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THE DEFENCE FORCE DISCIPLINE ACT; DISCIPLINARY DREAM OR ADMINISTRATIVE NIGHTMARE[1]

Brigadier William D. Rolfe

The general subject of this paper is the Defence Force Discipline Act 1982, proclaimed in mid 1985, and its impact on formal disciplinary measures. I intend to make a number of introductory remarks about military discipline in its social context, as that subject is at the root of concerns over formal disciplinary provisions, and to then explain some of the provisions of the Act. That should create a context for discussion of several High Court cases and the possibilities for management of the disciplinary system that flow from them. The particular cases are: *Re Tracey; Exparte Ryan* (1989) 63 ALJR 250; *McWaters v Day* (1989) CLR 289; *Re Nolan; Exparte Young* (1989) 172 CLR 460

It is important to look to social context and to the substance of the subject of discipline. There is no doubt that a matrix of factors including technology, social environment, and political and economic forces, impact on the military organization and influences internal and external perceptions of its role, structure, place in society and its needs as a professional organization. This has been no more evident in our history than in the present day. It is not necessary, and

1 A paper presented at a meeting of the Institute in Canberra on 4 March 1992. Brigadier Rolfe is Director-General, Defence Force Legal Services.

perhaps not even possible, to place the influence of such factors in any order of precedence or to delineate any particular time or period as more important than another. However, for my part I see the conclusion of our involvement in the socially divisive Vietnam war as a convenient point at which to mark the commencement of a period of quite dramatic change for the Defence Force.

Australian troop withdrawal from Vietnam ended a period of over 30 years during which some element of our forces had always been deployed on active service. I do not disregard the recent deployment to the Gulf war of our ships or our involvement in multinational or United Nations peacekeeping operations but I draw a distinction between them and the combat operations conducted throughout World War II, Korea, Borneo, Malaya and Vietnam. From the Vietnam era which saw a Task Force of about 8000 personnel (at the height of our involvement) employed on 12 month tours of duty, the percentage of personnel in the forces with combat/active service experience has declined to miniscule proportions. For the last 20 years our forces have been employed in what would once have been termed garrison duties, well removed from the active service which provides a part of the raison d'etre for discipline.

At about the time of the withdrawal from Vietnam I recall, in general terms, a Fabian Society paper published by Mr Barnard, Minister for Defence in the Whitlam government, wherein he referred to a certain tension between the military and Labor governments but prophesied the removal of the last vestiges of the military caste structure and the convergence of civilian and military styles of management and civilian and military skills. It seems to me that he paid insufficient regard to the strength of self supporting military conservatism (not always a bad thing) but in many ways his views were remarkably prophetic. Perhaps the first significant step in the process he envisaged was the defence reorganization based on the Tange Report, which saw the development of a defence bureaucracy combining the civil and military elements of the Defence Department, and which laid the basis for command of the Defence Force by the Chief of the Defence Force (CDF) and the joint administration of the Defence Force by the Secretary of the Department and the CDF. In more recent times, and continuing at the moment, we see the natural development of that process in the Defence Regional Support Review which combines core departmental and single service functions in single Defence Centres in each State.

During the same period we have seen the development of a relatively low profile Armed Forces Federation which, in traditional terms, cuts across the relationship between leaders at all levels and the troops. That event perhaps refocussed and even to some extent revitalized the position of traditional defence lobby groups such as the RSL, but at the same time drew a distinction between the military forces of yesteryear and the defence forces of the modern era. That distinction waxes and wanes: the emotive Sydney march of Vietnam veterans evokes memories of 'our boys' and their service to country, at least for the older generation, while the very existence of a Defence Force Remuneration Tribunal seems to represent the industrial focus of the present force. The Dibb Report refocussed strategy and led to reassessments of role and functions. The Wrigley Report raised the possibility of an almost European style defence – perhaps along the lines of the Swedish total defence model. The Force Structure Review has led to quite dramatic changes in manning and the first intake of the Ready Reserve (one year full time, four years part-time) is now in training.

In all these activities there is constant pressure on resources, and underlying that factor, as always, is the question of cost. New ways must be found to extend the capacity of resources limited by cost to reduce the cost. There is constant examination of 'contracting out', and greater reliance on existing infrastructure, and competing questions of whether the contractor will be there when the bullets fly or whether the infrastructure can cope in a variety of circumstances. Whatever the merit of the arguments the inexorable fact is that there is a discernible

convergence of military and civilian management to achieve the defence aim. It is likely that this will increase. There is and will be increasing interchange of skills, work practices and management styles. Issues of equal opportunity employment, privacy, occupational health and safety, and conditions of employment are becoming matters of 'common' parlance between civilians and servicepersons. That is not to say that they have never been issues for the military, but in yesteryear they were raised in an entirely military context.

So where has this convergence left the warrior class, which despite all remains a focal point of the defence aim. At this point we move to the other end of the continuum and look to the impact of this evolution on our military force. It is trite that we are all products of our environment.

It is a traditional and basic tenet that discipline in all its forms is at the heart of the effective fighting force. Discipline is an essential element of combat power, that is the total means of destructive force that a military organization can bring to bear on an opponent. The most modern military technology in the hands of an undisciplined force will not guarantee the decisive application of combat power. So what is discipline?

Our British heritage seems to have promoted two general concerns on the subject. First, parliamentary control of the military beast to ensure the protection of the public and its institutions and secondly, promotion of the efficiency and effectiveness of the force. Unlike many third world countries where militarism continues as a reaction to weakness in civil institutions our history has firmly established control of the military by government: accordingly I put to one side the historical concern to maintain discipline for the protection of the public and concentrate on the concern to promote efficiency and effectiveness. There is much mythology about Australian military discipline from the two world wars and we tend naturally to cling to the heroic aspects: 'mateship' is a central theme, along with disregard for rules and regulations. There is nothing wrong in this, but a clinical examination of the subject raises a myriad of factors which reveals the naivete of reliance on the heroic aspects.

The Army Handbook on Leadership, mirrored I am certain in publications in our sister Services, introduces the subject by stating that the existence of discipline ensures a readiness to obey willingly and to take appropriate and intelligent action. It proposes that discipline training is mental and moral training towards voluntary and swift compliance with a code of behaviour, and that the crux of the issue of discipline is the conscience of the person who conforms. Discipline is a matter of suasion rather than force, and the imposed discipline of recruit training becomes, with sound leadership, intelligent self discipline which will sustain persons in adversity, promote intelligent obedience, promote respect among peers subordinates and superiors, and promote cohesion among individuals - the whole leading to the capacity to apply combat power effectively. The regimentation of persons, a popular perception of military discipline, is far too simplistic a manner of description of this process.

The process places a heavy burden on leadership, but an equally serious obligation on individuals to conform to standards that will promote the effectiveness of the group.

At times the leadership will fail, or individuals will resist the process. A range of measures are available to continue efforts at persuasion, preventative measures such as fault checking, counselling, or formal warnings but where these measures fail, there exists the formal disciplinary system. But even in the final resort to punishment, essential aspects of discipline must be applied. Deputy Judge Advocate Robert Carey CB writing on military law and discipline in 1877 in London had this to say:

> 'Discipline and efficiency can only be secured by a careful study of individual character, by attention to the most minute details of all that concerns the health, comfort or

> necessities of soldiers, by impartiality, by experience, and by a determination to enforce obedience to all the rules and regulations of the service. To a certain extent this can only be attained by punishment, and at times by severity. It is however not only necessary to know what punishment can be legally awarded but also to discriminate and to decide what punishment ought to be awarded, when punishment can be dispensed with, or when it must be resorted to, and when the object desired to be attained will be best secured by a slight or severe award.'

In a more succinct statement of some these issues, writing nearly one hundred years later in the American Criminal Law Review, General William C. Westmoreland said:

> 'A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline.'

At first glance it seems that these lessons of history were considered in the development of the Defence Force Discipline Act 1982 and that policy framers and the draftsman took note of the 'convergence' theory articulated by Mr Barnard.

The Discipline Act had its genesis in the 1946 Reed Committee Report to the Minister for the Army upon the trial and punishment of offences against military law. The Report found overwhelming evidence that the form of military law was unsatisfactory and confusing and recommended that all offences, punishments and all matters relating to the trial and punishment of offences against military law should be in a separate code incorporating provisions that are applicable in both peace and war. In 1949 an interdepartmental committee was set up to review Defence legislation, including disciplinary legislation. During the next ten years numerous separate Service disciplinary Bills were prepared for presentation to Parliament, 11 in all I believe, but none were enacted. In this period and in the ensuing decade, considerable reliance was placed on the Reports of the Select Committees for the British House of Commons but then in 1965, on a Navy initiative, a decision was taken to prepare a 'uniform disciplinary code' for the three Services. Over the next seven or so years a Working Party under the chairmanship of a representative of the Attorney-General's Department developed comprehensive proposals against a backdrop of public disinterest, inherent military conservatism and competing Service positions. In 1973 the Working Party received new impetus with the receipt of Ministerial Directives as to matters to be incorporated in the disciplinary code. Included were:

(a) right to representation by counsel;

(b) right to legal advice;

(c) right to have a transcript of proceedings;

(d) suspension of sentences;

(e) inclusion of sentencing criteria;

(f) incorporation of rights under the Human Rights Bill;

(g) the need to keep Service encroachment on personal liberty and rights closely equated to the ordinary civil law.

