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A NOTE FROM THE EDITOR

In this edition of the Newsletter we publish two more papers on whistleblowing. These again emerge from a seminar in Adelaide earlier this year. They highlight policy issues and philosophical matters from a slant that differs from those of the two papers previously published. At the time of the Adelaide seminar the topic was timely because of the South Australian Act just passed. The topic is now timely in the Federal sphere because of the work of a Senate Committee stimulated by a Bill on whistleblowing originated by a Greens Senator in 1992.

We also publish two papers on the applicability of administrative law principles to government business enterprises. One of these papers distills the essentials from an Administrative Review Council Discussion Paper and presents the issues concisely and clearly. The other concentrates on the particular situation in Victoria.

Michael Sassella

2 September 1992

In this issue..

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APPLICABILITY OF ADMINISTRATIVE LAW TO GOVERNMENT BUSINESS ENTERPRISES : THE VICTORIAN PERSPECTIVE UNDER THE STATE OWNED ENTERPRISES ACT 1992

By Mick Batskos, Senior Associate, Mallesons Stephen Jaques, Melbourne

Paper delivered to the Australian Institute of Administrative Law, Victorian Chapter seminar entitled "Administrative Law and Government Business Enterprises", Leo Cussen Institute, Melbourne, 26 May 1993

Introduction

The *State Owned Enterprises Act 1992* (Vic) ("the Act") was assented to on 26 November 1992 and by 2 December 1992 the whole of the Act was in force.[1]

The Act establishes a framework for the reorgansation of Victorian government business towards a corporate model. It applies to existing entities and can also accommodate the introduction of new ones.[2] In discussing the effect of the Act, this paper will concentrate on the conversion or reorganisation of existing entities into new corporatised or privatised bodies, namely a State Business Corporation ("SBC") or State Owned Company ("SOC"). They are each types of State owned enterprises ("SOEs").

Although there are mechanisms within the Act for accountability of SBCs and SOCs to a Minister or "the government", there are few **public** accountability mechanisms. In fact, public accountability is seriously eroded by the potential for removal of SBCs and SOCs from the operation of the *Freedom of Information Act 1982* ("FOI Act") and the *Ombudsman Act 1973*.[3]

There is also an argument that SBCs and/or SOCs may not be subject to judicial review. This paper argues, however, that judicial review should and probably does continue to be available against such bodies despite attempts by the government to move these bodies across the dividing line between public and private.

State Owned Enterprises Act 1992

Introduction

Before embarking on a discussion of the administrative law consequences of the Act, it is important to briefly touch on the way the Act operates. The Act sets up the framework for the transition from existing statutory corporation to corporatised body and, if desired, to a privatised body. In addition, it facilitates the creation of a new entity (rather than converting an existing entity) described as a State body (which I will not discuss today).

For the purposes of illustration of how the Act operates, I will assume two different examples. First, say that the government wishes to reorganise an existing statutory corporation into a "corporatised" body, namely, an SBC but the existing statutory corporation has an inappropriate management structure.

In the second example, assume that the government wishes to convert an existing statutory corporation into a "privatised" company, namely, an SOC but that its current structure is inappropriate for that purpose.

REORGANISATION TO SBC

In the first example, two steps will need to take place. First, the existing statutory corporation is declared to be a **reorganising body** by Order of the Governor in Council published in the Government Gazette.[4] The constitution of the board of a reorganising body can then be changed by a further Order in Council published in the Government Gazette.[5] The Governor in Council can by that Order change the number of members, qualifications of members, appoint persons as members, remove members (without any entitlement to compensation for loss of office) and may "make such other changes to the constitution of the board as the Governor in Council determines".[6]

The Treasurer, after consulting with the Minister administering the Act constituting the statutory corporation, may then **direct** a reorganising body to, among other things, sell off assets, acquire or form a wholly owned subsidiary and generally reorganise its affairs in anticipation of becoming an SBC.[7] The reorganising body must comply with any direction.[8] The Treasurer also determines the amount and value of the initial capital upon which the reorganising body must pay a dividend to the State, in a manner determined by the Treasurer.[9]

The second step in the reorganising process is for the Governor in Council to declare the reorganising body to be an SBC.[10]

Part 3 of the Act contains machinery provisions for SBCs covering, among other things:

- the constitution and proceedings of the Board;
- appointment, vacancies, resignation and removal of directors;
- directors' duties;[11]
- changes to and repayment of capital;
- dividends, accounts and audits.

CONVERTING TO SOC

Turning to the second illustration, the first step in a statutory corporation becoming an SOC is to be declared a **converting body** under section 50 of the Act by Order of the Governor in Council published in the Government Gazette. Part 4 of the Act sets out provisions which ensure that the statutory corporation becomes a body with a corporate structure, with a name reserved under the Corporations Law, which adopts a memorandum and articles of association which an SOC would be obliged to have, with shares issued to the State (its nominee, a statutory corporation or an SOC), which applies to become registered as a company under the Corporations Law, and which will ultimately convert to an SOC.

It is interesting to note that once a converting body is registered as a company under the Corporations Law, the constituting Act of the statutory corporation which became the converting body continues to apply to the carrying out of functions and exercise of powers by the body after its registration as a company.[12]

The final step in becoming an SOC is for the converting body, having become registered as a company, to be declared to be an SOC by Order of the Governor in Council published in the Government Gazette.[13] Part 5 of the Act goes on to provide for, among other things, the transfer of assets and liabilities to an SOC; the legal status of an SOC;[14] the terms of the memorandum and articles of association of each SOC; the Treasurer to require information, business plans, annual reports or other matters; the Treasurer to be required to table in Parliament the memorandum and articles, accounts and other financial reports.[15]

Government direction or control: The need for public accountability

I agree with the statements in the Administrative Review Council ("ARC") discussion paper on Government Business Enterprises that "government control is the chief factor calling for some form of public accountability" in government business enterprises.[16] When the government has control, its political branch could sometimes decide outcomes affecting how those business enterprises are conducted. Control exists because the government is in a position to achieve a result desirable to it through action or inaction by the business enterprise.[17] The Act is sprinkled with specific examples where the government can exercise that control or direction, either through the Governor in Council, the Treasurer or the Minister administering the Act constituting the statutory corporation which was converted.

In the case of a reorganising body, the Treasurer can direct a body to sell assets. The Treasurer also determines the amount and value of capital on which dividends must be paid in a manner determined by the Treasurer.[18]

In the case of an SBC, the Minister (with the Treasurer's approval) may direct an SBC to perform or cease to perform functions the Minister considers to be in the public interest but which could cause the SBC financial detriment, or to cease to perform functions considered not to be in the public interest. The board of the SBC must comply with that direction.[19] Although there are no express provisions to cover the situation where the board does not comply, no doubt board members would have in the back of their minds the knowledge that the Governor in Council may remove any or all directors from office[20] and that they hold office on terms and conditions determined by the Minster and Treasurer.[21]

By contrast, there is no equivalent provision whereby the Minister can **direct** the performance of activities by an SOC. However, there is power for the Minister (with Treasurer approval) to **agree** with an SOC that it perform or cease to perform activities the board considers is not in the commercial interest of the SOC to perform. This is coupled with a power to reimburse to the company the cost of complying with such an agreement.[22] Therefore, although 'direction' is not present, a result desirable to the government is still able to be achieved by other means of control in a broad sense. It should also be remembered that government direction can also be achieved by the fact that the State is the sole shareholder of an SOC and shareholder approval is required by the articles of an SOC for certain things, for example, the selling or disposal of the assets making up an SOC's main undertaking.[23]

FOI and the Ombudsman

Inherent in the notion of governmental control is the need for public accountability. As the ARC discussion paper states:

> "The existence of government control and direction by being the sole or majority shareholder and the investment of public moneys in GBEs as a result of government ownership are both sufficient nexus with the public sector to require that GBEs be subject to public sector accountability mechanisms. Both of these features give the public an interest in GBEs."[24]

Part of this public accountability function is performed by administrative law mechanisms of the FOI Act and independent investigations by the Ombudsman. These mechanisms have been seriously eroded by the Act and been supplanted by less "public" means of accountability, mainly in an economic sense.

Section 90 of the Act relevantly provides[25]:

"(1) A State owned enterprise:

(a) that, but for this subsection, would be a prescribed authority within the meaning of the *Freedom of Information Act 1982*; and

(b) that is prescribed for the purposes of this subsection-

is to be taken not to be a prescribed authority within the meaning of that Act.

(2) A State owned enterprise:

(a) that, but for this subsection, would be an authority within the meaning of the *Ombudsman Act 1973*; and

(b) that is prescribed for the purposes of this subsection-

is to be taken not to be an authority within the meaning of the *Ombudsman Act 1973*.

Therefore, if a State owned enterprise ("SOE") is prescribed by regulation[26] for the purposes of subsection 90(1) of the Act, that SOE is not subject to the FOI Act. Similarly, if an SOE is prescribed for the purposes of subsection 90(2) of the Act, that SOE would not be able to be investigated by the Ombudsman under the **Ombudsman Act 1973**.

FREEDOM OF INFORMATION

In my view, there is no need for a provision which permits the Governor in

Council to determine that the FOI Act not apply to particular SOEs. As a matter of practicality, this involves a politically influenced decision on whether or not an SOE will be excluded from the FOI Act. No indications are provided as to the criteria to be applied and the circumstances in which an SOE will or will not be excluded. Although not determined by a Parliamentary Committee, as suggested by the Administrative Review Council,[27] it is a way of deciding on a case by case basis whether a body faces sufficient competition to merit exemption from the FOI Act. However, I believe there is sufficient existing protection in the FOI Act against the disclosure of commercial documents which could affect competition.[28]

Admittedly, s90 of the Act is not as severe as the equivalent NSW provision which globally excluded SOEs from the operation of the NSW *Freedom of Information Act* 1989.[29] But the better position is that advocated by a 1989 New Zealand Parliamentary Committee, which recommended that equivalent legislation[30] should continue to apply to SOEs and in fact should be expanded to make subsidiaries of SOEs also the subject of that equivalent legislation.

Ombudsman

Similarly, I believe that the Ombudsman should have jurisdiction over SOEs without the possible exclusion from that jurisdiction by a politically motivated decision and regulations made by the Governor in Council. As with the FOI Act exclusions, there are no criteria to indicate the basis on which an SOE will be excluded from the jurisdiction of the Ombudsman. As things stand, the Ombudsman does not generally have jurisdiction over SOEs that are companies. In my view the Ombudsman Act should have been expanded to cover this rather than providing an outlet in the Act by which the jurisdiction can be excluded.[31]

The New Zealand Parliamentary Committee also recommended that the New Zealand *Ombudsman Act 1975* should continue to apply to SOEs and be expanded to their subsidiaries.

In his 1991/92 Annual Report, the Victorian Ombudsman has expressed his belief that since there have been 638 complaints against the main public utilities between 1 July 1991 and 31 March 1993,

> "this demonstrates a need to ensure that corporatisation or privatisation of the public utilities of Gas and Fuel Corporation, State Electricity Commission and Melbourne Water does not leave members of the public without an effective, impartial, independent agency to investigate complaint against those organisations."[32]

Without the avenue of the Ombudsman, there is no publicly accessible avenue of investigation. The Act does provide for appointment of special investigators who may be appointed by the Treasurer to investigate specific matters or generally as directed by the Treasurer. However an SOE must be prescribed for the purposes of Part 6 to be investigated[33] and it is unlikely that an investigation would take place as often as if the Ombudsman had jurisdiction. Further, there is no guarantee that complaints will be pursued. This conclusion is based on the express purpose of the investigator provisions as stated in the parliamentary debates, namely, providing for appointment of special investigators to investigate affairs of statutory corporations other than companies (which are subject to the Corporations Law and Australian Securities Commission investigations where appropriate).[34]

Further, I agree with the view of the Victorian Ombudsman that even though an SOE faces competition, and an individual consumer can shop around or seek private law remedies, these factors are not enough to provide justice in individual cases:

> "....competition and private law remedies do not provide adequate fairness and accountability in the market place. There is still a need for formal accountability mechanisms and an effective agency which can independently and impartially pursue complaints."[35]

Other accountability mechanisms

Other accountability mechanisms similarly do not provide for justice in individual circumstances and are not as publicly accessible as use of the FOI Act and the Ombudsman. For example, the obligation for SBCs to give half yearly reports to the relevant Minister and Treasurer[36] and annual reports which must be tabled[37] are not directly relevant to individuals who may have a specific complaint about the provision of goods or services by the SBC. The limited accountability to the public is illustrated by the fact that no part of a corporate plan is able to be published or made available without prior approval of the board of an SBC, the Treasurer and the relevant Minister.[38]

Judicial review

Judicial Review in Victoria is available in two main ways. First, under the *Administrative Law Act 1978* ("ALA") and, secondly, at common law. For the purposes of this paper I will assume that an SOE is unlikely to fall within the scope of the ALA, as it will be rare that an SOE will be required to apply one or more of the rules of natural justice and therefore come within the definition of tribunal within the ALA.

