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ACCOUNTABILITY FOR THE EXERCISE OF 'PUBLIC' POWER: A DEFENCE OF *NEAT DOMESTIC*

Caspar Conde

This paper was awarded the 2005 AIAL Essay Prize in Administrative Law.

Introduction

Over the last 30 years in Australia there has been a marked increase in use by governments of private interests to pursue public goals¹. Many government bodies have been corporatised or privatised and many government functions have been 'contracted out' to private operators. It is essential then for the proper role for administrative law in this new environment of public and private actors to be resolved.

Kirby J spoke of this in the 2003 case of *NEAT Domestic Trading Pty Limited v AWB Limited*² (*NEAT Domestic*). His Honour thought the case presented a 'question of principle', namely³:

...whether, in the performance of a function provided to it by federal legislation, a private corporation is accountable according to the norms and values of public law or is cut adrift from such mechanisms of accountability and is answerable only to its shareholders and to the requirements of corporations law or like rules.

The majority judgment of McHugh, Hayne and Callinan JJ expressly refused to give a general answer to Kirby J's question, preferring to find that public law remedies were unavailable in the present case⁴. In spite of this, there is academic speculation that *NEAT Domestic* practically amounts to authority that private entities should be governed by private laws alone⁵.

This essay will consider *NEAT Domestic* and its effect on the administrative law package, with particular emphasis on whether the decision is likely to lead to unaccountability for the exercise by private interests of essentially 'public' power. This essay will compare the reasoning in *NEAT Domestic* to relevant constitutional law cases; to judicial review arising at common law rather than under statute; and to academic writings in the area. Finally, specific consideration will be given to the three means by which governments outsource their functions, namely, corporatisation, privatisation and 'contracting out'.

NEAT Domestic

NEAT Domestic concerned the export of wheat from Australia as governed by the *Wheat Marketing Act 1989* (Cth) (*the Wheat Act*), which was amended in 1998 to create an export monopoly for Australian wheat growers. The export monopoly was said to be necessary to maximise returns for Australian growers in the face of competition from heavily subsidised overseas growers⁶.

Section 57 of the *Wheat Act* provides, amongst other things, that:

- wheat may only be exported with the consent of the Wheat Export Authority;

- before giving a consent, the Authority must consult with AWB (International) Limited (*AWBI*), a wholly-owned subsidiary of the Australian Wheat Board, both of which are companies limited by shares;
- the Authority must not give a consent without the prior approval in writing of AWBI;
- the *Trade Practices Act 1974* (Cth) (the *Trade Practices Act*) does not apply to anything done by AWBI relating to the role given to it by the *Wheat Act*.

The effect of s 57 is to give AWBI the ability to veto any applications for a consent to export and thus to protect the export monopoly effected for Australian growers. Anyone wishing to export independently of the monopoly must obtain AWBI's consent.

NEAT Domestic Trading Pty Limited (*NEAT*) wished to export independently of the monopoly and made applications accordingly. It had a number of applications rejected. NEAT sought relief under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the *ADJR Act*), arguing that AWBI's failure to consent to a licence being issued constituted an improper exercise of power as per ss 5(2)(f) and 6(2)(f) of the *ADJR Act*. That is, NEAT sought public law relief against a private body.

Taken together, the judgments in *NEAT Domestic* indicate a two-stage approach for resolving the dispute between the parties: (1) is public law applicable? And (2) if public law is applicable, has there been a breach of that law in the present case, requiring a public law remedy? The majority, comprised of McHugh, Hayne and Callinan JJ, said 'no' to the first question and did not have to consider the second⁷. Gleeson CJ answered the first question 'yes', but the second 'no'⁸. Kirby J said 'yes' on both counts⁹.

In deciding whether public law was applicable, the Court had to examine s 3(1) of the *ADJR Act*. Section 3(1) provides that the *ADJR Act* applies where there is:

- a decision;
- of an administrative character;
- made under an enactment.

It is submitted that, despite there being three judgments with quite different conclusions, a close examination of the judgments in *NEAT Domestic* shows that their Honours adopted the same judicial reasoning. McHugh, Hayne and Callinan JJ did not, as might have been suggested¹⁰, effectively reject the appellant's case simply because AWBI was a private entity. Their Honours – as did Gleeson CJ and Kirby J – gave consideration to s 57 of the *Wheat Act*, the nature and structure of AWBI and how the facts should be construed for the purposes of s 3(1) of the *ADJR Act*. This process of construction involves some degree of subjectivity and it is submitted that it is this element of subjectivity, not the process of reasoning itself, that accounts for the different conclusions. The three judgments will be examined in turn.

McHugh, Hayne and Callinan JJ

McHugh, Hayne and Callinan JJ nominated three factors which led their Honours to conclude that public law remedies were unavailable where AWBI fulfilled its role under the *Wheat Act*¹¹:

- 1 the structure of s 57 and the roles given to the Wheat Export Authority and to AWBI;
- 2 the 'private' character of AWBI as an incorporated company for the pursuit of the objectives stated in its constitution; and
- 3 the incompatibility of public and private law obligations in the present case.

First, McHugh, Hayne and Callinan JJ acknowledged that s 57 gave the private corporation AWBI a public role to play¹², however their Honours were not persuaded that a decision by AWBI could be said to be the 'operative and determinative'¹³ decision required or authorised by the *Wheat Act*. In McHugh, Hayne and Callinan JJ's view, the operative and determinative decision required or authorised by s 57 was the decision of the Wheat Export Authority. Their Honours said that s 57 did not 'confer statutory authority on AWBI to make the decision to give its approval or to express that decision in writing' but instead that power was 'derived from AWBI's incorporation and the applicable companies legislation'¹⁴.

Second, the majority noted that AWBI did not owe its existence to the *Wheat Act* and had, as its chief objective, 'the pursuit of its private objectives ... reference to any wider "public" considerations would be irrelevant'¹⁵. AWBI's constitution provided that AWBI was to be managed with the objectives, amongst others, of maximising the returns for growers selling wheat into the pool and of distributing the net return to those who have sold into the relevant pool. As such, the majority did not think that AWBI was bound to consider the interests of the appellant.

Third, and related to the majority's second argument, the majority thought that because AWBI was obliged under its constitution to protect the export monopoly any public law obligations were incompatible with AWBI's private law obligations¹⁶:

[T]here is no sensible accommodation that could be made between the public and the private considerations which would have had to be taken to account if the [Wheat Act] were read as obliging AWBI to take account of public considerations.

Gleeson CJ

Gleeson CJ also looked at the character of AWBI and its role under s 57 of the *Wheat Act* in order to determine whether administrative law may be applied. Like the majority, Gleeson CJ considered AWBI's constitutional obligations¹⁷. But unlike the majority, Gleeson CJ was satisfied that the nature of AWBI and its role in the export monopoly as created by the *Wheat Act* made AWBI amenable to judicial review. His Honour said¹⁸:

While AWBI is not a statutory authority, it represents and pursues the interests of a large class of primary producers. It holds ... a monopoly which is seen as being not only in the interests of wheat growers generally, but also in the national interest. To describe it as representing purely private interests is inaccurate.

In Gleeson CJ's view, s 57 of the *Wheat Act* operated to allow AWBI to 'deprive the Wheat Export Authority of the capacity to consent to the bulk export of wheat in a given case'¹⁹. However, his Honour was not satisfied that NEAT had a valid cause of action. Gleeson CJ thought it perfectly reasonable for AWBI to have had regard to the interests it represents, and to adopt a policy in accordance with its constitutional (or private law) obligations. His Honour said²⁰:

There was nothing contrary to the Act in the adoption by AWBI of a general policy; a policy which so closely reflected the legislative purpose. The complaint that the policy was administered in an unduly inflexible manner was rejected by [the primary judge] Mathews J. It is entirely theoretical, no reason having been advanced as to why the policy should have been relaxed in the case of the appellant other than that it would have been in the interests of the appellant, and its suppliers, for that to be

done. As Mathews J found, “no material was put before AWBI which could be expected to persuade it to deviate from its policy”.

It is submitted that this conclusion, although phrased differently to the third argument put by McHugh, Hayne and Callinan JJ, is essentially the same. That is, that AWBI’s private law obligations outweighed any obligations which might have existed in administrative law; or, put another way, that any public law duties were discharged by AWBI having had regard to its private law duties.

Kirby J

Kirby J placed the greatest emphasis on the decision which was made, rather than the nature of the decision-maker. His Honour said the question before the Court was not whether AWBI, as the decision-maker, was a body of a particular character; the question was whether AWBI’s decision was sufficiently public as to be subject to administrative law²¹.

Kirby J thought s 57 of the *Wheat Act* had the effect of making AWBI’s refusal to grant a consent a decision within the meaning of s 3(1) of the *ADJR Act*: after all, without s 57 any decision made by AWBI would be ‘legally impotent’, and a decision made by a company other than AWBI would be a ‘meaningless exercise’²². Kirby J agreed with Gleeson CJ that AWBI represented much wider interests than the private interests of an ordinary corporation²³, and as such should be held to account by public law where AWBI exercised its powers in a manner affecting those wider interests. Further, Kirby J held there had been a breach of the *ADJR Act*. His Honour thought that such was the structure of the *Wheat Act*, Parliament intended individualised decision-making rather than a ‘blanket’ approach²⁴: accordingly, Kirby J was prepared to grant relief to NEAT.

