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# COSTS, STANDING AND ACCESS TO JUDICIAL REVIEW

Bruce Dyer\*

*This paper was delivered at the 1998 Annual Public Law Weekend, November 1998, in Canberra.*

## Introduction

The treatment of standing, and the award of costs, are both issues that have a significant bearing on the accessibility of judicial review. Both issues have recently received consideration in decisions of the High Court.<sup>1</sup> The judgments echo with responses to arguments of counsel as to the desirability of the courts seeking to facilitate proceedings brought to uphold “the public interest”. In this paper I propose to consider the implications of the High Court’s decisions, together with related decisions and law reform reports dealing with the award of costs and standing. In doing so I hope to identify some of the broader considerations which bear upon these matters, and to address the question of what, if anything, the courts should do to facilitate greater access to judicial review.

There has been much discussion of questions of “access to justice” both in general terms,<sup>2</sup> and in relation to administrative law in particular.<sup>3</sup> The problem of inequality of access to law is undoubtedly of the greatest importance. Radical reforms, and concerted action by all three branches of government, may well be necessary in order to bring reality significantly closer to the rhetoric of the rule of law. Whilst I hope not to overlook the implications of these important issues, this paper will deal only with a few points of detail on that broader canvass. As far as access to judicial review is concerned, I think it should be uncontroversial that, with legal aid now very difficult to obtain,<sup>4</sup> judicial review is usually<sup>5</sup> only a practical option for corporations and wealthy individuals who have substantial sums at stake.

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Author’s Note: This paper is a revised version of part of an earlier paper, entitled “Judicial Review – Recent Developments”, which was delivered at the Annual Public Law Weekend, ANU, Canberra, 7 November 1998. I also gave an earlier version of this paper at a seminar organised by Australian Institute of Administrative Law Inc (Victorian Chapter), “Access to Administrative Law: Costs, Standing and Public Interest Litigation” Melbourne, 25 February 1999. I wish to thank participants at both events, Mark Aronson, Enid Campbell, and Pam O’Connor for their helpful comments. Naturally, I remain fully responsible for any errors or omissions.
- 1 Re standing, see: *Bateman’s Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 155 ALR 684. Re costs see: *Oshlack v Richmond River Council* [1998] HCA 11; 152 ALR 83; *South-West Forest Defence Foundation Inc v Executive Director of Department of Conservation and Land Management (No 2)* [1998] HCA 35; 154 ALR 411.
- 2 See eg: Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice – Foundations for Reform* February 1993, *The Cost of Justice – Second Report* August 1993; Access to Justice Advisory Committee, *Access to Justice – an Action Plan* 1994; Australian Law Reform Commission, *Costs Shifting – who pays for litigation*, Report no 75, 1995; Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System, First Report* 1997, *Second Report* 1997, *Legal Aid Report 3* (Third Report) 1998.
- 3 The Administrative Review Council has considered specific issues of access in a number of reports. See eg: Reports No.s 27, 30 and 34. See also Senate Legal and Constitutional References Committee, *Legal Aid Report 3*, 1998, Chapter Seven – Legal aid in civil law matters ([http://www.aph.gov.au/senate/committee/legcon\\_ctte/legal3/](http://www.aph.gov.au/senate/committee/legcon_ctte/legal3/)).
- 4 Senate Legal and Constitutional References Committee, *Legal Aid Report 3*, 1998 ([http://www.aph.gov.au/senate/committee/legcon\\_ctte/legal3/](http://www.aph.gov.au/senate/committee/legcon_ctte/legal3/)) at Para. 9.82: “It is clear from numerous

In adopting this limited focus, it is important to keep the problems of inequality of access to judicial review in perspective. Judicial review is only one of a number of mechanisms which collectively ensure accountability on the part of government administration. Its significance stems from its theoretical role, rather than its practical or systemic impact. In most Australian jurisdictions there are other mechanisms, such as the Ombudsman and administrative tribunals, that are more accessible, and which accordingly ameliorate the significance of judicial review's inaccessibility. Even so, judicial review remains the linchpin, both because of its role in defining the operation and interaction of other mechanisms, and because of the relative permanence that results from judicial review being constitutionally entrenched at the Commonwealth level<sup>6</sup> and fiercely defended by the courts elsewhere.<sup>7</sup> It may not matter greatly that few can afford the linchpin if it secures the wheel of a cart on which all can ride. But is that the case? Or does judicial review provide carriage for the wealthy alone?

## Costs

If the courts were to seek to dismantle barriers to access to judicial review, the first target on the list would have to be the expense of curial proceedings. The rigorous and technical nature of judicial review proceedings means that they are not particularly quick and that expert legal representation is virtually essential. The cost of advice and representation, together with the risk of an adverse award of costs, and the limited availability of legal aid in such matters,<sup>8</sup> suggests that judicial review is not likely to be a practical option for many individuals.

My focus in this section will be on "cost orders" or the "award of costs" as the means by which the courts attempt to redistribute some of the expense of proceedings. However, I begin with some more general comments about that expense.

It is difficult to be certain, of course, as to the precise effects of the expense of proceedings. The Chief Justice of the High Court commented on this recently in an extra-judicial address, referring to the results of an empirical study of the financial status of litigants in the Common Law Division of the NSW Supreme Court.<sup>9</sup> The study found that the financial profile of plaintiffs matched very closely the profile of ordinary citizens, suggesting that access to the courts is not confined to the very rich and those who are legally-aided. Chief Justice Gleeson noted, however, that most actions in the Common Law Division were claims for damages for personal injuries, which are often conducted on an informal contingency fee basis. It would be most interesting to see a similar study conducted in relation to judicial review applications. I would be surprised, given the very limited availability of damages in relation to unlawful administrative action, if the results were not markedly different.

It might also be contended that the apparent prevalence of unrepresented applicants in judicial review proceedings suggests that representation is not always essential.<sup>10</sup> There are

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submissions that the legal aid system in Australia is fundamentally incapable of providing access to justice for an increasing number of Australians."

5 A qualification is noted below at n 11.

6 Constitution s 75(iii)(v).

7 As demonstrated in the interpretation of privative clauses. See generally: Aronson & Dyer, *Judicial Review of Administrative Action* (LBC Sydney 1996) Ch 18.

8 Senate Legal and Constitutional References Committee, *Legal Aid Report 3*, 1998, Chapter Seven – Legal aid in civil law matters ([http://www.aph.gov.au/senate/committee/legcon\\_ctte/legal3/](http://www.aph.gov.au/senate/committee/legcon_ctte/legal3/)).

9 The Hon. Murray Gleeson, "Commentary on Paper by Lord Browne-Wilkinson" NSW SC Judges' Conference 11 Sept 1998 ([HTTP://www.hcourt.gov.au/cj2.htm](http://www.hcourt.gov.au/cj2.htm)).

10 On the prevalence of unrepresented litigants in general, see: Helen Gamble and Richard Mohr, *Litigants in Person in the Federal Court of Australia and the Administrative Appeals Tribunal: A Research Note*, Paper

clearly large numbers of unrepresented applicants in the immigration jurisdiction of the Federal Court, most of whom are seeking to avoid deportation.<sup>11</sup> I would suggest that this is largely a measure of the desperation of these applicants and their dissatisfaction with the review processes available to them. It may be said then that, although judicial review is *usually* only an option for the very wealthy, it can still be used *on occasion* by litigants who are in such desperate circumstances that the threat of an adverse award of costs provides no real disincentive.

It is not unreasonable to assume that the disincentive created by the expense of curial proceedings is now the principal means by which the availability of judicial review is rationed. Some form of rationing of access to judicial review is practically inevitable, but there are several obvious problems with the use of cost as a rationing device. In the first place, it is grossly inequitable in view of the extent to which the impact of the disincentive will vary according to the means of potential applicants. Secondly, the disincentive is magnified in cases involving the enforcement of “public” rights and interests by the lack of an effective mechanism to spread the cost burden across the range of persons likely to benefit. In such cases the value of the right or interest to any one individual is unlikely to justify the expense involved in bringing proceedings for its enforcement. Thirdly, because the impact of the cost disincentive varies so greatly (for the reasons just given) it is unlikely to provide a justifiable means for identifying or selecting the instances of unlawful governmental action that are most deserving of the courts’ scrutiny.

The desirability of reducing the discriminatory effect of cost on access to judicial review is clear. But the question of what can be done to address this problem, and more particularly, what the *courts* can do, is much more difficult and controversial. A few possibilities, focussing on the exercise of the discretion to award costs, have been considered recently both here in Australia and in England.

### **Cost orders and public interest litigation**

The High Court was invited to consider the treatment of costs in proceedings brought for the benefit of the public in *Oshlack v Richmond River Council*<sup>12</sup> (“*Oshlack*”). The case concerned a refusal by Stein J of the NSW Land and Environment Court to award costs to a council and developer who successfully defended a challenge to the validity of the council’s consent to a development application. The proceedings were brought by Mr Oshlack, under subsection 123(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (“*EPA Act*”) which allowed “any person” standing to restrain a breach of the Act. Even though Mr Oshlack’s argument of unreasonableness failed, Stein J refused to award costs against him, concluding that there were “special circumstances” which justified a departure from the usual rule of costs following the event. His Honour supported this by reference to a number of factors, including his findings that the proceedings could be properly characterised as “public

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presented to the Sixteenth AIJA Annual Conference, Melbourne, 4 – 6 September 1998 ([http://www.uow.edu.au/law/law\\_web\\_main/litigants.html](http://www.uow.edu.au/law/law_web_main/litigants.html)); Australian Law Reform Commission, *The unrepresented party* Adversarial Background Paper 4, December 1996, S Parker, *Courts and the public* 1998 AIJA 107-111.

<sup>11</sup> Helen Gamble and Richard Mohr, *Litigants in Person in the Federal Court of Australia and the Administrative Appeals Tribunal: A Research Note*, Paper presented to the Sixteenth AIJA Annual Conference, Melbourne, 4 – 6 September 1998 ([http://www.uow.edu.au/law/law\\_web\\_main/litigants.html](http://www.uow.edu.au/law/law_web_main/litigants.html)). The evidence presented in Gamble and Mohr’s paper is based on sampling conducted in 1992, 1994 & 1996. The following searches of the SCALEplus FEDDEC database, although not comprehensive or reliable, demonstrate that there continues to be many unrepresented applicants, mostly appearing in immigration matters:  
(("in person" or "self represented")<near> (applicant or appellant or respondent)<and> (review and migration))<and>date>01/01/96 – 133 documents.  
(("in person" or "self represented")<near> (applicant or appellant or respondent)<and> (judicial review<not>migration))<and> date>01/01/96 – 54 documents

<sup>12</sup> [1998] HCA 11; 152 ALR 83.

interest litigation”, that the challenge was arguable and raised significant issues, and that Mr Oshlack had nothing to gain from the litigation apart from “the worthy motive of seeking to uphold environmental law and the preservation of endangered fauna.”<sup>13</sup> The NSW Court of Appeal set aside Stein J’s order, holding that the compensatory approach required by the High Court’s decision in *Latourdis v Casey*<sup>14</sup> (“*Latourdis*”) made the plaintiff’s “public interest” motivation irrelevant to the award of costs.<sup>15</sup> However a majority of the High Court<sup>16</sup> allowed Mr Oshlack’s appeal, and reinstated Stein J’s order.

It was put to the High Court that “public interest litigation” should be established as a special category of litigation in determining how costs should be allocated.<sup>17</sup> However the court declined that invitation and allowed the appeal on a much narrower basis. Gaudron and Gummow JJ, in their joint judgment, took the view that the real issue was not whether the case involved “public interest litigation”, but whether the subject matter, scope and purpose of the legislation conferring the power to award costs<sup>18</sup> enabled the Court of Appeal to treat the factors considered by Stein J as “definitely extraneous to any objects the legislature could have had in view”.<sup>19</sup> Their Honours emphasised the breadth of the discretion concerning costs,<sup>20</sup> and the fact that the relevant legislation had authorised “any person” to bring proceedings to enforce its terms.<sup>21</sup> They also implied that the Council had allowed itself to become too much of a “protagonist” in appealing the cost order.<sup>22</sup> The approach of Kirby J, the other majority judge, was similar, although his Honour arguably went a little further, suggesting that a rigid application of the “compensatory” approach to costs in the Land and Environment court would be “completely impermissible” having regard to the legislation’s objects and endorsement of “open standing”.<sup>23</sup>

In dissent, McHugh J, with Brennan CJ expressing general agreement, argued that the compensatory purpose of a costs award made the “public interest” character of litigation irrelevant.<sup>24</sup> His Honour reasoned that the provision for “open standing” should not justify a different approach, since Parliament had itself stopped short of taking that step, and the refusal of costs, unlike open standing, could cause significant prejudice to successful parties.<sup>25</sup> McHugh J considered also that the fact that a successful party is a public authority should not normally make the court less inclined to award costs, since the refusal of costs to public authorities would mean that such bodies have less to spend on their public functions.<sup>26</sup>

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<sup>13</sup> (1994) 82 LGERA 236 at 246. Stein J drew on a number of prior cases in which considerations of this nature had been taken into account. For further discussion see: E Campbell, “Public Interest Costs Orders” (1998) 20 Adel LR 245-264.

<sup>14</sup> (1990) 170 CLR 534

<sup>15</sup> *Richmond River Council v Oshlack* (1996) 39 NSWLR 622 at 627, 636, 638.

<sup>16</sup> Gaudron, Gummow and Kirby JJ allowing the appeal, with Brennan CJ and McHugh J dissenting.

<sup>17</sup> [1998] HCA 11 at [30], [58]-[59].

<sup>18</sup> s69(2) *Land and Environment Court Act 1979* (NSW)

<sup>19</sup> [1998] HCA 11 at [30]-[31] [49] (echoing the language of Dixon J in *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505).

<sup>20</sup> [1998] HCA 11 at [21]-[22], [36]-[45].

<sup>21</sup> [1998] HCA 11 at [47]-[48]

<sup>22</sup> [1998] HCA 11 at [12] [46], referring to *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13. Note that the developer, which was also refused its costs, did not appeal.

<sup>23</sup> [1998] HCA 11 at [134].

<sup>24</sup> [1998] HCA 11 at [67]-[70]. His Honour was also strongly critical of the imprecision of the concept of “public interest litigation”: [1998] HCA 11 at [71]-[75].

<sup>25</sup> [1998] HCA 11 at [86]-[90].

<sup>26</sup> [1998] HCA 11 at [92] but note also [94].



The decision of the majority in *Oshlack* gives the NSW Land and Environment Court the flexibility to take account of “public interest” considerations in dealing with costs in its jurisdiction under subsection 123(1) *EPA Act*.<sup>27</sup> However, the significance of *Oshlack* beyond its particular statutory context would appear to be fairly limited,<sup>28</sup> although it does undermine the narrowest interpretation of *Latourdis*, as necessarily requiring a compensatory approach to general powers to award costs in the absence of misconduct by the successful party. This will presumably have the effect of giving judges and tribunals at first instance greater leeway in dealing with costs,<sup>29</sup> especially in areas of jurisdiction where there are special policy considerations to be taken into account. An example of this may be *Transport Accident Commission v O’Reilly, Cavanagh, Moore & Davey*,<sup>30</sup> where Tadgell JA referred to *Oshlack* in order to demonstrate that the ordinary approach to costs in curial proceedings is not of universal application:<sup>31</sup>

In particular, a broad and unqualified statutory power to award costs may be exercisable in a particular case by reference to the nature of the proceeding and without any necessary presumption that a successful party should receive or that an unsuccessful party should suffer an order for costs.

In that case the Victorian Court of Appeal dismissed appeals against four cost orders made by the Victorian Administrative Appeals Tribunal<sup>32</sup> despite the fact that the judges clearly had significant reservations about the appropriateness of some of the orders.

One thing *Oshlack* does make quite clear is that the High Court will not seek to develop any special approach to the award of costs as a means of facilitating “public interest litigation”. Only Kirby J displayed any support for the notion of “public interest litigation”, and even he agreed that it was “difficult to define with precision”.<sup>33</sup> Gaudron and Gummow JJ described it as a “nebulous concept”, and suggested that it tended to distract attention from the real legal issue at stake in the case.<sup>34</sup> McHugh J was especially critical of the suggested concept, arguing that it was too broad (potentially including prosecutions and many civil actions), too imprecise, and threatened to make the award of costs turn on “nothing more than the social

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27 Even then it would seem that this is not a factor that must be taken into account, and early indications suggest that the judges of the Land and Environment Court will be reluctant to depart from the ordinary rule of “costs following the event”. Orders refusing costs to successful parties have been sought, but refused, in: *Seaton v Mosman Municipal Council* NSW CA 27 March 1998; *Bellevue Crescent Pty Ltd v Marland Holdings Pty Ltd* [1998] NSWSC 89; *Kogarah Municipal Council v Vodafone Pty Ltd* [1998] NSWLEC 106; *Tinda Creek Spiritual & Environment Centre v Baulkham Hills Shire Council* [1998] NSWLEC 109 also [1998] NSWLEC 296; *Donnelly v Tenterfiled Shire Council* [1998] NSWLEC 154 also [1998] NSWLEC 199; *North Cronulla Precinct Committee Inc v Sutherland Shire Council* [1998] NSWLEC 171; *Oshlack v Lismore City Council* [1998] NSWLEC 227; *Wykanak v Rockdale City Council* [1998] NSWLEC 272; *Balcombe v Nambucca Shire Council* [1998] NSWLEC 287; *Save the Showground for Sydney Inc v Minister for Urban Affairs and Planning* [1998] NSWLEC 294.

28 Orders denying costs to a successful party have been sought, but refused, in a significant number of cases already. See eg: *L v Director of Family Services (No 2)* [1998] SCACT 54; *De Silva v Ruddock* FCA (Merkel J) 31 March 1998; *Friends of Hinchinbrook Society v Minister for the Environment* [1998] FCA 432; *Margarula v Poole* NT SC 8.2.99 Thomas J; *The Guide Dog Owners’ and Friends’ Association Inc v Guide Dog Association of NSW and ACT* FCA 17.7.98 Sackville J; *Hollier v Australian Maritime Safety Authority (No 2)* FCA FC 14.8.98; *Botany Bay City Council v Minister for Transport & Regional Development* [1999] FCA 65 Selliah v *The Minister for Immigration and Multicultural Affairs* FCA Nicholson J 5.5.98.

29 The danger of this approach, of course, is that it might well result in the very kind of inconsistency that prompted the decision of the High Court in *Latoudis v Casey* (1990) 170 CLR 534, see, at 541 (Mason CJ), 558-9 (McHugh J).

30 [1998] VSCA 106 (13 November 1998).

31 [1998] VSCA 106 at para. 14.

32 Prior to its replacement by the Victorian Civil and Administrative Tribunal.

33 [1998] HCA 11 at [136].

34 [1998] HCA 11 at [30].

preferences of the judge”.<sup>35</sup> If any doubt remained after *Oshlack* that the High Court’s would recognise a special regime in public interest matters, it was removed, three months later, in *South-West Forest Defence Foundation Inc v Executive Director of Department of Conservation and Land Management (No 2)*.<sup>36</sup> In that case, unsuccessful applicants for special leave to appeal to the High Court sought an order that each party should bear its own costs, because the proceedings were “of a public interest character” because they sought enforcement of environmental laws for the benefit of the general public.<sup>37</sup> This order was refused, unanimously, by the High Court. The majority refused the order without elaboration. Kirby J gave separate reasons in which he confirmed that *Oshlack* had not established a special cost regime for public interest litigation.<sup>38</sup> His Honour commented that one of the considerations that supported the decision in *Oshlack* had been the existence of the “open standing” provision and noted that there was no provision of that kind in this case.<sup>39</sup>

The High Court is certainly not unaware of, or unconcerned about, the barrier that the expense of curial proceedings creates for those seeking to enforce public rights. McHugh J, in his dissent in *Oshlack*, observed that the risk of an adverse cost order may well inhibit the bringing of public law challenges, and commented:

Express recognition of this fact does not, however, mean that the courts should remove this inhibition by adopting a practice of declining to follow the usual order as to costs in cases of “public interest litigation”. Whether or not one regards a particular applicant’s actions as well-intentioned and striving, albeit unsuccessfully, to serve some perceived public interest, the respondent still faces real costs from having to defend the proceedings successfully. The applicant had a choice as to whether or not to be a party to the relevant litigation. The respondent typically had no such choice. The legislature has chosen not to protect such applicants from the affects of adverse costs orders, whether by an express statutory exemption or the creation of some form of applicants’ costs fund.<sup>40</sup> In such circumstances, one may well feel some sympathy for the plight of the unsuccessful applicant. But sympathy is not a legitimate basis to deprive a successful party of his or her costs.<sup>41</sup>

All judges in *Oshlack* appeared to consider that the problems of the public interest litigant, as far as costs are concerned, can only be dealt with by the legislature.<sup>42</sup> The main difference between the majority and the minority in *Oshlack* seemed to be that the majority were more willing to infer some form of legislative intention relevant to costs from the “open standing” provisions in the relevant legislation.<sup>43</sup> However there was a difference of emphasis among the majority even on that. Whereas Kirby J relied quite explicitly on legislative intent,<sup>44</sup>

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<sup>35</sup> [1998] HCA 11 at [71]-[75].

