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CURRENT DEVELOPMENTS IN CANADIAN ADMINISTRATIVE LAW

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- presented to the inaugural meeting of the Victorian chapter of the Australian Institute of Administrative Law, held in Melbourne on 13 May 1992.

The growth of administrative law in the last twenty years or so has been remarkable and is a phenomenon that most common law countries have witnessed. In one form or another, the law has come to be seen as an important part of the answer to the free-fall of public confidence in the political process and its traditional institutions and mechanisms. No longer are they regarded as adequate for redressing individual grievances arising from the administration of government programs, for ensuring open public participation in both the making and implementation of public policy and, more generally, for enhancing governmental accountability for the decisions made within the public sector. Whether as a result of the expanded role of law in government or because of it, agencies of the state are increasingly expected to respect the

In this issue ...

'rights' claimed by both individuals and by groups.

It has become quite clear during the years of deregulation and privatisation that the importance of administrative law does not depend on the perpetuation of the older forms of state regulation of the economy. Indeed, just the opposite seems to be the case. First, the move that has been taking place in some countries from government-run enterprises to publicly-regulated private enterprises is likely to increase the role of lawyers and administrative law. Regulatory agencies of the kind familiar in North America typically hold hearings before making significant changes to their policy and before deciding how the law and any relevant policies should be applied in individual cases. Second, public expectations that government should tackle new (or newly-identified) problems show little signs of abating. In recent years, demand for occupational health and safety, freedom from discrimination on grounds of race, ethnic origin and sex, protection from environmental hazards and consumer protection, for example, have all required the enactment of legislation and the creation of administrative structures to implement it.

At a general level, the concerns of administrative law are broadly similar, regardless of jurisdiction. They include the protection of individual rights and the redress of grievances that arise from the administration of programs, the quality of the decisions made and the efficiency of the bureaucracy and a concern to preserve democratic values such as fidelity to statutory mandate, public participation, accountability and transparency. In comparison to some other countries, including Australia, Canada has not recently engaged in any comprehensive examination of its system of administrative law. At the federal level, there is no Ombudsman, and no body, like Australia's Administrative Review Council, to monitor the operation of the system, to identify points of difficulty and to recommend corrective measures.

I have no doubt that the enormous quantities of energy and resources that have been devoted to dealing with the constitutional crises through which Canada has struggled over the last ten years has diverted attention from other, less pressing issues of public law reform. However, Canadian law has made some interesting and significant contributions to the development of administrative law that are, I believe, of interest.

1 Refugee determination

An issue currently facing many countries of the developed world is that of dealing with claims for refugee status made by individuals who present themselves at a port of entry or on a deserted beach, or who have been admitted temporarily in some other capacity (visitor or student, for example) and seek to avoid deportation when their leave to remain expires. Claims made by a comparatively small number of Cambodians seem to have thrown Australia's refugee determination process into a state of crisis and have provoked the Commonwealth Parliament into passing legislation in the middle of the night that retrospectively validates the detention of the Cambodian boat people and removes the jurisdiction of the courts to order their release. The success rate of

the approximately 300 refugee claims being made each month in Australia is less than 10%. Ultimate decisions are made by the Minister, on the basis of recommendations made by officials, and by a review committee whose members are drawn from Government departments. There is no shortage of critics who claim, with considerable justification, that Australia's current scheme is both inefficient and unfair. The lack of any oral hearing is seen as a particular flaw.

In 1989, Canada introduced a system for the determination of inland refugee claims that has produced remarkable results. Its origin can be found in a decision of the Supreme Court of Canada that held that the scheme then in place was a denial of liberty and security of the person, other than in accordance with the principles of fundamental justice and thus a breach of section 7 of the *Canadian Charter of Rights and Freedoms*. The Court held that the principles of fundamental justice required that no claim should be rejected without first affording the claimant an oral hearing, given both the potentially life-and-death nature of the decision to be made and the importance of credibility in most refugee claims.

The administrative structure created by the new Act is notable in two respects. First, it vests the responsibility for determination of refugee status in an independent administrative agency, the Immigration and Refugee Board. Secondly, it provides for a non-adversarial hearing for all claimants. Especially impressive has been the sheer size of the resources that the Canadian Government has been prepared to devote to ensuring a high quality of administrative justice. The Board is by far the largest administrative agency in Canada, with a full-time membership of 250 (of whom all but 20 are assigned to the Refugee Division of the Board) and a support staff of 750. In 1990-91, the operating budget of the Board was $90 million, while another $30 million was spent on legal aid for claimants. In addition, the provision of welfare benefits to claimants pending the final disposition of their claims and the additional departmental staff required have made significant demands on public resources, especially at a time of public sector fiscal restraint and a level of unemployment that might be expected to create a public opinion that is hostile to the admission of refugees.

The work load of the Board and the time taken to process the claims indicate a high level of efficiency. Currently, about 3 000 claims enter the system each month and the Board renders approximately 2 700 decisions a month. Perhaps most telling of all is the fact that the success rate for claimants is currently running at about 70%, a figure that masks a much higher rate for claimants from major refugee producing countries (such as Sri Lanka, Somalia, Ethiopia and El Salvador). The bold decision of the Canadian Government to legalise the refugee determination process has made a significant contribution to administrative justice in Canada and is a beacon in an area of human rights that in many other countries is one of gloom.

2 Limits of the judicial paradigm: doctrinal developments

One of the great dangers of the legalisation of public administration is that public administration will be forced to conform to judicial paradigms that are inappropriate and an impediment to the effective discharge of their statutory mandates. Let me give you two examples of very different contexts in which, despite their *quasi*-judicial appearance, the distinctive nature of the administrative agencies has been recognised.

(a) the independence of tribunal members

The issue of tribunal independence that has traditionally captured attention is that of the independence of its members from the Executive. Recently, however, the attention has been given in Canada to the relationship between the administrative tribunal as a corporate entity (and in particular its Chair) and individual members who sit to hear particular cases. Broadly, the issue raised is to what extent the tribunal as a whole has a responsibility for the quality of the decision rendered by individual members sitting as a panel of the tribunal and how this institutional responsibility can be accommodated to notions of procedural fairness.

In an important recent case, *Consolidated-Bathurst Packaging Ltd v International Woodworkers of America*,[1] a challenge was made to a long-standing practice of the Ontario Labour Relations Board. The Board, I should explain, has jurisdiction over the certification of trades unions as the sole collective bargaining agent for groups of workers and over allegations of unfair labour practices. The Board typically sits in panels of three; a representative each of labour and management and an independent chair. Many of the Board's members are part-time appointees, although the Chair and Vice-Chair are full-time appointees.

The case arose out of a determination by a panel that the company was guilty of an unfair labour practice by breaching its statutory obligation to bargain in good faith. The complaint was made by the union when the company shut down its plant, soon after negotiating a new collective agreement with the union. The panel approved an earlier Board decision holding that bargaining in good faith required a company to reveal to the union that the plant might close, provided that the decision-making process had reached a point that this was very possible, even though no formal decision to close had been taken. This information is obviously of great importance to the union, because it would cause the union to focus its bargaining on issues relating to the laying-off of workers, rather than on wage increases. The company obviously has its own reasons to delay the publication of its corporate plans.

The Board's practice has been to hold meetings of the full Board to discuss cases heard, but not yet decided, by panels that raised difficult or important issues of labour law and policy. The panel that had heard the *Consolidated-Bathurst* case wanted it discussed. At these meetings, the Chair invites members of the panel to outline the issues as they see them and to indicate the conclusion that they have tentatively reached. There is then a discussion by

all the Board members at the meeting, at the end of which the Chair expresses the wish that the panel has found the discussion helpful, reminds them that the ultimate decision is theirs alone and tells them that the Board looks forward to reading the reasons for decision, whatever they might be. Needless to say, counsel who appeared before the panel in the cases under discussion are not invited to attend these full Board meetings. Shortly after this meeting, the panel handed down its decision, finding the company guilty of bargaining in bad faith and imposing a fine of $0.75 million.

An application for judicial review was made by the employer, on the ground that the discussion of the case at the meeting of the full Board in the absence of the parties raised an apprehension of bias and breached that aspect of the rules of natural justice which provides that only those who hear a case may decide it. The Supreme Court of Canada, by a majority, dismissed the application, pointing out that a multi-member Board that sits in panels faces a particular administrative difficulty, especially when many of the members are part-time and may be relatively inexperienced. The difficulty is to ensure that the decisions rendered by panels across the Province are consistent and are properly informed by an understanding of the implications of the issues in the wider context of labour relations law and policy. The Court emphasised that there was a strong public interest in the quality of the Board's decisions, because the development of equitable and harmonious labour relations was important for the economic well-being of the Province of Ontario.

It concluded that a member of the Board was no more guilty of bias as a result of discussing a case that she had heard, but not decided, than was a member of the Court of Appeal who consulted other members of the Court who had not sat on the appeal. Moreover, since responsibility for deciding the case remained squarely with the panel members who had heard it, there was not a breach of the *audi alteram partem* rule. However, said the Court, its approval of the full Board procedure was subject to two limitations: first, the facts of the cases discussed were to be taken as given and not debated; second, if a new point emerged for the first time at a meeting it should be put to the parties for their comments before the panel made its decision.

