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Australian Institute of Administrative Law
PO Box 3149
BMDC ACT 2617
Ph: (02) 6251 6060
Fax: (02) 6251 6324
http://law.anu.edu.au/aial

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DEVELOPMENTS IN ADMINISTRATIVE LAW

Ron Fraser*

Government initiatives, inquiries, legislative and parliamentary developments

Election called

On Sunday 29 August 2004 the Prime Minister, Mr Howard, called an election for the House of Representatives and half the Senate to be held on 9 October 2004. In an unusual twist, Parliament was prorogued and the House of Representatives dissolved by the Governor–General, from 4:59 pm and 5 pm respectively on Tuesday 31 August 2004, and the sittings of the House scheduled for 30 and 31 August were cancelled. The Senate met only on Monday 30 August, and among other things established a select committee to inquire into matters arising from public statements by Mr Mike Scrafton about conversations he had with the Prime Minister about the 'children overboard' affair on 7 November 2001. The committee immediately took evidence from Mr Scrafton and some other witnesses and is to report by 24 November 2004. Cabinet met in the two days before Parliament was prorogued, and made a number of spending decisions announced later during the election campaign. The Government moved into caretaker mode immediately after the proroguing of Parliament: a document *Guidance on Caretaker Conventions* is available from:
http://www.pmc.gov.au/docs/caretaker.cfm

HREOC report on children in immigration detention

In April 2004, the Human Rights and Equal Opportunity Commission (HREOC) reported on the national inquiry it conducted into children in immigration detention. The report, entitled *A last resort?*, was tabled in Parliament on 13 May 2004. The inquiry was commenced in November 2001, and covered the period 1999–2002, although more up to date information is included in the report where possible. HREOC consulted with all relevant parties, received 410 submissions and held 68 public hearings and 17 confidential sessions which heard a total of 155 witnesses. It obtained access to primary documents relating to management of detention centres and concerning particular children and families.

HREOC made three major findings and a large number of detailed findings concerning the treatment of children in detention centres. Its principal finding is that Australia's immigration detention laws and their administration in relation to 'unauthorised arrival children' 'create a detention system that is fundamentally inconsistent with the *Convention on the Rights of the Child*' (CRC). In particular, it found among other things that the system failed to ensure that: detention of children was a measure of last resort, for the shortest appropriate period of time and subject to effective independent review; the best interests of the child are the primary consideration in all actions concerning children in the system; and children are treated with humanity and respect for their inherent dignity. Another major finding was that children in immigration detention for long periods of time are at high risk of serious mental harm. The

* *Information Access Consultant, Canberra; former Principal Legal Officer, Information Access, Commonwealth Attorney–General's Department.*

report made specific recommendations to rectify these abuses of human rights, including releasing all children currently in detention centres and residential housing projects, together with their parents, as soon as possible, but no later than four weeks after tabling. It also recommended the urgent amendment of Australia's immigration detention laws to comply with the CRC, including a presumption against the detention of children for immigration purposes. The Government rejected the major findings and recommendations contained in the report, together with the view that the immigration system was inconsistent with the UN CRC. It claimed that the conduct of the inquiry did not accord procedural fairness to the Department of Immigration and Multicultural and Indigenous Affairs or the detention services, and that the report was unbalanced and backward looking. The Treasurer, Mr Costello, has indicated that in his view the aim of policy should be to achieve a situation where there are no children in detention. (***A last resort? National Inquiry into Children in Immigration Detention***, HREOC, April 2004, available from HREOC's website, www.hreoc.gov.au/ ; **'HREOC Inquiry into Children in Immigration [Detention] Report Tabled', Joint media release of Minister for Immigration and Multicultural and Indigenous Affairs and the Attorney–General (VPS 68/2004)**, 13 May 2004, available from: http://www.minister.immi.gov.au/media_releases/media04/index04.htm)

Commonwealth legislative developments

Government legislative program Spring 2004

Among the new bills proposed by the Government for the Spring Sittings 2004 before the announcement of the calling of the federal election for 9 October 2004, were the following. Bills actually introduced before the dissolution of Parliament have lapsed. (The comments on Bills are drawn from the Government release, or from Parliamentary Bills lists where already introduced; the former list is available from:
www.pmc.gov.au/docs/parlinfo.cfm#legislation)

- *Jurisdiction of Courts (Judicial Review and Other Amendments) Bill 2004*, to implement the outcomes of the review of migration litigation [see (2004) 40 *AIAL Forum* at 5; its report has not been made public], in particular to: direct migration cases to the Federal Magistrates Court for quicker handling; reform court processes to reduce delays; and deter the bringing of unmeritorious migration cases. (See also below, 'Other legislative developments', for an earlier bill arising out of the Migration Litigation Review.) Additional resources will be injected into the Federal Magistrates Court, and the appointment of eight new Federal Magistrates was announced by the Attorney–General on 24 June 2004. The High Court will be able to remit migration cases directly to the Federal Magistrates Court 'on the papers'. The Government also intends to amend the High Court's fee waiver provision so that those people whose fees are waived on the ground of financial hardship will be required to pay one-third of the fees to discourage unmeritorious litigation. Courts may be given discretion to make personal costs orders against lawyers filing 'unmeritorious' migration cases. See Joint Media Release by the Immigration Minister and the Attorney–General, 11 May 2004, and Attorney–General's Media Releases, 6 May and 24 June 2004; also media release by Shadow Attorney–General, 6 May 2004.

- *Migration Amendment (Migration Zone) Bill*, to simplify the definition of 'migration zone' and clarify detention powers to remove persons to a place outside Australia, and *Migration Amendment (Border Protection and Visa Compliance) Bill*, to 'implement measures which will provide for further border protection and assist in combating people smuggling'.

- *Archives Amendment Bill*, to update the *Archives Act 1983* in accordance with current practice and assist the National Archives of Australia to promote good record-keeping across the Commonwealth.

- *Australian Communications and Media Authority Bill* and a companion transitional and consequential amendments Bill, to establish a new broadcasting and communications regulator as a result of the merger of the Australian Communications Authority and the Australian Broadcasting Authority, and provide for transitional arrangements arising from the merger. The new body will regulate telecommunications, broadcasting, radio-communications and online content, and is intended to be established by 1 July 2005.

- *Postal Industry Ombudsman Bill 2004*: see below under heading 'Ombudsman'.

- *Defence Legislation Amendment Bill*, to create the statutory appointments of Director of Military Prosecutions and Registrar of Military Justice; amend Defence legislation in relation to Defence Force discipline arrangements, including the convening and administration of courts martial and Defence Force magistrates trials; and other matters.

Other legislative developments

- The *Administrative Appeals Tribunal Amendment Bill 2004* was introduced into the Parliament on 12 August 2004, and the second reading was adjourned to a later date. See below under heading 'Administrative review' for a brief summary of the Bill.

- The Government introduced the *National Security Information (Criminal Proceedings) Bill 2004*, together with a consequential amendments Bill, on 27 May 2004, and debate was adjourned to a later date. The Bill's intention is to provide a procedure for federal criminal proceedings which will 'facilitate the prosecution of an offence without prejudicing national security and the rights of the defendant to a fair trial'. The principal mechanisms in the Bill for achieving these ends are: a requirement to notify the Attorney–General concerning the expected introduction of any information related to or affecting national security; a discretion for the Attorney to issue a certificate preventing the disclosure of such information or allowing it only in a summarised or edited form; providing for a certificate preventing the calling of a specified witness; empowering a court either to accept the certificate in relation to admissible evidence or to order disclosure of the information, subject to appeal in either case; provision for closed proceedings, from which the defendant and his legal representatives may be excluded; a prohibition on the legal representative of an accused receiving security related information without a security clearance by the Attorney–General's Department. Several new offences are created by the Bill. The Bill covers not only criminal proceedings but also certain applications under the *Extradition Act 1988* or for judicial review under s 39B of the *Judiciary Act 1903*. The Attorney–General, Mr Ruddock, has commented that the principal Bill was 'consistent with a number of the [Australian Law Reform Commission's] recommendations' in the report referred to below (see 'Freedom of Information, etc.'). The Senate Legal and Constitutional Legislation Committee, reporting on 19 August 2004, has recommended a number of significant amendments to the Bill, many of which are designed to give the courts greater discretion in relation to the exclusion or otherwise of evidence, the holding of closed hearings and ensuring that the defendant receives a fair trial. See:
  http://www.aph.gov.au/senate/committee/legcon_ctte/index.htm

  See also *Bills Digests*, Nos 25 and 26 2004–05, Information and Research Services, Parliamentary Library, 9 August 2004, available from:
  http://www.aph.gov.au/library/pubs/bd/index.htm

- The *Age Discrimination Act 2004* and a consequential amendments Act (see (2004) 41 *AIAL Forum* at 2 for the Bill) were passed by the Senate on 29 March 2004 and assented to on 22 June 2004. Such legislation had been recommended by HREOC and the House of Representatives Standing Committee on Employment, Education and Work Place Relations. In another development, a *Disability Discrimination (Education Standards) Bill 2004* was introduced into the House of Representatives on 12 August 2004 to support draft Disability Standards which will be formulated and tabled following passage of the Bill. The draft standards are available online from: http://www.ag.gov.au/DSFE

- A Bill to amend the *Sex Discrimination Act 1984* to permit the provision of teaching scholarships to males 'in order to address the imbalance in the number of male and female teachers in schools', was defeated in the Senate on 25 June 2004, and was reintroduced into the House of Representatives on 11 August 2004 (*Sex Discrimination Amendment (Teaching Profession) Bill 2004*). The legislation has been the subject of criticism by the Sex Discrimination Commissioner, Pru Goward: HREOC Media Release, 12 May 2004, available from: www.hreoc.gov.au/media_releases. See report of Senate Legal and Constitutional Legislation Committee, May 2004, available from the Committee's website: http://www.aph.gov.au/senate/committee/legcon_ctee .

- The *Aboriginal and Torres Strait Islander Commission Amendment Bill 2004* which is designed to abolish the Aboriginal and Torres Strait Islander Commission (ATSIC)was referred by the Senate to the Select Committee on the Administration of Indigenous Affairs for report on 31 October 2004. In the meantime, the Government has transferred responsibility for ATSIC–ATSIS programs and services to mainstream agencies from 1 July 2004: the programs are continuing. (See also Angela Pratt and Scott Bennett, 'The End of ATSIC and the future administration of Indigenous affairs', Current Issues Brief, No. 4 2004-05, Parliamentary Library, 9 August 2004.)

- The *Military Rehabilitation and Compensation Act 2004* (MRC Act) and its companion consequential amendments Act, after considerable amendment, finally passed through Parliament on 1 April 2004 and were assented to on 27 April 2004 (see (2004) 41 *AIAL Forum* at 9 concerning the review provisions). The Government accepted a recommendation concerning the review structure from the Senate Foreign Affairs, Defence and Trade Legislation Committee with the effect that all Australian Defence Force (ADF) members, regardless of the nature of their service, will 'have the option of applying to the Veterans' Review Board for review of decisions affecting them'. (Report of Senate Foreign Affairs, Defence and Trade Legislation Committee on the above Bills, March 2004, available via the Senate Committee's website: www.aph.gov.au/senate/committee/fadt_ctte/index.htm

  See also *Parliamentary Debates*, House of Representatives, 31 March 2004, p 27, 668; Dr Neil Johnston, 'Legislation for the Military Rehabilitation and Compensation Scheme', below p 19)

- See below under heading 'FOI, privacy etc' for the *Privacy Amendment Act 2004*, and recent amendments to the *Freedom of Information Act 1982*.

- *Migration Legislation*: The following are among the legislative developments in this area, in addition to those mentioned above:

  - The *Migration Amendment (Duration of Detention) Bill 2004* (see (2004) 41 *AIAL Forum* at 3) was defeated in the Senate on 8 March 2004.

- The first stage of the Government's response to the report of the migration litigation review is contained in the *Migration Amendment (Judicial Review) Bill 2004* (and see above for the proposed second stage). The Bill seeks to respond to the High Court's decision in *S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 by redefining the term 'privative clause decision' in section 5(1) of the *Migration Act 1958* (but not in section 474, the privative clause provision) to include a 'purported decision'. As stated in the Explanatory Memorandum to the Bill: 'It is intended that by redefining 'privative clause decision' in this way, those provisions in Part 8 that relate to time limits on judicial review applications, and the courts' jurisdiction in migration matters, will apply to all migration decisions, even those that are arguably affected by jurisdictional error'. The time limits are 28 days and an additional 56 days where it is in the interests of the administration of justice; in the case of the High Court, time runs from a deemed date of notice of a decision. On the question of the jurisdiction of courts, the result is that the Federal Court and the Federal Magistrates Court only have jurisdiction in relation to 'privative clause decisions' in the expanded sense that have been the subject of a merits review decision by the Migration Review Tribunal or the Refugee Review Tribunal. The Bill includes a consequential amendment to the *Administrative Decisions (Judicial Review) Act 1977*. (*Senate Legal and Constitutional Legislation Standing Committee*, report, June 2004; *Bills Digest*, No. 118 2003–04, 6 April 2004, Parliamentary Library, Information and Research Services.)

- The *Migration Legislation Amendment (Migration Agents Integrity Measures) Act 2004*, after acceptance by the House of Representatives on 24 March 2004 of a substantial number of Senate amendments, was assented to on 21 April 2004. (See reference in (2004) 41 *AIAL Forum* at 3.)

Report of select committee on ministerial discretion in migration matters

The report of the Senate Select Committee into the above matter was unable to reach any conclusion on allegations about impropriety in the exercise of the statutory discretions under sections 351 and 417 of the Commonwealth *Migration Act 1958* by the former Immigration Minister, Mr Ruddock, because, it claimed, it had been met with resistance from the Department and the present Minister, Senator Vanstone, in its attempt to collect detailed case file information. Nonetheless, the report contains interesting discussion of the history and practice of these wide ministerial discretions, and makes a number of recommendations which it believes would improve the transparency and accountability of the exercise of the discretion, and ultimately make the discretion a genuine last resort to deal with cases that are 'truly exceptional or unforeseeable'. It also recommends that the Government consider 'a system of complementary protection to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its non-refoulement obligations' under international conventions to which Australia is a signatory. (***Report of the Senate Select Committee on Ministerial Discretion in Migration Matters***, March 2004; see also: ***Ministerial Discretion in Migration Matters: Contemporary Policy Issues*****, Australian Parliamentary Library, Current Issues Brief No. 3, 2003–04**, 15 September 2003)

Report of consultative group on resolving Parliamentary deadlocks

The report of the Prime Minister's Consultative Group on Constitutional Change on the question of resolving deadlocks between the two houses of the Parliament under section 57 of the Constitution was presented to the Prime Minister in March 2004 and tabled in the House of Representatives on 1 June 2004. The group sought the views of the public by way of public meetings, written submissions (of which it received 293) and private discussions. It reported that in its view the issues raised in a discussion paper (see (2004) 40 *AIAL Forum* at 6 for further details) were of public importance, but that the proposals in that paper, while

meriting serious debate in future considerations of these issues, would not be carried in the event of a referendum. In view of the group's report, the Government did not propose to hold a referendum on this issue at the next election, and the Prime Minister announced that he had commenced discussions with the Leader of the Opposition about implementation of a program of education and consultation in relation to section 57 and constitutional issues more generally. (***Parliamentary Debates*, House of Representatives**, 1 June 2004, at pp 29,656–29,661; ***Resolving Deadlocks: The Public Response*, Report of the Consultative Group on Constitutional Change**, March 2004, available from website: www.pmc.gov.au/docs/constitutionalchange.cfm)

NSW legislation review committee's report on its operations & future directions

The New South Wales Parliament's Legislation Review Committee has reported on its operations since its establishment in September 2003 to undertake the scrutiny of bills coming before the Parliament as well as regulations subject to disallowance. It makes some detailed suggestions as to how it may perform its tasks better in the future, including the appointment of a sub-committee to consider regulations. (**Parliament of New South Wales, Legislation Committee, Report No. 1, *Operations, Issues and Future Directions, September 2003 – June 2004***, 24 June 2004)

The courts

All decisions discussed below may be accessed on the Australian Legal Information Institute website: http://www.austlii.edu.au

Non-state actors and persecution under the Refugees Convention – differing theories

Respondents S152/2003 raised issues relating to determination of refugee status where an asylum seeker claims to have a well-founded fear of persecution for reasons referred to in the Refugees Convention (the Convention) on the basis, not of the actions or complicity of a state or its agents (see *Kharwar* (2002)), but of the conduct of non-state actors. An asylum seeker (the applicant) was a Jehovah's Witness from the Ukraine who had been seriously attacked on three occasions when engaged in distributing publications and other forms of proselytising. On review of a refusal to grant him a protection visa, the Refugee Review Tribunal (RRT) rejected the claim that the Ukraine government had encouraged persecution of Jehovah's Witnesses or had been unable or unwilling to protect its citizens, and found that the attacks on the applicant because of his religious beliefs must be seen as 'individual and random incidents of harm' not amounting to persecution under the Refugees Convention.

The High Court (Gleeson CJ, Hayne and Heydon JJ in a joint judgment, McHugh and Kirby JJ) decided unanimously to allow an appeal against a decision of the Full Court of the Federal Court that the RRT had been in error in failing to consider 'the State's ability, in a practical sense, to provide protection' against the actions of non–state actors. However, there were significant differences between the judges' reasons for decision which, it is thought, could produce significantly different results in some circumstances. The authors of the joint judgment, and Kirby J in a separate judgment, essentially allowed the appeal on the basis that the RRT had in fact dealt with the matter and that its findings were open to it on the evidence. The joint judgment accepted that the question of the willingness or ability of the state to discharge its protection obligations to its citizens is relevant to determining whether conduct giving rise to a fear is persecution, whether such a fear is well-founded and whether an asylum seeker has justified being unable or unwilling to seek the home state's

protection. In the words of the joint judgment, a state is obliged to 'take reasonable measures to protect the lives and safety of its citizens' including an appropriate criminal law.

Justice McHugh, however, rejected the 'protection' theory that in the case of non-state actors it was necessary for an asylum seeker to show both persecutory acts by such persons and that the state has breached its duty to protect the applicant, as was held in a 2001 decision of the House of Lords. On the appropriate test of whether there was a real chance of persecution, the issue did not arise in this case on the evidence. Justice Kirby acknowledged the power of McHugh J's arguments against the 'protection' theory, while referring to contrary indications in its favour; as the outcome did not depend on the approach taken he applied the protection theory he had previously accepted as applicable in such cases. (***MIMIA v Respondents S152/2003*** **(2004) 205 ALR 487**, 21 April 2004; see also the application of *S152/2003* in, eg, ***Applicant A99 of 2003 v MIMIA*** **[2004] FCA 773**, 9 July 2004 and ***SVFB v MIMIA*** **[2004] FCA 822**, 25 June 2004)

Identification of 'a particular social group' under Article 1A(2) of the Refugees Convention

The appeal to the High Court in *Applicant S v MIMIA* raised the question whether it would have been open to the RRT to find that young, able-bodied male Afghans (or some variation on that description) were members of 'a particular social group' for the purposes of the definition of a refugee in the Refugees Convention. The appellant claimed refugee status on the ground of a well-founded fear of persecution in the form of random forcible recruitment to their armed forces by the Taliban of young able-bodied male Afghans. A majority of a Full Court of the Federal Court, on the basis of an earlier decision of that court, dismissed his appeal against a decision of the RRT upholding the refusal of a protection visa. In a five-member judgment, the High Court disapproved the decision of the Full Court that, in order for there to be persecution for reasons of 'membership of a particular social group', it is necessary that there be a *recognition* or *perception* within the relevant society that a collection of individuals is set apart from the rest of the community. All judges considered that to be a misreading of remarks of McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997). Whether or not individuals were members of a particular social group is rather an objective question whether a group is distinguished or set apart from society at large, on the basis of a common characteristic or attribute other than fear of persecution; perceptions held by the community may amount to evidence that a social group is a cognisable group within the community, but is not necessary to reaching that conclusion (joint judgment of Gleeson CJ, Gummow and Kirby JJ). The RRT had not considered the correct issue. Justice McHugh took a similar approach.

Justice Callinan agreed that the RRT and Full Court had been in error on the question of 'a particular social group', but would have dismissed the appeal on the ground that liability to conscription by the Taliban did not constitute persecution. The authors of the joint judgment, McHugh J taking a similar view, did not consider that the actions of the Taliban in relation to conscription amounted to a law of general application, being ad hoc and random, and for the same reason its conduct could not be considered appropriate and proportionate to a legitimate national objective. The joint judgment noted that on remittal of the matter to the RRT, it would be necessary for the tribunal to take into account the changes to the situation in Afghanistan since it last considered the matter. (***Applicant S v MIMIA*** **(2004) 206 ALR 242**, 27 May 2004)

In *Applicant S v MIMIA* (above), the High Court recognised that, while the persecution feared could not be the sole characteristic common to 'a particular social group', circumstances could arise where discriminatory behaviour might be absorbed into the social consciousness of the community with the result that those discriminated against became 'a particular social group' for the purposes of the Convention. Justice Merkel applied this conclusion in a case

concerning claims for refugee status by the Chinese parents of a child born in contravention of the Chinese 'one-child' policy and on behalf of the third child of such a couple, remitting the matter to the RRT for decision in accordance with the law as stated by the court. (***VTAO, VTAP, VTAQ v MIMIA*** **[2004] FCA 927**, 19 July 2004)

Procedural fairness claim rejected – further report to RRT on mental state of asylum seeker not required

In a 4:1 decision (Kirby J dissenting), the High Court rejected a claim that the RRT had not acted with procedural fairness in refusing to seek a 'more independent and expert' assessment of the mental state of an asylum seeker (the respondent), over and above a report obtained by the RRT from a psychologist in the detention centre where he was held. There had been evidence of the respondent's distress and self-harm in the detention centre, as well as his distress during the RRT proceedings. The majority, in allowing the Immigration Minister's appeal from the Federal Court (Selway J, exercising the appellate jurisdiction of the court), considered that the RRT went to great lengths to accommodate the respondent and his concerns, dealing with inconsistencies in his evidence in a way highly favourable to him on the assumption that he may have been suffering from post-traumatic stress disorder which had affected his evidence. In the words of Gleeson CJ, the RRT 'was not then obliged to embark on an open-ended investigation of the respondent's psychological condition to see whether, in any way, it might have affected his ability to put his case to best advantage'. In addition, the majority held that the grounds actually given by the Federal Court did not constitute jurisdictional error. Justice Kirby considered that there had been a denial of procedural fairness by the RRT. Despite the RRT's attempts to be fair, the history of the respondent's self-harm and attempts to commit suicide, together with other considerations, 'suggested that the proper course for the Tribunal to take was to postpone the hearing and to obtain an independent, expert and medical report on his psychiatric condition'. Referring to *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, four judges (Gleeson CJ, Gummow and Hayne JJ, and Kirby J) rejected the Minister's alternative argument that, if the Federal Court's findings had been upheld they would have been caught by the privative clause in section 474 of the Migration Act,. (***MIMIA v SGLB*** **(2004) 207 ALR 12**, 17 June 2004; and see (2003) 36 *AIAL Forum* at 6–7 on *S157/2002*)

In the event the court in *SGLB* did not find it necessary to examine legal issues relating to Selway J's finding that the RRT had 'no evidence' for its finding concerning post-traumatic stress disorder or in relation to the respondent's fitness to take part in the proceedings. See *NAYQ v MIMIA* for a decision of Wilcox J on an invalid lack of probative evidence to sustain an RRT decision. (***NAYQ v MIMIA*** **[2004] FCA 365**, 31 March 2004; relying on the Full Court decision in ***SFGB v MIMIA*** **(2003) 77 ALD 402**, 24 October 2003)

Family Court lacks jurisdiction to order release of children from immigration detention

The High Court unanimously allowed an appeal from a decision of a Full Court of the Family Court which would have had the effect of requiring the Immigration Minister (the Minister) to release the respondent children in this matter from immigration detention. By a majority, the Full Court had held that the welfare jurisdiction of the Family Court in respect of children was not limited to disputes between parents concerning custody and access to children, and could enable it in appropriate cases to make orders against third parties, including ordering the Minister to release children from immigration detention. In broad terms the proceedings in the High Court raised the issue whether the Family Court had power to make orders with that legal effect.