<sup>36</sup> [1998] HCA 35; 154 ALR 411. See also *Friends of Hinchinbrook Society v Minister for the Environment* [1998] FCA 432 (30.4.98) Fed Ct FC, discussed in E Campbell, “Public Interest Costs Orders” (1998) 20 Adel LR 245-264.

<sup>37</sup> [1998] HCA 35 at [1].

<sup>38</sup> [1998] HCA 35 at [5].

<sup>39</sup> [1998] HCA 35 at [6].

<sup>40</sup> cf Australian Law Reform Commission, *Costs shifting – who pays for litigation*, Report No 75, 1995, ch 18.

<sup>41</sup> [1998] HCA 11 at [90].

<sup>42</sup> See eg the comments of Kirby J at [1998] HCA 11 at [134] (numbered point 6), and *South-West Forest Defence Foundation Inc v Executive Director of Department of Conservation and Land Management (No 2)* [1998] HCA 35 at [5]; 154 ALR 411 at 412.

<sup>43</sup> [1998] HCA 11 at [47]-[49], [134] [143]. Compare McHugh J’s rejection of this approach at [84]-[89].

<sup>44</sup> See especially [1998] HCA 11 at [134] (numbered point 6).

Gaudron and Gummow JJ were more circumspect,<sup>45</sup> placing greater emphasis on the width of the discretion concerning costs.

The High Court's refusal to endorse a new regime for cost orders in "public interest litigation" is not surprising. There are clearly serious problems in defining the concept of "public interest litigation".<sup>46</sup> It must also be doubted whether the adoption of such a regime in the making of cost orders *at the end of proceedings* would significantly reduce the disincentive that the expense of proceedings creates for public interest litigants. A regime which allows judges to excuse public interest litigants from liability for adverse cost orders on a *discretionary* basis would reduce the risk of an adverse cost order, but not eliminate it. Presumably, most litigants hope that their proceedings will be successful and that they will receive their costs, but find it difficult to assess the risk that they may fail. Unless public interest litigants are relieved of liability for costs virtually as a matter of course,<sup>47</sup> it is questionable whether an uncertain reduction<sup>48</sup> in an uncertain risk will be likely to make a significant difference to their motivation to commence such proceedings.

It is possible that the existence of law reform proposals for statutory authorisation of "public interest cost orders" may have strengthened the inclination of the High Court to leave such developments to the legislature.<sup>49</sup> In its report on *Cost Shifting – who pays for Litigation*<sup>50</sup> the Australian Law Reform Commission (ALRC) examined the effect of cost allocation rules on access to justice, and recommended that courts<sup>51</sup> should be empowered to make "public interest cost orders" in order to reduce the deterrent effect of costs orders for a loosely defined category of "public interest litigation".<sup>52</sup> Such orders would be available at any stage of the proceedings,<sup>53</sup> and could include orders that:<sup>54</sup>

the party applying for the public interest costs order, regardless of the outcome of the proceedings,

- shall not be liable for the other party's costs
- only be liable to pay a specified proportion of the other party's costs
- be able to recover all or part of his or her costs from the other party.

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<sup>45</sup> [1998] HCA 11 at [48]-[49]. Referring to the possibility of costs awarded against an Attorney-General being borne by the public purse, their honours comment: "To what degree, it may be asked, should the position be any different *where statute has authorised any person*, otherwise than as a relator, to institute and conduct such proceedings to secure the observance of legislation enacted for the benefit of the public or a section of the public?" (emphasis added).

<sup>46</sup> See the comments of McHugh J: [1998] HCA 11 at [71]-[75], and also E Campbell, "Public Interest Costs Orders" (1998) 20 Adel LR 245-264.

<sup>47</sup> Which could be quite unfair, to the extent that costs are denied to private citizens, and could produce an unjustifiable diversion of public funds, if costs are routinely denied to public authorities.

<sup>48</sup> The reduction in the risk would depend on the frequency with which costs orders against public interest litigants are denied.

<sup>49</sup> But cf the comments of Kirby J at [1998] HCA 11 at [142].

<sup>50</sup> Report No 75, 1995. For discussion see: E Campbell, "Public Interest Costs Orders" forthcoming in the *Adelaide Law Review*). See also the recommendations of the Ontario Law Reform Commission concerning costs in its *Report on the Law of Standing* (1989) Ch 6 and 179-180, and P Bayne, "Costs orders on review of administrative action" (1994) 68 ALJ 816 (discussing Queensland's reforms).

<sup>51</sup> and tribunals.

<sup>52</sup> Chapter 13, recommendation 45. The ALRC recommended that a court or tribunal should be able to make such an order "if satisfied that: the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community; the proceedings will affect the development of the law generally and may reduce the need for further litigation; the proceedings otherwise have the character of public interest or test case proceedings."

<sup>53</sup> Recommendation 49. The ALRC suggested that the orders would be most effective if made at the start of proceedings: para 13.27.

<sup>54</sup> Recommendation 47

Both McHugh and Kirby JJ referred to the report.<sup>55</sup> The fact that the ALRC proposal would allow orders to be made at the start of proceedings<sup>56</sup> makes it potentially much more effective than the regime advocated before the court in facilitating public interest litigation. It would be difficult to justify such an approach in the absence of statutory authorisation.<sup>57</sup> However the ALRC's recommendations have been criticised. Professor Campbell has argued that the report does not adequately define the concept of "public interest litigation" or the criteria that would govern the making of the proposed orders.<sup>58</sup> She suggests that a better approach would be to incorporate special cost regimes in particular statutes governing the exercise of particular jurisdictions.<sup>59</sup>

One further matter worthy of note concerns the assumptions that underlie the various approaches of the judges in *Oshlack*. A contrast is apparent in the assumptions of McHugh J and Kirby J, which has echoes in several other cases discussed in this paper. This contrast concerns the way in which their Honours conceived of the main function of the type of proceedings before the NSW Land and Environment Court in *Oshlack*. McHugh J appeared to place greater emphasis on the function of the proceedings in providing redress for the grievances of individual parties. This was apparent in his explanation as to why public interest motivation should be irrelevant to the award of costs:<sup>60</sup>

it is because any departure from the usual order as to costs by reference to the motives or conduct of the unsuccessful party would typically, if not invariably, work injustice on the successful party. ... I can see no justification in legal principle or social justice for depriving a successful private litigant of his or her costs simply because that person was unlucky enough to get caught up in "public interest litigation".

Kirby J, in contrast, thought that the legislation had altered the assumptions upon which litigation takes place and reduced the emphasis on individual grievance redress:<sup>61</sup>

Instead of a purely adversarial contest between two parties having individual, and typically financial, interests to advance, parliament has envisaged that, in some cases at least, the contestants will be ranged as they were in these proceedings: on the one side an individual or representative body seeking to uphold one perception of the public interest and the requirements of environmental law; on the other side, a local government authority seeking to uphold another.

It seems to me that McHugh J and Kirby J might be said to be emphasising different functions of judicial review.<sup>62</sup> This raises a theme I will return to, which draws on Harlow and Rawlings' reference to "two main functions" of judicial review:<sup>63</sup>

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<sup>55</sup> [1998] HCA 11 at [90] [134] [142]

<sup>56</sup> See para 13.27

<sup>57</sup> But note the discussion in the next two sections of this paper.

<sup>58</sup> E Campbell, "Public Interest Costs Orders" (1998) 20 Adel LR 245-264.

<sup>59</sup> E Campbell, "Public Interest Costs Orders" (1998) 20 Adel LR 245-264, at 262-3.

<sup>60</sup> [1998] HCA 11 at [96].

<sup>61</sup> [1998] HCA 11 at [117]

<sup>62</sup> The proceedings provided for by s 123(1) *EPA Act* were in effect a limited statutory version of judicial review whereby the NSW Land and Environment Court was given jurisdiction to restrain breaches of the Act in substitution for the Supreme Court's ordinary jurisdiction to grant injunctive and declaratory relief: [1998] HCA 11 at [17].

<sup>63</sup> C Harlow & R Rawlings, *Law and Administration* (Butterworths London 1997 2nd ed) 530. John McMillan, made a similar point in the paper he gave for the first "Public Law Weekend": "Judicial review, accordingly, is not merely a process for adjudicating disputes between individuals and the government. It is in addition a concept that defines a special relationship of courts to the executive." J McMillan, "Recent themes in judicial review of federal executive action" (1996) 24 *FL Rev* 347 at 365.

like courts in general it [ie judicial review] is machinery for redress of grievance and, at least in the eyes of the red light theorists, it is a mechanism for the control of government and administration.

Of course it is not only “red light theorists” who see a role for judicial review that goes beyond the redress of individual grievances. Others may describe that role in very different ways, as providing principles of good administration perhaps, or as defining the nature of the relationship between the various branches of government. In each case however, there is a distinction between the benefits of judicial review for the individual parties, and for others or society in general. These “grievance redress” and “broader” functions of judicial review are, to some extent, two sides of the one coin. The traditional assumption is that by addressing individual grievances, judicial review also ensures accountability on the part of the administration. However I suggest that there is a tension, which finds expression in several of the cases discussed in this paper, as to which of these functions should receive the greatest emphasis.

### **Pre-emptive cost orders**

The approach of the High Court in *Oshlack* can be contrasted with that adopted by Dyson J in the English Queens Bench Division, in *R v Lord Chancellor, ex parte Child Poverty Action Group*<sup>64</sup> (“CPAG”). Several applicants, who had obtained leave to seek judicial review, sought orders at the outset that no order for costs be made against them in the proceedings, whatever the ultimate outcome. The applicants argued that the court should be prepared to make “pre-emptive cost orders” of this kind in cases involving “public interest challenges”. The essential characteristics of a public interest challenge were said to be:<sup>65</sup>

that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case.

Dyson J concluded that, although the court’s general discretion to order costs would allow the making of pre-emptive cost orders,<sup>66</sup> they should be made “only in the most exceptional circumstances.”<sup>67</sup> His Honour noted that the general rule of costs following the event “promotes discipline .. compelling parties to assess carefully ... the strength of any claim” and ensures that the assets of the successful party are not depleted. The latter was said to be “as desirable in public law cases as it is in private law cases” since unsuccessful claims impose costs on a public body which have to be met out of funds diverted from those available to fulfil its primary public functions.<sup>68</sup> Dyson J stated the *necessary* conditions for the making of a pre-emptive cost order in public interest challenge cases as being:<sup>69</sup>

That the court is satisfied that the issues raised are truly ones of general public importance, and that it has a sufficient appreciation of the merits of the claim that it can conclude that it is in the public interest to make the order.

His Honour stated that satisfaction of these conditions was necessary, but not sufficient for the making of an order, as:<sup>70</sup>

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64 [1998] 2 All ER 755.

65 [1998] 2 All ER 755 at 762.

66 Jurisdiction was, in any case, conceded: [1998] 2 All ER 755 at 761-2.

67 [1998] 2 All ER 755 at 764.

68 [1998] 2 All ER 755 at 764.

69 [1998] 2 All ER 755 at 766.

70 [1998] 2 All ER 755 at 766.

The court must also have regard to the financial resources of the applicant and respondent, and the amount of costs likely to be in issue. It will be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant, and where it is satisfied that, unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in so doing.

Dyson J found that the necessary conditions for the making of a pre-emptive costs order were not made out in relation to either of the applications before him. In one, the Child Poverty Action Group (CPAG), a registered charity, was seeking to challenge the refusal of the Lord Chancellor to provide any legal aid for proceedings before social security tribunals and commissioners. Dyson J was not satisfied that this was of sufficient “general public importance” since CPAG only contended that aid should be provided in a minority of cases, and the number affected was unclear.<sup>71</sup> Also Dyson J was not satisfied as to the merits, which turned on novel and complex arguments drawing on European Community law.<sup>72</sup> In the other application, two human rights organisations sought to challenge, as a “test case”, the decision of the DPP not to prosecute two individuals for possession of an “electro-shock baton” without licence. Dyson J observed that there was a strong factual element to the challenge which might mean that the decision would be of limited general public importance, and once again, was not satisfied as to the merits of the challenge.<sup>73</sup>

Dyson J’s concept of pre-emptive cost orders is similar, in several respects, to the ALRC’s proposal, but clearly has a far more limited reach. The concept of public interest litigation used by Dyson J is much narrower than that of the ALRC, since it is confined to “public law challenges” and excludes those “in which the applicant is seeking to protect some private interest of his or her own.”<sup>74</sup> Furthermore, Dyson J’s statement of necessary and sufficient conditions, and his application of these on the facts of the case, make it clear that such orders will be very exceptional indeed. The proposal of the ALRC, by contrast, seems to contemplate a broad discretion that could be exercised in a wide range of cases.<sup>75</sup>

The decision in *CPAG* appears to have created a situation in which pre-emptive cost orders for public law challenges are a theoretical possibility, but are unlikely to be made in practice. If so, that may not be such a bad compromise. The theoretical possibility of such orders may suffice to discourage governments and their agencies from persisting with unlawful practices in circumstances where they know there is unlikely to be any one individual with enough at stake to risk the expense of a challenge.<sup>76</sup> Even if that is not the case, making application for such an order could provide a relatively inexpensive means of bringing pressure to bear upon an intransigent agency, and bringing before the courts serious allegations of unlawfulness which might not otherwise be aired. The pre-emptive nature of these orders means that, within the limited bounds set for them by Dyson J’s judgment, they are more likely to be effective in overcoming the barrier created by the expense of judicial review proceedings. At the same time, by making it clear that such orders will be very difficult to obtain, the courts may still hope to be able to avoid some of the practical problems that are likely to arise in making and enforcing such orders.

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71 [1998] 2 All ER 755 at 767.

72 [1998] 2 All ER 755 at 767.

73 [1998] 2 All ER 755 at 768.

74 [1998] 2 All ER 755 at 762. However, note Bayne’s observation that private and public interests may sometimes overlap: P Bayne, “Costs orders on review of administrative action” (1994) 68 ALJ 816 at 821-2.

75 See Professor Campbell’s discussion of the ALRC’s concept of public interest litigation in: E Campbell, “Public Interest Costs Orders” (1998) 20 Adel LR 245-264.

76 For a possible example, illustrating the effect of the expense of judicial review in discouraging applicants see Allars’ account of an attempted challenge to the Immigration Review Panel Fees: M Allars, *Administrative Law: Cases and Commentary* (Butterworths, Sydney, 1997) [6.3.4] [6.3.9] [6.3.12].

### Wallersteiner Orders?

In the course of his judgment in *CPAG*, Dyson J made reference to the position that applies in private law litigation, quoting the statement of Hoffmann LJ in *McDonald v Horn*<sup>77</sup> (“*McDonald*”) that the general rule that costs follow the event was:<sup>78</sup>

a formidable obstacle to any pre-emptive costs order as between adverse parties in ordinary litigation. It is difficult to imagine a case falling within the general principle in which it would be possible for a court properly to exercise its discretion in advance of the substantive decision.

In order to deal with that statement, the applicants submitted that public interest challenges are not “ordinary litigation” between adverse parties, and sought to emphasise the “broader” functions of judicial review.<sup>79</sup> They argued that:

It is now recognised by the courts that the true nature of the court’s role in public law cases is not to determine the rights of individual applicants, but to ensure that public bodies do not exceed or abuse their powers.<sup>80</sup>

Consequently, it was said, the making of pre-emptive cost orders was necessary in public interest challenges in order to prevent a grave lacuna in the courts’ performance of this supervisory role. Dyson J went on to accept this submission, with the qualification that “the parties to such proceedings are nevertheless adverse as is the litigation”.<sup>81</sup> It would seem then that Dyson J’s endorsement of public interest pre-emptive cost orders was grounded in a strong emphasis on the broader constitutional role of judicial review.

The reference to *McDonald* is worth noting for another reason as well. Despite the statement of principle quoted above, the Court of Appeal actually went on in that case to *uphold* a pre-emptive costs order. The court did so by extending a type of order that is sometimes made at the instance of a minority shareholder bringing a derivative action under the “fraud on the minority” exception to the rule in *Foss v Harbottle*.<sup>82</sup> The leading authority for these orders is *Wallersteiner v Moir (No 2)*<sup>83</sup> (“*Wallersteiner*”), which has been applied<sup>84</sup> or assumed to be correct<sup>85</sup> in several Australian cases. *Wallersteiner* was extended in *McDonald* to permit

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77 [1995] 1 All ER 961 (CA).

78 [1995] 1 All ER 961 at 969.

79 See above at n 63.

80 [1998] 2 All ER 755 at 762.

81 [1998] 2 All ER 755 at 764.

82 (1843) 2 Hare 461.

83 [1975] QB 373 (CA)

84 *Wallersteiner* was relied on by Ipp J to make a cost order at the *end* of proceedings requiring the company to indemnify the plaintiffs for all reasonable costs incurred in relation to *unsuccessful* claims in: *Biala Pty Ltd And T S Holdings Pty Ltd v Mallina Holdings Ltd* (1993) 13 WAR 83 (Ipp J) upheld on appeal (1994) 13 WAR 124. A pre-emptive order was made in *Farrow v Registrar Of Building Societies and Others* [1991] 2 VR 589, but set aside by the Full Court on appeal (without questioning the correctness of *Wallersteiner*) on the grounds that the proceedings did not involve a derivative action: *Russell v Official Trustee in Bankruptcy as Trustee of the Estate of Farrow and Noitaroproc Pty Ltd* Unreported 23rd March 1993, Brooking, Nathan & Eames JJ.

85 *Parker v NRMA* (1993) 11 ACLC 866 (Kirby P (dissenting) would have granted an indemnity 876-7; the majority distinguished *Wallersteiner* but did not question its correctness 894-5); *Russell v Official Trustee in Bankruptcy as Trustee of the Estate of Farrow and Noitaroproc Pty Ltd* Unreported 23rd March 1993, Brooking, Nathan & Eames JJ; *Biala Pty Ltd And T S Holdings Pty Ltd v Mallina Holdings Ltd* (1993) 13 WAR 83 (Ipp J).

such orders to be made at the instance of members of a pension fund<sup>86</sup> alleging breach of trust by the fund's trustees.

It is interesting to note that the *Wallersteiner* order was developed to address what is probably the closest private law analogue of the problem of the "public interest" litigant.<sup>87</sup> Company law has a doctrine of standing because it shares with public law a common problem as to who should be permitted to represent what is essentially a collective interest – the interest of the company.<sup>88</sup> As in public law, where the Attorney-General represents the public interest, it is usually the persons elected by the majority, namely the directors,<sup>89</sup> who perform that role. However there are exceptions to that general rule, just as in the case of the special interest test. In company law it has long been recognised that minority shareholders must be permitted to bring proceedings on behalf of the company in cases of "fraud on the minority"<sup>90</sup> where the wrongdoers are in control of the company and are preventing the company from taking action.<sup>91</sup> However the cost of such proceedings creates a significant disincentive. Buckley LJ explained it in *Wallersteiner* as follows:<sup>92</sup>

The fruits of any judgment recovered in such an action belong to the company, but the expenses of recovering them, except so far as they may be recovered from some other party, fall not upon the company but upon the plaintiff. If the action fails the plaintiff is at risk of being ordered to pay the defendant's costs as well as his own.

These are considerations which are calculated to deter a minority shareholder from suing a fraudulent or oppressive majority. It is, I consider, clearly undesirable that in such a case a minority shareholder should be inhibited in this way.