At common law, judicial review is available for, among other things, the exercise of statutory decision making as well as decisions within the prerogative power of the government. However, I will in this paper focus on the question of whether judicial review is available against an SOE under the Act.

Recent cases in the United Kingdom suggest that judicial review is available against a body which although deriving its power from a source other than legislation or the prerogative, performs a functions of a public character. The main case in this area is *R v. Panel on Take-overs and Mergers; Ex parte Datafin PLC and Anor.*[39] The English Court of Appeal held that a body's source of power was not the only determinant in testing whether a body was subject to judicial review. The nature of the functions being performed by the body is also relevant. In particular, whether the power exercised has a public law element.

Without going into the details of that case, the following features were considered by the Court of Appeal in determining that the panel was subject to judicial review:

(a) it was performing a public duty; an important one; it was exercising public law functions and its activities were of a public nature rather than a purely or domestic nature;

(b) the rights of citizens were indirectly affected by the panel's decisions;

(c) it had a duty to act judicially;[40]

(d) the panel wielded enormous power and so long as there was a remote possibility that it could abuse those powers, it would be wrong for a court to abdicate its responsibility;

(e) there was an implied devolution of power by the government to the panel. "Power exercised behind the scenes is power nonetheless;"[41]

(f) its source of power was consensual submission to jurisdiction;

(g) the fact the body was self-regulating was more reason why it was appropriate for judicial review.

Therefore, if these statements are applied to SOEs, it is in my view possible that decisions of SOEs whose functions have that public element may still be amenable to judicial review. David Pannick has suggested that:

> "The courts have adopted a simple test of 'public element' in relation to a body which does not act pursuant to powers conferred by statute, statutory instrument or prerogative: but for the existence of that body, would the state be likely to have enacted legislation to confer statutory powers on a comparable body to regulate the area of life over which the body has de facto control?"

Taking that quote in reverse, it would seem that a body has the necessary public element if, before it was changed into an SOE it had the powers Pannick describes.

This is further supported by the existence in sections 18 and 69 of the Act of the principal objective of each SBC and SOC respectively to perform their functions **for the public benefit,** by operating efficiently as possible and maximising its contribution to the economy and well being of the State. This may be the "public element" nexus between an SOE and judicial review. It is arguable that a failure by an SOE to act for the public benefit and well-being of the State could make it subject to judicial review.

Another feature of the Act is that both SBCs and SOCs are empowered to exercise the functions conferred on them under their original constituting Act.[42] This nexus in my view brings SOEs closer to the "public" side of the public/private spectrum than the panel in the *Datafin* case.

Professor Taggart of the University of Auckland has suggested[43] that perhaps the strands of judicial support such as in the *Datafin* case might be drawn together to support judicial review of the exercise of significant market power by privatised and private bodies. Further, he suggests that there may be a resurrection of old common law doctrines analogous to the requirement that persons or corporations engaging in common callings (such as innkeepers, ferrymen and common carriers) be required to serve all comers and charge only reasonable prices. In the past, the courts also developed controls over persons or corporations which had a monopoly in the provision of services to the general public. These providers were required to serve the public at reasonable prices and without discrimination.

This branch of law grew into the public utilities law in existence in America, where privately owned public utilities must serve the public adequately and at reasonable prices. Unfortunately, the English Courts were reluctant in the 18th and 19th centuries to burden the equivalent providers of essential services in England.

In my view Professor Taggart's prediction or hypothesis that such privatised bodies, especially bodies like the SEC, Gas & Fuel and Melbourne Water (if and when they become privatised) may be subject to judicial review is not one which should be disregarded as fanciful, but one which should be closely analysed. It is this area of administrative law which I believe will grow at a rapid pace as more and more bodies come within the Act.

The views expressed in this paper are those of the speaker and are not to be taken to represent the views of Mallesons Stephen Jaques, nor should they be relied upon as legal advice.

ENDNOTES

1 Sections 1-6 and 76-85 commenced on the date of assent, 26 November 1992, and the remainder of the Act commenced on 2 December 1992.

2 Victoria, Legislative Assembly, *Parliamentary Debates*, 10 November 1992, P.634.

3 s.90 of the Act. Unless otherwise stated, references to sections are to sections of the Act.

4 s.7(1)

5 s.8

6 s.8(2)(d)

7 s.9(1)

8 s.9(2)

9 ss.10-13

10 s.17

11 If a director breaches his or her duties and either the director made a profit or the SBC suffered a loss or damage, that amount can be recovered as a debt by commencement of proceedings by the Minister administering the Act constituting the statutory corporation which became an SBC: ss.36, 37.

12 s.65(2), but only to the extent it is not inconsistent with the memorandum and articles: s.65(4).

13 s.66

14 including that the company is not and does not represent the State: s.70.

15 s.75

16 Administrative Review Council, Discussion Paper, *Administrative Review of Government Business Enterprises,* p45, para 4.15ff. ("Discussion Paper").

17 I Thynne and J Golding, *Accountability and Control: Government Officials and the Exercise of Power,* 1987 Law Book Co., p2.

18 ss.9, 10.

19 s.45.

20 s.30(3).

21 s.26(2).

22 s.72.

23 Articles of Association, cl. 4, Part B, Schedule 1 of the Act.

24 Discussion Paper, p46 para 4.17.

25 I do not discuss the impact of the Act on the *Subordinate Legislation Act 1962* or the *Public Authorities (Dividends) Act 1983.*

26 The Governor in Council has power under s.92 of the Act to make regulations for things required to be prescribed to give effect to the Act.

27 Discussion Paper, p49, para 4.35.

28 s.34 FOI Act.

29 s.37 *State Owned Corporations Act 1989* (NSW).

30 *Official Information Act 1982* (NZ).

31 I generally agree with the proposed changes to the Ombudsman Act (Cth) suggested by the Administrative Review Council with respect to a discretion in the Ombudsman to decline to investigate complaint arising out of the competitive commercial activities of bodies within the Ombudsman's jurisdiction.

32 Victoria, Ombudsman, *Nineteenth Annual Report,* 30 June 1992, p3.

33 s.76.

34 *Parliamentary Debates,* p635.

35 Ombudsman, *Nineteenth Annual Report,* p26.

36 s.55.

37 s.57.

38 s.41(6).

39 [1987] QB 815. See also *R v. Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864. Also, in *Finnigan v. New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 and (No 2) at 181, where a private sporting body was subject to judicial review for making a decision of national importance.

40 A body need not act judicially to be subject to judicial review: ***O'Reilly v. Mackman*** [1983] 2 AC 237, 279.

41 Id 849, per Lloyd LJ.

42 ss 19 and 65(2). The latter applies to converting bodies, but there is nothing to suggest that the functions are lost upon conversion to an SOC. Section 69 refers to the SOC's objective to "perform its functions" which arguably derive from the functions it has as a converting body.

43 M Taggart, "The Impact of Corporatisation and Privatisation on Administrative Law", paper presented to RIPAA/AIAL (NSW) conference at Sydney on 20 March 1992; and, by the same author, "Corporatisation, Privatisation and Public Law", (1991) 2 PLR 77-108. I rely heavily on these papers.

THE WHISTLEBLOWERS PROTECTION BILL - ITS GENESIS AND RATIONALE

Efficiency, effectiveness and ethics

By The Hon C J Summer MLC, Attorney-General for the State of South Australia

Paper delivered to the Australian Institute of Administrative Law, South Australia

Chapter seminar entitled 'The Whistleblowers Protection Bill, Adelaide, 7 April 1993

The issue of ethics and integrity in public and private administration and business dealings has been a major pre-occupation of government, the media, and public discourse for a number of years.

The causes of this phenomenon are well-known - in the private sector, it has been fuelled by revelations of tax evasion on a large scale and by the corporate collapses of the 1980s.

In the public sector, there has been the revelations of the Fitzgerald Royal Commission, the activities of the New South Wales Independent Commission Against Corruption and the Western Australian Royal Commission Into Commercial Activities of Government.

The Government of South Australia has not been idle in this area.

It has taken the view that, such are the complexities, difficulties and ambiguities involved in the interaction of ethical standards and public and private administration, one or two band-aid measures are unlikely to achieve the desired result and that a holistic approach to all facets of the problem is required.

It has put into place (or is in the process of doing so) the components of a comprehensive anti-corruption programme, which has included:

- the establishment of a Police Complaints Authority;
- the development of codes of ethics and conduct for police officers and public sector employees, members of parliament and Ministers;
- the enactment of the *Statutes Amendment and Repeal (Public Offences) Act 1992.*
- the launching of a Public Sector Fraud Policy and the establishment of the Public Sector Fraud Co-ordinating Committee;
- the establishment of the Anti-Corruption Branch of the South Australian Police Force;
- the preparation of a Bill reforming the register of interests for MPs and the disclosure of campaign contributions.

It is clear from experience in the United States and Canada as well as within this country that the agenda must include what is popularly known as whistleblowers protection.

In late 1991 it was announced that the Government would introduce whistleblowers protection legislation as a part of its public sector anti-corruption policy.

This undertaking was repeated in a Ministerial Statement to this House on tabling the Final Report of the National Crime Authority on South Australian Reference No 2.

The measure is, therefore, an integral part of the Government's comprehensive anti-corruption programme.

The genesis of this kind of legislation has the imprimatur of a number of highly regarded sources and inquiries.

In America, while a number of States promulgated whistleblowers protection laws of varying kinds, the major development occurred in 1978, with the passage of the Federal Civil Service Reform Act of 1978.

This legislation was the first broad framework for the protection of whistleblowers on a national scale.

This was followed by the Code of Ethics for Government Service Act, 1980, which imposed a duty to expose corruption, and the Whistleblowers Protection Act, 1989.

The effectiveness of these measures has been much debated - but the idea that some such policy should be in place has been widely agreed.

In 1986 the Ontario Law Reform Commission looked into the issues and reported:

> "The Commission has come to the conclusion and, accordingly, recommends that, as a general principle, whistleblowers should be protected from disciplinary or other action where they disclose government information that ought, in the public interest, to be disclosed. We believe that the legitimation of whistleblowers is consistent with recent trends and philosophy in Ontario respecting access to, and disclosure of, government information, and will help, ultimately, to secure good government in the Province.".

In Australia, support for the idea has a longer history than many know.

The Coombs Royal Commission into Australian Government Administration produced some discussion papers dealing with whistleblowers and their protection some twenty years ago.

More recently, in his Final Report, Commissioner Fitzgerald stated in relation to his investigations into public malfeasance in Queensland:

> "There is an urgent need ... for legislation which prohibits any person from penalising any other person for making accurate public statements about misconduct, inefficiency, or other problems within public instrumentalities. What is required is an accessible, independent body to which disclosures can be made, confidentially (at least in the first instance) and in any event free from fear of reprisals. The body must be able to investigate any complaint. Its ability to investigate the disclosures made to it and to protect those who assist it will be vital to the long term flow of information upon which its success will depend.".

This view has not been an isolated one.

The Fitzgerald recommendation on this matter was taken up with great thoroughness by the Queensland Electoral and Administrative Review Commission, and had resulted, in April 1992, in endorsement of the principles and the detail by the Queensland Parliamentary Committee for Electoral and Administrative Review.

In December 1991, the Review of Commonwealth Criminal Law (known as the Gibbs Committee after its Chairman, Sir Harry Gibbs) published its Final Report, which also recommended a form of whistleblowers' protection.

The Government of New South Wales has tested the waters by making public two draft Bills of its own.

