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A NOTE FROM THE EDITOR

This newsletter contains two papers presented at a seminar conducted by the Australian Institute of Administrative Law in Melbourne on the Victorian Administrative Law Act.

The third article, by Matthew Goode, comes from an Institute seminar in Adelaide on protection of whistleblowers. It gives a comprehensive run down of the whistleblowers legislation which has just entered force in South Australia. Several additional papers on this subject will appear in the next newsletter.

In this issue..

14 YEARS' EXPERIENCE WITH THE ADMINISTRATIVE LAW ACT - SUCCESS OR FAILURE?

By Emilios Kyrou, Mallesons Stephen Jaques

Paper delivered at the Australian Institute of Administrative Law Seminar entitled "Reforming Judicial Review in Victoria", Leo Cussen Institute, 8 February 1993

INTRODUCTION

1. Whether the *Administrative Law Act 1978* ("the ALA")* has been a success or failure depends on the criteria you use to judge it.

2. The criteria I propose to use in judging the ALA are:

   (1) Is the ALA used frequently?; and

   (2) Has the ALA brought about changes to public administration in Victoria?

* A copy of the ALA as published in *Williams Civil Procedure Victoria* is set out in appendix "A".

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3. In my view, the answer to both questions is "no" and accordingly, in my opinion, the ALA has been a failure.

4. Such a conclusion is probably too harsh. It ignores the limited aims of the ALA at the time that it was

enacted. It was always intended to be a modest little Act. Nevertheless, although the ALA has some positive features and has been useful in some cases, having regard to the rapid changes in the public administration law in Australia since 1978 it is my clear view that the ALA is incapable of meeting the needs for judicial review in Victoria in the 1990s. The Act should be replaced by legislation similar to the Commonwealth *Administrative Decisions (Judicial Review) Act 1977* ("the ADJR Act") as soon as possible.

LIMITED USE OF ACT

5. To the best of my knowledge, only approximately 100 written decisions have been made by the Supreme Court under the ALA since its commencement on 1 May 1979. This is in direct contrast to the extensive use that is made of the ADJR Act.

6. The ALA is little used because it is not well known. It is not well known because its scope is very narrow.

7. Because the ALA is little used, very few public servants in Victoria have been exposed to its operation. Many do not know about it and accordingly have not made any adjustments to the way they carry out their duties in light of the ALA. For this reason, the ALA has had minimal impact on public administration in Victoria.

8. The same cannot be said for other administrative law legislation in Victoria. The *Administrative Appeals Tribunal Act*, the *Freedom of Information Act* are well known to public servants in Victoria. I am personally aware of the manuals that have been written and the training sessions that have been conducted to educate public servants about the *Freedom of Information Act*. To my knowledge, very little has been done to educate public servants about the ALA.

9. Challenges to administrative decisions under the *Freedom of Information Act* and the *Ombudsman Act* receive publicity from time to time and this has heightened the awareness of the public, as well as administrators, of the availability and usefulness of that legislation. By contrast, the ALA receives very little publicity and this is another reason why it is not a dynamic and popular piece of legislation.

LIMITED SCOPE OF THE ACT

10. The ALA is little known and little used because its scope is limited.

11. The scope of the ALA is governed by the definitions of "tribunal", "decision" and "person affected" in section 3 of the ALA. Those definitions are as follows:

> *"'Tribunal' means a person or body of persons (not being a court of law or a tribunal constituted or presided over by a judge of the Supreme Court) who, in arriving at the decision in question, is or are by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice.*
>
> *'Decision' means a decision operating in law to determine a question affecting the rights of any person or to grant, deny, terminate, suspend or alter a privilege or licence and includes a refusal or failure to perform a duty or to exercise a power to make such a decision.*
>
> *'Person affected' in relation to a decision, means a person whether or not a party to proceedings, whose interest (being an interest that is greater than the interest of other members of the public) is or will or may be affected, directly or indirectly, to a substantial degree by a decision which has been made or is to be*

made or ought to have been made by the tribunal."

Narrow definition of "tribunal"

12. The ALA applies only to bodies which satisfy the definition of "tribunal". One of the weaknesses of the ALA is that there is considerable uncertainty as to whether a particular body satisfies the definition of "tribunal" because this in turn depends on whether that body is subject to the rules of natural justice. The answer to this question may change over time as changes take place in the law of natural justice. Moreover, at any given time the same body may be subject to the rules of natural justice for some of the decisions it makes (and thereby be a "tribunal") and may not be subject to those rules (and thereby not a "tribunal") in respect of those decisions. The position is clearly unsatisfactory.

13. There is another important limitation on the definition of "tribunal". Because that definition contains within it the word "decision", it has been held that the ALA applies only to public or semi-public tribunals and authorities exercising statutory power: *Monash University v Berg [1984] VR 383*. It was held in that case that the words "operating in law" in the definition of "decision" referred to decisions having force by virtue of statute or prerogative as distinct from private contract.

14. Accordingly, bodies which make decisions derive their status, operation and effect from private contract are not "tribunals" within the meaning of the Act. It has been held that private commercial arbitrators (see *Berg's* case), trustees of private superannuation funds (see *Dominik v Eutrope [1984] VR 636*) and the committee of the Victoria Racing Club (see *Vowell v Steele [1985] VR 133*) are not subject to the ALA.

15. The definition of "tribunal" makes it clear that the ALA does not extend to courts of law or tribunals constituted or presided over by a judge of the Supreme Court. In *Trevor Boiler Engineering Co Pty Ltd v Morely [1983] VR 716*, a wide interpretation of the expression "a court of law' was adopted and this further limits the scope of the ALA.

16. In recent years, a number of Acts have provided either expressly or impliedly that certain decisions made under those Acts are not reviewable under the ALA. Examples are the *Professional Boxing Control Act 1985*, the *Health Services (Conciliation and Review) Act 1987* and the *Corrections Act 1986*. Such legislation has further eroded the utility of the ALA.

17. Where there is any doubt over whether a particular body is governed by the ALA it is usual in Victoria to rely on the judicial review procedure in Order 56 of the Supreme Court Rules instead of the ALA. In some cases Order 56 and the ALA have been used concurrently as alternatives but this is not as frequent today because in many cases Order 56 in sufficient and there is no need to rely on the ALA.

18. In comparison to the ALA, the ADJR Act has a wider scope. It applies to administrative decisions made under an enactment. There is no requirement that the person or body who made the relevant decision be subject to the rules of natural justice. This is a significant difference between the two Acts and explains, in large part, why more use is made of the ADJR Act.

Narrow definition of "decision"

19. I have already referred to the reading down of the definition of "decision" by reference to the expression "operating in law".

20. The ALA has limited application to pre-decisional conduct. The Supreme Court has held that there must be a direct connection between a decision and its effect on a person's rights or privileges. In *Nicol v Attorney-General [1982] VR 353* at *361* the Full Court held that the granting of consent by the Attorney-General to a prosecution pursuant to section 381(2) of the *Companies Act 1961* was not a "decision" within the

meaning of the ALA because it did not, of itself, affect any rights or privileges.

21. A further narrowing of the definition of "decision" has been brought about by the High Court Decision in *Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321* which drew a distinction between substantive decisions and procedural decisions. That distinction was recently applied by J D Phillips J in *Mapel Nominees Pty Ltd v Whitvam Pty Ltd* (20 October 1992, unreported).

22. In comparison to the ALA, the ADJR Act has a wide definition of "decision" and expressly extends to pre-decisional conduct.

Definition of "person affected"

23. The aim of the definition of "person affected" was to overcome "the technical rules relating to locus standi": Second reading speech of the Attorney-General, Mr Haddon Storey. The ALA sought to provide a uniform test of standing for all the prerogative remedies that are available under the ALA.

24. Back in 1978, this would have been seen as an improvement on the common law of standing. Since 1978, however, there has been considerable liberalisation of the common law tests of standing. The statutory definition of standing may now in fact be narrower than the common law because of the requirement that the person must be affected to a "substantial degree" by the relevant decision. In *Charlton v Members of the Teachers' Tribunal [1981] VR 831 at 854* Mr Justice Garvie favoured the view that "substantial" meant "significant, in the sense of being more than trifling".

25. The definition of "person aggrieved" under the ADJR Act has been interpreted liberally and is now a well known and widely accepted test of standing in the context of judicial review. It is preferable to the ALA test of standing.

Grounds of review

26. The ALA does not set out any grounds of review. Accordingly, the common law grounds of review apply.

27. Although the common law grounds of review have been developed and expanded since 1978, some of them are still narrow in scope and are limited by technical considerations. In comparison, the ADJR Act codified and expanded the grounds of review and this has widened the scope of judicial review under that Act.