All judges except Kirby J proceeded by examining the provisions of the Commonwealth *Family Law Act 1975* (FLA) to determine the extent of the jurisdiction of the Family Court in relation to the welfare of children (in particular under section 67ZC of the FLA, the so-called 'welfare jurisdiction' provision). All concluded on the basis of detailed analysis of the statutory provisions of the FLA that the 'welfare jurisdiction' in relation to children under that provision was not at large, being limited by the other provisions of Part VII of that Act to the relationships between parents and children. Justice Callinan added that amendments to the Family Law Act did not incorporate in that Act the provisions of the UN Convention on the Rights of the Child.

Justice Kirby disposed of the matter entirely on the ground that, however wide the general powers of the Family Court might be assumed to be, they could not override specific and valid provisions of the Migration Act which required that the children, as 'unlawful non-citizens', be kept in immigration detention until they obtained a visa enabling them to stay in Australia or were removed or deported from Australia. In view of the failure of Parliament to change the legislation despite many official reports concerning the impact of detention on children and possible breaches of Australia's international obligations, there was no scope for reading the provisions of the Migration Act to make them consistent with international law. Justice Kirby rejected any relevance of the *Al Masri* decision (see below) in this matter. The Full Court's conclusion that detention of the children was unlawful could not be sustained. (***MIMIA v B* (2004) 206 ALR 130**, 29 April 2004)

For later proceedings seeking interlocutory orders for the release of the children involved in *B*, see *B v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2004] FCA 699, 3 June 2004, in which Lander J, relying in part on Kirby J in the earlier decision, decided there was no serious issue to be tried. There was evidence that, if the mother of the children requested her removal from Australia with them, there was nothing to prevent that happening. Note that further challenges to detention of children are involved in the matter of *Re Woolley & anor; Ex parte Applicants M276/2003*, on which the High Court reserved judgment on 3 February 2004.)

High Court upholds constitutional validity of indeterminate power of detention in Migration Act where removal of detainee unlikely to be achieved – Al Masri decision overruled

In two cases removed from the Full Federal Court for decision by the High Court, a 4:3 majority of the High Court (McHugh, Hayne, Callinan and Heydon JJ; Gleeson CJ, Gummow and Kirby JJ dissenting) has determined that there is no scope in sections 196 and 198 of the *Migration Act 1958* (the Migration Act) for release of a detainee who has sought removal from Australia but for whom there is no real likelihood of such removal occurring in the reasonably foreseeable future, as had been decided in *Al Masri v MIMIA* (2002) 192 ALR 609, upheld on this issue by the Full Court in *MIMIA v Al Masri* (2003) 126 FCR 54. One of the appellants (Mr Al-Kateb) was a stateless person of Palestinian origin who had lived most of his life in Kuwait; the other (Mr Al–Khafaji), an Iraqi national who had fled to Syria with his family as a child and had grown up there. The latter had been found to satisfy the Convention definition of refugee, but ironically had been excluded from protection under section 36(3) of the Act on the ground that he had effective protection in Syria including a right to re-enter and reside there. The Federal Court had found that there was little prospect of the removal of either appellant.

For the majority, Justice Hayne, with whom McHugh and Heydon JJ agreed, considered that the statutory scheme of mandatory detention essentially provides for indeterminate detention which only ceases when the detainee is removed or deported from Australia or is granted a visa (section 196). The language of the provisions did not permit the construction adopted in

the *Al Masri* cases (above): 'the time for the performance of the duty [of removal in section 198] does not pass until it is reasonably practicable to remove the non-citizen in question'. Continued detention remains for the purpose of subsequent removal even if it is impossible at a particular time.

On the constitutional issues, Justice McHugh characterised the detention provisions as being at the centre of the aliens power, with the purpose of making an alien available for deportation or preventing him or her from entering Australia or the Australian community; as such the provisions were not punitive and did not infringe Chapter III. Justice Hayne defined the aliens power more widely than the joint judgment in *Chu Keng Lim v Minister for Immigration* (1992) 176 CLR 1, extending it not only to prevention of entry and removal from Australia, but also to 'segregation from the community by detention in the meantime'. Similar points were made by Callinan J, while Heydon J substantially agreed with Hayne J without giving separate reasons.

In dissent, Gleeson CJ was not prepared, in the absence of unambiguous language to that effect, to impute to the Parliament an intention to achieve indefinite and perhaps permanent administrative detention, unrelated to personal circumstances or danger to the community. Justice Gummow, with whom Kirby J agreed, held that, on the proper construction of the detention provisions against the background of the constitutional principles discussed in *Lim*, where a detainee's prospects of removal to another country are so remote that continued detention could not be for the purpose of removal, the detainee's further detention is not authorised. A construction of legislation that recognises a power to keep a person in custody for an unlimited time should be avoided where reasonably open. In the of view Kirby J, the conclusion reached by Gummow J was further supported by considerations of international law and common law presumptions in favour of personal liberty. The reasons for decision are remarkable for the overt clash of views on such issues between McHugh and Kirby JJ, revealing profound differences concerning constitutional interpretation. (***Al Kateb v Godwin* (2004) 208 ALR 124** (the leading decision) and ***MIMIA v Al-Khafaji* (2004) 208 ALR 201**, 6 August 2004; for the *Al Masri* line of cases see also: (2002) 35 *AIAL Forum* at 6, (2003) 36 *AIAL Forum* at 8–9, and (2003) 38 *AIAL Forum* at 7–8)

Conditions of detention not a defence to a charge of escaping from immigration detention

By a majority of 6:1 (Gleeson CJ, McHugh, Gummow and Heydon JJ (joint judgment), Hayne and Callinan JJ; Kirby J dissenting), the High Court has held that it would not be an answer to a charge under section 197A of the Migration Act of escaping from immigration detention for a defendant to demonstrate that the conditions of his or her detention had been inhumane and harsh. Accordingly, the court upheld the decision of the Full Court of the Supreme Court of South Australia to set aside as irrelevant to the issues to be tried witness summonses issued on the appellant's behalf seeking to obtain material relating to conditions in the Woomera detention centre. While other legal remedies are available in relation to the conditions of detention, immigration detention is not for a punitive purpose, and whatever the conditions of detention it cannot be denied that a person is in 'immigration detention' if the detention satisfies the statutory definition of that term; there is no ground for a different statutory construction. Justice Hayne considered that to apply a test of whether the conditions of detention were reasonably necessary to migration control purposes would logically lead to a conclusion that 's 189 of the [Migration] Act was invalid insofar as it provided for mandatory detention of *all* unlawful non-citizens'. (Note that the appellant had not argued for such invalidity.) For the reasons his Honour gave in *Al Kateb* (above), the mandatory detention provisions are valid laws of the Commonwealth. In addition, Justice Callinan considered the summonses to be oppressive in their width and imprecision.

Justice Kirby dissented strongly on the grounds, among others, that the matter ought not to be concluded without having the desirable evidentiary foundation in a primary court. Only a court could determine whether the actual forms of the administrative restraint provided for by Parliament exceeded its constitutional powers. To subject an alien to inhuman and intolerable conditions of detention was quite different to establishing administrative detention for the limited purposes envisaged by the Migration Act. Principles of international law are relevant to interpreting a statute where the language permits a construction consistent with international law. The availability of alternative remedies was unlikely to provide a detainee with a forum to determine the lawfulness of his detention in relation to his actual legal position. (***Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs & ors*** **(2004) 208 ALR 271**, 6 August 2004)

High Court decision on extent of the aliens power in relation to certain children

The High Court has delivered its decision in a case involving the question whether the aliens power in section 51(xix) if the Australian Constitution extends to a child born in Australia of parents who are not Australian citizens or permanent residents. The court decided by a majority of 5:2 (McHugh and Callinan JJ dissenting) that the power did extend to such a child, who was therefore subject to the detention and removal provisions of the Migration Act. The decision will be summarised in more detail in the next developments section. (***Singh v Commonwealth of Australia & anor*** **[2004] HCA 43**, 9 September 2004; see also (2004) 41 *AIAL Forum* at 6)

Suspension of ATSIC Chairperson invalid

Justice Gray in the Federal Court has quashed the suspension by the present Minister for Immigration and Multicultural and Indigenous Affairs, Senator Vanstone (the Minister) of Mr Geoff Clark, Chairperson of the Aboriginal and Torres Strait Islander Commission (ATSIC). The Minister gave notice to Mr Clark on 23 December 2003 to show cause why he should not be suspended from office on the ground of 'misbehaviour' as provided for under section 40 of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) (the ATSIC Act). Suspension under the ATSIC Act is a condition precedent to terminating a Commissioner's appointment. Mr Clark had been convicted in a Victorian magistrates court on 28 March 2003 of two offences, obstructing police and behaving in a riotous manner; the Victorian County Court allowed an appeal against the latter conviction. Mr Clark was fined $750 on the former conviction. The Minister considered that the conviction amounted to misbehaviour within the terms of a Determination made by the former Minister under s 4A of the ATSIC Act. The Determination specifies that conviction of an offence for which there is a penalty of imprisonment is misbehaviour, even if a conviction is not recorded. The Minister also relied on the 'general concept of misbehaviour'.

The court noted that indigenous people were over-represented in the criminal justice system particularly in relation to public order offences, many of which under State and Territory laws provided for sentences of imprisonment. It found as a fact that 'the standard of behaviour required by [the Determination] was higher than that set for any other comparable office' and exceeded the power in the ATSIC Act to specify misbehaviour. That power must be construed so as not to require a higher standard of behaviour, since otherwise the Act would be in breach of the International Convention on the Elimination of all Forms of Racial Discrimination, and by section 10(1) of the Commonwealth *Racial Discrimination Act 1975* would have to be read down to avoid discrimination on the ground of race. The Determination must be read down to apply only to conduct within the meaning of 'misbehaviour' in the ATSIC Act. The clause was not saved by the fact that the Determination is a disallowable instrument.

The court held that the Minister, in considering the application of the Determination and the general concept of misbehaviour, was required to consider the impact of Mr Clark's conduct and conviction on his capacity to hold the office of Commissioner before making a finding of misbehaviour. In the court's view, her reasons for decision showed she acted on the assumption that the conviction itself was enough to constitute misbehaviour. On the other hand, in order to issue a valid notice to show cause, it was only necessary for the Minister to form the view that suspension was a possible outcome. (***Clark v Honourable Amanda Vanstone*** **[2004] FCA 1105**, 27 August 2004)

Administrative review and tribunals

Amendments to AAT Act

Following an internal government review of the operation of the Administrative Appeals Tribunal (AAT), the Attorney–General provided an exposure draft bill in May, and on 12 August introduced the Administrative Appeals Tribunal Amendment Bill 2004 (the Bill) into the Parliament. The Attorney–General stated that the Bill is intended to enable the AAT to provide 'a more efficient review mechanism by better managing its workload'. It makes changes in the areas of AAT procedures, removes some restrictions on the constitution or reconstitution of the AAT, provides for a greater role for ordinary members, gives the Federal Court and the Federal Magistrates Court greater powers to make findings of fact on appeal from the AAT (as earlier recommended by the Administrative Review Council), and enables the appointment as President not only of a Judge of the Federal Court but also of a former Judge of that court or of a State or Territory Supreme Court or of a legal practitioner of five years standing. Future appointments of members will be for periods up to seven years, with no provision for tenurable appointments. The Bill sets out criteria for consideration by the President in determining the constitution of the AAT for a particular hearing, and permits multi-member panels of the AAT to be comprised entirely of ordinary members, in place of the present requirement for a Senior Member to preside.

In performing its functions the AAT is made subject to the objective of providing a mechanism of review that is 'fair, just, economical, informal and quick', reflecting the formula found in the legislation establishing other Commonwealth tribunals. The President is given a new power to give directions as to the 'conduct of reviews', which is not thought to extend to the manner in which a particular review is conducted. Members will be able to carry out many procedural functions that are currently limited to presidential and senior members, giving the increased numbers of member level appointees a greater role in the management and determination of applications. Greater emphasis is to be given to the use of alternative dispute resolution procedures in the determination of applications. The AAT will have greater power to limit the questions of fact, the evidence and the issues that it considers, to avoid the consideration of irrelevant issues. Applicants may be required to give further details of their claim that a decision is not the 'correct or preferable' one, while decision-makers must use their best endeavours to assist the AAT to make its decision. A reference to the Federal Court will now require the consent of the President. **(For a fuller statement concerning these matters, see Dennis Pearce in (2004) 226 Australian *Administrative Law Bulletin* at[6729])**

Breach of Hardiman principle by ABA

The Australian Broadcasting Authority (ABA) was found by the Federal Court (Sackville J) to have breached the principle laid down by the High Court in *The Queen v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13, namely that a tribunal or other similar body that becomes a protagonist in litigation challenging its decisions risks endangering its impartiality in subsequent proceedings that may follow. The court did not

believe the principle should be confined in the way suggested by the ABA, ie to quasi-judicial proceedings involving contraventions of legislation which are substantially adversarial in character. The court followed a Victorian decision that held that the High Court's reasoning applied equally to 'decision-makers before whom hearings which were in substance inter partes were conducted'. There is the same need for impartiality and its appearance, particularly in relation to potential subsequent proceedings if the matter is remitted for reconsideration. In the matter before the court another party had been present to act as a contradictor, and the ABA had gone beyond assisting the court in relation to the proper extent of its powers. It was justified, however, in defending allegations that it had taken the possibility of criticism of its allocation decision into account in making that decision. In the event the court awarded the ABA only 25% of its costs against the unsuccessful party. (***Community Television Sydney Limited v Australian Broadcasting Authority*** **[2004] FCA 614**, 14 May 2004)

Ombudsman

Postal Industry Ombudsman

The *Postal Industry Ombudsman Bill 2004* was introduced into the House of Representatives on 12 August 2004, to amend the Commonwealth *Ombudsman Act 1976* to establish the Postal Industry Ombudsman (PIO) as a separate office within the office of the Commonwealth Ombudsman. The Bill also provides for the scheme to be self-funding through recovery on a proportionate basis of the costs of the PIO from Australia Post and other postal industry operators who opt into the scheme. The PIO will take over the existing role of the Commonwealth Ombudsman of investigating postal complaints against Australia Post, of which the Ombudsman receives about 1,000 each year. In addition, the PIO will have jurisdiction to investigate complaints against private sector postal operators that register to participate in the scheme. The holder of the new office will have the normal powers of an ombudsman. The scheme is distinctive in conferring jurisdiction on a single ombudsman to investigate complaints in the public and private sectors. The Commonwealth Ombudsman, Professor John McMillan, has referred to the benefits for organisations of participating in professional complaint handling schemes. Once the scheme was established, he would work with the postal industry to establish in-house customer complaint handling procedures to provide prompt and helpful service to complainants and to allow the PIO to concentrate on more serious or intractable complaints. The scheme is expected to commence within six months of the enactment of the legislation. (**'New postal industry role for Commonwealth Ombudsman', Media Release**, 23 August 2004**)**

Brief issues relating to the Commonwealth Ombudsman

- The Commonwealth Ombudsman has introduced a secure online complaint form which may be accessed at the Ombudsman's website. Its use is optional: http://www.comb.gov.au/

- Among the Ombudsman's public reports for 2004 is a report on an own motion investigation into a review of the operational and corporate implications for the Australian Crime Commission arising from alleged criminal activity by two former secondees (June 2004). The Ombudsman was limited to reviewing the review conducted by independent consultants, which he concluded had been undertaken in a proper manner and had made appropriate recommendations. In addition, the Ombudsman recommended a performance review of managers to address a concern that prescribed policies and procedure had not been appropriately followed, and implementation of a system of professional reporting to protect staff so that they can make a confidential disclosure about colleagues. Other reports relate to the Tax Agents'

Board of New South Wales, relating principally to the desirability of the Board giving adequate explanations of its decisions, and a major report on changes of assessment by the Commonwealth Child Support Agency to a person's child support payment. The reports, and media releases, are available from the above website.

Freedom of information, privacy and other information issues

Australian Law Reform Commission (ALRC) report on protection of classified and security sensitive information

In May 2004 the ALRC presented its report on the protection of classified and security sensitive information (security information), especially, but not only, in the context of court or tribunal proceedings. The principal recommendation is for the enactment of a National Security Information Procedures Act that would apply only in relation to the protection of security information in proceedings in any Australian court of tribunal. The principal feature of the Act would be to require notification at the earliest possible stage to the relevant court or tribunal of the likelihood of the use of security information in such proceedings, and require the court or tribunal to hold a directions hearing and make further orders for the further conduct of the proceedings and the use of security information. The report includes detailed recommendations on principles and processes concerning the court's powers to determine how relevant information will be dealt with, and includes safeguards for defendants or other litigants where the court imposes limitations on disclosure of information. It makes provision for certificates to be given by the Attorney–General stipulating that security information is not to be disclosed to all or specified persons, and for a court to determine in the light of the certificate whether proceedings should be stayed, discontinued, dismissed or struck out in part or whole. Ministers would be required to table in Parliament a report on the issuing of such certificates (and other similar certificates under other legislation such as the FOI Act).

As in its Discussion Paper, the ALRC recommends comprehensive 'whistleblower' legislation, amendment of certain offences to enable injunctions to be obtained to prevent disclosure of information, together with comprehensive reviews of provisions giving rise to a duty not to disclose official information, including section 79 of the Commonwealth *Crimes Act 1914* and other secrecy provisions. The report provides advice on a broader range of issues than those dealt with in the National Security Information (Criminal Procedures) Bill 2004 (see above under 'Other legislative developments'), and proposes somewhat different processes. (See also comments by the ALRC President that the Bill's mechanisms are consistent with the framework of the report.) **(*Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC, Report 98**, May 2004; **ALRC Media Release,** 24 June 2004; **Commonwealth Attorney–General, Media Release No. 102/2004**, 23 June 2004; see also (2004) 41 *AIAL Forum* at 11)

ANAO report on administration of FOI requests

The Australian National Audit Office (ANAO) completed its audit of six agencies, including the Attorney–General's Department, to assess the appropriateness of their policies and processes for dealing with FOI requests, and their compliance with the provisions of the FOI Act in relation to selected FOI requests. The report was generally favourable concerning the agencies' policies and processes for dealing with FOI requests, and found that the Attorney–General's Department and the Australian Government Solicitor 'had effective mechanisms in place to provide practical information to FOI practitioners about significant issues that may impact on the FOI process'. (***Administration of Freedom of Information Requests*, ANAO Audit Report No. 57 2003–04, Business Support Process Audit**, 24 June 2004)

Amendments to FOI Act

The *Law and Justice Amendment Act 2004* assented to on 26 May 2004 made some minor changes to the *Freedom of Information Act 1982* (Cth) (FOI Act), the most important of which was to amend section 45(1) so that the exemption does not apply where an action for breach of confidence could only be taken by a Commonwealth agency or the Commonwealth, bringing it into line with the wording of section 45(2). The other amendments remove some redundant provisions and make a minor technical change to the definition of 'request' in section 4(1) of the FOI Act.

In addition, the AAT Amendment Bill (see above under 'Administrative review' heading) makes significant amendments to provide: (1) that an exempt document that is voluntarily produced to the AAT is subject to a confidentiality provision, contrary to the decision in *Day v Collector of Customs* (1995) 57 FCR 176; and (2) that the AAT may require the production of such a document under the provisions of section 64 after 28 days have elapsed from notice to the decision-maker of the application to the AAT, even if the AAT has not yet begun to hear argument or otherwise deal with the matter. Both these amendments will assist the production of exempt documents to the AAT and its proper consideration of exemption claims in relation to them.

Amendments to Privacy Act

The *Privacy Amendment Act 2004* (Cth) was assented to on 21 April 2004. Its primary aims include amending the *Privacy Act 1988* (Cth) to: ensure that protections under the Act are available to all persons irrespective of nationality; provide the private sector with greater flexibility in relation to privacy codes; allow the disclosure of government payroll numbers for superannuation purposes; and enable the Privacy Commissioner to audit acts and practices of Commonwealth agencies in relation to certain personal information where those acts and practices are prescribed by regulation.

Privacy action brought directly to Federal Court

In a recent decision, the Federal Court (Gyles J) heard an application by the Seven Network against the Media Entertainment and Arts Alliance (the union) and a polling firm for injunctive relief in relation to alleged breaches of the National Privacy Principles (NPPs) contained in the Commonwealth *Privacy Act 1988*. The case was the first in which a person or organisation has gone straight to the Federal Court rather than complaining first to the Privacy Commissioner. The union had obtained personal information from employees of Network Seven via a polling organisation which used an annotated copy of an internal phone book supplied by the union. As it was not clear how the union had obtained the copy of the phone book, the court did not uphold any breaches by it of the NPPs on that basis. However, the court found that there had been a breach of NPP 1.1 concerning collection of personal information by the union, but not by the polling company, as collection of the information over the phone was not necessary to the functions of the union, although it was necessary to the functions of the polling company. Neither the union nor the polling company had complied with NPPs 1.3 and 1.5 by providing information about such matters as the fact that the person was able to gain access to the information, the purposes for which it was collected, and so on. The court made injunctive orders under section 98 of the Privacy Act as well as awarding damages under copyright legislation. (***Seven Network (Operations) Limited v Media Entertainment and Arts Alliance*** **[2004] FCA 637**, 21 May 2004)

Brief privacy issues

- The Commonwealth Attorney–General announced on 16 August 2004 that the Privacy Commissioner, Ms Karen Curtis, has been asked to conduct a review of the private sector provisions inserted into the *Privacy Act 1988* in 2000. Such a review was promised by the former Attorney–General when the legislation was introduced. The Privacy Commissioner has announced that she will prepare and issue a discussion paper in October 2004. There will be a consultation period of two months with key stakeholders, including consumer and privacy advocacy groups, business representatives and members of the private health sector, and submissions will be received up until 31 March 2005. (See Privacy Commissioner, Media Release, 20 August 2004; Attorney–General's Media Release, 13 August 2004.)

- The federal Privacy Commissioner has introduced a new interactive site called ComplaintChecker that asks step by step questions about users' privacy problem, and will tell you at the end if you are entitled to make an official privacy complaint: www.privacy.gov.au/privacy_rights/ComplaintChecker/index.html

  The Commissioner's website also now includes multilingual web pages available in 11 languages.

- The federal Privacy Commissioner has published 28 de-identified Case Notes on complaints investigated by the Commissioner's office in the period 2002–04, together with five 2004 determinations under section 52 of the Privacy Act; see Privacy Commissioner Media Release, 19 April 2004; the determinations are available from: http://www.privacy.gov.au/publications/index.html

- The New South Wales *Health Records and Information Privacy Act 2002* commenced on 1 September 2004. It applies to all health service providers, and to any other public or private sector organisation that deals with any health information. At its August meeting, the Australian Health Ministers Advisory Council was to consider a draft National Health Privacy Code which has been the subject of public consultation.