The Finn Integrity in Government Project, which is being conducted at the Australian National University with the support of all Australian Governments, stated in its Interim Report on Official information that whistleblower protection legislation was highly desirable, commenting:

> "Notwithstanding significant jurisdictional variations, no body of law (statutory or otherwise) addresses adequately the limits that should be placed upon official secrecy where secrecy itself becomes the mask for governmental or official misconduct and maladministration.".

Last, but by no means least, the Western Australian Royal Commission has recommended:

> "The Commission on Government review the legislative and other measures to be taken -
>
> (a) to facilitate the making and the investigation of whistleblowing complaints;
>
> (b) to establish appropriate and effective protection for whistleblowers; and

(c) to accommodate any necessary protection for those against whom allegations are made.".

I turn now to the philosophical underpinnings of the legislation and how I see the difficulties and complexities involved in it from a policy point of view.

Ethics is a central component of managerial decision-making, whether the ethics are consciously observed or not.

An article on ethics in business listed some ethical questions in decision-making - and here is one of them:

> "The old question 'would you want your decision to appear on the front page of the New Your Times?' still holds. A corporation may maintain that there's really no problem, but a survey of how many 'trivial' actions it is reluctant to disclose might be interesting. Disclosure is a way of sounding those submarine depths of conscience and of searching out loyalties."[1]

Measures providing protection for whistleblowers promises much.

There are many statements of its promise.

A useful summary of these advantages is to be found in an article by Julie Harders in the Canberra Bulletin of Public Administration:

> "Whistleblowing can be a useful weapon in the armoury against corruption for personal gain and also corruption for political purposes .... It can alert the public to dangers and provide the community with the information that could not necessarily be obtained under administrative law even if one knew where to begin looking. Taking this point further, whistleblowing can be seen to contribute to the democratic process which requires citizen participation and cannot survive in an environment of secrecy. Apart from sounding the alarm on immediate dangers, whistleblowing can bring benefits to society through improving the efficiency and integrity of the public sector.".[2]

But there are a great many ambiguities and complexities involved in dealing with whistleblowers.

These surface at all levels.

The protection of whistleblowers is not without a price - possibly a great price.

The stakes may be high indeed.

On the one hand may be institutional corruption of the worst kind.

On the other may be the destruction of the life and career of a person falsely accused.

Harders again puts this well:

> "Baseless allegations may still be investigated in some form with the result that innocent people have to endure months of suspicion. Investigation may be a lengthy affair.... Exoneration when it comes may be too little too late ... Whistleblowing can potentially promote integrity and ensure public sector organisations are run in the interests of the public they serve. It can also poison the work environment with suspicion and accusation and cause severe stress to individuals unjustly tagged as corrupt.".[3]

We are aware of the necessity to balance these imperatives and have striven to enact legislation which sets an appropriate balance.

The two-sided nature of whistleblowing, and hence the contradictions and ambiguities within it, is quite easily demonstrated at another, cruder, level.

William De Maria, lecturer in Social Work at the University of Queensland and a member of the Commonwealth Administrative Appeals Tribunal says that "Whistleblowing is set to become a state sponsored network of bureaucratic dobbers.".

Those who take this attitude to the area point out, with justification, that one of the earlier politicians in favour of whistleblowing was Richard Nixon, who advocated its introduction - so that public

servants could blow the whistle on suspected communists to the McCarthy hearings.

This information has a marked tendency to colour one's reactions.

But, on the other hand, so does the activities of people like Col Dillon, a Queensland police officer who blew the whistle on police corruption in that State's police force, and Clive Ponting, who disclosed Government lies about the sinking of the Belgrano during the Falklands war.[4]

Professor John Goldring, Dean of Law at the University of Wollongong, has put his finger on one of the inherent opposites of policy involved:

> "The basic issue of protecting whistleblowers is one of culture. The employment culture, the corporate culture and the union culture all regard 'dobbing' as bad. Those who are disloyal to the corporation or the union are ostracised. When a government is trying to corporatise its management structures, it is ironic that it should be trying to throw out one of the essential ingredients of the corporate structure - corporate loyalty.".[5]

At the same time, though, it can be argued that the cultural changes that are taking place with varying degrees of emphasis and speed within both private and public sectors, make it imperative that ethical behavioural values are internalised to organisations.

Those changes emphasise deregulation, decentralisation and self-accountability, and it was the bringing forward of those values without concomitant ethical standards which led to the corporate excesses of the 1980s.

It should also not pass notice that the lack of external regulation, self-accountability and strong internal self-reinforcing culture was at its most obvious in the Queensland police force, where it is quite clear that public interest ethics had little or no place.

But that need does not remove the competing and conflicting interests to be balanced.

It merely changes the imperatives, as the American experience demonstrates.

In the United States, the Office of Special Counsel and the courts have been forced to balance another policy conflict - between a whistleblowers policy designed to countenance and indeed encourage disruption caused by acts of public disclosure, - and protect the disruptors - and the elimination of inefficiency caused by disruption by employees who do not agree with what the public service is doing.

A member of the Office of Special Counsel, Bruce Fong, summarises that experience as follows:

> "Thus far, the law has struggled to resolve the inevitable conflict between two distinct congressional policies ... that have sometimes been at cross purposes with each other. One of these policies promotes and encourages the disclosure of waste, fraud, abuse of authority, and mismanagement. It accepts as necessary the attendant disruption that such disclosures may engender. The other promotes management's discretionary authority to eliminate disruptions caused by inefficiency by encouraging management to discharge employees 'who cannot or will not improve their performance to meet required standards.'".[6]

Whistleblowing legislation can only be a part of the major project of public sector reform.

It must be integrated within a strategy to promote ethics in government - a project that is well advanced in this State - and an integration of ethics into the major project of excellence, efficiency and effectiveness in management.

It is quite clear that the presumption of blanket secrecy in the public service cannot be maintained.

Loyalty to the corporation cannot be blind and without reference to the public interest which is a prime directive for the public service.

Whistleblower reform is hard work and, as I have indicated, this arises from the tensions between competing policies.

We have recognised these and tried hard to get them right.

We hope that we have achieved the correct balance.

Matthew Goodie was responsible for the preparation of the legislation, and I acknowledge his work on it.

I thank you for giving me this opportunity to speak to you about the challenges of whistleblowing reform.

I said it was hard work.

Despite discussions in other States and the head start which Queensland had, I note that South Australia is the first State to have actually passed such legislation.

ENDNOTES

1. Nash, "Ethics without the sermon", Harvard Business Review, November-December, 1981 at 86.

2. Harders, "Whistleblowing: Counting the Cost", *Canberra Bulletin of Public Administration*, No 66, October, 1991 at 30.

3. Harders, "Whistleblowing: Counting the Cost", Canberra Bulletin of Public Administration, No 66, October, 1991 at 34.

4. Ponting [1985] *Crim LR* 318.

5. Goldring, "Blowing the whistle", *Alternative Law Journal*, 1992 at 299. On the issue of organisational culture, see also Harders, "Whistleblowing: Counting the Cost", *Canberra Bulletin of Public Administration*, No 66, October, 1991 at 30.

6. Fong, "Whistleblower Protection and the Office of Special Counsel: The Development of Reprisal Law in the 1980s" (1991) 40 *Am ALR* 1015 at 1058.

GOVERNMENT BUSINESS ENTERPRISES IN THE FEDERAL SPHERE - AN ADMINISTRATIVE REVIEW COUNCIL PROPOSAL FOR REFORM

Stephen Lloyd, Director of Reseach, Administrative Review Council

Paper delivered to the Australian Institute of Administrative Law, Victoria Chapter seminar entitled "Administrative Law and Government Business Enterprises", Leo Cussen Institute, Melbourne, 26 May 1993

This paper is based directly upon extracts from the Administrative Review Council's Discussion Paper, *Administrative Review of Government Business Enterprises.* It is not designed to be a summary of that paper, rather it looks at the questions: what is the current application of the Commonwealth administrative law package to Government Business Enterprises (GBEs)? And, what should it be?

The questions arise because the public sector and GBEs in particular are currently undergoing change at a tremendous pace. This fluidity makes the distinction between the public and private sectors harder to draw and the appropriateness of different accountability systems more difficult to assess.

PRELIMINARY MATTERS

GBEs - typical characteristics

There is no single accepted definition of a GBE. The following characteristics, typical of GBEs, provide a description of the kind of body with which this paper is concerned:

- it is a legal entity distinct from its owner or owners;

- it is wholly or partly government owned, generally representing an investment of public monies;

- it sells goods and services to the public with financial returns accruing initially to the body itself;
- all or a significant portion of its operating costs are recovered from its own resources (that is, through sales or charges) with the aim of profit, and are not derived from the government budget;
- it operates with a substantial degree of independence - with full sefl-sufficiency possible in principle;
- it may operate in a competitive environment; and
- it may have to operate in accordiance with government social objectives.

Public sector nexus

The Council's preliminary view is that government control is the chief factor calling for some form of public accountability. This is because when the government has control, its political branch will be held responsible for, and may (and sometimes must) decide outcomes. The employment of public monies, or the potential for such employment (through loan guarantees for example), also requires that there be some form of public accountability. In the case of GBEs the government can exert control or direction in its capacity as the sole or majority shareholder and, generally speaking, there are public monies invested in such enterprises. There is, therefore, sufficient reason for GBEs to be subject to some form of public sector accountability. In the present context, the question is whether there are any features of GBEs that make the benefits provided by the Commonwealth administrative law package less valuable, or its application to GBEs otherwise inappropriate.

The Administrative Law Package

In undertaking this project, the Council addressed the four key elements of the Commonwealth administrative law package:

- judicial review, under the *Administrative Decisions (Judicial Review) Act 1977*, the Constitution and the common law;
- administrative review, predominantly under the *Administrative Appeals Tribunal Act 1975*;
- ombudsman review, under the *Omubudsman Act 1976*; and
- access to government information, under the *Freedom of Information Act 1982*.

The package has four primary functions:

- it provides a mechanism for ensuring that the government acts within its lawful powers;
- it provides a mechanism for achieving justice in individual cases;
- it improves the quality of administration; and
- it contributes to the accountability system for government decision making.

The functions of the package are designed to be fulfilled in an integrated manner through the promotion of the fundamental values of administrative law: openness, fairness, participation, impartiality and rationality.[1] The benefits of administrative law are based on the assumptions that these values are integral to moder democratic government and that administrative law is an important tool in advancing them.

I will now briefly outline the current application of the package to GBEs.

Judical review

I will assume that this audience is aware of the nature of judicial review, its common law background that the reforms effected by the *Administrative Decisions (Judicial Review) Act 1977*, in particular the introduction of a general entitlement to a statement of reasons. In this regard, I also assume that you are aware that there are three distinct jurisdictions for judicial review: statutory (AD(JR) Act); common law - constitutionally prescribed; and common law - inherent jurisdiction of

State Supreme Courts. I will turn briefly to expand upon the application of each of these to GBEs.

Scope of judicial review

Under this heading, I am not looking at the range of things that judicial review is concerned with, such as natural justice, reasonableness, etc, but at the persons and bodies that are subject to some form of judicial review. There is a different answer according to whether one looks under the Constitution, the AD(JR) Act or the common law.

The Constitution

Section 75 of the Constitution provides that: "In all matters - ...(v) in which a writ of Mandamus[2] or prohibition or an injunction is sought against an *officer of the Commonwealth*: the High Court shall have original jurisdiction." (Emphasis added)[3] This formulation omits reference to one of the common law remedies, certiorari,[4] but that remedy will often be available when it is requested in conjunction with one of the remedies expressly mentioned.[5]

Under section 39B of the *Judiciary Act 1903*, the Federal Court is given the same jurisdiction to provide these remedies as the Constitution gives the High Court, subject to two minor, not presently relevant, exceptions.

Whether proceedings be initiated in the High Court or the Federal Court, the operative criteria is whether the respondent to any judicial review application is an "officer of the Commonwealth". One attempt at defining the expression has been provided by Professor Lane:

> "Thus, an 'officer of the Commonwealth' within Constit. s75(v) is either a person appointed, paid, controlled and removable by the Commonwealth or a person appointed by the Commonwealth to exercise some function for the Commonwealth."[6]

While the full scope of the phrase is not free from doubt, one case indicates that the phrase includes: "The Prime Minister, Ministers, justices of Federal Courts, officers of statutory bodies and Federal public servants...".[7] It is also apparent that corporations will not themselves be officers of the Commonwealth.[8]

The AD(JR) Act

Judicial review under the AD(JR) Act is available in respect of:

> "a decision of an administrative character made, proposed to be made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not) under an enactment, other than a decision by the Governor-General or a decision included in any of the classes of decisions set out in Schedule 1;"[9]

Although there is not space in this paper for a detailed analysis of the ambit of the Act,[10] it is worth noting that the main constrictions on the breadth of the AD(JR) Act are that for a decision to be subject to review it:

- must be substantive, rather than procedural, and one which[11]
  - a statute requires or authorises; or
  - has the quality or character of finality;
- must be made under an enactment;
- must be of an administrative character;
- can not be one made or to be made by the Governor-General; and
- can not belong to a class of decisions excluded by Schedule 1 of the Act.

