articulating general principles as a prelude to the making of specific recommendations is a useful one; the principles articulated serve a valuable purpose in placing the issue of government accountability at the forefront. One of the dangers of outsourcing is that agencies may be tempted to pass on to contractors their responsibilities under information access regimes. Any such response would undermine the concept of government accountability and would seriously undermine the rights of those who are currently entitled to access.

The fact that functions are outsourced to private bodies should not affect the obligation of government to account for its use of governmental powers and tax- payer funded resources. Such accountability is fundamental to the legitimacy of government and ultimately to the stability of the constitutional system.

As previously noted, contracting out is especially problematic in that the government will usually have the ability to control through the terms of a contract the accessibility of information generated by contractors. Government may, if it so chooses, allow contractors

49 *Contracting Out report*, at para 5.111, Recommendation 19.

50 This conclusion derived from comments by the Federal Court in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111: see *Contracting Out report*, at para 5.106.

broad rights to claim confidentiality, and even insist on clauses that restrict the ability of contractors to release information or comment publicly on aspects of government activity. Furthermore, as noted by the Council in its Issues Paper, contracting out already features prominently in the governmental landscape and its use is likely to increase rather than decrease in the foreseeable future.[51] This means that any undermining of accountability in this context is likely to have serious implications for accountability in general.[52]

Mechanisms for preserving public information rights

The recommendation of the Council that performance-related documents should be deemed to be in the possession of the contracting agency makes considerable sense for the reasons outlined in the ARC Report, including consistency of this proposal with the general principles articulated by the Council. On the other hand, the alternative suggestion appears to have been too readily dismissed.

It is true that, subject to the qualifications discussed further below, the existing rights of access under the FOI Act have the potential to provide a substantial degree of transparency. However, there are good reasons why information regarding contracts should be published in a format that is readily accessible to all interested persons, rather than being subject to the comparatively costly FOI process. As noted at paragraph 5.52 of the ARC Report, agencies are required only to publicise *some* details of their contracts in the *Commonwealth (Purchasing and Disposals) Gazette*.

It should be noted in this regard that in the United States there is a federal requirement under Securities and Exchange Commission rules that publicly listed companies must lodge their procurement contracts for inspection.[53] Federal Acquisition Regulations also require that the unit prices of contract awards should be disclosed to unsuccessful offerors during the post award notice and debriefing process.[54] Likewise, in the State of California, most contracts are open for public inspection and so also are bids for government contracts.[55]

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51 *Contracting Out report*, at paras 1.8–1.12.

52 For a detailed discussion of these implications in the criminal justice contexts, see A Freiberg, "Commercial Confidentiality, Criminal Justice and the Public Interest" (1997) 9 *Current Issues in Criminal Justice* 124.

53 This has resulted in a situation whereby Australians have been able to access documents relating to government contracts with US companies in the US but not in Australia: see Freiberg, *ibid* at 137.

54 See US Department of Justice, FOIA Update, Vol XVIII, No 4 (accessed at www.usdoj.gov/oip/foia_updates/Vol_XVIII_4/page1.htm, on 22 April 1999).

55 The Californian Public Records Act ss 6250–6268 does not contain any specific exemption in respect of trade secrets, although information submitted confidentially or made secret by law may be withheld: see First Amendment Project, "The California Public Records Act" (accessed at www.thefirstamendment.org/prax.html, on 22 April 1999). See also B J Samuels, "Protecting Confidential Business Information Supplied to State Government: Exempting Trade Secrets from State Open Records Laws" (1989) 27 *American Business Law Jnl* 468.

The FOI exemptions

Insofar as the issue of the adequacy of the existing provisions is concerned, it is arguable that the approach taken by the minority of the Administrative Review Council in the ARC Report makes considerably more sense than the majority's approach. While the majority's recommendations concerning training and the issuing of guidelines should go some way to alleviating some of the existing problems, it is arguably unrealistic to expect that they can resolve the inherent difficulties which derive from the drafting of ss 43 and 45.

The majority's discussion of s 43 focuses on the constraints imposed by the requirement of "reasonable expectation". Their approach, however, ignores the implicit but questionable assumption that the criteria specified in the section will always be of sufficient importance to outweigh any competing interests in disclosure, even in the context of some impropriety or wrong doing. Their approach also fails to address two other major shortcomings. These are the fact that there is no minimal threshold requirement for the criteria specified in s 43(b) and (c)(ii),[56] and that there is a positive disincentive for agencies to exercise their discretion to grant access to any document that appears to fall within this exemption provision.