A report and draft legislation was presented to the Minister in late 1973 and tabled in 1974. Armed with the resulting comments, the Working Party presented a second draft in 1975. In the late 1970's the Defence Minister in a new government indicated that he was concerned about needless technicalities, and excessively generous provisions relating to legal representations. He took the view that simple disciplinary transgressions should be dealt with summarily and that there should be limited scope to involve legal procedure. A compromise was settled upon and the Defence Force Discipline Bill was enacted in 1982. An interesting side issue at the time was the contemplation of the Criminal Investigations Bill. It was envisaged that the Bill would shortly be enacted but to ensure the modernity of

the Discipline Act, many of the comprehensive investigatory provisions were incorporated. It is history that agreement could not be reached on the Investigations Bill and it lapsed - but many provisions were included in the Discipline Act.

The result of this 30 odd year gestation was not a 'code' of service discipline, despite the existence of several effective State codes of criminal law, nor is the legislation entirely uniform for the three Services, the latter requirement having foundered on the rock of naval requirements for summary discipline. The legislation has been described as:

> '... new and contemporary legislation, capable of meeting the perceived needs of the Defence Force over coming decades, subjecting all Australian Defence Force personnel to one readily identified and cohesive body of law which will provide for what it is realistic to call common offences and evidentiary rules, common requirements as to the composition of courts martial and the procedures observed therein, a common system of review of all trials, and so far as is feasible to adopt them, common forms of administrative practices for handling disciplinary matters throughout the 3 Services.'

Without more the development of homogenous Australian legislation for the three Services was a significant advance. For the rest the Discipline Act has been described as 'evolutionary' rather than 'revolutionary'. The proponents of the Bill contended that the change was not change for the sake of change, and that the driving motives were not those of reforming zealots. The intentions had been to:

> 'replace the existing systems [which were complex] with a sound new system which will match the perceived national, political, social and juridical aspirations of the day, and of ... tomorrow.'

It is not inappropriate to note that this global intention made no specific mention of 'military' aspirations. A generous interpretation would indicate that military needs are naturally incorporated in the scope of such a broad aim and that it marked a milestone in the convergence of military and civilian practices. A less generous approach, perhaps in danger of being described as a traditional military approach, is that insufficient account was taken of peculiarly military needs and circumstances and that the result was not so much a convergence as a subordination of traditional military requirements to civilian processes.

At this point a thumb nail sketch of the Act at time of proclamation is necessary and instructive. You will forgive me if, where it is necessary, I employ Army terms as descriptors that will apply in equivalent circumstances in the other two Services.

Broadly speaking there are three levels in the hierarchy of disciplinary tribunals: the summary level, the courts martial level, and the courts martial appeal level.

The explanatory notes indicate sub-levels in those levels of tribunals. In order to place their respective functions in perspectice, I provide you with the following figures:

Number of trials in 1990

Navy

Subordinate Summary Authorities	2139
Commanding Officers	1132
Superior Summary Authorities	Nil
Defence Force Magistrate	8
Restricted Court Martial	3
General Court Martial	2

Army

Subordinate Summary Authorities	2092
Commanding Officers	1388
Superior Summary Authorities	1
Defence Force Magistrate	53
Restricted Court Martial	19
General Court Martial	2

Air Force

Subordinate Summary Authorities	335
Commanding Officers	140
Superior Summary Authorities	1
Defence Force Magistrate	3
Restricted Court Martial	1
General Court Martial	1

When the figures from the three Services are combined they give figures of, at the summary level 7228 trials, and at the court martial level, 92 trials. In 1990 3 appeals from court martial proceedings were conducted.

The broad figures from the three Services also reveal that there are different policies at play in the approach to disciplinary questions, in some cases driven by different circumstances, but I disregard that matter for the purpose of this paper. They indicate that an overwhelming majority of offences are dealt with at a sub unit or unit level. I am also able to inform you that the vast majority of these offences relate to minor disciplinary infractions (a fact borne out by the Independent Review of Defence Force Discipline - of which more later) and that over 90 per cent of such trials involve guilty pleas.

It is clear that the Commanding Officer is at the centre of summary proceedings. A subordinate summary authority exercises his jurisdiction in respect of offences notified to him/her by the Commanding Officer. It is open to the Commanding Officer to refer matters to a Superior Summary Authority but it is clear that such a procedure has fallen into disuse. A Superior Summary Authority may also be a Convening Authority charged with the responsibility of Convening Courts Martial in respect of matters referred to him by a Commanding Officer - this is one of a number of factors which has led to the decline in exercise of summary jurisdiction by that superior summary authority.

The proceedings conducted by summary authorities are 'trials' involving the application of rules of procedure as established by the Judge Advocate General (a statutory appointment under the Act), application of the rules of evidence in force in the Jervis Bay Territory, a record of the proceedings, a prosecutor and, if requested, a defending officer. Effectively, summary proceedings reflect the formal proceedings of a court martial. The Act draws a clear distinction between the administrative decisions made preliminary to a summary disciplinary proceeding and the summary 'trial' of the offence. A commanding Officer has jurisdiction to 'deal with' any charge against any person being a defence member or a defence civilian - the latter being a civilian who accompanies the Defence Force and agrees to subjection to the Act - but has a limited jurisdiction to 'try' offences. If the offender is two or more ranks junior and the offence is not prescribed, the matter falls within his trial jurisdiction. I have set out sections 104, 107 and 110 of the Act under the heading 'jurisdiction of Commanding Officer' in note 2 of the explanatory notes in the hope that the relevant sections will provide an insight that my brief words cannot.

I turn now to the offences.

The jurisdiction of a Commanding Officer is to try 'service offences' that are 'not prescribed'. 'Service offence' means an offence against the Act or regulations, or an ancillary offence, committed when the person was a defence member or defence civilian. Under the Act an offence is 'ancillary' if it contravenes sections 6, 7, 7A and 86(1) of the Crimes Act 1914 (Commonwealth) - dealing respectively with, in broad terms, accessory after the fact, attempts, inciting or urging the commission of an offence, and conspiracy.

Service offences are set out in sections 15 to 60 and in s.62 of the Act. The offences range from purely military offences such as mutiny (s.20) desertion (s.22) absence without leave (s.24) to offences clearly recognised in the ordinary criminal law, such as assault (s.33 and see also assault on a superior officer at s.25, assault on a guard at s.30 and assault on an inferior at s.34) stealing and receiving at s.47 and false statement in relation to application for a benefit at s.56. Section 61 incorporates as a service offence acts or

omissions which, if they took place in the Jervis Bay Territory, would constitute 'Territory Offences'. We now approach, at last, the crux of the concern of this paper. Territory offence is defined in s.3(1) and means an offence against a law of the Commonwealth in force in the Jervis Bay Territory (other than the Discipline Act), an offence punishable under the Crimes Act 1900 (NSW) in its application to the Jervis Bay Territory as amended by Ordinances in force in that Territory, and an offence against the Police Offences Act 1930 of the Australian Capital Territory in its application to the Jervis Bay Territory.

In relation to a Commanding Officer, recall that he may 'deal with' any offence, but his jurisdiction to 'try' is limited by reference to prescribed offences. The prescribed offences include treason, murder, manslaughter, bigamy (yes bigamy) and certain sexual offences, offences ancillary to those offences, and service offences in respect of which a person is liable to more than two years imprisonment (other than an offence against s.43 (intentional destruction of service property), s.48 (false evidence) and certain other offences where circumstances may allow that they be dealt with as relatively minor matters. Particular other offences are also prescribed, they relating to endangering morale, dangerous behaviour, loss or hazard to a service ship and unauthorized disclosure of information. The latter are particular offences which Service authorities considered warranted trial at a higher level. The effect of the definition of 'prescribed offence' in s.104 is to remove serious criminal offences and the vast majority of Territory offences from the trial jurisdiction of the Commanding Officer - particularly most of the offences under the Crimes Act 1900 (NSW) as applied in the Jervis Bay Territory, and offences under the Commonwealth Crimes Act. Nevertheless he is able to 'deal with' such offences and refer them to a Convening Authority for decision as to their trial by Defence Force Magistrate or Court Martial.

There is a further general limitation to jurisdiction contained in s.63 of the Act. This limitation has already been referred to as it is also reflected in the definition of prescribed offence in s.104. Section 63 is to the effect that proceedings for offences caught by s.61 NSW Crimes Act in its application to the Jervis Bay Territory shall not be instituted in Australia without the consent of the Director of Public Prosecutions (necessarily the Commonwealth Director of Public Prosecutions, despite the following reference to State offences) where the relevant offence is treason, murder, manslaughter or bigamy, or certain of the serious sexual offences (ss.92A-E of the NSW Crimes Act in its application to the Jervis Bay Territory - being serious sexual assaults, sexual intercourse without consent and sexual intercourse with young persons).

The result of this brief survey is that a wide range of offences under the Discipline Act, which include offences such as assault and stealing and receiving, together with offences under the NSW Crimes Act in its application to the Jervis Bay Territory and offences under the Crimes Act (Commonwealth) - and other Commonwealth legislation creating offences, are caught by the disciplinary offence net. Commanding Officers do not have jurisdiction to 'try' many of these offences but may refer them to a Convening Authority for his consideration as to convening a court martial or referring the offences to a Defence Force Magistrate.

It will be readily apparent to you, as it was to Service authorities in 1985, that there were likely to be problems with the operation of this expanded disciplinary jurisdiction and the overlap of civil and military law. It is pertinent to point out that s.190 of the Act purported to deal with the jurisdiction of civil courts in relation to offences. In broad terms the section sought to remove the possibility of double jeopardy - perhaps a sound step in light of the development of a comprehensive, modern disciplinary system which appeared to all intents and purposes to operate parallel to the criminal justice system of the States and the Commonwealth.