Remedies

28. Unlike the ADJR Act, the ALA does not contain its own tailor-made remedies. Section 7 of the ALA makes it clear that the only remedies that are available are the common law judicial review remedies, namely certiorari, prohibition, mandamus, declaration and injunction. Although section 3(6) of the *Supreme Court Act 1986* changed the form of the prerogative writs to ordinary orders which provide the substance of the relief previously conferred by the prerogative writs, the substantive law of the prerogative writs still applies and this further limits the scope and utility of the ALA.

29. For example, in *Monash University v Berg*, it was held that section 7 of the ALA means that where a particular remedy is not available against a body under the general law, then it is also not available under the ALA.

REASONS FOR DECISION

30. One of the aims of the ALA was "to ensure that people are not prevented from challenging erroneous decisions merely because they cannot find out what was the tribunal's reason for deciding against them": Second reading speech of the Attorney-General, Mr Haddon Storey.

31. This aim is reflected in section 8 of the ALA which enables a person affected by a decision of a tribunal to request the tribunal to furnish him or her with a statement of reasons for decision. The request may be either

oral or in writing, and must normally be made within 30 days from the date notice of the decision is received. The statement of reasons must be in writing and furnished within a reasonable time. If a statement is not furnished within such time, the Supreme Court may order the tribunal to provide a statement within the time specified in the order. A statement of reasons need not be furnished where, in the Court's opinion, to furnish the reasons would be against public policy or the requester is not primarily concerned in the decision and to furnish the reasons would be against the interests of the party primarily concerned.

32. It has been held that section 8 applies only in respect of bodies which satisfy the definition of "tribunal" in section 2 of the Act: *Footscray Football Club Limited v Commissioner of Payroll Tax [1983] VR 505 at 512.* Many public bodies refuse to supply reasons on the ground they are not a "tribunal". In such a case, the only way reasons can be obtained is by an application for a court order. The costs and delay associated with such an application are usually sufficient to deter persons aggrieved from pursuing what is often a legitimate complaint against administrative action taken by a public body.

33. Another limitation of section 8 is that it does not specify what the statement of reasons must contain. This is sometimes a source of disputation as to whether a particular statement of reasons contains sufficient particulars for the purposes of section 8. Another source of disputation is what constitutes a "reasonable time" for the furnishing of the statement of reasons.

34. In comparison, section 13 of the ADJR Act is much clearer and much wider in its scope. Requests for reasons for decision under section 13 are a regular feature of administrative review at the Commonwealth level. In contrast, section 8 of the ALA is little used.

PROCEDURE

35. One of the key aims of the ALA was "to set up a new procedure by general order for review which will enable persons complaining of administrative decisions to seek a review without having to select a particular prerogative writ that fits their case". Second reading speech of the Attorney-General, Mr Haddon Storey.

36. This aim of the ALA is a key to its limited scope. The ALA was never intended to revolutionise judicial review in Victoria. It was merely intended to overcome some of the procedural and technical obstacles to the making of judicial review applications which existed in 1978. That procedure is set out in sections 3 and 4 of the ALA. The procedure relies on the granting of an order nisi for review at first instance which is considered in detail on the return of the order nisi when the order nisi is either made absolute (if the case for judicial review is made out) or is discharged if the applicant fails to substantiate a case for judicial review.

37. This procedure was a useful reform in 1978. Since that time, however, amendments to the *Supreme Court Act* and the Rules of the Supreme court have overcome some of the difficulties that existed in 1978 such that the reforms effected by the ALA are not as relevant today.

38. Furthermore, the ALA has attracted its own set of technical requirements which are often a trap for those using the ALA for the first time. For example, the 30 days time limit for the making of an application for review is mandatory (see *Quality Packaging Services Pty Ltd v City of Brunswick [1990] VR 829)* and failure to include all relevant parties as respondents to the application is fatal (*Charalambos v Carideo [1988] VR 604).*

STAY

39. Section 6 of the ALA enables the Master to grant a stay of the decision under review at the time of making an

order nisi. A stay may also be granted under section 9.

40. This is a useful remedy but once again it is not as important today because similar interim relief may be obtained from the Supreme Court under the Supreme Court Rules.

OUSTER CLAUSES

41. Section 12 of the ALA renders ineffective ouster clauses in legislation passed before the commencement of the ALA.

42. There are two major problems with the section. First, it does not apply to ouster clauses in legislation passed after the commencement of the ALA. The second major problem is that the section probably affects only direct ouster clauses and does not affect indirect ouster clauses such as ouster clauses which merely limit the grounds of review or the time within which an application for review may be made rather than exclude judicial review altogether.

CONCLUSION

43. If one asks the question "did the ALA achieve the limited aims for which it was passed in 1978", the answer is a qualified "yes". Those aims were to simplify the procedure for judicial review, establish a procedure for obtaining reasons for decision, simplify standing and repeal "ouster clauses". Judged by the position that existed in 1978, the ALA did bring about some useful changes in these areas.

44. When one, however, judges the ALA by the circumstances and needs of judicial review of public administration in 1993, the inescapable conclusion is that the ALA is inadequate and needs to be replaced by legislation similar to the ADJR Act. I was of that view in 1985 when I reviewed the ALA at a conference organised by the Law Institute of Victoria and I remain of that view today.

APPENDIX "A"

ADMINISTRATIVE LAW ACT 1978
No 9324

TABLE OF PROVISIONS

An Act to make Provision with respect to the Review of certain Decisions made by certain Administrative Tribunals, and for other purposes.

BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):

[10,231] Short title and commencement

1 (1) This Act may be cited as the *Administrative Law Act 1978.*

(2) This Act shall come into operation on a day to be fixed by proclamation of the Governor in Council published in the *Government Gazette.*

[10,235] Definitions

2 In this Act unless the context or subject matter otherwise requires -

"Decision" means a decision operating in law to determine a question affecting the rights of any person or to grant, deny, terminate, suspend or alter a privilege or licence and includes a refusal or failure to perform a duty or to exercise a power to make such a decision.

"Person affected" in relation to a decision, means a person whether or not a party to proceedings, whose interest (being an interest that is greater than the interest of other members of the public) is or will or may be affected, directly or indirectly, to a substantial degree by a decision which has been made or is to be made or ought to have been made by the tribunal.

"Tribunal" means a person or body of persons (not being a court of law or a tribunal constituted or presided over by a Judge of the Supreme Court) who, in arriving at the decision in question, is or are by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice.

[10,239] Tribunal decisions may be reviewed

3 Any person affected by a decision of a tribunal may make application (hereinafter called an application for review) to the Supreme Court for an order calling on the tribunal or the members thereof (hereinafter called an order for review) and also any party interested in maintaining the decision to show cause why the same should not be reviewed.

[10,243] Procedure for review

4 (1) An application for review shall be made *ex parte* not later than thirty days after the giving of notification of the decision or the reasons therefore (whichever is the later) supported by evidence on affidavit showing a *prima facie* case for relief under section 7.

(2) The Court, notwithstanding that a *prima facie* case for relief is disclosed, may refuse any such application if satisfied that no matter of substantial importance is involved or that in all the circumstances such refusal will impose no substantial injustice upon the applicant.

(3) Where the application for review relates to a proceeding taken or to be taken by or before a Small Claims Tribunal or the Credit Tribunal the Court shall refuse the application unless it is satisfied that the applicant has made out a *prima facie* case for relief under section 7 on the ground that the Tribunal had or has no jurisdiction under the *Small Claims Tribunal Act 1973* or under the *Credit Act 1984* or the *Credit (Administration) Act 1984* in relation to the matter or that there has been a denial of natural justice to a party in the proceedings before the Tribunal.

(4) Where an application for review relates to an application to, proceedings before or a determination of, the Residential Tenancies Tribunal, the Court shall refuse the application unless it is satisfied that the applicant has made out a *prima facie* case for relief under section 7 on the ground that the Tribunal had or has no jurisdiction under the *Residential Tenancies Act 1980* in relation to the matter or that there has been a denial of natural justice to the applicant or to a party to the proceedings before the Tribunal.

[10,247] As to orders for review

5 (1) An order for review may be made returnable before the Supreme Court

sitting as the Full Court or before the court constituted by a judge.

(2) An order for review shall contain such directions as the Court thinks fit with respect to the service of the *order nisi* for review, and as to its return, but unless for good cause shown shall be expressed to be returnable either-

(a) on a date not more than thirty days after its pronouncement; or
(b) at the next sittings of the Full Court following its pronouncement.

(3) The order for review shall state the grounds upon which it is sought to review the decision, but on the return of the order the Court shall have power to amend any of such grounds or to allow such additional grounds as to it seems fit.

[10,251] Power to impose terms on granting an order for review

6 The Court in granting an order for review may grant it on such terms as to costs or security as to it seems fit and may provide the stay of any proceedings on the decision and may order any implementation of the decision to be restrained.