The minority's suggested solution of introducing a reasonableness test into s 43(b) and (c)(ii) would simultaneously solve both of these problems, at least so far as those paragraphs are concerned. As previously noted, the reasonableness criterion, which already exists in s 43(c)(i), has been interpreted in a similar fashion to an overriding public interest test, as requiring a balancing of the competing public interest considerations for and against disclosure. This provides scope for granting access in contexts where there are especially strong public interest considerations in favour of disclosure, and ensures that information is unlikely to be withheld where the expected adverse effect is of a minimal nature.[57] The minority's suggestion of incorporating an inclusive list of relevant criteria to be taken into account by decision-makers in deciding whether or not to grant access also seems to be a very useful one.[58]

While those suggestions correctly focus on the issue of harm to the contractor as a relevant consideration, it would also be useful to provide some indication of the types of factors over and above the general objectives of the FOI legislation that would point in favour of granting access. For example, it would be helpful to insert a further criterion requiring consideration of whether the document sheds

56 It is arguable that a reasonable expectation of even the most minimal diminution in commercial value or prejudice to the supply of information may be sufficient to justify exemption.

57 *Contracting Out report*, at para 5.116.

58 *Ibid* at para 5.117.

light on the activities of the government[59] or on any wrongdoing or impropriety.[60]

The minority did not make any specific recommendations in relation to s 43(a), principally because the Council had not received any submissions in relation to the amendment of this paragraph. The minority did, however, suggest that there was a case for arguing that s 43(a) should also be subject to a public interest test. On the other hand, they acknowledged that trade secrets present particular problems due to their proprietary nature.[61]

While it is true that this provision presents less problems than the others, there would seem to be a good case for some amendment of it even it is decided not to incorporate a separate public interest test. At the moment, it is not uncommon for agencies and contractors to argue that contractual information concerning the manner in which a contractor proposes to, or has discharged, its contractual obligations[62] is in the nature of a trade secret. Another possibility would be to incorporate a more precise formulation, of the type suggested in *Re Organon (Aust) Pty Ltd and Department of Community Services & Health*.[63] In that case the Commonwealth AAT stated that regard should be had to the following criteria in determining the existence of a trade secret:

(a) whether the information is of a technical character;

(b) the extent to which the information is known outside the business of the owner of that information;

(c) the extent to which the information is known by persons engaged in the owner's business;

(d) measures taken by the owner to guard the secrecy of the information;

(e) the value of the information to the owner and to the owner's competitors;

(f) the effort and money spent by the owner in developing the information; and

(g) the ease or difficulty with which others might acquire or duplicate the secret.[64]

59 This criterion plays an important role in the case law generated under the United States Freedom of Information Act and was used by Heerey J in his judgment in *Australian Telecommunications Corporation v Colakovski* (1991) 100 ALR 111.

60 For example, it might be appropriate to use the criteria contained in the limited public interest override in the *Canadian Access to Information Act 1985* s 20 which refers to the public interest "as it relates to public health, public safety or protection of the environment".

61 *Contracting Out report*, at para 5.120.

62 For example, matters such as staffing levels that will be maintained to provide the contracted service.

63 (1987) 13 ALD 588.

64 *Ibid* at 593 – 594.

It should, however, be noted that the notion that a trade secret must be of a technical character was firmly rejected by the Federal Court in *Searle Australia Pty Ltd v Public Interest Advocacy Centre*.[65] The Court stressed that the indicia in *Re Organon* were merely guides.

An alternative approach is to use as a starting point the statement in *Lansing Linde Ltd v Kerr*,[66] which was expressly approved by the Federal Court in *Searle*:[67] The purport of the statement is that a trade secret has three characteristics:

- it must be information used in a trade or business;
- the owner must limit the dissemination of it or at least not encourage or permit widespread publication; and
- it must be information, which if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret.

In the case of s 45, the majority focused on the fact that the common law formulation contains a requirement that information should be inherently confidential. In their view, this was sufficient to ensure that the mere marking of a document as confidential would be insufficient to ensure its exemption. However, as pointed out above, the requirement that information should be inherently confidential simply requires that as well as being to some extent secret, it must be identified with sufficient specificity[68] and must not be of a "trivial" nature.[69] What is arguably more important is the requirement that information should have been imparted in circumstances which give rise to a duty to treat it as confidential. The critical problem in this regard is how to restrict the giving of an assurance of confidentiality in a situation where it is not appropriate, while still protecting the legitimate expectations of third parties.

One possible solution lies in the imposition of rules that set out clearly the circumstances in which it is appropriate to give undertakings to treat information as confidential. Such rules should also require that third parties, as far as possible, be informed as to the agency's obligations concerning confidentiality and access prior to imparting any information that they may wish to be treated as confidential. Fairness requires that third parties be made aware that the FOI Act does not contain an all-encompassing commercial-in-confidence exemption and that there are circumstances in which agencies will not be in a position to give binding undertakings to treat information as confidential.