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<sup>86</sup> as distinct from other forms of trusts, because of what was said to be a "compelling analogy between a minority shareholder's action for damages on behalf of the company and an action by a member of a pension fund to compel trustees or others to account to the fund": [1995] 1 All ER 961 at 972-3 (Hoffmann LJ), see also Balcombe LJ at 976b.

<sup>87</sup> For a detailed comparison of standing in company law and public law, see: S Bottomley, "Shareholder derivative actions and public interest suits: two versions of the same story?" (1991) 15 *UNSWLJ* 127. See also M Whincop and M Keyes, "Corporation, contract, community: An analysis of governance in the privatisation of public enterprise and the publicisation of private corporate law" (1997) 25 *Fed LR* 51, at 86-93.

<sup>88</sup> Although the company is a separate legal person, it is necessary to look to the collective interest of the members (at least) in order to give the interests of the company any real meaning.

<sup>89</sup> The directors are not *necessarily* elected by simple majority or given powers of management (including control over the company's litigation), but as a matter of practice that is almost always the case.

<sup>90</sup> E Boros, *Minority Shareholder Remedies* (Clarendon, Oxford 1995) 193-212.

<sup>91</sup> E Boros, *Minority Shareholder Remedies* (Clarendon, Oxford 1995) 189. The concept of "fraud on the minority" has long been problematic for the courts. The cases display a tension, similar to that noted above, between the aims of redressing individual grievances (i.e. those of minority shareholders) and giving effect to a constitutional structure which inevitably gives almost unlimited power to the majority. That power flows ultimately from the ability of the majority to amend the constitution by special resolution, subject to constraints which include equitable limitations on majority voting power and the statutory "oppression" remedy. These constraints might be said to express the "grievance redress" function of the law. It is somewhat paradoxical, but I think it is fair to say that whereas in *public* law, private grievance redress has formed the traditional starting point, in the *private law* area of company law, broader constitutional considerations have traditionally had the driving seat. This traditional constitutional emphasis of company law was vividly illustrated by the strong criticism the High Court received when it shifted that emphasis in favour of individual proprietary interests in *Gambotto v WCP Ltd* (1995) 182 CLR 432. (See, for example, the articles discussed in: Peta Spender, 'Guns and Greenmail: Fear and Loathing After Gambotto' (1998) 22 *Melbourne University Law Review* 96; Helen Bird, 'A Critique of the Proprietary Nature of Share Rights in Australian Publicly Listed Corporations' (1998) 22 *Melbourne University Law Review* 131.) Part of the explanation for that may be that in company law the constitution has a foundation which is, in part, private and contractual.

<sup>92</sup> [1975] QB 373 at 399. See also I Ramsay, "Corporate governance, shareholder litigation and the prospects for a statutory derivative action" (1992) 15 *UNSWLJ* 149.



Much the same could, of course, be said of a plaintiff who brings proceedings for the benefit of the public without having any private interest in the matter.

This problem was addressed in *Wallersteiner* by means of the court being prepared to authorise the plaintiff<sup>93</sup> to bring the proceedings on behalf of the company and order that he be indemnified by the company in doing so. In both *Wallersteiner* and *McDonald* the Court of Appeal was at pains to distinguish the order from a pre-emptive exercise of the general discretion to award costs. In *Wallersteiner*, Scarman LJ stated that:<sup>94</sup>

The indemnity is a right distinct from the right of a successful litigant to his costs at the discretion of the trial judge; it is a right which springs from a combination of factors – the interest of the company and its shareholders, the relationship between the shareholder and the company, and the court’s sanction (a better word would be “permission”) for the action to be brought at the company’s expense.

Moir, in that case, had sought a pre-emptive order that he be protected against being ordered to pay the costs of any other party. This was refused, and Buckley LJ commented in response that:

I have never known a court to make any order as to costs fettering a later exercise of the court’s discretion in respect of costs to be incurred after the date of the order. I cannot think of any circumstances in which such an order would be justified.<sup>95</sup>

Nevertheless Buckley LJ, and the other members of the court, saw no difficulty with Moir being indemnified by the companies on whose behalf he was suing.<sup>96</sup>

The interesting thing about the *Wallersteiner* approach is that it requires no departure from the usual principles governing the exercise of the discretion concerning costs. The minority shareholder brings the proceedings, on behalf of all members, against the wrongdoer (such as a director who has acted in breach of duty) and joins the company as a defendant.<sup>97</sup> A *Wallersteiner* order does not prevent costs following the event,<sup>98</sup> it simply means that in complying with any order as to costs, the plaintiff will be indemnified by the company, subject to any conditions imposed by the court.

At the time of writing it appears likely that the derivative action will be abolished in Australia and replaced by a statutory derivative action.<sup>99</sup> However the Bill expressly empowers the court to make orders requiring “indemnification for costs”,<sup>100</sup> in terms which appear to be inspired by the *Wallersteiner* approach.

Adaptation of the *Wallersteiner/McDonald* approach to public interest challenges might provide a means for reconciling the making of pre-emptive cost orders of the kind considered in

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<sup>93</sup> subject to conditions.

<sup>94</sup> [1975] QB 373 at 407. Statements to similar effect were made by Lord Denning MR at 391G, and Buckley LJ at 403C-H.

<sup>95</sup> [1975] QB 373 at 403.

<sup>96</sup> Similarly in *McDonald v Horn*, Hoffmann LJ affirmed the general rule of costs following the event, but observed that this was “no obstacle to orders determining in advance how parties in the same interest, for whom the event is bound to be the same, should, as between them, bear the burden of cost.”: [1995] 1 All ER 961 at 969.

<sup>97</sup> Ford, Austin & Ramsay, *Ford’s Principles of Corporations Law* [11.300]

<sup>98</sup> So that, if the proceedings fail, costs can be awarded in favour of the director (but paid by the company – pursuant to the indemnity).

<sup>99</sup> *Corporate Law Economic Reform Program Bill 1998*, proposed s236(3) and Pt 2F.1A generally.

<sup>100</sup> *Corporate Law Economic Reform Program Bill 1998*, proposed s242.

CPAG with the usual principles governing the award of costs. It must be said, however, that this would involve a significant extension of *Wallersteiner* and *McDonald*. Whereas in those cases it was relatively easy to identify persons said to benefit from the proceedings,<sup>101</sup> and who could therefore be required to provide the indemnity, that is far more problematic in the case of proceedings that are said to be brought in the public interest. This may have been the reason why Dyson J chose to distinguish *McDonald* rather than extend it.

### Pre-emptive cost orders in Australia?

The High Court's rejection in *Oshlack* of a new regime for cost orders in "public interest litigation" would not necessarily require rejection of the more limited concept of pre-emptive cost orders accepted by Dyson J in *CPAG*. However the tenor of both the minority and majority<sup>102</sup> judgements in *Oshlack* strongly suggests that the court would not be prepared to endorse such an approach in the absence of some express or implied legislative support for it. The pre-emptive nature of the orders would no doubt make the court even more hesitant to grant them.<sup>103</sup> Other obstacles would include the reluctance of the courts to direct expenditure by the executive,<sup>104</sup> and the need for a parliamentary appropriation for expenditure of public funds.

Of course, parliament could provide for the making of such orders. One possible alternative to the ALRC proposals<sup>105</sup> would be to adapt the *Wallersteiner/McDonald* "indemnity" approach for public interest challenges. This could be done through the establishment of a fund,<sup>106</sup> with plaintiffs/applicants being required to join the relevant Attorney-General as a defendant/respondent<sup>107</sup> in order to seek an indemnity for costs from the fund.<sup>108</sup> However this could well run the risk of becoming an extensive, judicially-directed legal aid scheme,<sup>109</sup> in which case it can be argued with some force that judges are not appropriate administrators for such a scheme.

## Standing

In this section of my paper I propose to focus on the High Court's recent consideration of standing to seek equitable relief in relation to public rights and duties in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd*<sup>110</sup> ("*Bateman's*

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<sup>101</sup> ie the members of the company in *Wallersteiner*, and the members of the pension fund in *McDonald*.

<sup>102</sup> See at n 43.

<sup>103</sup> In *Re JJT; ex parte Victoria Legal Aid* [1998] HCA 44; 155 ALR 251 (Gaudron, Gummow, Hayne & Callinan JJ, (Kirby J dissenting) an order, that was described by the primary judge as an "anticipatory" order as to costs, was held not to be authorised by the Family Court's power to award costs. However the order in question, which was made to require Victorian Legal Aid to meet the costs of separate representation of a child, had many defects. The fact that the order was anticipatory did not appear to be a concern for most of the judges.

<sup>104</sup> See eg *Re JJT, Ex parte Victoria Legal Aid* [1998] HCA44 at [118] [139] (Callinan J)

<sup>105</sup> See at n 50.

<sup>106</sup> cf the approach of the UK Law Commission, No.226 para 10.5.

<sup>107</sup> By analogy with the procedure in derivative actions. Essentially the company is joined as a defendant in order to argue that it should have brought the proceedings as plaintiff. See: Ford, Austin & Ramsay, *Ford's Principles of Corporations Law* [11.300].

<sup>108</sup> So, for example, if the first defendant/respondent (the decision-maker) is a statutory authority, which successfully defends the proceedings, the usual order for costs would then result in all costs being met out of the fund (by virtue of the indemnity). If the plaintiff/applicant succeeds, the first defendant/respondent would bear all the costs. This should mean that the usual principles as to costs would still operate to discourage departments and authorities from defending hopeless cases.

<sup>109</sup> Note also the comments by Bayne as to possible case-management concerns: P Bayne, "Costs orders on review of administrative action" (1994) 68 ALJ 816 at 822.

<sup>110</sup> [1998] HCA 49; (1998) 155 ALR 684.

Bay”). This discussion will pick up a number of the themes raised in my discussion of costs. There is an obvious, if overemphasised, link between the principles of standing and access to judicial review. Standing requirements explicitly regulate access to judicial review by reference to the identity of the applicant/plaintiff. I have suggested above that the expense of curial proceedings is the principal mechanism that regulates access to judicial review. I will argue below that this ought to be taken into account in determining what approach to take concerning standing requirements.

There is also a clear link, well recognised in the literature, between the treatment of standing and the question of the primary function of judicial review. The tension, noted above,<sup>111</sup> between the “grievance redress” and “broader” constitutional functions of judicial review was given considerable emphasis by Thio, in her treatise published in 1971:<sup>112</sup>

The problem of *locus standi* in public law is very much intertwined with the concept of the role of the judiciary in the process of government. Is the judicial function primarily aimed at preserving legal order by confining the legislative and executive organs of government within their powers in the interest of the public (*jurisdiction de droit objectif*), or is it mainly directed towards the protection of private individuals by preventing illegal encroachments on their individual rights (*jurisdiction de droit subjectif*)?

Thio went on to suggest that emphasis on preserving legal order would favour an *actio popularis*, whereas the latter would suggest that standing should be limited to cases in which individual rights are infringed.<sup>113</sup> I will argue below that other conclusions may be possible, but the connection between standing and the role of judicial review is clear.

The linkage of these issues was apparent in comments made by several judges of the High Court in *Bateman’s Bay*. Gaudron, Gummow and Kirby JJ, gave considerable emphasis to broader functions of judicial review in supporting the public interest in due administration, with the latter phrase recurring as a oft-repeated refrain throughout the judgment. In the course of criticising the House of Lords’ approach to standing in *Gouriet*,<sup>114</sup> their Honours commented that:

The reasoning in *Gouriet* appears to reflect a view of standing which sees administrative review as concerned with the vindication of private not public rights.<sup>115</sup>

McHugh J, in sharp contrast, affirmed the very same view that the majority implicitly rejected:

Absent interference or threatened interference with a private legal right, an ordinary member of the public generally has no standing in the civil courts. Those courts exist to protect the legal rights of individuals, not to ensure that individuals or public officials obey the law. Protecting the legal rights of individuals may often result in a civil court examining, restraining or directing the conduct of private persons or public officials. But such a result is merely an incident of the protection of the rights of the individual, except in those cases where the court is acting under a statute that gives it jurisdiction to review such conduct.

It is a corollary of the proposition that the basic purpose of the civil courts is to protect individual rights that it is not part of their function to enforce the public law of the community or to oversee the enforcement of the civil or criminal law, except as an

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<sup>111</sup> See above at 63.

<sup>112</sup> S M Thio, *Locus Standi and Judicial Review* (Singapore University Press 1971) 2 (footnotes omitted).

<sup>113</sup> S M Thio, *Locus Standi and Judicial Review* (Singapore University Press 1971) 3.

<sup>114</sup> *Gouriet v Union of Post Office Workers* [1978] AC 435.

<sup>115</sup> [1998] HCA 49 at [37]; (1998) 155 ALR 684 at 694. Compare McHugh J at [80-81].

incident in the course of protecting the rights of individuals whose rights have been, are being, or may be interfered with by reason of a breach of law.<sup>116</sup>

These comments were made in the context of a case that raised the thorny issue of “competitor standing”; that is, whether the “commercial” interests of persons who seek review of decisions that benefit their competitors should be sufficient to establish standing.<sup>117</sup> This is a specific example of the broader issue as to how standing rules for the enforcement of “public” rights and duties ought to deal with plaintiffs who seek to protect interests that are extraneous or even antithetical to the objects of the relevant legislation. That issue in turn raises the question of the relevance and significance, in determining standing to seek judicial review, of the objects and purposes of the legislation which confers the rights and duties that the plaintiff seeks to enforce. The decision of the High Court in *Bateman’s Bay*<sup>118</sup> provides only limited guidance on these issues, but needs to be considered in that context.

### Competitor standing and the “zone of interests” test

There is a substantial, although inconsistent, body of older cases suggesting reluctance on the part of the courts to grant standing on the basis of damage to a plaintiff’s competitive or commercial position.<sup>119</sup> This reluctance has been a little difficult to square with the “special interest” test<sup>120</sup> which is increasingly being applied to determine standing for all judicial review remedies.<sup>121</sup> The interest of a competitor will usually be pecuniary, not a mere intellectual or emotional concern, and will go well beyond the interest of an ordinary member of the general public.<sup>122</sup> However the reluctance of many judges to treat this as sufficient, of itself, to give standing is quite understandable. Allowing the “special interest” requirement to be satisfied by competitive interest alone might be thought to give those engaged in commercial activities a privileged position<sup>123</sup> in establishing standing to enforce (or perhaps obstruct) *public* rights and duties. That would be to privilege those who least need it, given the greater ability of commercial interests to afford proceedings, and exert their power through increasingly prevalent “market-based” mechanisms. There may be other dangers too. Commercial competitors may be more likely to have the incentive and means to litigate for tactical advantage. Their use of the proceedings may be essentially anti-competitive, and inconsistent with the objectives of relevant legislative schemes.

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<sup>116</sup> [1998] HCA 49 at [80]-[81]; (1998) 155 ALR 684 at 705 (McHugh J).

<sup>117</sup> See eg: *Big Country Developments Pty Ltd v Australian Community Pharmacy Authority* (1995) 132 ALR 379; 40 ALD 32 (Lindgren J); *Boots Company (Australia) Pty Ltd v Smithkline Beecham Healthcare Pty Ltd* (1996) 137 ALR 383; *Yu Feng Pty Ltd v Chief Executive, Dept of Local Government and Planning* Qld SC Mackenzie J, 3 April 1998; *Bateman’s Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 155 ALR 684.

<sup>118</sup> [1998] HCA 49; (1998) 155 ALR 684.

<sup>119</sup> For an overview of the cases see: S M Thio, *Locus Standi and Judicial Review* (Singapore University Press 1971) 107-110, 195-200; A S Bell, “Trade Rivals: Standing to Sue – a Survey of Some Recent Cases” (1992) 9 Aust Bar Rev 67; Aronson & Dyer, *Judicial Review of Administrative Action* (LBC Sydney 1996) 682-7.

<sup>120</sup> See: *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs* (SA) (1995) 183 CLR 552.

<sup>121</sup> Aronson & Dyer, *Judicial Review of Administrative Action* (LBC Sydney 1996) 707-9.

<sup>122</sup> See: A S Bell, “Trade Rivals: Standing to Sue – a Survey of Some Recent Cases” (1992) 9 Aust Bar Rev 67.

<sup>123</sup> Illustrated, perhaps, by the spectacle of environmental groups emphasising their commercial activities in order to gain standing. See eg: *Australian Conservation Foundation Inc v South Australia* (1989) 53 SASR 349; *Central Queensland Speleological Society Inc v Central Queensland Cement Pty Ltd (No 1)* [1989] 2 Qd R 512.

The last consideration has inspired a technique that has been seized on by some judges recently as a means of limiting the scope for competitor standing. The technique essentially involves qualifying the special interest test with a requirement that the interest that is relied on to give standing needs to be consistent with the objects and purposes of the statute that created the relevant right or duty. The decision of the Full Federal Court in *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd*<sup>124</sup> has been influential in the development of this approach. In that case SmithKline had requested reconsideration, under subsection 60(2) of the *Therapeutic Goods Act 1989*, of a decision to register its competitor's drug. The Court held that SmithKline was not a "person whose interests are affected", as required by the section. Davies J held that the interest of a competitor, affected by the registration of a competing drug, was not an interest that the Act would recognise<sup>125</sup>. Gummow J thought that no third party would have standing, regardless of motive.<sup>126</sup> Both Davies and Gummow JJ emphasised that to allow standing to a competitor would be inconsistent with the statute's objective of allowing the timely evaluation and provision of therapeutic goods.<sup>127</sup>

There is no question that, subject to constitutional limitations,<sup>128</sup> a statute can restrict the classes of persons who will have standing to enforce its provisions. The more difficult issue, however, is just how willing the courts should be to imply such a restriction in order to promote the objects and purposes of the Act. There may be a case for distinguishing the situation in *Alphapharm*, where the objects and purposes of an Act are used to interpret a standing test for a statutory remedy provided by that Act,<sup>129</sup> from the situation where standing to seek judicial review is in issue.<sup>130</sup> In the latter case, one is drawing on the objects and purposes of one Act (the Act that creates the public rights and duties in question) in order to restrict a standing test and remedy imposed by *another* Act,<sup>131</sup> or by the general law. It must be doubtful, in that case, that Parliament actually turned its mind to the question of standing to seek judicial review in relation to the rights and duties created by the first Act. Even if it did, it is by no means clear that Parliament would expect the courts to use the objects and purposes to imply a restriction on standing. Such a restriction is analogous, in its effect, to a limited privative clause, and Parliament might well assume that the courts would be reluctant to imply such a limitation.<sup>132</sup>

Despite this, standing to seek judicial review has been limited in several later decisions by reference to legislative objects and purposes or some presumption that Parliament could not have intended that competitive or commercial interests would give rise to standing. There

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<sup>124</sup> (1994) 49 FCR 250; 121 ALR 373

<sup>125</sup> (1994) 49 FCR 250; 121 ALR 373 at 387.

<sup>126</sup> (1994) 49 FCR 250; 121 ALR 373 at 403.

<sup>127</sup> (1994) 49 FCR 250; 121 ALR 373 at 385, 388, 403.

<sup>128</sup> Such as the entrenched jurisdiction of the High Court under s75(iii)(v) of the Constitution.

<sup>129</sup> In which case there may still be an issue as to whether the same approach should apply in determining standing to seek judicial review of the relevant decision (ie instead of using the statutory remedy). It may be argued that the restriction on standing for the statutory remedy should also imply a similar restriction on standing to seek judicial review of decisions to which the statutory remedy applies. That may be what Gaudron, Gummow and Kirby JJ meant by their reference to "the special but limited provision by the legislation considered in *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd* for judicial review of successful applications for registration" (underlining added) – the section discussed in *Alphapharm* concerned a right of appeal: *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49 at [48].

<sup>130</sup> But compare *Yu Feng Pty Ltd v Chief Executive, Dept of Local Government and Planning* Qld SC 3 April 1998 in which Mackenzie J concluded (at p 4) that this is not a significant distinction.

<sup>131</sup> Such as, for example, the ADJR Act, where that is the form of review sought.