[10,255] Powers of Court

7 Upon the return of the order for review, the Court may discharge the order or may exercise all or any of the jurisdiction or powers and grant all or any of the remedies which upon the material adduced and upon the grounds stated in the order might be exercised or granted in proceedings for relief or remedy in the nature of certiorari, mandamus, prohibition or quo warranto or in proceedings for a declaration of invalidity in respect of the decision or for an injunction to restrain the implementation thereof and may extend the period limited by statute for the making of the decision but shall not exercise any other jurisdiction or power or grant any other remedy.

[10,259] Reasons for decision to be furnished by tribunal on request by party concerned

8 (1) A tribunal shall, if requested to do so by any person affected by a decision made or to be made by it, furnish him with a statement of its reasons for the decision.

(2) The request may be made orally or in writing to the tribunal or to any member or officer thereof but must be made, in case of a Small Claims Tribunal or the Residential Tenancies Tribunal or the Credit Tribunal either before or at the time of the giving or notification of the decision, and in any other case either before the giving or notification of the decision or else within thirty days after the decision has come to the knowledge of the person making the request and in any event not later than ninety days after the giving or notification of the decision.

(3) The statement of reasons shall be in writing and furnished within a reasonable time.

(4) The Supreme Court, upon being satisfied by the person making the request that a reasonable time has elapsed without any such statement of reasons for the decision having been furnished or that the only statement furnished is not adequate to enable a Court to see whether the decision does or does not involve any error of law, may order the tribunal to furnish, within a time specified in the order, a statement or further statement of its reasons and if the order is not complied with the Court, in addition to or in lieu of any order to enforce compliance by the tribunal or any member thereof, may make any such order as might have been made if error of law had appeared on the face of the record.

(5) Notwithstanding anything in this section a tribunal shall not be bound to furnish a statement of reasons, and the Court shall not be bound to order it to do so, where to furnish the reasons would, in the opinion of the Court, be against public policy, or the person making the request is not a person primarily concerned with the decision and to furnish the reasons would, in the opinion of the Court, be against the interests of a person primarily concerned.

[10,263] Interim relief

9 The Supreme Court, in order to prevent irreparable damage pending judicial review, may by order suspend the operation, or postpone the coming into effect, of a decision made or to be made

by a tribunal or restrain the implementing thereof until the expiration of fourteen days from the furnishing by the tribunal of a statement of reasons as provided by sub-section (1) of section 8 or for such further time as the Court shall deem fit.

[10,267] Reasons to be part of record

10 Any statement by a tribunal or inferior court whether made orally or in writing, and whether or not made pursuant to a request or order under section 8, of its reasons for a decision shall be taken to form part of the decision and accordingly to be incorporated in the record.

[10,271] As to who may seek prerogative writ declaration or injunction

11 Any person affected by the decision of a tribunal or inferior court shall have sufficient standing to maintain proceedings for relief or remedy in the nature of certiorari, mandamus or prohibition or in proceedings for a declaration of invalidity or an injunction in relation to the decision but nothing in this section shall take away or impair any right to relief otherwise existing or the discretion to refuse any such relief.

[10,275] Provisions excluding jurisdiction by Court not to prevail

12 Any provision in an Act passed before the commencement of this Act that any proceedings shall not be quashed or shall not be called in question, and any provision in any such Act which by any similar words excludes any of the powers of the Supreme Court, shall not, as from the commencement of this Act, prevent the removal of proceedings of a tribunal or inferior court into the Supreme Court, not the quashing of a decision of a tribunal or inferior court by that Court, whether for error of law on the face of the record or otherwise, in proceedings for relief or remedy in the nature of mandamus or by way of declaration of invalidity or injunction in relation to a decision of a tribunal or inferior court or to make any order for review or other order provided for in this Act.

[10,279] Exemption of Ministerial Council

13 (1) The provisions of this Act shall not apply to a decision of the Ministerial Council.

(2) In this section-

"Agreement" means the Agreement made on 22 December 1978 between the Commonwealth and the States in relation to a proposed scheme for the co-operative regulation of companies and the securities industry or, if that agreement is or has been amended or affected by another agreement, that agreement as so amended or affected.

"Ministerial Council" means the Ministerial Council for Companies and Securities established by the Agreement.

[10,283] Review of matters within jurisdiction of Visitor of a University

14 (1) A person affected by a decision of a tribunal may apply for and be granted an order for review under this Act notwithstanding that the matter which is the subject of the application is within the jurisdiction of the Visitor of a University.

(2) If an application for review relates to a visitation which has been made a judgement which has been given or any other act which has been performed by a Visitor of a University, the Court to which the application is made shall refuse the application unless satisfied that the applicant has made out a *prima facie* case for relief under section 7 on the ground that the Visitor had or has no jurisdiction in relation to the matter or that there has been a denial of natural justice to the applicant or to a person who petitioned the visitation or judgement.

(3) If a Court grants an order to review a decision of a tribunal, a Visitor of a University has no jurisdiction concerning the matter which is the subject of the order.

(4) In this section-
"University" means:

(a) Deakin University; or
(b) La Trobe University; or
(c) Monash University; or
(d) The University of Melbourne.

"Visitor", in relation to a University means the person declared by the *Deakin University Act 1974*, the *La Trobe University Act 1964*, the *Monash University Act 1958* or the *Melbourne University Act 1958* (as the case may be) to be the Visitor of that University.

REFORM OF JUDICIAL REVIEW IN VICTORIA: IS THE ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT THE RIGHT MODEL?

BY Annette Rubinstein, Barrister

Paper delivered at the Australian Institute of Administrative Law Seminar entitled "Reforming Judicial Review in Victoria", Leo Cussen Institute, 8 February 1993

I would like to start with a cautionary tale for law reformers, which might be called, with apologies to Rudyard Kipling, **"How the Administrative Law Act got its definitions"**.

The problems that have been outlined earlier stem largely from the fact that the purpose of the legislation was radically enlarged between its conception and its eventual enactment, without corresponding changes being made to its structure. The ALA began life in 1968 in a report of the Chief Justice's Law Reform Committee. The original draft bill had an even more modest purpose than the **Administrative Law Act** itself. It was intended to clear up some practical difficulties in obtaining a writ of certiorari for error of law on the face of the record, in order to facilitate judicial review of statutory tribunals. At that time, the legislation establishing many such tribunals had no provision for appeals on a point of law.

There were three main difficulties facing applicants for certiorari. First, they were often unable to discover the grounds on which the Tribunal had made its decision. Secondly, even if reasons were given, and disclosed an error of law, the decision was not reviewable unless the error appeared on the fact of the record. Thirdly, the decision might be protected from review by a privative clause.

The main provisions of the bill were a requirement that tribunals give written reasons for their decisions, a statement that such reasons form part of the record, and a provision negating privative clauses in existing legislation. The definition section of the Bill was framed with this narrow purpose in mind. **"Tribunal"** was defined as a body bound to act judicially to the extent of observing one of the rules of natural justice because, in 1968, it was accepted that certiorari was restricted to these bodies. This doctrine was a corollary of the other early twentieth century heresy that only bodies exercising judicial, as opposed to administrative, power were bound by the rules of natural justice, an error laid to rest by the House of lords in **Ridge v Baldwin** in 1964. However, it was not until the decision of the Court of Appeal, then years later, (**R v. London Borough of Hillingdon; ex parte Royce Homes Ltd** [1974] 2 All ER 643, 648) that it was made clear that certiorari would lie whenever a body had legal authority to determine a question affecting rights, regardless of whether it was obliged to act judicially. Consequently, in adopting its much maligned definition of **"tribunal"**, the Chief Justice's Law Reform Committee was merely defining, as economically as possible, the bodies amenable in 1968 to certiorari. Exactly the same reasoning was behind the definition of a **"decision"** as one operating in law to determine a question affecting the rights of any person in law to determine a question affecting the rights of any person or to grant, deny, terminate or suspend a privilege or licence.

Other limitations on the scope of the ALA are similarly explicable by reference to its origin. Courts were excluded, because their decisions, unlike those of many tribunals, were subject to appeal. Therefore certiorari was rarely used to quash decisions of courts. Standing was granted to any person whose interests are, or were likely to be,

affected to a substantial degree, in order to overcome the very restrictive definition of standing by the Privy Council in **Durayappah v Fernando**.

If the draft Bill had been enacted as it stood, it probably would have served its limited purpose reasonably well. Instead, it was adopted by the Statute Law Revision Committee of the Victorian Parliament as a vehicle for general procedural reform of judicial review. Sections were tacked on permitting a person affected by a decision of a tribunal to make an application for review to the Supreme Court, and empowering the Court, on the return of an order for review, to grant any of the prerogative writs, a declaration or an injunction. The definitions of **"tribunal", "decision"** and **"person affected"** were left untouched. As a result, many decisions which were reviewable by mandamus, declaration and injunction were not reviewable under the ALA because the applicant could not satisfy the more stringent test for certiorari. Instead of establishing a single, simplified procedure for judicial review, the result was the creation of two parallel systems, and an entirely new set of procedural traps for litigants.