There is also some scope under the AD(JR) Act to seek judicial review of conduct engaged in for the purposes of making a decision.

Unlike with judicial review provided for in the Constitution, judicial review under the AD(JR) Act is related more to the nature of the decision, that is, its character and the source of the decision-making power, than the identity of the decision maker.

As regards the scope of the entitlement to reasons, the AD(JR) Act provides that, in general, decision makers are obliged to give a statement of reasons to any person who both has requested one and is entitled under the Act to seek judicial review of the decision.

The obligation to provide reasons is currently subject to two major qualifications.[12] Any decisions in a class of decisions included in Schedule 2 of the Act are exempt from the reasons requirement. Decisions exempted by Schedule 2 include, for example, decisions of a range of authorities concerning their commercial activities, and covers, among others, the Australian Industry Development Corporation and the Australian National Railways Commission.

The second qualification on the obligation to provide reasons appears in section 13A of the AD(JR) Act. That section removes the requirement to include in the satement of reasons any information about a range of matters such as personal or business affairs of another person, information supplied in confidence, or information the publication of which would reveal a trade secret.

Common law

Section 9 of the AD(JR) Act[13] denies to the State Supreme Courts jurisdiction to review any decision that falls within the jurisdiction defined by section 75(v) of the Constitution, that is where an officer of the Commonwealth is involved, and any decision that falls within the scope of the AD(JR) Act, including decisions it exempts from AD(JR) review. This leaves the State Supreme Courts with very little jurisdiction in respect of Commonwealth administrative action.

State Supreme Courts would have jurisdiction in respect of activities that are both not made by officers of the Commonwealth and not "decisions" within the meaning of that term in the AD(JR) Act.[14] This jurisdiction extends to carrying out judicial review of action by private bodies that undertake public functions.[15]

Application to GBEs

In so far as a GBE exercises powers under enactments, its actions are likely to be covered by the AD(JR) Act. This would cover decisions of a regulatory nature made by GBEs. To the extent that that commercial decisions are decisions made under enactments, they may be covered by the Act but are likely to have been expressly exempted from the reasons requirement of the AD(JR) Act. However, commercial decisions unable to be characterised as decisions made under an enactment would not be reviewable under the AD(JR) Act. This would suggest that most decisions of GBEs incorporated under companies legislation, rather than created under statute, are unlikely to fall within the ambit of the AD(JR) Act.[16]

Actions not covered by the AD(JR) Act may still be subject to judicial review by the High Court and the Federal Court under their constitutionally-defined jurisdiction,[17] but not subject to a reasons requirement, if the action was undertaken by an officer of the Commonwealth. Whether the executives and staff of GBEs are, in a particular case, officers of the Commonwealth, will depend upon a vast array of factors, including whether a Commonwealth function was being undertaken and the circumstances of the person's employment.

Even if such GBEs are not covered by the AD(JR) Act and if their executives and staff are not officers of the Commonwealth, to the extent that they exercise powers conferred by the Commonwealth or undertake any other public functions they may still be subject to judicial review in State courts.

In summary, under the present law, GBEs, their executives and staff are unlikely to be subject to judicial review unless they exercise powers conferred by the Commonwealth or have a public element. That is, they are likely to be immune from judicial review only if they are like completely private bodies.

There is, however, a much broader immunity from the obligation to provide reasons. This obligation will arise only in respect of decisions to which the AD(JR) Act applies and that do not fall under a relevant exemption. Most GBEs are

currently immune from the reasons requirement in relation to their commercial decisions.

Merits review

Here, I propose only to talk very briefly about merits review. Again, in this audience I will assume that you are aware of the fundamental nature of merits review, and how the jurisdiction in the Administrative Appeals Tribunal largely arose out of the jurisdictions of many smaller disparate review tribunals and bodies. This leaves me only to talk about its application to GBEs.

Scope of merits review

Unlike the AD(JR) Act, which applies to all decisions of a certain description, the AAT Act applies only to decisions specified either in the AAT Act itself or, more commonly, in the Act that creates the decision-making power.

In this way the scope of merits review by the AAT is determined on a case-by-case basis and is at the discretion of Parliament. In order to advise on which decisions should be subject to review, the AAT Act established the Administrative Review Council. In its 1986-87 Annual Report, the Council provided guidelines for the identification of decisions as suitable for review on the mertis.[18] The Council there stated:

> "A decision made in the exercise of a power conferred by an enactment is prima facie sutiable for review on the merits if the interests of a person will be or are likely to be affected by an exercise of the power".[19]

In clarification of this test, the Council noted that the following features did not, without more, make a decision unsuitable for merits review:

- that the primary decision is made by an expert body;
- that discretions involved in making the decision are legislatively unstructured;
- that the primary decision is made by a Minister or senior bureaucrat;
- that matters of national sovereignty or perrogative powers are involved; and
- that the decision is circumscribed by government policy.

Complementing this list, the Council noted a range of factors that might indicate that the decision should be subject to merits review:

- the decision involves matters of the highest consequence to the government or involves major political issues, for example:
  - decisions involving the management of the economy;
  - decisions affecting Australia's relations with other countries;
- the decision involves significant polycentric elements, such as where the making of one decision directly affects other decisions;
- the decision is of a preliminary nature, for example if it simply enables the making of a substantive decision;
- the decision is of a kind that no appropriate remedy may be given by the reviewing body, such as because it is irrevocable, for example the decision is made to exercise the power of search;
- the decision involves the determination of a penal sanction; and
- the decision is of a law enforcement nature, for example the decision to arrest a person.

Application to GBEs

At present, the AAT Act applies to a range of decisions made by GBEs. The AAT has been given power to review such decisions because they fall within the criteria noted above, regardless of the nature of the decision maker.

Ombudsman

Once again, I will assume that you are all aware of the role and powers of the Ombudsman and turn directly to the questions of the Ombudsman's existing jurisdiction over GBEs.

Scope of the Ombudsman Act

Turning to the scope of the Ombudsman Act, the Ombudsman's jurisdiction covers departments of state of the Commonwealth and prescribed authorities. The term "prescribed authority" includes bodies of any of the following descriptions:[20]

- a body, whether incorporated or not, established under an enactment for a public purpose, other than:
  - an incorporated company or association;
  - a body that has the power to take evidence on oath or affirmation and that may be constituted by a Justice or judge of a court created by the Commonwealth Parliament;
  - a body declared by the regulations not to be a prescribed authority; and
  - a Royal Commission;
- any other body, whether incorporated or not, declared by the regulations to be a prescribed authority, being:
  - a body established by the Governor-General or a Minister; or
  - an incorporated company over which the Commonwealth is in a position to exercise control;
- a person holding an office established by an enactment, other than:
  - an office whose duties the person performs as an employee of a department or as an employee of a department or as a member of a prescribed authority;
  - an office as member of a body;
  - an office established by an enactment for the purposes of a prescribed authority but any action by such an office is deemed to be taken by the department, body or authority concerned; or
  - an office declared by the regulations to be one such that its holder does not become a prescribed authority;
- a person performing the duties of an appointment declared by the regulations to be an appointment the holder of which is a prescribed authority, being an appointment made by the Governor-General or a Minister, other than an appointment made under an enactment.

However, the Ombudsman is specifically excluded from investigating action taken:[21]

- by a Minister;
- by a Justice or judge of a court;
- by a magistrate or coroner of a Territory;
- by any body or person in relation to persons employed in a department or prescribed authority in respect of that employment; and
- in relation to the appointment of a person to a statutory office.

Application to GBEs

Given the variety of forms that a GBE may take, there can be no general proposition that under the present law the Ombudsman has jurisdiction or does not have jurisdiction over GBEs. The question must be answered by determining whether a particular GBE falls into the definition of "prescribed authority". In summary, GBEs that are established under special statutes will generally be within the Ombudsman's jurisdiction unless they are specifically exempted by the regulations. GBEs that are incorporated under the *Corporations Law* will not generally be within the Ombudsman's jurisdiction, unless they are specifically included by the regulations.

Freedom of information

The formulation for the scope of the FOI Act is very similar to that of the Ombudsman Act, as noted below.

Scope of the FOI Act

The FOI Act applies in respect of documents held by agencies and official documents held by Ministers. "Agency" is defined as a department of state of the Commonwealth or a "prescribed authority". "Prescribed authority" includes bodies of any of the following descriptions:[22]

- a body, whether incorporated or not, established under an enactment or an Order-in-Council for a public purpose, other than:
  - an incorporated company or association;
  - legislative assemblies of the ACT, Northern Territory or Norfolk Island and the Executive Council of the Northern Territory;
  - a Royal Commission;
- any other body, whether incorporated or not, declared by the regulations to be a prescribed authority, being:
  - a body established by the Governor-General or a Minister; or
  - an incorporated company or association over which the Commonwealth is in a position to exercise control;
- a person holdilng an office established by an enactment or an Order-in-Council, other than:
  - an office as member of one of the legislative assemblies of the ACT, Northern Territory or Norfolk Island, or as an administrator or Minister of the Northern Territory, or as an administrator or executive officer of Norfolk Island;
  - a prescribed office;
  - an office whose duties a person performs as an employee of a department or as an office of or under a prescribed authority;
  - an office as member of a body; or
  - an office established by an enactment for the purposes of a prescribed authority; and
- a person holding or performing the duties of an appointment declared by the regulations to be an appointment the holder of which is a prescribed authority, being an appointment made by the Governor-General or a Minister, other than an appointment made under an enactment or an Order-in-Council.

The FOI Act also has the capacity to exempt agencies from its obligations under the Act, either totally or in respect of particular documents.[23] Exempt agencies currently inlcude the Australian Industry Development Corporation, the Australian Security Intelligence Organization and the Pipeline Authority. Partial exemptions of some agencies include, for example, the Federal Airports Corporation, in relation to documents in respect of its commercial activities and in respect of its aeronautical charges under the *Federal Airports Corporations Act 1986*, and the Australian Postal Commission in relation to documents in respect of its commercial activities.

Application to GBEs

There is no general rule about whether the FOI Act applies to GBEs. It will depend upon the basis of the establishment of each GBE. If it is established under statute, the GBE is likely to fall within the scope of the FOI Act. Where a GBE is a company incorporated under the *Corporations Law*, it will not be covered by the FOI Act unless it has been declared to be a prescribed authority by the regulations.

The package and GBEs

The functions of the administrative law package are particularly valuable in relation to public sector bodies where

there is little or no capacity to go elsewhere for a service provided by such a body and only indirect pressure to improve the quality of service delivery.

The Council considers that most of the functions played by the administrative law package are fulfilled by other mechanisms in respect of public sector bodies that face competition. In particular, the capacity to shop elsewhere and the availability of private law remedies will usually be sufficient to provide justice in individual cases, whilst competitive pressures operate to make such bodies improve the quality of their services. On this basis, the Council has come to the preliminary view that two of the four elements of the administrative law package should be modified in relation to bodies that face competition. Public sector bodies, including GBEs, that do not face any competition should continue to be covered by the package as currently formulated.

In brief, the two elements that do not need modification for bodies facing competition are the AD(JR) Act and the AAT Act. This is because, in the case of the AD(JR) Act, its ambit should correspond with the constitutionally-entrenched judicial review jurisdiction, the scope of which cannot be affected by competition. As for the AAT Act, GBEs that face competition are most unlikely to have any statutory powers at all. In respect of GBEs that do have statutory powers, decisions made about their competitive commercial activities are not subject to merits review under the existing law.