What is the ratio of *NEAT Domestic*?

There is academic disagreement about how best to interpret McHugh, Hayne and Callinan JJ’s decision in *NEAT Domestic*. In Hill’s view, the majority decision stands for the proposition that, although a decision is always made ‘under’ a Commonwealth Act when the Act is found to confer the power to make a decision, a decision is only sometimes made ‘under’ a Commonwealth Act when the Act gives legal consequence to the decision but does not confer legal capacity on the decision-maker²⁵. Mantziaris thinks *NEAT Domestic* stands for the wider proposition that the decisions of a private entity which has a role in a scheme of public regulation are not subject to judicial review under the *ADJR Act*²⁶. The late Federal Court Justice Selway thought the joint judgment²⁷:

...would seem to draw a ‘bright line’ distinction between bodies subject to public law and those that are not, on the basis, in part at least, of whether the body is part of the government or not.

It is submitted that Hill’s is the best interpretation. Those interpretations which find in McHugh, Hayne and Callinan JJ’s judgment a general statement of principle that private bodies are not subject to judicial review are, with respect, flawed in two respects: (1) the joint judgment expressly denies making such a statement of principle²⁸; and (2) the argument rests on what would seem a misinterpretation of statements made in the joint judgment.

As quoted previously, McHugh, Hayne and Callinan JJ said there is no ‘sensible accommodation’ that could be made between AWBI’s private law obligations and any potential public law obligations. As previously contended, this should be taken to mean that AWBI’s private law obligations outweighed any obligations which might have existed in administrative law; or, put another way, that any public law duties were discharged by AWBI having had regard to its private law duties. The quote should also be seen in the broader context of the judgment: McHugh, Hayne and Callinan JJ had already decided that, pursuant

to s 57 of the *Wheat Act*, AWBI did not make decisions ‘under an enactment’ for the purposes of s 3(1) of the *ADJR Act*. As such, the judgment should *not* be seen as excluding all private corporations from judicial review – if their Honours really intended to make such an exclusion, why make an express statement to the contrary?

According to Hill’s interpretation of *NEAT Domestic*, each time a private entity is given a public role, it is for the courts to determine whether the Commonwealth Act which creates that public role does so either by simply giving legal consequence to the private entity’s decision (in which case administrative law is only sometimes applicable) or by conferring legal capacity on the decision-maker (in which case administrative law will always be applicable). It is submitted that Hill’s interpretation is consistent with the reasoning process identified earlier from the three judgments.

Further, it is submitted that the case of *Tang v Griffith University*²⁹ (*Tang*) supports the above interpretation. At the time of writing, the High Court is yet to deliver judgment on an appeal which was heard on 21 June 2004³⁰. However, regardless of the High Court’s eventual findings in that case, both the judgment of the Queensland Court of Appeal and the transcript of the High Court proceedings show that in considering whether a decision falls within the meaning found in s 3(1) of the *ADJR Act*, courts undertake a process which is very much one of construction. In *Tang*, the relevant enactment is the *Griffith University Act 1998* (Q)³¹. Ms Tang was excluded from a PhD candidature programme on the grounds that she had undertaken research without regard to ethical and scientific standards³² and she argued that this exclusion was a decision of an administrative character under an enactment, and thus was subject to judicial review. The High Court’s eventual findings in *Tang* are not strictly relevant to Hill’s interpretation of *NEAT Domestic*; more important is the process which each member of the Court will undertake in deciding whether administrative law may be applied³³. Arguably, that process was seen operating in each judgment in *NEAT Domestic*, and it is that process which will determine whether a given entity is governed by public law or by private law alone.

Is there a risk of unaccountability after *NEAT Domestic*?

It might be asked: if a government can give executive powers to a private body; remove any private law (such as the *Trade Practices Act*) to which that body might otherwise be held to account; and, following *NEAT Domestic*, administrative law and its remedies might not be applicable, what law *can* be applied? Would not the separation of powers doctrine, embodied in the Constitution³⁴, be threatened by Parliament’s ability, in effect, to pursue its executive agenda away from the review of the judiciary?

Ellicott J provided a general definition of ‘administrative action’ in *Burns v Australian National University*³⁵:

[A]ll those decisions, neither judicial nor legislative in character, which Ministers, public servants, government agencies and others make in the exercise of statutory power conferred on them.

Ellicott J’s reference to ‘others’ might be taken as an anticipation that there would be bodies, other than governmental ones, making decisions of an administrative character. Such bodies would include private corporations. Pearce wrote³⁶:

There will always be tension between the various arms in our system of government. But that does not mean that one arm should set out to overpower the other. ... The real sufferers in this battle are the members of the public.

And Kirby and Callinan JJ said in *Gerlach v Clifton Bricks*³⁷:

No Parliament of Australia could confer absolute power on anyone ... there are legal controls which it is the duty of the courts to uphold when their jurisdiction is invoked for that purpose.

Does *NEAT Domestic* create a risk that private bodies will not be held to account where they perform essentially administrative functions?

It is submitted that these fears are unfounded, because they are based on inaccurate interpretations of *NEAT Domestic*. *NEAT Domestic* should be seen as authority for a *process rather than a result*. The fact that McHugh, Hayne and Callinan JJ decided that the private corporation NEAT should not be held to account under the *ADJR Act* does not mean that their Honours will judge this way for all private corporations³⁸. *NEAT Domestic* presented a task of construction for the High Court: Gleeson CJ and Kirby J were persuaded that s 57 of the *Wheat Act* envisaged a sufficiently public role for AWBI as to attract the jurisdiction of the *ADJR Act*; McHugh, Hayne and Callinan JJ were not persuaded. The High Court's judgment in *Tang*, when delivered, will no doubt involve a similar process of construction: that process was evident in the judgment of the Queensland Court of Appeal³⁹ and in the course of argument in the High Court⁴⁰.

In answer then to Kirby J's 'question of principle' in *NEAT Domestic*, it is submitted that *any* body (be it a private corporation or otherwise) may be held to account under the *ADJR Act* when that body, in an exercise of statutory power, has made an executive decision as per the definition found in s 3(1). In deciding whether or not there may be judicial review, the courts undertake a process of construction which might lead to different judgments (as was the case in *NEAT Domestic*), however this does not effect unaccountability. There will only be unaccountability if *NEAT Domestic* is interpreted as dictating a result rather than a process. It is submitted that such an interpretation amounts to a misunderstanding of the *ratio* of *NEAT Domestic* and as such would be an error of law.

Comparison with constitutional law cases

Although unrelated to the proper interpretation of the *ADJR Act*, it is instructive to compare the reasoning in *NEAT Domestic* with two constitutional law cases which involved private entities and public functions: *SGH Ltd v Commissioner of Taxation*⁴¹ (*SGH*); and *Bayside City Council v Telstra*⁴² (*Bayside*).

SGH

In *SGH*, a private company argued that it was a sufficiently public entity to constitute 'the State' for the purposes of s 114 of the Constitution. Section 114 provides, amongst other things, that the Commonwealth shall not impose any tax on property of any kind belonging to a State. *SGH Ltd* (now part of the merged Suncorp Metway entity) was a building society formed by the Queensland government in response to impending building society failures in 1976. Gleeson CJ, Gaudron, McHugh and Hayne JJ in a joint judgment, and Gummow J and Callinan J in separate judgments, found in favour of the revenue on the basis that *SGH Ltd* was not controlled exclusively by the State and was incorporated under the relevant legislation for private building societies⁴³. Kirby J dissented on the basis that *SGH Ltd* was essentially a manifestation of the Queensland government⁴⁴.

As in *NEAT Domestic*, the Court had the task of characterisation to undertake in *SGH*: could *SGH Ltd* be considered 'the State' for the purposes of s 114 of the Constitution? In deciding this, Gleeson CJ, Gaudron, McHugh and Hayne JJ listed the following factors which might be taken into account⁴⁵:

- the circumstances of the entity's establishment;

- the activities undertaken by the entity;
- the legal relationship between the entity and the executive government of the State; and
- any rights or powers which the executive government of the State might have over the use and disposal of the entity's property.

Gleeson CJ joined the majority in *SGH* in finding that the private corporation was not 'the State' for the purposes of s 114, however his Honour found in *NEAT Domestic* that NEAT was sufficiently public as to fall within the jurisdiction of the *ADJR Act*. One possible explanation for Gleeson CJ's different findings may be the constitutions of *SGH Ltd* and *NEAT* respectively. In *SGH*, it was found⁴⁶:

[T]here was no provision in the rules of *SGH*, or its governing statute, that it should pursue the interests of the State or the public or that its policies could be determined by the executive government.

In *NEAT Domestic*, by contrast, Gleeson CJ thought *NEAT*'s constitution demanded that the private corporation pursue essentially 'public' interests⁴⁷.

In *SGH*, Callinan J provided a more thorough list of 'six particular aspects or attributes' which his Honour took into account in deciding whether s 114 of the Constitution applied⁴⁸:

- 1 the absence or otherwise of corporators;
- 2 an explicit obligation of the corporation to conduct its affairs to the greatest advantage of the relevant polity;
- 3 the participation of the executive government in the process of formulating policy and making decisions;
- 4 the right or otherwise of the government to appoint directors and the source of, and responsibility for, their remuneration;
- 5 the destination of profits; and
- 6 the obligation or otherwise of the Auditor-General to audit the accounts of the corporation.