The problem was not new as courts in the United States had dealt with the issues of interaction of the military and civilian

jurisdictions for some time, particularly in the landmark cases O'Callahan v Parker (1969) 395 US 258 and Relford v Commandant United States Disciplinary Barracks Ft Leavenworth (1971) 401 US 355. When the possibility of jurisdictional problems arose between the DPP (Commonwealth) and the military it was to these cases that attention was directed. In the earlier case the United States Supeme Court had held that military jurisdiction under the Uniform Code of Military justice depended upon the 'service connection' of the offence. The latter case pointed to factors which were relevant in deciding whether that service connection existed. Not unusually they became known as the 'Relford factors'.

These factors formed the basis of guidelines arrived at in 1986 by consultation between military authorities and the Office of the Commonwealth DPP. The 'mutual' arrangement was considered preferable because doubt was expressed as to whether the Services would fall within the category of persons to whom guidelines could be furnished or directed under the DPP Act. In very broad terms the guidelines:

(a) recognized a legitimate role for military law in complementing the ordinary criminal law;

(b) generally defined the military interest as offences created by Part III of the Discipline Act (sections 15-60);

(c) stated the DPP's interest in offences constituting an identifiable breach of the ordinary law, most obviously the offences incorporated by s.61;

(d) set out criteria to be applied in assessing a service connection which would justify the application of military jurisdiction (a development of the Relford factors); and

(e) established a process of consultation.

The underlying concept in the guidelines was phrased in this manner:

> 'The basic question to ask is whether there is any reason why the exercise of jurisdiction by a service tribunal would not be appropriate rather than to begin from some underlying assumption that civil jurisdiction should be exercised unless inappropriate.'

These guidelines appeared to operate quite satisfactorily for several years although minor and conflicting warning signals on the operation of the disciplinary system as a whole were being sounded. It became apparent to Service authorities that guidelines similar to those arranged with the DPP should be in place in relation to the criminal laws of the States. In fact the likelihood of a closer relationship with State jurisdictions, rather than the Commonwealth, had been intimated in the Commonwealth guidelines. It remains a relatively innocuous but unusual provision that the Commonwealth DPP is the authority to be approached should Service authorities seek to deal in disciplinary fashion (in Australia) with offences of murder, manslaughter, bigamy and certain sexual offences. Clearly such offences against the person are the subject of State laws and the appropriate officer would be the relevant State DPP. Service efforts to make arrangements in respect of State laws promoted awareness of the overlap in criminal and military laws.

On a different tack an article prepared by Dr R.A. Brown, then a Professor of Law at the University of Tasmania and an officer of the Army Reserve in the Legal Corps, called in question the constitutionality of service tribunals under the Act (see 59 ALJ 319). He argued that service tribunals exercised the judicial power of the Commonwealth and violated s.72 of the Constitution. The proposition has now clearly been denied by the High Court but it created some consternation.

At about the same time the case of Solorio v United States (1987) 97 Law. Ed. (2d) 364 quite changed the direction of the military jurisdiction issue in overturning the two cases earlier referred to. As was subsequently pointed out in the High Court of Australia the United States Supreme Court concluded that it was a sufficient foundation for the jurisdiction of courts martial that the person charged was a member of the armed forces at the

time of the offence charged (see Re Tracey: Exparte Ryan 166 CLR at p 545). The Relford factors on which our guidelines were based were denied, the Supreme Court majority pointing to the confusion created by the complexity of the service connection requirement and the considerable time and energy expended in litigating the issue.

A provision in the Discipline Act itself, providing for the appointment of an independent Defence Force Discipline Legislation Board of Review after three years operation of the Act, next placed formal disciplinary measures under a spotlight, at least within the Services. After a quite searching inquiry the Board, headed by retired Federal and ACT Supreme Court Judge Mr Xavier Connor, QC, concluded that the Act was operating 'reasonably satisfactorily' and was 'generally accepted' within the Services but that it was important that some changes be made. The Board identified some 40 odd issues relating to offences, punishments, and procedures. In particular, the Board considered it quite inappropriate that minor breaches of discipline should be equated with offences, be dealt with by elaborate legal procedures, and be finally entered on a conduct record in a way that may permanently stain the members character both in service and civil life. The Board recommended the creation of a Discipline Officer empowered to deal with minor infringements of about seven offences. The infringements would not constitute offences, and the Discipline officer would not be a service tribunal.

In relation to proceedings before the summary tribunals the Board considered it odd, 'and bordering on the bizarre', to impose on the service relationship (commanders and their subordinates) a set of legal rules designed to govern proceedings before judges and magistrates where accused persons are complete strangers to them and the only relationship is the temporary one arising out of the trial itself (see paragraph 3.12 of the Report of the Board). The Board recommended that the rules of evidence not be applied to summary proceedings, but that principles of natural justice be observed and that the best evidence available be led in such proceedings.

The recommendations of the Board constitute a step back from what seemed a headlong rush to constitute 'courts' at every level.

Against this general backdrop the first of several cases on the issue of military/civil jursidiction was raised in the High Court.

In Re Tracey Staff Sergeant Ryan was charged with absence without leave and with making a false entry in a service document. He raised the constitutional argument foreshadowed by Professor Brown and applied to the High Court for a writ prohibiting the Defence Force Magistrate from proceeding to try the charges. In one of the subsequent cases, Re Nolan, Chief Justice Mason and Dawson J. described the Re Tracey judgements thus:

> 'Re Tracey presented the Magistrate with a very considerable problem. There was no majority for any one of the three opinions expressed in the judgements; indeed there was a majority rejection at least by way of preferred view, for each of the three opinions.'

Chief Justice Mason and Justices Wilson and Dawson took what might be called the 'service status' view (by reference to the United States Supreme court decision in Solorio on which they implicitly relied) namely that it is open to Parliament to provide that any conduct that constitutes a civil offence also constitutes a service offence if committed by a defence member. The Parliament's view will prevail so long as the proscription of that conduct is relevant to the maintenance of good order and discipline. Justices Brennan and Toohey took a more restrictive view, akin to that of earlier United States cases namely that military proceedings may be brought against a member if, but only if, those proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing discipline. Justice Deane restricted the issue further, holding that the comprehensive jurisdiction purportedly conferred upon service tribunals is valid

in relation to offences in Australia in time of peace only to the extent that it deals with exclusively disciplinary offences. Justice Gaudron's position was not dissimilar. It is also important that the judgements clearly struck down ss.190(3) and (5) of the Act, which I have earlier referred to generally as the 'double jeopardy' provision.

In implementing the Tracey judgement in practice the military was obliged to rely on what Professor Brown, ruefully and critically examining the decision (13 Crim L.J. 263) referred to as the 'highest common factor', that being the joint judgement of Justices Brennan and Toohey.

In McWaters v Day (1989) 168 CLR 289, Sergeant Day was charged by civil police with a drink driving offence under the Queensland Traffic Act in relation to an accident that occurred on a road in Enoggera Barracks. Day sought prohibition on the ground that the Traffic Act had no application because s.40(2) of the Discipline Act (use of vehicles) entirely covered his situation. Accordingly there was an inconsistency and the Commonwealth law should prevail. The High Court held that there was no inconsistency as the Discipline Act is supplementary to and not exclusive of the criminal law. It does not deal with the same subject matter or serve the same purposes as the ordinary criminal law.

In Re Nolan; Ex Parte Young (1991) 172 CLR 460 Sergeant Young, an Army pay representative, was charged with two offences in respect of each of seven documents. The offences involved falsification of a service document under s.55(1)(a) of the Discipline Act and using a false instrument under s.61 of the Discipline Act, picking up s.135C(2) of the Crimes Act 1900 (NSW) in its application to the ACT (this case arising prior to amendment of the Discipline Act which now applies the Crimes Act 1900 NSW in its application to the Jervis Bay Territory).

In the intervening period, since Tracey's case, Mr Justice Wilson had retired to be replaced by Mr Justice McHugh. In the event Chief Justice Mason and Justice Dawson found no reason to resile from the view they expressed in Re Tracey. Justices Brennan and Toohey adopted the same line that they had taken in Re Tracey, although it could be said that some substance was added to the bones of principle that they then enunciated insofar as they clearly indicated that it could reasonably be said that the maintenance and enforcement of service discipline would be served by proceeding on all charges against Young before a service tribunal. The charges in this case, you will recall, included s.135C of the Crimes Act 1900 NSW in its application in the ACT. In Re Tracey they had suggested that in assessing whether the substantial purpose of prosecution is reasonably able to be regarded as for the maintenance and enforcement of service discipline, factors of convenience, accessibility to, and appropriateness of, civilian courts loomed large. The factors of convenience and accessibility would seem, in peacetime, to weigh in favour of civilian courts so that the issue of appropriateness must have taken on added significance. The significance is perhaps found in their words:

> 'Perhaps Sergeant Young's alleged service offences might have been charged as offences under the law of South Australia ... but, however that may be, it would usually be prejudicial to service discipline to exempt an offender from service punishment when the offence consists in the malperformance of his service duties. Service discipline is not merely punishment for wrongdoing. It embraces the maintenance of standards and morale in the service community of which the offender is a member, the preservation of respect for and the habit of obedience to lawful service authority and the enhancing of efficiency in the performance of service functions.'

Mr Justice Deane maintained his firm position enunciated in Re Tracey and took the view that it was an imperative judicial necessity that he adhere to that view, it being impossible to identify in the earlier decision any general principle accepted by the majority as justifying the actual decision. Justice Gaudron was in

essential agreement with Justice Deane and Justice McHugh adopted the reasons expressed by Justice Deane in Re Tracey.