It think it is worth dragging up this ancient history because there appears to me to be a very real risk of falling into much the same trap by adopting the ADJRA as a model for reform of judicial review in Victoria. The major criticism of the ALA seems to be that its coverage is not wide enough. Too many decisions can only be reviewed using the old remedies, without the benefit of reasons for decision. If the primary aim of legislative reform of judicial review is the creation of a single system of review which will cover the overwhelming majority of cases currently reviewable by the old remedies, then the ADJRA, at least in its present form, may not be the right model, for the same reason that the Chief Justice's Law Reform Committee's draft bill was not. It was drafted for a somewhat different purpose.

I think it would be fair to describe the purpose of the ADJRA as the simplification and partial codification of the law relating to the review of a particular category of decisions, the administrative exercise of statutory power. It is entirely understandable that legislative reform should have concentrated on this class of decisions. At the time the ADJRA was under consideration, before FOI and the AAT, these were the decisions least susceptible to scrutiny or challenge. Cutting judicial review free of the technicalities surrounding the old remedies, and setting out in statutory form the grounds for review and the available remedies, undoubtedly made the whole process more comprehensible, both to decision makers and to those affected by their decisions. However, the price paid for codification is the restricted coverage of the Act.

Legislation which, like ADJRA, was restricted to decisions of an administrative character, would inevitably fragment the system of judicial review in a State jurisdiction. There are not too many cases in the Federal jurisdiction in which litigants have fallen at this particular barrier. There are two reasons for this. The first is the wide definition of **"administrative"** adopted by the Federal Court. The second, and more significant for State reformers, is the constitutional restriction on bodies other than Chapter III Courts exercising the judicial power of the Commonwealth. It has been held on a few occasions that, although a decision maker is not exercising the judicial character, but such cases are understandably rare. Decisions of a judicial character in the Federal jurisdiction are almost always made by Courts, and are readily identifiable as such.

Of course, there is no equivalent restriction on the exercise of the judicial power of the States. Bodies which are not courts can and do exercise judicial power; clear cut examples include the Small Claims Tribunal, the Credit Tribunal, the Residential Tenancies Tribunal and the Equal Opportunity Board. Decisions of these bodies are currently reviewable under the ALA.

To make matters worse, some Victorian tribunals exercise powers which are not easy to categorise; do the Mental Health Review Board, the GAB, the Racing Appeals Tribunal and the Police Discipline Board make decisions of the

administrative or a judicial character? Might the answer depend on the particular issue before the Tribunal? Judicial power has been characterised as involving a determination of a question as between defined persons or classes of persons as to the existence of a right or obligation (**R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd** (1970) 123 CLR 361). Some Tribunals which review administrative decisions, most notably the AAT, do so by substituting their decisions for those of the original decision maker. The decisions of the review Tribunal in these cases would appear to be administrative in character. However, other review Tribunals, such as the recently abolished Accident Compensation Tribunal, adjudicate between the original decision maker and the person affected, and make determinations binding on both parties. Is this an exercise of judicial power? If so, whether a tribunal could be reviewed under a state ADJRA would often depend on matters of form rather than substance.

The requirement that a decision be of an administrative character would also preclude decisions concerning the validity of subordinate legislation being reviewed under the ADJRA type Act. Although such decisions in most cases cannot be reviewed under the ALA, they can be reviewed using the old remedies.

A further limitation on the coverage of the ADJRA is the requirement that the decision be made under an enactment. Decisions holding that the ALA does not extend to tribunals which do not derive their authority from statute, such as commercial arbitrators or the Victoria Racing Club, have been much criticised. Of course, these tribunals would also be excluded from review under ADJRA, although in some circumstances non-statutory judicial review may be available. The same is true of some decisions made under the royal prerogative.

The question that naturally springs to mind is **"could these limitations be overcome by expanding the definition of "decision" in an ADJRA type Act to include both administrative and judicial decisions?"** I think the answer is no, unless changes are made to the codification of the grounds of review. The existing grounds of review are appropriate for the review of bureaucratic decisions, and to narrow them would unjustifiably restrict the rights of those affected. However, they are considerably wider than the common law grounds for reviewing judicial decisions, namely jurisdictional error and error of law on the face of the record. In fact, incorporation of judicial decisions in to the ADJRA as it stands would have the potential to create an entire alternative system of appeal, extending to interlocutory decisions. Section 5(3)(b) of the ADJRA, which allows a decision to be reviewed on the ground that the decision maker based the decision on the existence of a fact, and the fact did not exist, would, if it were applied to judicial decisions appear to allow decisions of courts to be reviewed on the facts. Consequently, it would be desirable to have separate grounds of review for judicial decisions, or at least decisions of Courts. Obviously the difficulties of categorisation would remain. However, since in borderline cases, grounds would be pleaded in the alternative, this would be less likely to lead to disaster for litigants than using these same categories to define the scope of the Act. It would be relatively easy to incorporate review of justiciable decisions made under the royal prerogative and review of the validity of subordinate legislation in an ADJRA type Act. However, I have a lot of difficulty in seeing how review of domestic tribunals could be incorporated. Some decisions of such tribunals have been held to be susceptible to judicial review based on the old remedies, most notably the decisions of the English Panel on Takeovers and Mergers, which possessed neither statutory nor contractual power, and remarkably, had no legal authority of any kind. Whether judicial review is available appears to depend greatly on the facts of the particular case, including factors which are not readily susceptible of incorporation into a statutory definition, such as whether the existence of the body has dissuaded the Government from establishing a statutory body to carry out its functions. The price of adopting a definition which was too wide would be the shifting of what are

essentially private law contractual disputes into the administrative law field.

What are the alternatives to adopting the ADJRA as a model? The main alternative approach, adopted in the UK, NZ, Ontario and British Columbia, is to adopt a uniform, simplified procedure for applying for judicial review. This approach has also been adopted in the Queensland legislation for decisions not covered by the part of the Act based on the ADJRA. On an application for judicial review, the court may grant an order in the nature of a prerogative writ, or a declaration or injunction, but only if the applicant would have been entitled to that particular form of relief outside the judicial review legislation.

Different restrictions have been adopted in the various jurisdictions to restrict applications for judicial review by way of declaration or injunction to traditional public law matters. In NZ, BC and Ontario, declarations and injunctions are only available in relation to the exercise of statutory powers. In the UK they are available if it would be appropriate, having regard to the nature of the matters in relation to which prerogative writs may be granted, the persons against which they may be granted and the circumstances of the case, a definition which could be said to lack a degree of certainty. The Queensland definition resembles the UK one.

The major limitation of this approach is it requires continued knowledge of the circumstances in which the prerogative writs were available. It does not permit the litigant to obtain a remedy not available at common law, giving fresh life to technicalities like the rule that mandamus does not lie against a Crown employee acting as an agent of the Crown, but does lie if he or she exercises power as persona designata. The attempt to limit judicial review by way of declarations and injunctions to public law matters created some nasty procedural traps in both Canada and the UK.

It seems to me that some of the limitations of legislation of this type could be removed by including a provision enlarging the power of the Court to grant remedies. A litigant could apply for an order to review in any case where he or she could apply for a prerogative writ, or in any case where the exercise of a statutory or prerogative power would be reviewable by declaration or injunction. An order to review could grant any of the remedies set out in Section 16 of the ADJRA, regardless of the specific type of relief available in relation to that particular decision at common law. So, for example, an injunction would be available against the Crown. A statutory requirement that reasons for decision be given could be added, together with a uniform test of standing, based on the provisions of the ADJRA. This approach ought to pick up all decisions currently reviewable by the old remedies, since in those cases in which review of a body not exercising statutory or prerogative powers was permitted, the prerogative writs were held to lie. The price for this wide coverage would be that eligibility for review would depend on a definition unintelligible to anyone but an administrative lawyer. However, the more restrictive coverage of the ADJRA, at least in its present form, may be an even higher price to pay for more accessible legislation.

A GUIDE TO THE SOUTH AUSTRALIAN WHISTLEBLOWERS PROTECTION ACT 1993*

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The decision to enact whistleblowers protection legislation was grounded in the policy recommendations of the Fitzgerald Royal Commission[1], the Ontario Law Reform Commission[2], the Gibbs Committee[3] and so on. That was, in many ways, the easy part. The hard part was to fashion legislative principles and hence legislation which would be clear, accessible, and which would not create intolerable difficulties. Moreover, while there seemed to be a general level of support for the principle amongst

interested groups and people, that surface consensus masked divisions about the defensible limits of the idea. As ever, for example, the interests of the media lay in as much protected disclosure as possible. By contrast, for example, the Local Government Association was generally concerned about the preservation of a deal of confidentiality. As ever, one's perspective always depends on where one sits. I am not saying that either the media interest or the local government interest was wrong. I am saying that they are examples of forces pulling in different directions.