Callinan J found that only the sixth of these factors was satisfied in *SGH*; accordingly his Honour joined with the majority⁴⁹.

Again, Kirby J dissenting, was persuaded that *SGH Ltd* was 'the State' for the purposes of s 114. His Honour's view was consistent with his Honour's dissent in *NEAT Domestic*. Kirby J said⁵⁰:

[*SGH Ltd*] is a special building society with origins in State objectives, created for State purposes, controlled by a State manifestation, established pursuant to amended State legislation to do the business of the State and audited by the State Auditor-General under State law. ... It is also connected with what I regard as the significant and relevant changes in governmental activities in recent years and the new and different instruments by which such activities are now accomplished.

Bayside

Unlike *NEAT Domestic* and *SGH*, *Bayside* is a case where the High Court gave legal consequence to the public role envisaged for private corporations by the Parliament.

In *Bayside*, the High Court held that a State law, which allowed local councils to charge Telstra and Optus fees for laying cables, was invalid under s 109 of the Constitution. Schedule 3, cl 44 of the *Telecommunications Act 1997* (Cth) (the *Telco Act*) removes the effect of any State law which 'discriminates' against telecommunications carriers: the Court held that since Telstra and Optus were charged fees, whereas other utilities were not, there was discrimination for the purposes of the *Telco Act*, and thus s 109 of the Constitution applied⁵¹.

One of the arguments raised against this finding was that Telstra and Optus were private corporations, and thus were beyond the legislative powers of the Commonwealth as described by the telecommunications power found in s 51(v) of the Constitution. Only Callinan J, in dissent, thought this argument should succeed: in his Honour's view, Telstra and Optus could not be considered the Commonwealth's 'agent' for the purposes of the *Telco Act*, and thus Sch 3, cl 44 of the *Telco Act* was beyond the power of the Commonwealth⁵². Callinan J thought that s 51(v) should not be read to give the Commonwealth the power to legislate for entities which were not its agents; otherwise, the Federal / State balance would be disturbed. The majority did not find the argument as persuasive⁵³. In the course of argument, Kirby J remarked⁵⁴:

See, all of this is part of the process of turning public authorities into quasi-private authorities, and at least one arguable explanation of the federal legislation is, let us have an even playing field; let us make sure that you get even burdens which truly pass on to the users of that particular service the costs of that service.

The joint judgment of Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ traced the history of telecommunications services in Australia since Federation⁵⁵. Initially, services were provided by the government; then by a statutory corporation; and today by publicly listed companies (including Telstra, which is majority-owned by the Commonwealth).

Telecommunications carriers have roles and duties in both public and private law: as opposed to the facts in *NEAT Domestic*, the regulatory framework seen in s 3 of the *Telco Act* includes the *Trade Practices Act*. Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ said the *Telco Act* established⁵⁶:

[A] universal service regime with the object of ensuring that all people in Australia ... should have reasonable access, on an equitable basis, to standard telephone services, payphones and prescribed carriage services.

The joint judgment saw no reason to limit the scope of the telecommunications power found in s 51(v) of the Constitution⁵⁷. Similarly, McHugh J thought it 'difficult to see' why the telecommunications power, which enabled the Commonwealth to create its own telecommunications carrier (what is now Telstra) and to protect that carrier from State laws, should not extend to protecting a private company operating as a telecommunications carrier from State laws⁵⁸.

Public / private considerations at common law

It is also instructive to compare the reasoning in *NEAT Domestic* with judicial review as arising from the common law, in particular the case of *Forbes v NSW Trotting Club Ltd*⁵⁹ (*Forbes*).

In Selway J's view, the 'joint judgment [in *NEAT Domestic*] clearly reflects a departure from some earlier cases'⁶⁰. His Honour cited *Forbes* as an example. With respect, it is submitted that *NEAT Domestic* does not reflect – clearly or otherwise – a departure from *Forbes*. That case concerned a decision of the NSW Trotting Club Ltd (the Club) to exclude a professional punter from its premises. The Club passed the following resolution:

That Mr Douglas Mervyn Forbes be forthwith and henceforth excluded from admission to the Harold Park Paceway and Menangle Park Paceway and any other course or courses which may now or in the future be occupied by or under the control of the New South Wales Trotting Club Limited and that Mr Douglas Mervyn Forbes be immediately informed in writing of the decision of the Committee.

The Club was a limited liability company with a public role, controlling trotting in NSW pursuant to the Rules of Trotting. The Club also owned two racecourses: the Harold Park and Menangle Park Paceways mentioned in the resolution. The Club argued that it sought to exclude the appellant in the Club's private capacity as proprietor rather than in its public capacity pursuant to the Rules of Trotting; and therefore, acting in its private capacity, the Club was entitled to exclude the appellant without affording the appellant procedural fairness⁶¹.

The Club conceded, however, that if it were found to have excluded the appellant pursuant to the Rules of Trotting, then the exclusion would be void because the appellant would have been owed procedural fairness and none had been given⁶². The High Court held that the resolution was made by the Club in its public capacity under the Rules of Trotting. Barwick CJ, Gibbs, Stephen, Murphy and Aickin JJ all made findings one way or the other about the capacity in which the Club had acted. Barwick CJ, in dissent, thought the resolution was 'ambiguous'⁶³ and, having considered the NSW Trotting Club's constitution and the Rules of Trotting, concluded the resolution was made by the Club in its private capacity as proprietor⁶⁴. Gibbs, Stephen, Murphy and Aickin JJ thought it determinative that the resolution referred to courses under the 'control' of the Club⁶⁵. Their Honours concluded that the Club was seeking to exercise its rights under the Rules of Trotting, and as such a duty of procedural fairness was owed to the appellant.

It is submitted that the *ratio* of *Forbes* is no different to that of *NEAT Domestic*: in each case, the High Court considered the capacity in which a private entity was acting, and whether or not public law was applicable. The fact that the judicial review sought in *Forbes* was at common law, whereas that sought in *NEAT Domestic* was under the *ADJR Act*, makes little difference: it is submitted that both cases should be seen as authority for a process rather than a result.

It should be noted that in *Forbes* Gibbs and Murphy JJ went on to make wider, *obiter* statements about whether the Club may have been subject to judicial review in the event that it did not have a public role under the Rules of Trotting. Gibbs J said⁶⁶:

An owner who uses his [*sic*] land to conduct public race meetings owes a *moral duty* to the public from whose attendance he benefits; if he invites the public to attend for such a purpose, he should not defeat the reasonable expectation of an individual who wishes to accept the invitation by excluding him quite arbitrarily and capriciously. [*Emphasis added.*]

Murphy J agreed⁶⁷:

[T]he respondent exercises power which *significantly affects members of the public* ... From early times, the common law has declined to regard those who conduct public utilities, such as inns, as entitled to exclude persons arbitrarily. [*Emphasis added.*]

Murphy J thought the High Court was wrong to have dealt with exclusion from a racecourse in *Cowell v Rosehill Racecourse*⁶⁸ (*Cowell*) as being concerned with private rights only⁶⁹.

Where a private body has no statutory function, judicial review is unavailable under the *ADJR Act*: s 3(1) provides that the decision must be made under an enactment. Nor would it seem from cases such as *Forbes*, *Cowell* and *NEAT Domestic* that review is available at common law⁷⁰. The reason for this is likely that, where a private body has no statutory function, it is difficult, if not impossible, to determine the private body's public role (if any). Gibbs J's reference to the 'moral duty' of a private corporation is highly subjective and might lead to judicial activism and the associated problems which that might create for the rule of law⁷¹. Murphy J's reference to 'power which significantly affects members of the public' is similarly problematic: theoretically it could apply to most corporations and private bodies. An indeterminately wide net of public law would be at odds with a capitalist society's goal of minimising state control over private interests⁷². In light of the increasing use of private interests to pursue public goals, Selway J saw no reason for the courts to continue treating functions passed to the private sector as governmental 'simply because some judges still have a view of the "welfare state" which the electorate rejected decades ago'⁷³. It would seem likely to place a large burden on the courts if every private body whose power affects the public was governed by administrative law; not to mention the extra constraints placed on the private interests themselves, held accountable not just by market forces and private laws, but perennially unsure of what other laws may apply to their decisions.

That is not to say there may not be judicial review of private bodies with statutory functions: as submitted earlier, *NEAT Domestic* is authority for the proposition that where a private entity is given a public role, it is for the courts to determine whether the Act does so in a manner making certain decisions amenable to judicial review. *NEAT Domestic* should not be seen as authority for the proposition that all private bodies are outside the jurisdiction of administrative law.

Academic consideration of what is 'public' and 'private'

There is a large amount of academic literature on what is often referred to as the 'public / private distinction'⁷⁴.

At the outset, it could be argued that the expression 'public / private distinction might be misleading: it could be inferred that the applicability of administrative law rests solely on a given entity's structure. But this is not the case: it is respectfully suggested that cases such as *Forbes*, *SGH*, *Bayside* and *NEAT Domestic* illustrate a process to be undertaken by the courts in determining an entity's public role⁷⁵. That process might give regard to the given entity's structure, however the structure is not determinative⁷⁶.