Public administration

Legal training for primary decision makers

The Administrative Review Council (ARC) has recently published a 'curriculum guideline' aimed to assist those providing legal training to public sector primary decision makers. Preparation of the guideline was assisted by Professors Robin Creyke and John McMillan, both members of the ARC. It is not itself a training document, but is 'designed as a resource for people who are developing training programs, either at agency level or more widely across the Australian Public Service', allowing for agencies to develop training programs reflecting their specific decision-making environment. It is expected that the guidelines will be reviewed and revised from time to time, and comments and suggestions for change are welcome. (***Legal training for primary decision makers: A curriculum guideline*, ARC**, June 2004; the document may be obtained in hard copy from the ARC or from its website at: www.law.gov.au/arc)

Public Service Commissioner's thoughts on managing the interface of the APS with ministers and Parliament

In April 2004 the Commonwealth's Public Service Commissioner, Mr Andrew Podger, delivered an address to Senior Executive Service personnel on the above theme. It covers a

wide range of topics, including the role of the Australian Public Service (APS) Values in relation to contact with Ministers and their advisers, the need for responsiveness to government without losing sight of other APS values including being apolitical, the results of an agency and employee survey on relationships with government and Parliament in practice, and the Commissioner's views on such currently significant issues as record-keeping, leaking and whistleblowing, the system of ministerial advisers, relations with the media, 'frank and fearless' advice, and appointments and performance management of Secretaries and Agency Heads. In a much-quoted passage, the Commissioner remarked that he did not believe that 'the Children Overboard case was the Service's finest hour' and that he remained uncomfortable with 'the [subsequent] reluctance by officials to face up to the facts'. (**Andrew Podger, 'Managing the interface with ministers and the Parliament'**, 23 April 2004, available from the Commissioner's website: www.apsc.gov.au/about/pscommissioner.htm)

Brief public administration items

- On 5 August 2004 the Secretary of the Department of Prime Minister and Cabinet, Dr Peter Shergold, launched a Manual on *Public Service Governance* published by CCH and written by Stephen Bartos with the assistance of a reference group. (**Dr Peter Shergold, 'Public Service Governance in Australia: Launch of CCH Manual'**, 5 August 2004, available from his website at: www.pmc.gov.au/doc/Shergold)

- The latest publication of the Management Advisory Committee (MAC), a forum of Secretaries and Agency Heads established by statute to advise government on the management of the APS, deals with the question of whole of government responses to priority challenges. (***Connecting Government: Whole of Government Responses to Australia's Priority Challenges*, MAC Report 4**, 2004, available from the MAC website at: www.apsc.gov.au/mac/index.html)

Other developments

United States Supreme Court decisions on detention of 'enemy combatants' in Guantanamo Bay and the US

In two decisions of the US Supreme Court delivered on 28 June 2004, the court held that Congress had, in its 2001 Authorization for Use of Military Force, authorised the Executive Branch to detain persons as enemy combatants, but that (1) such a detainee who was an American citizen had a constitutional due process right to a meaningful opportunity to offer evidence that he was not an enemy combatant (*Hamdi v Rumsfeld*), and (2) US courts had jurisdiction under the federal habeas corpus statute to consider challenges to the legality of the detention of foreign nationals captured abroad and incarcerated in Guantanamo Bay (*Rasul et al v Bush*, brought on behalf of two Australian detainees, Mamdouh Habib and David Hicks, and 12 Kuwaiti detainees). Four judges in *Rasul* (Stevens J delivering judgment for the court, O'Connor, Ginsburg and Dreyer JJ joining the opinion) distinguished a 1950 decision of the court, concerning German prisoners held by US forces in a fort in Germany, on the facts and the legal context. They also held that the presumption against extra-territorial application of statutes did not apply to the Guantanamo Bay Base held under an indefinite lease from Cuba under which the United States exercises complete jurisdiction and control. Justice Kennedy agreed with the decision of the majority, but on the grounds that the decision could be justified within the framework of the earlier decision because Guantanamo Bay was in every practical respect a US territory far removed from hostilities, and that the detainees were subject to indefinite detention. The minority (Scalia J delivering the opinion,

Rehnquist CJ and Thomas J joining it), considered that the majority's decision was a 'wrenching departure from precedent'.

Following those decisions, it was reported that Mr Habib and Mr Hicks would take action in the US federal courts. Preliminary proceedings against David Hicks before a military commission were heard in August, attended by Australian Government observers and an observer on behalf of the Law Council of Australia (Melbourne barrister Lex Lasry, QC). After those proceedings, the Australian Government stated it had some concerns about the military commission process, in particular relating to procedural fairness, which it said it would take up with the United States Government. (***Hamdi et al v Rumsfeld*, No. 03/6696,** and ***Rasul et al v Bush*, No. 03/334, US Supreme Court,** 28 June 2004; see also ***Rumsfeld v Padilla*, 03/1027**, 28 June 2004; ***Canberra Times***, 6 September 2004, p 3)

House of Lords rejects bill concerning the office of Lord Chancellor and structure and appointment of the judiciary

On 13 July 2004, after receiving an inconclusive report from a select committee, the House of Lords (by 240:208) rejected legislation to abolish the office of Lord Chancellor, replace the Law Lords by a new Supreme Court and create a judicial appointments commission (see (2004) 41 *AIAL Forum* at 14). The majority consisted of Conservative and cross-bench peers, while the Liberal Democrats supported the Government's measures. The Bill had not gone back to the House of Commons at the date of writing. (**'Peers throw out plans to abolish Lord Chancellor',** ***The Independent***, 14 July 2004; for the role of the new Department for Constitutional Affairs see its website at:
www.dcaaagov.uk/dept/manifesto.htm

For a copy of the Bill as amended by the Select Committee, see the link at:
www.publications.parliament.uk/pa/pabills.htm)

LEGISLATION FOR THE MILITARY REHABILITATION AND COMPENSATION SCHEME

Dr Neil Johnston*

Paper presented at an AIAL Seminar, Canberra, 18 August 2004

Introduction

This paper provides an overview of the Military Rehabilitation and Compensation Act which came into effect on 1 July 2004 and analyses some of the key features of the legislation from an administrative law perspective. The new legislation applies to all future military service from that date.

Background

The legislation for the Military Rehabilitation and Compensation Scheme (MRCS) represents major legislation comparable in significance to the earlier major review of veterans legislation which led to the passage of the Veterans' Entitlements Act (VEA) in 1986.

Military service in recent years has been covered by both VEA and the Military Compensation and Rehabilitation Scheme (MCRS) which has in turn been based on the Safety, Rehabilitation and Compensation Act (SRCA) which was legislated in 1988. Peacetime service has been covered by the MCRS, while warlike and non-warlike (operational) service have been covered by both the MCRS and VEA. These dual arrangements have been complicated to administer, difficult for serving and veteran members to understand and have led to a degree of anomaly in the way they enable members to select benefits between the two schemes.

The possibility of establishing a single scheme for military compensation and rehabilitation has been discussed for many years with a recommendation to that effect in the major review by Justice Toose in 1975. The push for reform gained momentum in 1995 and 1996 as a result of two unfortunate accidents. A training accident in the Northern Territory resulted in a young soldier becoming a quadriplegic. He was married with three young children and did not own his own home. Notwithstanding that he had dual entitlement under the VEA and MCRS there was a view that available payments were not adequate to his needs.

These perspectives again came into sharp profile within the defence community following the collision of two blackhawk helicopters in an SAS training operation in June 1996. Eighteen servicemen were killed in the incident with ten suffering serious injury. Differences in service history meant there were significant differences in entitlement for some (with some having dual entitlement from previous service) and there was also concern about the adequacy of benefits in a peacetime service context. In response to these incidents the Government decided in 1998 to use a Defence Determination under the Defence Act 1903 to provide supplementary benefits to assist in cases of severe injury and to assist widows.

* *Secretary, Department of Veterans' Affairs.*

While these initiatives responded to concerns at the time about the adequacy of benefits, they did not address the longstanding interest in establishing a single scheme. A decision was made by Government in June 1997 to move on this direction. This led to the appointment of Mr Noel Tanzer AC in May 1998, a past Secretary of the Department of Veterans' Affairs, to undertake a review for this purpose.

Mr Tanzer reported to the Government in March 1999 with recommendations to proceed with legislation for a single scheme for military service. Following extensive consultation within government, a draft framework for such legislation was distributed for comment, including by the ex-service community, in March 2000. With the in principle support of the defence and veteran communities the Government announced in 2001 that new legislation would be developed. A consultative Ex-Service Organisation (ESO) working party was established in March 2002 to assist in considering the detail of the legislation and this has met on more than ten occasions to consider and comment on the complex issues that have been involved.

A draft bill was circulated by the Government on 27 June 2003 and this was followed by a further consultative period with the defence and veteran communities. A revised bill was then tabled in the Parliament on 4 December 2003. Following passage in the House of Representatives, the bill was the subject of a further round of public consultation by the Senate Committee for Foreign Affairs, Defence and Trade Legislation. Final passage of the legislation occurred on 1 April 2004 following agreement on a number of amendments recommended by the Senate Committee.

The Objectives for the Legislation

The Tanzer Report identified a number of objectives in framing a single scheme for military rehabilitation and compensation :

- To provide legislation more appropriate to current and future conditions of military service
- To reflect current workers' compensation practice
- To facilitate ease of understanding
- To facilitate ease of administration
- To remove perceived current anomalies

In subsequent consultation, the Government emphasised that in melding two current pieces of legislation the objective was to adopt the best of both frameworks with the guarantee that there would be no loss of entitlement compared with the current legislation.

The Consultative Process

It will be evident from the above background material that the preparation and passage of the legislation has been protracted with extensive opportunity for involvement of the defence and veteran communities. In summary :

- Consultation by Tanzer
- Public consultation on broad framework
- Consideration of the detail of a new framework by ESO Working Party
- Public consultation on detailed draft bill

- Senate Committee public consultation on bill before the Parliament.

The time taken and the extent of the consultation has reflected both the complexity and sensitivity of the issues being addressed.

This has been the case in respect of both the nature of entitlements and the administrative processes. It is interesting that the two areas of late amendment following the final round of Senate Committee consultation were in respect of widows' entitlements and appeal processes.

MCRS/SRCA Provides the Foundation

The foundations for the new legislation is drawn from the MCRS and SRCA. Occupational health and safety requirements for defence service continue to be governed by the Occupational Health and Safety Act 1991, which is administered within the Employment and Workplace Relations portfolio, with the new legislation focussing on rehabilitation and compensation provisions for (future) serving and ex-serving members of the defence force.

It is fair to say that at the time of the Tanzer Report neither Defence nor DVA had undertaken a detailed comparison of MCRS and VEA benefits but what work was available, including some Actuarial comparisons, indicated that in many cases MCRS benefits were superior to VEA benefits. Given that the MCRS/SRCA reflected more current workers' compensation practice in the Commonwealth this added to the case for using it to provide the foundation for the new scheme.

Significant elements that are reflected in the new legislation and which represent significant change in veterans' legislation are :

- a distinction between economic and non-economic loss. The need for this distinction has long been discussed in the veteran jurisdiction. Changes to effect the distinction have been recommended by the Toose Report in 1975, the Baume Report in 1994, the Tanzer Report in 1999 and, most recently, by the Clarke Report in January 2003. While not accepting the substantial restructuring of VEA benefits recommended by Clarke, the Government's response in March 2004 has reflected this distinction in its approach to differential indexation arrangements depending on whether payments, in effect, reflect non-economic or economic loss compensation.

- Payment of lump sums for non-economic loss. Veteran organisations are concerned that lump sums may not be used wisely and have opposed them in the past. However, consultations have indicated strong support for lump sums in the defence community and this has been accepted. In a number of cases the legislation provides for a choice between lump sums and periodic payments.

- Income maintenance in proportion to earnings and concluding at age 65. This approach reflects workers' compensation practice and represents a significant change from the VEA which provides for welfare type payments which are paid at a common level regardless of rank or past earning capacity but can be adjusted to reflect family circumstance and can be subject to means and asset testing. However, as discussed below, provision is made in the new legislation for payment of a VEA 'safety net' in certain circumstances. The legislation also provides for continued access to the service pension but that is not expected to be relevant in many circumstances.

- Strong rehabilitation focus. Given that the new legislation applies equally to current serving personnel as well as veterans it is appropriate that it gives emphasis to

rehabilitation and return to work where possible. What is significant is that it provides for a needs assessment and rehabilitation, if appropriate, for any subsequent claims that can be related to military service.

- Possibility of review. In circumstances where income maintenance is being paid, the SRCA provides for review if there is reason to believe circumstances may have changed. The new legislation includes the same provision, including in respect of those in receipt of income maintenance post military service. This is a sensitive issue for veterans and has been addressed in a rehabilitation protocol (see below).

- Superannuation offsetting. The MCRS/SRCA provides for offsetting of Commonwealth superannuation benefits (accrued at the same time as the military service leading to the claim) against any income maintenance entitlement. The VEA has no comparable provision and this difference has been one of the major reasons for perceived anomaly between those with and without dual entitlement to the VEA and MCRS. A proposal to amend the VEA to remove this difference was withdrawn by the Government when introducing the new legislation to the Parliament. However, offsetting applies for any future incapacity payments paid under the new Act.

Defence Act/VEA Features of the Legislation

The proposals for new legislation have, from the outset, envisaged that significant administrative features of the VEA would carry over to the new arrangements. Most importantly these include :

- The beneficial (or reverse criminal) standard of proof for claims arising from warlike and non-warlike (operational) service, with no onus of proof on the member.

  The civil or balance of probability standard of proof will continue to apply for peacetime service.

- Use of Statements of Principle (SoPs) to indicate the basis on which injury, disease or disability can be related to military service. The legislation provides for the Repatriation Medical Authority (RMA) to continue to determine SoPs and for these determinations to be subject to review by the Specialist Medical Review Council (SMRC).

- Use of the Guide to the Assessment of Rates of Veterans Pensions (GARP)

  A detailed comparative analysis of GARP with the Permanent Impairment Guide (PIG) which applies for the MCRS indicates that the GARP is more comprehensive and hence more beneficial than the PIG in a number of areas, and most notably, in its assessment of psychiatric and respiratory conditions. Impairment and lifestyle rating are linked in GARP in a combined table to determine incapacity (as specified in Chapter 23 of GARP). In the new legislation a weighted average of the two assessments is taken to determine incapacity and compensation payable in the same way as occurs in combining these factors under the MRCS. The detailed analysis indicates that lifestyle ratings under GARP are more variable and possibly less reliable than the corresponding impairment ratings and they will be given less weight (15 per cent) than is in effect the case with use of GARP under the VEA (35 per cent).

These foregoing provisions have been unique to the veteran jurisdiction, can be complex in concept and have been the subject of extensive deliberation in the courts, so drafting of the new legislation has sought to carry over in full the relevant provisions under the VEA to facilitate continuity of administrative and legal practice.

Another set of important provisions carry over existing levels of benefits to the new legislation with two significant areas of enhancement – benefits in the instance of severe injury and widow(er)s' benefits. In addition, work undertaken over the last couple of years including in consultation with the ESO Working Party has established that VEA benefits can be superior to MCRS benefits in two significant areas – in compensation paid for what equates to non-economic loss and, depending on the circumstances of the individual (age, rank, family circumstance), the level of income maintenance that is provided.

Reflecting these considerations, the following applies :

- The legislation provides MCRS levels of compensation for non-economic loss for peacetime service

- Compensation for non-economic loss for warlike and non-warlike (operational) service is provided, in effect, at the higher VEA levels

- In both cases, compensation for severe injury is increased compared with that provided under the Defence Act, with a tapered increase for lesser levels of incapacity. The Charts at Attachment A compare previous and future rates of benefits. The decision to maintain two rates of compensation for non-economic loss is a departure from the model envisaged in the Tanzer Report. It reflects the effect of current legislative provisions which arguably, in turn, reflects a longstanding view in the community that operational service and particularly warlike (or qualifying) service warrant additional generosity on rates of benefit.

- A safety net provides members with a once-only choice of Special Rate (or Totally and Permanently Incapacitated-TPI) benefits payable under the VEA if the member is unable to work because of their incapacity.

  Basic TPI benefits are tax free and payable for life with a range of other concessional benefits depending on their family circumstances, and it is expected that this package will be financially preferable in a range of situations. Members will be required to take financial advice to inform their decision-making.

  Again, the inclusion of a welfare type of 'safety net' in the legislation represents a departure from the approach envisaged in the Tanzer Report. However, a common approach to income maintenance applies across all types of military service and the inclusion of the optional safety net ensures that no-one is less well off financially than they would be under the VEA. Some ex-service organisations have also emphasised the importance of allowing the option of a lifetime payment which the safety net provides.

- Widows' benefits have been set at a common level regardless of the nature of service of the member, with a significant enhancement compared with previous entitlements.

  The draft legislation had proposed a higher level of benefit for death arising from warlike (or qualifying) service but this was subsequently extended to all service related death. All widow(er)s are eligible for the equivalent of the war widow(er)s' pension provided under the VEA or an equivalent age related lump sum. SRCA-type death benefits also apply plus an age-related supplementary lump sum of up to $105,472 for the widow(er) and a top up of $63,283 for each dependent child.

A number of veteran associated benefits also carry over from the VEA:

- Use of the gold and white cards for access to health services once conditions have stabilised.

  White cards provide health care for specific accepted conditions and the gold card provides comprehensive health care.

- Provision of the gold card for veterans over the age of 70 with warlike (or qualifying) service

- Unrestricted access to treatment for cancer and mental health conditions (PTSD, anxiety and depression) whether or not the condition is an accepted condition.

- Access to a number of other VEA benefits such as funeral benefit, and dependent access to the Veterans' Children Education Scheme.

New Features to the Legislation

There are a number of novel features to the new legislation that are noteworthy from an administrative point of view.

The Act requires in certain circumstances and, as a general rule, that a needs assessment will be undertaken once liability has been accepted for a condition. A needs assessment is intended to ensure that comprehensive and structured consideration is given to the case at hand with a written report and a copy provided to the member. A set of principles and protocols for conduct of a needs assessment has been developed in consultation with the ESO Working Party.

A set of principles and protocols for the conduct of rehabilitation (and review) has also been developed in consultation with the ESO Working Party. This is a particularly sensitive aspect of the administrative requirements under the new legislation and a copy of these is provided at Attachment B.

While these do not have the force of legislation or of legislative instruments (as in the case of SoPs), they are important and will need to be kept under close review in consultation with the defence and veteran communities.

Aspects that have been closely examined in consultative meetings are :

- The scope to provide education and training above a level equivalent to that attained during military service provided it is cost effective for the Commonwealth to do so (paragraphs 9 and 10 of protocol).

- The approach to social rehabilitation (paragraphs 11, 12 and 16 of the protocol).

- The circumstances under which a member may be deemed to be able to work (paragraphs 27 to 30 of the protocol).

- Procedures when a member lacks confidence in medical practitioners or case managers assigned to their case (paragraphs 7 and 15 of protocol).

- The need for sensitivity in case reviews, particularly for members suffering from mental health problems and particularly for those of mature age (paragraphs 34 and 35 of protocol).

As noted above, Senate Committee consideration of appeals provisions led to changes which gives all members the option to have 'original' (or reviewable) determinations on their matters reviewed by the VRB prior to consideration by the AAT.

- A qualification is that 'veterans' legal aid which is not subject to means and priorities testing is only available for cases relating to warlike and non-warlike (operational) service, as is currently the case. Awarding of costs is waived when legal aid applies.

- All members have the right, if they wish, to seek an internal reconsideration and then take such a determination direct to the AAT.

The Act uses the concept of 'original' determination to indicate which determinations are reviewable. The Act also specifies in sub-section 345(2) a range of matters that are not original determinations such as a decision to suspend the right of compensation because of failure to comply with administrative requirements and decisions to write off debt, recover interest, etc. Such determinations are, of course, subject to challenge in the courts on the basis of an error of law.

The appeals framework is outlined in more detail in relation to the Rehabilitation Protocol at Attachment B.

A final feature of note of the new legislation is the establishment of the Military Rehabilitation and Compensation Commission (MRCC) to supervise the administration of the legislation by the Department of Veterans' Affairs (DVA). The new Commission has five members comprising the three full-time members of the Repatriation Commission which supervises the administration of the VEA and two part-time members, one nominated by the Minister for Defence and one nominated by the Minister for Employment and Workplace Relations.

Points of note in relation to the MRCC are :

- It is also responsible for supervising DVA's administration of the MCRS.

- Its structure will facilitate a seamless relationship with the Repatriation Commission.

- The arrangements will facilitate coordinated administration and legislative synergy between the MRCS, MCRS and VEA in future years.

Conclusion

The development of the MRCS has been a significant enterprise for government. The melding of two existing pieces of legislation has been a complex undertaking that has entailed compromise as well as innovation. Importantly, it has sought to build on the lessons of the past, including past administrative practice. No doubt, however, the legislation will need to be kept under review in the light of future experience.

APPENDIX A

COMPENSATION FOR NON-ECONOMIC LOSS – COMPARISON OF MRCS WITH VEA AND MCRS LEVELS

The following chart (over page) shows a hypothetical comparison of MRCS non-economic loss (permanent impairment) compensation with VEA disability pensions and MCRS lump sums (SRCA s24 and s27 plus severe injury adjustment). The VEA disability pension levels have been converted to lump sums using the age-based number provided by the Australian Government Actuary to convert a MRCS periodic payment to a lump sum for a 30-year old male.

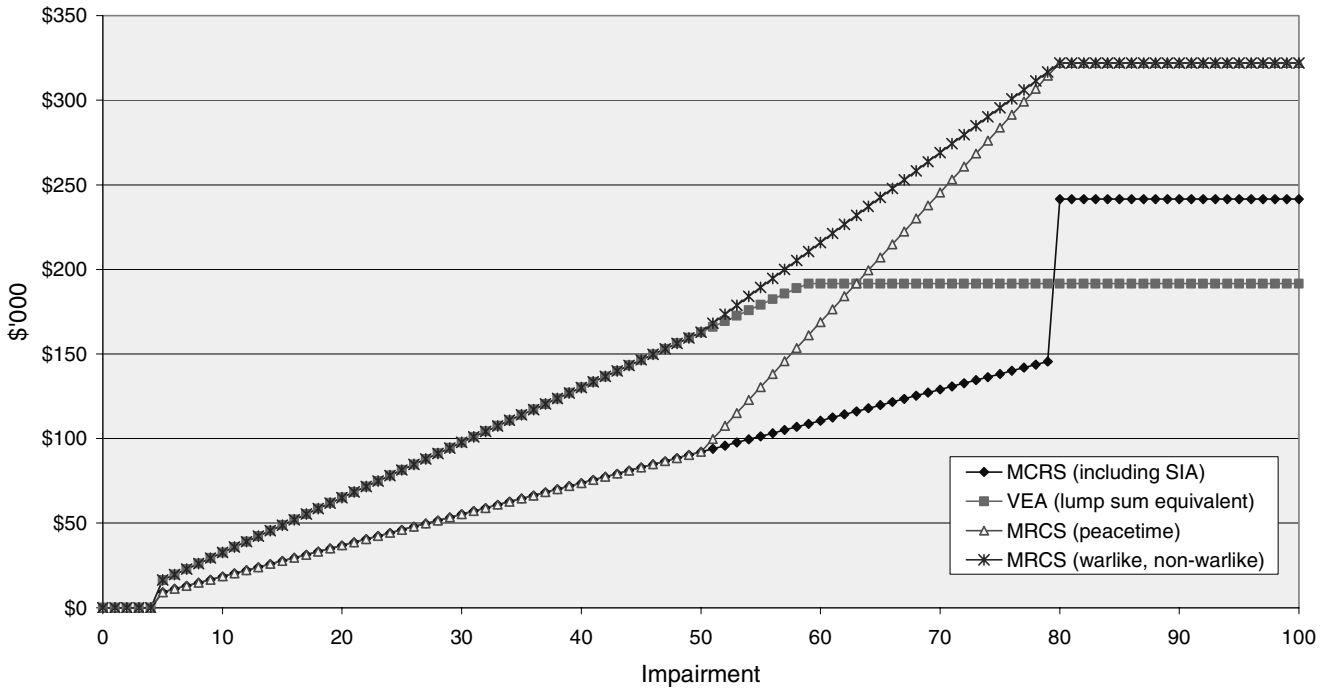
The chart shows:

- MRCS compensation for conditions arising from warlike and non-warlike service matches that available under the VEA up to 50 impairment points. It then increases to the maximum level that is available from 80 impairment points. This maximum is the same for all types of service
- MRCS compensation for conditions arising from peacetime service matches that available under the MCRS up to 50 impairment points. It then increases to the maximum level which is available from 80 impairment points
- VEA compensation reaches its maximum at 60 impairment points, equivalent to the general rate (100%) disability pension
- MCRS compensation jumps to a maximum at 80 impairment points because of the operation of the Severe Injury Adjustment

Points to note include:

- lifestyle cannot be exactly proportional to permanent impairment as it is measured on an integral scale of 0-7 (MRCS and VEA) and 0-15 (MCRS)
- under the VEA, impairment is rounded to the nearest 5 points and combined with lifestyle to give a disability pension which increases in ten-point steps, rather than continuously as shown in the chart. Similarly under the MCRS, impairment is rounded down to the previous ten point multiple, apart from certain conditions for which there is a five point threshold
- up to 50 impairment points compensation factors for both warlike/non-warlike and peacetime service under the MRCS are based on weights of 85% for impairment and 15% for lifestyle. From 50 to 80 impairment points the lifestyle weighting drops to zero while for 80 and above impairment points the maximum amount of compensation is payable.