<sup>132</sup> This may have been what Davies J had in mind when he noted in *Alphapharm* that a different approach may be required in the context of judicial review: *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd* (1994) 49 FCR 250; 121 ALR 373.

was a hint of this approach in the observation of Lockhart J, in the *Right to Life* case, that the arguments and objects of the Right to Life Association were not related to the objects of the relevant legislation.<sup>133</sup> However the clearest example is provided by *Big Country Developments Pty Ltd v Australian Community Pharmacy Authority*.<sup>134</sup> In that case, the owner of a shopping centre, who stood to suffer substantial losses as a result of a pharmacy relocating to another shopping centre, was found to lack standing to seek ADJR Act review of the required statutory approval. That approach was followed in two more decisions in the first half of 1998.<sup>135</sup> More recently, however, two cases in which standing was denied at first instance, using restrictions implied from legislative purposes, have been overturned by the Full Federal Court and the High Court. These cases, discussed below, are: *Allan v Development Allowance Authority* (“Allan’s case”)<sup>136</sup> and *Bateman’s Bay*.

Several judges have drawn comparisons between the approach to standing adopted in *Alphapharm* and the American “zone of interest” test. This test requires that, for a plaintiff to have standing to seek judicial review under the U.S. Administrative Procedure Act “the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute ...in question.”<sup>137</sup> Davies J, in *Alphapharm*, expressed support for the application of this approach in interpreting a statute providing for administrative review.<sup>138</sup> Mansfield J sought to combine “zone of interests” with the “special interest” test in *Allan’s* case. In that case the AAT had concluded that Mr Allan lacked standing to appeal against the issuing of certificates that provided tax concessions for the Melbourne City Link Project. Part of the project included widening the Tullamarine freeway running close by Mr Allan’s home, and Mr Allan claimed that this would have a severe adverse effect on his residential amenity. The Tribunal accepted that his interests would be affected, but thought this “too remote” to give standing.<sup>139</sup> That decision was upheld by Mansfield J, who noted that the applicant’s special interest was not claimed to be relevant to the decision,<sup>140</sup> but subsequently set aside by the Full Federal Court.<sup>141</sup> The Full Court concluded that the issue of the certificates had given life to the project, and that Mr Allan would have a “special interest”<sup>142</sup> in the decision provided he could show damage going beyond that suffered by the public generally.<sup>143</sup> It did not matter that the Authority, in

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<sup>133</sup> *Right To Life Association (NSW) Inc v Secretary, Department Of Human Services And Health* (1995) 128 ALR 238 at 254-5.

<sup>134</sup> (1995) 132 ALR 379; 40 ALD 32

<sup>135</sup> In *Yu Feng Pty Ltd v Chief Executive, Dept of Local Government and Planning* (Qld SC Mackenzie J, 3 April 1998) a shopping centre owner was denied standing under the *Judicial Review Act* 1991 (Qld) to challenge the waiver of an environmental impact statement for the extension of a competing shopping centre. In *Canberra Tradesman’s Union Club v Commissioner for Land and Planning*, (SC ACT Crispin JJ 23 June 1998) an association of licensed clubs was denied standing to appeal from, or seek review of, a decision approving a variation of a Crown lease that had the potential to bring the Canberra Casino into competition with the clubs.

<sup>136</sup> (1997) 46 ALD 560; overturned on appeal (1998) 152 ALR 439 – a case on standing to appeal to the AAT.

<sup>137</sup> *Association of Data Processing Service Organizations, Inc v Camp*, 397 US 150, 153 (1970).

<sup>138</sup> However Davies J noted that it might not be appropriate in the context of judicial review: (1994) 49 FCR 250; 121 ALR 373 at 383.

<sup>139</sup> *Re Moody and another and Development Allowance Authority* (1996) 45 ALD 603 at 615 (McDonald DP)

<sup>140</sup> *Allan v Development Allowance Authority* (1997) 46 ALD 560 at 571.

<sup>141</sup> (1998) 152 ALR 439.

<sup>142</sup> Applying the classic test of standing to seek injunctions and declarations to enforce public rights and duties in *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.

<sup>143</sup> (1998) 152 ALR 439 at 446-7, 457. On remittal, the Tribunal found that Mr Allan could not demonstrate such an interest: *Allan v Development Allowance Authority* (AAT, 9 September 1998). Mr Allan had by that time sold his house and moved to another 500m further away from the freeway. Mr Allan alleged that the sale price for his house was adversely affected by the freeway proposal, but failed to prove that claim to the Tribunal’s satisfaction. However that decision has recently been overturned on appeal *Allan v Development Allowance Authority* [1999] FCA 426 (Merkel J, 14.4.99). Merkel J held that the AAT erred in law in failing to

issuing the certificate, could not take account of the effect on residential amenity.<sup>144</sup> Wilcox J emphatically rejected the notion that there should be any “further stipulation that the special interest be related to the objects, or the scope and purpose, of the legislation pursuant to which the decision was made.”<sup>145</sup> His Honour pointed out that there was no suggestion of such a limitation in the leading High Court cases on the special interest test,<sup>146</sup> and quoted at length criticisms of the American “zone of interests” test from the 2<sup>nd</sup> edition of KC Davis’s *Administrative Law Treatise*.<sup>147</sup> R D Nicholson J, who delivered the main judgment in the case, appeared to be less inclined to reject the “zone of interest” approach entirely. His Honour commented that there can be no error in applying the “zone of interest” approach “to measure the degree of affection” provided that the special interest test remained the ultimate test.<sup>148</sup> Exactly how the “zone of interest” test can measure affection is not clear. However, what is clear is that none of the judges<sup>149</sup> in *Allan’s* case would support a narrow application of the “zone of interest” test of the kind that requires, in effect, a positive legislative endorsement of the interest asserted by a plaintiff in order to gain standing.

In view of the references made by some judges to the American “zone of interest” test it is appropriate to take note of the more recent development of the test in the United States. In the 3<sup>rd</sup> edition of KC Davis’s *Administrative Law Treatise*, Professors Davis and Pierce report a significant, and in their view, laudable, shift in the Supreme Court’s interpretation of the test after 1984.<sup>150</sup> In essence, this appears to have involved a progressive weakening of the “zone of interest” requirement, bringing the test ever nearer to the alternative formulation suggested in the concurring opinion in *Barlow v Collins*,<sup>151</sup> which simply asks “whether Congress ... foreclosed review by the class to which the plaintiff belongs.”<sup>152</sup> This change in approach has led Professors Davis & Pierce to express qualified support for the test, in its application to “statutory” standing cases at least.<sup>153</sup> The development of the test in this direction has been confirmed recently in a split decision of the US Supreme Court. In *National Credit Union Administration v First National Bank & Trust Co*<sup>154</sup> (“NCUA”) five banks brought an action under the *Administrative Procedure Act* to challenge the NCUA’s interpretation of a statutory limitation on the membership of federal credit unions. The NCUA had revised its interpretation of the section in such a manner as to reduce significantly the effect of the limitation, and the banks claimed that this caused them “competitive injury”. The District Court held, nevertheless, that the banks lacked standing as their competitive interest was not within the zone of interests to be protected by the relevant section. That conclusion

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consider the applicant’s standing as at the date of the original applications to the DAA and the AAT. Merkel J held further that a change in the circumstances giving rise to standing could be addressed by an application for the appeal to be struck out as frivolous and vexatious under s 42B AAT Act, but concluded that any such application would have had to be dismissed on the evidence in this case (as a matter of law) if the applicant were found to have originally had standing. The matter was remitted to the AAT to be determined according to law.

144 (1998) 152 ALR 439 at 441 (Wilcox J).

145 (1998) 152 ALR 439 at 441.

146 (1998) 152 ALR 439 at 443.

147 (1998) 152 ALR 439 at 445-6.

148 (1998) 152 ALR 439 at 444.

149 Finn J declared himself to be in “substantial agreement” with the reasons of both Wilcox J and R D Nicholson J: (1998) 152 ALR 439 at 4447.

150 K C Davis & R J Pierce Jr, *Administrative Law Treatise* 3rd Ed (Little Brown 1994) Vol 3 pp 5, 56, and see generally Section 16.9.

151 397 US 159 (1970).

152 397 US 159, 173 (1970). See K C Davis & R J Pierce Jr, *Administrative Law Treatise* 3rd Ed (Little Brown 1994) Vol 3 p55.

153 K C Davis & R J Pierce Jr, *Administrative Law Treatise* 3rd Ed (Little Brown 1994) Vol 3 pp 3-5.

154 25 February 1998

was rejected by the Supreme Court on appeal. The majority<sup>155</sup> affirmed the “zone of interests” test, but held that the bank’s interest was arguably within the zone of interests to be protected.<sup>156</sup> The majority emphasised that, in applying the test, the court does not ask whether, in enacting the provision, Congress specifically intended to benefit the plaintiff.<sup>157</sup> Rather the issue is whether the plaintiff’s interests are amongst those “arguably .. to be protected”. In this case, the fact that federal credit unions could only offer banking services to members meant that the statutory limitation on membership had the effect of limiting the markets that such credit unions could serve. According to the majority, this meant that the banks’ competitive interest in enforcing the latter limitation was “arguably” within the interests protected, and it mattered not that there was no evidence that Congress was concerned with competition or the banks’ competitive interests. Indeed, the majority thought it “irrelevant that in enacting the [legislation], Congress did not specifically intend to protect commercial banks.”<sup>158</sup> Likewise it was “beside the point” that the banks’ objectives were “not eleemosynary in nature”.<sup>159</sup> In the dissenting opinion, O’Connor J<sup>160</sup> argued with some force that the majority approach “all but eviscerates the zone-of-interests requirement”, since every litigant who can establish “injury in fact”<sup>161</sup> will inevitably satisfy the majority’s weakened “zone of interest” requirement.

### **The Bateman’s Bay case**

The foregoing sets the stage for the important recent decision of the High Court in *Bateman’s Bay*. The case touches on the issue of competitor standing, but also contains obiter comments of far wider significance.

The appellants were the Bateman’s Bay Local Aboriginal Land Council (“BBLALC”) and the New South Wales Aboriginal Land Council (“NSWALC”), who had collaborated to establish a funeral benefits fund for Aboriginal persons and their spouses and/or children. The fund set subscription rates at levels which would require heavy subsidisation from the public funds received by the NSWALC, and which were substantially below those of the respondents (the “Fund companies”), who operated businesses providing life insurance and a contributory funeral benefit fund for members of the NSW Aboriginal community. Under the agreements establishing the Land Councils’ fund, the BBLALC was appointed trustee, but delegated its powers and duties to the NSWALC, which indemnified the BBLALC against losses. This structure was apparently adopted because of concerns that the NSWALC lacked power to operate the fund in its own right.<sup>162</sup> The Fund companies sought injunctions to restrain the Land Councils from operating the fund, arguing that the Land Councils were acting beyond their powers and that the exemption they had obtained from the provisions of the Funeral Funds Act was not effective. At first instance McLelland CJ found that the Fund companies lacked standing. When that decision was appealed successfully to the Court of Appeal, McLelland CJ reheard the case, finding that the NSWALC had acted beyond its powers in giving an indemnity to the BBLALC, and that the Funeral Funds Act exemption was

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<sup>155</sup> Thomas J for the court, with Rehnquist CJ, Kennedy, Ginsburg and Scalia JJ agreeing. The dissent was filed by O’Connor J, with Stevens, Souter and Breyer JJ joining.

<sup>156</sup> Section II

<sup>157</sup> Section II B.

<sup>158</sup> Section II C.

<sup>159</sup> Section II C. The US Supreme Court has long been willing to recognise commercial and competitive injury as giving rise to standing. See eg: K C Davis & R J Pierce Jr, *Administrative Law Treatise* 3rd Ed (Little Brown 1994) Vol 3 pp13-14.

<sup>160</sup> Stevens, Souter and Breyer JJ joining.

<sup>161</sup> The other element of the “two-part” American standing test. See: K C Davis & R J Pierce Jr, *Administrative Law Treatise* 3rd Ed (Little Brown 1994) Vol 3 pp 3-4, 10-11.

<sup>162</sup> [1998] HCA 49 at [11]; (1998) 155 ALR 684 at 687.



invalid.<sup>163</sup> The Land Councils agreed to withdraw an appeal against the second and final decision of McLelland J in order to persuade the High Court to grant special leave to appeal from the Court of Appeal's decision on standing.<sup>164</sup>

On the hearing of the standing issue in the High Court, all judges were agreed that the trial judge had erred, and the respondent Fund companies did in fact have standing.<sup>165</sup> McLelland CJ at first instance had made a valiant effort to rationalise the inconsistent case law on competitive and commercial interests in standing. His Honour distinguished two categories of cases, according to whether the actual or likely effect on the plaintiff was direct or indirect. Those involving direct effect would be analogous to infringement of a private right",<sup>166</sup> but in the case of indirect effect, His Honour thought that:

... in order to attract standing to sue, a plaintiff's "special interest" must as a matter of principle be an interest of the general kind which the relevant public right was intended to safeguard or protect, or, where the "special interest" consists in a vulnerability to "special damage", the damage must be "within the same class of damage as the public suffers as a whole" and not just "any side effect of the infringement of the public right".<sup>167</sup>

McLelland CJ found that the Fund companies in this case fell into this second category but did not come within the classes of persons whose interests the relevant legislation was intended to protect. Although it was not described as such, this was essentially a variation of the "narrow" version of the "zone of interest" approach,<sup>168</sup> effectively requiring express or implied legislative endorsement of the interests of the plaintiff.

The High Court, like the NSW Court of Appeal, found this approach to be too narrow and inflexible, and incompatible with the established "special interest" test.<sup>169</sup> Gaudron, Gummow and Kirby JJ referred to the discussion of the special interest test in the *Shop Distributive* case,<sup>170</sup> and commented:

Their Honours stated that the rule is flexible and continued that "the nature and subject matter of the litigation will dictate what amounts to a special interest". This emphasises the importance in applying the criteria as to sufficiency of interest to support equitable relief, with reference to the exigencies of modern life as occasion requires. It suggests the dangers involved in the adoption of any precise formula as to what suffices for a special interest in the subject matter of the action, where the consequences of doing so may be unduly to constrict the availability of equitable remedies to support that public interest in due administration which enlivens equitable intervention in public law.<sup>171</sup>

On the issue of competitor standing, Gaudron, Gummow and Kirby JJ stated:

Upon the true construction of its subject, scope and purpose, a particular statute may establish a regulatory scheme which gives an exhaustive measure of judicial review at

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<sup>163</sup> [1998] HCA 49 at [19]; (1998) 155 ALR 684 at 689.

<sup>164</sup> [1998] HCA 49 at [2]; (1998) 155 ALR 684 at 685.

<sup>165</sup> [1998] HCA 49 at [52] (Gaudron, Gummow and Kirby JJ), [102]-[105] (McHugh J), [107] (Hayne J); (1998) 155 ALR 684 at 699 (Gaudron, Gummow and Kirby JJ), 711-2 (McHugh J), 712 (Hayne J).

<sup>166</sup> (1996) 22ACSR 56 at 63.

<sup>167</sup> (1996) 92 LGERA 212 at 219

<sup>168</sup> Note that the Full Federal Court had not then given its decision in *Allan's* case.

<sup>169</sup> [1998] HCA 49 at [20] [46] (Gaudron, Gummow and Kirby JJ), [102]-[105] (McHugh J), [107] (Hayne J); (1998) 155 ALR 684 at 689, 697 (Gaudron, Gummow and Kirby JJ), 711-2 (McHugh J), 712 (Hayne J).

<sup>170</sup> *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552.

<sup>171</sup> [1998] HCA 49 at [46]; (1998) 155 ALR 684 at 697 (footnotes omitted). See also the comments of McHugh J at [100]-[101], (ALR p711).

the instance of competitors or other third parties. An example is the special but limited provision by the legislation considered in *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd* for judicial review of successful applications for registration. However, the circumstance that the plaintiff conducts commercial activities in competition with those which it seeks to restrain is not necessarily insufficient to provide it with a sufficient interest in the subject matter of the action.<sup>172</sup>

Clearly, this is inconsistent with any narrow version of the “zone of interests” approach. In that respect it would appear to be broadly consistent with the approach of the Federal Court in *Allan*, and even the general thrust of the US Supreme Court’s approach in *NCUA*. What remains a little unclear, however, is just how ready the courts will be to find an implied limitation on standing of the kind that existed in *Alphapharm*.<sup>173</sup> The more general comments of Gaudron, Gummow and Kirby JJ concerning standing, which I discuss further below, suggest that they would be reluctant to imply such a limitation.

It may be that it is a mistake to read the “competitor” cases too literally, and that the underlying issue is really the courts’ ambivalence as to whether to allow the use of public law litigation for anti-competitive purposes.<sup>174</sup> The High Court does not expressly deal with that issue. But that is understandable, and perhaps even desirable. “Competition” is practically a *grundnorm* for many governments at present, but the courts have a long history of accommodating, without embracing, such shifts in dominant ideology. There would be significant dangers, I believe, in the courts attempting to protect or promote competition through their application of standing principles. The distinction between “competitive” and “anti-competitive” behaviour can be a fine one. If, in the context of the statutory scheme considered in *Alphapharm*, a competitor sought to challenge registration of a drug which could not lawfully be registered, that might well be regarded as *promoting* competition by preventing conduct (the unlawful registration) which goes beyond the bounds set by law for competitive conduct.<sup>175</sup> Competition is such a powerful and essential force in our society, one would have to question the desirability<sup>176</sup> and effectiveness<sup>177</sup> of any attempt to restrict competitively motivated public law litigation. But if, on the other hand, competitor standing were permitted without qualification, there might well be a regressive effect on equality of access to the courts, and an adverse effect on the ability of the courts to ensure that judicial review serves supervisory ends, rather than just the ends of individual applicants. Unrestricted competitor standing is likely to mean a greater volume of judicial review in certain areas,<sup>178</sup> but that does not necessarily translate into better “supervision” of the executive in those areas.

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<sup>172</sup> [1998] HCA 49 at [48]; (1998) 155 ALR 684 at 697-8 (footnotes omitted). See also the comments of McHugh J at [102], (ALR 711-2).

<sup>173</sup> The reference to *Alphapharm* is a little confusing, given that the issue considered in *Alphapharm* concerned standing to exercise a statutory right to have a decision reconsidered. Review was sought under the ADJR Act of the *refusal to reconsider* the original decision to register: (1993) 118 ALR 617 at 618. However it may be that the limitation found to exist in relation to standing to seek the statutory remedy could also apply to standing to seek judicial review of the original decision to register. See further above at n 129.

<sup>174</sup> My thanks to Mark Aronson for this observation.

<sup>175</sup> My colleague Mark Davison has pointed out to me that the fact that litigation is intended to be detrimental to the plaintiff’s competitor does not necessarily mean that it is detrimental to the competitive process ie the rules under which competitors are meant to compete. On the contrary, the litigation may be designed to protect the competitive process by targeting an individual competitor who has breached the process or who is gaining an advantage by a government authority failing to implement the process.

<sup>176</sup> The expense of seeking judicial review may mean that, in some areas, competitors will be the only persons likely to be willing to seek enforcement of a statutory scheme.

<sup>177</sup> Distinguishing “competitive” or “commercial” motivation from other motives will always be difficult.

<sup>178</sup> And quite possibly, greater “tactical” use of judicial review eg to cause delay.

The High Court ultimately disposed of the appeal in *Bateman's Bay* quite easily by applying the established “special interest” test, or something like it,<sup>179</sup> and finding it to be satisfied on the facts.<sup>180</sup> But in the course of doing so, Gaudron, Gummow and Kirby JJ (the “majority”<sup>181</sup>), and McHugh J in his separate judgment, offered some most interesting and important comments on a range of matters. These comments warrant careful consideration as they are potentially far more significant than the actual decision in the case itself. They address such fundamental issues as: the role and nature of judicial review; the basis for equitable intervention in public law matters; standing requirements in general; and the desirability of the courts, as opposed to the legislature, seeking to modify the principles governing standing. Even though all the judges were in agreement as to the outcome of the appeal, there was a marked divergence between the views expressed by the majority judges and McHugh J on many of these broader issues. Hayne J offered only a few tantalising comments, and declined to commit himself on these matters.

The majority commented on the “deficiencies” of the traditional *Boyce* standing model, which was modified by the High Court to formulate the Australian “special interest” test.