Nevertheless, academic consideration of the so-called 'public / private distinction' is useful, in that it highlights the importance of ensuring that administrative law may be applied to private entities fulfilling statutory functions. If administrative law could not be applied in that way, there would likely be increased unaccountability. As Freeman points out⁷⁷:

Virtually every service or function we now think of as 'traditionally' public, including tax collection, fire protection, welfare provision, education and policing, has at one time or another been privately performed.

Freeman observes that 'private actors are deeply involved in regulation, service provision, policy design, and implementation'⁷⁸. She posits a 'contract metaphor' to explain governmental interactions and processes: 'In contrast to those presenting hierarchical models of administrative law, I conceive of governance as a set of negotiated relationships'⁷⁹.

Rhode agrees: 'the state is best understood as a network of institutions with complex, sometimes competing agendas'⁸⁰. In a critique of feminist argument based on the 'public / private distinction', Rhode wrote⁸¹:

Lumping together police, welfare workers, and Pentagon officials as agents of a unitary patriarchal structure does more to obscure than to advance analysis.

It is submitted that Freeman's 'contract metaphor' sits well with the approach for determining whether administrative law may be applied as seen in *NEAT Domestic* and similar cases. A 'public / private distinction' which focuses only on the nature of the decision-maker would seem likely to lead to widespread confusion given that, as Freeman points out, governance today is more a set of negotiated relationships than a set hierarchy. In Hutchinson's view, the government 'is neither independent of private power nor completely subservient to it'⁸².

Kitto J said in *Inglis v Commonwealth Trading Bank of Australia*⁸³ (*Inglis*):

The decisive question is not whether the activities and functions with which the respondent is endowed are traditionally governmental in character ... The question is rather what intention appears from the provisions relating to the respondent in the relevant statute: is it, on the one hand, an intention that the Commonwealth shall operate in a particular field through a corporation created for the purpose; or is it, on the other hand, an intention to put into the field a corporation to perform its functions independently of the Commonwealth, that is to say otherwise than as a Commonwealth instrument, so that the concept of a Commonwealth activity cannot realistically be applied to that which the corporation does?

This question of Kitto J, demanding as it does judicial consideration of the operation of the relevant structures and provisions, will aid in making sense of the 'contract metaphor' interpretation of government. It is submitted that Kitto J's approach is reflected in subsequent cases, including *NEAT Domestic*.

Means of government outsourcing

Specific attention should be given to the three general means by which governments fuse private with public interests and of the consequences these may have on general levels of accountability. The following are considered: (a) corporatisation; (b) privatisation; and (c) 'contracting out'.

Corporatisation

Corporatisation involves 'requiring agencies to operate more commercially' so as to make the public sector more efficient⁸⁴: in effect it is an application of private sector principles to public sector bodies.

Corporatised public bodies often will be exposed to the accountability mechanisms of the private sector (such as competition) and as such it has been argued that 'administrative law statutes should not apply'⁸⁵. After all, a corporatised body facing competition⁸⁶:

...would not possess government powers or immunities, and in relation to its commercial activities would be as susceptible to private laws as its competitors.

To the extent that corporatised bodies make commercial decisions, the traditional mechanisms of accountability in the private sphere should apply. The Federal Court has held as much: in *General Newspapers v Telstra*⁸⁷ (*General Newspapers*), Davies and Einfeld JJ, with Gummow J agreeing, held that Telstra's refusal to enter into a private contract was not a decision amenable to judicial review⁸⁸. The Administrative Review Council argued in 1995 that the commercial activities of a Government Business Enterprise 'should be exempt from

the administrative law package⁸⁹. It is arguable that the reverse of this – a decision made by a corporatised body pursuant to a statutory role or function – may be amenable to judicial review⁹⁰.

Privatisation

When managing government-owned assets, governments have decided that the given asset can be run more efficiently for profit by a private body and as a result consumers will enjoy better outcomes. According to Cole⁹¹:

[T]he public sector is not set up to maximise efficiency. The elaborate arrangements set up to make the public service accountable ... [have] to be subordinated to other ends.

However, it is undeniable that countless privatised corporations continue to represent public interests: an example is Sydney Airport. It is submitted that the vast majority of decisions by privatised bodies should be held to account by private law alone, however, as with corporatised bodies, some scope should remain for the intervention of public law where a decision is made pursuant to a statutory role or function⁹².

'Contracting out'

Contracts pose the greatest difficulty for considerations of public and private interests and associated mechanisms of accountability. On the one hand, a contract between a government agency and a private corporation has a strong avenue of accountability inherent in every contract: the parties have agreed to terms, breach of which will lead to a remedy being awarded. On the other hand – from the point of view of the 'consumer' – against whose decision will he or she seek judicial review when rights are affected adversely by a body's exercise of public power? Should it be the private corporation or the government agency? This is indicative of 'a larger concern that any move toward formal contract in regulation will amount to private deals that "oust" the public interest'⁹³.

One solution might be a relaxation of the privity of contract rule, which holds that only the parties to a contract are legally bound by and entitled to enforce the contract⁹⁴. Regarding contracted-out public responsibilities, perhaps those affected by the private interest's decisions could be considered a party to the contract. The privity doctrine is in a state of development in Australia after *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*⁹⁵, in which the High Court held that a corporation which was intended to be benefited by an insurance policy could recover the benefit intended for it, despite the fact that the corporation was not a party to the contract.

It is submitted that a stronger argument lies in the proposition that those affected should seek a remedy against the government agency that contracted out its responsibilities in the first place. In *General Newspapers*, Davies and Einfeld JJ said 'a decision taken under a federal enactment is an action or a refusal which, by virtue of the statute, affects legal rights and / or obligations'⁹⁶. If a government agency contracts out its responsibilities in such a way that someone's legal rights and / or obligations are affected and the private body contracted to perform a duty fails to perform that duty, then it is submitted that the public body should be held to account. The public body may well have an action in contract against the private body, but it must ultimately be held to account for its decision to enter into the contract which affected public rights and / or obligations.

Conclusion

This essay has considered the 'question of principle' posed by Kirby J in *NEAT Domestic*, namely, whether private corporations fulfilling statutory obligations may be held to account

by administrative law or by private law only. The argument presented has shown that *NEAT Domestic* and similar cases are authority for a process rather than a result; that whenever a private entity fulfils a public role, it is for the courts to determine whether the relevant obligations and decisions merit the application of public law. It is submitted that all entities, whether private or otherwise, may be held to account under public law when Parliament has given legal consequence to an entity's decision: however it is a matter of construction for the courts to determine whether public law will be applied. Accordingly, it is submitted that *NEAT Domestic* will not lead to unaccountability for the exercise by private entities of essentially 'public' power.

Endnotes

- 1 Management Advisory Board, *Accountability in the Commonwealth Public Sector*, AGPS, Canberra, June 1993, p 14.
- 2 (2003) 198 ALR 179; [2003] HCA 35.
- 3 *ibid* at [67].
- 4 *ibid* at [49]-[50].
- 5 See C Mantziaris, 'A "wrong turn" on the public / private distinction' (2003) 14 *PLR* 197 at 198; B Selway, 'The public / private divide', *Administrative Law Students' Forum 2004*, University of Adelaide Law School and the Australian Institute of Administrative Law, 2004, p 1; cf, G Hill, 'The Administrative Decisions (Judicial Review) Act and "under an enactment": Can NEAT Domestic be reconciled with Glasson?' (2004) 11 *AJ Admin L* 135 at 139.
- 6 See para [19]-[20] of the Explanatory Memorandum to the *Wheat Marketing Legislation Amendment Act 1998* (Cth).
- 7 *ibid* at [64].
- 8 *ibid* at [26]-[27].
- 9 *ibid* at [147].
- 10 See C Mantziaris, above note 5.
- 11 *ibid* at [51].
- 12 *ibid* at [49].
- 13 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 336-337 per Mason CJ.
- 14 *ibid* at [54].
- 15 *ibid* at [57].
- 16 *ibid* at [63].
- 17 *ibid* at [13].
- 18 *ibid* at [27].
- 19 *ibid* at [29].
- 20 *ibid* at [26].
- 21 *ibid* at [99] and [129].
- 22 *ibid* at [131].
- 23 *ibid* at [104].
- 24 *ibid* at [139].
- 25 See G Hill, above note 5.
- 26 See C Mantziaris, above note 5.
- 27 See B Selway, above note 5.
- 28 *ibid* at [49]-[50].
- 29 [2003] QCA 571.
- 30 *Griffith University v Tang* [2004] HCATrans 227. The High Court has since handed down its decision [2005] HCA (3 Mar 05) 213 ALR 274 and found that the university's decision was not susceptible to review under the *ADJR Act*.
- 31 Ms Tang applied for judicial review pursuant to the *Judicial Review Act 1991* (Qld). Section 4 of that Act mirrors s 3(1) of the *ADJR Act*.
- 32 [2003] QCA 571 at [1] per Jerrard JA.
- 33 Both in the Queensland Court of Appeal's judgment and in argument in the High Court, consideration was given to how best to apply *General Newspapers v Telstra* (1993) 45 FCR 164: in that case, Telstra's decision not to enter into a contract was held not to be amenable to judicial review. In *Tang*, at issue is whether the given decision might be compared to Telstra's decision, or whether it was sufficiently 'administrative' that it ought to be reviewable.
- 34 *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
- 35 (1982) 40 ALR 707 at 714.
- 36 D Pearce, 'Executive versus Judiciary' (1991) 2 *Pub L Rev* 179 at 193.
- 37 (2002) 209 CLR 478 at 504, quoted by Kirby J in *NEAT Domestic* *ibid* at [66].
- 38 See *ibid* at [49]-[50].