Indication of permanent impairment compensation lump sums (for 30-year old male)
(Assumes lifestyle proportional to impairment)



APPENDIX B

PRINCIPLES GUIDING REHABILITATION UNDER THE MRCA

(Italics are quotes from the Act)

1. *The aim of rehabilitation is to maximise the potential to restore a person who has an impairment, or an incapacity for service or work, as a result of a service injury or disease to at least the same physical and psychological state, and at least the same social, vocational and educational status, as he or she had before the injury or disease.*
   Section 38

2. A person can be considered for rehabilitation where the Military Rehabilitation and Compensation Commission (the Commission) has accepted liability for an injury or disease, which causes incapacity for work, or caused impairment that requires medical or social rehabilitation.

3. If the Commission has accepted liability for a person's injury or disease that person can request an assessment for suitability to undertake rehabilitation and that request must be complied with.

4. The Commission can determine that a person undertakes a rehabilitation program having regard to the following:

   - *any written report in respect of the person under subsection 46 (3);*

- *any reduction in the future liability of the Commonwealth to pay or provide compensation if the program is undertaken;*
- *cost of the program;*
- *any improvements in the person's opportunity to be engaged in work after completing the program;*
- *the person's attitude to the program;*
- *the relative merits of any alternative and appropriate rehabilitation program; and*
- *any other matter the rehabilitation authority considers relevant.*

Subsection 51 (2)

5. Any reference to written reports or relevant material in the Act, may include reports provided from the person's principal treating practitioner and any other report provided by the claimant in respect of both assessments of the person's capacity for rehabilitation and the development of the rehabilitation program.

6. The rehabilitation program can include vocational and social rehabilitation.

7. Persons with suitable qualifications or expertise in rehabilitation will assess a person's capacity for rehabilitation and where applicable provide guidance on the type of program the person should undertake.

8. If a person fails to undertake a rehabilitation assessment or program without reasonable excuse the Commission may suspend the person's right to compensation (but not treatment).

9. Rehabilitation will be coordinated, integrated and adequately resourced to achieve effective outcomes.

10. Relevant incapacity payments (income replacement) are payable whilst a person is undertaking a rehabilitation program and they are unfit for work.

11. All determinations relating to rehabilitation, with the exception of a determination relating to the suspension of compensation for refusing or failing to undergo a rehabilitation examination, or refusing or failing to undertake a rehabilitation program, are original decisions and subject to review and appeal.

Protocols of Rehabilitation under the MRCA

Rehabilitation Screening

1. Where a person seeks a payment for impairment or incapacity for work a delegate will consider whether that person should undertake an assessment of capacity to undertake rehabilitation.

2. Where it is considered that such an assessment should be undertaken a written determination must be made.

3. A person may request an assessment of their capacity for rehabilitation at any time.

Rehabilitation Assessment

4. Persons who have requested an assessment, or where it has been determined that such an assessment is required, will be referred for a professional and comprehensive assessment.

5. The assessment will be undertaken by suitably qualified or experienced professionals in the field of medical, psychological and vocational rehabilitation to measure the capacity and needs of the person to participate in the rehabilitation.

6. The suitably qualified or experienced professional who will perform the rehabilitation assessment is determined by the rehabilitation authority from a list of approved providers. Persons, Ex-Service and Defence organisations may nominate any person or provider to be considered for approval to the Military Rehabilitation and Compensation Commission.

7. In the event that a dispute arises between a client and the approved provider performing the rehabilitation assessment, the Department will endeavour to resolve the issues. If the issues cannot be resolved the Department undertakes to use its best endeavours to assign another approved provider to conduct the rehabilitation assessment.

8. The ***vocational assessment and rehabilitation*** *consists of or includes any one or more of the following:*

    - *assessment of transferable skills;*
    - *functional capacity assessment;*
    - *workplace assessment;*
    - *vocational counselling and training;*
    - *review of medical factors;*
    - *training in resume preparation, job-seeker skills and job placement; and*
    - *provision of workplace aids and equipment.*

Subsection 41 (1)

A vocational assessment will also include an assessment of employability taking into account age, capability and labour market conditions.

9. Vocational training and education is generally provided to return a person to the workforce at a level to which they are accustomed. If, in order to regain employment, the assessment determines that education or training to a higher level, including tertiary, is required to achieve reasonable likelihood of a return to the workforce, and such provision could reasonably be expected to be cost effective, training or education to that level will be considered.

10. Matters to be considered when determining cost effectiveness include:

    - Cost of the training or education, including where applicable HECS;
    - Additional reduction in future liability that would be attributable to the studies; and
    - Improvement in work opportunities and capacity to obtain paid employment.

11. Where a person will benefit from social rehabilitation a rehabilitation plan will list the services aimed at restoring or maximising a person's function in the community by providing appropriate behavioural and basic training skills for living and participating in a community setting.

12. The prime factor when considering what, if any, non-vocational measures will be implemented will be the recommendations from the rehabilitation assessment and the attitude of the person towards rehabilitation aimed at achieving quality of life outcomes.

Rehabilitation Plan

13. A rehabilitation program will only be developed if the person has undergone an assessment of their capacity for rehabilitation by a suitably qualified person.

14. The rehabilitation program will be described by a rehabilitation plan that will list the services that will be provided, the time period covered under the plan and the likely outcome at the completion of the plan.

15. All parties to the plan, which includes, at a minimum, the person's case manager, an approved provider and the person will be consulted during the preparation of the plan. This will enable each party to sign up to the plan. The consultation will include providing the person with information and options to allow them to make informed decisions.

16. The ***rehabilitation program*** *means a program that consists of or includes any one or more of the following:*

    - *medical dental, psychiatric and hospital services (whether on an in-patient or outpatient basis);*
    - *physical training and exercise;*
    - *physiotherapy;*
    - *occupational therapy;*
    - *vocational assessment and rehabilitation*
    - *counselling;*
    - *psycho-social training.*

Subsection 41 (1)

Social rehabilitation could include such measures as referral to community support services, attendant care services, psychosocial counselling, basic skills training, fitness and exercise regimes and drug and alcohol management programs.

17. The plan will include an outline for the coordination arrangements for each of the rehabilitation services.

18. Rehabilitation plans are subject to review, as requested, to ensure they remain relevant to the person's needs.

19. If it is decided that the rehabilitation program should cease or vary another assessment is required.

Rehabilitation Services

20. Services, including assessment, are to be provided by approved providers only. These will be:
    - providers approved for the purposes of the *Safety, Rehabilitation and Compensation Act 1988;* and
    - providers with appropriate skills and expertise approved by the Commission.

21. Rehabilitation services will be provided to ensure that the most cost-effective outcome is achieved for both the person and the Commonwealth.

22. The delivery of the services will be coordinated to ensure they are delivered in an effective and timely manner.

Rehabilitation Delivery Costs

23. The Commonwealth will meet the cost of all rehabilitation activities approved by a delegate. This includes examinations, assessments, aids, appliances and other activities included in a plan.

24. Where a person is incapacitated for work due to a combination of compensable and non-compensable conditions, or being medically discharged due to a non-compensable condition, the Commission will consider paying for rehabilitation costs of the non-compensable injuries if it has the potential to be cost effective in facilitating a return to work.

25. If there is a requirement to travel to undertake a rehabilitation examination, then the Commonwealth will pay compensation for any costs reasonably incurred in that journey. If the person is also required to stay in accommodation in the area as a result of the journey then compensation for all reasonable costs will be paid.

26. *In determining the amount payable, the rehabilitation authority will have regard to:*
    (a) the means of transport available to the person for the journey; and
    (b) the route or routes by which the person could have travelled; and
    (c) the accommodation available to the person

Section 48

Deeming a person able to earn income.

27. Where a person fails to accept an offer of suitable employment, fails to begin or continue such employment or fails to undertake rehabilitation or a retraining program as a condition of obtaining suitable work without reasonable excuse the person can be deemed to be earning the amount that they would have received but for their failure.

28. If a person fails to seek suitable work they can also be deemed to be earning an amount that they could reasonably be expected to earn, having regard to the labour market. If the person can show genuine yet unsuccessful attempts to obtain employment they will not be 'deemed' when suitable employment is not possible.

29. The processes and requirement to communicate with a person prior to a determination to suspend compensation will be the same as current processes in place under the *Safety, Rehabilitation and Compensation Act 1988*. These processes ensure that the person has

an opportunity to provide the rehabilitation authority with evidence of reasonable excuse for their inability to undertake a rehabilitation program.

30. *Suitable work for a person means work for which the person is suited having regard to the following:*

    (a) the person's age, experience, training, language and other skills;

    (b) the person's suitability for rehabilitation or vocational retraining;

    (c) if work is available in a place that would require the person to change his or her place of residence – whether it is reasonable to expect the person to change his or her residence;

    (d) *any other relevant matter*.

Section 5

Assistance in Finding Work

31. Where a person's injury or disease results in an incapacity for work the rehabilitation authority must take all reasonable steps to assist the person to find suitable work in the civilian workforce. This requirement does not apply while the person is a full-time member of the ADF.

32. If liability for the injury or disease ceases the requirement to provide assistance in finding suitable work also ceases.

Review

33. A person's capacity for rehabilitation may vary from time to time depending on their medical status. This may mean that a person not previously able to undertake rehabilitation due to medical factors may subsequently be able to do so. Alternatively a person in a rehabilitation program may no longer be able to continue that program due to medical factors.

34. Reviews of treatment provision and rehabilitation will continue to be relevant in post working age years. A person may at any time request that the Commission undertake a review to ensure that they are receiving the most appropriate level of rehabilitative services. The review may cover appropriate levels of medical treatment, social rehabilitation services and vocational programs and services.

35. The frequency of reviews will be determined taking account of advice from treating physicians and specialists, and as appropriate as specified in a rehabilitation plan. Up to the age at which incapacity payments would normally cease, the Commission will at a minimum, undertake a review at least every 5 years, including consideration of whether appropriate treatment and services are being provided. Where a principal treating practitioner states that a review must be undertaken with particular care, in such circumstances, a review will not be undertaken without first contacting the treating practitioner. A review may be undertaken on the papers.

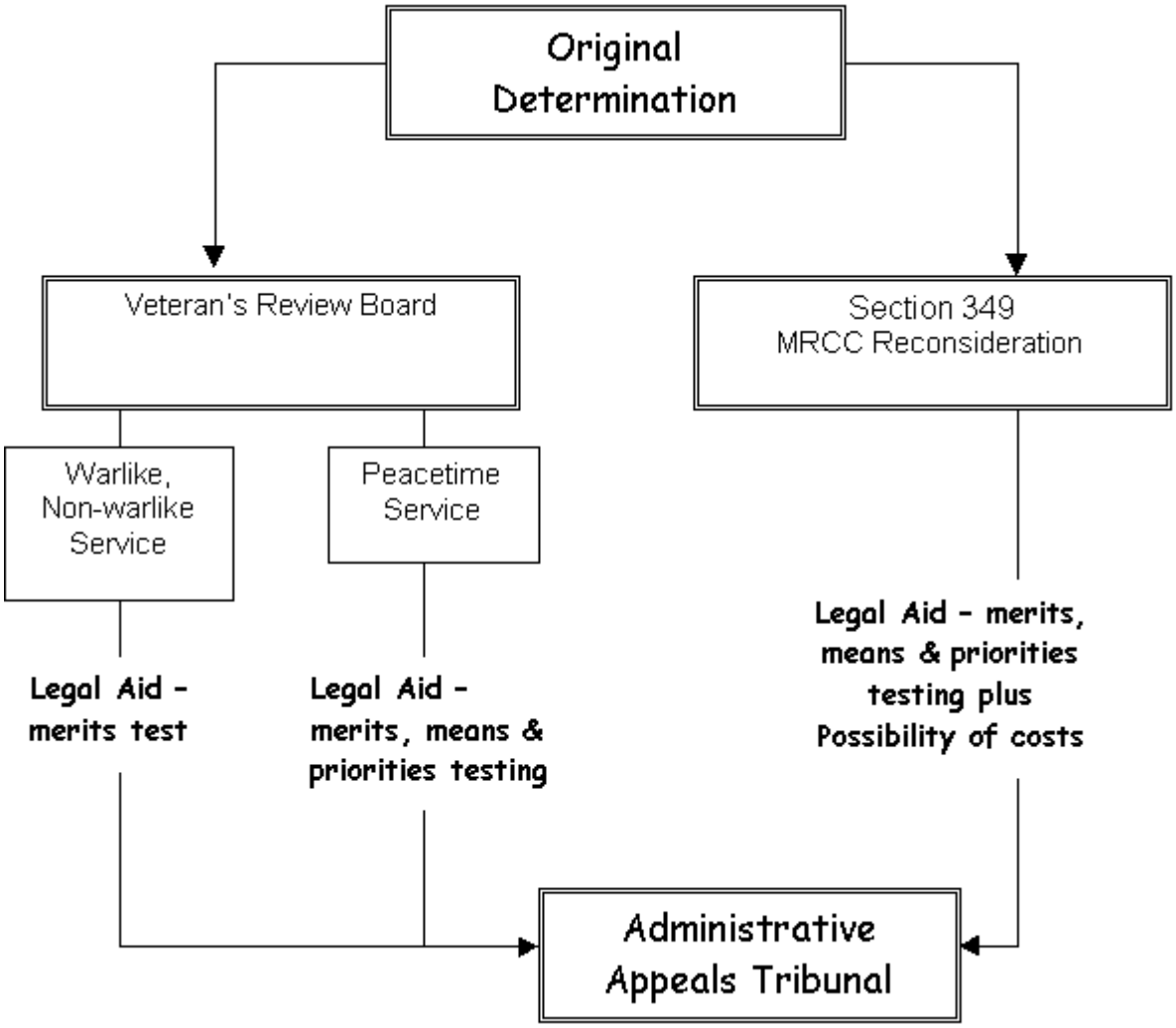
36. The Commission or a person can at any time seek a review of services being provided.

37. Where a person's capacity for work changes following a medical review, a review of their rehabilitation capacity should also be undertaken. This would involve the person undergoing an assessment for rehabilitation.

Appeal mechanisms

38. All aspects of a rehabilitation plan, including the selection of provider are subject to review.

39. A person's appeal rights are determined as set out in the diagram below.



40. A person has the right to be accompanied by a person of their choice, including a family member, an ex-service organisation or service representative, or a legal representative to interviews and in phone conversations relating to any aspect of their claim including at reconsideration and appeal. The only exceptions are VRB proceedings which are non-adversarial and legal representation is not permitted.

41. Legal Aid may be available in respect of AAT matters, subject to relevant Legal Aid guidelines and priorities including merit and/or means testing for eligibility.

42. Determinations relating to the suspension of compensation for refusing or failing to undergo a rehabilitation examination, or refusing or failing to undertake a rehabilitation program are not 'original determinations' and are not subject to either reconsideration or review by the Veterans' Review Board or the Administrative Appeals Tribunal. These decisions can only be appealed on a matter of law to the Federal Court. All other

determinations concerning rehabilitation are 'original determinations' and are subject to merit review.

Interaction with the Transition Management Service (TMS)

43. Interaction between the TMS Coordinator and the Rehabilitation Coordinator is necessary to ensure discharging members are aware of and thus able to utilise all benefits available to them through MRCS and their ADF discharge entitlements. Discharging members have a variety of entitlements through the ADF's Career Transition Assistance Scheme (CTAS) ie. Training, resume preparation, job seeking and on the job training.

44. There are discharging members who will require additional rehabilitation assistance through the MRCB to achieve their goal of returning to suitable employment and/or coping with activities of daily living. The TMS coordinator is required to liaise with the DVA rehabilitation team and to refer those clients who require additional MRCB rehabilitation intervention.

Review of the administration of the rehabilitation provisions

45. A forum comprising representatives of the ex-service and Defence force communities and the MRC Commission will meet at least annually to review the experience of the administration of the Rehabilitation clauses in the Act.

Office of the Principal Adviser, Rehabilitation
23 April 2004

FUTURE DIRECTIONS FOR TRIBUNALS IN OUR TERRITORY

Jon Stanhope MLA*

Paper presented at a Council of Australasian Tribunals/Australian Institute of Administrative Law Seminar on 20 July 2004

I would like to thank the Council of Australasian Tribunals and the Australian Institute of Administrative Law, the joint hosts of this seminar, for inviting me here today to speak about future directions for tribunals in our Territory.

First, I would like to recognise the members of tribunals across the ACT. You play a very important role in helping many Canberrans to access justice. For that I commend and thank you.

In talking about the future of tribunals in the ACT, I would like to emphasise that I am talking about improvements to the system that further enhance access to justice and equity for our community – to the benefit of us all.

In considering potential reforms, my Government acknowledges that tribunals in the ACT are highly regarded and invaluable to the community. However, within any organisation there is always an opportunity to improve and my Government also has an obligation to examine developments and reforms in other jurisdictions and changes in the needs of the community.

Views on Justice and ACT Tribunals

Before we discuss tribunals in particular, I would like to outline my views on the justice system in Canberra – a system in which our tribunals play an integral role.

The justice system should be not only accountable, but should be built upon the principles of equity and accessibility. I believe that a robust and fair justice system allows for, and indeed encourages, community participation in the matters that affect the lives of individuals – without of course being knee-jerk or succumbing to occasional pressures to establish a punitive law and order regime.

My Government has demonstrated its commitment to reform. We have introduced major reforms to human rights, discrimination against minority groups, civil law and the criminal code among many others.

There is more to be done in the area of unfair contracts, fair trading and the structure of the justice system itself, that is, the legal profession and the courts and tribunals that administer the law.

* *ACT Attorney-General.*

The second term of a Labor Government will impact on ACT tribunals as each of us working within the system searches for ways to enhance the operations of our tribunals – focusing on the critical elements of independence, fairness, impartiality, accessibility and cost effectiveness.

As you know, tribunals fulfil a special function in the Australian justice system – enhancing access to justice and providing an accessible, affordable and streamlined alternative to the courts.

Since their inception tribunals have operated in a way that essentially complements the role of the courts. In certain specialist jurisdictional areas, this role has been extended to replace the courts.

I do not believe that anyone would argue that courts should be a 'last port of call' in matters of conflict and dispute.

The development of alternative dispute mechanisms over the last decade or so is as a direct result of the cost and delays associated with the use of courts.

Alternative dispute mechanisms such as tribunals also offer the benefit of enhanced accessibility and simplicity. The less formal operation of tribunals means that legal representation may not be necessary or non-legal representation may be allowed. I would venture to take this a step further and suggest that in some tribunals lawyers should not be permitted other than as presiding members.

Due to the manner of their evolution, tribunals were not established with any consistent reference to a specific model and therefore perform a mixture of judicial and quasi-judicial functions and a variety of roles from merit review, statutory oversight and regulatory functions to dispute resolution.

The differences between each of the tribunals reflect their ability to deal with cases in a targeted way. It also means that tribunals have the skills to be sensitive to the complexities of every case, however big or small.

For instance, the Mental Health Tribunal is chaired by Magistrates, but also has psychiatrists, psychologists, and members of the community as its members. (I am advised that psychologists are not used as frequently as might be expected but I trust that is an issue the President is addressing.)

The issues that arise are specific to each individual, invariably complex and require a range of skills and perspectives that falls outside the expertise of legal professionals. The Mental Health Tribunal has 22 members from the courts, the medical profession and the community, ensuring that decisions are well informed and have been examined from a variety of perspectives.

The Essential Services Consumer Council, on the other hand, has no magistrates but instead includes members from industry and the community who collectively have qualifications or experience in law, business, consumer affairs, or helping people suffering financial hardship. The Council has a distinctly community-based feel reflecting the consumer-based service it provides.

No matter what their structure or composition, tribunals have made a significant contribution and our focus is now on maximising and enhancing that contribution.

Future Directions for Tribunals

In considering the future direction of tribunals it is paramount that we continue to ensure that tribunals:

- are independent, open, fair and impartial;
- are accessible to users;
- have the needs of users as their primary focus;
- offer cost effective procedures;
- are properly resourced and organised; and
- are responsive to the needs of all sections of society.

Despite the excellent track record of tribunals in the ACT, there are areas of concern in the current system. For example, there are too many points of contact.

We have a number of tribunals operating in isolation from each other, most of which use separate registry or secretariat services. This leads to duplication and inefficiency in the system.

Given the investment by Government and the community, not only in housing tribunals but in providing administrative support, we should ask whether the return for the community and members would be greater if some form of rationalisation were to occur.

In talking about rationalisation I am not simply talking about cost cutting but about exploring ways of better using resources. The benefits of a carefully planned approach could include better access for the community and improved support for tribunal members.

Rationalisation also makes sense in such a small community as the ACT. We have a number of specialised jurisdictions where the relevant tribunal may rarely have cause to meet. This places enormous pressure on tribunal members, and the small number of cases can impede professional development and limit the opportunity to refine processes and procedures.

How we proceed is obviously a matter for debate. The options include consolidating tribunals, rationalising jurisdictions or rationalising tribunal registries. I gather that some observers prefer that any rationalisation occur through a consolidation of the tribunals themselves or through a rationalisation of jurisdictions.

Of course, some consolidation of jurisdictions has already occurred. For instance, the Consumer and Trader Tribunal is an example of an ACT tribunal that has a number of separate jurisdictions. This Tribunal is responsible for hearing disciplinary matters relating to the agents and security industries and appeals against licensing and registration decisions for these industries.

In the future, this Tribunal will be expanded to cover other industries regulated by the Office of Fair Trading, such as the Dispute Resolution Committee for the motor vehicle service and repair industry, the Complaints Resolution Committee for the fitness industry and the Liquor Board. This consolidation avoids duplicating existing committee and board functions.

Expanding the jurisdiction of the Tribunal to replace these other committees will also ensure consistency of process and produce economies of scale.

And the Health Professions Tribunal, which will soon commence operations, will consolidate the hearing of complaints against a variety of different health professionals including surgeons, nurses and chiropractors. It will assess serious complaints and reports about the standard of practice of a health professional and review decisions of a health profession council.

The Tribunal will be empowered to take action in relation to a health professional's registration including the sole power to suspend or cancel registration.

This Tribunal is an example of the consolidation of specialised, though related, jurisdictions. What remains however is a question of whether the tribunal should itself remain as a separate entity operating independently under the supervision of the courts.

In consolidating jurisdictions we cannot lose sight of the need to ensure that tribunals continue to be composed of the 'right' mix of professionals and experts.

The Consumer and Trader Tribunal, for example, has a pool of people with skills and experience in industry, community representation, finance and the law, so that the most appropriate member or panel of members can sit on a case. If the jurisdiction is expanded, it follows that the breadth of skills and experience on the tribunal would also need to expand.

I would also, at this point, like to discuss the issue of membership of legal professionals - those panel members who have been chosen because of their expertise in the law. I know that there is a strong view that legally trained members are often in a better position to fulfil and understand the legal requirements of natural justice and decision-making within the context of the broader justice system which includes tribunals.

I do not disagree with this. It is one of the reasons why magistrates preside over some tribunals and why some tribunals come under the supervision of the courts. My concern with continuing to place such a strong emphasis on the need for legally trained and supervised members is that we risk losing sight of the value of tribunals as flexible, responsive bodies whose accessibility to the community stands in contrast to the court system.

This contrast exists essentially because of the balance between legalistic and non-legalistic operation.

We also need to bear in mind the question of the separation of powers. If tribunals are part of the Executive as some say we must, at some stage, ask whether it is appropriate to have them headed by members of the Judiciary? That is a question I will leave for the future.

There has been some speculation about potential models that would combine the ACT's tribunals into one organisation so that they operate as a 'super' tribunal.

It has in fact been suggested to me that we should create a single tribunal with a number of divisions featuring common infrastructure and support mechanisms with a single broad hearing methodology. This would ensure we maintain the unique characteristics of existing tribunals or jurisdictions, for example, allowing flexibility in the type of hearing that a particular matter requires.

In such a model, a division of administrative decisions would replace the current Administrative Appeal Tribunal jurisdiction over the merit review of ACT Government agency decisions. This would exist along side a consumer and trading division dealing with the merit resolution of consumer and trader disputes. This division could consolidate and rationalise eight separate tribunals over seven separate jurisdictions.

This model would incorporate two other divisions, one being a community services and social welfare division covering such matters as discrimination and housing amongst many others. The other would be an occupational division, covering the professions and tradespersons, for instance, lawyers, health professionals, architects, electricians, plumbers, and the security industry.

This model makes sense and clearly has some appeal but, as with all major restructures, it requires much deeper examination – a process I will discuss a little later.

But clearly one of the factors we would need to consider would be the impact of a separate tribunal structure on the workloads and therefore terms and conditions of magistrates.

Another issue which would need to be canvassed in any rationalisation is the location of the tribunal. A large number of our tribunals are currently located within the Magistrates Court.