In *Boyce*, and in the present litigation, insufficient attention was given to the basis upon which equity intervenes in public law matters, particularly to restrain apprehended ultra vires activities of statutory authorities which involve recourse to public moneys.<sup>182</sup>

The basis for equitable intervention in public law was described by the majority as follows:

In this field, equity has proceeded on the footing of the inadequacy (in particular the technicalities hedging the prerogative remedies) of the legal remedies otherwise available to vindicate the public interest in the maintenance of due administration. There is a public interest in restraining the apprehended misapplication of public funds obtained by statutory bodies and effect may be given to this interest by injunction. The position is expressed in traditional form by asking of the plaintiff whether there is “an equity” which founds the invocation of equitable jurisdiction.<sup>183</sup>

This jurisdiction was said to have developed by analogy with the courts’ role in ensuring the due administration of charitable trusts and as a development of the courts’ visitorial jurisdiction in relation to chartered corporations lacking private founders with rights of visitation. Importantly, the majority emphasised that the basis of equity’s intervention is not solely to protect proprietary or other legal rights of the plaintiff.

It is interesting to speculate about the significance of these comments. At one level they are clearly a recognition of the limitations of the “private rights” model in public law, and a recognition also of the longstanding parallels between aspects of certain equitable doctrines and the principles of judicial review. One wonders, however, whether they might not herald some more fundamental developments. Increasing “cross-fertilization” between equitable principles and judicial review may be one possibility. Another may be in the area of the scope of judicial review. The repeated references in the judgment to the importance of

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<sup>179</sup> Although Gaudron, Gummow and Kirby JJ spoke of a “sufficient material interest” in their combined judgement, it is not clear that they intended any immediate change in the law, and they revert to the phrase “sufficient special interest” in stating their conclusion: [1998] HCA 49 at [52]; (1998) 155 ALR 684 at 699. However, as explained below, their Honours make it clear elsewhere in their judgment that they think the established test needs to be reconsidered.

<sup>180</sup> [1998] HCA 49 at [52] (Gaudron, Gummow and Kirby JJ), [102]-[103] (McHugh J), [107] (Hayne J); (1998) 155 ALR 684 at 699 (Gaudron, Gummow and Kirby JJ), 711-2 (McHugh J), 712 (Hayne J).

<sup>181</sup> Strictly speaking, of course, these comments are only obiter, but I use this term for the sake of convenience.

<sup>182</sup> [1998] HCA 49 at [22]; (1998) 155 ALR 684 at 690.

<sup>183</sup> [1998] HCA 49 at [25]; (1998) 155 ALR 684 at 690 (footnotes omitted)

ensuring “due administration”<sup>184</sup> in the activities of public bodies with “recourse to public moneys”<sup>185</sup> are addressed mainly to statutory bodies, as was appropriate in this case. But it may be that the majority judges will seek to employ their concept of “recourse to public moneys” more widely in the future as a means of supporting judicial review in its application beyond the familiar territory of statutory powers.

The majority’s comments on equity’s intervention in public law provided the backdrop to their discussion on standing. It was made reasonably clear by the majority that they would favour relaxation of the established special interest test. They commented that the result of the test is

an unsatisfactory weighting of the scales in favour of defendant public bodies. Not only must the plaintiff show the abuse or threatened abuse of public administration which attracts equitable intervention, but the plaintiff must also show some special interest in the subject matter of the action in which it is sought to restrain that abuse.<sup>186</sup>

The majority questioned the appropriateness in Australia of *Gouriet’s* affirmation of the Attorney-General’s exclusive right to represent the public interest, noting that Attorneys General in Australia tend to have a more political role. As a possible alternative approach to standing, they suggested the following:<sup>187</sup>

In a case where the plaintiff has not sought or has been refused the Attorney-General’s fiat, it may well be appropriate to dispose of any question of standing to seek injunctive or other equitable relief by asking whether the proceedings should be dismissed because the right or interest of the plaintiff was insufficient to support a justiciable controversy, or should be stayed as otherwise oppressive, vexatious or an abuse of process. The plaintiff would be at peril of an adverse costs order if the action failed. A suit might properly be mounted in this way, but equitable relief denied on discretionary grounds. Further, declaratory rather than injunctive relief may be sufficient.<sup>188</sup>

The comments of McHugh J in *Bateman’s Bay* stand in sharp contrast to those of the majority on several points. At the most fundamental level, his Honour adopted a markedly different approach in relation to the function of judicial review, affirming the more traditional view of the supervisory role of judicial review as an incident of the protection of the rights of individuals.<sup>189</sup> McHugh J also provided a strong defence of the traditional approach to standing in the following terms:

The enforcement of the public law of a community is part of the political process; it is one of the chief responsibilities of the executive government. In most cases, it is for the executive government and not for the civil courts acting at the behest of disinterested private individuals to enforce the law. There are sometimes very good reasons why the public interest of a society is best served by not attempting to enforce a particular law. To enforce a law at a particular time or in particular circumstances may result in the undermining of the authority of the executive government or the courts of justice. In extreme cases, to enforce it may lead to civil unrest and bloodshed.

Moreover, any realistic analysis of law, politics and society must recognise that not every law on the statute books continues to have the support of the majority of members of the

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<sup>184</sup> [1998] HCA 49 at [25] [26] [41] [46].

<sup>185</sup> [1998] HCA 49 at [1] [22] [23] [41] [50].

<sup>186</sup> [1998] HCA 49 at [34], see also [22], [42]; (1998) 155 ALR 684 at 693.

<sup>187</sup> Although they did not find it necessary to actually adopt and apply this approach.

<sup>188</sup> [1998] HCA 49 at [39]; (1998) 155 ALR 684 at 695. Their Honours go on to observe that special considerations would apply where the plaintiff is seeking to enforce the criminal law by injunction: [41].

<sup>189</sup> See above at n 116.

community or always serves the public interest. Laws that once had almost universal support in a community may now be supported only by a vocal and powerful minority. Yet to attempt to repeal them may be more socially divisive than to allow them to lie unenforced. Moreover, the interests of a society arguably are often furthered by not enforcing particular laws.

The decision when and in what circumstances to enforce public law frequently calls for a fine judgment as to what the public interest truly requires. It is a decision that is arguably best made by the Attorney-General who must answer to the people, rather than by unelected judges expanding the doctrine of standing to overcome what they see as a failure of the political process to ensure that the law is enforced.<sup>190</sup>

His Honour acknowledged the differences in the role of Attorneys-General in Australia and England, and noted the scepticism of some lawyers as to the suitability of the Attorney-General to determine whether the public interest is best served by declining to enforce public law.<sup>191</sup> Indeed his Honour went so far as to concede that the present law of standing is far from coherent. However, McHugh J concluded that, given divergent opinions on the issue, the court should leave it to the legislature to rationalise standing.<sup>192</sup>

### Reform of standing

The question of who should *reform* the law of standing is related to, but also distinguishable from, the issue of the appropriate roles of the courts and the legislature in *determining* standing. The latter issue lies at the heart of the debate over the American “zone of interests” test. It seems to me that the majority in *Bateman’s Bay* was right to seek to develop further the law of standing. The relevant principles are the product of the common law,<sup>193</sup> and it is arguably the duty of the courts to ensure that those principles are modified or adapted to ensure that they are appropriate having regard to changes in society and in the operation of our constitutional structure. The fact that there may be divergent opinions as to the best way to proceed is not necessarily a good reason for leaving any development to the legislature. The principles of standing have great significance for the practical operation of the separation of powers doctrine. It could be viewed as an abdication of responsibility for the courts to expect executive-dominated legislatures to perform *all* the maintenance on principles that are so fundamental to our constitutional framework. Furthermore, there are several arguments to suggest that judicial development may well be preferable to legislative reform in this area. First, legislative reform will almost certainly result in undesirable divergence in the approach taken in different Australian jurisdictions. Secondly, whatever shape the principles take, they will almost certainly need to be broad and flexible, and thus arguably are more suitable for development through the “incremental” processes of the courts rather than the “comprehensive planning” approach of the legislature.<sup>194</sup> Finally, the provisions of particular statutes will necessarily prevail over any principles formulated by the courts, and consequently judicial development of standing should still leave at least some room for the legislature to make its contribution to the application of the principles in the context of particular statutory schemes.<sup>195</sup>

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<sup>190</sup> [1998] HCA 49 at [83] [84] [86]; (1998) 155 ALR 684 at 706, 707 (footnotes omitted).

<sup>191</sup> [1998] HCA 49 at [87]-[88]; (1998) 155 ALR 684 at 707-8.

<sup>192</sup> [1998] HCA 49 at [91]; (1998) 155 ALR 684 at 708.

<sup>193</sup> Although they have, of course, been adopted, and in some cases modified, by the legislature in many different statutes. Whether developments in the common law principles can flow through to statutory remedies will depend on the terms in which they have been adopted.

<sup>194</sup> For a brief description of these ideal types of decision-making see: Aronson & Dyer *Judicial Review of Administrative Action* (1996 LBC) at 189-92.

<sup>195</sup> This is arguably where the legislature is able to make its greatest contribution since its attention will be focussed on the operation of a specific statutory scheme.

But what is the approach to standing favoured by Gaudron, Gummow and Kirby JJ? That, I suggest, is a little unclear. Their Honours' comments could possibly be read as favouring an "open standing" approach which affords standing to anyone, provided that the matter is justiciable and the action is not oppressive, vexatious or an abuse of process. Many commentators support liberalisation of standing rules, but true open standing is another matter. Those who seek to defend open standing, usually end up supporting a presumption in favour of standing subject to narrowly defined exceptions, or alternatively, a test of justiciability which incorporates the potential for consideration of factors associated with the identity of the applicant. To my mind, both these approaches maintain a standing requirement, albeit one that is narrowly defined, or goes by another name. In either case there will still be rules that, as Professor Cane puts it, "serve the function of focussing attention on the question of whether the particular applicant should be allowed access to the judicial process"<sup>196</sup> and can appropriately be described as standing rules. True "open standing", if it means what it says, would have no need for such rules. Nevertheless, some approaches are closer to open standing than others. Fisher and Kirk, in their advocacy for "essentially open standing", go further than most.<sup>197</sup> They favour a presumption of standing which is rebuttable only in very limited circumstances namely (1) a clear lack of merit or competence to bring or present the case (2) where legislation clearly indicates that the applicant should not have standing, and (3) where the challenge involves a breach of the "privacy" of another citizen who could adequately represent their own interests but has chosen not to.<sup>198</sup>

An example may help to illustrate my concerns about this approach. Take the case of a millionaire seeking to bring proceedings to stop benefit payments to the homeless youths who loiter on the beach and spoil the view from his harbourside mansion. Let us assume that the homeless youths do not qualify for the benefits, which are in fact being paid unlawfully, and that the proceedings would "save the taxpayer" a few hundred dollars per week of expenditure that the state is not required to make. I suggest that it would, nevertheless, be highly objectionable to allow the millionaire standing. The objection flows, I think, from a combination of (1) the fact that the law ought to be equally accessible to all, but patently is not; and (2) the use of the law by one who can afford to use it, but has no real personal interest at stake, to the disadvantage of those who have very real personal interests at stake but cannot afford to defend them.<sup>199</sup>

Under Fisher and Kirk's test, the millionaire would appear to have standing since the example does not fall within any of the exemptions to their presumption of standing. They might well argue that this is an appropriate result, since the proceedings will do no more than "facilitate the rule of law".<sup>200</sup> If so, that seems to me to be a vision of the rule of law which exaggerates the importance and the desirable place of law – allowing law's rule to become a

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<sup>196</sup> P Cane, "Standing, Representation, and the Environment", in I Loveland (ed) *A Special Relationship? – American Influences on Public Law in the UK* (Clarendon 1995) 123-150, at 130

<sup>197</sup> E Fisher & J Kirk, "Still Standing: An Argument for Open Standing in Australia and England" (1997) 71 ALJ 370. See also: Australian Law Reform Commission, *Beyond the door-keeper – Standing to sue for public remedies*, Report No 78, 1996, discussed below at n 225.

<sup>198</sup> E Fisher & J Kirk, "Still Standing: An Argument for Open Standing in Australia and England" (1997) 71 ALJ 370 at 383.

<sup>199</sup> No doubt my example is a little far fetched and (hopefully) unlikely to occur. But I fear that other examples, which are objectionable for the same *reason*, even if not to the same degree, may well occur. It is possible, I think, that we may have reached the point where the cost and uncertainty of judicial review is such that it will rarely be sought *purely* for what we might regard as the "right" reasons, namely, that the decision in question is wrong and unlawful. It would hardly be worth the risk in the absence of "tactical" advantages, or extraneous personal motives. If that is so, then it must be all the more likely that the cases that open standing permits will be ones where the plaintiffs are pursuing "tactical" advantages or "personal agendas".

<sup>200</sup> E Fisher & J Kirk, "Still Standing: An Argument for Open Standing in Australia and England" (1997) 71 ALJ 370 at 374.

totalitarian regime. I favour a more limited and modest understanding of the place of law within society – more akin with that described by McHugh J in *Bateman's Bay*<sup>201</sup> – where it is recognised that the role of law needs to be coordinated with various political and social mechanisms. This is not the place to explore the philosophical and sociological assumptions that underlie one view or the other. It is important, however, to recognise the link, highlighted by McHugh J, between standing and the appropriate role of law in society.

Another issue worth noting concerns the relationship between standing rules and access to the courts. It has sometimes been suggested that standing rules should operate to ration the use of judicial resources.<sup>202</sup> In practice there is no need for standing rules to perform that function, since the cost of bringing proceedings usually ensures that the courts are not overwhelmed with applications. However the disincentive created by the cost of proceedings is clearly a most unacceptable method of rationing access to the courts, since its effect varies enormously according to the financial circumstances of each potential litigant. The cost of proceedings is rightly seen not as a rationing device, but as a barrier to access to the courts. It may be that if a means were found to remove that barrier (or at least “equalise” its effect on different litigants), there could be a more pressing need for standing requirements to operate to limit the matters that can be brought before the courts. Realistically, it seems most unlikely that the barriers to access to the courts will be overcome to that extent. However that then raises another issue. If there is no significant change in the high cost of curial proceedings and the limited availability of legal aid, it is at least possible that the removal of standing requirements could have a regressive effect on the extent to which the law operates for the benefit of the whole community, and in particular, those of limited means. One must assume that open standing would be of greatest benefit to those who have the means to make use of the courts.<sup>203</sup> That is particularly likely if there is no real constraint on the use of judicial review as a means of promoting or protecting commercial or competitive interests.<sup>204</sup> The danger here is well described by Evans *et al*:<sup>205</sup>

Given the cost of litigation and inequality of access to the services of lawyers and to the courts, a “liberal” standing law will simply confer a further advantage on those who are privileged in the political process already or will sustain the undemocratic possibility of attack in the courts by traditional vested interests on “socially progressive” government policies or programs. In that sense, the promise of a “liberal” standing law for those who are presently disadvantaged in society and in the political process is but a snare and a delusion.

It can of course be argued in response that the relaxation of standing requirements could also facilitate the bringing of proceedings by a representative on behalf of persons who lack the means to take action themselves. However it is dangerous to assume that relaxation of standing requirements will promote “public interest” proceedings more than proceedings brought to protect commercial and competitive interests.

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<sup>201</sup> See above at n 190. As McHugh J observes, there may be something quite democratic about the *non-enforcement* of laws if, as his Honour implies, it is laws which lack majority support that tend not to be enforced

<sup>202</sup> See: K E Scott, “Standing in the Supreme Court – A Functional Analysis” (1973) 86 Harv L Rev 645

<sup>203</sup> We may reduce inequality of access to law, and most certainly should seek to do so, but the rich will always have far greater capacity to use the law than the poor. That need not necessarily mean that the law only benefits the rich: The whole of society can benefit from legal principles that are developed or enforced in proceedings brought by wealthy litigants. But I think it does mean that we need to be particularly careful about the potential of those who can afford judicial proceedings to use them against those who cannot.

<sup>204</sup> See the discussion above on “competitor standing”.

<sup>205</sup> Evans *et al*, *Administrative Law – Cases, Text, and Materials* (Emond Montgomery, Toronto, 1995, 4th ed) at 1267.

It seems to me that, in fact, the dicta of the majority judges in *Bateman's Bay* stops well short of an endorsement of open standing. The majority also recognise that, in federal jurisdictions, the constitutional requirement of a "matter" imposes minimum requirements that are analogous to, or overlap with, standing requirements.<sup>206</sup> The judges appear to envisage a *presumption* in favour of standing, but qualify this by suggesting that proceedings may be dismissed if "the *right or interest of the plaintiff* [is] insufficient to support a justiciable controversy" (emphasis added).<sup>207</sup> The reference to the sufficiency of the plaintiff's right or interest implies something more is required than just an evaluation of justiciability.<sup>208</sup> At the very least though, the test entails a *prima facie* presumption in favour of standing. It would also appear to suggest a shift away from the "special interest" approach, and its emphasis on the need for an interest greater than that of the general public.<sup>209</sup> If that is so, it may be important and, I think, a desirable development. The requirement of "special damage" or an interest greater than the general public is, as the majority note, somewhat incongruous when applied to the enforcement of *public* rights and duties.<sup>210</sup> It would almost seem to be designed to ensure that the plaintiff has some additional or extraneous interest going beyond simply enforcing the duty – an "ulterior motive", one might say. This, I suggest, goes to the heart of the courts' difficulties<sup>211</sup> in dealing with the issue of competitor standing. The problem is not so much that the test allows standing to a person with "commercial" motives, but rather, that it denies standing to a person who simply and genuinely wishes to see the law enforced. If that is correct, the majority judges are right to marry their recognition of "commercial" interests with a questioning of the "special interest" concept.

But what alternative is there to the "special interest" approach? The majority refrain from committing themselves to any particular approach. I have suggested above that "open standing" and even "essentially open standing" may not be desirable. Many other approaches have been suggested. There is not the space here to review them, but let me at least suggest a tentative preference. It seems to me that it should be possible to liberalise standing requirements,<sup>212</sup> while also addressing (to some extent at least) the concerns I have expressed above. One means of doing so may be to change the point of reference that is used in determining the "sufficiency" of the applicant's interest. Instead of comparing the applicant's interest with that of a member of the general public, it could be compared with the interests of those who are likely to be affected to an equivalent or greater degree by the decision (or its reversal).<sup>213</sup> If there are no such persons, the applicant should have standing.<sup>214</sup> If there are such persons, however, the court could consider whether it is appropriate that the applicant be afforded standing having regard to the significance of the

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<sup>206</sup> [1998] HCA 49 at [37] [51]; *Croome v State of Tasmania* (1997) 142 ALR 397. It appears likely that this issue will be considered further by the High Court in proceedings which have been removed pursuant to s 40 *Judiciary Act* 1903: *Macquarie Infrastructure Investment Management Limited v Truth About Motorways Pty Limited* S92/1998 (HCA transcript, 20 November 1998).

<sup>207</sup> [1998] HCA 49 at [39]; (1998) 155 ALR 684 at 695.

<sup>208</sup> I use the term "justiciability" here to refer to the test of the suitability of a matter for curial determination, which in recent times has tended to focus on the nature or subject matter of the challenged decision. Issues of standing and justiciability are sometimes confused, but the two concepts can (and arguably should) be distinguished: P Cane, "The Function of Standing Rules in Administrative Law" [1980] *Public Law* 303 at 309-312.

<sup>209</sup> [1998] HCA 49 at [34] [39] [42].

<sup>210</sup> [1998] HCA 49 at [42]; (1998) 155 ALR 684 at 696.

<sup>211</sup> Discussed above.

<sup>212</sup> Of course, the principles governing intervention must also be modified in a compatible manner.

<sup>213</sup> Measured according to prevailing community values, taking into account the position of the person affected.

<sup>214</sup> This may be a difficult question to determine. I suggest below that there should be a presumption that this requirement is satisfied, unless the respondent establishes to the contrary. Note also that I am not suggesting that this criterion should determine standing – rather it marks the border between the non-discretionary and discretionary elements of the test.



decision (and the proceedings) for the other persons affected.<sup>215</sup> In assessing that question, the court could consider a range of factors, including: (1) any claim by the applicant to represent the public,<sup>216</sup> or other persons affected by the decision;<sup>217</sup> (2) whether the applicant has attempted to alert other persons affected by the decision of the existence of the proceedings;<sup>218</sup> (3) whether the interests of other persons likely to be affected by the proceedings will be adequately represented before the court;<sup>219</sup> and (4) the importance of the benefit said to be likely to flow from the proceedings (having regard to the number of persons who will benefit, the extent to which they benefit and the likelihood of the proceedings succeeding). I would argue that the last factor (4) should be given less weight and be assessed only on a relatively cursory “prima facie” basis. A more rigorous examination of this issue would otherwise lead inevitably to standing being merged with the merits, as in England.<sup>220</sup> So, to return to the example given above,<sup>221</sup> I would argue that the millionaire should not have standing, even if the proceedings would save the taxpayer a million dollars, unless the court could be satisfied that the benefit recipients would be adequately represented in the proceedings.