- 39 *Tang v Griffith University* above at note 29.
 40 *Griffith University v Tang* above at note 30.
 41 (2002) 188 ALR 241; [2002] HCA 18.
 42 (2004) 206 ALR 1; [2004] HCA 19.
 43 *ibid* at [32]-[33], [72]-[74], [149]-[150].
 44 *ibid* at [79].
 45 *ibid* at [16].
 46 *ibid* at [31] per Gleeson CJ, Gaudron, McHugh and Hayne JJ.
 47 *ibid* at [13], [27].
 48 *ibid* at [131].
 49 *ibid* at [148]-[150].
 50 *ibid* at [79]-[80].
 51 *ibid* at [44].
 52 *ibid* at [148]-[149].
 53 *ibid* at [29] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ; and at [96] per McHugh J.
 54 [2003] HCATrans 382.
 55 *ibid* at [6].
 56 *ibid* at [9].
 57 *ibid* at [29].
 58 *ibid* at [96].
 59 (1979) 143 CLR 242.
 60 B Selway, above at note 5.
 61 See *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 (*Heatley*) at 506, 511.
 62 (1979) 143 CLR 242 at 248 per Barwick CJ. That concession was thought by Barwick CJ to be consistent with the High Court's decision in *Heatley*.
 63 *ibid* at 248.
 64 *ibid* at 258.
 65 *ibid* at 266 per Gibbs J; at 274 per Murphy J; and at 278 per Aickin J, with Stephen J agreeing.
 66 *ibid* at 268-269.
 67 *ibid* at 274.
 68 (1937) 56 CLR 605.
 69 *Forbes* at 274-275.
 70 Cf, comments of Murphy J in *Forbes* (1979) 143 CLR 242 at 275; and Kirby J in *NEAT Domestic* [2003] HCA 35 at [110]-[111].
 71 See D Heydon, 'Judicial Activism and the Death of the Rule of Law', *Quadrant*, Jan-Feb 2003.
 72 M Friedman, 'The Role of Government in a Free Society', Chapter II, *Capitalism and Freedom*, Chicago, University of Chicago Press, 1982, p 22.
 73 B Selway, see above note 5 at 2.
 74 See, for example, M Allars, *Administrative Law: Cases and Commentary*, Butterworths, Sydney, 1997, p 49.
 75 See also *General Newspapers v Telstra* (1993) 45 FCR 164.
 76 See, for example, the criteria considered in *SGH* above note 41 at [49].
 77 J Freeman, 'The private role in public governance' (2000) 75 *N Y U L Rev* 543 at 552-553.
 78 *ibid* at 551.
 79 *ibid* at 571.
 80 D Rhode, 'Feminism and the State' (1994) 107 *Harv L Rev* 1181 at 1185.
 81 *ibid* at 1186.
 82 A Hutchinson, 'Mice under a chair: Democracy, Courts in the Administrative State' (1990) 40 *University of Toronto L Jo* 374 at 397.
 83 (1969) 119 CLR 334 at 337-338, quoted by Callinan J in *SGH*, [2002] HCA 18 at [128].
 84 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No 38, 1995 at [4.2].
 85 *Ibid* [4.2], [4.14], [4.24].
 86 *Ibid* at [83] [4.16].
 87 (1993) 45 FCR 164.
 88 *ibid* at [14].
 89 *Op cit* note 84 at [4.20].
 90 As per the *ratio* of *NEAT Domestic* above at note 2.
 91 R Cole, 'The public sector: The conflict between accountability and efficiency' (1988) 47 *Aust Jo of Pub Admin* 223 at 225.
 92 As per the *ratio* of *NEAT Domestic*.
 93 See J Freeman, above note 77 at 669.
 94 *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 at 853 per Viscount Haldane LC.
 95 (1988) 165 CLR 107.
 96 (1993) 45 FCR 164 at [14], with Gummow J agreeing.

THE *BENNETT* DECISION EXPLAINED: THE SKY IS NOT FALLING!

*Christopher Erskine**

Paper presented at an AIAL seminar, Canberra, 27 April 2005.

The decision in *Bennett v President, Human Rights and Equal Opportunity Commission and Another*¹ sent shockwaves around the Commonwealth public service. To hear some people talk, the sky, metaphorically, was falling.

Why there should be such anxiety is a little difficult to understand. The trial judge, Finn J, did not kick the stars from their orbit, nor cause the sky to fall. While invalidating a particular regulation, he recognised the existing common law duty of fidelity and loyalty owed by public servants.

That duty has not been debated very extensively in this country, but it has been in Canada. The Canadian experience shows that the common law duty has coherent and sensible principles that neatly cover the difficult questions raised by public servants disclosing government information. Furthermore, the common law duty is sufficiently flexible and adaptable to be proportionate, and hence it will have no difficulty being consistent with both the implied constitutional guarantee of freedom of political communication and the International Covenant on Civil and Political Rights (ICCPR).

Disclosure and Comment

I will not summarise what happened in *Bennett* in any detail: we can all read it for ourselves. But to understand the significance of the case, it is necessary to look a bit more closely at the concept of disclosure.

Mr Bennett was charged with disciplinary breaches of a regulation which protected the disclosure of everything from Australia's most sensitive military secrets to the number of writing pads ordered by the regional office of a government department in the most remote part of the country.

His sin was not something out of a cold war Hollywood epic, with a shadowy character in a trench coat sidling up to a Russian spy in a darkened alleyway and handing over a buff envelope containing plans of a secret missile system. Nor was he a Deep Throat whistle blower revealing corruption in government at the highest level.

Instead, his offence was to make public comments in his capacity as the President of a small registered trade union, the Customs Officers Association. The comments were about proposed cuts to the number of customs officers on the barrier at our ports and airports. In the course of his comments he happened to note that at that time we actually inspected only a small number of the containers that cross the waterfront.

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At no time during the interview was he ever identified as a customs officer. Even more remarkably, most of the information he had 'disclosed' was already on the public record.

The interview came at the end of a long period of vigorous correspondence and disagreement between Mr Bennett and the CEO of the Australian Customs Service (ACS) about his right to make public comments on behalf of his union. One could be forgiven for thinking that the interview was probably the last straw in the eyes of an exasperated ACS.

The disciplinary offence was 'disclosure'. But a fair reading of the transcript of the interview shows that what Mr Bennett said was largely 'comment'. Along the way he made disclosures, but the average listener would probably have thought his remarks were comments on government policy, not disclosures of government information.

This is an important point, because it highlights one of the difficulties with limiting the right of public servants to make disclosures. There is a close connection in many cases between comment and disclosure. Finn J accepted this proposition.²

We can highlight the problem by taking a few hypothetical situations based on Mr Bennett's own comments in his interview. Let me hasten to say that every one of these examples is imaginary, including the so-called facts and disclosures set out in them.

- 1 Mr Bennett could have said: 'I believe that the proposed staff cuts are a bad thing'.

That would be pure comment, one would think. But what weight do I, as an interested member of the public, put on those comments? I have to give them some weight because of his experience and position as the head of a union of customs officers. But how do I weigh them against other comments that the proposed staff cuts will make the ACS more efficient?

- 2 Mr Bennett could have said: 'I believe that the proposed staff cuts are a bad thing because they will compromise our ability to patrol this country's borders'.

That goes a little further, because there is an opinion of future compromise of border protection. But it is still Delphic (to use one of Finn J's favourite expressions). What weight do I, the interested member of the public, give to his opinion? What is it based on?

- 3 Mr Bennett could have said: 'I believe that the proposed staff cuts are a bad thing because we currently inspect only a tiny handful of containers coming into this country, and fewer staff means even fewer inspections, which will compromise our ability to patrol this country's borders'.

Only now am I starting to get enough information in this 'comment' to let me weigh the significance of Mr Bennett's comments and opinions. The disclosure, one would think, is pretty trivial. But it gives substance to his comments, and lets me compare them with other comments from other people that support the proposed policy.

- 4 Mr Bennett could have said: 'I believe that the proposed staff cuts are a bad thing because we currently inspect only a tiny handful of containers coming into this country, as the CEO of the Customs Service admitted to a Senate Committee last week, and fewer staff means even fewer inspections, which will compromise our ability to patrol this country's borders'.

The difference on this occasion is that the 'disclosure' is of information already on the public record. Most people would think this was hardly a disclosure at all if it was already public.

- 5 Mr Bennett could have said: 'I believe that the proposed staff cuts are a bad thing because we currently inspect only a tiny handful of containers coming into this country, as the CEO of the Customs Service admitted to a Senate Committee last week (and in fact the figure is a pathetic 1.5% of all containers), and fewer staff means even fewer inspections, which will compromise our ability to patrol this country's borders'.

The only difference between this hypothetical comment and its predecessor is the addition of a statistic. Let us assume that the statistic (which, I repeat, is entirely hypothetical) was not disclosed in the Senate Committee. It certainly confirms the CEO's admission of only a 'tiny handful' of containers being inspected. Is this a disclosure of any significance?

But let me return to the point here. Disclosure is often necessary in order to make sense of a comment, and to give it some weight. It is unrealistic to maintain a rigid distinction between them: comment good, disclosure bad. Comment does not *have* to involve disclosure, but it often will. Without some disclosure, Finn J remarked that comment would be a 'dialogue of the deaf' between those who know and those who do not.