The first thing to do was to set about the broad principles. The draft Queensland Bill produced by the Electoral and Administrative Review Commission contained no less than 70 sections, several pages of definitions and was highly bureaucratic[4]. It involved, for example, the establishment of a Whistleblowers Counselling Unit in the statute. We did not like this at all. We wanted something that could, so far as is possible, be read by the public with some chance of understanding. We did not want to create another bureaucracy - and we thought that we had enough authorities with investigative powers around the place to deal with issues without having another to stumble over - or by legislating another set of investigative rules which may be at odds with their own.

Nevertheless, the Queensland Bill pointed to some decisions that we had to take to start with. First, what institutions should be subject to the regime of protected whistleblowing? The key problem here turned out to be whether to extend it to the private sector. The Queensland recommendations were that it should[5]. We thought that to be right. Here are the reasons:

- In terms of the public interest, the distinction between private and public sector is blurred now and there is every indication that it will be even more blurred in the future. The influence of privatisation is the most obvious example of this.

- The consequence of excluding the private sector entirely would mean that, if one council did its own rubbish disposal and did it appallingly, it could have the whistle blown on it, but if it contracted out the same appalling service to a private company, it could not. This makes no sense.

- There are hard cases at the overlap. For example, are Universities public or private sector[6]?

However, it did make sense to discriminate between private and public sector in terms of matters in which the public interest in having the information revealed outweighs the private interest in having something not nice concealed. We took the view that the private sector could hardly argue that it should be able to conceal information about criminal activity, or about the improper use of public funds, or about conduct that causes a substantial risk to public health, safety or the environment. But we also thought that, while there is a public interest in disclosure of information which tends to show that an officer in the public sector is incompetent or negligent, for example, that is not so about the private sector. If a company wants to keep secret the fact that its managing director has shown incompetence - well, so be it. The legislation is structured to reflect those decisions. Later we discovered that the Western Australian Royal Commission came to a similar conclusion.

> "... while the primary purpose of our proposal is to protect our system of government from the actions of public officials, this inquiry has revealed that it can be the actions of persons in the private sector that put public funds and government itself at risk. For this reason, while the Commission does not now positively recommend that its proposed whistleblowing legislation be extended generally to the private sector, a step which has been taken in the United States of America and which in modified form has been recommended by EARC in Queensland, it is essential at least that it extend to allow disclosures about companies and persons dealing with government where those dealings could result in fraud upon, or the misleading of, government."[7]

The next question was to sort out what sort of protection to offer a genuine whistleblower. There was no lack of

options. The core of debate centres around the protection of the employment of the whistleblower - from victimisation because of his or her disclosure of confidential information. Working from the principle that we should not create another agency or bureaucracy if we already had one that could do the job, we could not follow the Queensland model centering on a Criminal Justice Commission. The normal industrial grievance tribunals were a possibility, but that would be complex because of the bifurcation between private and public sector rules about dismissal and so on, and avenues of appeal. The Ombudsman has the reputation, the powers and the procedures - but again, if we stuck to our decision to keep the private sector in, we would have to amend his legislation to widen the scope of his powers. The clue to the solution came from the very conservative Gibbs Committee recommendations, which suggested that unlawful discrimination in Commonwealth Government employment could be dealt with via their Merit Protection and Review Board. The Equal Opportunity Commissioner has the powers, the procedures - and covers both private and public sector employment. Further, the Commissioner fits the bill - she deals with discrimination in employment on grounds deemed to be contrary to public policy. This all seemed to make sense.

When the Bill was debated in the Legislative Council, the Opposition moved to, in effect, create a tort of victimisation as an additional option for the victimised whistleblower, subject to the proviso that a person must elect which of the two alternative remedies he or she will pursue. A civil remedy is, strictly speaking, unnecessary - the Equal Opportunity system contains the power to make the equivalent of injunctive orders and award compensation for loss or damage[8]. The Government decided in the end, that it would accept the amendment. The real argument against giving a victim a choice of remedy is that the equal opportunity route is designed to reduce confrontation, and encourage conciliation and education if possible, unlike the court based option. The real question was whether that outweighed the choice aspect. In the end, it was decided that it did not.

The other central component for protection was obvious - protection was civil and criminal liability. That is common to all schemes. The other options for protection were the creation of a criminal offence of taking reprisals and a public sector disciplinary offence. In the end, we rejected both of these. The criminal offence was rejected as overkill, and contrary to the general principle of parismony in the criminal process; that is, that the blunt weapon of the criminal law should only be employed where the need is clear and the offence will go at least some way to meeting it. The public sector disciplinary offence was a possiblity - but that failed to take into account the private sector part of the legislation, and, in any event, would reveal a certain lack of faith in the ability and willingness of the Commissioner for Public Employment to take appropriate action against a member of the public service who failed to comply with legislative directions in the public interest. So we stayed with the shield of immunity and the sword of unlawful discrimination. The tort, of course, was added later.

That leads naturally to the central building blocks of the legislation. It seemed to us that the core of whistleblowing was, in non-technical terms, the disclosure of information in the public interest to an appropriate body for genuine reasons. There are three elements to that: (a) what information engages the public interest sufficiently to warrant this protection?; (b) what is the test for genuineness in a whistleblower?; and (c) what restrictions, if any, should the legislation impose on the ability of the whistleblower to "go public"? Each of these questions has key implications for the scope of the measure.

What we came up with one the first question was a definition of "public interest information". Here is what was in the Bill originally:

> "public interest information" means information that tends to show -
> (a) that an adult person(whether or not a public officer), or a body corporate, is or has been involved (either before or after the commencement of this Act) -
> (i) in an illegal activity; or
> (ii) in an irregular and unauthorised use of public money; or

(b) that a public officer is guilty or impropriety, negligence or incompetence in or in relation to the performance (either before or after the commencement of this Act) of official functions;...."[9].

This definition turned out to be *relatively* uncontroversial, but some features of this definition require further commencement[10].

- A number of people or organisations consulted questioned the restriction of the first part of the test to adults. The answer to this is an excellent example of the real power of this measure, and an illustration of why it is necessary to be cautious. The reason why the provision was limited to information about adults is in order to preserve the confidentiality of the identity, or information that might disclose the identity, of children who are either the victims of crime or who are offenders or alleged offenders. It was thought that the legislation should not invade that area of confidentiality. On the other hand, that has the consequence that the conduct of a 16 year old (for example) poses a substantial risk to the environment remains uncovered by the Bill. We simply could not devise an effective way to frame the legislation to resolve that hiatus.

- A number of the organisations and people consulted felt uncomfortable with the possible width of the term 'incompetence'. It was there originally because the term appears in the Queensland Bill[11]. On the other hand, the first New South Wales Bill covers "maladministration" which is quite extensively defined.[12]. This was repeated in the second Bill[13]. The Gibbs Committee recommendations are far more restrictive in a number of ways and would require "gross mismanagement"[14]. The WA Royal Commission referred to the necessity of coverage of allegations about "the protection of public funds from waste, mismanagement and improper use"[15]. The Interim Report of the (Finn) Integrity in Government Project also recommended the coverage of "maladministration"[16]. This was a matter concerning which there was clearly no consensus. In the final analysis, it was the Local Government Association which came up with a very persuasive argument for changing it. They argued, in effect, that the public interest was with the *effects* of incompetence rather than the mere fact that it existed. Maladministration is the effect. We thought that to be entirely persuasive. so we amended the Bill to replace the concept of "impropriety, negligence or incompetence" with the word "maladministration" and defined it to include "impropriety and negligence".

- There was also some discomfort with what was perceived to be the vagueness of the descriptive language used. We would have been most interested in any attempt at definition which would not sacrifice flexibility for certainty, but, the very difficulty of the task had the result that the expressed discomfort was not accompanied by a suggested precision. The problem is that any attempt to cast a net which will adequately cover the range of possible misconduct of public interest in both private and public sectors necessarily contemplates a toleration of a deal of uncertainty. That this is so is demonstrated by the fact that the same kinds of words are used in all Bills and reports on the issue. Because these words and phrases are essentially words of degree - that is, they were designed not to have a fixed meaning but to convey a spectrum or continuum of meaning within the parameters of the ordinary meaning of the words - they would be resistant to definition but would rather require description - using other words of similar meaning which would then be susceptible to criticism as being vague[17]. This would complicate the Bill to no sound end.

- When the Bill was debated in the Legislative Council, the Opposition moved to amend the definition to add "the substantial mismanagement of public resources". This was agreed by the Government. It was thought that the Bill covered this conduct in any event, but there could be no objection to spelling it out in this way.

The next problem was the question of disclosure to whom? The first question was whether protection should be

restricted to disclosure via "the proper channels" or whether and if so in what circumstances the whistleblower could go to the media. This forced us back to the basic rationale for the legislation. The reasoning went as follows.