While basing its decision on a legal recognition that the Labour Relations Board performs functions and has public policy responsibilities that courts of law do not, the Supreme Court appeared not to notice important institutional differences. In particular, its acceptance of an analogy between the discussions of individual cases among members of the Court of Appeal and the meetings of the full Board overlooks the more strongly hierarchical nature of the Board and, especially, the important position occupied by the Chair in the decision made by the Minister on whether members' appointments should be continued. Might not a losing party reasonably suspect that, if the Chair or another senior member of the Board expresses a view about the way that a given matter should be decided, it would require a particularly strong-minded panel member to ignore this advice?

A somewhat similar issue has been raised about the practice of the Chair of the Immigration and Refugee Board in issuing Board position or policy papers on the interpretation of various provisions of the *Immigration Act* that have not been the subject of an authoritative judicial pronouncement. There are also policy papers advising the members on the approach favoured by the Board to the exercise of the various statutory discretions conferred on the Board. As I have already indicated, this is a large administrative tribunal, with some 250 members sitting, typically, in panels of two across the country. Consistency and the quality of decisions is a matter of grave concern to the Board. Incidentally, the Chair is described in the statute as the Chief Executive Officer of the Board.

These position papers are not issued under statutory authority and are therefore not legally binding on Board members. Indeed, if they purported to be, they would be unlawful fetters on the decision-making powers of the Board members hearing the case. The status and propriety of these Board policy statements are the subject of some controversy among Board members. Some members of the Board, particularly those geographically furthest-removed in a westerly direction from Ottawa, have suggested that they represent improper pressure from Board headquarters, because it has been made clear to them that members are expected to give considerable deference to the position papers and, except in the most compelling instances, to give effect to them. Again, the influence of the Chair in the reappointment of members is seen by some as a powerful inducement to members to comply.

Whether the issue of these position papers is an unlawful fetter on the performance by members who hear cases has not yet been litigated in the courts. It is my view, however, that this proactive initiative by the Board is a commendable attempt to maintain the quality of the Board's work and of the level of administrative justice that it dispenses. Traditional notions of 'judicial independence' must be accommodated to the institutional nature of this agency. Statutory powers are conferred on members in their capacity as members of an institution, not as individuals operating entirely on their own. It is important to point out that the Board's policy or position papers are available to the public and are the product of extensive consultation both within the Board and outside. Those that I have seen are of a very high quality indeed. If members feel constrained normally to defer to the collective wisdom of their colleagues, that is, in my opinion, quite appropriate. Allegations of bias and lack of independence connote the apprehended influence on decision-makers of some improper kind of pressure and there is nothing improper in the assertion of corporate responsibility by the Board for the quality of its members' decisions. To the extent that the independence of members is diminished, the benefits accruing from consistent and fully-informed decisions outweigh the costs.

(b) statutory interpretation and jurisdictional review

The second important area in which relevance of the judicial paradigm to administrative decision-making has been called into question concerns the interpretation of agencies' enabling

statutes and the scope of the courts' power to review for jurisdictional error administrative decisions that are protected by a strong statutory preclusive clause. I should add that the Supreme Court has held that provincial legislatures lack the constitutional power to exclude judicial review for jurisdictional error. 'No *certiorari* clauses in Canadian legislation are largely confined to tribunals operating in the area of labour relations, although the courts have recently held that simple finality clauses also have the effect of limiting judicial review to jurisdictional issues.

In the last few years, the Supreme Court of Canada has proved remarkably volatile in its approach to the review of labour tribunals' interpretation of their enabling legislation. The contested ground has been the proper allocation of responsibility between courts and tribunals for the interpretation of administrative statutes and, more particularly, the extent to which the courts are prepared to recognise that traditional attitudes to the interpretation of legislation are not necessarily appropriate for tribunals when interpreting the statutory framework within which they must discharge their regulatory responsibilities.

In the early 1980s, the Supreme Court of Canada reformulated the test of jurisdictional review in a way that explicitly recognised that the legislation administered by tribunals often provides no clear answer to a problem, usually because Parliament had not foreseen the particular issue that has arisen. And in filling the silences and resolving the ambiguities of the statutory text, said Chief Justice Dickson, the labour relations expertise of the members of the specialist tribunal is just as relevant as the techniques and skills traditionally brought by the judiciary to the interpretation of statutes. In many ways, the most remarkable thing was that these statements were made in a case (*CUPE v New Brunswick Liquor Corporation*) in which the issue of statutory interpretation was whether an adverb that follows two verbs qualified both verbs, or only the verb immediately preceding it. The Court said that there was no 'correct' answer to this question and that the tribunal's decision should only be set aside if the tribunal had placed an interpretation on the legislation that was 'patently unreasonable'.

If the Court was prepared to recognise that the interpretation of legislation involved the exercise of implicit discretion in the context of the kind of syntactical issue that judges have traditionally regarded as peculiarly within their province, then one might have expected the Court to adopt a position of curial deference in a great many cases. Unfortunately, the judicial paradigm of statutory interpretation seems to have recaptured the imagination of the Supreme Court and judges are once again proceeding on the assumption that, even when legislatures have created specialist tribunals to administer a regulatory scheme and have protected their decisions with preclusive clauses, those provisions in the legislation that confer or limit the jurisdiction of the tribunal must be interpreted 'correctly' by the tribunal if the decisions are to be afforded legal authority as within its jurisdiction.

You will not be surprised to learn that it is about as easy to identify a 'jurisdiction conferring' clause in a statute as it used to be to distinguish a 'preliminary' or 'collateral' question from one that went to the 'merits' of the tribunal's decision. It is equally important to note that the resurgence of judicial activism in this area has been very much to the advantage of the employers' side of labour relations disputes.

3 The Canadian Charter of Rights and Freedoms

The adoption of a constitutionally-guaranteed bill of rights in 1982 has added an important new source of public law in Canada. Approximately half of the cases that have been decided under the *Charter* have concerned criminal law and procedure but the *Charter* has also had a significant impact on public administration in Canada.

The provisions of the *Charter* that have been of most importance to public administration have been the right to freedom of expression and of the press (s2), the right to life, liberty and security of the person and the right not to be deprived thereof other than in accordance with the principles of fundamental justice (s7), and the right to equality before and under the law and the right not to be discriminated against on grounds that include ethnic and national origin, sex, race and religion (s15). Section 1 of the *Charter* expressly recognises that none of the rights protected by the *Charter* is absolute and that measures that infringe them may still be upheld if they are reasonable limits prescribed by law that are demonstrably justifiable in a free and democratic country. Finally, I should add that while the *Charter* is part of the supreme law of the land (and states that laws that are incompatible with it are inoperative) many *Charter* rights - but not section 2 - can be expressly overridden by legislation, a power that legislators have in the main been reluctant to invoke. The difference between Canada's constitutional guarantee that can be expressly overridden and New Zealand's statutory affirmation that requires other enactments to be interpreted consistently with it whenever possible, is one of degree, not of kind.

In a remarkably short time, the Canadian *Charter* has become an integral part of our system of law and government. It has prompted public servants, politicians, the courts and public opinion to measure legislative and administrative action against its guarantees of basic civil liberties. On the whole, our courts have interpreted the *Charter* provisions in a manner that recognises that government plays an important role as the provider of goods, services and benefits and as the regulator in the public interest of much economic activity.

As Chief Justice Dickson once observed, the *Charter* is not an invitation to the judiciary to roll back the frontiers of the regulatory and welfare state.

Let me make one last general observation about the *Charter*'s impact. It has increased enormously the importance of lawyers within the public service, where they are expected to advise on potential *Charter* difficulties posed by proposed legislation and administrative action. Lawyers in the

public service have undoubtedly moved closer than ever before to the centre of policy making. In addition, the private Bar has benefited enormously from the litigation generated by the *Charter* and constitutional law has rapidly permeated all branches of the practice of law.

As for the courts, their public profile has undoubtedly been raised considerably as many of the social issues of the day come before them: abortion, refugee determination, restrictions on advertising children's toys on television, and tobacco, mandatory retirement at 65, the extradition of fugitive offenders to jurisdictions where they face the death penalty and the compulsory payment of union dues, for example. The volume and difficulty of litigation produced by the *Charter* has undoubtedly put significant strain on the judiciary. The increase in the judiciary's importance has also turned the spotlight on the appointment of judges, especially to the Supreme Court of Canada.

Nonetheless, courts rarely have the last word on an issue, even when they strike down legislation on *Charter* grounds. As often as not, the issue is returned to the political process for rethinking. The end product is generally better than the original. The courts' role is often to put back onto the political or legislative agenda an issue to which the Government has given a low priority or with which the Government would rather not deal because of its politically volatile nature. Abortion and refugee determination are good examples.

Let me give you some examples of the kinds of impact that the *Charter* has had upon public administration. As far as the hearing process of administrative tribunals is concerned, the courts have invalidated the previous refugee determination scheme for lack of an oral hearing, held that a presumption that certain tribunal proceedings be held in private (especially professional disciplinary hearings) was a violation of the freedom of the press and established that inmates appearing before prison discipline tribunals on serious charges have the right to be represented by counsel. In addition, challenges have been made to the independence from the Executive of members of tribunals with power over liberty and security of the person and it has been held that the principles of fundamental justice include the right that administrative proceedings be concluded without unreasonable delay. This latter use of the *Charter* may force some administrative agencies to conduct rigorous efficiency and effectiveness audits of their operations, especially since the prospects of additional public funding are less than promising in the present climate.