In relation to the other elements of the package, the Council considers that GBEs that face sufficient competition should be exempted from the operation of the Ombudsman Act and the FOI Act, by means of an excluding schedule attached to each Act. Where a GBE undertakes insufficient competitive commercial activities to warrant total exclusion, the Council considers that the Ombudsman should be given a discretion to decline to investigate the competitive commercial activities of such GBEs, and that the FOI Act should include an exemption relating specifically to documents concerning their competitive commercial activities.

A key issue is what amount of competition is sufficient to merit total exclusion. This involves consideration of both the proportion of a GBE's activities that face competition as well as the intensity of that competition. As to what will constitute sufficient competition, the Council has not yet formed a final view. At this stage, it considers that a parliamentary committee should be given the function of assessing the question whether a particular GBE does in fact face such competition as to warrant total exemption from the Ombudsman and FOI regimes.

Political environment/model business

There are two outstanding issues about which the Council was particularly interested to receive submissions. The first concerned the political environment in which GBEs operate and the question whether they could ever be in a position to compete in a marketplace, or whether political factors will always be brought to bear. If the latter be the case, there is a strong argument that if a GBE, even one facing competition, is in truth acting as an arm of government it should be subjected to the full package notwithstanding the existence of any competition.

The second issue concerns the question whether GBEs should be model business. If the conclusion is reached that a GBE faces sufficient competition to justify its being exempted from the Ombudsman and FOI regimes, there remains the question whether GBEs should operate as "model businesses" such that these regimes should apply to them in order to ensure best practice in relation to fairness and ethical standards.

The Council noted that it was prepared to accept that the benefits of the administrative law package were less valuable when a GBE faces competition because consumer choice and competitive pressures could provide substitutes for the functions provided by the package. At the same time, it was noted that the main feature that competition could not provide is a mechanism for ensuring that GBEs achieve the highest level of fairness and ethical standards. However, the Council recognises that a substantial segment of the community considers that GBEs should behave fairly, that is as "model businesses". Indeed, this may be seen as one of the main reasons for the

government continuing to hold a stake in the GBE at all.

It is also clear that the concept of an ombudsman has a great deal of public support, even in commercial areas, for ensuring that businesses act fairly. The recent establishment of the Banking Industry Ombudsman provides an example of this.

In this regard, both the Council and I are very interested in receiving submissions on whether it is appropriate to GBEs to be required to achieve particularly high standards of fairness and ethics, or whether it is sufficient for them, as market participants, to achieve whatever level of fairness and ethics the market demands. If the answer is 'yes', it would then be appropriate to maintain the Ombudsman and FOI regimes notwithstanding the existence of competition as a method of ensuring that they act fairly and as model businesses.

ENDNOTES

1 This list of fundamental values is extracted from Professor M Taggart, *Corporatisation, Privatisation and Public Law,* Legal Research Foundation, Publication No 31, 1990, p31.

2 This writ orders its recipient to fulfil a public duty that has not yet been properly undertaken.

3 I note that there may also be scope for jurisdiction to be exercised against a corporation under s75(iii) of the Constitution but do not propose to deal with that here.

4 This remedy quashes the decision to which it refers. This often means the decision-maker will have to remake the decision, but this time according to law.

5 See the discussion by Justice Gibbs, as he then was, in *R v Cook; ex parte Twigg* (1980) 147 CLR 15 at 26.

6 P Lane, *The Australian Federal System with United States Analogues* (1972), p507. In M Aronson and N Franklin, *Review of Administrative Act,* The Law Book Company, Sydney, 1987, p501 the authors add a qualification to Lane's above comment: "One may have to qualify these tests so as to exclude the lowest level of public servant; this would depend upon whether one could regard such a person as holding an 'office'".

7 As stated by Justice Murphy in *Church of Scientology v Woodward* (1982) 154 CLR 25 at 65.

8 *BHP v NCSC* (1986) 67 ALR 545, 551 (Dawson J), Waterhouse v ABC (Fed CT, 21/10/87), Businessworld Computers PL v ATC (1988) 82 ALR 499 (Gummow J) and Post Office Association Ltd v APC (1988) 84 ALR 563 (Davies J).

9 Section 3 of the AD(JR) Act, "decision to which this Act applies".

10 For such a discussion see *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act* Report No 32 by the Aministrative Review Council, 1989.

11 This gloss on the Act was added by the High Court in *ABT v Bond* (1990) 170 CLR 321.

12 In its Report No 33, *Review of Administrative Decisions (Judicial Review) Act: Statements of Reasons,* the Council considered that decisions made by bodies established under an Act of Parliament (other than the *Corporations Law*) should not be exempted from the scope of the reasons requirement but that provisions should be made in section 13A to protect information the release of which would, or could reasonably be expected to, adversely affect an authority of the Commonwealth in respect of its competitive commercial activities: see paragraphs 168-173.

13 And also to some extend section 38 of the *Judiciary Act 1903.*

14 This predominantly means decisions that are not required by the Act or not having the character or quality of

finality, as stated by the High Court in *ABT v Bond.*

15 The capacity of courts to undertake judicial review of private bodies that have public functions is discussed in *R v Panel on Takeovers and Mergers; Ex parte Datafin plc* [1987] QB 815 and in D Pannick, "Comment: Who is Subject to Judicial Review and in Respect of What?", *Public Law,* Spring 1992, p1.

16 See on this issue of commercial decision making of GBEs: Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act,* Report No 32, 1989.

17 That is, under section 75(v) of the Constitution, in relation to the High Court, and under section 39B of the *Judiciary Act 1903*, in relation to the Federal Court.

18 Administrative Review Council, *Eleventh Annual Report 1986-87* at chapter 9.

19 Id, para 228.

20 Id, section 3.

21 Id, section 5(2).

22 See section 4, FOI Act.

23 See Schedule 2, FOI Act.

WHISTLEBLOWING: THEORY AND PRACTICE

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Paper delivered to the Australian Institute of Administrative Law, South Australia

Chapter seminar entitled 'The Whistleblowers Protection Bill', Adelaide, 7 April 1993

Introduction

Modern administrative systems that face problems of governance, including a legitimation deficit, have usually responded in one or two inter-related ways. Either they have pursued greater openness by revealing more about their operations or they have sought to create multiple channels for accountability such as the Ombudsman and the ICAC (in the New South Wales case)[1]. Of course these two techniques are related in that the latter two institutions are given privileged access to governmental information in order to investigate complaints. In some cases greater openness has taken the form of freedom of information laws together with greater intrusiveness by the media.

The central difficulty with these methods is that they tend to leave in place a dominant ethos of secrecy within the bureaucracy which, as we shall see, makes access to information and accountability less effective that it might otherwise have been.[2] All governments have secrets, and not even in very open systems is all information revealed to the public. There are obvious categories, such as defence, foreign affairs and commercial secrets, as well as current law enforcement issues that remain hidden from view, though the exact parameters of these categories are usually the subject of considerable debate.

It is also clear, and the evidence for this grows daily, that organizational secrecy is often used not merely to cover up embarrassment but to cover up fraud, breaches of the law and other forms of maladminsitration, including waste and incompetence. The question then arises as to whether public officials within bureaucracies who encounter such conduct should be allowed to reveal this to outsiders, and whether, if this is accepted in the public interest, they should be protected against organisational retaliation. The dilemma for the public official is of either being disloyal to his or her employer or of deceiving the public and betraying his or her conscience.[3] This paper considers these questions in the light of the interest in and experience with 'whistleblower' laws. In particular we will consider whether the American experience, which is the most sophisticated and extensive available, shows that whistleblower protection laws actually work.

Clearly it is difficult to devise measures by which laws are actually said to achieve their stated objectives but, in this case, since the laws are supposed to prevent the victimization of those who blow the whistle, it is obviously relevant to consider whether all those who seek their protection actually do so. As a general point it may be asserted at the outset that that accountability in developed administrative systems deserves to be taken seriously and that multiple channels of control are usually better than single channels that are prone to disruption or failure. In such a case a backup by-pass system is better for the health of the body politic.

One further preliminary: a whistleblower is an American term that refers to persons, whether in the private or public sectors, who discover fraud, waste, abuse of power or criminal behaviour in the organisation and who then reveal this (ie blow the whistle) to outsiders, whether this be the media or not. The emphasis in this paper will be on the public sector experience, though it should be noted that the same phenomenon exists in the private sector.

The interest in whistleblowing

Interest in this subject other than the United States has been greatest in Australia[4]. There have been major papers in Queensland, following the Royal Commission of 1987 into corruption in that state,[5] South Australia has a Whistleblower Protection Bill before the State Parliament, which is likely to be law by April 1993, while the recent Royal Commission into WA Inc in Western Australia recommended such legislation.[6] There is also a Bill before the New South Wales Parliament which has been criticised as not being effective enough[7].

Outside Australia the best account of the subject remains the Ontario Law Reform Commissioner's Report of 1986 which recommended legislation, though nothing has eventuated.[8] The only place outside the United States to pass legislation has been Queensland, which provided limited whistleblower protection for persons helping the Criminal Justice Commission,[9] but only for a limited period.[10]

The existing law

The existing law (both statutory and common law) resists disclosures that are not authorised. In the case of public servants, disclosures may not be made unless authorised nor may such a servant 'comment on any matter affecting the public service or the business of the public service'. If they so act they may be liable to disciplinary action.[11]

At common law an employee is oblilged to obey lawful and reasonable orders. Conversely this means that orders that are not lawful need not be obeyed.[12] An employee is not under a legal duty to disclose their own fraud or wrong doing but they may be obliged at common law to reveal the wrong doing of their subordinates if there is a term to that effect in their contract of employment.[13] In reality it would be a very brave public servant who decided to so act; and most unlikely of all in the case of a subordinate, though instances are known.[14]

An intelligence agency is bound by the law and cannot break the law nor can it refuse to reveal information eg the names of agents and thereby thwart a criminal investigation. In *A v Hayden* (1984) 156 CLR 532 a group of Australian intelligence operatives broke into the wrong hotel room during an exercise and assaulted a civilian. They subsequently refused to cooperate with a Victorian police investigation, on the grounds that their identities were a matter of national security. The High Court of Australia said that there is no defence of superior orders; that the identities could be revealed and that any contract between the operatives and the Crown forbidding them from revealing the information could not override the law nor could this be used as an excuse to thwart the processes of the law.

The exception for inequity[15]

Desipite the foregoing, the common law recognised that there could be no confidence in inequity (*Gartside v Outram* (1856) 26 LJCh 113, 114).[16] A number of legal cases in England in recent times suggest that the common law will recognise a public interest exception where information is leaked, usually to the media, but also to relevant external

regulatory bodies. To illustrate the point: where an agency covers up acts that might harm the public (eg unsafe medical practices), this information may be revealed to the press (*Belhoff v Pressdram* Ltd [1973] 1 All ER 241, 260(ChD)) as may breaches of a regulatory statute in which case the disclosure to the external regulatory body will be protected (*In re Company's Application* [1989] 3 WLR 265(Ch D)).[17] Even if the information disclosed proves to be baseless, no harm will be done if the disclosure is to a regulatory body that is obliged to keep the disclosed information confidential. The problem with this doctrine is that it involves the operation of a balancing test and the courts do not always support disclosures to the press. If the material shows an egregious abuse of power, such as corruption by the police (*Cork v McVicar*, The Times, October 31, 1984(ChD)), disclosure to the media may be allowed. Equally, if serious flaws in an administrative procedure, such as faulty breathalyser equipment that resulted in the conviction of many people (*Lion Laboratories v Evans* [1984] 2 All ER 417 (CA)) publication by the press may proceed unscathed.

On the other hand, if the material shows a serious defect, even one that may threaten the public, there may be countervailing considerations that compel non-disclosure. This arose in *X v Y* ([1988] 2 All ER 648(QBD)), in which the press published an article that showed that some medical practitioners were HIV positive but the courts refused to allow their names to be published, since it was argued that the AIDS crisis could only be tackled if those with the disease, inlcuding doctors, could be assured of complete anonymity.