In his reasons, Finn J traced the history of statutory prohibitions on comment and disclosure by public servants. It is worth noting that until 1974 Commonwealth public servants were prohibited not only from disclosing any information, but from making any comments whatsoever on government activity³.

The ban on comment was probably dropped because by 1974 Canberra was electing two members to the House of Representatives and two Senators. Inevitably this resulted in the ACT having very active political parties whose membership was drawn to a significant extent from public servants. Can you imagine trying to be a member of a political party (especially the opposition party) while facing an absolute prohibition on making 'public comment on the administration of any Department of the Commonwealth'⁴?

But while the ban on comment was dropped in 1974, the ban on disclosure remained.

Then came the *Freedom of Information Act 1982* (Cth) (FOI Act). This important legislation created a right in every Australian citizen to access to government information, subject only to the exceptions contained in Part IV of the Act.

It is true, as John Basten QC⁵ pointed out in submissions before Finn J, that there is an important distinction between disclosure under FOI and disclosure by any public servant. Under the FOI Act there is a regulated system of disclosure, in which specifically authorised public servants make decisions on specific requests for disclosure. This does provide a reasonable degree of uniformity of approach and careful consideration of issues for every application for disclosure.

By contrast, a system of unregulated disclosure by any public servant who felt like it would produce capricious and inconsistent results, with widely differing consideration of significant issues such as national security and privacy.

But the point remains that the FOI Act is an important recognition that even in the area of disclosure, the balance should be tipped in favour of disclosure except in certain specified situations. It is surely anomalous that the public has a right to disclosure of a document

under the FOI Act, but a public servant disclosing the very same document outside that Act would be subject to a disciplinary and possibly a criminal charge.

In a very real sense, then, the question is no longer the substance of disclosure, but the process by which it happens. For the vast majority of government documents, the public has a right to see them. The issue is who makes the decision to release them, not whether they are released at all.

By the time the story reaches the 21st century, two more considerations had impacted on this discussion. First, Australia acceded to the ICCPR. While the Covenant does not act entirely as a bill of rights, it does have substantial legal effect. The Human Rights and Equal Opportunity Commission (HREOC) has considerable powers of investigation and enforcement as well as the power of making recommendations to government about inconsistencies between the Covenant and statute law.

Second, in the 1990s the High Court controversially recognised an implied constitutional guarantee of freedom of political communication. The text of this guarantee, as enunciated by a unanimous court of 7 judges in *Lange v ABC*⁶, involves strikingly similar concepts to Art 19 of the ICCPR. As with the Covenant, the guarantee does not operate as a bill of rights. But all Commonwealth legislation (as well as the common law) must now be measured against the guarantee. Any law which fails to measure up is invalid.

The effect of these last two developments made the decision in *Bennett* probably inevitable. It was a question of when, not whether, the archaic ban on disclosure would be invalidated. A blanket ban of the kind previously in force in the public service could never stand against guarantees of free speech that demanded that any restrictions on free speech be directed at a legitimate end and be reasonably proportionate and adapted to that end.

The Current Situation

Alarmist reports of the decision in *Bennett* focussed entirely on the invalidity of the regulation prohibiting disclosure by public servants. Few seemed to understand the significance of Finn J's very careful comments in the second part of his judgment, in which he recognised the possibility that a direction not to disclose information could be supported by a public servant's common law duty of fidelity and loyalty to the employer.

While it was clear that HREOC really had not considered the duty of fidelity and loyalty in any serious way, there was next to no Australian jurisprudence on this topic. His Honour was circumspect about the scope of the duty, preferring to remit the case to HREOC to be considered there.

And that, for the moment, is where the case rests. Submissions have been made to HREOC about the scope of the duty and whether it could support the directions made by the ACS to Mr Bennett to make no comments or disclosure. As far as I am aware the ACS has not yet made submissions in reply. After that, HREOC will have to make its decision.

In the meantime, however, the government reacted with what looks like panic in slow motion. A new regulation was drafted, although it took about 12 months to be promulgated.

I say 'panic' because there appears to have been little consideration of whether a regulation was actually necessary at all. I am happy to be corrected on this, but my reading of the situation is that no serious attention was paid to how the common law duty of fidelity and loyalty might fill the gap left by the regulation. In particular, there seems to have been no consideration of the Canadian jurisprudence to which Finn J was taken in some detail during the submissions in *Bennett*, and to which His Honour referred approvingly in several places.

The scope of the duty of fidelity and loyalty in the context of comment and disclosure by public servants has been considered on several occasions by the Supreme Court of Canada, on several more occasions by the Federal Court of Canada, and on far more occasions by diverse Canadian provincial courts and tribunals. Almost all of this caselaw is less than 20 years old. There is every reason to think that the Canadian jurisprudence is germane to Australian legal and political conditions, and that the principles and criteria worked out in Canada would be applicable here.

Canada: The *Fraser* Decision

The starting point for the Canadian jurisprudence is the decision of the Supreme Court of Canada in *Fraser v PSSRB*⁷.

Mr Fraser was the Group Head of the Business Audit Division of Revenue Canada, Taxation, in the regional office in Kingston, Ontario. One might expect him to be the stereotype of a quiet unassuming public official, diligently but self effacingly working away to audit business taxpayers and thus protect the revenue of the government of Canada. But Mr Fraser was a man of firm views and fiery temper.

He was strongly opposed to metric conversion. He wrote a letter to the local paper on the topic. He also attended a public meeting at which his hostility to metric conversion was robustly expressed and equally well publicised in the paper next day. At this point he was suspended for a few days for exceeding the bounds of reasonable comment by public servants.

This, however, only encouraged him. He turned his attention to the impending introduction of the Canadian Charter of Rights and Freedoms (the Charter). He attended a public meeting about the Charter, and made more comments critical of the government.

Next he appeared on a radio talkback show. He refused to talk about anything to do with Revenue Canada, but he made strong comments about the Charter. For good measure (why be restrained after all this vigorous public comment?) he also compared Prime Minister Trudeau's method of governing with the communist dictatorship in Poland.

Enough was enough as far the long suffering officials at Revenue Canada were concerned. After an inquiry, he was sacked. He appealed to a public service arbitrator, who confirmed the dismissal. He appealed to the Federal Court of Appeal, which also upheld the dismissal. Finally the case reached the Supreme Court in Ottawa.

It is important to know that this case did not involve any consideration of the Canadian Charter. That document postdates the actions in dispute. Rather, the Court was considering the general common law duty of employees of the Crown. That is, the Court was determining the scope of the duty of fidelity and loyalty, paying careful attention to the right of public servants to take part in a democratic society. In addition, there was no relevant public service statute which covered the right of public servants to comment or make disclosures. The governing law was the common law.

The reasoning is, therefore, directly applicable to the question remitted by Finn J to HREOC: what is the scope of the common law duty of a public servant in the context of public comment and disclosure?

The Supreme Court decision is, to Australian eyes, relatively concise and very much to the point. It pays close reading for the careful and well expressed discussion of the competing considerations facing public servants who wished to make comment.

Speaking for the Court, the Chief Justice acknowledged that there was a balance to be struck.

The act of balancing must start with the proposition that some speech by public servants concerning public issues is permitted. Public servants cannot be, to use Mr. Fraser's apt phrase, 'silent members of society'.⁸

But balanced against that are equally powerful considerations.

The tradition [of the public service] emphasizes the characteristics of impartiality, neutrality, fairness and integrity. A person entering the public service or one already employed there must know, or at least be deemed to know, that employment in the public service involves acceptance of certain restraints. One of the most important of those restraints is to exercise caution when it comes to making criticisms of the Government.⁹

Dickson CJ identified three reasons why public servants had some right to make public comment.

32. First, our democratic system is deeply rooted in, and thrives on, free and robust public discussion of public issues. As a general rule, all members of society should be permitted, indeed encouraged, to participate in that discussion.

33 Secondly, account must be taken of the growth in recent decades of the public sector--federal, provincial, municipal--as an employer. A blanket prohibition against all public discussion of all public issues by all public servants would, quite simply, deny fundamental democratic rights to far too many people.

34 Thirdly, common sense comes into play here. An absolute rule prohibiting all public participation and discussion by all public servants would prohibit activities which no sensible person in a democratic society would want to prohibit. Can anyone seriously contend that a municipal bus driver should not be able to attend a town council meeting to protest against a zoning decision having an impact on her residential street? Should not a provincial clerk be able to stand in a crowd on a Sunday afternoon and protest a provincial government decision cutting off funding for a day care centre or a shelter for single mothers? And surely a federal commissioner could speak out at a Legion meeting to protest against a perceived lack of federal support for war veterans. These examples, and many others could be advanced, demonstrate that an absolute prohibition against public servants criticizing government policies would not be sensible.

Those are comments that could be applied directly in Australia, with appropriate changes to the settings of the examples. But the balancing process is always important.