The equality guarantee of the *Charter* has also had a significant impact on public administration. For example, it has been used to expand the reach of statutory anti-discrimination legislation. Thus, the Ontario Court of Appeal held that the exemption from the Act of the rules of sporting organisations respecting single-sex sports teams was itself discriminatory on grounds of sex, and was struck out. Benefits targeted to adoptive parents but not extended to actual parents have been impugned in the Federal Court of Appeal. The Court held that the appropriate remedy was the extension of the benefit to all parents and not the total invalidation of the program. A union representing

agricultural workers in Ontario has attacked on equality grounds the provision in the *Labour Relations Act* that excludes agricultural workers from the benefits of being represented by a union certified by the Labour Relations Board. Finally, the broad interpretation given by the courts in recent years to anti-discrimination statutes may also be, in part, the result of the constitutional entrenchment of a right to equality and freedom from discrimination. Indeed, the Supreme Court has gone so far as to describe these statutes as *quasi*-constitutional in nature, a far cry from the not so distant past, when they were construed narrowly, on the ground that they restricted freedom of contract and the right to dispose of property.

4 Conclusions

As I hope I have indicated, public law in Canada is very much alive and kicking. The difficulties of holding our improbable country together have not absorbed all the public law energy of our bureaucrats, commentators and lawyers. Needless to say, there is a vast array of administrative law issues that I have not been able to deal with but I hope that I have said enough to arouse your interest in Canadian developments, not only in the area of the *Charter* - with which you may have to acquire some familiarity - but with broader issues of administrative law as well.

Exercises in comparative public law are rarely straightforward. The law relating to government is always to a degree specific to the political culture, institutional arrangements and constitutional traditions of the particular jurisdiction. However, in a rapidly shrinking world, it would be extremely short-sighted if we public lawyers thought that we had nothing to learn from our respective experiences in tackling governmental and administrative problems that, in one form or another, face all liberal democracies: how to advance public welfare without sacrificing individual rights, how to enhance the transparency and accountability of the modern administrative state and how to ensure that concerns for effectiveness and efficiency in the way that we are governed are not pursued to the exclusion of democratic values.

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1 (1990) 68 DLR (4th) 524.

AMAZING AMERICAN ADMINISTRATIVE LAW[1]

Not waving, drowning

Bronwyn McNaughton

The relationship between the courts and decision-makers is defined by the scope of judicial review, with the nature of the supervisory relationship varying depending on whether the determination under review is one of 'fact' or 'law'. It is taken for granted that there are certain decisions that primary decision-makers will be best placed to make and others that will more readily be determined by a court. A question relating to the purpose of a statute may be an example of the latter, while within

the confines of such statutory purposes administrators will be left with the discretion to apply the terms of the law. Differentiating between questions of law and questions of fact has sought to capture this kind of distinction: the relevance of whether a question is one of fact or law (or of mixed fact and law) relates, at least in theory, to the amount of deference that is assumed to follow, although the distinction has not always provided a particularly elegant resolution of the dilemma faced by the reviewing court.

A couple of the leading American cases regarding the appropriate standard of review for findings of fact involve drownings. In the first and less spectacular of these, *O'Leary*,[2] the Supreme Court reviewed an award of compensation under the Longshoremen's and Harbor Workers' Compensation Act to the mother of an employee of a government contractor operating on Guam.

Brown-Pacific-Maxon was engaged in construction work for the US Navy on the Island of Guam. It maintained a recreation centre for its employees, next to a channel so dangerous that swimming was forbidden. Signs to this effect had been erected. One afternoon, after spending time at the recreation centre, an employee drowned while attempting to swim the channel in order to rescue two men in distress in the water.

Under the Act, which authorised compensation for 'accidental injury or death arising out of and in the course of employment', it was found as a matter of fact that the death was compensable and death benefits were awarded to the employee's mother.

A lack of current awareness

The Court of Appeals upheld an appeal. It concluded that '[t]he lethal currents were not part of the recreational facilities supplied by the employer and the swimming in them for the rescue of the unknown man was not recreation'. It found that the swimming in the channel was disconnected from any use for which the recreational facilities had been provided and was not within the scope of the relevant employment.

The Supreme Court reversed this decision, however, and upheld the award of compensation. It took a broader view of the scope of employment, requiring not that the employee be engaged at the time of the injury in activity of benefit to the employer but merely that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose. A reasonable rescue attempt, such as this one, was seen to be within the 'zone of special danger'.

A question of fact

The Court acknowledged the difficulties inherent in labelling a determination as one of fact: it commented that to do so 'only serves to illustrate ... the variety of ascertainments covered by the blanket term "fact". Here of course it does not connote a simple, external, physical event as to which there is conflicting testimony. The conclusion concerns a combination of happenings and the inferences drawn from them. In part at least, the inferences presuppose applicable standards for assessing the simple, external facts. Yet the standards are not so severable from the

experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as "questions of law"'.

According to the terms of the Administrative Procedure Act, as a finding of fact, the finding had to be accepted unless unsupported by substantial evidence on the record considered as a whole. (The three dissenters found that the voluntary nature of the rescue meant that there was no causal connection between the employment and the death, and accused the agency of finding facts when there were none to be found.)

The second and more spectacular case, *O'Keeffe*,[3] similarly involved the drowning of an employee of an American firm working outside the USA. This firm was an engineering management concern working in Seoul under contracts with the United States and Korean governments. The employee was responsible for personnel in the stenographic and clerical departments. He was on call at all times, often working Saturdays and Sundays and at other times outside the normal work day, although his usual work week was 44 hours.

Archimedes' principle

On the weekend in question, the employee was visiting a friend who had a house on a lake about thirty miles east of Seoul. At some time during the weekend, he filled a rowboat with a load of sand and attempted to row across the lake. He had been assisting his friend fill in a small beach in front of the house with sand, the only sand available being on the other side of the lake. As the Court said, '[t]he return trip ... put Archimedes' Principle to the test; in the middle of the lake the boat capsized and sank. Two of the three men [aboard] drowned...'.

Death benefits were awarded to the widow under the Longshoremen's and Harbor Workers' Compensation Act - the employer considered all its employees to be in the course of regular occupation from the time they left the United States until their return. The award was challenged, but was upheld by the Supreme Court. Relying on *O'Leary*, the Court ruled that the inferences drawn by the deputy commissioner who had made the award had to be accepted unless they were irrational or 'unsupported by substantial evidence on the record ... as a whole'. Although the Court noted that it might well have found differently if the decision had been for it to make, upon review, applying the accepted standard for a question of fact, it was not able to say either that the decision was irrational or that it was not supported by substantial evidence on the record as a whole.

The dissenting judgment in *O'Keeffe* discusses generally the proper standard of review for questions of fact. It starts with *Universal Camera Corp v Labor Board*,[4] handed down on the same day as *O'Leary*, and relied upon in that case. *Universal Camera* defined judicial responsibility for examining the whole of the record in Labor Board cases, rather than just the part that supports the case of the Labor Board, and was interpreted by the dissenters as a prominent directive to lower courts not to underestimate their responsibilities. They found it untenable to read a case which purported to apply the *Universal Camera* standard of

review as embodying a philosophy they characterised as judicial abdication, which is how they viewed *O'Leary*. The dissenters saw the award of compensation in *O'Keeffe* as imposing absolute liability on the employer. They claimed that, if the Court were to accept such an interpretation of the statute, it was incumbent upon it at the least to hear argument on the merits of the interpretation.

These cases, arising out of similar fact situations, hint at the murkiness of a distinction which many text books and theoreticians suggest is a clear and obvious one. The appeal of a straightforward distinction is obvious but, so far at least, one that does not seem to be of substance. Despite the lip-service it receives and the significance that would be attached to it, it continues to bedevil American administrative law.

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

2 *O'Leary, Deputy Commissioner, Fourteenth Compensation District v Brown-Pacific-Maxon, Inc et al* 340 US 504 (1951).

3 *O'Keeffe, Deputy Commissioner, Bureau of Employees' Compensation, US Department of Labor v Smith, Hinchman & Grylls Associates, Inc et al* 380 US 359 (1965).

4 340 US 474.

THE PRIVACY ACT: REFLECTIONS ON FEDERAL LAW AND ITS RELEVANCE TO STATE ADMINISTRATION

Kevin O'Connor*

- an address to the Victorian chapter of the Australian Institute of Administrative Law on 28 July 1992, in Melbourne

I am pleased to have the opportunity today to address the Victorian chapter of the Australian Institute of Administrative Law on the Federal Privacy Act and its possible relevance for adoption by State governments.

The *Privacy Act 1988* came into operation on 1 January 1989 and at that time had two spheres of operation. Those spheres related to, one, all personal information handling activities of almost all Commonwealth government departments and agencies; and, two, the use of a particular category of information - the tax file number and information linked to that number - within the whole Australian community. Since that time, the Privacy Commissioner has been given responsibility for ensuring the effective operation of Commonwealth law limiting the use and disclosure of old conviction information (the relevant provisions being contained in Part VIIC of the *Crimes Act 1914*) and, more significantly, responsibility for implementing a complex array of new requirements in relation to the handling of credit reporting and other credit history information affecting consumers, contained in Part IIIA of the Privacy Act. Part IIIA of the Privacy Act became fully

operational on 25 February 1992. Two aspects of the Privacy Commissioner's brief in relation to Commonwealth administration have since been the subject of detailed statutory provisions: data-matching using the tax file number by the Department of Social Security (the *Data-Matching Program (Assessment and Tax) Act 1990*) and the operation of the Pharmaceutical Benefits and Medicare Schemes (s135AA of the *National Health Act 1953* and related amendments).