This suggested approach may be regarded by Australian courts as relatively radical,<sup>222</sup> and might be criticised on several grounds. The test might be said to be unduly discretionary,<sup>223</sup> and require the court to make broad value judgments and ascertain difficult and complex matters of fact. Whether it would be any worse, in these respects, than the “special interest” test is questionable. Nevertheless I think it would be desirable that the class of cases in which the suggested inquiry is required be kept as narrow as possible. That could be achieved by adopting a “two-stage” test that allows standing as of right (under the first stage)

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<sup>215</sup> This is similar to the approach suggested by the Ontario Law Reform Commission in its *Report on the Law of Standing* (1989). The Commission recommended that there be (in effect) a presumption in favour of standing unless a party satisfies the court that there exist factors that outweigh the factors in favour of proceeding. In deciding that question the court would be required to consider, *inter alia*, “whether to proceed would be unfair to persons affected..” (pp 100-103, 178).

<sup>216</sup> Which Professor Cane refers to as “citizen” or “public interest” standing. Cane argues that citizen standing should be permitted only to protect the most important or fundamental of the public’s interests: P Cane, “Standing, Representation, and the Environment”, in I Loveland (ed) *A Special Relationship? – American Influences on Public Law in the UK* (Clarendon 1995) 123-150, at 140-144; P Cane, “Standing up for the Public” [1995] *Public Law* 276; P Cane, *An Introduction to Administrative Law* 1996 52-55.

<sup>217</sup> On the basis of what Professor Cane calls “associational standing”. See further: P Cane, “Standing, Representation, and the Environment”, in I Loveland (ed) *A Special Relationship? – American Influences on Public Law in the UK* (Clarendon 1995) 123-150, at 133-140; P Cane, “Standing up for the Public” [1995] *Public Law* 276. Compare: *Executive Council Of Australian Jewry v Scully* (13 February 1998 Wilcox J)

<sup>218</sup> Cf the suggestion by Professor Cane that a court should have power to classify a case as being of public importance and require publicity to bring the case to the attention of potential interveners: P Cane, “Standing up for the Public” [1995] *Public Law* 276 at 282 n27.

<sup>219</sup> This would include consideration of whether, having regard to the financial circumstances of other (non-governmental) persons affected to an equivalent or greater degree, it is reasonable to allow the applicant to expose them to the burden of defending the decision. See also the other factors suggested for consideration by the Ontario Law Reform Commission in its *Report on the Law of Standing* (1989) pp 193-105, 178.

<sup>220</sup> *R v IRC, ex p. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617. See P Cane, “Standing, Legality and the Limits of Public Law” [1981] PL 322 at 335-6.

<sup>221</sup> See at n 199.

<sup>222</sup> In particular, the suggestion, in factor (4), that the court should have regard to the financial circumstances of potential non-governmental respondents, may well be controversial. However the intended effect of this would merely be to make the court more willing to grant standing where the persons most likely to wish to defend the challenged decision have the means to do so. This is only a very modest attempt to move beyond mere “formal” equality before the law.

<sup>223</sup> cf the often quoted comment of Brennan J in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 75: “Whether a plaintiff has shown a sufficient interest in a particular case must be a question of degree, but not a question of discretion.”

to the person most significantly affected by the decision.<sup>224</sup> There could be a presumption of standing on this basis unless the respondent demonstrates that the applicant is not the person most significantly affected, whereupon the onus would shift to the applicant to show that they should be afforded standing having regard to the factors already mentioned.

The approach suggested above might well be similar in effect to that recommended by the Australian Law Reform Commission in its 1996 report. The ALRC recommended that:<sup>225</sup>

- Any person should be able to commence and maintain public law proceedings unless
- the relevant legislation clearly indicates an intention that the decision or conduct sought to be litigated should not be the subject of challenge by a person such as the applicant; or
  - in all the circumstances it would not be in the public interest to proceed because to do so would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it differently or not at all.

It appears that the concept of “private interest” in the second proviso was intended to have a broad meaning.<sup>226</sup> If so, there will usually be at least one person who can claim to have a “private interest in the matter”, and the operation of the test will turn very much on the concept of “unreasonable interference”. The report gives no real indication as to what is meant by the concept, but conceivably it could involve a consideration of factors similar to those described above.

Development of standing in the direction suggested above would be a modest, incremental reform. I do not believe that it would result so much in a significant widening of existing standing requirements as a reformulation of those requirements. The main benefits of such a development would be, I suggest, that it could provide a more principled basis for determining standing, and provide the means for the courts, if necessary, to prevent those with the greatest access to judicial review taking unfair advantage of their privileged position.

This approach may not result in the relaxation of standing requirements to the extent favoured by Gaudron, Gummow and Kirby JJ. As explained above, it is unclear from *Bateman’s Bay* how far those judges would be prepared to go. It also remains to be seen whether they will be able to persuade another member of the High Court to join them. If they do, there will be other consequential issues to address. A further relaxation of standing requirements, without more, would lead to what Harlow and Rawlings called the English “funnel” model. Harlow and Rawlings argued that this was an unsustainable compromise between the traditional “drainpipe” model and the American “freeway”.<sup>227</sup> More recently they have commented:<sup>228</sup>

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<sup>224</sup> There are, of course, many other criteria that could be used for the first “stage” of the test eg: whether the applicant is affected *directly* (see *Aboriginal Community Benefit Fund Pty Ltd v Batemans Bay Local Aboriginal Land Council* (1996) 22 ACSR 56 at 62-3 (NSW Sup Ct, McLelland CJ), but compare *Simos A-JA* on appeal (1997) 41 NSWLR 494 at 512); whether the applicant is “personally adversely affected” The Law Commission, *Administrative Law: Judicial Review and Statutory Appeals* No. 226 (1994, London HMSO) p43 para 5.20; or whether the applicant is the “very object of a law’s requirement of prohibition” A Scalia, “The Doctrine of Standing as an Essential Element of the Separation of Powers” (1983) 17 *Suffolk U L Rev* 881 at 894; *Lujan v Defenders of Wildlife* 112 S Ct 2130 (1992) at 2137.

<sup>225</sup> *Beyond the door-keeper – Standing to sue for public remedies*, Report No 78, 1996, Recommendation 2. The Attorney-General has announced that the government does not propose to implement the Report’s recommendations: (1998) 72 *Reform* 4.

<sup>226</sup> And not limited to private *rights*.

<sup>227</sup> C Harlow & R Rawlings, *Pressure Through Law* (London: Routledge) 1992; R Rawlings “Courts and Interests”, in I Loveland (ed) *A Special Relationship? – American Influences on Public Law in the UK* (Clarendon 1995).

<sup>228</sup> C Harlow & R Rawlings, *Law and Administration* (Butterworths London 1997 2nd ed) 602-3 (footnotes omitted).

Elsewhere, the authors have likened English judicial review to a funnel, generous with access, sucking in litigants and more recently intervenors. ... This is the 'public interest model', in which the courtroom is seen as a platform for public discussion and forum for debate of matters of public interest by litigants who are increasingly interest and pressure groups. When we wrote this, grounds for review were less expansive, while remedies remained within the traditional drainpipe model. We argued that the model could not remain static; generous access would inevitably create pressure on later stages of the process.

Our prophecy is beginning to be fulfilled. [They refer to English developments demonstrating a more expansive approach to jurisdiction and remedies] ...The growth of rights-based theories of judicial review has buttressed the public interest model. Consciously or unconsciously, courts under the leadership of a relatively interventionist judiciary, are beginning to function as a surrogate political process, responsive to the pressure created by generous access to the courtroom.

Australian courts are not as ambitious or interventionist in judicial review cases as their English counterparts, and there is as yet no indication that the High Court wishes to move in that direction.<sup>229</sup> There are dangers for the courts in becoming a "surrogate political process". They may fall prey to the same shortcomings that affect the political process, and in doing so, give up the advantages that flow from their individualistic focus and incremental approach. It is also questionable whether the interventionist approach of the English courts is appropriate in Australian jurisdictions given the significant differences which exist in terms of constitutional and political frameworks, and the content of statute-based administrative law.

There may, however, be an alternative to Harlow and Rawlings' "drainpipe", "funnel" and "freeway" models. To extend the metaphor, this might be called the "round-about" model. It would involve the courts retaining a relatively tight reign, by means of standing and justiciability requirements, on the types of matters they deal with, but at the same time permitting limited participation by a wider range of affected persons through greater willingness to accept intervenors and amici curiae.<sup>230</sup> The High Court has already taken some steps in this direction, with qualified support from some judges and commentators.<sup>231</sup> Such an approach could allow a wider range of interests to be taken into account in developing the law, but without necessarily expanding and exaggerating the role of law and legal institutions in society. This approach may be particularly useful to the extent that the courts wish to emphasise the "broader" functions of judicial review over mere grievance redress.

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229 It is worth noting, however, that some aspects of the "English" approach appeared to have found greater support in the Federal Court. See eg the discussion of the rule of law in: *Pickering v DCT* (1997) 37 ATR 41; *Ryan v Secretary, Department of Social Security* (1997) 48 ALD 259; *Moran Hospitals Pty Ltd v King* (1997) 49 ALD 444; *Re Bedlington, ex p Chong* (1997) 149 ALR 266 (overturned, but without reference to the "rule of law" argument in *Bedlington v Chong* (1998) 157 ALR 436).

230 The description "round-about" model may also hint at a possible shortcomings of this approach – that it may lead to courts repeatedly circling the round-about, unable to decide which exit to choose!

231 See: The Hon. S. Kenny, "Interveners and Amici Curiae in the High Court" (1998) 20 *Adel LR* 159-171; Sir Anthony Mason, "Interveners and Amici Curiae in the High Court – A Comment" (1998) 20 *Adel LR* 173-176; A Durbach "Interveners in High Court Litigation: A Comment" (1998) 20 *Adel LR* 177-182; W Neville, "Abortion before the High Court – What Next? Caveat Interventus: A Note on Superclinics Australia Pty Ltd v CES" (1998) 20 *Adel LR* 183-192; R Owens, , "Interveners and Amici Curiae: The Role of the Courts in a Modern Democracy" (1998) 20 *Adel LR* 193-198.

## Conclusion

Access to judicial review is undoubtedly very restricted, and necessarily so. That follows from the fact that, whereas judicial review is potentially relevant to large numbers of decisions affecting a great many individuals, it is a rigorous and expensive procedure which, if fully funded by individuals, will only be available to the wealthy, and if funded by government, can only be justified in a small number of important cases.

Although, in theory, standing and justiciability are the legal mechanisms that regulate access to judicial review, I have argued that, in reality, the expense of bringing proceedings is by far the most significant rationing device. There is little that the courts can do to change that without concerted and radical action on the part of the executive and the legislature. But that does not mean that the courts should do nothing. The approach of the courts, I suggest, should not be so much to *increase* access to judicial review, as to do what they can to ensure that the inequality of that access is minimised. I have offered some very modest proposals as to how the requirements of standing might be reformulated to allow reference to that issue.

To return to the question I left unanswered in the introduction, I would argue that it is the responsibility of the courts to ensure that judicial review does not “provide carriage” only for the wealthy. In the short term at least, it would seem likely that, discounting ineffectual use of judicial review by unrepresented applicants, it will inevitably be the wealthy who make the greatest use of judicial review. The courts cannot stop that. But they may be able to prevent the abuse of that privilege. They may also be able to do more in looking beyond the grievances of the parties before them and taking account of the consequences of a decision or proposed development of the law<sup>232</sup> for a wider group of affected persons, who may not have the means to bring their concerns before the court. Greater willingness to hear interveners and amici curiae may help to facilitate this approach, although there are also, of course, dangers to be guarded against in this “round-about” model.<sup>233</sup> I believe it is vitally important that the courts seek to address these issues. Not because there is a great deal they can achieve. But because, by doing so, the courts demonstrate that they are committed to the ideal of equality before the law, however unrealistic it may be to expect that ideal to be fully realised in our imperfect society.

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<sup>232</sup> This approach also has implications for the treatment of substantive issues – such as the development of the grounds of review – but I will not attempt to address this broader issue here.

<sup>233</sup> The problems associated with greater use of interveners and amici curiae are well discussed in the articles cited in fn 231.

# WHEN THE BUSINESS OF BUSINESS IS GOVERNMENT: THE ROLE OF THE COMMONWEALTH OMBUDSMAN AND ADMINISTRATIVE LAW IN A CORPORATISED AND PRIVATISED ENVIRONMENT

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## Introduction

It has been suggested that investigation of administrative action by the Ombudsman can improve the efficiency of government agencies, so complementing moves to a more managerialist approach to public administration.<sup>1</sup> Conversely, the constraints imposed by administrative law (through freedom of information legislation, judicial, tribunal and Ombudsman review) are often seen as fetters on the efficiency and effectiveness of administrative bodies; this is said to be especially true of government-owned corporations that have to compete with the private sector<sup>2</sup>

As much of the work of government is increasingly corporatised, privatised or is contracted out into private hands, it is becoming important to ask what relevance administrative law has in the current administrative order. In short, should public power always be regulated by public law, or are there times when it should not be?<sup>3</sup>

The need for consideration of this question has acquired greater urgency with recent changes to the way the Commonwealth Government provides services to the public. The changes relevant to this paper have taken place in two main areas: a range of welfare services previously provided by government agencies are now provided through a pseudo-corporate agency, Centrelink; and employment services are now provided through a contested market, Job Network, in which a government-owned corporation, Employment National, competes with private service providers to place people in jobs.

As we will see, especially in the case of Job Network, the issue of how service providers are to be made accountable is far from settled. It is the argument of this paper that where the provision of services to disadvantaged and vulnerable members of our community has in the past been subject to accountability through the mechanisms of administrative law, this accountability should not be lightly removed.<sup>4</sup>

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1 Dennis Pearce, "The Ombudsman: neglected aid to better management," (1989) 48(4) *AJPA* 360.

2 *National Competition Policy* (1993) AGPS, Canberra (*The Hilmer Report*) Chs.6 and 13.

3 A question posed in Margaret Allars, "Private Law but Public Power: Removing Administrative Law Review from Government Business Enterprises," (1995) 4 *PLR* 44.

4 An argument also put forward by the *Senate Finance and Public Administration References Committee Report on the Contracting out of Government Services (Senate Contracting Out Report)* (1998) <http://www.aph.gov.au/senate/committee/fapa-ctte/contracting/contents/htm>. See especially Ch.1.

In the specific case of the Ombudsman, it will become apparent that the availability of external review and investigation of decision-making has been, and continues to be, a valuable means of legitimising decisions. And, despite the rhetoric of managerialism, it will also become apparent that such review is an aid to the efficient provision of services.

## 1. The administrative context of Centrelink and Job Network: a brief history of administrative law and managerialism.

In the 1970s, there was a growing realisation that the traditional methods of keeping the government's bureaucracy accountable were no longer sufficient. As the government administered an increasingly extensive and complex range of services, it became apparent that the common law and ministerial accountability were no longer adequate tools to safeguard the interests of citizens in their dealings with government.<sup>5</sup> A number of committees<sup>6</sup> recommended that consumers of government services should receive greater protection: the administrative law package began to take shape.

In Australia, at the Commonwealth level, a number of statutory safeguards and review bodies were established to provide this protection. The key elements of this package include freedom of information legislation,<sup>7</sup> tribunals to review administrative actions,<sup>8</sup> a statutory process for judicial review of administrative decisions,<sup>9</sup> and the Ombudsman.<sup>10</sup> The function of the Ombudsman, which will be the focus of this paper, is to investigate complaints about administrative action and determine if maladministration has occurred or if mistakes have been made during the administrative process. The Ombudsman may investigate such matters and make recommendations to the affected administrator in the hope that any problems can be avoided in the future. The Ombudsman need not always act on a complaint, and may launch own-motion investigations if necessary.<sup>11</sup>

Besides protecting citizens' rights,<sup>12</sup> the primary objectives of the processes and bodies comprising the administrative law package were to promote openness, rationality, fairness and participation by the citizenry in the actions of government.<sup>13</sup> These objectives were predicated on a conviction that different standards of fairness should apply to those who wield public power from the standards applicable to those who wield private power.<sup>14</sup> In other words, the Department of Social Security should be held to a different standard from that applied to a major private company.

The administrative law package was aimed at regulating government behaviour, but there were some dissenting voices who felt that administrative law should extend its ambit further. Most notably, Murphy J questioned the orthodoxy of excluding private bodies from the application of public law.<sup>15</sup>

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5 See Margaret Allars, "Managerialism and Administrative Law," (1991) 66 *CanbBullPubAdmin* 50.

6 Such as the Bland, Ellicott and Kerr Committees, see Allars, *Op cit* at 50-51.

7 *Freedom of Information Act 1982* (Cth.)

8 For example, the *Administrative Appeals Tribunal* formed in 1977.

9 *Administrative Decisions (Judicial Review) Act 1977* (Cth.)

10 *Ombudsman Act 1976* (Cth.)

11 The general function of the Ombudsman is discussed in Pearce, "The Ombudsman: neglected aid to better management?" *Op cit*.

12 See A.W.Bradley, "The role of the Ombudsman in relation to the Protection of Citizen's Rights," (1980) 39(2) *CambLJ* 304.

13 Allars, "Private Law but Public Power," *Op cit* at 45.

14 *Ibid*.

15 See *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 274-5.

For instance, when considering if a private trotting club should be allowed to “warn off” a citizen (in this case, a professional punter) from its premises without according him procedural fairness (ie. a hearing), Murphy J felt it appropriate to emphasise the public effect of exercises of private power. A trotting club’s rules could affect the livelihood of members of the public, such as trainers, drivers and bookmakers. Although it was exercising its rights as a private property holder, the trotting club was in reality exercising public power. As such, Murphy J felt the club should be subject to public law, just as government departments exercising public power are held accountable.

Murphy J’s post-liberal views on the nature of power were not, however, embraced by the majority of the High Court. Administrative law, they made clear, is public law which should only be applied to exercises of public power by public bodies.

This support for maintaining the classic liberal distinction between public and private power was re-enforced and broadened in subsequent cases. For instance, when a statutory body exercised rights given to it by a contract, its actions were held by the Federal Court not to be subject to judicial review under administrative law.<sup>16</sup>

In *ANU v Burns*, an academic (Burns) was dismissed by a statutory body (the ANU) exercising dismissal powers conferred on it by the employment contract it had made with Burns. It was held that the source of the dismissal was the private contract, not the Act constituting the university. Accordingly, the decision was not reviewable under the Administrative Decisions (Judicial Review) Act (AD(JR) Act). It was a private decision and, as such, should be regulated by private law; if Burns wanted a judicial hearing on the decision, he should sue in contract, not administrative law.

### **The rise of managerialism**

The above limitations notwithstanding, there has been widespread recognition of the positive effect of the administrative law package.<sup>17</sup> Citizens could be assured that bureaucratic power was responsibly used, that departments were forced to adhere to proper procedures when making decisions, and that the inevitable inequities created by the exercise of broad public power were at least minimised.

But the administrative law package came at a cost. In complying with reporting requirements and, for instance, responding to freedom of information (FOI) requests, large amounts of government resources were tied up in ensuring fairness in administration was both done and seen to be done.<sup>18</sup>

As economic conditions worsened in the 1980s, new priorities began to supplant the values of the administrative law package in the debate over government accountability. It was argued that many departments had been hamstrung by the new administrative law. The emphasis on fairness and due process had led to an administrative culture in which, it was argued, adherence to correct procedures had replaced getting the job done as a priority.<sup>19</sup> Commentators compared this approach to decision-making unfavourably with the more

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<sup>16</sup> *Australian National University v Burns* (1982) 43 ALR 25.

<sup>17</sup> See Pearce, “The Ombudsman: neglected aid to better management?” Op cit and Allars, “Managerialism and Administrative Law,” at 56-58 Op cit.