In the absence of such rules there is a real danger that agencies and businesses will work together to ensure that any information received by an agency is received in circumstances which create a duty to treat it is as confidential. Such information will then be

65 (1992) 36 FCR 111 at 117.
66 [1991] 1 All ER 418 at 425.
67 (1992) 36 FCR 111 at 117.
68 *O'Brien v Komesaroff* (1982) 15 CLR 310 at 327–328.
69 *Coco v Clark (Engineers) Ltd* [1969] 2 RPC 41 at 48.

eligible for exemption under s 45, provided that it meets the very minimal requirements of being information which can be identified with specificity, is not generally known and its disclosure falls outside the range of uses for which it was provided. The majority of the ARC is correct in stating that an agency cannot avoid the operation of the FOI Act simply by promising to invoke s 45.[70] This, however, ignores the fact that the existing wording of s 45 is insufficient to preclude agencies from structuring their dealings with contractors in such a way as to engineer the requirements for exemption.

The minority's recommendation that s 45 should be amended to include a proviso that documents should not be exempt if it is in the public interest for them to be disclosed reduces the potential for abuse. It is, however, suggested that any guidelines should contain a specific requirement for agencies to notify contractors of the existence of the public interest proviso before giving any undertaking to treat information as confidential. Furthermore, in assessing the question of public interest in relation to information that is subject to undertakings given prior to amendment of the legislation, it would be appropriate for decision-makers to attach weight to a third party's legitimate expectation that its information would be treated as confidential.

One further issue that arises in relation to s 45 is its relationship to the recommended deeming provision. The majority implicitly acknowledged that this relationship would be problematic. Their suggested solution was that the deeming provision should be drafted in such a way that it could not be undermined by contractors and agencies agreeing to treat documents as confidential.[71] On the other hand, as the minority pointed out, the inclusion of a public interest test would have the advantage of clarifying the interrelationship between s 45 and the deeming provision.[72]

Guidelines

As noted by the Council, the ACT Government has released draft "Principles and Guidelines for the Treatment of Commercial Information".[73] Guidelines potentially have a very important role to play, given the general level of misunderstanding which flows from the inherent ambiguity of terms such as "commercial confidentiality" and "commercial in confidence". They can also play an invaluable role in ensuring fairness. While it may be appropriate in some circumstances for the private interests of contractors to give way to the broader public interest in ensuring government accountability, fairness requires that contractors have a clear understanding of the rules that govern disclosure before any information is provided by them.

70 *Contracting Out report*, at para 5.71.
71 *Ibid* at para 5.74.
72 *Ibid* at para 5.119.
73 *Ibid* at para 5.107.

It is unrealistic to expect guidelines to make up for inherent deficiencies in the drafting of individual exemption provisions. If it is desirable for public interest considerations to be assessed in deciding whether or not to treat information as confidential, this should be spelt out in the FOI Act itself. Any attempt to produce guidelines which endorse, and encourage, disclosure of information that is not clearly exempt under the FOI Act is fraught with difficulty given that officers will not be protected against liability unless they believe that disclosure is required *under the Act*.[74] On the other hand, to the extent that exemptions contain tests of public interest or reasonableness, guidelines can also serve a very useful purpose in clarifying the sorts of factors that are relevant in assessing competing public interests and in spelling out the types of documents that would normally be accessible.[75]

CONCLUSION

The potential for abuse of commercial in confidence claims in the context of contracting out is a matter of concern, not only because of its potential to undermine accountability (both generally and in the specific context of outsourced functions), but also because the effectiveness of the outsourcing process itself arguably requires greater rather than less transparency. Agencies need to share information if they are to be able to bargain effectively, whilst losing bidders also require adequate information to enable them to compete effectively in any subsequent tendering.[76] Furthermore, if it is accepted that contracting out is intended to make government more accountable by separating its role as purchaser from that of service provider, it is important to ensure that any information about adverse performance or financial incompetence cannot be hidden from scrutiny.

The ARC Report serves a useful role in re-emphasising the twin principles, that rights of access to information relating to government services should not be lost or diminished because of the contracting out process, and that agencies, rather than contractors, should bear responsibility for ensuring that rights of access under the FOI Act are not lost or diminished as a result of contracting out. It is, however, doubtful whether the recommendations contained in Chapter 5 of the ARC Report on "Access to Information" will be sufficient in themselves to ensure that the necessary level of transparency in fact occurs.

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74 See FOI Act, ss 91, 92.

75 The Industry Commission in its report, *Competitive Tendering and Contracting by Public Sector Agencies* (1996), highlighted the types of things it felt should be released in any circumstance. In the case of contracts and competitive tendering these included the specifications for the service, the criteria for the tender evaluation, and the criteria for the measurement of the performance of the service provider against those criteria: see Recommendation No 1.1 at 95.

76 M Aronson, "A Public Lawyer's Response to Privatisation and Outsourcing" in M Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 59.

On the other hand, the adoption of the recommendations suggested by the minority would go considerably further in that direction, particularly if the FOI Act were to be supplemented by a set of clear and unambiguous guidelines. As noted in a recent UK White paper:

> [O]peness should be the guiding principle where statutory or other public functions are being performed, and in the contractual arrangements of public authorities. ... Commercial confidentiality must not be used as a cloak to deny the public's right to know.[77]

77 *Your Right to Know: The Government's Proposals for a Freedom of Information Act*, Cmnd 3818 (HMSO, 1997) at 18.