I have recorded the work of my office in my annual reports to the Attorney-General, which are tabled in Parliament. The first annual report covers the first 6 months of operation of the office to 30 June 1989. The second and third annual reports cover the years 89/90 and 90/91 respectively. At the moment, I am preparing my fourth annual report, dealing with the period 91/92. I mention these reports as they probably provide the most comprehensive view of the work of the office and would, I feel, be instructive to any governments contemplating adoption of Privacy Act standards in their own jurisdictions.

Influences leading to Privacy Act

The Privacy Act was the product of two policy influences at work in Federal administration during the 1980s. The first influence was the work of the Australian Law Reform Commission (ALRC) and, in particular, its then Chairman, Justice Michael Kirby. In 1983, the ALRC handed down its report entitled *Privacy*, comprising two large volumes, being the product of almost seven years of work, following a reference given to it in the early days of the Fraser Government by (then) Attorney-General Ellicott. During the period of that reference, Justice Kirby was involved in the work of the Organisation for Economic Co-operation and Development (OECD) in seeking to develop international guidelines on the protection of the privacy of personal data. The OECD work culminated in 1980, with the adoption by the OECD of guidelines on the protection of the privacy of personal information and the regulation of transborder data flows.

The ALRC report of 1983 dealt with the two major strands of privacy concern: one, electronic and physical intrusions into privacy, usually by means of surveillance devices; and, two, the privacy issues raised by modern practices and developments in relation to the collection, use and dissemination of personal data. The ALRC's recommendations in relation to the second matter involved the suggestion that there be enacted a Federal Privacy Act which laid down a series of information privacy principles regulating the collection, storage, use and dissemination of personal information. The ALRC information privacy principles were influenced by, to some extent, the language of the OECD guidelines. But, in many respects, the ALRC's information privacy principles were more specific than the OECD guidelines. The administrative model recommended for implementation of the information privacy principles was to give responsibility to an office of Privacy Commissioner attached to the Human Rights Commission. The Privacy Commissioner would essentially have an Ombudsman-like role, with a power to examine issues of concern, make proposals as to policy and give advice to the areas affected by the legislation. But there would be no

formal sanctions in respect of any alleged contraventions of the information privacy principles. The ALRC model envisaged that the information privacy principles would apply to the public sector and generally within the Territories.

The other major influence on the development of the Privacy Act was, of course, the proposals which emanated from the high-profile economic summit of 1986. At the summit, Mr Eric Risstrom of the Australian Taxpayers' Association had floated the idea that there be a universal identity number and card system developed by the Government to assist in the administration of various government functions. That idea was later picked up by the Government and formed the basis of the development of the Australia Card policy. As you will recall, considerable controversy surrounded that proposal. One of the elements of the Australia Card package was that there be a Privacy Bill introduced, to apply safeguards in relation to the handling of personal information in Commonwealth administration. Responsibility for ensuring that the Australia Card system operated within the boundaries set by the law and that information generally in Commonwealth administration was adequately protected by privacy safeguards was given by the Australia Card Bill to a Data Protection Agency, working in conjunction with a Data Protection Advisory Committee.

The proposal for an Australia Card was eventually dropped in 1987 and agreement reached between the Government and the Coalition to proceed with an upgraded tax file number system to assist in the administration of the tax system. That agreement was subject to the condition that the Privacy Bill be proceeded with. A number of revisions were made to the contents of the previous Bill (the one introduced as part of the Australia Card package). Responsibility for oversight of the legislation which applied information privacy principles to Commonwealth administration was given to a retitled office of Privacy Commissioner, attached to the Human Rights and Equal Opportunity Commission.

The information privacy principles were made legally binding, with contravention entitling the Privacy Commissioner to issue a formal determination against a Commonwealth agency, which might include an order for damages. The 1988 Bill, subsequently enacted, did not give the Privacy Commissioner any formal jurisdiction over the general community, other than in the area of the tax file number system. Instead, the Privacy Commissioner was given a function to encourage corporations to adhere to the OECD guidelines and their information-handling practices. The preamble to the Privacy Act referred to international instruments as providing part of the basis for the Federal Parliament's intervention in this area - namely clause 8 of the International Covenant on Civil and Political Rights, which refers to the protection or privacy as a human right and, more significantly, the OECD guidelines of 1980, which have been adopted by Australia.

The Privacy Act as a code of administrative procedure

For administrative lawyers, the legislation is particularly interesting. What it does - and in this regard I suspect it is unique within the framework of Australian administrative law - is lay down a legally-binding code of procedure to apply to the everyday personal-information-handling activities of Commonwealth administration. I recall that the only unacted-upon element of the administrative law package put forward to Commonwealth administration by the Kerr Committee in the early 1970s was that which related to the enactment of a code of administrative procedure to apply in relation to Federal Government administrative decision making. It could be argued that, to some extent, the Privacy Act fills that gap. But the Privacy Act provisions do not depend for their application on there being an endpoint decision to which the process is directed, as would presumably be the case for an administrative procedure code to apply.

Information Privacy Principles

The Information Privacy Principles are set out in section 14 of the Privacy Act. As you will see, they lay down standards in relation to: the practices to be followed by agencies in collecting information either directly from the individuals concerned, or from third parties; the storage and security of that information; the notice to be given to the public of the existence of data systems; access and correction (where the principles reinforce the requirements of the *Freedom of Information Act 1982*); and the use of information and the disclosure of that information. The principles do not directly address issues to do with the retention and destruction of data, as these are left to the oversight of the Archives Office, under the *Archives Act 1983.*

Systematic activity

My office's work has focussed on systemic issues in the area of Commonwealth administration. This focus reflects the emphasis on these issues in my statement of functions (see ss27, 28 of the Privacy Act as to the Commonwealth sector) and is in line with the role envisaged for the office by the ALRC in its 1983 report (see especially items 4, 13, 62 and 88 of the Summary of Recommendations - Report No 22 (1983), vol 1).

- *Policy Development*

This month, I am issuing data-matching guidelines for adoption on a voluntary basis by Commonwealth agencies. Earlier in the year, I issued covert surveillance guidelines for adoption on a similar basis. Both resulted from long and detailed consultation processes with agencies. In some areas, my guidelines have legally-binding status. These include those on tax file numbers and on the data-matching program at the Department of Social Security (DSS) involving the tax file number. I have also been given power to issue binding guidelines affecting the operation of the pharmaceutical benefits and Medicare systems. I have declined to act on that brief to date due to technical difficulties with the enabling legislation. I reported formally to that effect to Parliament during May.

- Formal investigations and reports

The development of guidelines has generally occurred outside the framework of any particular public controversy. But incidents which have given rise to public concern have on occasions provided the basis for my office making proposals for systemic improvements to agencies.

Examples are -

- The report issued in August 1990 relating to allegations first made in the *Age* newspaper in September 1989 of a 'trade' in passenger data as between various officials in Commonwealth administration and also with private detectives. While I found no evidence to support the main allegations, I did detect weaknesses in administrative procedures which could lead to improper disclosures occurring or improper access being obtained to the data. Various recommendations, accepted by those agencies, were made to the Department of Foreign Affairs, the Australian Customs Service and the Department of Immigration to better control the flow of microfiche copies of passenger movement data.

- During this year, I have issued reports on mail-out errors at DSS and the Australian Taxation Office, with a report pending in relation to the Department of Employment, Education and Training (DEET).

- Most recently, I issued a report on the release by the Australian Federal Police (AFP) of an arrest list of AIDEX demonstrators to DSS. Again I have recommended that there be a tightening of procedures, this time in the AFP and at DSS. That report is being examined by a working party.

- Audit

Audit is the final way in which systemic observance of the Information Privacy Principles is sought to be achieved. I have several staff devoted full-time to visiting Commonwealth agencies and auditing their practices. Audits have been undertaken in relation to aspects of the operations of the Cash Transaction Reports Agency (CTRA), DSS, DEET and the Australian Customs Service. An account of this work will be included in the next annual report.

The audit program seeks to respond to the difficulty that individuals do not know or may not understand what happens to their data in the hands of administration. The audit program seeks to ensure that privacy principles are observed behind the fours walls of administration.

Individual complaints and inquiries

Complaints often only give a limited insight into the satisfactoriness or otherwise with which administration complies with privacy standards. Often complaints are one-off, concerned with isolated incidents or are relatively trivial. Some, of course, are more significant and have agency-wide importance.

It is not advisable for me to discuss publicly the details of complaints and inquiries made to my office, but the following statistics may give you an insight into the operation of my office in this area:

General enquiries

There were 16 600 general enquiries in the year 91/92, divided as follows: 2 266 involved 'complaints' about alleged breaches of privacy by a variety of bodies in the country, of which only a very small number turned into formal statutory complaints; general information requests - 9 954, with the majority of these in the credit reporting area; 3 634 requests for publications; and 1 181 classified as 'other'. Over 100 000 pamphlets and over 9 000 copies of the credit reporting code of conduct were issued.

Formal statutory complaints

In the year 91/92, there were 201 formal complaints, 140 being in relation to alleged breaches of the Information Privacy Principles by Commonwealth agencies.