One view states that court supervision ensures the due process of the law thereby protecting human rights. But any rationalisation proposal would also need to consider if there are grounds for locating tribunals outside of the courts, to ensure their separation from the courts while still maintaining their flexibility and accessibility.

Conclusion

I have only touched on the broad picture of the future of tribunals and really only identified one direction of rationalisation and consolidation and the advantages of this potential approach.

If my Government is re-elected we will be looking at the operation of the legal system, including tribunals, early in the next term. We have already begun work to ensure that the structure of the legal profession, including its disciplinary procedures, and the courts and tribunals all meet 21st century needs and expectations.

To further progress and extend this work, I have asked the Department of Justice and Community Safety to develop a range of options for Government consideration. I envisage that the Department will engage an external consultant to develop a discussion paper on what those options may be. I propose that the terms of reference extend also to a review of the operations of the Magistrates Court. Obviously we will consult fully with interested parties and bodies in both the development of options and implementation of any resulting reforms.

The options for further reform of tribunals would need to preserve, and possibly strengthen, the advantages and strengths of current tribunals such as their independence, their fair and impartial decision-making and their responsiveness to the needs of the community in a legal, physical and social environment that is constantly changing.

I look forward to your cooperation and contributions to the development of future directions for Territory tribunals.

THE VCAT – RECENT DEVELOPMENTS OF INTEREST TO ADMINISTRATIVE LAWYERS

Jason Pizer*

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Introduction

The Victorian Civil and Administrative Tribunal ('the VCAT') is a significant feature of the Victorian legal landscape. Its significance may be attributed, at least in part, to the volume and breadth of its work. In each financial year since 1 July 1998 — when the VCAT opened its doors — it has received approximately 85,000 applications. And those applications cover areas as diverse as anti-discrimination, consumer credit, domestic building, fair trading, freedom of information, guardianship and administration, land valuation, liquor, planning and environment, residential and retail tenancies, state taxation and transport accidents.

Given the volume and breadth of its work, it is neither possible nor desirable to discuss all recent VCAT developments.[1] That said, it is both possible and desirable to discuss some recent VCAT developments of interest to administrative lawyers.

Broadly speaking, this paper deals with three such developments, which fall into the following areas:

(a) the VCAT and natural justice;

(b) the VCAT and reasons for decision; and

(c) the VCAT and appeals to the Supreme Court of Victoria.

I will deal with these three topics in turn.

The VCAT and natural justice

As is well known, there are two rules of natural justice. The first rule, the 'hearing rule', requires a decision-maker such as the VCAT to provide each party to a proceeding before it with a reasonable opportunity to present its case. And the second rule, the 'bias rule', requires that decision-maker to be free from bias when making its decision.[2]

As is also well known, natural justice does not require the inflexible application of a fixed body of rules; rather, it requires fairness in all the circumstances. Those circumstances include the nature of the decision-maker and the statutory context in which the decision is made.

* *Victorian Bar.*

The tribunal system created by the Victorian Civil and Administrative Tribunal Act 1998 ('the VCAT Act') places a significant emphasis on fairness. Section 97 of that Act, for example, provides that the VCAT must act fairly and according to the substantial merits of the case in all proceedings. And, most relevantly for present purposes, section 98(1)(a) of the VCAT Act provides that the VCAT is bound by the rules of natural justice.[3]

Not only does the tribunal system created by the VCAT Act place a significant emphasis on fairness, it also places an emphasis on the prompt, efficient and inexpensive disposition of proceedings.[4] Consistent with this emphasis, the VCAT Act empowers the VCAT to take a more flexible and informal approach to procedural and evidentiary matters than might be expected in a court.

To start with, the VCAT has a discretion to regulate its own procedure.[5] Nevertheless, this discretion cannot be exercised in a manner that constitutes a departure from the rules of natural justice.[6] As the VCAT noted in *Re Castik Investments Ply Ltd and Stonnington CC*:[7] whilst tribunals are expected to bring a more relaxed attitude to procedural matters, they are not expected to 'play fast and loose with the substantive law or procedural fairness'.

Not only does the VCAT enjoy a discretion to regulate its own procedure, it is not bound by any practices and procedures applicable to courts of record (except to the extent that it adopts those practices or procedures).[8] It is well established, however, that this does not relieve the VCAT of its obligation to comply with the rules of natural justice.[9]

Not only is the VCAT not bound by the practices or procedures of courts of record, the VCAT may inform itself on any matter as it sees fit,[10] and is not bound by the rules of evidence.[11] Importantly, however, in *Clean Ocean Foundation Inc v Environment Protection Authority*,[12] Balmford J observed that these two privileges are 'to be exercised with care, and remembering always that the Tribunal is ... bound by the rules of natural justice'.[13]

Finally, it may be noted that not only is the VCAT able to inform itself on any matter as it sees fit, section 98(1)(d) of the VCAT Act charges it with the responsibility of conducting each proceeding with as much speed as possible and with as little formality and technicality as possible. Importantly, however, section 98(1)(d) does not relieve the VCAT of its obligation to comply with the rules of natural justice.[14] Indeed, as the VCAT observed in *Re Golem and Transport Accident Commission (No 1)*,[15] the VCAT's obligation in section 98(l)(d) does not mean that what could be described as 'Rafferty's Rules' prevail.

It can be seen from the above that whilst the VCAT has various powers that enable it to take a more flexible and informal approach to procedural and evidentiary matters than might be expected in a court, the rules of natural justice are still regarded as being applicable and of paramount importance. Indeed, in *Francis-Wright v VCAT*,[16] Gillard J observed that, in the VCAT context, 'one cannot over-emphasise the importance of complying with the rules of natural justice and acting fairly.'

The hearing rule in the VCAT

As already stated, the 'hearing rule' requires a decision-maker such as the VCAT to provide each party to a proceeding before it with a reasonable opportunity to present its case.

When considering the application of the hearing rule in the VCAT context, it is useful to distinguish between the following two scenarios:

(a) first, where a party to a VCAT proceeding did not receive a hearing at all; and

(b) secondly, where that party received a hearing, but that hearing was not 'fair' in all the circumstances.[17]

These two scenarios will be dealt with in turn.

No hearing

There are two distinct situations in which it may be said that a party to a VCAT proceeding did not receive a hearing.

The first situation is where the party was not heard on the merits of the case because the proceeding was dismissed or struck out:

(a) under section 75 of the VCAT Act (on the basis that the proceeding was frivolous, vexatious, misconceived, lacking in substance or was otherwise an abuse of process);

(b) under section 76 of the VCAT Act (for want of prosecution); or

(c) under section 78 of the VCAT Act (on the basis that the VCAT was satisfied that the party had been conducting the proceeding in a way that unnecessarily disadvantaged another party).

In this situation, it may be said that whilst section 98(1)(a) of the VCAT Act imposes a requirement that, ordinarily, a party should be given an opportunity to be heard upon the merits, that opportunity is not absolute and may be lost without a breach of the rules of natural justice.[18]

The second situation in which it may be said that a party to a VCAT proceeding did not receive a hearing at all is where that party was not present (either personally or through a representative) at the hearing.

A useful starting point for considering this situation is the judgment of Gillard J in *Francis-Wright v VCAT*.[19] In that case, the VCAT had made findings and orders in the absence of the landlord in two proceedings in the Residential Tenancies List. It did so in circumstances where it was not satisfied that the landlord had been properly served with any documents. On appeal, Gillard J made the following observations:

(a) consistent with its obligations to act fairly and in accordance with the rules of natural justice, the VCAT does not have any general power to hear an application in the absence of a party who has not been served. In fact, the VCAT only has a limited statutory power to hear such an application: the power under section 123 of the VCAT Act to hear an application for an ex parte interim injunction;[20]

(b) except in the case of an ex parte interim injunction,[21] the VCAT 'must not proceed without notice against another party making findings and making orders and without giving that party an opportunity to be heard'; and

(c) where a party fails to attend, the VCAT must — as a first step — be satisfied that proper service has been effected on that person, and that they do not propose to appear.

In the result, Gillard J held that, by making findings and orders in the absence of the landlord who had not been served with any documentation, the VCAT had breached the rules of natural justice and the duty to act fairly.

Where, however, the VCAT is satisfied that proper service has been effected on a party and that that party does not propose to appear, section 99(2) of the VCAT Act expressly authorises the VCAT to hold the hearing in the absence of that party. Further, section 51(5) of the VCAT Act provides that if an applicant does not appear (either personally or by a representative) at the hearing of a proceeding for review of a decision, the VCAT must confirm that decision. It follows that the VCAT Act itself authorises conduct that may otherwise have been regarded as being in breach of the hearing rule.

An unfair hearing

As noted above, a distinction may be drawn between the scenario where a party did not receive a hearing at all, and the scenario where that party received a hearing but that 'hearing' was not 'fair' in all the circumstances.

A 'hearing' received by a party to a VCAT proceeding may not be 'fair' in all the circumstances due to events or conduct that took place before, during or even after the final hearing.

As for conduct before the final hearing, it is accepted that whilst the VCAT is not a court of pleading, a party to a VCAT proceeding is entitled to know the case that it must meet before the hearing commences.[22] Accordingly, the rules of natural justice may be breached if a party is not placed in that position before the commencement of the final hearing (and the matter is not rectified before the time the VCAT makes its decision).[23]

As for conduct during the final hearing, it should be noted at the outset that section 102(1) of the VCAT Act imposes a natural justice requirement on the VCAT. That section provides as follows:

> (1) The Tribunal must allow a party a reasonable opportunity —
>
> (a) to call or give evidence; and
>
> (b) to examine, cross-examine[24] or re-examine witnesses; and
>
> (c) to make submissions to the Tribunal.

The scope of this natural justice requirement is narrowed by section 102(2), which allows the VCAT to refuse to allow a party to call evidence on a matter if the Tribunal considers that there is already sufficient evidence of that matter before it. And, as Byrne J observed in *Winn v Blueprint Instant Printing Pty Ltd*,[25] the obligation contained in section 102(1) is also constrained by the ordinary requirements of relevance.

Winn 's case is also important in this context because it emphasises the need to take into account the nature of a VCAT proceeding when determining what the 'hearing rule' requires. In this regard, his Honour said this:

> [9] It [is] accepted that the Tribunal must act fairly and that it [is] bound by the rules of natural justice. But this does not require that its procedures be that of a formal court. Indeed, the [VCAT Act] makes it clear that the Tribunal is to act in an informal way and that its procedures must be moulded to accommodate the fact that, in most cases [that would now be dealt with as 'small claims' under the Fair Trading Act 1999], the parties will not be represented by a professional advocate. This necessarily involves the Tribunal taking a more active role and identifying the real issues between the parties and directing them as to the evidence which legally and logically bears on those issues. It may be, too, that in a given case, the Tribunal will itself interrogate witnesses in a manner and to an extent which would not be expected in a court.

Although these observations are plainly important, it is critical to bear in mind that they were made in the context of applications for leave to appeal from three small claims that had been

heard and determined in the VCAT's Civil Claims List. Where the parties are legally represented and the proceeding is being conducted as an adversarial contest, the VCAT can be expected to take a much less 'active role' than the role identified by Byrne J.

Byrne J's observations in the *Winn* case were recently endorsed by Nettle J in *Collection House Limited v Taylor*.[26] That case is a useful illustration of a number of natural justice principles in the VCAT context and, as such, will now be dealt with in some detail.

Relevantly for present purposes, the facts of the Collection House case were as follows. The appellant ('Collection House') recovered part of a statute-barred debt from the respondent ('Ms Taylor'). It did so after one of its employees, Mr Hempenstall, had telephoned Ms Taylor at home in relation to the debt. Ms Taylor subsequently commenced a proceeding in the VCAT claiming that Collection House had engaged in unconscionable conduct and misleading or deceptive conduct. During the VCAT hearing, the VCAT Member raised an issue for the first time. That issue, which the Member himself described as 'significant', was whether Mr Hempenstall was genuinely on secondment to a law firm, as he had claimed. Towards the end of the hearing, the Member asked whether either party wanted to say anything further or to provide any further evidence on any aspect of the matter. Collection House's representative, Mr Easy — who was not a lawyer — responded by offering to provide further material in relation to the secondment arrangement if that would be of assistance to the VCAT (noting, however, that that material could not be provided there and then). The Member relevantly responded by saying 'I'm loathe [sic] like to adjourn it because that just means people have to come back again another day'. Mr Easy then responded by saying 'I understand that completely'. In the result, the VCAT concluded that Collection House had engaged in unconscionable conduct and in misleading or deceptive conduct. In the course of its reasons, the VCAT noted that Collection House 'did not produce any documentary evidence of the supposed secondment, although Mr Easy stated that such evidence did exist'.

On appeal to the Supreme Court, Collection House argued that the VCAT had failed to afford it natural justice by refusing to allow it time to provide additional evidence concerning the nature and terms of Mr Hempenstall 's secondment. Collection House contended that Mr Easy's suggestion late in the hearing (that he could provide the VCAT with further material in relation to the secondment arrangement if that would be of assistance) constituted a request for an adjournment and that the Member's response — that he was loath to adjourn — was tantamount to a refusal.

Ms Taylor submitted that Collection House should have anticipated that the secondment arrangements were likely to be a significant issue in the case before the VCAT and that Collection House had plenty of opportunity in advance of the hearing to prepare its evidence accordingly. As such, it was said that Collection House was given a proper opportunity to present its case and that there was no denial of natural justice. Nettle J rejected this submission. In doing so, his Honour said this:

> [23] It is not to the point that [Collection House] might have anticipated the need for evidence on the secondment arrangements. Applications for adjournments are not to be decided on the basis of whether a party could have anticipated the requirement which gives rise to a need for adjournment. It is not an occasion for punishment of a party for its mistake or for its delay in making its application. The paramount consideration is to do justice and thus to enable the parties to present their cases as fully as necessary within the limits of the law...

His Honour went on to state that the refusal of the adjournment to allow Collection House to adduce written evidence on the secondment issue — particularly where the Member himself regarded the nature and terms of the secondment arrangements as a significant issue, and where the Member also thought to be significant the fact that Collection House did not

provide any documentary evidence of those arrangements — was 'likely to create an appreciable risk of injustice'.

Ms Taylor then submitted that, regardless of whether Collection House should have anticipated the need for the evidence on the secondment issue, Mr Easy's suggestion that further evidence could be obtained did not amount to a request for an adjournment. Nettle J accepted that Mr Easy's reference to the possibility of presenting further material 'was not the most sanguine of applications for adjournment'. His Honour then went on to say this:

> [28] In court counsel are expected to make plain when and if they are seeking an adjournment, and it goes without saying that the way in which a case is presented is a matter for counsel. But that is because of the training of counsel and the etiquette of the court to which they are accustomed. It is different with laypersons before administrative tribunals. It cannot be assumed that they will make their meaning clear. They may have no experience of litigation, and they are likely to be nervous. In such circumstances it falls to the tribunal to clarify what seems obscure.
>
> [29] If counsel asks a judge whether further evidence would be of assistance to the court, counsel may properly be told that the way in which they run their case is a matter for them. But if a layperson asks an administrative tribunal whether further evidence on an issue would be of assistance to the tribunal then, depending on the circumstances, the tribunal will need to say if it could be. Otherwise. there is a risk of causing the person to take a mistaken view of the state of affairs relating to the manner in which they might choose to conduct their case. That in itself would be a denial of natural justice. (emphasis added)

In the case before him, his Honour held that, in the circumstances, Mr Easy should be taken to have sought an adjournment.

The next issue was whether it could be said that the VCAT had refused to grant the adjournment sought by Mr Easy: the Member did not say that he refused to grant an adjournment; rather, he simply said that he was loath to grant it. In relation to this issue, Nettle J said this:

> [30] In court it may be assumed that counsel will not lightly be deflected from an application for adjournment. And if a judge says that he or she is loathe [sic] to grant the adjournment, counsel may rightly respond with a demonstration of why the justice of the occasion demands the adjournment, if that be the case. But that too is because of the training of counsel and the etiquette of the court to which they are accustomed. It does not apply to unrepresented laypersons appearing before administrative tribunals. When an unrepresented layperson is told by an apparently authoritative presiding member of an administrative tribunal that the tribunal is loathe [sic] to grant an adjournment, a layperson is likely and in my view entitled to treat the member as refusing to adjourn.

Accordingly, his Honour held that, in the circumstances, the VCAT should be taken to have refused Mr Easy's application for an adjournment and that, to that extent, there was a denial of natural justice.

But that was not the end of the matter. The next issue was whether it could be said that Collection House had waived its right to complain about the refusal to grant an adjournment by Mr Easy stating that he 'completely understood' the reticence of the Member to allow further time. In relation to this issue, Nettle J observed that if Mr Easy were a barrister and the VCAT a court, one might think that Mr Easy had made a calculated choice to run with his case as it was. His Honour continued:

> [26] The fact of the matter, however, is that Mr Easy was not a barrister; he was not even a lawyer; the Tribunal is not a court; and the sorts of conventions and assumptions which apply to the conduct of litigation by barristers in courts by and large do not apply to the conduct of proceedings by laypersons before the Tribunal.
>
> …

> [31] ... I do not attach much significance to Mr Easy's concession before the Tribunal that he completely understood the Member's attitude. No doubt if such a thing was said by counsel to a judge, the judge might take counsel as saying that they had reconsidered their position and withdrew their application. But it is different for a layperson before an administrative tribunal. There, as in everyday society, it is commonplace for a person denied a request to respond with an expression of understanding. It may be no more than good manners to do so. But it does not mean that the person is to be taken as having withdrawn the request or that the person may not be bitterly disappointed. Granted that a layperson might also think it is in his or her interests to ingratiate themself to the tribunal, obsequious resignation is hardly reasoned retreat.

Accordingly, his Honour concluded that Collection House had not waived its right to complain about the VCAT's refusal to grant the adjournment.

This led to one final issue: whether it could be said that the VCAT's denial of natural justice could have had any impact on the outcome of the case.[27] As for this issue, Nettle J was unable to conclude that the additional evidence that Collection House would have put before the VCAT had the adjournment been granted could not have influenced the VCAT's decision. Accordingly, his Honour concluded that the VCAT's refusal to grant the adjournment deprived Collection House of a reasonable opportunity to present its case upon a significant issue.[28]

As noted above, Nettle J accepted (at [29]) that the VCAT may breach the hearing rule during the final hearing if, during that hearing, the VCAT caused a party to take a mistaken view of the state of affairs relating to the manner in which they might choose to conduct their case. It follows, for example, that the VCAT must not mislead a party into believing certain evidence is not required and then rely in part on the absence of that evidence to draw adverse inferences against that party.[29] Similarly, the VCAT must not mislead a party into believing that it had received and considered certain relevant documents when it had not done so.[30]

In addition, the VCAT may breach the hearing rule during the final hearing if it refuses to allow a party to make a submission on a relevant issue. An example of this is *Port Phillip CC v Hickey*,[31] where Smith J held that the VCAT had denied natural justice to the planning permit applicants and a local council. His Honour reached that conclusion in circumstances where the VCAT had refused to allow those parties to be heard on the merits of the permit application due to some confusion as to what submissions they were seeking to put to the Tribunal.

It follows from the above that there are a number of circumstances in which the VCAT may breach the hearing rule during the final hearing.

As for conduct <u>after</u> the final hearing, the hearing rule may be breached if, for example, the VCAT:

(a) entertained a submission from a party after the hearing in circumstances where leave to make further submissions had not been given and where the other parties had not been given an opportunity to be heard in relation to that submission;[32]

(b) relied upon its particular specialist knowledge in making its decision without giving prior notice of that fact to the parties;[33]

(c) required an extensive change to a development plan for a proposed subdivision of land in circumstances where that change had substantial adverse implications for the applicant, where the parties had no notice that the VCAT was considering such an extensive change and where, as a result, the parties had not been given an opportunity to make submissions or adduce further evidence in relation to that change.[34]

Finally, it may be noted that if the VCAT conducts a post-hearing view or an inspection in the absence of the parties and proposes to base its decision on its own observations, it may be under an obligation to give the parties an opportunity to deal with those observations by addressing argument and possibly also calling evidence.[35]

The VCAT and reasons for decision

As is well known, there is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions that have been made in the exercise of a statutory discretion and that may adversely affect the interests, or defeat the legitimate or reasonable expectations, of other persons.[36]

The VCAT Act, however, contains provisions dealing with the following two scenarios:

(a) first, where the maker of the decision that is (or may be) under review by the VCAT has not provided reasons; and

(b) secondly, where the VCAT has provided oral or written reasons for its final order.

These two scenarios will be dealt with in turn.

Reasons of the original decision-maker

Pursuant to section 45 of the VCAT Act, a person who is entitled to apply to the VCAT for a review of a decision, or to have a decision referred to the VCAT for review, may request the decision-maker to provide a written statement of reasons for the decision. This request for reasons must be in writing and must be made within 28 days after the date upon which the decision was made.[37] The written statement of reasons must contain the reasons for the decision and the findings on material questions of fact that led to the decision, referring to the evidence or other material on which those findings were based. The written statement must be provided within 28 days after the request for reasons is received.[38] If this is not done, the person seeking reasons may obtain an order from the VCAT requiring the statement of reasons to be given within a time specified by the VCAT.[39]

In addition, if a proceeding is commenced for review of a decision, the decision-maker must lodge with the VCAT what is colloquially known as a 'section 49 statement'. The section 49 statement must contain the statement of reasons given by the decision-maker under section 46(1) of the VCAT Act or, if no such statement has been given, a statement containing:

(a) the reasons for the decision; and

(b) the findings on material questions of fact that led to the decision, referring to the evidence or other material on which those findings were based.[40]

One issue that arises in this context is this: what should the statement of reasons contain (whether required pursuant to section 46 or section 49(1)(a) of the VCAT Act)? In *Re Filonis and Transport Accident Commission*,[41] Judge Bowman VP made the following observations about this issue:

- the reasons provided should be adequate to assist the Tribunal, as a generic body, in understanding how the decision was made and the reasons for its making;

- the reasons, even in brief form, should indicate that there has been a genuine consideration and evaluation of the material available to the decision-maker;

- the reasons should ordinarily deal with any conflicts of evidence and should plainly state whether the decision-maker accepted or rejected such evidence (endorsing *Transport Accident Commission v Bausch*[42]);

- the reasons need not attain the level of perfection, nor have the precision of pleadings;

- 'pro forma' reasons will frequently not be sufficient; and

- the reasons given in response to a request under section 45 must be based upon the material available to the decision-maker at the time that the decision was made.[43]

Reasons of the VCAT

The VCAT may decide to give oral or written reasons for its final order. If the VCAT gives oral reasons, a party may request the VCAT to give written reasons. Such a request must be made within 14 days from the date upon which the oral reasons were given and the VCAT must comply with that request within 45 days after receiving it.[44]

Section 117(5) of the VCAT Act provides that if the VCAT gives written reasons, it must include in those reasons its findings on material questions of fact. One issue that arises in this context is this: what should the VCAT's written reasons contain?

Section 117(5) is modelled on section 49(3) of the (now repealed) AAT Act. The AAT's obligation to give reasons for decision and to include in those reasons its findings on material questions of fact, included a responsibility to make clear, coherent and intelligible findings.[45] In *Barlow v South East Water Ltd*,[46] the VCAT confirmed that what is required under section 117 is along the lines of what was prescribed by section 49 of the (now repealed) AAT Act.

In *Commissioner of State Revenue v Anderson*,[47] Nettle J made the following observations about the VCAT's requirement to give reasons:

- the reasons of the Tribunal are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which reasons are expressed;

- it is not necessary for the Tribunal to address every issue raised in a proceeding; rather, it is enough to make findings on the material facts upon which its decision turns and to explain the logic of the decision;

- to explain the logic of a decision requires that reasons be intelligible (which is what section 117 of the VCAT Act requires); and

- reasons are not intelligible if they leave the reader to wonder about the process of reasoning that has been followed.

Further, in *Re Lucas and Transport Accident Commission*,[48] Osborn J observed (at [8]) that it is generally incumbent upon a tribunal such as the VCAT — which is obliged to give reasons and exercises a quasi-judicial function in cases where argument and analyses are advanced on either side — to 'enter into the issues canvassed before it and explain why it prefers one case over the other'.