What is the effect of the matters I have raised with you: what is the position of the military? As always there is good news and bad news. In my opinion, and I stress that the following comments are my personal views, the advantage flowing from the High Court cases is that the military is in a position to conduct its disciplinary business in pretty much the same way as it has done since inception of the Discipline Act. Judgements will have to be made as to whether the disciplinary jurisdiction is appropriate, but that situation has applied since the Act was implemented. There is some express support for the exercise of disciplinary jurisdiction, even where substantially similar civilian offences are involved, as long as it can reasonably be regarded as substantially serving the purpose of maintaining or enforcing discipline. So far as the recommendations of the Defence Discipline Legislation Board of Review are concerned there is a quite firm indication that summary proceedings should be less technical and more in keeping with the ethos promoted in service life. The proposal for a Discipline Officer is reminiscent of a proposal of the Discipline Working Party in 1973 (subsequently discarded) when the Working Party stated:

> '... The basic reason for the introduction of a two tier summary system is our reluctance to extend the features of a criminal trial to minor breaches of discipline which should not be classified as crimes and which, in the industrial setting would be regarded as management problems.'

This proposal, along with the recommendation to eliminate application of the rules of evidence of the ACT (to be replaced with rules of natural justice and the best evidence available), will likely have the dual effect of reducing the administrative burden that has resulted from the conduct of essentially criminal trials at unit level and will tend to realign some of the Service positions on summary proceedings with that of traditional allies such as Canada, the United States, Great Britain and New Zealand. Broadly speaking these countries rely on what the United States term 'non judicial' procedures and punishments to deal with day to day minor disciplinary infractions.

These positive results are consistent with the military requirement to have in place a disciplinary system which operates effectively in peace or on war service and at home or overseas. The requirement for discipline has not ever been seriously challenged but questions remain about the manner of its maintenance. Our traditional western allies have also wrestled with this issue. The Solorio Case in the United States resolved the issue in favour of military tribunals. In some European countries the issue has been resolved in favour of the civil courts although many other social factors are at play in those countries. In the case of Germany, for example, there was real concern at the possibility of resurgence of an elitist military and stringent steps were taken to eliminate what were seen as privileges and elitist traditions. The same issue has not been raised to that extent in this country although you may recall that I earlier referred you to Mr Lance Barnard's prophecy of the elimination of the last vestiges of the military caste structure.

That brief digression leads me to the bad news. As Mr Justice Deane points out in Nolan's Case, there is no identifiable general line of reasoning in Tracey's case in relation to service-related offences enjoying the support of a majority of the seven Justices. The present break up of opinion is two, two, three with the 'highest common factor' being based on the judgement of Justices Brennan and Toohey, namely whether proceeding on charges of service offences can reasonably be regarded as serving the purpose of maintaining and enforcing service discipline. That highest common factor appears to be a recipe for further litigation, as was demonstrated in the range of cases in the United States following Relford. Chief Justice Rehnquist in delivering the majority decision of the Supreme Court in Solorio said:

> 'Since O'Callahan and Relford, military courts have identified numerous categories of offences

> requiring specialized analysis of the service connection requirement. For example, the courts have highlighted subtle distinctions among offences committed on a military base, offences committed off base, offences arising from events occurring both on and off a base, and offences committed on or near the boundaries of a base. Much time and energy has also been expended in litigation over other jurisdictional factors, such as the status of the victim of the crime, and the results are difficult to reconcile.'

In addition to that possibility a dispute of sorts has arisen with the Office of the Director of Public Prosecutions over the exercise of disciplinary jurisdiction where the disciplinary offence reflects an offence against the ordinary criminal law. It seems to be the position of the DPP that in every situation where such an overlap arises, the relevant DPP (Commonwealth or State) should be approached for a decision as to whether the disciplinary jurisdiction can be exercised. This position appears to me to reflect something of the view of, for example, Mr Justice Deane, who would limit disciplinary jurisdiction to purely disciplinary infractions, but at the same time concedes that disciplinary tribunals may exercise jurisdiction over disciplinary offences which overlap the ordinary criminal law, if the DPP agrees to the exercise.

In my view that position is contrary to the Discipline Act and out of step with the 'highest common factor' to be gleaned from Tracey's Case and Nolan's case. In Tracey's Case, after reciting the test I have now often referred to, Justices Brennan and Toohey stated that:

> 'In the application of this test, much depends on the facts of the case and the outcome may depend upon matters of impression and degree, especially on the needs of service discipline.'

They later continued:

> '... the test is an objective one. It must be applied by those in whom the Discipline Act vests certain procedural powers. The repositories include the Attorney-General (s.63(1)) [now amended and replaced by the DPP (Cth) in respect of the serious criminal offences therein set out - treason, murder, manslaughter, rape and particular sexual offences] a convening authority (ss 103(1), 129A(1)) a commanding officer (s 110(1)) ...'

In my view the plain procedural powers in the Act place the decision as to whether a disciplinary issue is involved in the hands of disciplinary authorities. A contrary view would place the discipline of the Defence Force in the hands of the respective Commonwealth and State DPP's.

I add for the sake of completeness that the Justices went on to point out that decisions that proceedings be taken on a charge of a service offence seem to be excluded by schedule 1 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) from review under that Act. In fact decisions made under the Defence Force Discipline Act are not amenable to appeal or review in any forum other than those referred to in the Act itself and in the Defence Force Discipline Appeals Act.

Specifically, no rights of appeal or review are created under the following provisions:

> Administrative Decisions (Judicial Review) Act (Schedule 1 paragraph (o));
>
> Ombudsman Act (paragraph 19(5)(d));
>
> Administrative Appeals Tribunal Act (no right of appeal in DFD Act as required by s.25 of AAT Act); and
>
> Defence Force redress of grievance system (Defence Force Regulation 82(1)).

I add also that where, for example, a Defence Force Magistrate decides that there is no military jurisdiction, there is presently no appeal available to a Convening Authority, who has quite clearly, in referring the matter to a DFM,

made a decision that the discipline of his command has been affected.

The view that military authorities decide whether or not to institute disciplinary proceedings in respect of offences that have counterparts in the ordinary criminal law creates a range of other philosophical and practical issues. It is said that the serviceman is subject to both the disciplinary and the criminal jurisdiction. If the disciplinary jurisdiction vindicates the disciplinary issue in an 'overlapping' offence of say, theft, how is the community interest to be vindicated? Sections 190(3) and (5) of the Act purported to protect servicemen against double jeopardy but were struck down as involving an unconstitutional intrusion. Section 4C of the Commonwealth Crimes Act may provide protection aginst double jeopardy in respect of Commonwealth offences, but that section does not purport to preclude the prosecution and punishment of an offender for any offence against a law of a State. If a State prosecution for a criminal offence were maintainable following prosecution for a substantially similar disciplinary offence, serious questions would arise if different results were reached. There is also the issue of punishment, bearing in mind the fact that the punishments for 'overlapping' offences are most likely to be the same in the disciplinary and the criminal jurisdiction.

Where the military identifies one of these overlapping offences and decides to prosecute in the disciplinary jurisdiction, these issues will arise for, most likely, State authorities. Where State authorities discover an offence which has significant disciplinary connotations and prosecute it as a criminal offence, they are under no duty to notify military authorities, and the State prosecution will preclude any formal disciplinary action for an offence.

There is no easy answer, if indeed there is an answer, to these concerns. The military organization has not relied and will not rely solely on the legislative provisions which appear to give it both the responsibility and authority to prosecute a wide range of offences dealt with under the ordinary criminal law. The military has social responsibilities in the community too. At the same time it is charged with maintaining an effective force ready to meet the legitimate demands of government, and must balance this obligation, within its authority, with other social needs. In relation to disciplinary matters the discipline legislation supplements the ordinary criminal law, it does not supplant it. This is well recognized and there are many instances where military authorities have referred particular matters to civil police as the most appropriate investigatory agency.

The matters I have dealt with do not provide a clear answer to the implicit question in the title I adopted for this paper. There is no doubt in my mind that the 'convergence' process raised by Mr Barnard in the early 1970's is taking place and at an increasing rate. In my view there are limits to the process but they are as much subject to fluctuation warranted by technological and sociological developments as is the process itself. It is a dynamic process and that is reflected in societal issues such as military disciplinary procedures. Our disciplinary legislation has been evolving as distinctly Australian legislation for some time and I see no end to the evolutionary process. The Discipline Act represented a quite dramatic step in the process, but it was consistent with other developments underway. The Connor Review took stock of practice, and in my view called for a temporary respite in the headlong application of civil courtroom procedure and practice to ensure that sight was not lost of the objectives in maintaining a disciplinary system. The difficulties created as a result of the differing opinions in the High Court can be seen in the same light. There is no doubt of the requirement for a disciplinary system to support effectiveness and efficiency in our Defence Force, but the means and measures of its process are in a state of flux. The discipline of the Defence Force is not threatened, and real opportunities to cast off obsolete practices and to propose and develop new ones more suited to the modern force are presenting themselves. It seems to me that a sound foundation for a disciplinary system which meets our military and societal needs has been laid. It is not perfect, the

disciplinary dream, but neither is it a nightmare of administration. A balance is being maintained which ensures that we will not be hampered by the last war's equipment in dealing with the modern threat.