Similarly, in the Spycatcher cases in Britain and Hong Kong, despite evidence of wrong doing by the intelligence services the balance of the public interest was said to lie against disclosure.[18] As Dickson CJC put in a Canadian case '... in some circumstances a public servant may actively and publicly express opposition to the policies of the government. This would be appropriate if, for example, the government were engaged in illegal acts, or if its policies jeopardised the life, health or safety of the public servant or others....'[19]

The American position

(a) Common law

At common law the American law of dismissal allows for dismissal at will (ie, in Commonwealth terms, summary dismissal) which meant that if employers wanted to retaliate against 'whistleblowers' they were free to do so. However, the 'at will' doctrine is subject to a number of exceptions, the most important of which is very similar to the 'public interest disclosure doctrine' in English law. In a number of cases involving nuclear safety (*English v General Electric Co* 110 L Ed2d 65(US SC, 1970)), and other public health threats, such as the sale of contaminated milk (*Garibaldi v Lucky Food Stores Inc* 726 F2d 1367(9th Cir, 1984)), as well as other forms of conduct where employees refused to violate enactments (*Sterling Drug Inc v Oxford* 743 SW2d 380 (Arkansas, 1988)), the courts carved out a public policy exception such that employees could not be dismissed for refusing to break the law. The problem with this approach was that not all states recognised it (see *Perdue v JC Penney Co* 470 F Supp 1234(SD NY, 1979)) and its effects were, like the English rules on public interest disclosure, uncertain in their operation. Moreover there was neither an agency to provide protection to 'whistleblowers' nor was there a way around the problem that workers might be legitimately dismissed for an unrelated matter.

(b) The move towards statutory protection: the first phase, 1967-1988

Beginning in 1967[20] commentators began to recommend that special statutory provisions be passed to provide for a more reliable form of protection for whistleblowers. These same commentators noted that, as early as 1912, civil servants had been provided protection by statute from disclosing wrongdoing to Congress by petition.[21] The difficutly with this legislation was that such disclosures were not permitted if they were irresponsible and unjustified, and since a civil servant could never be sure of the outcome, even if they acted in good

faith, few actually used this legislation for fear of retaliation.

Following these commentaries in the 1970s a number of specialist statutes providing whistleblower protection, especially in environmental matters,[22] were passed, beginning in Michigan in 1981.[23] Subsequently a number of other states passed whistleblower protection legislation.[24] The most important Federal development was the passage of the *Civil Service Reform Act 1978* (CSRA), which created the Office of Special Counsel (OSC) and was the first national legislative protection for whistleblowers on a broad scale. The OSC has an ombudsman-like role of providing an independent channel to whom whistleblowers could go with allegations and it was then left to the OSC to investigate the matter.[25] The Act dealt with violations of any law, rule or regulation together with mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. Complaints actuated by malice were not protected, nor was mere criticism of government policy. What was sought was actual information. The general conditions allowing for protection on the basis mentioned just above was qualified, since if the matter was specifically prohibited from disclosure by a law, or was specifically to be kept secret in the interests of national defence or the conduct of foreign affairs, the CSRA did not assist the whistleblower. The primary personnel effect intended by the new legislation was that certain types of adverse personnel action were prohibited whilst a complaint was being investigated by the OSC (for up to 15 days which might then be extended by the MSPB). Such adverse action included appointments, promotions, transfers or reassignments, performance evaluations, decisions concerning pay, benefits or awards including eduction and training, or 'any other significant change in duties or responsibilities which is inconsistent with the employees salary or grade in an agency'.[26]

This legislation had mixed results in the early years of operation. There were many delays in case processing, there was poor communication with whistleblowers, inadequate follow up of agency's responses to the OSC investigations, and under the Reagan regime from 1980 on the budget of the office was cut, despite that administration's drive against waste in government. A related defect was that the operation of the OSC was not independent of the Merit Systems Protection Board (MSPB) on which the OSC was financially dependnent.[27] In principle the parallel enactment of the *Inspector General Act 1978* was also supposed to provide further institutional assistance to whistleblowers.[28] The third element in the late 1970s reforms in the United States was the passage of the *Code of Ethics for Government Service Act 1980*[29] which imposed a duty to expose corruption and most importantly required civil servants to 'Put loyalty to the highest moral principles and to country above loyalty to persons, party or government department.'[30] This was a complete turn around from the British position most recently upheld in *Ponting* ([1985] Crim L Review 318), where such higher loyalties were said not to exist in law. In that case a judge directed a jury in an Official Secrets trial that the duty of the civil servant who leaked documents from the defence department concerning the 1982 Falklands war to a member of Parliament, was to the Government of the day and that there was no overriding duty to the public or the Parliament.[31]

Legally the test in the CSRA was a very strict one. The employees had to argue that the retaliation by the employer for the whistleblowing was for making a report and that this was the reason for the dismissal or other retaliatory action: the so-called 'but for' test.[32] That is, the employee had to show that the sole reason for the action was the whistleblowing and that action had not been taken for some other reason.[33] It was not hard for employers to argue that there were other reasons. One consequence of these strict tests is that many whistle blowers found that their cases were beyond the jurisdiction of the OSC, ie were not eligible for OSC protection and in practice the OSC was the last place whistleblowers blowers approached for help.[34] In practice the CSRA failed,[35] partly because Congress underestimated the scale of the problem:

a key assumption in the legislation was that retaliation would be very rare.[36] One American study concluded that between 1979 and 1984 only 16 out of a total of 1500 adverse actions complained of by whistle blowers in the Federal civil service resulted in corrective action on behalf of the employee.[37] The same study concluded that the legislation 'had had no ameliorative effect on employee expectations or experience in regard to reprisals'.[38] One reason for this conclusion is that despite the congressional assumption that retaliation would be rare, in practice whistleblowers feared retaliation in very high numbers, while approximately one quarter actually experienced retaliation or were threatened by it.[39] The consequences of a sustained campaign against whistleblowers was also otherwise serious since many found it difficult to get jobs after they had left the service and many experienced financial problems as a result of the high costs of fighting their case; still others needed medical assistance.[40] Other defects in the legislation included the fact that it explicitly excluded senior officials and any position determined by the President on the grounds that it was necessary and warranted by the conditions of good administration, as well as Government corporations, the CIA, FBI, National Security Agency, the Defense Security Agency and the General Accounting Office[41].

(c) The pre-1989 US empirical evidence[42]

The empirical evidence suggests that for whistleblowers the risks of retaliation are greatest if they reported a matter internally within their organisation or to the press, rather than to an external governmental agency whether state or federal.[43] The reasons for this are that in the case of a purely internal complaint the internal disciplinary system tends to assume that subordinates who complain are disruptive forces and are therefore a discipline problem. One effect of a complaint is to call into to question the supervisory system even if the complaint is not about a superior directly. In the case of external complaints to the media the internal stakes are raised, given the external pressures, and the fact that resistance from those threatened increases. Complaints to external governmental agencies are more often less 'dangerous' to the employee because the agency acts as a counterweight to internal pressures and the external agency may itself be able to impose sanctions on superiors who threaten to employ retaliation.

Despite the anecdotal evidence from individual studies that whistleblowers are not 'trouble-makers or neurotics',[44] it has been suggested that organisations see them as obsessives who are difficult people and who do not fit into the organisation.[45] In practice those who blow the whistle are better educated than those who do not, and are actually more highly committed to the organisation than their co-workers.[46] It is precisely because such people take the official goals of the organisation more seriously than do their co-workers that they are inclined to report wrong doing. They are in fact an exceptional group, since the American evidence suggests that the vast majority of people who are aware of corruption within organisations do not report it, even though such wrong doing is an open secret within the organisation.[47] One reason for this is that they are relatively junior and vulnerable to pressure. Another reason for low rates of corruption reportage is that such people are weakly committed to the organisation and its goals.[48] On the other hand, in the case of government agencies the existence of an effective external monitoring agency seems to be a major factor in inducing people to blow the whistle, especially if they are likely to be protected by it and there is a perception on the part of the whistleblower that the external agency will be committed to the discovery of wrong doing.[49]

Despite the defects in the American system, there is evidence that in some cases whistleblowing actually produces policy change and in some cases systemic abuses of power were tackled.[50] What is not clear is how often this happens. What is known is that the whistle blowers must be unusually determined, have a supportive political environment to which they can turn (such as a legislative

committee that is investigating waste or fraud, or a specialist anti-corruption agency) and be able to rely upon extensive and sympathetic media coverage and on the assistance of pressure groups.[51] Normally, only relatively senior officials with good political contacts and skills are in a position to achieve these results.

(d) The Whistleblower Protection Act 1989[52]

In view of the well known defects in the 1978 legislation, a second attempt was made in 1989 to provide statutory protection for whistleblowers. At one level the legislation is well supported. Opinion poll evidence shows consistently strong support for it, whatever the actual results in practice.[53] The 1989 legislation still requires complainants to approach the OSC but the special counsel now have 120 days to report and must also concentrate on retaliation cases. Thus while personnel discipline is important it is to be overborne by the protection of complainants as a paramount consideration.[54] In practice the cases are complex, but actually are treated seriously. In the first year of operation only 250 complaints were received out of a total work force of 3 million.[55] Whether, in view of the distrust in the Official of Special Counsel, this is a good result is open to question. In the opinion of those in the OSC, the fact that a stay of disciplinary action can now be imposed and that agencies generally take notice of the investigations is an improvement over the 1978 Act.[56] The other major changes are that appeals are now permitted to an administrative law judge and not to the MSPB. The latter was primarily concerned with organisational efficiency and merit, while an administrative law judge is obliged to consider the fairness of the individual case. Lastly, the 1989 Act has altered the legal test of retaliation from one where the whistleblower had to show that the retaliation was the sole factor in the personnel action taken, to a case where it is merely a contributory factor, ie one of several considerations.[57]

Conclusions

It must not be assumed that the whistleblowing experiment has failed. Even if all of the institutions described above were dismantled, the problems of fraud, waste and breaches of the law would remain. In fact insiders are in a unique position and are usually privy to far more wrong doing than any external agency, which can normally only be activated when it receives information from inside the bureaucracy, though this is often combined by media attention after 'leaks' have occurred. Of course not every person who thinks that they have discovered fraud, abuse and breaches of the law within the bureaucracy are correct in so thinking. Sometimes they are wrong and there are also misguided persons who are the bureaucratic equivalent of the vexatious litigant, a point the advocates of whistleblowing tend to ignore. Still, if a public service is truly serious about stamping out corruption it should strengthen the existing institutions and accept the wrongly made complaints will be rare and are an acceptable price to pay for effective public accountability.

The evidence suggests that the following institutional and legal conditions need to be in place for a 'whistleblower protections' system to work effectively:

(a) Effective external agencies that both provide a channel of communication for whistleblowers and which possess the necessary powers to investigate their complaints. It should be noted that the Criminal Justice Commission in Queensland is obliged to protect sources from harassment and to prevent prejudice to a whistleblower's career. It is also provided in the same legislation that disclosures to the Commission are not a breach of confidence nor are the providers of information liable to any disciplinary action.[58]

(b) It would help, however, if the personnel rules within the civil service were altered to protect 'whistleblowers' from retaliation. No disciplinary proceeding should be allowed to go forward against whistleblowers while other investigations are in train.

(c) An alteration in the civil service laws on secrecy and confidentiality to permit a public interest exception in the case of whistleblowers.

(d) Providing a statutory basis for the media to justify the publication of 'leaked' material from whistleblowers on the basis that it is *prima facie* in the public interest. Unfortunately even in systems with constitutional protection of free speech public officials may be subject to restrictions in what they may say to the media.[59]

(e) On the other side of the fence there is currently no privilege that attaches to the press. This means that a media person who receives material in confidence cannot refuse to disclose it to a court or other legal proceedings such as a Royal Commission.[60] One possibility is to provide that while confidences that also go to the heart of a judicial proceeding must be revealed, journalists and their employers who publish confidential material in good faith about matters of the public interest are protected from adverse legal proceedings. That is, the media could be compelled to reveal information so as not to thwart judicial proceedings, but not be themselves the subject of civil or criminal proceedings in receiving the information. The public interest would include materials concerning the operation of public organisations, not just the civil service, and would extend to private organisations that carry out public functions, eg private laboratories.[61]

This is not of course an ideal solution, since the real target of actions to uncover sources is not the journalist but the source itself. As recent media cases in South Australia suggest, a whistleblower may wish to remain anonymous under current legal conditions and may refuse to release the journalist from the undertaking of confidentiality.