If the Bill makes it too hard for whistleblowers to obtain the protection that it offers, then they will ignore it and take the risk of reprisals as they do at the moment. That would not be a good result both because the martyrdom of the whistleblower obscures the truth or otherwise of his or her allegation - and that is the heart of the matter - and because one of the points of legislating is to try to offer encouragement for whistleblowers to do the right thing and go to a responsible authority if that is the reasonable thing to do in the circumstances. Equally, on the other hand, if the legislation makes it too easy to obtain the protection in the sense of sensational allegations in the media, it would have a tendency to undermine the integrity of government and the justifiable need for a politically neutral and impartial public service to keep some matters confidential while serving the government of the day; or alternatively, undermine the integrity and corporate ethos of a private sector employer and put at risk justifiable commercial and industrial confidentiality.

Setting that balance is not an easy task. But stating the matter in that way led us to reject the position taken by the Gibbs Committee and the New South Wales Bills that protection was conditional on disclosure via an official channel. We agreed with the Queensland and Western Australian recommendations on this. There was another reason for that. Common law contains a vague and ill-defined public interest exception to certain kinds of legal action in relation to the unauthorised disclosure of information, known as the "iniquity" rule[18]. There is some authority on it and it is inconclusive[19]. But the point for present purposes is that there is an argument that it might allow for a defence in some cases in which the whistleblower goes beyond the proper channels. The last thing that we intended to do was to restrict existing rights. So we decided to put a non-derogation clause in the Act to say that[20] - and we decided that we had to allow a certain going outside the authorities. This also entailed the very significant advantage that, as we shall see, we did not have to list every single appropriate authority for every single possible eventuality.

The course we have adopted in the Act is to say that in order to get the protection, one had to disclose to a person "to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure."[21]. I submit that it is hard to quarrel with that. Then we deemed disclosure to an appropriate authority to be reasonable and appropriate. Then we listed what we thought to be the main ones. We thought that a Minister of the Crown was always appropriate. In relation to illegal activity - the police. In relation to the police - the Police Complainants Authority. In relation to fiddling public funds - the Auditor-General. In relation to public employees - the Commissioner of Public Employment. In relation to a judge - the Chief Justice. In relation to public officers not police or judges - the Ombudsman. And in any event, a responsible officer of the relevant government unit. And so on[22]. Because of the decision we had made, we did not face the unenviable task of specifying who is right when the disclosure is about the Chief Justice, or the Ombudsman, or the Auditor-General (for example)[23].

Once we had made it clear in the drafting that the system was that you could go to anyone if that was the reasonable and appropriate thing to do in the circumstances, there was little agitation expressed about the appropriate authorities list. There are, however, three brief points to make about it.

- There was some pressure to make MPs "appropriate authorities"[24]. We could not agree to this. The Bill enacts a very powerful weapon indeed, once a disclosure falls within its scope. It provides very complete protection against all legal action. It follows that it potentially protects the leakage of confidential information from all levels of the public service. If a Member of Parliament was, as such, an "appropriate authority" in terms of the Bill, then any member of the public service could with impunity leak information to any Member. This

would seriously compromise the integrity of any Government.

- The Commissioner of Police made the point that the Anti-Corruption Branch of the Policy Force should be an appropriate authority in relation to allegations of corruption and the like. We considered this very carefully. Our response in the end was to say that the reason was the ACB was to act as a clearing house for information of this kind, and that it would be better to write this role into the legislation directly. Even so, we had to amend the Bill in the Legislative Council to make sure that this role did not conflict with the jurisdiction and role of the Police Complaints Authority.

- It was put to us that there may well be new "appropriate authorities" created in the future. The most obvious example was the announced policy of the Government to introduce legislation to set up an Environment Protection Authority. Clearly, the EPA would be the appropriate authority in relation to at least environmental matters. That is why we amended the legislation to give a regulation making power to add and delete appropriate authorities.

The third building block was the hardest one. In general terms, how do you define a genuine whistleblower? The leads one to consider, also, for example, the research and anecdotal evidence on the nature of whistleblowers themselves. Who are we dealing with here? What kind of behaviour and motivation is involved? De Maria, summarising the available research, distinguishes between whistleblowers, informants, perpetual complainants, and activist groups. De Maria continues:

> "All participants appear to define wrong-doing in their own moral terms, usually as a breach of some absolute rather than relative ethic, and all want to do something to improve the situation, whatever it is. Beyond these matters there appear to be big differences. Perpetual complainants express their grievances randomly to any sympathetic ear, their behaviour being cathartic rather than change-oriented. Unlike whistleblowers, informants are usually not bureaucratically contexted in the same setting in which the breaches occur.... Informants and whistleblowers also differ in terms of motive. When the informant discloses a serious breach, he or she could be motivated by a desire for prosecutional immunity. Whistleblowers are usually motivated by a concept a public interest..... An attempted working definition would go something like this. The whistleblower, born of frustration with bureaucratic unresponsiveness, is a lone dissident, usually in a public authority, who observes a practice in the course of work, that is personally judged as wrong in law or ethics. At the risk of reprisal.... the whistleblower plans and executes a media-sensationalised and often clumsy strategy of public disclosure.... The purpose of the disclosure strategy.... seems to be to correct a part of the total, rather than seeking a transformation of the organisation's world view."[25].

A senior Canadian public servant has also taken the trouble to point out the difference between "public heroes" - the whistleblower to be admired and protected - and "vile wretches" - what De Maria would call the perpetual complainants. In the passage which follows, he essentially blames what he sees to be the poor record of the American system on a failure to distinguish between the two:

> "One reason for these relatively fruitless results is that compulsive moralists tend to be difficult people, and it has been hard for the special counsel to separate reprisals perceived to be due to whistleblowing from those due to personality defects that make these employees such a pain in the neck to work with. They 'tend to exhibit a distinctive approach to moral issues and decision-making'. By 'distinctive' it is plain that the authors mean 'at odds with peer group values'. During my career I've run across a few of these compulsive moralists. They grieve everything grievable, appeal every competition they lose, incite other employees to complain, and generally make nuisances of themselves. As a class, they are the ones who deliver 'brown envelopes' to opposition members and to media people".[26].

The Laframboise piece is also valuable for pointing out a more subtle clash of policy

values. Contrary to Laframboise's analysis, some research indicates that true whistleblowers are not neurotics or troublemakers and that they blow the whistle precisely because they are highly committed to the public interest goals of the organisation for which they work. This may be as good a distinction as any between the whistleblower and the perpetual complainant - the difference being that one is committed to the public interest which provides the motivation, and that the other is committed to the private interests of individual morality and self righteousness. But it is simply not possible to accurately reflect the complexities of this behaviour in legislation, even if it was desirable - and even if people did conform to the stereotype rather than, as is normally the case, they exhibit characteristics of many kinds.

This is not the place to enter the lists on the subject of whether or not there are absolute moral values and whether or not moral relativism is an abandonment of principle - but if one accepts that moral and ethical issues commonly consist of shades of grey rather than black and white, then one must also accept that the ethics of whistleblowing will depend very much on the individual case and will have both good and bad effects. If that is so, then legislation can do very little more than sketch the boundaries within which judgement must be made and trust specific application to dispute resolution mechanisms (such as courts and tribunals) set up for the task.

Nevertheless, the perceptions of the behaviour do shape the legislation in subtle ways. The legislation does exhibit a desire to mark out a boundary between the whistleblower and the perpetual complainant. It does so by providing that the victimisation remedy should not be available where a person alleged to fall within the protection of the legislation has had the issues fully aired in some other forum - such as a court or a grievance procedure. This remedy is not intended to allow a person to have two or three bites at the cherry[27].

The issue of genuineness is all the more central because of the possible consequences. For example, Goldring states:

> "There is a problem when public servants go to the media: if they do so without good reasons the result could be disastrous. There are unnecessary restrictions on public servants' communication with the media, but when people are revealing corrupt conduct, maladministration or substantial waste they ought to be protected..... However, an unfounded or malicious complaint can do untold harm to the career and personality of officials. The interests must be balanced."[28].

Easier said than done. We started with a position which was, on reflection, not coherent and showed how hard the problem was and our own confusions about it. A major part of the problem was that we had genuineness in three places. First, the whistleblower had to genuinely believe that the information was true - in order to be a "whistleblower" for protection purposes. Second, we had a defence to a victimisation allegation if "the disclosure is false or not made or intended in good faith". Third, we had a criminal offence of making a false allegation knowing it to be false and misleading.