AMAZING AMERICAN ADMINISTRATIVE LAW[2]
A matter of life or death

Bronwyn McNaughton

Is a decision of an administrative agency to exercise its 'discretion' not to take certain enforcement action subject to judicial review? This is the question that the Supreme Court grappled with when a group of prison inmates, convicted of capital offences and sentenced to death by lethal injection, petitioned the Food and Drug Administration (the FDA) to take certain enforcement action.[3]

The facts

The prisoners had been sentenced to death under the laws of Oklahoma and Texas. They claimed that the drugs that were used for human executions had not been approved for such use, although they had been approved for various medical purposes stated on their labels. They said also that the drugs had not been tested for the purpose and, given that they would in all likelihood be administered by untrained personnel, it was likely that they would not induce the quick and painless death intended. They claimed the use of the drugs for human execution was an 'unapproved used of an approved drug' and therefore was a violation of the Food, Drug and Cosmetic Act's prohibition of 'misbranding'. They also claimed that the use of the drugs for human execution was a new use, and therefore the Act's requirements for the approval of 'new drugs' applied.

Accordingly, it was claimed that the FDA was required to approve the drugs as 'safe and effective' for human execution and various forms of investigatory and enforcement action to prevent the perceived violations was requested. This included that labels be affixed stating that the drugs were unsafe and unapproved for human execution, that statements be sent to drug manufacturers and prison administrators stating that the drugs should not be so used, that the drugs be seized from prisons and that prosecution of those in the chain of distribution be recommended.

The FDA Commissioner refused to take the requested action. It was pointed out that the FDA's jurisdiction over the unapproved use of approved drugs was at best unclear. In any event, the commissioner claimed that it should not be used to interfere with this particular aspect of the state criminal justice systems. The prisoners sought review under the Administrative Procedure Act (the APA).

A general presumption of reviewability

The District Court found in favour of the FDA, but the Court of Appeals reversed. It held that there was a general presumption of reviewability under the APA and that the exceptions to review should be construed narrowly. It noted that the APA precluded judicial review of federal agency action only when either it was precluded by statute or 'committed to agency discretion by law'. The latter exception applied only where the substantive statute left the court with 'no law to apply', but in this case, there was law to apply in the form of a policy statement that had been issued by the FDA. The policy statement indicated that the FDA considered itself 'obliged' to take certain investigative actions, in particular to investigate the unapproved use of approved drugs when such use became 'widespread' or 'endanger[ed] the public health'. On this basis, the FDA's refusal was found by the Court of Appeals to be reviewable and the refusal an abuse of discretion.

The Supreme Court considered only the extent to which decisions not to enforce

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2 The second note in an occasional series looking at some of the more interesting fact situations that have helped develop American administrative law.

3 See *Heckler v Chaney* 470 US 821 (1985)

should be subject to review. Its reasoning was not dissimilar to that of the Court of Appeals although it held that the FDA's decision was not subject to review: enforcement decisions were traditionally 'committed to agency discretion' and there was no indication that the APA had been intended to alter this tradition. While this presumption against reviewability was rebuttable, for example if statutory guidelines were to contour the discretion, neither the Food, Drug and Cosmetic Act nor the policy statement provided a meaningful standard against which the agency's exercise of discretion could be judged. Thus the decision was committed absolutely to the agency's discretion. The court noted, moreover, that a refusal to act generally does not involve the exercise of a coercive power over an individual's liberty or property rights and thus it differed from a positive act of enforcement which would provide a focus for judicial review.

Deference

The Supreme Court's general presumption of the unsuitability of prosecution decisions for judicial review rested on the nature of those decisions: in reaching such decisions, an agency must take into account not only whether there has been a violation but also the likelihood of success of any action, whether the prosecution fits with its overall policies and the best use of its resources, for example. An agency itself is in the best position to make such judgments, the court reasoned. Similar concerns animate a more general principle of American administrative law: courts generally will defer to an agency's construction of the statute it is charged with implementing and to the procedures it adopts for implementation. This deference recognises the expertise of the agency in its particular field.

Unreviewability and the rule of law

Although all members of the court concurred in the outcome of the case, now-retired Justice Marshall issued his own strongly worded opinion. He found the 'presumption of unreviewability' fundamentally at odds with the 'rule-of-law principles firmly embedded in [US] jurisprudence'. He found that refusals to enforce were reviewable in the absence of a 'clear and convincing' congressional intent to the contrary, just like other agency action, but that refusals warranted deference when, as here, there was nothing to suggest that an agency with enforcement discretion had abused that discretion.

A 'fading talisman'

Justice Marshall continued that the sine qua non of the APA was the 'inherited judicial reluctance to constrain the exercise of discretionary administrative power – to rationalize and make fairer the exercise of such discretion'. He said that 'discretion can be a veil for laziness, corruption, incompetency, lack of will, or other motives ...', and quoted eminent administrative law scholar Louis Jaffe in saying that its presence should not bar a court from considering a claim of its illegal or arbitrary use. He referred to prosecutorial discretion as a 'fading talisman' and said reliance on it to justify unreviewability was inappropriate.

The 'traditional' arguments, Justice Marshall wrote, should only apply to an agency's decision to decline to seek penalties against an individual for past conduct, and not to a decision to refuse to investigate or take action on a public health, safety or welfare problem.

In fact, the lower courts have not always followed this ruling of the Supreme Court but rather have tended to narrow it, and indeed Justice Marshall noted this 'firmly entrenched body of lower court case law' that powerfully refuted the 'tradition' of unreviewability. He recognised an appropriate defence to an agency's legitimate need to set policy through the allocation of scarce budgetary and enforcement resources, but in conclusion said that 'traditional principles of rationality and fair process' offer 'meaningful standards' and 'law to apply' and that 'no presumption of unreviewability should be allowed to trump these principles'.

ADMINISTRATIVE LAW AND THE CORPORATIONS LAW

Introducing the speakers at a seminar held by the New South Wales Chapter of the Institute in Sydney on 21 May 1992, Mr Mark Robinson, who is Treasurer of the NSW Chapter of the Institute, gave the following overview:

As you all know, radical changes took effect on 1 January 1991. Simultaneously with the establishment of the ASC, the Federal Government took the opportunity to alter the regime which governed the challenge to or review of decisions by the former National Companies and Securities Commission (NCSC).

Formerly, the Supreme Courts had broad powers to review decisions of the NCSC under s.537 of the Companies Act 1981, s.134 of the Securities Industry Act 1980 and s.141 of the Futures Industry Act 1986.

From the beginning of last year, decisions made by the ASC under the Corporations Law (and some decisions made under the ASC Law) are reviewable by the Commonwealth Administrative Appeals Tribunal (AAT) unless specifically excluded. The review is of course by way of an administrative hearing on the merits of the ASC decision concerned.

Naturally, most of our attention to date has been focused on the practical effect of the commencement of the Corporations Law and examination of the ASC and its new structural regime and powers, particularly its new investigative powers. There has been little attention by the profession in relation to the procedures for challenging a decision of the Australian Securities Commission.

When the scheme first commenced, practitioners and the AAT expected a considerable number of applications for review to be made during the first 12 months. This did not happen and in fact only a handful of applications were made.

I would suggest a number of reasons for this including:

- it took the ASC, in my view, a full 12 months to come to grips with, and feel comfortable with, its role, functions and powers. It is only in the last six months or so that the ASC appears to be asserting itself and taking, where it believes it to be appropriate, tough decisions; and

- the economic recession which began its impact immediately prior to the commencement of the Corporations Law scheme has dampened any enthusiasm for seeking merits review of unfavourable decisions in the AAT. This is particularly so when a client is advised that costs will not be awarded even in the event of a favourable review by the AAT. This is even more true, in my experience, if a challenge to the ASC's decision is commenced and the client must go to the Federal Court under the ADJR Act with the resulting litigious costs which many clients believe to be prohibitive.

Accordingly, as the economy improves and the ASC becomes more comfortable with itself and its role, we expect the new jurisdiction of the AAT to be utilised more in the coming year. There are signs of new activity that indicate this is already happening.

In addition to the shift from merits review being conducted by the Supreme Courts to the Commonwealth AAT, the ASC is also subject to four other Federal Acts which may provide avenues of redress against unfair or unjust decisions, or conduct of the ASC. By the same complex interlocking of a number of Commonwealth and State Corporations Law Acts that underpin the entire scheme, the following Acts apply:

- the ADJR Act
- the Freedom of Information Act
- the Ombudsman Act
- the Privacy Act

You can see that the full range of Commonwealth administrative law mechanisms and remedies are now available in respect of companies and securities in Australia. It is an enormous and significant extension of the application of administrative law in Australia.

There is one notable exception. Section 39B of the Judiciary Act does not appear to apply to officers of the ASC: see s.49 of the Commonwealth Corporations Act and s.41 of the State Corporations Act]. The High Court's jurisdiction may, however, be preserved in this regard.

From a practitioner's view, I must say it is satisfying to be able to advise on Corporations Law matters knowing that we may have the benefit of a written statement of reasons, an AAT review or a Federal Court challenge, access to documents under FOI and, if required, the intervention of the Commonwealth Ombudsman or the Commonwealth Privacy Commissioner in this area of practice.

JUDICIAL REVIEW OF ASC INVESTIGATIONS: THE ADJR ACT[4]

John Kluver

Application of ADJR Act to ASC Investigations

By virtue of the Australian Securities Commission Act and Law (ASCA) s.244, the Administrative Appeals Tribunal has no substantive role in the review of ASC investigations. Equally, much of the case law on ASC investigations does not involve the Administrative Decisions (Judicial Review) Act (ADJRA). The role of this Act is to provide a mechanism to regulate challenges to administrative activity. It has no application (except pursuant to a relevant cross-claim) where an action for compliance or breach is initiated by the ASC.