For completeness, however, it should be noted that, in *Gennimatas v Transport Accident Commission*,[49] Ashley J observed that the adequacy of the Tribunal's reasons should be considered in the context of the way in which the matter was conducted before it.[50]

The VCAT and appeals to the Supreme Court

A decision of the VCAT may be challenged in three ways:

(a) first, a party to a proceeding may appeal to the Supreme Court, under section 148 of the VCAT Act, from an order of the VCAT;

(b) secondly, a person may apply to the Supreme Court, under Order 56 of Chapter 1 of the Supreme Court Rules ('the SCR'), for relief in the nature of certiorari to quash a VCAT decision; or

(c) thirdly, a person may apply to the Supreme Court, under the Administrative Law Act 1978 ('the ALA'), for relief in the nature of certiorari to quash a VCAT decision.[51]

In practice, appealing under section 148 of the VCAT Act is by far the most common method used. Indeed, in *Re Buttigieg v Melton SC*,[52] Justice Morris P observed that appealing under section 148 'would generally be the most expeditious and appropriate method of challenging a VCAT decision'.

The logical starting point for a consideration of the scope of section 148 of the VCAT Act is section 148(1). That provision provides as follows:

> (1) A party to a proceeding may appeal, on a question of law, from an order of the Tribunal in the proceeding—
>
> (a) to the Court of Appeal, if the Tribunal was constituted for the purpose of making the order by the President or a Vice President, whether with or without others; or
>
> (b) to the Trial Division of the Supreme Court in any other case— if the Court of Appeal or the Trial Division, as the case requires, gives leave to appeal.

Four points concerning the scope of section 148 emerge from a reading of this provision.

First, only a 'party' to a 'proceeding' may challenge an order of the VCAT under section 148. The word 'proceeding' is defined in section 3 of the VCAT Act to mean a proceeding in the Tribunal,[53] and section 59 of that Act sets out when a person is to be regarded as a 'party' to such a proceeding.

Secondly, it is not strictly accurate to refer to an appeal from a VCAT 'decision'. Rather, the appeal must be from an 'order' of the Tribunal.[54] The word 'order' is defined in section 3 of the VCAT Act to include an interim order of the Tribunal. Further, by virtue of section 117(6) of the VCAT Act, the reasons for an order, whether oral or written, form part of that order.

Thirdly, a party may not appeal under section 148 unless and until leave to appeal has been granted.

And fourthly, section 148 does not confer a free-standing right of appeal; rather, the right to appeal is confined to an appeal on a 'question of law'.[55]

As stated in paragraph 54 above, there are three ways of challenging VCAT decisions: appeals under section 148 of the VCAT Act, applications under Order 56 of Chapter 1 of the SCR and applications under the ALA.[56]

There was once 'some support' for the argument that section 148 of the VCAT Act was an exclusive code for challenging an order of the VCAT and, as such, that it (implicitly) excluded the judicial review authority of the Court.[57]

It is difficult to see why section 148 of the VCAT Act should be interpreted in that manner. That is particularly because only a 'party' to a proceeding may invoke the appeal process and, in certain circumstances, a non-party may wish to challenge an order of the VCAT.[58]

In any event, the High Court has expressly doubted whether section 148 is an exclusive code in this sense:

> Although s 148 uses the word 'appeal' it is clear that the Supreme Court is asked to exercise original, not appellate, jurisdiction and to do so in proceedings which are in the nature of judicial review. That is not to say that there are no other avenues for judicial review. The VCAT Act makes no express provision excluding the general supervisory jurisdiction of the Supreme Court. It may, therefore, be doubted that s 148 should be understood as doing more than providing, in some cases, an important discretionary reason for not permitting resort to that general supervisory jurisdiction on the basis that s 148 provides a suitable alternative remedy.[59]

Although section 148 is not an exclusive code, it is expressed in wide terms. In *Francis-Wright v VCAT*,[60] the respondent landlord submitted that, when the ground of appeal was a denial of natural justice, section 4(4) of the ALA prevented a party from appealing under section 148 from an order of the VCAT made under the *Residential Tenancies Act 1997*. Gillard J rejected that submission, noting that there were no words in section 148 or in any other part of the VCAT Act that supported it. According to his Honour, 'the right to appeal is with leave in relation to a question of law and there are no words in the section or the [VCAT] Act which restrict the generality of those words'.[61]

Viewed in this light, the Court of Appeal's *obiter* in *The Attorney-General for the State of Victoria v The Warehouse Group (Australia) Pty Ltd*,[62] is, with respect, curious.

The Warehouse Group case was an appeal from Balmford J, where her Honour had concluded that the VCAT had no power to hear and determine a proceeding in the Planning and Environment List. Her Honour reached that conclusion on the basis that the VCAT was constituted by a member who did not have sound knowledge of, and experience in, planning or environment practice in Victoria.[63]

The Court of Appeal unanimously allowed the appeal. It found that the VCAT member in question did have the requisite knowledge and experience and, as a result, that the VCAT did have the power to hear and determine the proceeding in question. Nevertheless, the Court went on to express the following views (in obiter):

> 22. [T]here is... a fundamental objection to the exercise of jurisdiction by the Trial Division in relation to ground 16 in the notice of appeal, which stems from the commencement of an appeal under s. 148. In ground 16 Warehouse was challenging the very constitution of the Tribunal which made the orders from which it was otherwise wishing to appeal. Such a challenge is to jurisdiction, as indeed the Trial Judge. in upholding the challenge, recognised ... Such a challenge should have been mounted by way of judicial review and not appeal: See, for example *GJ Coles & Co v Retail Trade Industrial Tribunal* in which a tribunal was wrongly constituted and prerogative relief was sought and granted Nor, in our view, was anything to the contrary said in *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* ... Our dealing with the question of the constitution of the Tribunal should therefore not be taken as any endorsement of the procedure adopted by Warehouse on this occasion.
>
> 23. In another case, the conclusion that a proceeding by way of judicial review was appropriate but not an appeal might mean that leave to appeal should never have been granted in the first place and that, once granted, the appeal should have been dismissed as incompetent. In this instance, however, there were many other grounds of appeal: only ground 16 was affected by the considerations of procedure to which we have referred, and ground 16 was determined as a preliminary question. [emphasis added]

With respect, the correctness of these views may be doubted. There are several reasons for this.

First, there is nothing in the language of section 148 of the VCAT Act to suggest that the 'appeal' process may not be used when the only question of law to be considered is whether the VCAT had the jurisdiction to make the order that it did. It would have been a very simple thing for the Victorian Parliament to have limited the scope of section 148 in that manner. It did not do so.

Secondly, there is nothing in the subject matter or context of section 148 that compels the conclusion that the scope of the section must be limited in the manner suggested. Importantly, as the High Court in the *Roy Morgan* case pointed out, an 'appeal' under section 148 is itself in the nature of a judicial review. It is not a free-standing 'appeal'. Given that an 'appeal' under section 148 is a proceeding in the nature of a judicial review, the Court of Appeal's insistence that a challenge only as to the VCAT's jurisdiction must be 'mounted only by way of judicial review and not [by an] appeal' under section 148 is puzzling.

Thirdly, there is nothing in the relevant second reading speech or explanatory memorandum to suggest that the Victorian Parliament intended to limit the scope of section 148 in the manner suggested.

Fourthly, the Court of Appeal's reliance upon the New South Wales decision of *GJ Coles and Co v Retail Trade Industrial Tribunal*,[64] is misplaced. Admittedly, *GJ Coles* was a case in which an order in the nature of certiorari was sought and granted in respect of a tribunal that was wrongly constituted. Critically, however, seeking prerogative relief was the only available means of challenging that tribunal's decision. That was because there was no right of appeal - on a question of law or otherwise - from that tribunal's decision.[65] In the circumstances, the New South Wales Court of Appeal in *GJ Coles* did not consider the scope or availability of any right of appeal. Accordingly, that case offers no support for the view that the right of appeal in section 148 of the VCAT Act ought be confined in the manner suggested.

Fifthly, the Federal Court has held that the comparable provision in the Commonwealth *Administrative Appeals Tribunal Act* 1975[66] - which also allows appeals on a question of law - is broad enough to allow that Court to entertain an appeal on the basis that the Administrative Appeals Tribunal did not have the jurisdiction to entertain the application in question.[67]

Finally, the High Court in the *Roy Morgan* case appears to endorse the view that section 148 of the VCAT Act, whilst not an exclusive code, may provide an important discretionary reason for not permitting resort to Order 56 or the ALA on the basis that section 148 provides a suitable alternative remedy. This suggests that section 148 provides the principal route for challenging VCAT decisions and that the other routes are to be treated as subordinate. The Court of Appeal's *obiter* not only reverses that position (where the challenge is to the VCAT's jurisdiction only), it carves out an unnecessary and unjustified limitation on the scope of section 148.

For these reasons, it is to be hoped that the Court of Appeal's *obiter* in the *Warehouse Group* case will not be endorsed in the future.

Two further points should be made for completeness.

First, in *Re Buttigieg v Melton SC*,[68] Justice Morris P referred to these criticisms of the Court of Appeal's obiter and observed (at [13]) that although it was unnecessary and undesirable for him to enter into the debate, section 148 of the VCAT Act 'will usually provide the most

convenient method of challenging a VCAT decision, including as to jurisdiction as it enables the legal correctness of that decision to be considered by the Supreme Court'.

And secondly, the Court of Appeal's *obiter* may have some far reaching implications if, as appears likely, the Court is to be taken as suggesting that a challenge to the VCAT's jurisdiction embraces a challenge made on the basis that the VCAT made a jurisdictional error. That is particularly so if the VCAT is taken to be an 'administrative tribunal' - and not an 'inferior court' - for the purposes of the High Court's decision in *Craig v South Australia*.[69] That is because an administrative tribunal will commit a jurisdictional error if it identifies the wrong issue, asks itself a wrong question, ignores relevant material, relies upon irrelevant material or, at least in some circumstances, makes an erroneous finding or reaches a mistaken conclusion.[70] Further, an inferior tribunal will make a jurisdictional error if it breaches a rule of natural justice.[71]

It follows from the previous paragraph that if:

(a) the Court of Appeal in the *Warehouse Group* case is to be taken as suggesting that a challenge to the VCAT's jurisdiction embraces a challenge made on the basis that the VCAT made a jurisdictional error; and

(b) the VCAT were treated as an administrative tribunal for the purposes of the *Craig* decision — the scope of section 148 would be significantly curtailed. That would be a most surprising outcome that Parliament could not have intended.

Conclusion

As noted at the outset, the VCAT is a significant feature of the Victorian legal landscape. And, as this paper has sought to demonstrate, a number of VCAT developments - particularly in the areas of natural justice, reasons for decision and appeals to the Supreme Court of Victoria - should be of interest to administrative lawyers in this State.

Endnotes

1 For an excellent discussion of recent developments concerning the practice and procedure of the VCAT, see S Morris, 'VCAT practices and procedures: Recent developments' (2004) 11 *Aust Jo of Admin Law* 173.

2 I will not deal with the 'bias rule' in this paper.

3 Section 98(4) of the VCAT Act provides that s 98(l)(a) does not apply to the extent that the VCAT Act or an enabling enactment authorises, whether expressly or by implication, a departure from the rules of natural justice. In *PRA v MA* [2004] VSCA 20, Ormiston JA observed (at [2]) that a provision such as s 98(4) 'must in the circumstances be read and construed with some care'.

4 See *Magazzu v Business Licensing Authority* (2001) 17 VAR 264 at 277. See also the VCAT's 'User Service Charter', where the VCAT describes its purpose as being 'To provide Victorians with a tribunal that delivers a modern, accessible, informal, efficient and cost-effective civil justice service'.

5 See s 98(3) of the VCAT Act.

6 *Rumpf v Mornington Peninsula* SC (2000) 2 VR 69 at [74].

7 (1999) 3 VPR 46.

8 See s 98(1)(b) of the VCAT Act.

9 See *Rumpf v Mornington Peninsula SC* (2000) 2 VR 69 at [74]; *Francis-Wright v VCAT* (2001) 17 VAR 306 at 317.

10 See s 98(1)(c) of the VCAT Act.

11 See s 98(1)(b) of the VCAT Act.

12 [2003] VSC 335 at [27].

13 See also *Francis- Wright v VCAT* (2001) 17 VAR 306 at 317.

14 See *The Warehouse Group (Australia) Pty Ltd v Bevendale Pty Ltd (No 2)* (2002) 11 VPR 321 at [57].

15 (2002) 19 VAR 265 at 269.

16 (2001) 17 VAR 306 at 317-318.

17 Compare C Enright, *Federal Administrative Law* (Federation Press, 2001) at [34.5].

18 See *Bell Corp Victoria Pty Ltd v Stephenson* [2003] VSC 255 at [51].

19 (2001) 17 VAR 306. See also *PRA v MA* [2004] VSCA 20.
20 But note that, in *Jacques Nominees Pty Ltd v National Mutual Trustees Pty Ltd* (2000) 16 VAR 152 the VCAT found (at 175-176) that it had the power to hear an application for an Anton Pillar order on an ex parte basis. Compare also *PRA v MA* [2004] VSCA 20 at [2], [50].
21 And, possibly, an ex parte application for an Anton Pillar order: *Jacques Nominees Pty Ltd v National Mutual Trustees Pty Ltd* (2000) 16 VAR 152.
22 See, eg, *Barbon v West Homes Australia Pty Ltd* [2001] VSC 405 at [16].
23 In *PRA v MA* [2004] VSCA 20, Ormiston JA observed (at [2]) that 'if what is being sought by a party or what is proposed by the Tribunal is not apparent on the piece of paper served, it would to my way of thinking be generally necessary for the Tribunal to give a fair opportunity to each party affected to respond, either by the calling of evidence or the preparation of appropriate submissions, to the application made'.
24 In *Re Campbell and Port Phillip CC* [1999] VCAT 128 the VCAT noted (at [32]) that, save in the most exceptional circumstances, the parties 'have an entitlement in accordance with the rules of natural justice to cross-examine any expert whose evidence is to form a key basis for a finding of fact'. Similarly, in *Chan v Kostakis* [2003] VCAT 951 the VCAT expressed the view (at [26]) that it would be contrary to the rules of natural justice to allow a letter to be the basis of a crucial finding of fact without opposing parties having the opportunity to cross-examine the author of that letter or to clarify the situation.
25 [2002] VSC 295 at [9].
26 [2004] VSC 49 at [26].
27 Nettle J observed that not every breach of the rules of natural justice will render a decision invalid. That is because the court may refuse relief if it is satisfied that what appears to have been a denial of natural justice could have had no bearing on the outcome of the case. See *Stead v State Government Insurance Commission* (1986) 161 CLR 141.
28 See also *The Warehouse Group (Australia) Pty Ltd v Bevendale Pty Ltd (No 2)* (2002) 11 VPR. 321.
29 See *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82.
30 See *Muin v Refugee Review Tribunal* (2002) 190 ALR 601.
31 (2001) 14 VPR 108.
32 See *Rumpf v Mornington Peninsula SC* (2000) 2 VR 69 at [61]-[78]. In that case, Balmford J concluded that whilst the Tribunal had erred in law in entertaining the further submission when leave had not been given, that error, in all the circumstances, was not a vitiating error of law.
33 See *Turner v Horsfall* (2002) 11 VPR 340, where Ashley J observed (at [46]) that 'if the Tribunal had particular specialist knowledge upon which it proposed to rely, it was knowledge of which the parties should have been apprised before a decision was made in reliance upon it.'
34 See *Breese Pitt Dixon Pty Ltd v Wyndham CC* [2004] VSC 199.
35 See *Torrington Investments Pty Ltd v Shire of Bulla* (1985) 57 LGRA 181 at 185-186; *Sheedy Simmons Building Permit Service v Mornington Peninsula SC* (unreported, Vic Sup Ct, Nathan J, 3 October 1996).
36 See *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 662.
37 See s 45 of the VCAT Act.
38 See s 46 of the VCAT Act.
39 See s 47 of the VCAT Act.
40 Section 49 does not apply to all proceedings involving the exercise of the VCAT's review jurisdiction. See [2428] of *Pizer's Annotated VCAT Act* (2nd Edition, JNL Nominees).
41 (2003) 20 VAR 96.
42 [1998] 4 VR 249 at 261 per Tadgell JA.
43 See also *Re Rymarz and Transport Accident Commission* [2003] VCAT 808 at [13]-[16].
44 See s 117 of the VCAT Act. The VCAT President may extend the 45-day period in accordance with s 117(4).
45 *Noel Johnson's No 1 Pty Ltd v Kennedy-Bush* (1996)10 VAR 102 at 107 per Charles JA.
46 (2000) 17 VAR 34.
47 [2004] VSC 152.
48 [2003] VSC 97.
49 (2002) 5 VR 547
50 Similarly, in *Hamilton v White* (2000) 18 VAR 1 the Supreme Court endorsed the Federal Court decisions of *Copperart Pty Ltd v Commissioner of Taxation* (1993) 26 ATR 327 at 328-329 and *Australian Postal Corporation v Lucas* (1991) 14 AAR 487 at 495 and held that the question as to whether the findings of fact made by the VCAT are sufficient will always turn on all the circumstances of the particular case.
51 Except if the VCAT was constituted by, or presided over by, the VCAT President: see s 2 of the ALA.
52 [2004] VCAT 1048.
53 The definition goes on to state that a 'proceeding' includes an inquiry conducted by the Tribunal, a compulsory conference, a mediation, a rehearing or reassessment under Part 6 of the *Guardianship and Administration Act 1986*, but does not include a referral by the Tribunal to the Equal Opportunity Commission under section 156(1) of the *Equal Opportunity Act 1995*.
54 The VCAT must have actually made an order instead of merely being inclined to do so: *The Muir Electrical Company Pty Ltd v The Commissioner of State Revenue (No 2)* [2002] VSC 224 at [40].
55 This point was emphasised by the High Court in *The Roy Morgan Research Centre Pty Ltd v Commission of State Revenue* (2001) 207 CLR 72 at [15]:

> Section 148 of the VCAT Act is concerned with the invocation of judicial power to examine for legal error what has been done in an administrative tribunal. Although s 148 uses the word 'appeal', it is clear that the Supreme Court is asked to exercise original, not appellate, jurisdiction and to do so in proceedings which are in the nature of judicial review... [I]t is important to recognise that the essential character of s 148 is that it provides for the institution of proceedings in the Supreme Court, by leave, in which the legal correctness of what the Tribunal has done can be challenged.

56 Applications under the ALA have been made to prevent the VCAT from continuing to hear a proceeding — *The Warehouse Group (Australia) Pty Ltd v Bevendale Pty Ltd*, referred to in [2002] VSC 291 at [34] - and to quash a decision of the VCAT: *Sweetvale Pty Ltd v VCAT* [2001] VSC 426.
In the latter case the Court noted that there was no suggestion that the proceeding under the ALA could not be brought - whether or not the applicants might have proceeded under section 148 of the VCAT Act. An application for leave to appeal to the Court of Appeal was dismissed: *Sweetvale Pty Ltd v VCAT* [2003] VSCA 83. See also *Podhaski v Bennett* [2000] VSC 197; *Loh v Shi* [2003] VSC 271 at [18].

57 See *Richards v VCAT* [2000] VSC 148.

58 See, eg, *Independent Cement and Lime Pty Ltd v VCAT* (2000) 16 VAR 290; *Tamas v VCAT* [2002] VSC 309 (an appeal to the Court of Appeal was allowed: *Tamas v VCAT* (2003) 20 VAR 237).

59 *The Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue* (2001) 207 CLR 72 at [15].

60 (2001) 17 VAR 306.

61 It should be noted, however, that is has been said that it is 'uncertain' whether a denial of procedural fairness gives rise to a question of law for the purposes of section 148: see *PRA v MA* [2004] VSCA 20 at [36]. This issue is discussed in detail in *Pizer's Annotated VCAT Act* (2nd Edition, JNL Nominees) at pages 493 -494.

62 (2002)19 VAR 111.

63 (2002) 11 VPR 98. See clause 52 of Schedule 1 to the VCAT Act.

64 (1987) 7 NSWLR 503.

65 (1987) 7 NSWLR 503 at 519.

66 Section 44(1) of that Act provides that a party to a proceeding before the AAT may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding.

67 See, eg, *Deputy Commissioner of Patents v Board of Control of Michigan Technological University* (1979) 2 ALD 711 at 714 and 723. See also *Director-General of Social Services v Chaney* (1980) 3 ALD 161 and *Northcote Food Wholesalers Pty Ltd v City of Northcote* (1994) 13 AATR 175.

68 [2004] VCAT 1048.

69 (1995) 184 CLR 163 at 176-180. In *Tamas v VCAT* [2002] VSC 309 Gillard J observed (at [23]) that whether or not the VCAT is to be equated with an inferior court or an administrative tribunal (for the purposes of *Craig's* case) is an interesting and difficult question. His Honour then appeared to proceed on the basis that the VCAT was to be equated with an inferior court because the VCAT had the power to decide questions of law, and those questions must be decided by a judicial member or a member who is a legal practitioner. On appeal, the Court of Appeal was spared the need to resolve this question: see *Tamas v VCAT* (2003) 20 VAR 237 at [30].

70 Ibid at 179.

71 See *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597; *Plaintiff S157/2002 v Commonwealth* (2002) 211 CLR 476, esp at [76] and [83].

EXTERNAL REVIEW OF CHILD SUPPORT AGENCY DECISIONS: THE CASE FOR A TRIBUNAL

Tammy Wolffs*

Introduction

The current family law system and the Child Support Scheme have been the subject of intense debate ever since their inception, respectively in 1975 and 1988. This is entirely understandable, given the emotive nature of family separation and the number of adults and children affected by the Child Support Scheme.[1]

Most recently, the Parliament's Senate Standing Committee on Family and Community Affairs released its report, *Every picture tells a story: report on the inquiry into child custody arrangements in the event of separation*.[2] In response to the report and its recommendations[3], the Government announced that a Ministerial Taskforce and Reference Group would be set up to review aspects of the operation of the Child Support Scheme.[4]

The Committee recommended that the Taskforce undertake a broad examination of the Child Support Scheme, including the operation of the current child support formula.[5] The Committee also made a number of recommendations for immediate reforms to the Scheme, including that decisions made by the Child Support Agency (CSA) be reviewable by an external tribunal.[6] However, the Government has excluded consideration of this last recommendation from the terms of reference for the Taskforce and Reference Group.[7]

The lack of a tribunal to review decisions made by the CSA seems to be anomalous in the context of modern administrative law practice. This article considers both the need for external review of CSA decisions and how such a process could be practically implemented.

The Child Support Scheme

Prior to the introduction of the Child Support Scheme in 1988, separating parents made an arrangement for the payment of child support, or could be ordered to do so by the Family Court of Australia (FCA). This could be a costly and time consuming process, could create greater tensions between parents who were often already in dispute over other matters, lacked consistency from case to case, and could be difficult to enforce.[8] Where orders were made, they were generally for insignificant amounts (an average of $26 per week),[9] and were considered by the FCA to be 'top-ups' to government funded family assistance entitlements, rather than for substantive support.[10] Only about thirty per cent of the court ordered amounts were actually being paid.[11]

The Child Support Scheme was designed to transfer the primary responsibility of financial support of children to their parents, with additional family assistance available on a needs basis.[12] When the Scheme was established, from 1 June 1988, it allowed for existing court orders and court registered maintenance agreements to be registered with the newly created Child Support Agency (Stage 1 cases).[13] From 1 October 1989, the CSA was able to use a

* *Department of Finance and Administration, formerly Director of Investigations, Office of the Commonwealth Ombudsman.*

formula to assess child support, obviating the need for court orders in new cases, except in special circumstances (Stage 2 cases).[14]

The CSA was created as part of the Australian Tax Office (ATO), both to ensure the Agency's access to income and employment information and so that child support assessments could be enforced through the mechanisms available to the ATO. Where paying parents were in employment, the CSA was required to collect payments by applying employer withholding to their wages or salaries.[15] Policy responsibility for the CSA was with the then Department of Social Security (now the Department of Family and Community Services).[16]

A formula approach is used to determine the amount of child support to be paid, calculated on the taxable incomes of parents and the number of children each parent is required to support, with the intention that parents should support their children according to their capacity to do so.[17] To calculate an assessment, the CSA establishes the taxable income of the non-resident parent[18] (the 'payer'), and deducts an amount available for self-support, called the 'exempt income'.[19] The exempt income is derived from social security pension rates and is increased in cases where the payer has other natural or adopted children to support.[20]

The CSA also considers the taxable income of the resident parent (the 'payee'). If the taxable income exceeds the 'disregarded income' allowed in the formula, which is based on a measure of average weekly earnings, it will have the effect of reducing the assessment.[21]

Child support is calculated on the income remaining to the payer, after adjustments to allow for the exempt income and the payee's disregarded income have been made. The percentage that is applied depends on the number of child support children, and varies from 18 per cent for one child and 36 per cent for five or more children.[22] There is a maximum income (the 'cap') above which child support is not paid on the excess[23] and a minimum amount of child support ($260 per year) that is assessed for low income payers.[24]

Where a parent has substantial contact or shared care of the children, for between 30 and 70 per cent of nights in the year, the formula is calculated treating the income of both parents as the payer, and the respective liabilities are offset against each other to arrive at the assessed amount.[25]

The CSA has wide powers of enforcement:

> If a parent refuses to negotiate payment or fails to comply with negotiated payment arrangements, the CSA has the right to take administrative action to achieve payment without going to court.
>
> In general, this consists of:
>
> - having payments deducted from the parent's pay;
> - intercepting the parent's tax refund;
> - taking the money due from the parent's bank or credit union account; or
> - collecting the money owing to the parent from a third party.[26]

Where enforcement through administrative mechanism is unsuccessful, the CSA may take court action to recover outstanding debts.[27]

While the formula approach may seem to simplify arrangements for child support between parents, the Scheme is extremely complex because of the many different, and often changing, circumstances of individual parents,[28] which may include changes in income or financial arrangements, changes in levels of care and contact between parents and their

children and/or changes in family structure (for example, additional children from another relationship).