All of this is aside from the question whether the source is correct or not. A whistleblower system does assume that fraud and wrongdoing exists, but not that all whistleblowers are correct. The American evidence suggests that retaliation still takes place despite the existence of agencies to protect the whistleblower. Whether this means that the experiment has failed or merely means that effective protections are still needed is for others to judge. The US evidence is revealing for another reasons. Irrespective of the effects on the whistleblowers themselves, the effects in key areas where abuses were common have been beneficial with major reforms resulting in better levels of public safety.[62]

The public and the government of South Australia ought to give thought to these developments. Of course any such debate must recognise the limits of legal/institutional changes, especially as these seek to change long held attitudes about the primacy of confidentiality in the public service. Ideally any such laws would be coupled with internal efforts to change a predominant 'organisational culture' through education, cooperative committees with external agencies to identify problems, and managerial accountability to prevent the abuses against which whistleblowing is ultimately aimed.

ENDNOTES

1 Or possibly in South Australia if the *Independent Commission Against Crime and Corruption Bill 1992* (No 24 of 1992 read for the first time September 9, 1992) is passed.

2 Whether this will be eroded by the *Freedom of Information Act 1991* (SA) remains to be seen.

3 H Collins, Justice in Dismissal (Oxford Clarendon Press, 1992) pp204-205.

4 For other Australian literature see: John McMillan, 'Whistleblowing', in Peter Grabosky (ed) *Government Illegality* (Canberra: Australian Institute of Criminology Proceedings, No 17, 1987) pp 193-200. John

McMillan, 'Blowing the Whistle on Fraud in Government', (1988) No 56 *Canberra Bulletin of Public Administration* 118-123; Commonwealth Criminal Law, *Final Report*, (December 1991) pp 335-355 (Canberra: Commonwealth Parliamentary Paper No 371 of 1991); J G Starke, 'The Protection of Public Service Whistleblowers - Part 1', (1991) 65 *Australian Law Journal* 205-219; J G Starke, 'The Protection of Public Service Whistleblowers - Part 2', (1991) 65 *Australian Law Journal* 252-265.

5 For the Queensland material see: *Report of a Commission of Inquiry Pursuant to Orders in Council* (1987-89) (sometimes known after its chairman as the Fitzgerald inquiry) (Brisbane: Government Printer, 1989) pp 133-134; *Electoral & Administrative Review Act 1989* (Qld) (No 106) (Schedule: Item 16 as a research matter); Greg Sorenson, "Fitzgerald Reform Agenda Under Way in Queensland",(1990) 1 *Public Law Review* 205-216; Queensland, Electoral & Administrative Review Commission, *Report on Protection of Whistleblowers* (Brisbane, October 1991). *Whistleblowers (Interim Protection) Act 1990* (Qld) No 79. The recommended legislation has not been passed, however. See: Queensland, Electoral & Administrative Review Commission, *Review of the Preservation and Enhancement of Individuals' Rights and Protections.* (Issues paper No 20) (Brisbane: Government Printer, June 1992) p 9; William D Maria, 'Queensland Whistleblowers: Sterilising The Lone Crusader', (1992) 27 *Aust J of Social Issues* 248-261; John McMillan, 'Legal Protection of Whistleblowers', in Scott Presser, et al (eds), *Corruption and Reform: The Fitzgerald Vision* (St Lucia: University of Queensland Press, 1990) pp 203-211.

6 *The Weekend Australian*, November 14-15, 1992 p1,. cols 1-3; *Report of the Royal Commission Into Commercial Activities and Other Matters Part 2* (Perth: Government Printer, 1992) pp 4.14 to 4.20.

7 *Whistleblowers Protection Bill 1992 (No 2)* (NSW); John Goldring, "Blowing The Whistle", (1992) 17 *Alternative Law Journal* 298-300.

8 Ontario Law Reform Commission, *Report on Political Activity, Public Comment & Disclosure by Crown Employees* (Toronto, 1986) See also: H L Laframboise, 'Vile Wretches and Public Heros: The Ethics of Whistleblowing in Government', (1991) 34 *Canadian Public Administration* 73-77.

9 Created by the *Criminal Justice Act 1989* (Qld) (No 111).

10 *Whistleblowers (Interim Protection) and Miscellaneious Amendment Act 1990* (Qld), s11.

11 *Government Management and Employment Act 1985* (SA s67(h). The previous legislation repealed in 1985 also prohibited unauthorized disclosures and made such acts a criminal offence: *Public Service Act 1967* (SA) s58(j). See also Regulation 21(1)(c)(i) & (iii) made under the 1985 Act: Government Gazette, (SA) June 26, 1986 p1668, which allows disclosures provided that it does not create a reasonably foreseeable possibility of prejudice to the Government in the conduct of its policies or is not made contrary to any law or lawful instruction or direction.

12 *Parrish v Civil Service Commission of Almeda* 425 P2d 223 (Cal SC, 1967); *Morish v Henly (Folkestone) Ltd* [1973] 2 All ER 137, 139G (Nat Ind Rels Ct) (refusal to falsify records); *Gregory v Ford* [1951] 1 KB 121, 123H (Notts Assizes) (refusal to drive an uninsured vehicle).

13 *Swain v West Butchers Ltd* [1936] 3 All ER 261 (CA); *Sybron Corporation v Riochem Ltd* [1983] 2 All ER 707, 715H-J, 717F-G(CA).

14 A teacher was threatened with disciplinary action recently for making public comments about alleged safety problems at his school: *The*

Advertiser, January 23, 1993 p4, cols 1-3.

15 The other exceptions are that there may be a higher duty to another authority, and a balancing of the public interest: P D Finn, 'Confidentiality and the Public Interest', (1984) 58 Australian Law Journal 497 at 505-507.

16 A view reiterated in more recent cases such as: *Initial Services Inc v Putterill* [1986] 1 QB 396, 405(CA); Y Cripps, 'Protection From Adverse Treatment by Employers: A Review of the Position of Employees Who Disclose Information In The Belief That Disclosure is In The Public Interest', (1985) 101 *Law Quarterly Review* 506-539.

17 For discussion of this case see: E Lominicka 'The Employee Whistleblower and His Duty of Confidentiality', (1990) 106 *Law Quarterly Review* 42-46. See also *Hasselblad* (GB) *Ltd v Orbinson* [1985] 1 QB 475, 504(CA).

18 The same conclusions were reached in other cases involving intelligence officers in Britain: R Pyper, 'Sarah Tisdall, Ian Willmore, and the Civil Servant's Right to Leak', (1985) 56 *Political Quarterly*, 72-81. For a summary account of most of these cass as well as the failed Spycatcher litigation in Australiasia see: A Stewart & M Chesterman, 'Confidential Material: The Position of the Media', (1992) 14 *Adelaide Law Review* 1, 8-12.

19 *Re Fraser and Public Service Staff Relations Board* (1985) 23 DLR(4th) 122, 133(SCC).

20 L E Blades, 'Employment at Will vs Individual Freedom: On Limiting the Abusive Exercise of Employer power', (1967) 67 *Columbia Law Review* 1404, 1432.

21 M J Lindauer, 'Government Employee Disclosures of Agency Wrongdoing: protecting The Right to Blow the Whistle', (1975) 42 *University of Chicargo Law Review* 530, at p545, fn 88; Note, 'The Right of Government Employees to Furnish Information to Congress: Statutory and Constitutional Aspects', (1971) 57 *Virginia Law Review* 885-919. It should be noted that in Australia disclosures by witnesses to certain parliamentary committees are protected and retaliatory action against such witnesses is forbidden: *Public Works Committee Act 1951* (Cth), s32; *Public Accounts Committee Act 1969* (Cth), s19(2). In English law, if a constituent discloses wrong doing by public officials to a member of parliament, and in the letter defames the official concerned, the MP has a privileged occasion defence in receiving the letter: *R V Rule* [1937] 2 KB 375, 380(CCA); *Beach v Freeson* [1972] 1 QB 14, 21-22(QBD).

22 *Willy v Coastal Corporation* 855 F2d 1160 (5th Cir, 1988); (1992) 140 *Federal Rules Decisions* 219, 221.

23 Martin H Malin, 'Protecting the Whistleblowers From Retaliatory Discharge', (1983) 16 *University of Michigan Journal of Law Reform* 277, 304.

24 Note, 'State law Protection of At Will Employees Who 'Blow the Whistle', (1988) 65 *University of Detroit Law Review* 551, p553, fn 5 lists 10 states with legislation. For a detailed discussion of three of the earliest state statutes see: T M Dworkin and J P Near, 'Whistleblowing Statutes: Are They Working?', (1987) 25 *American Business Law Journal* 241-264. For a list of the state statutes see: Marcia P Miceli & Janet P Near, *Blowing The Whistle* (New York: Lexington Books, 1992), pp260-273, where 35 state enactments are breifly described.

25 *Frazier v MSPB* 672 F2d 150, 162 (DC Cir, 1982).

26 *Civil Service Reform Act 1978* PL 95-454; 92 Stat 111 s2302(a)(2)(A).

27 B C Indig, 'The Rights of Probationary Federal Employee Whistleblowers Since The Enactment of the Civil Service Reform Act of

1978', (1983) 11 *Fordham Urban Law Journal* 567, 596.

28 K W Muelenberg & H J Volzer, 'Inspector General Act 1978', (1980) 53 *Temple Law Quarterly* 1049-1066.

29 PL 99-303; 94 Stat 855-856.

30 Ibid item IX in the Code.

31 Citing the views of Lord Devlin in *Chandler v DPP* [1964] AC 763, 807 (HL(E)).

32 J L Martin, 'The Whistle Blower Revisited', (1985) 8 *George Mason University Law Review* 123, 129.

33 *Frazier v MSPB* 672 F2d 150, 165(DC Cir, 1982).

34 Philip H Jos, et al, 'In Praise of Difficult People: A Portrait of the Committed Whistleblower', (1989) *Public Administration Review* 552, 554, Table 2.

35 US General Accounting Office, *Whistleblower Complainants Rarely Qualify for Office of Special Counsel* (Washington DC: Government Printer 1985) p 18 as cited in Gerald A Caiden & Judith A Truelson, 'Whistleblower Protection in the USA: Lessons Learnt and To Be Learnt', (1988) 47 *Australian Journal of Public Administration* 119, 123.

36 *Frazier v MSPB* 672 F2d 150, 165 (DC Cir, 1982).

37 Gerald A Caiden & Judith A Truelson, 'Whistleblower Protection in the USA: Lessons Learnt and To Be Learnt', (1988) 47 *Australian Journal of Public Administration* 119, 122.

38 Ibid p122. The same pessimistic conclusion was reached in T M Dworkin and J P Near, 'Whistleblowing Statutes: Are They Worling?', (1987) 25 *American Business Law Journal* 241, 258-259.

39 Judith A Truelson, 'Blowing the whistle on systematic corruption: On Maximizing reform and minimizing retaliation', (1987) 2 *Corruption and Reform* 55, 57. Philip H Jos, et al, 'In Praise of Difficult People: A Portrait of Committed Whistleblower', (1989) *Public Administration Review* 552, 554, Table 1 shows that only 1% did not experience retaliation.

40 Philip H Jos et al, 'In Praise of Difficult People: A Portrait of the Committed Whistleblower', (1989) *Public Administration Review* 552, 554, put this figure at 57%.

41 Ontario Law Reform Commission, *Report on Political Activity Public Comment & Disclosure by Crown Employees* (Toronto, 1986) p236.

42 For two excellent accounts of this see: M Glazer & P Glazer, *The Whistleblowers* (New York: Basic Books, 1989) and M P Miceli and J P Near, *Blowing the Whistle* (New York: Lexington Books, 1992).

43 E S Callahan, 'Employment At Will: The Relationship Between Societal Expectations and the Law', (1990) 28 *American Business Law Journal* 455, 462-463.

44 M A Parmalee, et al, 'Correlates of Whistleblowers' Perceptions of Organisational Retaliation' (1982) 27 *Administrative Science Quarterly* 17, 32-33.

45 H L Laframboise, 'Vile Wretches and Public Heroes: The Ethics of Whistleblowing in Government', (1991) 34 *Canadian Public Administration* 73, 76.

46 Marcia P Miceli and Janet P Near, 'Individual and Situational Correlates of Whistle-blowing', (1988) 41 *Personnel Psychology* 267-281; Mary Brabeck, 'Ethical Characteristics of Whistle Blowers', (1984) 18 *Journal of Research in Personality* 41-53.

47 Judith A Truelson, 'Blowing the whistle on systematic corruption: on maximizing reform and minimizing retaliation', (1987) 2 *Corruption and Reform* 55, 56 reports that in one US study by the MSPB 70% of federal employees claiming personal

knowledge of corruption did not report it.