With this in mind, many of the recent leading cases on the ASC investigative powers fall away. The most common situation leading to litigation is by virtue of an application for compliance under ASCA s.70 eg *ASC v Graco* (1991) 5 ACSR 1; *ASC v Zarro* (1991) 6 ACSR 385; *ASC v Lord* (1991) 6 ACSR 350; *ASC v Dalleagles* (1992) 6 ACSR 674 (subject to an ADJRA based cross-claim).

In some other situations the parties have proceeded pursuant to an application for a declaration heard by consent eg *Dalleages v ASC* (1991) 6 ACSR 498 (whether certain documents were covered by legal professional privilege); *Johns v Connor* (1992) 10 ACLC 774 (whether a notice complied with the requirements of ASC s.19(3) (a) to state the "general nature of the matter that the Commission is investigating").

It is only in the more limited situation where a person initiates a challenge (or enters a relevant cross-claim) that the ADJRA applies. The number of cases where the ADJRA has been referred to, let alone argued at length, are far from numerous. Looking back over the period since 1 January 1991, the list is relatively short eg *Bell v ASC* (1991) 5 ACSR 638; *Financial Custodian Corp v Taylor* (1991) 6 ACSR 215; *Little River Goldfields v Moulds* (1991) 6 ACSR 299 (possibly the most significant decision); *ASC v Dalleagles* (1992) 6 ACSR 674 (a continuing case); *Johns v ASC* (1992) 10 ACLC 684 (first instance); Full Federal Court (19 June 1992); and *Allen Allen & Hemsley v ASC* (Federal Court, 29 May 1992).

Overview of ADJRA

Under the ADJRA, the Federal Court only reviews the legality of administrative decisions; it does not remake decisions on the merits as can the AAT under s.43 of the AAT Act. Thus the mere fact that the Federal Court might have made a different decision if left to its own devices does not mean that it will interfere with an ASC

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4 The author is Executive Director, Companies and Securities Advisory Committee. A companion paper entitled 'The Australian Securities Committee and the Administrative Appeals Tribunal' was delivered at the same seminar by Christopher Robson, Manager of the Administrative Law Co-ordination Unit of the office of the Chairman of the Australian Securities Commission. A paper by Mr Robson covering the same field will be included in the Proceedings of the 1992 Administrative Law Forum and his seminar paper is accordingly not included in this Newsletter. It should be noted, however, that in his presentation to the seminar on 21 May 1992 Mr Robson referred to *Hong Kong Bank of Australia Ltd & ors v Australian Securities Commission, Murphy and anor* (unreported decision of Deputy President McMahon, Administrative Appeals Tribunal, 11 May 1992). On appeal to the Full Federal Court (Lockhart, Gummow and O'Connor JJ, judgment handed down 10 June 1992) the decision of the AAT was upheld on different grounds.

decision on ADJRA review. Only if the decision maker has made an error of law in reaching a decision (as interpreted in ss.5–7) will the Federal Court intervene.

In relation to State Supreme Courts, s.9(1) of the ADJRA expressly provides that a State Supreme Court has no power to review any decision, conduct or failure to decide, falling within ss.5–7 of the ADJRA.

Under the ADJRA, the key remedies which an applicant may seek are:

- a statement of reasons from the decision maker;
- review of the legality of a decision.

Right to a statement of reasons

As we know from *Public Service Board v Osmond* (1985) 159 CLR 656, the common law does not require the giving of reasons as an aspect of natural justice. Accordingly the right under s.13 to seek a statement of the decision maker's reasons may be a crucial aspect of the remedies provided by the Act.

The fact that little or nothing may be known about how and why the decision was reached is precisely what makes it difficult in many cases to mount a successful challenge to an administrative decision. The information obtained under s.13 can fill crucial gaps in the applicant's understanding of the decision making process and either identify defects in that process or suggest that the applicant's doubts about the propriety and correctness of the decision were misplaced.

Given this, to obtain a statement of reasons under s.13 will often be a very useful preliminary step in determining whether or not to commence a formal action under the Act. In essence, the s.13 procedure acts in fact as a form of 'particulars' of the Government's case.

Any person making an application for a statement of reasons by the ASC, in the context of current investigations, faces two fundamental hurdles:

- the statement of reasons only applies to decisions which are subject to s.5. For actions short of a s.5 decision, s.13 has no application. We will review this later when discussing *Little River Goldfields v Moulds* (1991) 6 ACSR 299;

- Schedule 2 (e). This excludes from the operation of s.13 decisions relating to the administration of criminal justice and, in particular, decisions in connection with the investigation or prosecution of persons; decisions in connection with the appointment of investigators or inspectors for the purposes of such investigations; decisions in connection with the issue of search warrants; and decisions requiring the production of documents, the giving of information or the summoning of persons as witnesses. Schedule 2(f) contains a similar exclusion for decisions in connection with the institution of civil proceedings, including pecuniary penalties.

The terms of Schedule 2 para (e) were discussed by Davies J in *Hatfield v Health Insurance Commission* (1987) 77 ALR 103. This case discusses the outer limits of decisions coming within this particular paragraph. However it is clear that decisions centrally related to investigations eg to issue notices for production of books or attendance at examinations fall squarely within the Schedule. Thus s.13 has little utility for current ASC investigations. However the ASC has provided reasons, under s.13, concerning a past investigation: *Allen Allen & Hemsley v ASC* (Federal Court, 29 May 1992 Ryan J).

Before leaving this area, I wish to draw your attention to ADJRA s.13A. This provides that in other circumstances where the ASC may be required to provide reasons (eg pursuant to non-investigative decisions under the Corporations Law) it may exclude from that statement information supplied in confidence to the ASC or information furnished to the ASC by a third party 'in compliance with a duty imposed by an enactment'. The effect is that the ASC may exclude from any statement of reasons information provided to the Commission pursuant to its statutory investigative and other

information gathering powers. This ensures against 'back door' compulsory disclosures of investigative material.

Reviewing the legality of a decision

Under s.11(1) of the ADJRA, an application for review of a decision must be made in the prescribed manner, set out the grounds for the application, and be made within the prescribed time. The Court has power to strike out parts of an application eg where they disclose no ground for review under the ADJRA but, conversely, an applicant is not limited to the grounds set out in the original application. The Court has a discretion under s.11(6) to permit the addition of new grounds. The Court also has a discretion to extend the time for lodgement of an application in appropriate circumstances. This is discussed further below.

Analysis of the relevant provisions.of ss.5–7 and s.11 disclose that there are six hurdles which must be successfully negotiated before a person will be entitled to remedies under s.16 of the ADJRA namely:

- there must be a decision, or conduct for the purpose of making a decision (or failure to make a decision), to which the ADJRA applies;
- the decision must not be 'excluded' from review;
- the applicant must be a 'person aggrieved';
- the application must be made within time;
- the applicant must establish one of the statutory grounds set out in ss.5–7; and
- the case must not be one where the court in its discretion regards it as inappropriate to grant relief.

First element: there must be a relevant decision or relevant conduct (failure) for the purpose of making a reviewable decision

Sub-section 3(1) of the ADJRA defines 'a decision to which this Act applies' as:

- a decision;
- of an administrative character;
- made under an enactment.

Also, s.3(8) provides that decisions of a delegate or lawfully authorised representative are deemed to be decisions of the principal.

Decision

We are all no doubt aware of the High Court decision in *ABT v Bond* (1990) 170 CLR 321. However this does not render unnecessary consideration of the pre-Bond decisions, which, I suspect, are not disturbed to the extent first contemplated when the *Bond* decision was handed down. There are a number of taxation cases which, I suggest, are still good law and would have equal application, by analogy, to ASC investigations. For instance, it was held in *FCT v Citibank Ltd* (1989) 85 ALR 588 and *Allen Allen & Hemsley v DCT* (1989) 86 ALR 597 that a decision to exercise the powers under s.263 to obtain access to premises or documents constituted a reviewable decision. Likewise, a decision to serve a notice under s.264 of the ITAA seeking information, evidence, or the production of records constituted a reviewable decision eg *Perron Investments Pty Ltd v DCT* (1989) 90 ALR 1.

Overall, we might say that prior to *ABT v Bond*, the Courts had taken a pragmatic and broad approach to the question of identifying a relevant decision, thus ensuring that applicants were not blocked off from the possibility of a remedy on technical or narrow grounds.

Post ABT v Bond

It was feared by some that the *Bond* decision, and the test formulated in it, intentionally narrowed the scope of 'decisions' covered by the ADJRA, by excluding 'intermediate' decisions from review. However subsequent cases that impinge on ASC investigations suggest that *Bond*, properly understood, does not in practical terms significantly narrow the grounds for review.

Before turning to ASC decisions, I would like to refer quickly to a number of other cases which have interpreted *ABT v Bond*. The first, and the one most favouring a

narrower interpretation, is *Edelsten v Health Insurance Commission* (1990) 96 ALR 673. In that case the Full Federal Court held that a decision to refer to the Minister for consideration allegations of medical over-servicing did not constitute a reviewable decision because the Minister was under no duty to act on the reference. Secondly, and possibly more relevantly, a subsequent decision by the Minister's delegate to refer the allegations to the Medical Services Committee of Inquiry did not constitute a reviewable decision because it merely required the Committee at the preliminary stage to consider whether Dr Edelsten may have rendered excessive services. This case is therefore support for the proposition that the mere commencement of an investigation does not constitute a reviewable decision for the purposes of the ADJRA. This point is further taken up and applied, although without specific reference to the *Edelsten* case, in *Little River Goldfields NL v Moulds* (1991), as to which see later.