The complexity of the Child Support Scheme

The complex legislation contained in the *Child Support (Registration and Collection) Act 1988* (Cth), the *Child Support (Assessment) Act 1989* (Cth) and the *Child Support (Adoption of Laws) Act 1990* (WA)[29] means that CSA administrative officers make many difficult decisions based on the individual circumstances of each case. In addition, decisions made by the FCA, in accordance with Division 7 of the *Family Law Act 1975* (Cth) (relating to maintenance), are also considered by CSA decision-makers. Examples of the legislative complexities of the Child Support Scheme include:

- how to derive the income of a parent to assess child support in circumstances where taxable income is not known, that is where a tax return has not been lodged for the relevant period;[30]

- the circumstances in which a parent may lodge an estimate of income and how that income is reconciled with their taxable income at the end of the child support period;[31]

- when a child support agreement entered into by the parents may be accepted by the CSA and how an agreement may be changed or ended;[32]

- the imposition of late payment penalties in cases where the payer has arrears of child support;[33] and

- the treatment of payments made by child support payers directly to the other parent (in cases registered for collection by the CSA) or to third parties, rather than to the CSA.[34]

Further, much of the operation of other aspects of the Child Support Scheme is detailed in CSA internal guidelines and can be the subject of dispute between the CSA and its clients, particularly as it relates to enforcement of arrears of child support. Examples include: the circumstances in which a paying parent's tax refund may be intercepted and applied to outstanding child support arrears;[35] and the application of Departure Prohibition Orders, preventing a child support payer from leaving Australia without making an arrangement to pay outstanding arrears.[36]

As well as the complexity of the legislation, case law and guidelines that affect decision-making by the CSA, each decision has an impact on at least two parties (the parents), who are often in dispute. These disputes often extend to matters that can change the calculation or collection of child support, for example, the amount of care or contact a child has with each parent; the income of one or both parents; and whether reasonable action is, or has been, taken to collect outstanding child support.

Parents who do not agree that the formula operates fairly in their particular circumstances can apply to the CSA for a change of assessment.[37] This can occur, for example, in cases where a paying parent has high costs associated with contact or access to their children or where a parent could reduce taxable income through the use of company structures. Where a parent spends larger amounts than would be considered usual in exercising contact with their children, such as in cases where long distance travel is required, the CSA may reduce the child support assessment to reflect the extra cost. Likewise, if a payer has a low taxable income because of the operation of a business, company or trust, the CSA may increase the child support assessment to more accurately reflect the resources available to the payer.[38]

Other reasons for changing assessments centre around the needs and interests of the child, for example, where costs of support are higher because of costs associated with a child's disability or medical/dental needs, or where the parents have agreed that a child should be enrolled at a private school or be involved in specific extra-curricular activities. [39]

Most commonly, applications for a Change of Assessment are made for the reason that the assessment is unfair because of the income, earning capacity, property or financial resources of one of the parents.[40] Decisions are made on an individual basis and are highly discretionary.

This option has been available since 1992 and expanded between 1994 and 2002, so that there are currently ten prescribed reasons for making a Change of Assessment.[41]. Previously, parents who did not agree with the assessment had to apply to the FCA (or another court with family law jurisdiction) for a change in arrangements, but few parents pursued this course:[42]

The unique nature of child support administration

There are three elements of child support matters that set its administration apart from all other government agencies. The first is that the CSA, in a unique relationship with its clients, acts to transfer money from one person to another. Each case managed by the Agency has two clients, one who is paying money and the other who is receiving the money paid. This means that any decision made by the CSA that has a positive effect on one of its clients is likely, by its nature, to have a detrimental impact on another of its clients. Further, when the CSA reverses a decision to correct an earlier mistake, it may well resolve the problem for the parent that was previously adversely affected, but may create a problem for the other parent.

The second unique element of the CSA is that it operates in the emotively charged family law environment, in which the parents of child support children may have no contact with each other, may have very strained relations or there may be outright hostility and an intention by one or both parents to control or 'punish' the other. Parents also often have very different perspectives on issues around separation, re-establishing themselves after separation and providing financial and other support for their children. For example, some paying fathers (around 90 per cent of paying parents are men)[43] may feel that it is unfair that the CSA is able to enforce the payment of child support when there is no agency that is able to enforce arrangements permitting them contact with their children. They feel that withholding child support is the only leverage they have to see their children. On the other hand, some payee mothers claim that fathers disappoint the children by not turning up for contact and believe that they do not have to support their children if they forego contact.[44]

The third unique feature of child support matters is that, as with other family law issues, they are subject to widespread community debate, advocacy by groups supporting mothers and fathers, payees and payers, men and women, and are subject to continual scrutiny by the Parliament and the community. The reasons for this include:

- the number of families affected by separation and child support (the CSA has approximately 1.3 million clients, covering more than one million children);[45] and

- the inclusion of issues that concern the wellbeing of children and the impact on the financial resources of parents and the community (the CSA transferred nearly $2 billion dollars between parents in 2002-2003,[46] with around $844 million dollars in debt remaining[47] and total savings to government outlays of almost $434 million)[48].

Existing forms of review

Review mechanisms have been introduced into the Child Support Scheme in an incremental way. This has been due, in part, to general public interest in the Scheme and the activities of the CSA, as reflected in the number of times the Scheme has been scrutinised by parliamentary committees and been subject to new government measures and proposals. As a result, when looked at holistically, the appeal procedures within the CSA do not conform to principles of administrative law to the same extent as many other comparable areas of decision-making.

In the initial design of the Scheme, the Child Support Consultative Committee did not deal with the need for internal review of CSA decisions, but instead concentrated on the need to ensure that the formula could be altered in cases where it would not provide a fair outcome to parents and children. The Committee recommended that the courts retain the ability to depart from the formula in appropriate cases.[49]

The Change of Assessment process, originally introduced in 1992 as the 'Child Support Review Office', was seen as a mechanism for administrative review of CSA decisions:

> There was considerable anecdotal evidence that many cases of hardship existed and, concerned that this reluctance might be due to the perceived costs and general difficulty of going to court, authorities decided that just as child support was now determined administratively so there should also be an avenue of administrative appeal which was independent, operated relatively informally and did not involve any cost to parents.[50]

The Child Support Review Office changed its title to the 'Change of Assessment' process in 2000. At the same time, its decision-makers, known as 'Child Support Review Officers', were renamed 'Senior Case Officers'. Around 90 per cent of these decision-makers are employed on contract to the CSA, and are mainly family law practitioners,[51] giving impetus to the view that the process provides a semi-external review of CSA administrative decisions.

However, the Change of Assessment process is really designed to provide a review of the formula assessment in cases where there are special circumstances that would mean that the child support assessment does not operate fairly. It is not a review mechanism for other types of decisions made by the CSA.[52]

A further internal review mechanism was introduced, from 1 July 1999, which allowed parents to lodge an 'objection' to most decisions made by the CSA, including Change of Assessment decisions.[53] There are three problems with the objection process, as it relates to internal review of Change of Assessment decisions.

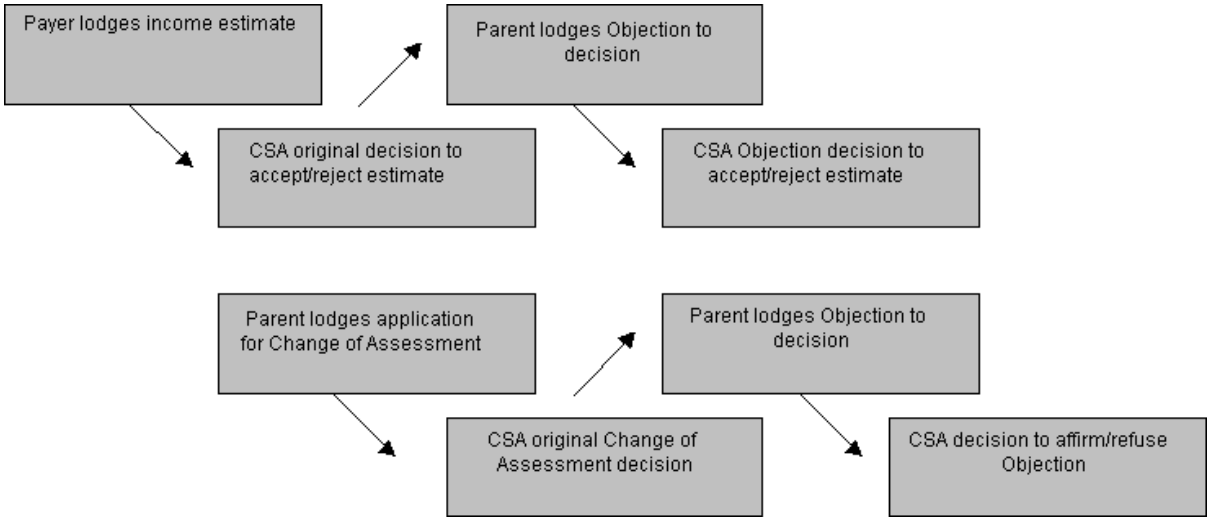
Firstly, Objection Officers are employed at the same administrative level as Senior Case Officers, rather than at a more senior level. Logically, this would seem to compromise the value that the internal review process could add to Change of Assessment decisions. This may particularly be the case in respect of the perceived independence of the process, conflicting with guidelines for best practice in administrative review.[54]

A related problem is that most Senior Case Officers are legal practitioners with experience in family law and are, arguably, more qualified in respect to change of assessment decisions, than the internal administrative Objection Officers.

Secondly, there can also be a perception that Change of Assessment decisions are returned from a semi-external process for internal CSA review. The normal administrative law hierarchy is that an internal review process is followed by at least one layer of external administrative review. In this case, there seems to be a semi-external decision making process, followed by an internal review mechanism; or, to look at it another way, there is a

two-tier internal review process, where the first layer arguably has more expertise than the second.

There are also some situations in which the Change of Assessment process can, in effect, be used to review an objection decision. For example, as illustrated in the diagram below, a payer may lodge an estimate of income with the CSA on the basis of a reduced income. The payee may then object to the CSA's decision to accept the estimate (or the payer may object if the decision was to refuse the estimate). If either parent does not agree with the outcome of the objection process, an application may be made for a Change of Assessment, so that a Senior Case Officer can more closely consider the payer's income and earning capacity. Of course, either parent can then lodge an objection to the outcome of that process. This can create a protracted and confusing sequence of actions and internal review processes, as well as demonstrating that the two mechanisms do not work together to progress an internal review.



A third and additional problem arises in cases where a Senior Case Officer has made a decision that the matter is too complex for a Change of Assessment process and the parents need to have the matter considered by a court. In these cases, the legislation requires the parent seeking the change to go through the objection process before making an application to the court.[55] This simply creates an additional hoop for parents to jump through before having the matter dealt with in an appropriate forum.

The Administrative Appeals Tribunal (AAT) is the only mechanism for external administrative review of CSA decisions. However, the only decisions reviewable by the AAT relate to decisions to grant or refuse applications for extensions of time; the remission of late payment penalties imposed on payers with child support arrears; and the imposition of Departure Prohibition Orders (preventing payers with child support debts from leaving Australia).[56]

The only other viable mechanism for external review of CSA decisions is by the FCA (or another court with FCA jurisdiction[57]); the application for review must name the other parent as the respondent.[58] Further, this mechanism is really only applicable to Change of Assessment decisions.[59] There remains no mechanism for external administrative review of most CSA decisions, although the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and section 110 of the *Child Support (Assessment) Act 1989* (Cth)can be used to seek review in the Federal Court of Australia of administrative decisions by the CSA (except for Change of Assessment decisions, which are specifically excluded).

The court review and appeal mechanisms can be daunting and confronting for those who must appear before them. The formal and adversarial nature of courts can be a major disincentive for a person wishing to access review and appeal processes.

Use of the courts

The adversarial approach used by the courts is often thought to create or exacerbate conflict between disagreeing parties, because of the way in which parties are required to put their competing interests to a magistrate or judge, who then makes a decision, with one party the 'winner' and the other the 'loser'.[60] In child support disputes, the nature of the disagreement is of a profoundly personal nature, dealing with matters related to relationship breakdown and the financial and practical care of children of the relationship, such as occurs in child support matters. This can mean that a parent may have a greater stake in avoiding court proceedings to avoid further conflict with the other parent. Anecdotal evidence suggests that, in some cases, there may be an entirely opposite effect, with excessive use of the court system by some parents to continue disputes and conflict. The unique nature of family law matters, including child support, particularly the need to act in the best interests of the children, have for some time been the subject of concern in relation to the adversarial nature of dispute resolution:

> … individual litigants, corporations and consumer groups expressed the view that the adversarial system was unsuitable for many types of disputes, particularly family law disputes, because the system was concerned with 'winning at all costs', exacerbated conflict, victimised the poor and less powerful and left children out of the process.[61]

The Family Court does have mechanisms in place that address the differences between it and other courts, such as its ability to intervene in children's matters by obtaining additional information not provided by either parent, to call its own additional witnesses, order family reports and appoint child representatives.[62] It is also has sophisticated arrangements for assisting self-represented litigants.[63] However, it seems that there is a continuing reluctance for parents to use this mechanism. For example, court ordered child support assessments post-1989 (when the CSA commenced child support formula assessments) numbered less than 2000 as at 30 June 2002, or just 0.3 per cent of the CSA caseload.[64] Further, only 420 appeals on child support matters and 329 departure applications were made to the FCA between 1 October 1989 and 29 June 1991.[65] While there is no recent available data on the total number of child support matters that have been considered within the FCA jurisdiction or the Federal Court of Australia, anecdotal information from the CSA indicates that judicial review and appeal of child support decisions is not common.

Many tribunals, on the other hand, have been set up to be inquisitorial and less formal, and include provisions to minimise conflict. This may include a requirement that applicants cannot have legal representation, or a prohibition on the agency from appearing. Tribunals may conduct their own investigations:

> … with the tribunal controlling the proceedings, defining issues, deciding on the factual material to be considered and calling witnesses on its own motion. In some proceedings parties may be restricted to answering questions from tribunal members, with no right to examine witnesses or address the tribunal, and there is less emphasis placed on a single determinate hearing, with oral argument and case presentation.[66]

Most importantly, tribunals that consider disputes purely between government agencies and their clients have the potential to reduce conflict between the parties:

> Tribunals and other administrative decision-making processes are not intended to identify the winner from two competing parties. The public interest 'wins' just as much as the successful applicant because correct or preferable decision-making contributes, through its normative effect, to correct and fair administration and to the jurisprudence and policy in the particular area.[67]

It would be unlikely, however, that this could ever be entirely true for child support matters, because disputes determined between the CSA and a parent will, in most cases, have an impact on the other parent in the case, who will often generally have a competing interest in the matter.

Role of the Ombudsman

A non-adversarial and informal method of challenging CSA decisions currently exists through the Commonwealth Ombudsman. The CSA consistently ranks as one of the three highest volume agencies for complaints (along with Centrelink and the ATO, both of which have many times the number of clients of the CSA).[68] The Ombudsman received nearly 2500 complaints about the CSA in 2002-03.[69]

The *Ombudsman Act 1976* expressly permits the Ombudsman to make suggestions or recommendations to government agencies where a decision is considered to be unjust.[70] The Ombudsman also presents as an alternative to judicial review for clients of the CSA, even though the Ombudsman has the ability to decline to investigate a matter where there is another appeal process available to the person, including through courts.[71] This is because the Ombudsman's office has always taken the view that the cost, time and general reluctance of parents to appeal to the courts on child support matters result in the office acting as a more accessible mechanism to CSA clients. In other words, the lack of administrative review processes significantly increases the resource requirements within the Ombudsman's Office.

However, while s 15 of the Ombudsman Act enables recommendations to be based on merit, the Ombudsman will not undertake a merits review of decisions and make suggestions or recommendations solely because it considers that a better decision could be made, except in unusual circumstances. The Ombudsman will generally only ask an agency to reconsider its decision in cases where a view is formed that the decision is not lawful, that is, that no reasonable person could have made such a decision. This is because the Ombudsman will generally not displace the judgement of the decision-maker by second-guessing the merits of particular decisions. Rather, the concern is to identify instances of defective administration, that is, circumstances where decisions are unreasonable.

Further, the Ombudsman is not able to compel an agency to change its decision. This means that, except in limited circumstances, there is no non-adversarial mechanism available for parents to seek merits review of decisions made by the CSA.

Quality of CSA decision making

The Commonwealth Ombudsman recently investigated the quality of decision-making in, arguably, the most difficult and contentious area of CSA administration – Change of Assessment decisions made on the basis of parents' financial resources, including the capacity to earn a higher income than reflected by a formula assessment.[72]

Change of Assessment applications are made in only around 6 per cent of child support cases, with around 60 per cent of these applications resulting in a change to the assessment.[73]

One reason parents may apply to the CSA for a change to the administrative assessment, is that they consider the formula assessment 'would result in an unjust and inequitable determination of the level of financial support to be provided by the liable parent for the child because of the income, earning capacity, property and financial resources of either parent'.[74] Where the reason has been established, CSA Senior Case Officers must also consider

whether it would be 'just and equitable as regards the child, the carer entitled to support and the liable parent; and otherwise proper'[75] to make the change.

Parents commonly apply for a Change of Assessment on the basis of this reason where they believe that: the other parent operates a business or company in a way that means that personal taxable income does not reflect the resources available to that person; the other parent has voluntarily left employment or not taken appropriate steps to secure employment; the other parent has received a large termination, compensation or other lump sum payment; or the other parent has salary packaged income so that taxable income has been reduced.[76]

As part of the Ombudsman's investigation into CSA decisions relating to parents' income and earning capacity in Change of Assessment processes, an analysis was undertaken of 1156 decisions made over a six month period (1 June to 30 November 2002), where parents applied for a Change of Assessment for this reason.[77] Each decision was read and given a rating in terms of its quality. The ratings are indicative only and generally based only on reading the decision, although some queries were raised with the CSA and further information obtained. They were as follows:

1. good decision;

2. better explanation needed and/or grammar/spelling/other editing errors;

3. not able to determine whether good decision or not;

4. better decision could have been made, but outcome would be same/close;

5. concern with decision, but open to Senior Case Officer;

6. decision was not reasonably open to Senior Case Officer.[78]

Of the 1156 decisions analysed, 678 (59 per cent) were initiated by applications from payees and 470 (41 per cent) by payers. The remaining cases (eight or one per cent) were cases where the child support liability of both parents were equal, such as when the parents had shared care of the children and their incomes were similar. [79]

The table below indicates that around 17 per cent of decisions were not correct or preferable and could be open to change through an external merits review process. In a further 7 per cent of cases, it was not clear whether a better decision could have been made.[80]

Table: CSA Region by quality of decisions

	NSW/ACT (n=362) %	**Vic/Tas** (n=343) %	**WA** (n=212) %	**Qld** (n=172) %	**SA/NT** (n=67) %	**Total** (n=1156) %
Good dec'n	68	73	75	68	76	71
Better expl'n needed	4	1	1	3	3	3
Unclear	3	10	9	9	5	7

Outcome ok	5	2	1	3	7	3
Concerns with dec'n, but open	12	10	11	12	7	11
Not reas open	8	4	3	5	2	5
Total	**100**	**100**	**100**	**100**	**100**	**100**

The research undertaken by the Commonwealth Ombudsman also found that approaches to decision-making varied in different CSA regions. Where Senior Case Officers found that a parent had the capacity to earn a higher income than assessed, but could not determine the amount, decisions were made using different indicators. For example, decision-makers in the Victoria/Tasmania region were more likely to set a new child support assessment based on the costs of raising children, while in New South Wales/Australian Capital Territory a measure of average income was more likely to be used, and in Western Australia Senior Case Officers generally referred to award rates or guides for relevant occupations.[81]

As can be seen from the table, there were also statistically significant variations in the quality of decision-making across CSA Regions. In using two nominal variables, as in the table above, one recommended measure of association or statistical significance is Lambda.[82] It is generally accepted that associations of more than 0.05 (in small samples) or 0.01 (in large samples) are indicators that there is an association between the variables.[83] In this case, the Lambda test showed an association of 0.196. This indicates that the CSA Region in which the decision was made was a statistically significant predictor of the quality of the decision.

The quality of decision-making was highest in South Australia and the Northern Territory, while decisions made in Queensland and New South Wales and the Australian Capital Territory were more likely to be of poorer quality. However, in the latter two locations, the decisions were clearer and more easily able to be categorised. It is possible that if the decisions in all Regions that were unclear ultimately belonged in the last two categories, Queensland would stand out on its own as the Region with the poorest decisions.[84]

The CSA, as a Commonwealth body, could reasonably be expected to demonstrate consistency in decision-making in each of its office locations. That is, a parent should be able to expect the same outcome in his or her child support case, regardless of where he or she lives.

Parliamentary interest

The CSA and the Child Support Scheme have been the subject of intense parliamentary scrutiny and there have been two major public inquiries in the last ten years that have considered the Child Support Scheme in part or in whole. Both of these inquiries ultimately recommended that CSA decisions be subject to external merits review by an existing or new tribunal.