48 Marcia P Miceli et al, 'Who Blows the Whistle and Why?', (1991) 45 *Industrial and Labour Relations Review* 113, 125-126.

49 Ibid 127.

50 R A Johnson and M E Draft, 'Bureaucratic Whistleblowing and Policy Change', (1990) 43 *Western Political Quarterly* 849-874.

51 Ibid p869.

52 *Public Law* 101-12 (10 April 1989); 103 Stat 16.

53 E S Callahan, 'Employment At Will: The Relationship Between Societal Expectations and The Law', (1990) 28 *American Business Law Journal* 455, 480.

54 *Whistleblowers Protection Act 1989* PL 101-12; 103 Stat 16, s2(b)(2)(A).

55 (1991) 133 *Federal Rules Decisions* 392, 399.

56 Ibid pp400-401.

57 (1992) 140 *Federal Rules Decisions* 219, 221.

58 *Criminal Justice Act 1989* (Qld) ss3.31 & 3.32.

59 *Mt Health School District Board of Education v Doyle,* 50 L Ed 2d 471, 482 (US SC, 1977); *Pickering v Board of Education,* 20 L Ed 2d 811 (US SC, 1968); *Connick v Meyers,* 75 L Ed 3d 708 (US SC, 1983); *US v Richey,* 924 F2d 857, 860 (9th Cir, 1991). First amendment rights are not absolute, for a balance may need to be struck between their interest as a citizen and the interst of the state, as an employer in promoting the efficiency of the public services it performs though its employees. The same ideas have been accepted in Canada: see Re *Fraser and Public Service Staff Relations Board* (1985) 23 DLR (4th) 122(SCC); *Re OPSEU and Attorney-General of Ontario* (1988) 41 DLR (4th) 1, 16((SCC).

60 See: Australia: *State Bank of South Australia v Hellaby (1992)* 168 LSJS 1(FC) *Kerrisk v North Queensland Newspapers Co Ltd* [1992] 2 Qd R 398 (FC); *John Fairfax & Son Ltd v Cojuanco* (1988) 165 CLR 346 (HCA); *The Herald and Weekly Times Ltd v The Guide Dog Owners" and Friends' Association* [1990] VR 451; *McGuiness v Attorney-Geneal of Victoria* (1940) 63 CLR 73(HCA). Britain: *Attorney-General v Mulholland* [1963] 2 QB 477; *Attorney-General v Clough* [1963] 1 QB 773; *Maxwell v Pressdram Ltd* [1987] 1 WLR 298; *X v Morgan-Grampian (Publishers) Ltd* [1990] 2 WLR 1000(HL(E)); The United States: *Branzburg v Hayes,* 33 L Ed 2d 626(US SC, 1972); *Cohen v Cowles Media,* 115 L Ed 2d 586 (US, SC, 1991). Canada: *Moysa v Labour Relations Board* (1989) 60 DLR (4th) 1(SCC). For disucssion see: TRS Allen, 'Disclosure of Journalists' Sources, Civil Disobedience and the Rule of Law', (1991) 50 *Cambridge Law Journal* 131-162; Sally Walker, 'Compelling Journalists to Identify Their Sources: "The Newspaper Rule" and "Necessity"', (1991) 14 *University of NSW Law Journal* 302-324; A Stewart & M Chesterman, 'Confidential Material: The Position of the Media', (1992) 14 *Adelaide Law Review* 1-34.

61 The issue in *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417(CA) concerned the leaking of information that showed that the testing of blood alcohol limits was highly unrealiable and that the private manufacturers knew this. On the basis of the findings produced by faulty equipment the police and the Home Office continued to use this equipment in traffic law enforcement.

62 M P Glazer & P M Glazer, *The Whistleblowers: Exposing Corruption in Government and Industry* (New York: Basic Books, 1989) pp 240-246.

AUSTRALIAN INSTITUTE OF ADMINISTRATIVE

Incorporated

(Australian Registered Body Number 054 164 064)

MEMBERS NOTES

(accompanying Newsletter No 14 1993)

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CANBERRA ACT 2601

State chapters

Since the last Members Notes, there has (as usual) 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 17 May, Professor Donald Arnavas, a Washington attorney and adjunct professor of law at the Dickinson School of Law, Carlisle, Pennsylvania, gave an address to ACT members on the role of the administrative law judge in American administrative law.

The next Institute function held in the ACT will be the annual general meeting of the Institute, which is to be held on Thursday 30 September. At the conclusion of the formal business, the Commonwealth Minister for Justice, the Hon Duncan Kerr MP, will address the meeting. Further details of the meeting are set out below and also in the material included with this Newsletter.

A public meeting is planned for 13 October, to be addressed by the Hon Justice Walter Tarnopolsky, a judge of the Court of Appeal for Ontario. His Honour will speak on 'The independence of the judiciary'. ACT members will receive further details of the meeting in due course.

Planning is also under way for proposed seminars on administrative law for practitioners and on broadcasting law, both of which are planned for October - November.

New South Wales: On 9 June, the chapter held a successful seminar on recent developments in administrative law and constitutional law, which was addressed by Dr Margaret Allars and Leslie Katz. It is hoped that at least one of the papers from the seminar will be published in a future Newsletter.

A seminar on aspects of environmental law was held on 12 August. Matthew Smith, of the Sydney Bar, spoke on the regulation of fisheries and Donna Campbell, a Senior Legal Officer with the NSW Environment Protection Authority spoke on 'New directions for the EPA'. It is hoped that both papers

will be published in the Newsletter in due course.

Planning is under way for a seminar on 'Parliamentary committees and public accountability', to be held, in conjunction with the Royal Institute of Public Administration Australia, on 22 September. NSW members will receive details of the seminar in due course. In the interim, inquiries about the seminar can be directed to the treasurer of the chapter, John Fitzgerald, on (02) 911 2449.

There is a possibility that a seminar on human rights will be held in November, in conjunction with Australian Lawyers for Human Rights. The proposed talk by Leroy Certoma, the Principal Member of the new Refugee Review Tribunal (which was foreshadowed in the last Members Notes) may be included in the seminar.

Inquiries about these and other activities of the chapter should be directed to the secretary of the chapter, Mark Robinson, on (02) 221 5701.

Queensland: The chapter held its annual general meeting on 6 August. At the meeting, the following persons were elected to the chapter's executive committee:

Chairperson: Maurice Swan (Australian Government Solicitor's Office)
Secretary: Michael Halliday (Barrister)
Treasurer: John Bickford (Bickford's)
Executive committee members: John Cockburn (Gilshenan and Luton), Barry Cotterell (Barrister), Suzanne Sheridan (Minter Ellison Morris Fletcher) and David Shultz (Administrative Appeals Tribunal).

At the conclusion of the formal business, the meeting was addressed by the Commonwealth Attorney-General, the Hon Michael Lavarch MP.

The chapter's primary focus for the next 9 or 10 months will be the planning of the 1994 administrative law forum, which is to be held in Queensland. This matter is discussed in further detail below.

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

South Australia: The chapter's annual general meeting was held on 23 June. At the meeting, the following persons were elected to the executive committee of the chapter:

Chairperson: Eugene Biganovsky (SA Ombudsman)
Secretary: Alex Gardini (Department of Multicultural and Ethnic Affairs)
Treasurer: Paul White (SA Attorney-General's Department)
Executive committee members: Geoffrey Hackett-Jones (SA Parliamentary Counsel), John Harley (Finlaysons), Graham Hemsley (White Berman), Jean Matysek (SA Housing Trust), Wendy Purcell (Commonwealth Administrative Appeals Tribunal) and Michael Radin (Immigration Review Tribunal).

At the conclusion of the formal business of the meeting, the President of the Institute, Robert Todd, gave his 'Breaker' Morant presentation.

On 20 July, the chapter conducted a seminar at which 3 papers were presented on, respectively, the Hong Kong administrative system and the 1997 transition, the Hong Kong Bill of Rights and 'The Chinese concept of law'. The speakers were Robert

Wickins, and Dr Carlos Wing-Hung Lo. It is hoped that at least some of the papers might be published in a future Newsletter.

Any inquiries about the activities of the chapter should be directed to the chairperson of the chapter, Eugene Biganovsky, on (08) 212 5712.

Tasmania: The Executive Committee of the Institute has taken an in-principle decision to establish a Tasmanian chapter of the Institute. It is intended to arrange an inaugural meeting shortly. In the interim, inquiries, expressions of interest and offers of support should be directed to Rick Snell at the Faculty of Law, University of Tasmania, on (002) 20 2062.

Victoria: The chapter's seminar on government business enterprises, held on 26 May, was addressed by the secretary of the chapter, Mick Batskos and Stephen Lloyd of the Administrative Review Council secretariat. Both the papers from the seminar are published in this Newsletter.

On 27 July, the chapter held a successful seminar on changes to FOI in Victoria. It was addressed by Victor Perton MP, a member of the Attorney-General's Bill Committee and Dr Spencer Zifcak of LaTrobe University. It is hoped that both papers will be published in the Newsletter in due course.

The chapter's next function will be it's annual general meeting, to be held on 8 September. The speaker will be Professor Cheryl Saunders, whose topic will be 'The experience of the Administrative Review Council - Lessons for Victoria'.

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

Western Australia: The chapter held its annual general meeting on 1 September. At the meeting, the following persons were elected to the chapter's executive committee:

Chairperson: Hon Justice Robert Nicholson (Supreme Court of WA)
Secretary: Ilse Petersen (Australian Government Solicitor's Office)
Treasurer: Richard Fayle (University of WA)
Executive committee members: Michael Barker (Barrister), Dr Stephen Churches (Barrister), Hon Peter Durack QC, Stan Hotop (University of WA), Laurie Marquet (WA Legislative Council) and Dr Hannes Schoombee (Murdoch University).

Any inquiries about the activities of the chapter should be directed to the secretary of the chapter, on (09) 224 1815.

1993 annual general meeting of the Institute

As mentioned above, the 1993 annual general meeting of the Institute will be held in Canberra on Thursday 30 September. Important matters for consideration include the President's report on the activities of the Executive Committee in 1992-93, the presentation and adoption of the Treasurer's report for the same period, the election of a new Executive Committee and the setting of the membership fees for 1993-94. In addition, the meeting will be required to consider some proposed amendments to the Rules of the Institute, which are intended to bring the Rules into line with the requirements of

the ACT *Associations Incorporation Act 1991*.

At the conclusion of the formal business, the meeting will be addressed by the Commonwealth Minister for Justice, the Hon Duncan Kerr MP, who is a member of the Institute. Further details of the meeting (including a copy of the proposed amendments to the Rules) are enclosed with this Newsletter.

1994 administrative law forum

As foreshadowed on several occasions in recent years, the Executive Committee decided that the 1994 administrative law forum should be conducted by a State chapter at a location other than Canberra. 'Bids' were received from the New South Wales and Queensland chapters. Both bids were strong, meritorious and worthy. However, after deliberations that would have done the International Olympic Committee proud (though, unfortunately, without the accompanying inducements!), the Executive Committee decided that the 1994 administrative law forum should be conducted by the Queensland chapter and held in Brisbane. At this stage, it is intended that the forum should be held in July, rather than the now-customary April. Further details of the forum will be provided to members as they come to light.

Missing members

The secretariat of the Institute has lost contact with the following members (whose last known addresses are noted in brackets): Dr Lyn Fong (Commonwealth Attorney-General's Department), Phillip Simpson (NSW Soil Conservation Service) and Elizabeth Veevers (Gallens Crowley and Chamberlain). If anyone can assist with the current addresses of any of these persons, please contact Kathy Malcolm, on (06) 251 6060.

MEMBERSHIP RENEWALS

As indicated above, the membership fees for 1993-94 will be set by the annual general meeting on 30 September. Therefore, members should **not** send in their renewals until such time as that has happened and, indeed, until membership renewal forms have been sent out. The renewal forms will be sent out with the next Newsletter, which we hope to send out in late October.

MEMBERSHIP INQUIRIES

Members are reminded that, until further notice, they 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.

CONTRIBUTIONS TO THE NEWSLETTER

Members are also reminded that they are welcome at any time to submit articles for publication in the Newsletter. Any inquiries should be directed to Michael Sassella, on (06) 244 7047.