The next case is *FCT v McCabe* (1990) 21 ALD 740. In that case Davies J of the Federal Court pointed out that conduct not constituting a decision may still be relevant to the evaluation of a decision. He quoted Mason CJ in the Bond case then added:

> 'Those words do not convey that a finding of fact which is not itself a decision but is made in the course of the reasoning leading to a decision is not examinable. His Honour said that such a finding must be examined only in the context of the review of a decision. Thus a decision may be invalidated on the grounds of unreasonableness if, taking into account the reasoning process leading to it, it was a decision to which no reasonable decision maker would have come'.

This does not overcome the hurdle of attaching your case to a reviewable decision; but it does suggest that in the context of ss.5-6, the course of reasoning leading to a decision, as well as the ultimate decision itself, can be reviewed by the Court.

The outer limits of the meaning of 'decision' for the purposes of the ADJRA is exemplified in *Pegasus Leasing Ltd v FCT* (1991) 104 ALR 442. In that case, O'Loughlin J held that an advice by the ATO to a taxpayer did not constitute a decision for the purposes of the Act. The Court pointed out that the ITAA did not require the Commissioner to make any such communication; the communication was only advice, and it did not have the character and quality of finality. As the Court pointed out:

> 'The whole tone of the letter is suggestive of on-going investigations and opinions - all of which would most probably lead, in due course of time, to a decision'.

There are four cases under the national scheme laws that have touched on the concept of a decision.

In *Bell v ASC* (1991) 5 ACSR 638, Pincus J accepted an application under the ADJRA to review the 'decision' of an inspector relating to the right of attendance of the legal representative of the examinee, pursuant to ASCA s.23. The ASC did not dispute the 'decision' point.

In *Financial Custodian Corp of Victoria v Taylor* (1991) 6 ACSR 215 an application was made pursuant to ADJRA s.15 (stay of proceedings) to suspend the operation of a certain 'decision' - being the decision to issue and serve three notices under ASCA Pt Div 3 to produce documents. Again this was conceded without argument.

The next case, and the only one to apply *ABT v Bond* so as to place restrictions is *Little River Goldfields v Moulds* (1991) 6 ACSR 299. In this case Davies J ruled that the exercise of the power under ASCA s.13 to initiate an investigation 'does not confer a power upon the Commission to take a decision which is an ultimate or operative determination [as in *ABT v Bond*]. Section 13 merely confers a power upon the Commission to commence an investigation when there is reason to suspect that there may have been committed a relevant contravention.' His Honour also took the view that the original report which initiated the

investigation, the internal approval given to investigate, or the mere carrying on of the investigation did not constitute reviewable decisions. By contrast 'the notices [to attend at examinations and to produce books: ASCA ss.19, 31, 33] stand, however, in a different position for they are formal acts which impose obligations upon the recipients. Counsel for the Commission accepted that those notices were reviewable'.

The ruling in this case in regard to commencement of an investigation under ASCA s.13 is consistent with *Edelsten v Health Insurance Commission*.

A recent relevant decision is *Johns v ASC* (1992) 10 ACLC 684. In that case Heerey J held that the relevant 'decision under an enactment' for the purposes of the ADJRA was the decision of the ASC on 11 February 1991, reflected in the resolution in the formal Minutes of an ASC Commission meeting of that date, to make available to the Victorian Royal Commission into the affairs of Tricontinental the services of certain ASC officers, including the delegation of certain investigative powers to them. It was resolved at the ASC meeting that the Commission execute an instrument to give effect to the Commission's decision concerning the delegation of power.

It would seem unwise for the ASC, in the light of this case, to make a general practice of initiating a s.13 investigation through a formal procedure. To so do may provide grounds for distinguishing *Little River Goldfields v Moulds* and attracting ADJRA remedies.

There is another area, at the other end of the investigative context, where an ASC decision could be subject to challenge. ASCA s.25, for instance, allows the ASC to pass on information gathered in investigations to private litigants. Tony Hartnell in a speech in March to an Australian Institute of Criminology Conference described third party civil litigation as 'a major part of the enforcement weaponry available to the ASC. It clearly underpins a Government philosophy to encourage enforcement of the Corporations Law through private actions and not just rely on action by the ASC'.

A key question is whether the ASC is obliged to comply with requests under ASCA s.25 for release of information. In *Ex Parte Wardley Australia Ltd* (1991) 5 ACSR 786, the Full Supreme Court of Western Australia in interpreting the forerunner of ASCA s.25(1) held that, when requested by a private litigant, the NCSC had a duty, rather than a discretion, to provide information, upon satisfaction of the statutory pre-conditions. It could decline disclosure only for good reason eg anticipated prejudice to a continuing investigation. However the NCSC retained a general discretion under the forerunner of ASCA s.25(3) to provide the information to any other party.

It is doubtful whether this case is still good law on ASCA s.25(1). The Corporations Law s.109ZB(3), which had no equivalent in the Companies Code, indicates that the word 'may' in ASCA s.25(1) and (3) confers a discretion on the Commission whether to act. ASC Policy Statement 17 (March 1992) sets out the considerations that the Commission will take into account in determining applications. For instance 'Generally the ASC will not release information under [ASCA] s.25 unless the investigation to which the examination relates is completed or is sufficiently advanced so that the release of the information would not jeopardise the continuing investigation': para 6, 21. Judicial review pursuant to the ADJRA ss.5, 6 could be sought either by a rejected applicant or other 'aggrieved person', eg (as in *Johns v ASC*) the provider of the information to be released: ADJRA s.3(4). Alternatively, an applicant may seek the information from the ASC by way of a subpoena duces tecum. The court may enforce the subpoena, notwithstanding the general duty of confidentiality on the ASC under ASCA s.127.5 The ASC could resist production, where appropriate, on the

5 See *Maloney v NSW National Coursing Association Ltd* (1978) 3 ACLR 385; *Parkes Management v Perpetual Trustee Co Ltd* (1979) 4 ACLR 63; cf *FCT v Nestle Australia Ltd* (1986) 69 ALR 445.

grounds of public interest immunity: *Zarro v ASC* (1992) 10 ACLC 831.

The decision must be of an administrative character

In various cases, the courts have tested the boundaries between decisions of an administrative, legislative and judicial nature. There is little doubt that any investigative decision would be of an administrative nature. Clear precedent is found in *FCT v Citibank*; *Allen Allen & Hemsley*; and *Perron*. See also the early case of *Houston v Costigan (No1)* (1982) 5 ALD 90, where it was held that decisions by a Royal Commission to examine witnesses and pursue a particular line of inquiry constituted a decision of an administrative character.

The decision must have been made 'under an enactment'

The term 'enactment' covers Commonwealth Acts. By virtue of the terms of Part 8 Div 2A of the Corporations Act, and equivalent provisions in the Corporations [name of State] Acts, any ASC decisions satisfy this element. The concept of 'under' an enactment was reviewed in *Century Metals and Mining NL v Yeomans* (1988) 16 ALD 406, where French J said at 421 that a decision will be made 'under an enactment' if it is made 'in pursuance of' or 'under the authority of' the Act. Any decision relating to the exercise of ASC investigative powers would appear to establish a sufficient nexus between the enactment and the making of the decision.

Conduct for the purpose of making a decision

Section 6 allows a review of conduct undertaken by the decision-maker for the purpose of making a reviewable decision. Sub-section 3(5) provides that this includes the doing of any act or thing preparatory to the making of the decision. In *ABT v Bond*, Mason CJ concluded that 'conduct' for the purposes of ADJRA s.6 is essentially procedural and not substantive in character.

One could possibly describe the initiation of an investigation under ASCA s.13 as conduct which may well lead to a decision eg to issue notices. Whether it would be conduct 'preparatory' to making that decision is another matter. I would suggest, based on ITAA cases, particularly *DCT v Clark and Kann* (1983) 15 ATR 42, that the courts would see the relationship as too remote to describe it as being preparatory to making a decision. However this line of attack on the ASCA s.13 commencement procedure may be argued in a future case.

Second element: the decision must not be one excluded from review

Certain decisions which would otherwise be reviewable are expressly excluded from review. These are set out in Schedule 1 to the ADJRA. No paragraph in Schedule 1 applies directly to ASC decisions. Incidentally, the exemption in paragraph (e) referring to decisions making or forming part of the process of making or leading up to the making of tax assessments is not wide enough to encompass a decision to issue a s.264 ITAA notice. (*DCT v Clark & Kann* (1983) 15 ATR 42 at 47, per Sheppard J).

Third element: the applicant must be a 'person aggrieved'

This is defined under s.3(4) of the ADJRA. Under these provisions, as applied in numerous cases, a person aggrieved is (broadly) any person whose interests are (would be) affected by the decision. A person aggrieved must be able to show a grievance which will be suffered as a result of the decision complained of beyond that which he or she has as an ordinary member of the public. The grievance may be shown because the decision directly affects his or her existing or future legal rights. On this reasoning a suspect may be able to challenge a notice issued to a third party.

Fourth element: the application must be made within the prescribed time

This is set out in s.11 of the ADJRA. The policy behind s.11 was neatly summarised by Hill J in *Victorian Broadcasting Network v Minister for Transport and*

Communications (1990) 21 ALD 689 at 690 where His Honour commented that:

> 'The policy of s.11 is quite clear. Applications to review decisions to which the Act applies are to be made without undue delay. Many decisions, which are reviewable under the Act, are decisions essential to implementation of Government policy and administration. The relevant Government authority must know, within a relatively short time whether that decision is under attack, and if it is, the grounds upon which the review is to be sought. It is for this reason that the legislature has set a short period (28 days) in which a person aggrieved by a decision must commence his or her proceedings in the Court'.