In the most recent enquiry, the Senate Standing Committee on Family and Community Affairs[85] recently completed an inquiry into Child Custody matters. The terms of reference for the Committee included, 'Whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children'.[86] The report recommended that there be external review of child support decisions, rather than the current need for appeals to courts with Family or Federal Court jurisdiction. The Committee proposed that this could be a tribunal set up specifically for that purpose within the portfolio

responsibilities of the Commonwealth Department of Family and Community Services or as part of a family tribunal that the Committee proposed be set up to consider child custody matters.[87]

There is only limited reference in the report to the views of the Committee about the specific need for external review of CSA decisions and the reasoning for its recommendation for a tribunal for this purpose.[88] However, the Committee focussed strongly on the need for a tribunal to consider child custody matters and it seems that its reasoning for such a family tribunal is highly pertinent to child support matters. For example, the Committee noted:

> It has become very clear to the committee during this inquiry that the dynamics and emotions of family separation make adversarial litigation inappropriate … It is predicated on a win/lose outcome.[89]

The Committee gave detailed consideration to the problems of an adversarial system, noting that the nature of disputes between parents in the court system make it more difficult to resolve conflict and act in the best interests of the child:

> … the adversarial ethic pits people against each other to determine a winner and a loser. It pushes them apart when they need to be brought together around their children's needs. It trawls over the past when they need to be looking to the future.[90]

The Committee also examined the growth in self-represented litigants in family law disputes and the particular difficulties experienced by parents facing the court system in such circumstances.[91] This reasoning is relevant to the Committee's express views about the need for a tribunal to review CSA decisions:

> The change of assessment process was an improvement particularly on the previous court based processes. However, the committee believes that there should be a proper external review process similar to the Social Security Appeals Tribunal processes.[92]

Unfortunately, the Government has excluded further consideration of external review of CSA decisions from the Terms of Reference of the Child Support Taskforce and Reference Group that were set up in response to the Committee's report.[93] It may be that the Government aligned this issue with its rejection of the need for a tribunal to deal with residency and contact between parents and their children.[94]

The Senate Standing Committee on Family and Community Affairs was not the first to conduct a Parliamentary inquiry that encompassed child support matters. In 1994, the Joint Select Committee on Certain Family Law Issues[95] published its report examining the operations and effectiveness of the Child Support Scheme. The Joint Select Committee also recommended external merits review of CSA decisions.[96]

The Joint Select Committee was established in May 1993 in response to complaints about the Child Support Scheme and the CSA that had been made to the Commonwealth Ombudsman, the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act and to Members of Parliament and Senators.[97]

Submissions by the Child Support Agency and the Commonwealth Ombudsman considered the need for a tribunal to review decisions made by the CSA. The CSA's submission included an appendix containing the views of Senior Case Officers contracted to what was then called the Child Support Review Office (and is now simply known as the Change of Assessment process within the CSA).[98] The submission suggested that the Child Support Review Office be physically separated from the CSA and, effectively, operate as a tribunal:

> A concerted effort needs to be made to utilise hearing rooms of other agencies such as the Social Security Appeals Tribunal, Veterans' Review Board, Immigration Review Tribunal, wherever possible, or obtain fully separate premises for the Review Office.[99]

In separating the function, the submission also suggested that the review powers be wider than making decisions to change the assessment in cases:

> The Scope of Review Officers are currently confined to Part 6A applications, and there is no general power to review decisions taken by the Agency on a wider range of support matters. Currently a person who disputes a decision of the Agency as to the application of an administrative assessment, or one of the components of that assessment must ultimately take the matter as an appeal under section 110 of the Act to a court … It is suggested that there are direct benefits to be gained from expanding the role of the Review Office beyond the departure jurisdiction under Part 6A into a broad administrative review of CSA decisions under the Act.[100]

The submission by the Commonwealth Ombudsman was not as strong in suggesting that an external review mechanism was necessary in respect of CSA decisions. However, the Ombudsman was concerned that the Child Support Review Office was representing itself as a form of external review when, legislatively, it was an internal process, and suggested that the Office either operate as intended or an external review process be created:

> The CSA has promoted its arrangements for the exercise of the new power to make determinations as being a review mechanism. The decision-makers have been specifically recruited at senior levels for that task. They are known as review officers and as a group, they are located in an area called the 'Child Support Review Office' (CSR office). The CSR office is promoted as independent of the CSA, akin to a body such as the Social Security Appeals Tribunal. Once a review officer makes a decision, even if it appears unreasonable on the face of it, the decision cannot be changed without a fresh application or a court hearing. But the Assessment Act is clear that the review officers are original decision-makers who are delegates of the CSA Registrar – they are part of the CSA, not independent of it. The resources allocated to the CSR office are consistent with this. In reality therefore, the way in which the CSR office should exercise its function is unclear.[101]

The Joint Select Committee recommended that, 'the child support legislation be amended to establish an external review office, called the Child Support Appeals Office, to determine appeals by custodial parents or non-custodial parents' (Recommendation 77)[102] and that 'the relevant legislation be amended to establish a Child Support Claims Tribunal within the registry of the Administrative Appeals Tribunal' (Recommendation 81).[103]

Recommendation 77 related to moving the departure, or change of assessment, process from inside the CSA to an external and independent body, with members appointed by the Minister, in much the same way as other administrative tribunals.

In its response (November 1997), the Government expressed the view that an external review office was not necessary, but that, 'recommendations arising from the 'Reform of the Merits Tribunal' review,[104] which might improve the proposed Child Support Agency review process, will be considered.'[105] The response did not provide any further detail or address the concept of a new merits appeal tribunal. A further internal review mechanism was introduced, however, which allowed for parents to lodge an 'objection' to most decisions made by the CSA.[106]

The objection process provides a further internal review mechanism for CSA decision-making, increasing accountability and possibly improving the overall quality of decisions by the Agency. However, as discussed above, many of the most contentious decisions are made through the Change of Assessment process and objection officers reviewing these decisions may not have the level of expertise and experience to improve many of those decisions. External administrative review can enable greater accountability by a government agency and is likely to result in improved decision-making more broadly in that agency.[107]

The case for a tribunal

The benefits provided by external review in other areas of public administration can be applied in the child support jurisdiction. While acknowledgement and consideration would

need to be given by a review body of the impact that decisions may have on third parties (that is, the need for the parent who is not a party to the proceedings between the other parent and the CSA to be able to make representations to the tribunal), this may not be an insurmountable disadvantage.

There is also a need to recognise that, for many clients of the CSA, decisions of the Agency are final. The reasons for the reluctance of parents to return to the courts to deal with child support matters generally include one or more of the following: [108]

- a belief that the CSA has made a wrong decision that should be corrected without the need to apply for a court hearing against the other parent;
- the related desire for a remedy that is less likely to antagonise the other parent (further);
- previous unhappy experiences with the family court system;
- the perceived cost of proceedings;
- the time involved;
- the formality of court proceedings and lack of understanding of the processes;
- a reluctance by parents to represent themselves, especially in cases where the other parent is likely to have legal representation;
- fear of retribution (eg family violence, withholding contact) from the other parent if taken to court.

The introduction of a tribunal to review CSA decisions would have a number of benefits. Firstly, conflict between parents may be significantly reduced, both because a tribunal would operate in a less adversarial way than a court, and because a parent would be naming the CSA as the respondent in the action, rather than the other parent. In cases where the other parent objects to the application and joins in the proceedings, an advantage may remain by the use of non-adversarial procedures.

A second and related advantage is that, assuming legislation provides for a standard tribunal model, its inquisitorial nature would mean that the process would be less formal and less costly. An administrative tribunal may also be able to deal with some routine CSA matters that currently must be determined by a court, such as 'stays' of administrative action. For example, a payer may seek a suspension of enforcement action, including the garnishee of a bank account or the intercept of a tax refund, while that parent is seeking a reduction in the assessment or arrears through a Change of Assessment process. Currently, the CSA will only suspend such action on the order of a court. The transfer of this jurisdiction to a tribunal may be simpler for the parent and more cost effective.

Finally, the CSA would be compelled to either implement the tribunal's decision or appeal the matter to a higher authority (depending on how the system is set up.)

Establishing a tribunal may also improve normative decision-making processes:

> As a general rule, their decision-making occurs more quickly than hearings before the courts, they consider more cases, and hence have the opportunity to provide a more comprehensive view of the law on a topic and, because of the frequency with which their jurisdiction is invoked, they often lead the way in examining issues of general relevance to the wider community.[109]

It would seem that the benefit to be gained in this respect, compared to those offered through judicial review, may be greater than in many other jurisdictions because of the relatively low number of CSA cases dealt with through the courts.[110]

Where would a tribunal sit?

If CSA decisions were to be reviewable, consideration would need to be given to the need for a single or two tier process, and whether a new tribunal should be created to deal exclusively with CSA appeals, or whether the jurisdiction of an existing or proposed tribunal (such as the Social Security Appeals Tribunal (SSAT) and/or the Administrative Appeals Tribunal (AAT)) could be extended to CSA matters.

A single appeal right to the AAT may not be attractive, as it is more formal and more costly than the use of a lower tier tribunal, particularly for high volume agencies – as would be anticipated with a body that reviews CSA decisions. While it is difficult to predict the number of appeals on CSA matters, the volume of complaints to the Commonwealth Ombudsman may give some indication of demand. In 2002-03, 9642 Centrelink complaints and 2500 CSA complaints were received by the Ombudsman.[111] The number of Centrelink matters currently heard by the SSAT is comparable to the number of complaints about Centrelink matters to the Ombudsman.[112] If the number of appeals to a tribunal in respect of CSA matters also remains comparable to the number of complaints received by the Commonwealth Ombudsman, it could be expected to increase the workload of the AAT by around 37 per cent (based on 6700 applications made to the AAT in 2002-03).[113]

On the other hand, the creation of a new tribunal would contribute to the proliferation of existing tribunals, would entail a significant additional cost to set up and operate, and may also be politically difficult to advocate. Since the failure of the Administrative Review Tribunal Bill 2000, the Government abandoned its policy to amalgamate existing tribunals into a single entity. Nevertheless, the Government remains committed to reforming tribunals where it can do so without the need for legislative reform[114] and it is, therefore, unlikely to support the creation of a new tribunal.

The traditional argument against incorporating a new tribunal jurisdiction into an existing one is the need for specialised knowledge within the new tribunal and the risk of loss of knowledge in the existing one. The experience of the Victorian Civil and Administrative Tribunal (VCAT), however, presents an example to the reverse, as it has found that 'the ability to move members between lists can expand the pool of specialist tribunal members'.[115] This can be an advantage where panels are used, ensuring quality and consistency of decision-making.[116] Including child support appeals in an existing tribunal is also more likely to contain costs and more readily fits into a climate disposed to rationalising the existing tribunal system.

If CSA decisions were to be reviewable by an existing tribunal, they would seem to be most logically dealt with by the SSAT. Several arguments could be put for this, including that appellants to the SSAT, comprising income support and family support recipients, have many commonalities with CSA clients. These similarities include source of income (approximately one third of CSA payers and most payees rely on Centrelink benefits as their main source of income), that most are low income earners (median income of CSA payers is approximately $21,000 per year, while median income of payees is less than half of that amount).[117] Other similarities include the shared area of government responsibility, with both Centrelink and the CSA within the Family and Community Services portfolio, and the interaction between receipt of child support and family assistance entitlements. Another advantage of incorporating merits review of CSA decisions into the SSAT is the use of multi-member panels in that tribunal, with specialist knowledge consistent with that needed for CSA. Panels incorporate a legally qualified member, a welfare member and a departmental

member (although, there are often only two members who will make a decision in respect of Centrelink matters).[118]

The main difficulty in giving the SSAT jurisdiction over CSA decisions lies with the unique nature of the Child Support Scheme. It can be argued that, because any decision made by the CSA affects two parties in diametrically opposing ways – creating a detriment for one and a benefit to the other – that disagreement with CSA decisions is a matter that needs to be dealt with between the parties, rather than as an action against the CSA. At a minimum, a tribunal would have to allow for the other parent to take part in the process. This would require developing new procedures for the SSAT, which currently does not allow parties, other than the appellant, to appear before it.

Conclusion

It seems that, despite the complexity in dealing with two clients with competing interests in each case, there needs to be some appeal mechanism for CSA decisions that are in dispute that does not require CSA clients to take direct action against each other. The principles of external merits review through a tribunal system are equally as relevant to CSA decisions as other government decisions. It seems that external review mechanisms have been set up in every other area of government administration, with very good reason, and that this area of government decision- making has fallen behind.

The informality, speed and nature of investigation and decision-making by administrative tribunals seems ideally suited to the CSA environment. Many parents who are not satisfied with CSA decisions face one or more disadvantages, including low income. There is commonly existing conflict between parents that can be exacerbated by more formal processes, particularly judicial review, or parents do not seek judicial review to avoid further conflict.

The resources needed to set up a new tribunal to deal with child support matters, would be high and would likely result in government resistance. Further, the current Government has expressed an intention to amalgamate the existing tribunals and, while the necessary legislation has so far been unsuccessful, is unlikely to want to see any further proliferation. In any case, it would seem that the existing SSAT has an appropriate structure and could easily acquire the required expertise, so would require less adjustment than other alternatives to be geared to consider child support matters.

The main constraint in extending the review of CSA matters by the SSAT is that the tribunal would need to be able to put mechanisms in place to accommodate disputing parties. It is likely that the tribunal would need to become accustomed to these changes in procedures at the same time as dealing with a significant increase in the volume of applications. At the same time, child support legislation is complex and the SSAT would need to acquire expertise in this area. There is a need to ensure that such changes could be implemented without undermining the current effectiveness of the SSAT. While this may be problematic, this option deserves to be explored, as it remains the most viable for external merit review of CSA decisions.

It is a pity that, despite the recommendations of two Parliamentary Committees, such consideration falls outside of the Terms of Reference of the newly convened Child Support Taskforce and Reference Group.

Endnotes

1 Approximately 1.3 million parents of over 1.1 million children are registered with the Child Support Agency (Child Support Agency and Attorney General's Department, *Facts and Figures 2002-03*, CSA, Canberra, 2003, p17-18).
2 Tabled 29 December 2003.
3 Recommendations 26 and 27 of the Report propose setting up a Ministerial Taskforce to review the operation of the Child Support Scheme and its composition, p 174-176.
4 Prime Minister (2004) *Reforms to the Family Law System,* media statement 29 July 2004, p 2; and Anthony, Larry (2004) *Taskforce to examine child support scheme*, media statement 16 August 2004.
5 Recommendation 26, p 174-175.
6 Recommendations 25 and 27, p 174 and 176. While some of the components of recommendation 25 are to be considered by the Taskforce and Reference Group, tribunal review of CSA decisions (Recommendation 27) has not been included in the terms of reference for either body.
7 Anthony, *above n 4*.
8 Jan Bowen, *Child Support: A Practitioner's Guide* (2nd ed), The Law Book Co Ltd, Sydney, 2002, p 1.
9 Michael Carmody, 'Opening address by Child Support Registrar to the Joint Select Committee on Certain Family Law Issues', 22 September 1993, p 2.
10 Jan Bowen, *above n 8*, p 1.
11 Michael Carmody, *above n 9*, p 1.
12 Child Support Consultative Group, *Child Support: Formula for Australia*, AGPS, Canberra, May 1988, pp 4-5.
13 Jan Bowen, *above n 8*, p 1.
14 *Ibid*, pp 1-2.
15 Jan Bowen, *Child Support: A Practitioner's Guide* (Ist ed) The Law Book Co Ltd, Sydney, 1989, p 9. This subsequently changed, so that automatic withholdings are only applied at the request of the payer or where the payer refuses to make voluntary payments; this is set out in the *Child Support (Registration and Collection) Act 1988* (Cth) ss 43 and 44.
16 Child Support Consultative Group, *above n12,* p 5. The operation of the CSA was moved from the Australian Tax Office to the Family and Community Services Portfolio in October 2001.
17 Jan Bowen, *above n 8*, p 15.
18 1996 reforms to the *Family Law Act 1975* (Cth) changed the terms 'custodial parent' and 'non-custodial parent' to 'resident parent' and 'non-resident parent'.
19 Jan Bowen, *above n 8*, pp 16-17.
20 Jan Bowen, *above* n 8, pp 16-17 and *Child Support (Assessment) Act 1989* (Cth) s 39.
21 Jan Bowen, *above n 8*, p 17 and *Child Support (Assessment) Act 1989* (Cth) ss 43-46.
22 Jan Bowen, *above n 8*, p 16 and *Child Support (Assessment) Act 1989* (Cth) s 37.
23 Jan Bowen, *above n 8*, p 21 and *Child Support (Assessment) Act 1989* (Cth) s 44.
24 Jan Bowen, *above n 8*, p 21 and *Child Support (Assessment) Act 1989* (Cth) ss 41, 57, 66, The minimum child support assessment was not part of the original Scheme and was introduced from 1 July 1999.
25 Jan Bowen, *above n 8*, pp 23-24, and *Child Support (Assessment) Act 1989* (Cth) ss 8, 47-54.
26 Jan Bowen, *above n 8*, pp 81-82 and Parts IV and V of the *Child Support (Registration and Collection) Act 1988.*
27 Jan Bowen, *above n 8*, p 84 and *Child Support (Registration and Collection) Act 1988* s 104.
28 John Faulks, 'Foreword', in Jan Bowen, *above n 15,* p v.
29 Western Australia (WA) has not conferred its Constitutional power to make laws in respect of children born outside of marriage to the Commonwealth, as the other States have, so has its own Act to include ex-nuptial children in the Child Support Scheme. WA amends the Act to reflect changes to the Commonwealth child support legislation, but there is usually a time lag, so different rules may apply to affected child support cases in that State.
30 *Child Support (Assessment) Act 1989* (Cth) s 58.
31 *Ibid,* ss 60-64.
32 *Ibid,* ss 83-89.
33 *Ibid,* s 67.
34 *Ibid,* ss 71-72A.
35 Jan Bowen, *above* n 8, p 82.
36 *Ibid*, p 83 and *Child Support (Registration and Collection) Act 1988* (Cth) Part 5A.
37 *Ibid,* s 117 and Part 6.
38 *Ibid,* s 117 and Part 6.
39 *Ibid,* s 117 and Part 6.
40 CSA, unpublished data, 2004.
41 Jan Bowen, *above n 8*,p 62.
42 Jan Bowen, *above n 8*, p 57.
43 Child Support Agency and Attorney-General's Department, *above n 1,* p 19.
44 eg Family Law Council, *Report on Child Contact Orders: Enforcement and Penalties*, AGPS, Canberra, 1998, para 10.01.
45 Child Support Agency and Attorney-General's Department, *above n 1,* pp

17-18.
46 *Ibid*, p 27.
47 *Ibid*, p 30.
48 *Ibid*, p 6.
49 Child Support Consultative Group, *above n 12,* pp 141-144.
50 Jan Bowen, *above n 15,* p 57.
51 Information provided by the CSA.
52 Office of the Commonwealth Ombudsman, 'Submission to the Joint Select Committee on Certain Family Law Issues: Inquiry into the Child Support Scheme', unpublished, August 1993, pp 17-18.
53 Jan Bowen, *above n 8,* pp 77-79, *Child Support (Assessment) Act 1999* (Cth) s 98X and *Child Support (Registration and Collection) Act 1988* (Cth) ss 82 to 85.
54 Administrative Review Council, *Report to the Attorney General: Internal Review of Agency Decision Making*, ARC, report no 44, November 2000, p 65.
55 *Child Support (Assessment) Act 1989* (Cth) s 98W(2)
56 *Child Support (Assessment) Act 1989* (Cth) s 98ZF and *Child Support (Registration and Collection) Act 1988* (Cth) ss 72T, 95 and 100,
57 Most Magistrates' Courts have FCA jurisdiction and do, in fact, consider more cases than directly by the FCA.
58 *Child Support (Assessment) Act 1989* (Cth) s 123.
59 *Ibid.*
60 Australian Law Reform Commission (2000) *Managing Justice: A review of the federal civil justice system*, Report no 89, Canberra: AGPS, p 90-93.
61 *Ibid*, p 93.
62 *Ibid*, pp 95-96.
63 *Ibid*, pp 95-96.
64 Child Support Agency and Attorney-General's Department, *above n 1*, p 15.
65 Child Support Evaluation Advisory Group, *Child Support in Australia: final report of the evaluation of the Child Support Scheme*, vol 1, AGPS, Canberra, 1992, p 257.
66 Australian Law Reform Commission, *above n 60,* pp 635-636.
67 *Ibid*, p 635.
68 Office of the Commonwealth Ombudsman, *Annual Report 2002-03*, Office of the Commonwealth Ombudsman, Canberra, 2003, p 11
69 *Ibid*, p 27
70 *Commonwealth Ombudsman Act 1976* (Cth) s 15.
71 *Ibid*, s 6.
72 Commonwealth Ombudsman (2004) *Child Support Agency: Change of Assessment Decisions: Administration of Change of Assessment decisions made on the basis of parents' income, earning capacity, property, and financial resources*, Office of the Commonwealth Ombudsman, Canberra, 2004.
73 Child Support Agency and Attorney-General's Department, *above n 1,* p 15.
74 *Child Support (Assessment) Act 1989* (Cth) s 117(2)(c)(i).
75 *Child Support (Assessment) Act 1989* (Cth) s 117(1)(b)(ii).
76 Commonwealth Ombudsman, *above n 72*, pp 4-5
77 *Ibid*, p 11
78 *Ibid,* p 10
79 *Ibid,* p 11
80 *Ibid,* p 13
81 *Ibid,* p 14.
82 D A de Vaus Surveys in Social Research, (3rd ed) Allen and Unwin, St Leonards, 1992, p 194.
83 *Ibid*, p 191.
84 Commonwealth Ombudsman, *above n 72*, p 14.
85 Senate Standing Committee on Family and Community Affairs, *op cit, n 2.*
Ibid, p xvi.
87 *Ibid*, Recommendation 29.
88 *Ibid*, p 152.
89 *Ibid*, pp 65-66.
90 *Ibid*, p 75.
91 *Ibid*, pp 79-80.
92 *Ibid*, p 152.
93 Larry Anthony*, above n 4*.
94 Prime Minister*, above n 4*, p 1.
95 *Child Support Scheme: An examination of the operation and effectiveness of the Scheme*, Parliament of the Commonwealth of Australia, Canberra, November 1994.
Ibid, pp 230-233.
97 *Ibid*, p 1.
98 Child Support Agency, 'Submission to the Joint Select Committee on Certain Family Law Issues', unpublished, 1993, pp 96-127.
99 *Ibid*, p 97.

100 *Ibid*, p 98.
101 Office of the Commonwealth Ombudsman, *above n 52*, 1993, pp 17-18.
102 Joint Select Committee on Certain Family Law Issues, *above n 95*, p 230.
103 *Ibid*, p 231.
104 This is a reference to Administrative Review Council, *Report to the Minister for Justice: Better Decisions: Review of Commonwealth Merits Review Tribunals*, report no 39, AGPS, Canberra, 1995.
105 Department of Social Security, Child Support Agency and Attorney-General's Department, *Government response to the Report of the Joint Select Committee on Certain Family Law Issues*, Canberra, November 1997, p 35
106 *Ibid*, p 33.
107 Robin Creyke, 'Tribunals: divergence and loss' (2001) 29 *Fed L Rev* 403 at 425.
108 The following list is based on some of the author's experience handling complaints received in the Office of the Commonwealth Ombudsman and Child Support Evaluation Advisory Group, *Child Support in Australia: final report of the evaluation of the Child Support Scheme*, AGPS, Canberra, 1992, vol 1, p 260, vol 2, pp 102, 117.
109 Robin Creyke, *op cit n 107*, 2001 p 245.
110 Child Support Agency figures for 2001/02 show that court ordered departures of child support are less than 2000 (or 3 per cent of cases). While refused departures and applications regarding other aspects of CSA decision making are not included, the CSA considers that overall numbers are not significant.
111 Office of the Commonwealth Ombudsman, *above n 68*, 2003, pp 20, 27.
112 Social Security Appeals Tribunal, *Annual Report 2002-03*, SSAT, Canberra, 2003, p 13.
113 Administrative Appeals Tribunal, *Annual Report 2002-03*, AAT, Canberra, 2003, p 17.
114 Attorney-General for Australia, *Improving the Federal Merits Review Tribunal System*, media release, 6 February 2003.
115 Stuart Morris, J, 'The Emergence of Administrative Tribunals in Australia', a paper delivered at the Annual General Meeting of the Victorian Chapter of the Australian Institute of Administrative Law Inc on 13 November 2003 at Parliament House, Melbourne, p 7.
116 *Ibid*, p 7.
117 CSA and Attorney-General's Department, *above n 1*, pp 20-21.
118 Robin Creyke, *The Procedure of the Federal Specialist Tribunals*, AGPS, Canberra, 1994, pp 34-35.

AIAL ESSAY PRIZE IN ADMINISTRATIVE LAW 2005

The Australian Institute of Administrative Law (AIAL) was established in 1989. The Objects of the Institute include

> "(a) to promote knowledge of and interest in administrative law;"
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COMPETITION RULES

1. Entries must be unpublished essays which are the original work of the author. They may be on any topic relating to administrative law.
2. The winning entry is likely to exhibit original ideas on issues of importance in the practice of administrative law or in administrative law theory.
3. Entries should be 8,000 to 10,000 words in length.
4. All entries should be on A4 paper and typed single spaced. The original and two copies of each essay should be submitted. The name of the author and a short biography should be included on a detachable page. The author's name should not appear on the essay or copies.
5. The winning entry will be determined by the Executive of the AIAL acting on the recommendation of a judging panel appointed by the Executive. The award of the prize shall be in the absolute discretion of the Executive. The Executive may determine not to award the prize in any year.
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10. The closing date for entries is **1 March 2005**.

Further inquiries relating to the competition, including whether an essay is eligible for submission for the prize, may be directed to Emeritus Professor Dennis Pearce, Faculty of Law, Australian National University, Canberra, ACT 0200; dennis.pearce@anu.edu.au.