Consultation quickly revealed that this did not hang together, and that we had to rethink it all. The first thing was that no-one approved of the defence to an action for victimisation - so we took it out. The second matter was that we had to keep an offence to deal with what might loosely be described as malicious complaints. Now, we decided that, for these purposes at least, if the information was true, then it did not matter if the motivation was malice. So the offence should be concerned with disclosures of false information. Next, we appreciated the concern that some had shown about the uncertainty inherent in the word "misleading". It is one thing to tolerate a degree of uncertainty in dealing with discretionary remedies - but the criminal law should be as certain as possible. False should stay - misleading should go. That left us with an offence that covered a disclosure of information that is false knowing or being reckless about the fact that it is false.

Respondents to the consultation process were not happy with the requirement that the whistleblower genuinely believe that

the information is true. There were two reasons for this. The first was that, as a general proposition, many were concerned that it catered too much for a person who was very credulous and/or self-deluding, and, further, that a person could genuinely believe that the information was true - thus attracting the protection - and still be aware of the possibility that it was false - thus also being guilty of the offence.

We started from the proposition that if the disclosure was true, then there was no need for any further objective test. The objectivity lies in the truth of the disclosure. Further, for example, it does not matter if the disclosure is made in bad faith or for all of the wrong reasons, because the public interest lies in the disclosure of the truth of those defined categories of information[29].

The problem arises in an acute form once one examines what the test should be if the disclosure is false. In that case, we could only say that we preferred reasonable belief to reasonable suspicion. Further, we could not justify a test which was different according to whether the information was true or not. We could not bear to contemplate the metaphysical decisions that would be required and the minute dissection of possible complex information and statements that that would involve.

As it happened, the respondents in consultation preferred the test in the Queensland Bill[30] that there must be a belief on reasonable grounds that the information is true. We agreed for the above reasons and that is the test.[31].

The second point is a little more subtle. The Commissioner for Equal Opportunity commented that the requirement that the person genuinely believe that the information is true created an unfair distinction. The distinction is best put as follows:

> "As a matter of fairness it would seem to me that the Act ought to protect the fair-minded and objective person, who is unable to make up his or her own mind about the truth of the allegations, to the same extent as it protects the person who rashly accepts and believes everything he or she hears."

That seemed right to us. So that went in too. That is why the test of belief on reasonable grounds is supplemented by an alternative as follows:

> "..... is not in a position to form a belief on reasonable grounds about the truth of the information but believes on reasonable grounds that the information may be true and is of sufficient significance to justify its disclosure so that its truth may be investigated."[32]

That explains, I think, where we came from and where we finished up and why the journey took the course that it did. It will, of course, be necessary for there to be a good public awareness campaign to educate the public about what the legislation says and what it is intended to mean. I look forward to co-operating with all concerned parties to do that. Hence, I hope that this seminar is just a beginning.

[1]*Report of a Commission of Inquiry Pursuant to Orders in Council, 1987-1989.*

[2]Ontario Law Reform Commission, *Report on Political Activity, Public Comment and Disclosure by Crown Employees,* (1986).

[3]Review of Commonwealth Criminal Law, *Final Report,* (1991).

[4]See Electoral and Administrative Review Commission, *Report on Protection of Whistleblowers,* (1991).

[5]This was a replication of the current state of the argument in Queensland. There is a summary in Legislative Assembly of Queensland, Parliamentary Committee for Electoral and Administrative Review, *Whistleblowers Protection,* (1992).

[6]See *The Age,* 10/8/92 for a story on the whistleblowers who exposed fraudulent research.

[7]*Report of the Royal Commission Into Commercial Activities of Government and Other Matters,* (1992) at 4.7.10.

[8]*Equal Opportunity Act,* 1984, s 96.

[9]*Whistleblowers Protection Bill,* 1993, s 4(1).

[10]There are other isues of detail which cannot be covered in the text. For example, when the definition referred to a person generally, it was not necessary to include a corporate body because of the operation of s 4 of the *Acts Interpretation Act*, but once we said "adult person" that may have carried an exclusionary implication. We also agreed with a submission which said that the legislation should apply to information about conduct occurring before the Act came into operation. It does not, of course, apply to disclosures of information made before the Act comes into operation.

[11] *Whistleblowers Protection Bill,* s 11(1)(b).

[12] *Whistleblowers Protection Bill,* 1992, s 9(2).

"For the purposes of this section, conduct is a kind that amounts to maladministration if it involves action or inaction that is:

(a) contrary to law; or

(b) unreasonable, unjust, oppressive or improperly discriminatory; or

(c) based wholly or partly on improper motives.".

[13] *Whistleblowers Protection Bill,* 1992 (No.2), s 11(2).

[14]Review of Commonwealth Criminal Law, *Final Report,* (1991) at 32.32.

[15] *Report of the Royal Commission Into Commercial Activities of Government and Other Matters,* (1992) at 4.7.9.

[16]Finn, *Official Information: Integrity in Government Project: Interim Report 1,* (1991) at 51.

[17]A good example is the attempt in New South Wales to define "maladministration". That is contained in a note above. The definition is clearly descriptive and indicative - but not more certain.

[18]So called after the phrasing in its first real appearance in *Gartside v Outram* (1856) 26 LJ Ch 113 at 144. Gibbs CJ considered the doctrine without enthusiasm in *A v Hayden* (1984) 59 ALJR 6. See generally Starke, "The Protection of Public Service Whistleblowers - Part 1" (1991) 65 ALJR 212 at 213-219; Stewart and Chesterman, "Confidential Material" (1992) 14 Adelaide LR 1 at 14-21.

[19]The Queensland EARC found that the common law protection was "uncertain, uneven, potentially costly, and it does not protect a person against all of the different forms of overt or subtle retaliation...." See Legislative Assembly of Queensland, Parliamentary Committee for Electoral and Administrative Review, *Whistleblowers Protection,* (1992) at 7. The Australian Press Council says that the current law is "unsatisfactory, ambiguous, time consuming and discouraging.": Australian Press Council, *Submission to EARC On Protection of Whistleblowers,* 1991.

[20]This is also meant that we had to discourage "double dipping": see s???

[21] *Whistleblowers Protection Act,* 1993 s 5(2)(b).

[22]During debate in the Legislative Council, the Opposition moved to add two new ones: in relation to MPs, presiding officer of the relevant House, and in relation to local government, a responsible officer of that local government authority. Both were eminently sensible additions.

[23]This is all done in *Whistleblowers Protection Act,* 1993 s 5(3), (4).

[24]The Australian Democrats moved an amendment to the Bill to achieve this. The amendment was defeated.

[25]De Maria, "Queensland Whistleblowing: Sterilising the Lone Crusader" (1992) 27 *AJSI* 248 at 252-253.

[26]Laframboise, "Vile Wretches and Public Heroes: the Ethics of Whistleblowing in Government" (1991) 34 *Can Pub Admin* 73 at 76.

[27] *Whistleblowers Protection Act,* 1993, s 9(3). As a matter of detail, this issue also arises in the test for victimisation. The test which we settled on says [s 8(1)] that discrimination exists where the action is on the ground, or substantially on the ground, that the person is a whistleblower.

"Substantially" is, of course, subjective - but our view was that this reflected the test that already exists in s 6(2) of the *Equal Opportunity Act* and to require that it be the only reason would make the task of the victim impossible while making it any part of the reason would make the task of the employer impossible.

[28]Goldring, "Blowing the whistle", *Alternative Law Journal,* 1992 at 299-300.

[29]Finn, *Official Information: Integrity in Government Project: Interim Report 1* (1991) at 66.

[30]And, as it happens, one part of the test recommended by Profesor Finn: see Finn, *Official Information: Integrity in Government Project: Interim Report* (1991), at 63, 66-67.

[31] *Whistleblowers Protection Act,* 1993, s5(2)(a)(i).

[32] *Whistleblowers Protection Act,* 1993, s5(2)(a)(ii).

Book Review

Administrative law: Cases and Materials by Roger Douglas and Melinda Jones (Federation Press, 690 pages including index, paperback, price $60.00)

As its title suggests, this is a book of readings and materials rather than a straight text book on administrative law. In their preface, the authors state that their reasons for compiling these materials is the transformation of 'the staple of administrative law' by recent developments in both the statute book and in the courts' interpretation of the statute book. This, in turn, is a reflection of what the authors regard as a 1980s trend toward extensive law-making by parliaments and the courts.

This is a somewhat novel (albeit welcome) dynamic approach to the subject material and is particularly evident in the first three chapters of the book, which deal with, in turn, 'Issues and problems in Australian administrative law'. Chapter 2, in particular, discusses some fundamental public law concepts that are not always dealt with in administrative law texts such as the rule of law, responsible government and the separation of powers. The book addresses matters of current concern such as in the discussion of the growth of Executive dominance of the legislative process (and the concomitant increase in the volume of delegated legislation) and the mechanisms available to parliaments as a means of curbing this growth.

In Chapter 3, this theme is continued, with 'The decline of Parliament' opening up a sequence of sections that lead, inevitably, to 'The new administrative law' (before the bureaucracy strikes back at the end of the chapter with 'efficiency' and 'the new managerialism'!).