His Honour also discussed the meaning of the term 'a reasonable time' as set out in s.11(4). His Honour said:

> 'The question of what is a reasonable time must be considered in the light of the facts of each particular case ... Nevertheless, in considering the reasonableness of a period of time, it will clearly be relevant to consider any prejudice that may result to the decision maker ... so too, the complexity of the issue will be a relevant matter'.

The Court has the discretion pursuant to s.11(1) (c) to permit an applicant to lodge the application within 'such further time as the court (whether before or after the expiration of the prescribed period) allows'. That is, the Court has an unfettered discretion to allow extensions of time for lodgement. Various criteria have been identified in *Victorian Broadcasting Network* and other cases, including

- the period of delay involved;
- the conduct of the parties in connection with the delay (eg whether and when the applicant voiced dissatisfaction with the decision);
- whether the application raises matters of public importance; and
- whether any prejudice would be suffered by the decision-maker if the application under the ADJRA were to be permitted despite the delay.

This power was recently exercised in *Johns v ASC* (1992) 10 ACLC 684. In February 1991 the ASC entered into arrangements with the Victorian Royal Commission into the affairs of Tricontinental to make available the services of certain ASC officers. Heerey J ruled that this constituted the relevant 'decision under an enactment' for the purposes of the ADJRA ie from when the 28 day prescribed period commenced. In July 1991 Mr Johns, through his solicitors, was advised in writing by solicitors for the Royal Commission of the use of a transcript of his examination in a way of which he later sought to complain. He entered no protest until January 1992. In the meantime the Royal Commission proceeded. When the action came before Heerey J in April 1992, the ASC opposed an extension of time. Notwithstanding the delay the extension was granted.

> 'In my opinion, considerations of public policy weigh strongly in favour of a grant of the extension sought. An attack has been made on the legal validity of the Royal Commission's proceedings in a fundamental respect (ie use of information supplied by the ASC). This has now been fully argued over a trial lasting five days. I think there would be a substantial risk to public confidence in the Royal Commission's conduct of its proceedings and any subsequent report were these issues to remain unresolved. This is particularly so when a contributing cause to the delay by Mr Johns in bringing his complaint before a court was a persistent refusal of the Victorian Government to grant him legal assistance until quite recently, notwithstanding that all other major figures appearing before the Royal Commission had substantial legal representation (most of them at public expense) and despite the Royal Commission's recommendation for such a grant as long ago as 28 March 1991'.

This ruling was upheld by the Full Federal Court on appeal (*Johns v ASC*, 19 June 1992).

Fifth element: the applicant must establish one of the statutory grounds set out in the ADJRA

The grounds of review under ASCA ss.5–7 are really an elaboration of common law administrative law principles, including denial of natural justice, failure to take into account relevant considerations, taking into account irrelevant considerations, improper purpose and error of law.

There are a liberal sprinkling of investigative orientated cases under these provisions particularly under TPA cases such as *Melbourne Home of Ford Pty Ltd v TPC* (1982) 39 ALR 565, and ITAA cases such as *Perron Investments Pty Ltd v DCT* (1989) 90 ALR 1.

There is really very little to report under the ASC regime. Claims of ultra vires, error of law, failure to take into account relevant considerations, taking into account irrelevant considerations, improper purpose and a general ground of unreasonableness were contained in the cross-claim against the ASC in *ASC v Dalleagles Pty Ltd* (1992) 6 ACSR 674.

In *Johns v ASC* (1992) 10 ACLC 684 the plaintiff claimed breaches of s.5(1) (c) (d) (e) (f) (g) and s.5(2) (c) (j). None of these claims were successful. Heerey J ruled that aiding a Royal Commission was a proper purpose for which the ASCA conferred power on the ASC. The Court noted that the subject matter of the Royal Commission's enquiry – the collapse of the Tricontinental Group – was squarely within the province of the ASC. The ASC had 3 courses open to it: do nothing, conduct its own investigation or aid the Royal Commission. Heerey J noted the terms of ASCA s.127(4) and ASCA s.25(3) and concluded that these provisions expressly authorised the disclosure of ASC material to the Commission. Furthermore 'such authority [to disclose information] is not conditional on the consent of the person who provides the information to the ASC'. It was not a case of an unauthorised and unlawful breach of confidentiality. This ruling was upheld by the Full Federal Court on appeal (19 June 1992).

The most detailed analysis of the application of ADJRA s.5 to the ASC is found in *Allen Allen & Hemsley v ASC* (Federal Court 29 May 1992, Ryan J). This case dealt with a decision by the ASC under ASCA s.127A (2) (c) not to disclose to the applicant information obtained by the NCSC in an earlier investigation. The Court discussed various grounds raised by the plaintiff, including taking into account irrelevant considerations, failure to take into account relevant considerations, exercise of power for an ulterior purpose, unreasonable exercise of power, abuse of power, error of law, and absence of evidence or other material to justify the decision. Ryan J concluded that the ASC's exercise of its discretion may have miscarried only by failing to take into account a relevant consideration concerning the 'public interest' element in ASCA s.127A (2) (c), namely that its decision, in the circumstances, could unfairly treat different parties to relevant civil litigation. The matter was referred to the ASC for further consideration, but with no order as to costs.

Sixth requirement: the case must not be one where the Federal Court regards it as appropriate to exercise its discretion to refuse a remedy

Applicants who satisfy the statutory requirements in ss.5–7 of the ADJRA will be entitled prima facie to a remedy under the Act. The powers of the Federal Court are set out in s.16. However the Federal Court has under s.16 a discretion as to whether or not to grant a remedy and in appropriate cases will refuse to do so even where the applicant establishes a statutory ground, eg where the making of an order would be futile.

AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW

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MEMBERS NOTES

(accompanying Newsletter no. 10 1992)

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State chapters

Details of recent and forthcoming State chapter activities are set out below.

Australian Capital Territory: The seminars on the new Australian Capital Territory planning legislation (addressed by John Mant) and on refugee decisions (addressed by Dr Kathryn Cronin and Dr Evan Arthur) both went well.

The next ACT function will be the annual general meeting of the Institute, to be held on (Wednesday) 23 September at University House. The meeting will be addressed by Tom Sherman, former Chairman of Queensland's Electoral and Administrative Review Commission. Registration information and other details of that meeting are enclosed with this Newsletter.

New South Wales: The chapter's seminars on the relationship between administrative law and the Corporations Law (addressed by Chris Robson and John Kluver - Mr Kluver's paper is reproduced in this Newsletter) and on recent administrative law developments in Great Britain and the European Community (addressed by Anthony Lester, QC) were both well-attended. The chapter also supported a joint Ethnic Communities Council of NSW - Law Week seminar on changes and opportunities in administrative law in NSW.

The chapter's seminar on administrative law aspects of proposed changes to local government legislation in NSW (addressed by Andrew Kelly and John Mant) was also successful.

The chapter's next function will be its annual general meeting and dinner, to be held on (Thursday) 24 September at the Hotel InterContinental. The meeting will be addressed by Justice Deirdre O'Connor, President of the Administrative Appeals Tribunal. Inquiries about the meeting should be directed to the Treasurer, Mark Robinson on (02) 259 8070.

Queensland: The Principal Registrar of the Administrative Appeals Tribunal, David Schulz, addressed a meeting of members held in Brisbane on 20 July

on the recently-completed review of the AAT. Approximately 40 members attended.

The chapter held its annual general meeting on 5 August. At that meeting, the following persons were elected to the executive committee of the chapter:

Chairperson - Maurice Swan (Electoral and Administrative Review Commission)

Secretary - Barry Cotterell (Barrister)

Treasurer - John Bickford (Bickfords)

Members - Dr John Forbes (Law School, University of Queensland), Sarah Garvey (Cabinet Office), Harvey Greenfield (SEQEB), Michael Halliday (Barrister) David Schulz (Principal Registrar, Administrative Appeals Tribunal) and Suzanne Sheridan (Morris Fletcher and Cross).

Inquiries about the activities of the chapter should be directed to the Chairperson, Maurice Swan, on (07) 237 9634.

South Australia: The inaugural chapter function will be held on (Thursday) 10 September 1992, at the University of Adelaide Law School. The President of the Administrative Appeals Tribunal, Justice Deirdre O'Connor, the Honourable Justice Trevor Olsson of the Supreme Court of South Australia and the President of the Institute, Professor Dennis Pearce will address the topic 'Is there too much natural justice?'. A dinner will be held after the meeting. Further details can be obtained from the Chairperson, Eugene Biganovsky, on (08) 212 5712.

Victoria: The next chapter function will be the annual general meeting, which will be held on (Wednesday) 16 September. A seminar will be held in conjunction with the meeting, at which the topic 'Winding back administrative review: The impact of the new immigration law' will be addressed. Further details can be obtained from the Secretary, Mick Batskos, on (03) 619 0906.

Western Australia: It is hoped that a first chapter function will be held shortly. In the interim, any inquiries should be directed to Associate Professor Hannes Schoombee, on (09) 360 2984.

1992 administrative law forum

The Executive Committee of the Institute is currently engaged in arranging to publish the proceedings of the 1992 administrative law forum. It is intended to provide a copy of the publication early in the 1992-3 financial year to all paid-up members of the Institute.

1993 administrative law forum

Planning is already under way in relation to the 1993 administrative law forum, to be conducted jointly with RIPAA. The forum has been tentatively titled 'Administrative law and public administration: Happily married or living apart under the same roof?'. The dates set down for the forum are (Thursday and Friday) 15 and 16 April 1993. The forum will be held in Canberra. A flier calling for speakers and papers is enclosed with this Newsletter.