<sup>18</sup> On a senior public servant’s frustrations with FOI red-tape in the Defence Department, see R.W.Cole, “The Public Sector: the conflict between Accountability and Efficiency,” (1988) 47(3) AJPA 223 at 227-228.

<sup>19</sup> See Cole, “The Public Sector” Op cit; Allars, “Managerialism and Administrative Law,” at 57 Op cit; and Peter Bayne, “Administrative Law and the new Managerialism in Public Administration,” (1988) 62 ALJ 1040 at 1042.

result-driven decision-making that was said to be characteristic of private sector corporations.<sup>20</sup>

The corporate model, it is argued, is a more efficient way to achieve outcomes. Once the board of directors of a corporation agrees with its owners about what goals the corporation is to pursue, the managers are then free to decide how those goals are achieved, and are duly rewarded if they attain them.<sup>21</sup> If the managers do not reach the goals set, they are accountable to the shareholders and can be voted out of management. Success for such corporations is usually measured in profit made and market share gained.<sup>22</sup>

On the face of it, the corporate model would, then, seem more likely to produce efficient outcomes. It is a model which implicitly accords the managers of a corporation a great deal of autonomy: once corporate goals are set, managers should be allowed to decide how the goals are met.

With the widespread acceptance of the notion that adopting a corporatised governance structure for the provision of government services will result in more efficient decision-making, the late 1980s and 1990s have seen a rapid corporatisation of many services previously provided through government departments: for example, postal, transport, telecommunications and water supply are areas that have been corporatised.<sup>23</sup> The usual model for the government corporation is incorporation under the Corporations Law or a constituting statute, and the installing of a board of directors answerable to the relevant minister.

Corporatisation of government services is usually also accompanied by calls for a reduction in the applicability of the administrative law package to such corporations.<sup>24</sup> This is especially so where the government-owned corporations find themselves in competition with private service providers on the open market. The Administrative Review Council, for instance, recommends that when they face real competition, government-owned corporations should be free from review under the administrative law package.<sup>25</sup>

The concept of “competitive neutrality” for government-owned corporations competing with the private sector was described in *The Hilmer Report* in 1993.<sup>26</sup> Hilmer argued that competition in the open market is the surest way to ensure the efficient provision of services.<sup>27</sup> For competition to achieve this efficiency, government business enterprises had to compete on the same terms as their private sector counterparts: with neither the advantages nor the disadvantages stemming from their status as government organisations applying to their actions. In other words, for competition to work, government-owned corporations and privately-held companies had to compete on a level playing field.

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<sup>20</sup> See Cole, “The Public Sector,” Op cit at 224, in which he encourages public servants to adopt the same risk-taking decision-making adopted by Westpac Bank in its lending section in the 1980s.

<sup>21</sup> John Farrar and Bernard McCabe, “Corporatisation, Corporate Governance and the De-Regulation of the Public Sector Economy,” (1995) 6(1) PLR 24 at 30-33.

<sup>22</sup> Ibid at 33. See also Michael Taggart, “Corporatisation, Privatisation and Public Law,” (1991) 2 PLR 77.

<sup>23</sup> Allars, “Private Law but Public Power,” Op cit at 46.

<sup>24</sup> Allars, “Private Law but Public Power,” Op cit at 46-7.

<sup>25</sup> ARC, *Administrative Review of Government Business Enterprises - Discussion Paper* (1993) AGPS, Canberra.

<sup>26</sup> *The Hilmer Report*, Ch.13.

<sup>27</sup> *The Hilmer Report*, “Executive overview,” at xv-xxxix. (see note 2)



In short, managerialists argue that the private sector corporation provides a model for an efficient decision-making organisation. And competition with the private sector in the market, where possible, is the most effective way of keeping government corporations efficient.

It has been suggested that the social responsibility of a corporation begins and ends with its obligation to make profits.<sup>28</sup> In that it is profit-driven, the market is unlikely to force corporations (be they government-owned or privately-owned) to adhere to the values of rationality, openness and fairness imposed by the administrative law package. In fact, the need to maintain a “competitive edge”<sup>29</sup> in the marketplace may compel corporations to value secrecy over openness: revealing how you deliver your services could compromise your competitiveness.<sup>30</sup> In such an environment, fairness may only be accorded to the extent that it enhances a corporation’s competitiveness. Accountability in such a context is largely measured by economic performance, not in terms of how properly and fairly decisions are made.

It would be wrong however, to over-simplify the various ways in which different government-owned corporations and corporations providing services to the government are made accountable. There is no single model for the corporatisation and opening up to competition of government services. The process may be undertaken in a number of ways, each of which has different implications for accountability: some versions of corporatisation and privatisation result in Hilmer’s level playing field, and others result in a different outcome.

The process may be achieved by the government forming a corporation in which it (represented by the minister) is the only shareholder. More radically, the government may first incorporate a government body and then privatise it: selling it off on the share market.<sup>31</sup> After being sold, the privatised corporation competes in the market like any other privately-held company. Or, the government may contract out its service responsibilities to private service providers who assume the role of providing government services to the public.<sup>32</sup>

Accountability varies depending on which of the above options is pursued. When the government privatises or corporatises a government service, for instance, it may force the service provider to adhere to a Community Service Obligation.<sup>33</sup> Such obligations should prevent mere economic efficiency from being the sole priority of the corporation. In practice, however, these obligations tend to be broadly worded, and reserve a wide discretion for the corporation’s managers to decide how best to achieve corporate priorities. As such, these obligations may be difficult for customers to enforce.<sup>34</sup>

When the government operates its own corporation, by Hilmer’s logic, that corporation should be accountable to the market. However, the peculiar nature of the government-owned corporation may blunt some of the market’s more salutary effects. Unlike a privately-held company, the government-owned corporation does not face the discipline of the stock market: the government holds the shares, they are not traded and would accordingly be difficult to ascribe a market value to. Similarly, the valuable input of dissenting shareholders at Annual and Extraordinary General Meetings is notably missing from a corporation where

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28 Milton Friedman, quoted in Taggart, “Corporatisation, Privatisation and Public Law,” Op cit at 87.

29 A term used by Centrelink CEO Sue Vardon to describe the agency’s approach to service provision, in an interview, *Australian Financial Review* 9-10 May 1998 at 61.

30 Taggart, “Corporatisation, Privatisation and Public Law,” Op cit at 100.

31 As partially undertaken in the case of Telstra.

32 As with Job Network.

33 Such as that imposed on Telstra by the *Telecommunications Act*, see *Yarmirr v Australian Telecommunications Corporation* (1990) 96 ALR 739.

34 Ibid.

there is only one shareholder with only one perspective on how the company should be run. Finally, and perhaps most importantly, the government-owned corporation is most unlikely to face the ultimate sanction of the market: insolvency.<sup>35</sup>

When the government contracts out service provision to private providers, the relevant minister may retain some control over the behaviour of those service providers. The contract made between the department and the providers may, for instance, contain conditions to be complied with, or may impose a Code of Conduct on providers.<sup>36</sup>

However, these contractual arrangements may provide only an illusory safeguard for members of the public in their dealings with private service providers. Privity of contract may preclude them from suing for breach of terms of the contract. Also, as a commercially sensitive document, the contract may be secret: the citizen may not be able to find out its terms in order to ascertain if they have been breached.<sup>37</sup>

As we will see in the specific cases of Centrelink and more especially Job Network, recourse to the administrative law package to enforce agreements like those discussed above may be problematic at best.

In an environment where different government corporations are competing - or are preparing to compete - with the private sector, how are the values of rationality, openness and fairness to be preserved? Would the application of the administrative law package in such an environment impair efficiency?

In the case of Centrelink, we will be looking at a pseudo-corporation, established by the government with a view to eventually entering a contested market for the provision of services. In the case of Job Network, a government-owned corporation is already in competition with the private sector.

## **2. Managerialism in practice: the creation of Centrelink and Job Network**

In the 1996 Federal Budget, the coalition government announced a major overhaul of the provision of Commonwealth welfare and employment services.<sup>38</sup> The existing system, it was argued, had resulted in an inefficient duplication of services. Moreover, after two decades of the administrative law package, a culture had become entrenched in the Commonwealth Public Service which valued process over results. It was time to apply managerial theory to these areas, and to introduce the efficiency-creating discipline of contested markets for the provision of these services.

### **Centrelink**

Coming into existence on July 1, 1997, Centrelink is a statutory authority which provides a range of income-support and welfare programs previously supplied by a number of separate departments: among others, Department of Social Security (DSS), Department of Employment, Education, Training and Youth Affairs (DEETYA), Department of Health and Family Services (DHFS) and the Department of Primary Industry and Energy. As its name

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<sup>35</sup> See Taggart, "Corporatisation, Privatisation and Public Law," Op cit at 80.

<sup>36</sup> In the case of Job Network, all providers have to subscribe to the *Employment Services Industry Code of Conduct*.

<sup>37</sup> Discussed by the *Senate Contracting out Report* at Ch.1.

<sup>38</sup> *Budget Statement 1996-7* (August 1996) AGPS, Canberra.

implies, under Centrelink all of these previously disparate services are now supplied through one centralised service operating 401 offices throughout Australia.<sup>39</sup>

This “one stop shop” approach to service provision would appear to be more efficient than the spread of services it replaced. This aspect of Centrelink has been widely praised for cutting down service duplication. It has even been suggested that the process could be extended, incorporating the Ombudsman into some key Centrelink offices.<sup>40</sup>

The structure of Centrelink is embodied in the Community Services Delivery Agency Act (CSDA Act).<sup>41</sup> Like a corporation, operation of the agency is managed by a board of directors and a chief executive officer.<sup>42</sup> It is a statutory requirement that at least two of the members of the Board must not be principal officers of Commonwealth Authorities.<sup>43</sup> The board is answerable to, and must take direction from, a minister.<sup>44</sup> In effect, the minister seems to be expected to perform the role of the shareholders; though, of course, Centrelink does not have any shares and is not incorporated under the Corporations Law. Under the CSDA Act the board is to ensure Centrelink’s functions are properly, efficiently and effectively performed.<sup>45</sup>

When the CSDA Bill was put before the House of Representatives, it was stressed that, as Centrelink was responsible for spending large amounts of public money, the usual administrative law accountability measures would apply to it, and it would be accountable under the Audit Act.<sup>46</sup>

However, there is a contradiction at the heart of Centrelink. Although it is a statutory authority and subject to review, it is also a pseudo-corporation pursuing efficiency as one of its key goals. Centrelink CEO, Sue Vardon, has said that it is hoped Centrelink will be competing with private service providers in a contested market for the provision of government services within 3-5 years.<sup>47</sup> Whether review under the administrative law package will be appropriate or adapted to such an environment remains a vexed and uncertain question.

Some hint as to how administrative law will fit within such future arrangements may be provided by an area in which a government-owned corporation is already competing with private service providers: Job Network.

### **Job Network**

On May 1, 1998, the old Commonwealth Employment Service was replaced by Job Network. Placing people in employment was no longer to be the task of government. Competitive tenders were called for private service providers to supply DEETYA with employment services. Successful tenderers contracted with DEETYA to put people into jobs. This scheme is now administered by the Department of Employment, Work Place Relations and Small Business (DEWRSB). The government was to become a purchaser, rather than a

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<sup>39</sup> For more information, visit the Centrelink homepage at <http://www.centrelink.gov.au>.

<sup>40</sup> Robin Creyke, “Sunset for the Administrative Law industry? Reflections on developments under a Coalition Government,” in John McMillan (ed.) *Administrative Law under the Coalition Government* (1997) Canberra.

<sup>41</sup> 1997 (Cth.)

<sup>42</sup> CSDA Act Pt.3.

<sup>43</sup> CSDA Act s.16(2).

<sup>44</sup> CSDA Act s 13.

<sup>45</sup> CSDA Act s 12(2).

<sup>46</sup> See Explanatory Memorandum to the CSDA Bill, and *House of Representatives Hansard* (4 December, 1996) for the second reading speech on the Bill.

<sup>47</sup> *Australian Financial Review* (9-10 May, 1998) at 61.

provider, of employment services.<sup>48</sup> Government monitoring and evaluation of provider performance is facilitated through management of the providers' contracts by the relevant minister.<sup>49</sup>

Thirty five percent of the initial contracts went to Employment National. Employment National was incorporated under the Corporations Law in 1997, and its sole shareholder is the Commonwealth government.<sup>50</sup> The corporate structure of Employment National, however, distances its provision of services from the government. Employment National has sub-contracted its service provision responsibilities to Employment National (Administration), a separate company.<sup>51</sup> So the actual provision of services seems to be conducted by a provider acting under contract to another provider which has a contract with DEETYA or DEWRSB.

### **3. How accountable are Centrelink and the members of Job Network?**

Because of the newness of Job Network, the exact applicability of the administrative law package to its provider members is not yet completely clear and awaits an authoritative judicial decision. Centrelink is, however, clearly subject to the full range of accountability measures under the package. Most likely, Job Network members are less easily held to account.

#### **The accountability of Centrelink**

It was stated in the second reading speech for the CSDA Bill that Centrelink is at the moment subject to the full range of review options available under the administrative law package.<sup>52</sup>

Judicial review is available under the AD(JR) Act for decisions of an administrative character made under an enactment.<sup>53</sup> In that it makes decisions under the CSDA Act and a range of other Acts, Centrelink is then, apparently, amenable to AD(JR) Act jurisdiction. That Centrelink's decisions must be of an administrative character to be so reviewable probably represents no great obstacle to review. This term has in the past been broadly construed to apply to a wide range of decisions.<sup>54</sup>

Investigation by the Commonwealth Ombudsman is available for reviewing an action that relates to a matter of administration by a government department or prescribed authority.<sup>55</sup> Once again, an "action relating to a matter of administration" has in the past been construed broadly, even allowing for review of a commercial decision.<sup>56</sup> In that Centrelink was

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48 For details of the scheme, see the DEETYA homepage (now the DETYA homepage) at <http://www.deetya.gov.au>.

49 Till very recently the Minister responsible for DEETYA. Now probably the Minister responsible for DETYA.

50 For a discussion of the contracting process and nature of Employment National, see Moore J's judgment in the - as yet - unreported decision of *Peter Schanka, Erica Aldridge, Robert Ashfield and Richard Walden and Community and Public Sector Union v Employment National (Administration) Pty Ltd.* (Unreported Judgment of the Federal Court, 9/9/98.)

51 Ibid.

52 See second reading speech CSDA Bill.

53 AD(JR) Act s.5.

54 *Evans v Frieman* (1981) 35 ALR 428 at 435.

55 *Ombudsman Act 1976* (Cth) s 5(1).

56 *Re British Columbia Development Corp and Friedmann* (1984) 14 DLR (4th) 129.

established for a “public purpose...by an enactment”<sup>57</sup> it would seem to fit the definition of a prescribed authority for the purposes of the Ombudsman Act.

The *Freedom of Information Act 1982* (Cth) would also apply to Centrelink’s current decisions. This Act gives anyone a legal right to access documents of agencies, prescribed authorities and ministers (section 11). A prescribed authority includes a body corporate or unincorporated body “established for a public purpose by or in accordance with the provisions of an enactment” (subsection 4(1)).

In the future contested market, where Centrelink may enter contracts for service provision, the above reviewability may be less clear. People seeking to challenge Centrelink decisions in such circumstances will probably have to establish that the contracts entered into by the agency were required by the CSDA Act and were not made under a general power to contract.<sup>58</sup>

Accountability by way of tribunal review is not directly accorded by the CSDA Act, but given that it mostly makes decisions under other Acts (for instance, it may assess benefit eligibility under the Social Security Act) availability of review for a Centrelink decision by a tribunal is conferred by these Acts.

The operations of Centrelink are also subject to the *Financial Management and Accountability Act 1997* (Cth).<sup>59</sup>

### **The accountability of Job Network providers**

In determining the applicability of accountability mechanisms to Job Network members, it is necessary to distinguish between Employment National and the privately-owned service providers it competes with. As we will see, Employment National may be easier to hold accountable.

Given that the actions of the service providers (both privately and government-owned) are carried out under contracts with DEWRSB, they are probably not subject to judicial review under the AD(JR) Act. The proximate source of the providers’ decision-making power is the contract, not an Act. As courts have stressed in the past, such private arrangements are not intended to be subject to the administrative law package.<sup>60</sup>

The Ombudsman probably would be able to investigate the actions of Employment National, in that it is a Commonwealth controlled company, and so comes within the Ombudsman’s jurisdiction.<sup>61</sup> However, the private contractual arrangements between Employment National and its subsidiary company Employment National (Administration) for the provision of services may remove the actual decisions regarding the provision of services from the Ombudsman’s jurisdiction: Employment National (Administration) is arguably not a Commonwealth controlled company.<sup>62</sup>

The privately-owned service providers are even less likely to be subject to the Ombudsman’s jurisdiction. They are plainly not Commonwealth controlled companies. Arguably they may

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<sup>57</sup> *Ombudsman Act* s.3(1).

<sup>58</sup> See, for instance, the reviewability of Telecom’s (as it was called at the time of the decision) contractual decisions in *General Newspapers Pty Ltd v Telstra* (1993) 117 ALR 629.

<sup>59</sup> CSDA Act s 39.

<sup>60</sup> See *General Newspapers v Telstra* (see note 58) and *ANU v Burns* (see note 16).

<sup>61</sup> *Ombudsman Act* s.3AB.

<sup>62</sup> On the nature of the somewhat confused relationship between Employment National and Employment National (Administration) see *Schanka v Employment National (Administration)*. (see note 50)

be brought into jurisdiction if they could be shown to be acting under the authority of DEWRSB - ie. their acts are deemed to be those of the department that authorised them.<sup>63</sup>

Privately-owned service providers are then, most likely not subject to the Ombudsman's jurisdiction. Employment National *may* be in jurisdiction for the reasons discussed above.

In that the decision-making power of both Employment National and the privately-owned service providers is conferred on them by their contracts with DEWRSB (and not under an Act) and neither is a prescribed authority, it is unlikely that the *Freedom of Information Act* applies to them. Both Employment National and the privately-owned service providers are incorporated under the Corporations Law. Such corporations are not prescribed authorities.<sup>64</sup>

It should be remembered that for both the Freedom of Information Act and the Ombudsman Act, it is possible for the Parliament to turn Employment National and the privately-owned service providers into prescribed authorities by listing them as such in the regulations of both Acts. So far this has not been done.

Arrangements for tribunal review of the decisions of employment service providers have not yet been implemented.

### **Accountability under the Job Network contracts**

A complaints process has been established by the contracts finalised between each service provider and DEWRSB. Under these contracts, service providers undertake to conform to the Employment Service Industry Code of Conduct. Like the statutory Community Service Obligations that have been found so hard to enforce in the past,<sup>65</sup> the Code of Conduct is broadly worded and gives providers wide discretion in how to provide their services. However, all providers must afford access to an internal complaints procedure for aggrieved "customers". Customers must also be given access to their own records on request.<sup>66</sup>

If customers are unhappy with how the agency handles their complaint, they may take the complaint to DEWRSB. DEWRSB's handling of these complaints is, obviously subject to the full range of review measures applicable to the decisions of departments. However, it is unclear how far this review could "reach down" into the decision-making process. Although DEWRSB's handling of the complaint is reviewable, is it possible for the Ombudsman (for instance) to investigate the circumstances of the original decision being complained about? The answer to this has yet to be found.

In summary, then, it would seem that "government by contract" - especially when the contracts are with privately-owned corporations - effectively removes the exercise of public power from scrutiny under the range of public law remedies provided by the administrative law package.

As a managerialist would no doubt point out, service providers are also accountable to the market. If they do not perform efficiently and for the price they tendered for, they go broke. This particular form of accountability has recently been very much in evidence. In late 1998, a Sydney privately-owned service provider that joined Job Network after operating for 15 years as a private employment agent closed its doors, owing \$260,000. The provider claimed DEETYA (the Department then administering the scheme) had not delivered on its

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<sup>63</sup> This type of jurisdiction would be available, if at all, under Ombudsman Act s 3(4).

<sup>64</sup> Freedom of Information Act s 4(1).

<sup>65</sup> See *Yarmirr v Australian Telecommunications Corporation* (1990) 96 ALR 739.