Some complaints prove to be unfounded. Of those regarded as reasonably raising a concern, almost invariably Commonwealth agencies are prepared to resolve them by negotiation. Usually, the agency agrees to modify its conduct or remedy the particular harm with which the complainant is concerned.

So far, in three and a half years, I have not made a final formal determination of a complaint. One has been the subject of a preliminary determination which has yet to be finalised. Several others which have not been capable of resolution in the usual way are not proceeding to determination.

Sectoral approach

Perhaps drawing on the example of other Western democracies and the constraints imposed by the Australian Constitution, the Australian approach to privacy has been 'sectoral', with the initial area regulated being Commonwealth government administration. There is some incidental protection of information privacy interests at State level by way of freedom of information legislation and confidentiality provisions. The Federal spent convictions legislation and the credit reporting legislation have had an impact on the State and private sectors.

Need for greater uniformity

The need for greater uniformity of standards in relation to information privacy protection - as between the Commonwealth and the States in relation to the public sectors, and as between the public sector as a whole and the private sector - is becoming more urgent. In its report of 1983, the ALRC identified the promotion of uniform approaches to data protection throughout Australia as a major role for its envisaged Privacy Commissioner.

At present, a number of important trends are occurring in government administration which underscore the need for greater attention to be given to the need for uniformity. These include -

(1) Within the Commonwealth administration, greater use of multi-agency strategies

. directed to the needs and problems of individuals eg DSS-

Commonwealth Employment Service - Health, Housing and Community Services joint approach to Jobsearch and Newstart

- to protect agencies against fraud - an issue currently being examined by a Parliamentary committee.

(2) As between Commonwealth and State administration, greater sharing of information such as in law enforcement (eg CTRA's arrangements to share its data with State police forces made under memorandum of understanding); health services; and the management of the electoral roll.

(3) Greater use by Commonwealth agencies of 'outsourcing' arrangements, with the result that Privacy Act protections are reduced.

(4) The privatisation or corporatisation of functions formerly performed in the public sector, eg telecommunications, accompanied by removal of Privacy Act protections.

If the Coalition is elected to government at the next election, its policies as outlined in *Fightback!* will, if implemented, tend to heighten the trends to which I have referred, especially in the third and fourth areas that I have mentioned - 'outsourcing' and 'privatisation' or 'corporatisation'. Consequently, it was with particular interest that I noted that recently in a major speech the Opposition Spokesman on Science and Technology, Mr Peter McGauran, referred to the consequences for privacy protection of outsourcing and similar strategies. In his speech, he noted that a Coalition Government would contract out up to an estimated $1 billion in public service computer technology requirements. He said:

> We would have to have proper regard to privacy requirements and legislation, [but] I think we can work our way through that. For all but sensitive private matters there should be contracting out.[1]

State developments

It may be useful if I recount the position in the States and Territories, in particular, recent developments.

(1) New South Wales

The New South Wales Privacy Committee is one of the world's longest-operating privacy protection bodies. It has a wide brief and can look at both intrusions and information privacy issues.

The Privacy Committee Act 1975 established the NSW Privacy Committee. The Committee performs the role of a privacy ombudsman. The Committee may:

- Investigate/conciliate complaints

- Make reports and recommendations to the Minister.

A NSW Privacy and Data Protection Bill, incorporating some of the recommendations made by the Committee for the Independent Commission Against Corruption (ICAC),

introduced as a Private Member's Bill (by Mr Tink), was tabled in December 1991. Due to a lapse in time, the Bill will need to be tabled again. It is anticipated that the Bill will not be discussed until September or later.

(ii) Queensland

Queensland had a Privacy Committee (*Privacy Committee Act 1984*), however this was abandoned in 1991. A discussion paper was circulated in 1990, proposing the formulation of privacy guidelines akin to the Information Privacy Principles and establishing a Privacy Commissioner. Reform in this area is in abeyance and it is uncertain as to when reform, if any, will come to fruition.

(iii) South Australia

A Privacy Committee was established in July 1989. Its main functions are to make recommendations to the Attorney-General affecting privacy, to improve access to government-held information, and to refer written complaints to the appropriate authorities.

A Privacy Bill advocating a 'tort of privacy' was introduced as a Private Member's Bill (by Mr Groom). The Bill was supported by the Government and its carriage was transferred to the Attorney-General. The Bill created widespread opposition from media, business and industry. The Bill was referred to a parliamentary committee in response to a widespread opposition and was subsequently reintroduced into Parliament. As amended, the Bill excluded media and business from the tort and this was passed by the House of Assembly. However, when the Bill was introduced to the Legislative Council, the Australian Democrats moved a significant number of amendments to the Bill. These included the establishment of a Privacy Committee, with both government and community representatives, to handle complaints relating to both government agencies and the private sector. It involved roles for the Ombudsman and the Police Complaints Authority, and the establishment of a new set of privacy principles (based on the NSW Private Member's Bill). The Privacy Committee was to be given widespread powers to delegate its functions.

The Government proceeded with the Bill until Parliament rose in May 1992. The Attorney-General now intends to reintroduce a 'clean' Bill in August 1992. The revised Bill is intended to take into account all views expressed so far, with a view to it becoming law by the end of the year.

(iv) Victoria

The Victorian Law Reform Commission (VLRC) has a privacy reference and advocates developing guidelines which would give effect to the OECD guidelines. However, Victoria already has a degree of legislation where avenues are available for people to make complaints in relation to breaches of confidence (eg freedom of information, public records and credit reporting). VLRC may look at the possibility of incorporating administration of the Freedom of Information Act with administration of privacy legislation by the Attorney-General's Department.

(v) Northern Territory

Cabinet has agreed to establish administrative instructions in relation to information privacy and freedom of information. These proposals will go to Cabinet in September. The intention is for there to be a privacy committee, however, there is no precise formula for this as yet.

(vi) Western Australia

A committee was proposing to bring forward a Privacy Bill as part of a freedom of information package, however this issue is in abeyance at present.

(vii) Australian Capital Territory

The ACT Administration is subject to the Privacy Act and to my jurisdiction.

(viii) Tasmania

I am not aware of any action on this issue in Tasmania.

Privacy agencies meetings

In early 1990, with a view to encouraging greater sharing of experience and to assist States and Territories contemplating information privacy legislation, I initiated a national meeting of privacy agencies. Since its first meeting in February 1990, this group has met regularly at approximately 6-monthly intervals.

Participating have been representatives of privacy bodies from New South Wales, South Australia, the Commonwealth and, until its body was disbanded, Queensland.

Invitations to attend have been given to jurisdictions without privacy bodies and all except Tasmania have attended on one or more occasions.

Applicability of the Privacy Act scheme to the States

As no doubt you might expect me to say, I do see State adoption of information privacy principles as desirable. But, equally, I acknowledge that it may not be realistic to expect the States to duplicate entirely the Commonwealth privacy protection scheme. While I regard the 'systemic' area as the one where an office of this kind can have the most impact, it may be that to some extent a State regulator can take advantage of the work being done by my office without having to revisit the entire subject. The framework of the national privacy agencies meeting could also be used to avoid duplication.

The nature of the personal data often held in State (or Territory) administration provides a significant reason for States adopting an information privacy policy. State government functions are often 'closer to the people', with a tendency for greater personal detail to be collected in State administration as compared to many areas of Commonwealth administration, eg prisons, police, community services, hospitals, educational institutions.

In the institutional areas mentioned, the data is often gathered in a 'case work' setting. Fine-grained data of the 'case-work' kind has not been seen traditionally as being as amenable to computer storage as basic category data of the kind often collected in

Commonwealth administrative schemes. 'Case-work' data is more likely to be held in manual files and stored in manual systems. Insofar as the argument for detailed privacy protections is driven by concerns about computerised storage and dissemination, this factor may be seen as counting against the need for State laws. But the trend seems to be towards more reliance on computer systems, even in this area. In South Australia, for example, the State government has a computerised Justice Information System which, as I understand it, links the various departments and courts concerned with welfare and justice and contains a significant amount of personal data.

During my time as Privacy Commissioner, I have had informal discussions with a number of State offices and some State Ministers on the possibility of applying the Commonwealth model to the States. My advice as to what might be feasible has gone along the following lines:

- Adopt information privacy principles, with any modifications/changes to meet any necessary differences between State and Federal environment.

- Vest responsibility for their implementation in an independent agency

  - short of creating a new agency, options might be Ombudsman or Equal Opportunity Commissioner.

- Encourage regulators to take advantage of Federal work in the systemic area and encourage States as a whole to look at common standards on issues such as education records, hospital records, prisoner records. Federal office could play a role in this.

- If existing office chosen as regulator, engraft IPP-complaints onto the complaints-mechanism already in use in that office.

- Question remains of application of information privacy standards to private sector generally.

I will close my talk on that note.

* Kevin O'Connor is the Privacy Commissioner.

1 See *The Australian*, 20 July 1992, pp 17, 20.

ADMINISTRATIVE REVIEW, PARLIAMENT AND THE COURTS

Peter Costello MP*

- address to the Australian Institute of Administrative Law on 7 October 1992, in Canberra

Under a system of *responsible government*, theoretically, the Executive answers to a Minister, the Minister answers to the Parliament and the Parliament answers to the electors.