Chapter 4 addresses the topic of freedom and open government. Chapter 5 introduces what is an increasingly popular topic for the 'modern' administrative lawyer (as evidenced by the 'new morality' session at the recent 1993 Administrative Law Forum), the issue of corruption and how administrative law, in particular, deals with it.

In Chapter 6, the authors take their first step towards providing a more mainstream treatment of administrative law, by discussing the role of the Ombudsman in investigating administrative action. Indeed, from that point on, the chapter and subject headings of the book, take on the more comfortable feel of any of the standard administrative law texts. Topics such as administrative review on the merits (Chapter 6), the duty to act for proper purposes and in good faith (Chapter 10), unreasonableness (Chapter 12), the right to procedural fairness (Chapter 13), the hearing rule (Chapter 14), the rule against bias (Chapter 15) and judicial review (Chapter 18) are dealt with in the remaining chapters.

The treatment in these succeeding chapters is not necessarily as 'orthodox' as the headings suggest, however. In Chapter 16, for example, the authors pose the question 'From natural justice to substantive fairness?' In considering this question, they outline the development of natural justice and its metamorphosis into

'procedural fairness'. At the end of that chapter, the authors offer their concluding thoughts on procedural fairness. Their final paragraph is as follows:

> Discussions of the desirability of extending the scope of procedural fairness protections must also bear in mind that courts are not free agents in their determination of the scope of administrative remedies. There are various ways in which governments can react to what they perceive as excessively liberal procedural review rules. They can legislate to prescribe relatively restricted procedural rules. They can establish statutory schemes which drastically restrict the range of matters to be taken into account (and on which citizens might therefore have a right to be heard). (The revised Migration law is an example of this). They may privatise, thereby removing authorities from the administrative supervision of the courts, pending the development of a body of private administrative law ... . They may actively resist judicial review ... , especially if there are powerful pressures on administrators to behave "efficiently", coupled with doubts about the legitimacy of legal review of administrative action. Awareness of such considerations is likely to constrain law's imperialism, and ensure that legal regulation of administrative action does not pose undue threats to "efficiency". If judicial review were intolerably costly, it would not be tolerated. If it is tolerated, it is presumably tolerable.

This is a provocative (and inherently interesting) way of concluding the chapter.

Overall, this book is an appealing treatment of administrative law, containing many useful and thoughtfully-extracted excerpts from a wide range of sources (going well beyond the usual string of predictable cases that can give casebooks a bad name). Clearly, it is not a straight text book but it does not pretend to be. Rather, it offers itself as a useful companion work, which provides students of administrative law (whether or not they are students in the formal sense) a wider perspective on the topic. This offer is made all the easier to accept by an approachable size and format and by the inclusion of a comprehensive table of sources and index.

Stephen Argument

Note: Members notes accompany this newsletter.

AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW

Incorporated

(Australian Registered Body Number 054 164 064)

MEMBERS NOTES

(accompanying Newsletter no. 13 1993)

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ACT 2601

State chapters

Since the last Members Notes, there has been a great deal of activity in the various State chapters. Details of this activity and of forthcoming State chapter activities are set out below.

Australian Capital Territory: On 24 March, Professor George Trubow, Director of the Centre for Informatics Law at the John Marshall Law School, Chicago, addressed a meeting of members held in Canberra on recent developments in privacy law in the United States.

The next ACT public meeting will be on (Monday) 17 May, when Professor Donald Arnavas, a Washington attorney who is also an adjunct professor of law at the Dickinson School of Law, Carlisle, Pennsylvania, will give an address on the role of the administrative law judge in American administrative law. Professor Arnavas is a former administrative law judge. ACT members should already have received details of the seminar.

Planning is also under way for a public meeting, to be conducted jointly with the National Environmental Law Association, on environmental law. The meeting will be addressed by Professor Mark Squillace, a visiting Fullbright Scholar. ACT members will receive details of the meeting in due course.

New South Wales: The chapter's next seminar, which will deal with statutory interpretation for non-lawyers, will be held on (Tuesday) 4 May. Speakers will include the NSW Parliamentary Counsel, Dennis Murphy QC, John Fitzgerald from the Australian Securities Commission and Robert Watt from the University of Technology.

A seminar on recent developments in administrative law and constitutional law, to be addressed by Dr Margaret Allars and Leslie Katz, is planned for (Wednesday) 9 June.

A seminar on environmental law is planned for the evening of (Thursday) 12 August.

It is hoped that, later in the year, Leroy Certoma, the head of the new Refugee

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Review Tribunal, will give an address to members on the work of the Tribunal.

Details on these and other activities of the chapter can be obtained from the secretary of the chapter, Mark Robinson, on (02) 221 5701.

Queensland: On 27 April, James Douglas QC gave an address to members in Brisbane on the changes to the jurisdiction of the Queensland Supreme Court arising out of the *Judicial Review Act 1991*. His address covered the provisions of the Act as well as recent Supreme Court decisions on cases brought under the Act.

The chapter's next function will be on (Monday) 24 May 1993, when Marg O'Donnell, the Director of the Community Justice Program in the Queensland Attorney-General's Department, will give an address on the resolution of disputes with government agencies. The function will be in the enclosed terrace area on Level 2 of the Gateway Hotel, Brisbane. Queensland members should note that this represents a change from the chapter's normal venue, the British Bar which, in the republican spirit, has been re-named the 'Legends Bar'!. The change in venue is unrelated to the name change.

For further details of the activities of the chapter, contact the Chairperson, Maurice Swan, on (07) 360 5702.

South Australia: The chapter's 7 April seminar on the Whistleblowers Protection Bill, held in conjunction with the Royal Institute of Public Administration, was a great success and appears to have made a small profit for the chapter.

It is intended to hold the chapter's annual general meeting in June and that the President should give his 'Breaker' Morant presentation at the meeting. South Australian members will receive details of the meeting in due course.

A seminar on recent court decisions and the possibilities for an Australian Bill of Rights is being considered for July. Any inquiries about the activities of the chapter should be directed to the chairperson, Eugene Biganovsky, on (08) 212 5712.

Tasmania: Moves are afoot to establish a chapter of the Institute in Tasmania, which is presently the only State without such a chapter. Inquiries and offers of support should be directed to Rick Snell at the Faculty of Law, University of Tasmania, on (002) 20 2062.

Victoria: As previously reported, the chapter's seminar on non-legal members of tribunals was a great success. As a result, the chapter hopes to publish the proceedings of the seminar. Inquiries about the publication should be directed to Loula Rodopoulos, on (03) 282 8444.

The chapter's next seminar will be on government business enterprises and administrative law and will be held on (Wednesday) 26 May.

The chapter's annual general meeting is planned for late August or early September.

Inquiries about the activities of the chapter should be directed to the secretary, Mick Batskos, on (03) 619 0906.

Western Australia: A successful function was held on 10 March, at which the President gave his 'Breaker' Morant presentation. Any inquiries about the activities of the chapter should be directed to Associate Professor Hannes Schoombee, on (09) 360 2984.

Published proceedings of the 1992 administrative law forum

All persons who were members of the Institute as at the end of 1992 should have received their copy of the published proceedings of the 1992 administrative law forum. There appears to be general agreement that the publication is worthwhile, not the least because it has been provided free of charge to members.

The Executive Committee of the Institute has decided to make the remaining copies of the publication available for sale. Copies can be purchased by writing to the Secretary. The price is $35, including postage. Recently-joined members can purchase the publication for $20 per copy, including postage.

1993 administrative law forum

The 1993 administrative law forum, held in conjunction with the ACT Division of the Institute of Public Administration Australia, was held in Canberra on 15 and 16 April. In excess of 250 persons attended and the forum appears to have been a great success, both in terms of providing a forum for the exchange of ideas and as a means of raising revenue for the Institute.

It is hoped that, as with previous forums, the proceedings will be published in a single volume and distributed to members free of charge.

Meeting between the Executive Committee and representatives of the State chapters

In conjunction with the administrative law forum, the Executive Committee of the Institute met with representatives from the various State chapter executives who were in Canberra to attend the forum. Those discussions were useful, both in terms of exchanging ideas and also as a means for canvassing future directions for both the Institute and the various chapters. It is hoped that such meetings will continue as an annual event.

MEMBERSHIP RENEWALS

All members who had not renewed their membership by 31 March 1993 have been removed from the mailing lists of both the national organisation and the relevant State chapters. Though only 50 of 550 members did not renew their membership, the Executive Committee was disappointed by the delay in renewing by a significant number of members and urges all members to send in their renewal fees promptly in future years.

MEMBERSHIP INQUIRIES

Until further notice, members should direct any general inquiries about their membership to Jenny Kelly or Kathy Malcolm, of the ACT Division of the Institute of Public Administration Australia, on (06) 251 6060.