Public servants have some freedom to criticize the Government. But it is not an absolute freedom. To take but one example, whereas it is obvious that it would not be 'just cause' for a provincial Government to dismiss a provincial clerk who stood in a crowd on a Sunday afternoon to protest provincial day care policies, it is equally obvious that the same Government would have 'just cause' to dismiss the Deputy Minister of Social Services who spoke vigorously against the same policies at the same rally.¹⁰

Further on His Honour said:

39 This analysis and conclusion, namely that Mr Fraser's criticisms were job-related, is, in my view, correct in law. I say this because of the importance and necessity of an impartial and effective public service. There is in Canada a separation of powers among the three branches of government--the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.

40 The federal public service in Canada is part of the executive branch of Government. As such, its fundamental task is to administer and implement policy. In order to do this well, the public service must employ people with certain important characteristics. Knowledge is one, fairness another, integrity a third.

41 As the Adjudicator indicated, a further characteristic is loyalty. As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. And indeed, in some circumstances a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability. But, having stated these qualifications (and there may be others), it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies. In conducting himself in this way the appellant, in my view, displayed a lack of loyalty to the Government that was inconsistent with his duties as an employee of the Government.

42 As the Adjudicator pointed out, there is a powerful reason for this general requirement of loyalty, namely the public interest in both the actual, and apparent, impartiality of the public service. The benefits that flow from this impartiality have been well-described by the MacDonnell Commission. Although the description relates to the political activities of public servants in the United Kingdom, it touches on values shared with the public service in Canada:

'Speaking generally, we think that if restrictions on the political activities of public servants were withdrawn two results would probably follow. The public might cease to believe, as we think they do now with reason believe, in the impartiality of the permanent Civil Service; and Ministers might cease to feel the well-merited confidence which they possess at present in the loyal and faithful support of their official subordinates; indeed they might be led to scrutinise the utterances or writings of such subordinates, and to select for positions of confidence only those whose sentiments were known to be in political sympathy with their own.

If this were so, the system of recruitment by open competition would provide but a frail barrier against Ministerial patronage in all but the earlier years of service; the Civil Service would cease to be in fact an impartial, non-political body, capable of loyal service to all Ministers and parties alike; the change would soon affect the public estimation of the Service, and the result would be destructive of what undoubtedly is at present one of the greatest advantages of our administrative system, and one of the most honourable traditions of our public life.'

See paragraphs 10-11 of c. 11 of MacDonnell Committee quoted in *Re Ontario Public Service Employees Union and Attorney-General for Ontario* (1980), 31 OR. (2d) 321 (C.A.), at p. 329.

43 There is in Canada, in my opinion, a similar tradition surrounding our public service. The tradition emphasizes the characteristics of impartiality, neutrality, fairness and integrity. A person entering the public service or one already employed there must know, or at least be deemed to know, that employment in the public service involves acceptance of certain restraints. One of the most important of those restraints is to exercise caution when it comes to making criticisms of the Government.

I have quoted from this case at some length because it is not only the starting point of the extensive Canadian jurisprudence, but it stands as a very thoughtful analysis of the competing considerations for public servants who want to take part in public debate.

Canada: More Recent Developments

We can trace the development of Canadian caselaw more rapidly from this point. The key decisions are *Osborne v Canada*¹¹; *Haydon v Canada*¹² (*Haydon No 1*), and, most recently, *Haydon v Canada*¹³ (*Haydon No 2*) in which the same Dr Haydon found herself disciplined for a second time for an entirely different set of public remarks.

After *Fraser*¹⁴, the Supreme Court returned to the topic of the public service in *Osborne*. However, on this occasion it was considering the rights of public servants to take part in public debate in the context of s 1 of the Charter, which is similar in effect to the proportionality requirements of art 19(3) of the ICCPR. It did not directly discuss the precise content of the duty of loyalty and fidelity. Instead it considered the impact of a particular legislative provision that prohibited involvement by public servants in political campaigns.

However, under the heading 'Minimal Impairment', Sopinka J (with whom the majority of the Court agreed) made some important comments about the significance of tailoring restrictions on the rights of public servants to make comments according to their rank and level. 'To apply the same standard to a deputy minister [the equivalent of a departmental secretary in Australia] and a cafeteria worker appears to me to involve considerable overkill...'¹⁵.

His Honour went on to note the evidence that 'a substantial number of public servants neither provide policy advice nor have any discretion with respect to the administration'. Other evidence suggested a line could be drawn, roughly, at the managerial level, 'which would allow the bulk of the public service below the line to be politically freed, while maintaining the neutrality of the public service as an institution'. Comparisons were drawn with the public service in the UK and in most of the Canadian provinces, which made such a distinction in determining the extent of restriction on the rights of public servants to take part in public debate.

It must follow from this analysis that, if the scope of the duty of fidelity and loyalty is to be based on reasonableness,¹⁶ it could not fail to differentiate between public servants at different levels of the hierarchy. Conversely, if it did not make that differentiation, it would inevitably fail the test of proportionality required in art 19(3). It would probably also fail the implied constitutional guarantee of freedom of political communication for the same reason, but that is not for HREOC to determine.

Superficially *Haydon No 1* involves the application of the Canadian Charter. However, closer analysis shows that, in fact, the crucial parts of this decision relate to the content of the duty of fidelity and loyalty.

In this case, Her Honour was dealing with public comment made by two public servants on national TV. The public servants were doctors employed by the national agency responsible for testing drugs. The comments were highly critical of government policy and programs for testing drugs. The public servants had been disciplined for making public comment, and had also been prohibited from making further public comment without authority.

Note that this case clearly involved both disclosure and comment: the public servants disclosed problems within the drug testing agency and made comments about the ineffectiveness of the agency's procedures. It is a classic example of the frequent interrelationship between disclosure and comment. Without disclosure the comments would have been pretty meaningless. With disclosure the comments revealed a potentially grave danger to public safety and public health.

Her Honour concluded that the common law duty of fidelity and loyalty, as set out in *Fraser*, passed the proportionality requirements of s 1 of the Charter¹⁷. This is an important point, because it highlights the flexibility and adaptability of the duty to meet particular requirements. If it passes the proportionality test for the Charter, it seems inevitable that it would pass the same test for both art 19 and the implied constitutional guarantee in Australia. It was to the content of that duty to which Her Honour then turned.

Her Honour concluded that the original decision-maker had erred in law by failing to understand that there were exceptions to, or limits on, the duty of loyalty and fidelity as expounded in *Fraser*. She drew particular attention to the exception for 'disclosure of policies that jeopardize the life, health or safety of the public'¹⁸. She set out the way in which the issue in the case had been raised within the agency, and had become a matter of public importance. She did not think it important that the comments also reflected a degree of frustration with management¹⁹ and described the original decision as having 'failed to proceed with a fair and complete assessment of the applicant's right, as members of the Canadian public, to speak on an important public issue'²⁰.

Of significance to the Australian situation is Her Honour's conclusion²¹ that the blanket ban on making further public comment went beyond the scope of the duty of loyalty as established in *Fraser*. It is clear that a restriction which has the practical effect of banning any contact with the media, for example, goes beyond the scope of the duty of loyalty and fidelity.

Her Honour summed up the situation²²:

Where a matter is of legitimate public concern requiring a public debate, the duty of loyalty cannot be absolute to the extent of preventing public disclosure by a government official. The common law duty of loyalty does not impose unquestioning silence.

By the time *Haydon No 2* had been decided in May 2004, there had been a number of decisions of Canadian courts and employment tribunals which had considered the duty of loyalty from a number of different angles. *Haydon No 2* is useful in providing something in the nature of a checklist of issues to be looked at in determining the scope of the duty of loyalty in relation to public servants who wish to make public comment or disclosure, drawing on the whole of recent Canadian jurisprudence.

In this case, the very same Dr Haydon was interviewed by a reporter for the *Globe and Mail*, Canada's major national newspaper, over a ban on the importation of beef from Brazil. There was some concern that Brazilian beef might not be rigorously tested and hence involve a risk of such diseases as BSE. Dr Haydon spoke generally to the reporter about the issues, but along the way made comments that in her opinion the ban on Brazilian beef was only about trade, not about a danger to health. These comments found their way into the article in the paper, ascribed to Dr Haydon who was described as a 'Canadian government scientist'.

She was suspended for 10 days (later reduced to 5) and she appealed, ultimately, to the Federal Court. Martineau J reviewed all the authorities²³ and included in his analysis some comments of tribunals that had been accepted as stating general principles to do with the scope of the duty.

His Honour cited²⁴ with approval extracts from an earlier decision of the British Columbia Arbitrator in *Re Ministry of Attorney General, Corrections Branch and British Columbia Government Employees' Union*²⁵:

In my view, each case must be decided on its own facts, taking into account among other factors, the content of the criticism, how confidential or sensitive was the information, the manner in which the criticism was made public, whether the statements were true or false, the extent to which the employer's reputation was damaged or jeopardized, the impact of the criticism on the employer's ability to conduct its business, the interest of the public in having the information made public and so forth.

The duty of fidelity is not designed to protect the employer from all criticism. Nor is an employee's duty of loyalty aimed at the personalities who may occupy a particular position in the corporation or bureaucracy. An employee's duty of fidelity extends to the enterprise not the particular individual who may be managing the enterprise. By the same token, a public servant's loyalty extends to the Government, not the political party who happens to be in office (emphasis added).