The Judiciary, which interprets the law is also theoretically answerable to the Parliament - Judges can be removed for proved misbehaviour and judges

are appointed by Government - again answerable to Parliament.

In theory, capricious or arbitrary exercise of power by the public service or an executive agency could be remedied by making the Minister answer to the Parliament.

In practice, it rarely happens. A recognition that such a system does not offer practical and useful rights to individuals has led to a well developed system of administrative and judicial review - a system that I fully support and would like to strengthen.

The Parliament has acted to confer power on institutions to perform the task of administrative review. The pillars of this scheme at the Commonwealth level are the *Administrative Appeals Tribunal Act 1975*, the *Ombudsman Act 1976*, the *Administrative Decisions (Judicial Review) Act 1977*, the *Freedom of Information Act 1982*.

In recent days there have been suggestions that institutions other than Parliament, specifically the High Court, could perform the role scrutinising legislation to protect rights better than the Parliament.

In a speech delivered on 16 July 1992, entitled 'The impact of a Bill of Rights on the role of the Judiciary: An Australian perspective', the Honourable Sir Gerard Brennan said:

> There are some issues which, in a pluralist and divided society, are the subject of such controversy that no political party wishes to take the responsibility of solving them. The political process may be paralysed. If Governments can create a situation where such issues are submitted to curial decision, political obloquy can be avoided by Governments, though it is sometimes transferred to the Courts, as the continuing controversy over *Roe v Wade* illustrates.[1]

In a speech in Darwin this week, entitled 'A government of laws and not of men?', the Honourable Justice John Toohey said:

> Yet it might be contended that the courts should take the issue a step higher and conclude that where the people of Australia , in adopting a constitution, conferred power to legislate with respect to various subject matters upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties - a presumption only rebuttable by express authorisation in the constitutional document. Just as Parliament must make unambiguous the expression of its legislative will to permit executive infringement of fundamental liberties before the courts will hold that it has done so, it might be considered that the people must make unambiguous the expression of their constitutional will to permit Parliament to enact such laws before the courts will hold that those laws are valid.[2]

One can understand the view that the courts should take the role of scrutinising parliamentary legislation with a view to striking down bills that restrict rights or liberties. The Parliament has sunk to a low ebb. It has not done a good job of protecting rights recently. The passing of legislation to restrict political advertising and inhibit free speech was a disgrace.

I welcome the High Court's decision striking down Part IIID of the *Broadcasting Act 1942*. The Court declared the Government's proposal to restrict free speech illegal.

But the matter should never have got to that stage. The Parliament should have stopped that Bill. I tried to persuade it to do so. I failed. I am glad that the legislation has been struck down.

The Parliament ought to learn from that episode. It must begin to take an interest in human rights. It should not trample on these rights. If it fails in its duty and the Court takes the role of scrutinising legislation it will ultimately prove damaging both to the Parliament and to the Court. As Sir Gerard Brennan observed in his speech of 16 July:

> ... a Bill of Rights evokes a determination of a priority of rights or values by reference to which the human rights in competition with each other may be adjusted. Once the right is defined, the Court must weigh the collective interest against the right of the individual. This is the stuff of politics, but a Bill of Rights purports to convert political into legal debate, and to judicialize questions of politics and morality.[3]

My view is that political decisions should be made by politicians not by judges.

If controversial decisions are hand-balled by the politicians to the Court, this might make political life easier for politicians. But only by making political life harder for judges. The judges, of course, are insulated by the fact that they can not be voted out of office by the public for making controversial decisions. But this is the very reason they should not be given this task.

Those who make controversial political decisions should be subject to direct political accountability. They should be subject to election and public scrutiny.

If the Parliament does not reassert an interest in defending human rights and if the Court takes up that role it will inevitably politicise the role of the Court and ultimately damage its prestige.

A parliamentary committee to scrutinise legislation against accepted principles of individual rights would be a good step in showing the Parliament is interested in taking up this role. But it will only work if the Government takes it seriously- if it allows independence to its members and takes notice of its decisions.

As part of the Coalition's commitment to improve the conduct of Parliament we will strengthen such procedures.

Administrative rule making

While there have been significant achievements in developing a

comprehensive regime for the exercise and scrutiny of executive decisions of an administrative character, there has been comparatively little development of Commonwealth procedures in the area of regulatory rule making. This is somewhat surprising given that the vast bulk of official regulation is in the form of delegated instruments emanating from government agencies and departments.

The traditional form of delegated instrument has been the statutory rule, most commonly the regulation, made by the Governor-General-in-Council, for which a framework for scrutiny has developed over time. That framework is still far from perfect.

On 24 June 1992, the Senate returned the Superannuation Guarantee (Administration) Bill 1992 to the House of Representatives with a Schedule containing 25 amendments, requesting the House to concur in those amendments. The House reported the message on the same day and considered and agreed to the 25 amendments. On 29 June, after the Bill had been printed for transmission to the Governor-General for Royal Assent, officers of the House were advised that 4 of the amendments contained in the Senate Schedule had not, in fact, been made by the Senate. This advice was subsequently confirmed by officers of the Senate.

The result of the inclusion, in error, of the 4 amendments in the Senate Schedule was that the House of Representatives had been asked to agree, and had agreed, to 4 amendments which had not been made by the Senate. As the Bill had not been passed by both Houses in identical terms, it was not possible for the Bill to be transmitted to the Governor-General for Royal Assent.

On 30 June 1992, the Governor-General-in-Council made Statutory Rule No 223 - the Occupational Superannuation Standards Regulations (Amendments). These Regulations were to commence with the Superannuation Guarantee Charge. But no such Charge was in force. No Act had been enacted. Nevertheless, the Government proceeded to make the regulation without the legislation having come into force.

I believe that the making of those regulations was invalid and that the Government in advising the Governor-General to make them advised him to act unlawfully - shades of Rex Connor.

The Government also believes that the making of those Regulations was invalid. On 19 August 1992, the Government introduced the Occupational Superannuation Standards Regulations Application Bill 1992 into the Parliament. The object of the Act was to validate, retrospectively, the making of the regulations on 30 June 1992.

The House of Representatives was informed:

> Legal advice on 30 June was that the amendments to the Occupational Superannuation Standards Regulations could proceed and come into effect from 1 July 1992, even though the Superannuation Guarantee (Administration) Bill had not been enacted.

> That advice was on the basis that 1 July 1992 would be the commencement date for the SG Bill, when it was enacted, and that it would follow that the commencement date of the amendments to the Occupational Superannuation Standards Regulations would be 1 July 1992.
>
> Subsequent legal advice raised doubt about the validity of this approach. In consequence, the Government decided to introduce the present Bill to place beyond doubt the validity of the amendments to the regulations from 1 July 1992.

The Government's defence is that its legal advice changed. Even if that is the case, and I have asked for and not yet received that legal advice, it means that on 30 June 1992, according to the latest legal advice, the Governor-General was advised by the Government to make invalid regulations.

On 1 July 1992, there was in force no statute imposing a Superannuation Guarantee Charge. But the Australian Taxation Office (ATO) proceeded with a national advertising campaign in July, to the effect that employers were liable to pay superannuation under the Superannuation Guarantee from 1 July. That was clearly false - there was no legislation requiring such payment at the time of the advertising.

If the ATO was subject to the *Trade Practices Act 1974* - and in such respects it should be - it would have breached section 52 - misleading and deceptive conduct.

A complaint in regard to the ATO's advertising campaign was subsequently lodged with the Australian Standards Council. The Advertising Standards Council ruled that the advertisements breached the Advertising Code of Ethics, requiring that 'advertisements should be truthful and shall not be misleading or deceptive', and ordered the ATO to withdraw its advertising.

To summarise. In July this year:-

1. there was no legislation requiring the payment of a Superannuation Charge;

2. the Government had invalidly made regulations relating to it;

3. the ATO engaged in misleading advertising to the effect that the Charge was in force.

Some people will ask does this matter? The Government had announced the Superannuation Charge and was sooner or later going to introduce it. All the Government and the ATO were doing was anticipating the decision.

I happen to think it does matter. I happen to think responsible government is important.

I think that governments and their agencies should not be free to assert the law. I think they should not be able to make regulations when they have not enacted the necessary legislation. I think they should not inform people they are liable for a charge when they are not.

Examples like this illustrate that governments and their agencies can and do behave as if they are not

subject to the law. It illustrates why rigorous scrutiny is necessary.

In recent years, there has been an explosion in the volume and diversity of delegated legislative instruments. In 1971, the Senate Standing Committee on Regulations and Ordinances considered 284 instruments. In 1990-91 it considered 1645 statutory rules and disallowable instruments. This figure did not include an unknown number of instruments which were legislative in character but not subject to tabling and disallowance requirements.

As great a concern as the number of instruments is the bewildering array of different types of instrument. At last count, there were well over 100 different categories of disallowable instruments alone.