<sup>66</sup> See *Employment Services Industry Code of Conduct* (1998) AGPS, Canberra.

contractual promise to have a large number of job-seekers referred to the service through Centrelink.<sup>67</sup> It is unclear whether the terms of the contract included this promise as it is a private document between the provider and DEETYA.

As we have seen, if the service provider wishes to challenge the actions of DEETYA in this matter, it will most probably have to do so by suing under the private law of contract. The logic of the public/private distinction in law would dictate that such contractual matters are beyond the ambit of public law.

So the current arrangements in employment services seem to propel both service providers and service recipients to private law if they wish to challenge the exercise of public power by private means.

#### **4. Should private providers of public services be subject to public law?**

It seems odd that, in theory at least, a job-seeker who is unhappy with the service given him/her by Employment National has direct recourse to the Ombudsman, while a job-seeker complaining about the same service given by a privately-owned provider does not. If competition is to ensure efficient service-provision, it must do so in an environment where all the competitors are competing equally: subject to the same advantages and disadvantages.<sup>68</sup> A competition in which the competitors do not start on an equal footing is no competition.

The question that must be answered when setting up such a public market is: should all providers be subject to public law accountability mechanisms or should none be subject to them?

The report of the Senate References Committee on Finance and Public Administration on Contracting Out has suggested that, at least, providers in a contested market for services previously supplied by the government ought to be subjected to Ombudsman review and freedom of information requirements. It was felt that the presence of the Ombudsman would provide a useful source of legitimacy for decisions: unlike an internal complaints process, the Ombudsman provides a review that is independent in both appearance and substance. Freedom of information would allow clients to get enough information about a provider's contract with the government to assess whether that contract had been breached. In other words, it would help them to decide if it is worth suing or not. Providers would also be more careful in reaching decisions if they knew their decision-making process could be subject to such scrutiny.

My practical experience has been in observing the role the Ombudsman plays in the complaint process. It is my opinion that this element of public law, at least, should be available to clients of privately-owned providers of public services. For reasons that will become clear, this form of review is especially necessary in a contested market for the provision of services to vulnerable members of the community. As Centrelink moves towards a contested market for such services, it is imperative that this issue be addressed now.

Managerialists frequently object that external review of service provision is a source of inefficiency.<sup>69</sup> This strikes me as a particularly inappropriate argument when it is applied to

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<sup>67</sup> *Australian Financial Review*, (30/10/1998) at 34, *Australian Financial Review* (27/10/1998) at 5, *The Australian* (27/10/1998) at 5.

<sup>68</sup> See *Hilmer Report* Chs. 6 and 13; *Op cit.*

<sup>69</sup> See, for instance, *the Hilmer Report* (see note 2), and Cole, *The conflict between Accountability and*

the provision of welfare services. If efficiency is measured in terms of providing a public service to those people eligible to receive it, then I would argue that the Ombudsman is an aid to efficiency, not a source of inefficiency.

The above argument assumes, of course, that efficiency means the same thing in all contexts. Experience suggests that this may not be so. Figures released through DEETYA when it was administering the scheme stressed the success of Job Network in placing people in employment.<sup>70</sup> It was assumed that this measure of performance is an unproblematic indication as to how efficiently Job Network is functioning. As the Treasurer pointed out when first launching the program,<sup>71</sup> the emphasis in the new employment market is in getting people into work. The objectives of the previous system of case management, which measured its efficiency not only in terms of getting people into work, but also by placing them in appropriate training programs, were obviously different.<sup>72</sup>

Measuring efficiency in the welfare sector - for instance, in the payment of income support - is even more difficult than measuring efficiency in employment services. During the latest federal election campaign, the coalition government made much of the performance of Centrelink in eliminating welfare fraud: saving taxpayers \$46 million dollars a week in payments that had been found to be unjustified.<sup>73</sup>

Such savings are, of course, important for the efficient functioning of government welfare programs. And it is easy to imagine competitors in a contested market being able to enforce such efficiencies. In the United States, for instance, such savings have been made in contested markets: when they lost their defence contracts to build the Stealth Bomber, Lockheed Martin turned their attention to providing all of Florida's state welfare services. The result has been a leaner provision of services with lower overheads, so ensuring a profit for the provider and a quality service for the customer. Or so Lockheed claims.<sup>74</sup>

What may not be so easily achieved by the market is ensuring that income-support services, for instance, go to those who are eligible to receive them. It would perhaps affront a managerialist to hear that the most efficient service provider in a welfare system was the one most effective at paying out the most benefits. It is hard to conceive of a contested market alone ensuring such efficiency.

Besides being an independent review body, the Ombudsman provides a way for service providers to find out if their services are reaching those eligible to receive them. For instance, the recent managerialist push for risk-management in welfare provision has seen an increased onus on welfare recipients to work out what benefits they are eligible for: it is their responsibility, not the agency's. As the Ombudsman recently observed,<sup>75</sup> this risk management approach coupled with increasingly complicated eligibility requirements means a vulnerable section of the community may not be receiving the support they need and are eligible for.

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*Efficiency* Op cit.

70 Such figures are regularly updated on the DEETYA web page, at <http://www.deetya.gov.au>.

71 See the Budget Speech, 1996.

72 On this qualitative difference between the priorities of the two systems, see Mitchell Dean, "Lecture 9A: Unemployment after the Welfare State," which is a lecture recently delivered to students at Macquarie University. Available on the internet at: <http://www.macq.edu.au>.

73 Figures discussed on ABC Radio National, "Background Briefing", 11/10/98.

74 Ibid.

75 Balancing the Risks - Own Motion Investigation into the role of agencies in providing adequate information to customers in a complex income support system." Report under s 35A Ombudsman Act; due for release, August, 1999.



To redress this inefficiency in service provision, the Ombudsman frequently assists individual clients to work out what benefits they are entitled to. The Ombudsman's annual reports are sadly always full of stories of non-English speaking, illiterate and developmentally disabled clients who have "fallen through the cracks" of the welfare system and are not receiving the benefits they are entitled to. The Ombudsman is one readily available means of ensuring such people receive adequate service.

There is a typical pattern to such cases. The eligible person either does not know he or she is entitled to benefits at all, or is unable to understand how and what to apply for. He or she may for instance, be illiterate, or unable to understand the Centrelink literature explaining eligibility for a benefit. If he or she complains to the Ombudsman about the difficulties, it is possible for the office to explain the eligibility criteria. The Ombudsman, through annual reports and daily discussions with service providers, can frequently alert the service providers to gaps and problems in their services.<sup>76</sup>

The Ombudsman's reporting of systemic problems like the one above may provide a salutary warning to service providers that their services should be better advertised or simplified. For instance, the New Zealand Ombudsman alerted that country's corporatised Telecom to the unfair and overly-complicated way in which it worded its standard customer service contracts. Acting on this advice, Telecom re-wrote the contracts.<sup>77</sup>

In New South Wales, where many state-provided community welfare services have been contracted out, it is a frequent observation that the "hard cases" are often not dealt with by privately-owned service providers.<sup>78</sup> People with severe mental, financial, and /or language problems are unlikely to be sought out as clients in a system predicated on payment for results, competition and economic efficiency.<sup>79</sup>

Arguments for a contested market for the provision of welfare services assume that such a market can be achieved in the first place. As Schoombe points out,<sup>80</sup> "real competition" may be something of a fiction in an environment where customers have little real choice - they usually do not choose to enter the market, and may be ill-equipped to act as rational consumers once they do.

Advocates of contested service provision also suggest that consumers in such markets have the ultimate means of holding providers of inadequate and maladministered services to account: they can "vote with their feet," and go to another service provider.<sup>81</sup> But does this self-help solution really solve anything? Unlike administrative review, which may fix the problem and ensure it does not recur, if a customer just leaves a service provider, the problem remains unaddressed: a land mine for the next hapless job-seeker. Problems in such a system, and the reasons for them, are unlikely to be rigorously examined.

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<sup>76</sup> Ibid, p 13.

<sup>77</sup> Taggart, "Corporatisation, Privatisation and Public Law," at 91. (see note 22)

<sup>78</sup> Anita Tang, "Contracting out in Community Services," in Linda Pearson (ed) *Administrative Law: Setting the Pace or Being Left Behind?* Sydney (1997) at 334.

<sup>79</sup> Ibid at 340.

<sup>80</sup> Hannes Schoombe, "Privatisation and Contracting Out - Where are we going?" in John McMillan (ed) *Administrative Law under the Coalition Government* (1997) Canberra.

<sup>81</sup> Something job-seekers are encouraged to do in the foreword to the *Employment Industry Code of Conduct*.

## **Conclusion: Does administrative law have a place in a managerialist system?**

As we have seen, external review need not be antithetical to efficiency. In some areas of service provision, it may in fact be a positive aid to the efficiency and effectiveness of a service. Unlike internal complaint handling mechanisms, external review has the advantage of being independent and impartial in both appearance and reality. It can legitimise decision-making in a way internal review never can. Through independent review, I would argue, service providers and their customers are at least to some extent assured that decisions are made rationally, openly and fairly.

Allars has suggested<sup>82</sup> that review processes themselves should be as efficient as possible. In economically hard times, it must be ensured that review processes do not become overly legalistic, formal and time-wasting exercises. Reporting and auditing the effectiveness (not just the economic efficiency) of review procedures is perhaps an area where managerialist techniques can be used to make review processes more efficient.

It is ultimately a matter for the elected parliament to decide how resources are distributed in our society. The argument of this paper has been that an efficiency-minded government should not lightly dismiss external review, for the review process is not necessarily antithetical to economic efficiency.

It is perhaps also time for the illogical separation between the public and private spheres in law and government to be questioned, if not set aside. In Australia, there has been a marked reluctance to apply public law to private decision makers. Such an approach is no longer justified when private bodies have taken on many of the functions of government.

Instead of looking at the source of power to decide if decision-makers should be accountable under public law or not, attention should be paid to the effect of their decision-making. If a privately owned service provider's actions affect citizens in the same way as the decisions of a government agency, there seems to be no sound reason for that decision to be immune from the same accountability measures. In other words, public law should apply to private service providers when they are providing a public service.

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<sup>82</sup> In *Managerialism and Administrative Law* Op cit.

# DOORS CLOSING, DOORS OPENING: LESSONS FOR THE ART

*Sue Tongue\**

Tribunals are encouraged to report on their methods so that best practice can be established.<sup>1</sup> There is little written on the mechanics of ending or establishing a tribunal<sup>2</sup> but the recent experience in closing the Immigration Review Tribunal (IRT) and establishing the Migration Review Tribunal (MRT) has some useful lessons for the proposed federal Administrative Review Tribunal (ART) which are worth recording. For the purposes of this paper I tried to separate issues surrounding closure and opening but they are inevitably intertwined. For example, information which is disseminated has to cover both subjects and the new organisation must have links with the old.

## Closure issues

A main issue faced when closing a tribunal is the challenge of keeping the core tribunal business going, that is, reviewing applications while members face perhaps losing their jobs and staff face significant organisational change. While such change is now commonplace and accepted in the public sector close attention must be paid to its planning and management.

The old adage that you can never overdo the provision of information was borne out in the IRT experience and has been noted in Canada.<sup>3</sup> Clients as well as members and staff of the old tribunal need information. Anyone who has been involved in national information dissemination campaigns will attest to the need to carefully plan a strategy maximising the use of available funds. Letters must be sent to review applicants explaining the change and information must be provided internally. At times of change rumours abound, particularly if jobs and status may be lost. After the legislation establishing the MRT was introduced there was a need to report any developments. Ideally, a regular newsletter and constant face to face internal and external meetings should occur. Planning for the new tribunal should be transparent. If information is dispersed as soon as it is available, a degree of trust may be developed.

The MRT head was appointed five months before start up to work solely on the establishment of the new body. Senior staff straddled both organisations and a trial of the proposed MRT case management system was run in the IRT. An Acting Principal Member took over the running and closure of the IRT. An ART head would need to work closely with the heads of existing tribunals to ensure a smooth transition to the new body.

The impact on the lives of members and staff of the old tribunal is significant. This is particularly so if there is to be no presence for the new tribunal in places where it existed previously. Even if the function is to continue and staff have an expectation of securing a position in the new organisation, there is uncertainty. Members lose office when a tribunal is

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1 "Best Practice in Administrative Justice" Canadian Council of Administrative Tribunals 10-12 October 1999.

2 Brian P. Goodman "The Winddown of a Tribunal" *Administrative Agency Practice* (1995) 1 *Administrative Agency Practice* 79-87; Justice Murray Kellam "The Victorian Civil and Administrative Tribunal – The First Days" (1998) 18 *AIAL Forum* 31-35.

3 Goodman *ibid.*

replaced by another. The Minister wrote to each IRT member detailing the arrangements. The provision of workforce re-entry programs is of assistance. Experienced human relations staff are invaluable.

The finalisation of cases before members of the old tribunal must be carefully managed. For example, the timing of limiting further hearings to enable the completion of writing decisions on matters already heard, must be monitored.

An organisation needs to mourn its passing. Many people have devoted many hours to assisting review applicants, conducting reviews, promulgating procedures and contributing to organisational life. A history, which celebrates the highlights of the organisation, would be useful.

## Opening issues

In establishing any new organisation certain key issues must be addressed. Early planning and consultation are essential. The following ten key issues emerged in establishing the MRT.

A most important step is to put someone in charge of the set up as soon as possible who has a stake in the consequences. While many aspects of tribunal management are similar to the management of other bodies, particularly other statutory authorities, there are specific skills required. An independent mind and spirit is obviously essential but it must be tempered with an understanding of the realities of government. The place of tribunals in relation to government, courts, applicants' advisers and review applicants is unique. Obviously an awareness of the difficulties some face in gaining access to justice is desirable. An ART head will have an interesting role in relation to several departments, which have been involved in developing the tribunal proposal.

The information technology to be applied by a new tribunal is fundamental to its efficient operation. It not only facilitates case management, reporting on case flows and encouraging productivity but also enables sound knowledge management which is of increasing importance in any organisation. The introduction of new computer hardware and software into the IRT had been delayed pending the introduction of the MRT so it was necessary to do a complete upgrade at the same time as ensuring year 2K compliance. If the divisions of an ART are to link, produce comparable data and share resources such as filing systems and library catalogues a first step is to link computer systems. Adequate and appropriate links to departments, which take account of outsourcing arrangements, must also be established.

The MRT needed a strong emphasis on information support for members and staff with up-to-date relevant information on desktops. All key databases available including LEGEND (the Department's compilation of legislation and policy) were required. It was decided to establish an intranet to capture all information and make it readily accessible to all members and staff. MARTIE, as it is known, allows the tribunal's statistics, procedures, corporate documents to be readily accessible. Importantly, it also has an "expert system" on which are entered all Federal Court decisions and remittals, related articles and guidance on certain aspects of regulations. The system can be quickly word searched. Also linked to MARTIE are the library catalogue system, HORIZON, and the TRIM record of administrative files.

Such knowledge management is not just about toys for the computer buffs. It is an integral part of achieving quality decisions that are consistent across the country. Migration law changes rapidly through regulation changes, Federal Court decisions and policy changes.

Information about current law has to be harnessed and quickly disseminated. Often in a tribunal information of wider relevance can be lost onto an individual case file or into a member's mind when it would be invaluable to the rest of the organisation. The MRT does not have the advantage of counsel appearing before it to present the law or argue approaches.

It often has a departmental file and an unrepresented review applicant and must find all relevant law for itself. It was a selection criterion for appointment to the MRT that members have the capacity to use information technology.

The selection of the best available members is a key to a good tribunal. There were several hundred applications to the MRT for a limited number of positions. Shortlisting, interviewing and referee checking must be carefully done. Ideally, psychological testing, which is being considered in law firms<sup>4</sup>, would occur. It is fairer to both the job applicant and the organisation if material detailing the nature of the work and the expectations of members is provided. The proposed MRT performance agreement for members and code of conduct were distributed to applicants for MRT member positions. Similarly applicants for staff positions also received information.

The fourth issue is training of members and staff. There are general areas of training for tribunal work such as conducting hearings, weighing evidence, using interpreters and writing reasons for decisions. Specific training is needed in legislation and procedures and the context in which the tribunal works. Ideally, training would occur before the doors of a new tribunal open. In Canada, the Council of Administrative Tribunals organises general training for federal and provincial tribunals which has proved very successful. Here the Australian Institute of Judicial Administration and the Administrative Review Council have organised some useful training days but a more structured approach is needed. It would be very useful to have a body to organise training for federal and state tribunals, drawing on the skills of academics, practitioners and tribunal members. There would also be advantage in some aspects of the training being offered to primary decision-makers.

Information dissemination is critical if a new organisation is to begin and sustain smooth operations. New forms and brochures must be devised and disseminated together with community information. Key stakeholders must be kept informed through seminars and meetings. While the internet is a useful tool it doesn't reach the "information poor" who include many applicants to tribunals. Helpful, knowledgeable counter and switchboard staff are invaluable. A 1300 number operating for extended hours and answered by a live person has proved useful in the MRT.

A sixth step is to develop and consult on draft procedures before testing and disseminating them. The MRT had to implement several new procedures including providing an applicant an opportunity to comment on adverse information (Migration Act section 359A) and handing down of decisions (section 368B). A new case management system was also introduced which involves case officers undertaking a first examination of the file, drawing together the facts of the case, the relevant law, key issues, information that may lead to the decision going against the review applicant and recommending action to progress the case. The case then goes to the member to decide on further action and ultimately make the decision. Staff are involved in such a way in other jurisdictions such as Canada<sup>5</sup> and it allows for more efficient, economical and consistent case processing. Early signs in the MRT are that the model works well.

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<sup>4</sup> Rebekah Dooley "Psychological Testing in the Selection Process" *Australian Legal Practice* October 1999,2.

<sup>5</sup> Pierre Gosselin "Best Practises in Administrative Tribunals" note 1,11.

Adjusting accommodation to meet the needs of a new organisation takes planning, consultation and time. The MRT needed to refit offices in Canberra, Sydney and Melbourne to cater for additional staff and members. There was a 50% increase in staff with the increase in the number of applications for external review due to the absorption of the internal review function (formerly performed by the Department). Five staff from the Migration Internal Review Office (MIRO) in the Department of Immigration and Multicultural Affairs (DIMA) office in Melbourne joined the tribunal.

The transfer of cases from the old tribunal to the new must be handled speedily and accurately. Review applicants calling for information on their case need answers from the first day of operation of the new tribunal. The MRT received 2427 cases from MIRO and 2314 from the IRT. Between June and August, the first three months of the new tribunal, 1431 applications were received.

Arrangements with the departments from which cases are appealed must be put in place. Overseas posts in DIMA needed early information about the new arrangements. MIRO had previously provided a filter in most cases coming before the IRT which meant that the departmental files were gathered and the departmental position on a case was generally well presented. In addition the MIRO offices provided a contact point for the tribunal which was lost. The latter issue is an example of the “consequential” which flow from the abolition of a body and need to be thought through.

The final step, and one of the most important, is to ensure that normal public sector operations continue while a myriad of additional administrative tasks are undertaken. Above all, staff must be considered and valued as important members of the team. Their certified agreement and other arrangements must be addressed in an open and consultative manner. Appropriate financial systems must also be put in place in accordance with legislative and other requirements. The MRT operated for a month before coming under the Financial Management Accountability Act arrangements. Other agencies in the public and private sector must be advised of the changes.

## Conclusion

As I have explained, the establishment of the MRT was not simply a “rebadging” of the IRT. Similarly if an ART is established it will not be simply the AAT “taking over” the “other” tribunals. It is an opportunity to adopt best practice in tribunal decision making and management. It will be important to value the work of all tribunals and plan their amalgamation carefully. It would be in everyone’s interests if the departments whose decisions will be reviewed approach the new tribunal in a spirit of cooperation, recognising the contribution a good tribunal can make to improving primary decision making and policy formulation.

The external life of a tribunal reflects its internal life. If the principles of openness, accountability, natural justice and respect are applied routinely in a tribunal’s internal dealings it is easier to translate them into service to the public. “A well tempered tribunal is one where there is relative consistency in organizational ethic, and one in which all members are generally committed to that ethic”.<sup>6</sup> When a new tribunal is established this ethic needs to be clearly defined and enunciated from the very start.

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<sup>6</sup> Roderick Macdonald “Global Law, Local Practices or Local Law, Global Practices” note 1,14.