The problems that have emanated from the proliferation in volume and variety of instruments are well documented in the recent report of the Administrative Review Council (ARC), entitled *Rule Making by Commonwealth Agencies.* Many of the problems identified in the Report are, I am sure, well known to you: the poor quality drafting of many delegated legislative instruments; the anomaly that primary legislation receives wide public exposure before enactment, at least in theory, whereas delegated legislation does not; the element of chance in the application of the tabling and disallowance procedures of Parliament to delegated legislative instruments which are not statutory rules; the inaccessibility of delegated legislation; and the absence of any clear view of the distinction between matter appropriate for delegated and for primary legislation

You will also be well aware that the ARC has proposed in its report a new regime for the making, scrutiny and publication of delegated legislation. As a vehicle for the new regime, the Report recommends the enactment of a new statute, to be called the Legislative Instruments Act (LI Act), to apply to every delegated instrument that is legislative in character except those expressly exempted by their parent Act of Parliament. In particular, the Report recommends that:

* a set of criteria to better guide law makers on matters appropriate for inclusion in Acts of Parliament and on matters which can be included in rules should be incorporated into the Legislation Handbook;

* instruments which are legislative in character should be drafted by the Office of Legislative Drafting or arrangements for drafting should be made with that Office;

* the LI Act should broadly provide for mandatory public consultation before any delegated legislative instrument is made, with limited exceptions;

* all instruments to which the LI Act applies should be subject to tabling in Parliament;

* all delegated legislation be 'sunsetted', to promote periodic review in order to ensure that it is still achieving its aims and that it has not become outdated;

* the Statutory Rules series should be replaced by a new series, to cover all delegated legislative instruments that are subject to the Act;

* a Legislative Instruments Register should be established, in which all delegated legislative instruments covered by the Act should be published.

Here we have some excellent recommendations.

There is much to be said for mandatory public consultation before a new instrument is made.

Any new law, whether an Act of Parliament or other form of legislation, is improved by obtaining a variety of views, especially from members of the community likely to be affected by it.

Critics will no doubt argue that compulsory consultation will increase the cost of rule making and cause delay to the rule making process. Similar criticism has been directed at the administrative law reforms of the 1970's. Of those criticisms, Sir Anthony Mason said, in a paper presented to the ACT Law Society in 1989:

> If these innovations have a price in time and additional cost then, **within proper limits**, it is a price well worth paying, so long as we obtain a greater measure of administrative justice. (emphasis added)[4]

Our focus on administrative justice must now focus on the making of rules not just their application.

In this regard I am encouraged by the ARC's finding that the evidence from Victoria, where comprehensive procedures for public consultation on delegated legislation have been in place since 1985, suggests that the cost burden of mandatory consultation is offset by better instruments.

I also welcome those recommendations in the ARC's report aimed at increasing public access to delegated legislation.

Access to the law is imperative, given the principle that ignorance of its terms does not excuse the citizen from complying with it. Many delegated legislative instruments are very difficult to obtain. The material is not always available and, where it is, access is often impeded because the material is not kept in any systematic series. The growth in numbers of delegated instruments has compounded the problem.

The ARC's recommendation that the Statutory Rules series be replaced by a new series to cover all delegated legislative instruments is desirable and feasible. Coupled with the establishment of a Legislative Instruments Register, this will go a long way towards increasing public access to delegated instruments.

But perhaps of most importance is the Report's recommendation that all instruments that are legislative in character be tabled in each House of Parliament. At present, there are many instruments which cannot be categorised as a regulation or disallowable instrument and thus escape Parliamentary scrutiny. Indeed, it has been suggested that such instruments are often used to avoid the

unwelcome attention of the Parliament. As early as 1972, the then Chairman of the Senate Standing Committee on Regulations and Ordinances, Senator Ian Wood, warned the Senate about 'instruments in writing' being used in preference to regulations or ordinances, in order to evade his Committee's scrutiny.[5] More recently, Mr Peter O'Keeffe, a Clerk Assistant in the Senate and a former Secretary of the Standing Committee on Regulations and Ordinances, said in an article published in the *Business Council Bulletin* in 1989:

> These imaginative names and classifications serve only one purpose - to create the pretence that the species of legislative or quasi-legislative instrument in question is different in kind from a statutory rule and therefore warrants different treatment by way of drafting, presentation and promulgation under the complete control of the relevant policy department.[6]

Without drawing any conclusions as to the reasons behind the trend towards less formalised rule making, it is clear that there has developed a level of rule making which is increasingly the province of bureaucrats and into which the Parliament cannot intrude.

The net result is that the executive arm of government ends up making laws with no Parliamentary scrutiny. This is an unsatisfactory state of affairs. All instruments of a legislative character must receive some scrutiny by Parliament. Anything less involves a derogation of the power of the Commonwealth Parliament as the supreme law making body in Australia.[7]

It is time for Commonwealth procedures in the area of regulatory rule making to be given a serious overhaul. Too much government regulation, in the form of delegated instruments which have a real impact on the rights and lives of citizens, is emanating from the executive arm of government without effective Parliamentary scrutiny and adequate public consultation.

Whilst it is important to heighten the opportunity for scrutiny, it is important that Parliament heighten its interest in protecting rights and freedoms as part of that scrutiny.

A Coalition Government will direct intense interest to improving the mechanisms to allow Parliament to fulfil this role.

* Peter Costello MP is the Shadow Attorney General and Shadow Minister for Justice

1 Brennan, G, 'The impact of a Bill of Rights on the role of the judiciary: An Australian response' - paper delivered to conference on 'Australia and human rights: Where to from here?', conducted by Centre for International and Public Law, Australian National University, on 15-17 July 1992, p 15.

2 Toohey, J, 'A government of laws and not of men' - paper delivered to conference on 'Constitutional change in the 1990s', held in Darwin on 4-6 October 1992, p 25.

3 Brennan, supra note 1, p 10.

4 'Administrative review: The experience of the first twelve years', (1989) 18(3) *Federal Law Review* 122, at p 133.

5 Senate, *Hansard*, 29 February 1972, p 265.

6 'Who is watching the regulators?' (1989) 58 *Business Council Bulletin* 32, at p 35.

7 See generally, Argument, S, 'Parliamentary Scrutiny of Quasi-legislation', (15) *Papers on Parliament*, chapters 4 and 8.

REVIEW - 'ADMINISTRATIVE TRIBUNALS: TAKING STOCK'*

Robert Todd**

This publication comprises seven papers given at a one-day seminar held in April 1992, following a forum conducted by the Australian Institute of Administrative Law.

Included are papers presented by Professor David Mullan, Queen's University Ontario, and by Professor Michael Taggart, Universities of Auckland and Harvard. Taggart is a prolific writer on a wide range of administrative law topics and is well-known in Australia. Neither New Zealand nor Canada have an over-reaching tribunal of general jurisdiction on the model of the Administrative Appeals Tribunal (AAT). Taggart's paper concentrates on the difficulties of obtaining consistency of procedures over a wide range of separate tribunals, while Mullan centres on independence of tribunals. He highlights the problem of the independence of tribunals from the legislature; the executive; the courts; various other external sources; and from influences within a tribunal itself. A striking example of such a situation is given, displaying the very great risks in high level efforts to enforce consistency in a tribunal's decision-making.

The problem of inconsistency is picked up in a paper by Mrs Rosemary Balmford, a distinguished Senior Member of the AAT. She discusses *inter alia* how the AAT operates; how it should be constituted for a particular proceeding; how it receives evidence and other information; the place of inquisitorial, adversarial and interventionist techniques; and the reasoning processes of members, defined widely so as to embrace one of the major features of life on the AAT, that is to say, the Federal Court's insistence that it is not enough for the AAT simply to address the arguments put forward by the parties. It must come to the 'correct' or, in a discretionary area, the 'preferable', decision and must therefore pursue all issues which it considers to be relevant. It has a duty not only to deal with such issues but to identify their existence, an onerous if not character-building requirement.

Mr Justice Teague, of the Supreme Court of Victoria, in a helpfully calm analysis, tackles the question of alleged 'tribunalisation' which has in recent years in Victoria taken on electric proportions. Judges of the Supreme Court have spoken out strongly about increased reliance on tribunals which

are, allegedly, subject to governmental whim or interference. He rightly emphasises the need for some security of tenure, a principle which unhappily is under increasing attack in the Commonwealth sphere.

Lindsay Curtis comments on the limited attention given in writings and discussion to the role of tribunals in the States and Territories. He observes how the latter, freed from constitutional inhibitions, have the opportunity to face squarely the question 'court or tribunal?' when considering the creation of a new process for the review of administrative decisions. Aspects of the 'court' option are discussed in a paper by Mr Justice Stein of the NSW Land and Environment Court. Curtis raises *inter alia* three aspects of independence; the establishment of common codes of procedure; and the need for review 'on the merits', rather than judicially, of decisions of 'first tier' tribunals. He also suggests the desirability of monitoring bodies at the State/Territory level along the lines of the Administrative Review Council.

Extremely important issues are raised in the final paper 'The way ahead for tribunals', by Professor Julian Disney. It cannot be summarised adequately here, but it builds on a number of issues raised above. The sections on appointment, independence and authority of members deserve special scrutiny. He argues for informality and speed of decision-making and for the adoption of specialist divisions of the AAT. As for informality, that question has been elaborately discussed in the Review of the AAT. In my view, a 'hearing' can be so attenuated as not to be a hearing at all with, ultimately, serious consequences for the equality of the parties in the absence of provision for further review on the merits.

This leads to a final critical issue at which Disney gives a broad hint. I would extend the hint in this way: should not two-tier review be rationalised within one body, with the divisional set-up being both horizontal, affording review of a more formal kind for more difficult cases or (by leave) for those where further review is sought of a decision made at 'first tier' level; and vertical, reflecting the different needs, especially at the first level, of different jurisdictions, eg environmental decisions, social security matters and so on.

* papers presented at a seminar held by the Australian National University's Centre for International and Public Law and its Faculty of Law in Canberra on 29 April 1992. Edited by Robin Creyke, Faculty of Law, ANU, with a foreword by The Hon Sir Gerard Brennan, AC, KBE. Published by The Centre for International and Public Law. ($15)

** Robert Todd is President of the Australian Institute of Administrative Law

(Acknowledgment is made to the *ANU Reporter*, where this review first appeared.)

AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW

Incorporated

(Australian Registered Body Number 054 164 064)

MEMBERS NOTES

(accompanying Newsletter No. 11 1992)

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ANNUAL GENERAL MEETING

The annual general meeting of the Institute was held in University House, Canberra, on 23 September. At the meeting, the outgoing President, Professor Dennis Pearce, presented the Executive Committee's report on its activities in 1991-92 (copy included with this Members Notes) and the outgoing Treasurer, Dr Gary Rumble, presented the audited statement of income and expenditure and audited balance sheet covering the same period (copies available from the Secretary, on request). The documents demonstrate that the Institute continues to grow and and to make a useful contribution to the discussion of administartive law in Australia. They also indicate that the Institute it is on an increasingly sound financial footing.

Apart from the election of officer bearers (see further below), the major item of business concluded at the meeting was the setting of the membership fees for 1992-93. Professor Pearce informed the meeting that it was the view of the outgoing Executive Committee that membership fees for individuals and organisations should be increased to $45 and $150 respectively and that the fee for students and persons not engaged in paid employment should remain at $10. He informed the meeting that the basis of this recommendation was that while the membership fees had remained static since the formation of the Institute, the overheads involved in producing a quarterly Newsletter (which is the largest single on-going expense) had increased significantly. He also noted that since the Executive had passed a resolution in relation to the funding of the State chapters which involved the State chapters receiving one third of membership fees received from their State, further strain on the financial resources available to the Executive Committee.

In addition, Professor Pearce noted that, to date, the Institute had relied heavily on the goodwill of the Australian National University Law Faculty (largely in relation to the production of the Newsletter) and the hard work of the honorary Secretary. He advised the meeting that the Law Faculty was no longer in a position to provide assistance with the Newsletter and that the Institute would presumably have to seek paid assistance. He noted that this would increase the production cost of the Newsletter.

On the question of the role of the Secretary, Professor Pearce suggested that, in view of the substantial increase in members, it was unfair to expect the Secretary to carry the burden of administering the affairs of the Institute without some form of administrative support. He informed the meeting that, for this reason, the Executive Committee was exploring options for providing the Secretary with some part-time administrative support, including seeking a

grant-in-aid for this purpose from the Standing Committee of Attorneys-General. He noted that the bottom line was that, if necessary, the Institute would have to be prepared to pay for such support out of membership funds. Professor Pearce told the meeting that, for this and the other reasons he had outlined, an increase in the membership fee was warranted.

On the motion of Professor Pearce, seconded by Mr Selth, the meeting agreed that the membership fees for the 1992-93 financial year should be set at $45 for individuals, $150 for institutions and $10 for students and persons not engaged in paid employment.

After the setting of the membership fees, the following persons were elected to the Executive Committee:

President - Robert Todd

Vice Presidents - John McMillan (ANU Law Faculty) and Dr Gary Rumble (Blake Dawson Waldron)

Secretary - Stephen Argument (Senate Standing Committee for the Scrutiny of Bills)

Treasurer - Bert Mowbray (Attorney-General's Department)

Officers - Kathryn Cole (Parliamentary Library), Professor Michael Coper (Sly and Weigall), Pamela O'Neil (Immigration Review Tribunal), Professor Dennis Pearce (ANU Law Faculty) and Michael Sassella (Department of Social Security).

Mr Todd thanked the outgoing members of the Executive for their contribution and thanked Professor Pearce, in particular, for his efforts in leading the Institute during a period in which four State chapters had been established, the membership had increased by 150% and several significant seminars had been conducted.

At the conclusion of the formal business, Tom Sherman, former Chairman of Queensland's Electoral and Administrative Review Commission (and current Chairperson of the National Crime Authority) gave an address on his time at EARC and on the work of the Commission.

STATE CHAPTERS

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

Australian Capital Territory: As discussed above, the annual general meeting of the Institute was held in Canberra on 23 September.

On 7 October, the Shadow Attorney-General and Shadow Minister for Justice, Mr Peter Costello MP, addressed a meeting of members on administrative review and on the approach of a Coalition Government to law and justice issues. Mr Costello's paper is reproduced in this Newsletter.

The next ACT function will be an address on 12 November by the President, Robert Todd, entitled "Breaker" Morant: Scapegoat or scoundrel?'. Further details are provided to ACT members with this Members Notes.

New South Wales: The chapter's second annual general meeting and dinner was held on 24 September at the Hotel InterContinental. At the meeting, the following persons were elected to the executive committee of the chapter:

Chairperson - Hugh Roberts QC (NSW Crown Solicitor)

Secretary - Mark Robinson (Mallesons Stephen Jaques)

Treasurer - John Fitzgerald (Australian Securities Commission)

Officers - Frank Esparraga (Department of Veterans' Affairs), Stephen Gageler (Barrister), Melinda Jones (UNSW Law School), James McLachlan (TCN Channel 9), Linda Pearson (Macquarie University Law School) and Chris Robson (Australian Securities Commission).

At the conclusion of the formal business, the meeting was addressed by Justice Deirdre O'Connor, President of the Administrative Appeals Tribunal.

Inquiries about the chapter should be directed to Mark Robinson on (02) 259 8070.

Queensland: The next chapter function will be a gathering on (Monday) 26 October, to be addressed by David Solomon, the Chairman of the Electoral and Administrative Review Commission. Queensland members will receive details in due course.

It is hoped that a seminar will be held in late November to discuss the eagerly-awaited EARC paper on administrative appeals.

Inquiries about the activities of the chapter should be directed to the Chairperson, Maurice Swan, on (07) 360 5702.

South Australia: The inaugural function of the chapter was held on 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 (then) President of the Institute, Professor Dennis Pearce addressed the topic 'Is there too much natural justice?'. Papers from the meeting will be published in the next Newsletter.

Further details on the activities of the chapter can be obtained from the Chairperson, Eugene Biganovsky, on (08) 212 5712.

Victoria: The chapter's annual general meeting and dinner was held on 16 September. At the annual general meeting, the following persons were elected to the executive committee:

Chairperson - Julian Gardner (WorkCare Appeals Board)

Secretary - Mick Batskos (Mallesons Stephen Jaques)

Treasurer - Jacky Kefford (Residential Tenancies and Small Claims Tribunals)

Members - Michael Clothier (Immigration Review Tribunal), Joan Dwyer (Administrative Appeals Tribunal), Peter Hanks (Barrister), Erskine Rodan (Erskine H Rodan Solicitors), Loula Rodopoulos (Administrative Appeals Tribunal) and Professor Cheryl Saunders (University of Melbourne).

A seminar was held in conjunction with the meeting, at which Kevin Bell of the Victorian Bar, Chris Conybeare, Secretary of the Department of Immigration, Local Government and Ethnic Affairs and Peter Hanks of the Victorian Bar addressed the topic 'Recent developments in administrative law: Immigration decision making'.

On (Sunday) 22 November, the chapter will be conducting a 1-day conference on the issue of 'non-legal' members on review bodies. Papers relating to that seminar are enclosed with this Members Notes. Inquiries should be directed to Jacky Kefford, on (03) 602 8191 (W).

Further details on the activities of the chapter can be obtained from 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 the Chairperson, Associate Professor Hannes Schoombee, on (09) 360 2984.

1992 ADMINISTRATIVE LAW FORUM

The Executive Committee of the Institute is currently finalising the publication of the proceedings of the 1992 administrative law forum. It is intended to provide a copy of the publication to all paid-up members of the Institute.

1993 ADMINISTRATIVE LAW FORUM

Planning is proceeding in relation to the 1993 administrative law forum (to be conducted jointly with the ACT Division of RIPAA), on the basis of proposals for papers received in response to the call for speakers and papers included with the last Members Notes. The forum will be held in Canberra on (Thursday) 15 and (Friday) 16 April 1993. It is intended that the program for the forum, titled 'Administrative law and public administration: Happily married or living apart under the same roof?', will be ready to be sent out in the next 2 or 3 months.

MEMBERSHIP RENEWALS

Since the annual general meeting has now set the membership fees for 1992-93, those fees are now due and (pursuant to subrule 6(5)) must be paid by 23 December 1992. A membership renewal form is included with this Members Notes.

Please read the form carefully since, depending on when you joined the Institute, you may not be liable for the full renewal fee.

If you have joined the Institute within the last 2 or 3 months, you may not be liable to pay a renewal at all. In that case, there will be no renewal form included herewith.

In previous years, some members have been slow to renew and it has been necessary to send out reminder notices. The Secretary would, therefore, greatly appreciate your prompt attention to your renewal notice.

Members will not receive their copy of the published proceedings of the 1992 administrative law until their renewal has been received.

CONTRIBUTIONS TO THE NEWSLETTER

Members are reminded that they are welcome at all times to submit articles for publication in the Newsletter. Articles should be sent to 'The Editor, AIAL Newsletter', at the address indicated at the top of these Members Notes. Any inquiries should be directed to Robert Todd, on (06) 248 9968.