His Honour summarised his own reasons²⁶:

In summary, the question before the adjudicator was whether the applicant breached her duty of loyalty thereby giving the employer cause for discipline. The applicant did not enjoy an absolute license, as a public servant, to publicly criticize policies of the Government or to cast doubt on their appropriateness. Considering all of the relevant factors, including the context, the manner and the timing of the reported statements, the decision of the arbitrator to find the applicant guilty of misconduct was one that could reasonably have been made based on the evidence on the record. The adjudicator did not err in law. His interpretation was consistent with the Charter. The duty of loyalty

constitutes a reasonable limit to the freedom of expression. Clearly, there has been a balancing of the competing rights. This case is distinguishable from *Haydon, supra*, and the other cases cited by the applicant. A large and liberal interpretation should be given to the exceptions mentioned in *Fraser, supra*. However, at the same time, it must be consistent with the objective of maintaining an impartial and effective public service. Clearly, this is not a case of 'whistle blowing'. The applicant's reported statements, in my opinion, do not involve public interest issues of the same order as in *Haydon, supra*. They do not address pressing issues such as jeopardy to public health and safety (or Government illegality). Moreover, the evidence reveals that the applicant did not check her facts or address her concerns internally before she spoke to The Globe and Mail. It also appears that her statements were not accurate. Nevertheless, they carried significant weight because the applicant is a scientist and they had an adverse impact on the operations of the Government of Canada. As a result, the adjudicator found that the applicant breached her duty of loyalty and that discipline was warranted. In this regard, I am unable to find any material error.

Canada: The Principles Summarised

Let me briefly return to a point made several times. While most of the Canadian cases generally talk about 'comment', they are applicable to 'disclosure' as well, because of the close connection between the two in many situations. Also, *Haydon No 1*, one of the key decisions in this jurisprudence, expressly deals with disclosure as well as comment.

Hence the extent of the duty of fidelity and loyalty in connection with disclosure can be measured in many situations by the discussion in the caselaw about comment.

Tying all these cases together, then, the following principles emerge:

- 1 The duty of fidelity and loyalty owed by public servants involves a balancing process that takes account of the countervailing rights of public servants to take part in a democratic society;
- 2 The purpose of the duty is to defend both the actual and perceived impartiality of the public service, and thereby enable government agencies to function effectively;
- 3 The duty is owed to the government of the day, not the political party in power;
- 4 The duty is owed to the agency that employs the person, and to the government as a whole, rather than to any individual supervisor of the person;
- 5 However, the duty is not intended to prevent dissent, because dissent can in some cases be beneficial to the agency as well as a reflection of the public servant's right to participate in a democratic society;
- 6 The duty is not absolute in all cases, but is tailored precisely to meet the circumstances of the particular case;
- 7 The duty involves restraint on the part of a public servant;
- 8 The exceptions to the duty should be given a large and liberal interpretation;
- 9 Where the disclosure of information involves information received by the government in confidence, or which affects national security, more restraint is required;
- 10 The more senior the position, the more restraint is required; 'senior' in this context is judged by the rank and the degree of involvement in the administration and policy-making of the particular public servant;

- 11 The closer the connection between the topic of the comment or disclosure and the duties of the public servant, the more restraint is required;
- 12 The duty does not prevent disclosure or comment on matters of public safety, public health, or illegal government conduct;
- 13 The duty does not prevent disclosure or comment on matters of legitimate public interest or debate;
- 14 As a general rule the public servant should first raise concerns internally in relation to matters of concern before making public comment or disclosure;
- 15 A greater degree of restraint is required where the public servant is to be identified as a public servant in the publication of the comment or disclosure;
- 16 As a general rule the public servant should check their facts before making a public comment or disclosure in order to ensure that the facts are correctly stated.

Reading the list, one is struck by three things.

First, the principles represent the striking of a careful balance between legitimate government needs for confidentiality on the one hand, and the rights of public servants to take part in public debate on the other.

Second, the principles are flexible, and adapt to particular situations.

Third, the principles seem to reflect common sense. None of them seems in the least bit startling or threatening to good order. National security and effective government are well protected, while giving public servants reasonable opportunities to take part in public debate. The principles also reflect the public interest in whistleblowing, which was conspicuously absent from both the old public service regulation in Australia and, arguably, the new one too.

One point is clear beyond argument. Any attempt to ban comment or disclosure indiscriminately goes far beyond the scope of the duty, and hence the duty cannot support such a ban. This is one of the explicit conclusions of the judge in *Haydon No 1*, and is well supported by the comments of the Supreme Court in *Fraser and Osborne*.

I would suggest, therefore, that if Australia were to accept the principles developed in Canada, there would be no need for any express regulation of the public service dealing with disclosure or comment. On the basis of the Canadian jurisprudence, the sky is most definitely not falling in relation to disclosure by public servants.

As a postscript to the Canadian discussion, Dr Haydon has recently had another win. In *Chopra and Haydon v Canada*²⁷ the Federal Court of Canada overturned, on the merits, the decision of the public service arbitrator to dismiss the protagonists in what I have called *Haydon No 1*. The decision turns on the way in which that particular decision was made, and sheds no particular light on the law relating to disclosure. However, it seems that Dr Haydon's battle continues.

The New Regulation in Australia

In the light of the Canadian experience there was probably no need for the Australian Government to replace the regulation invalidated by Finn J with anything at all. There is no

obvious reason why Australian courts would not have found the Canadian discussion persuasive and helpful in defining similar principles for this country.

However, the government chose to amend the Public Service Regulations 1999 by inserting a new regulation 2.1²⁸. That regulation lasted barely six months before being disallowed by the Senate. Whether the government intends to re-submit the regulation now that it has a majority in the Senate is anybody's guess, but I would assume that this takes a very low priority compared with all the other legislation the government wants to put through the newly-compliant Senate.

The disallowed regulation, however, is worth looking at briefly²⁹.

It seems clear that it was not drafted in the light of the Canadian caselaw. It lacks anything remotely approaching the careful development of principles derived from those cases. Nor did it use another useful model, the extensively-discussed principles in Part IV of the FOI Act.

Parts of it can be traced to the reasons of Finn J. But the rest of it seems to be a new attempt to define the extent of a public servant's ability to disclose information. And like its predecessors, it seems to have the same problem. In attempting to regulate disclosure in a sentence or two, the drafters are missing much of the point of Finn J's decision, let alone the flexible and extensive principles developed in Canada.

It is simply impossible to set out in one or two sentences the occasions on which disclosure should or should not take place. Nor is a 'one size fits all' approach going to give the necessary flexibility.

The advantage of the Canadian jurisprudence is that it has produced a set of principles that can be adapted with relative ease to many different situations. By contrast, reg 2.1 looked heavy handed, lacked certainty, and might possibly have ended up not doing any more than the common law anyway. It was at least arguable that reg 2.1.5(c) would have imported the common law tests, and thus ended up allowing the common law to regulate the situation rather than the regulation itself.

Is there any need for a regulation at all? I accept that for the purposes of certainty of effect, it might be necessary to have a regulation which recognises the common law duty of fidelity and loyalty and connects it with the criminal sanction in, say, s 70 of the Crimes Act. But beyond that very limited purpose, I think the common law as developed in Canada has produced a sensible set of principles that ought to be allowed to inform the duty of fidelity and loyalty in this country.

And that means that reg 2.1 ought to stay disallowed. On one view it was probably completely ineffective anyway, as it allowed the common law duty to override the regulation. Assuming it had some effect, though, that effect was unclear and was likely to cause yet more problems and lead to yet more court challenges.

The sky did not start falling when Finn J handed down his decision in *Bennett*. The common law had already dealt with most of the problems, and it should be allowed to continue to do so. The common law has a demonstrated flexibility and adaptability that will enable it to pass the tests of proportionality applied in Australia through the implied constitutional guarantee and art 19 of the ICCPR. Regulation 2.1, on the other hand, was a court challenge waiting to happen. It might be naïve in the extreme to suggest that we leave it to the Australian courts to develop principles that are likely to be similar to those developed in Canada – but is our track record any better so far in trying to deal with the issue by regulation?

Endnotes

- 1 (2003) 78 ALD 93.
- 2 At pars 74 and 75.
- 3 Public Service Regulations (Cth) reg 41(a).
- 4 Ibid.
- 5 Counsel for the Commonwealth.
- 6 (1997) 189 CLR 520.
- 7 [1985] 2 SCR 455.
- 8 At par 31.
- 9 At par 43.
- 10 At par 36. As far as I can tell a Deputy Minister in the Canadian public service is the equivalent of the Secretary of an Australian department.
- 11 [1991] 2 SCR 69 (Supreme Court of Canada).
- 12 [2001] 2 FC 82 (Federal Court of Canada - Trial Division).
- 13 [2004] FC 749 (Federal Court of Canada – Trial Division).
- 14 See note 7.
- 15 Above note 11 at 99.
- 16 Which underlies the decision in *Fraser*.
- 17 At par 89.
- 18 At par 100.
- 19 At par 108.
- 20 At par 111.
- 21 At par 115-117.
- 22 At par 120.
- 23 Including the earlier *Haydon* decision.
- 24 Note 13 at par 46.
- 25 (1981) 3 LAC (3d) 140 at 158-59.
- 26 At par 69.
- 27 [2005] FC 595.
- 28 2.1 Duty not to disclose information (Act s 13)
 - (1) This regulation is made for subsection 13 (13) of the Act.
 - (2) This regulation does not affect other restrictions on the disclosure of information.
 - (3) An APS employee must not disclose information which the APS employee obtains or generates in connection with the APS employee's employment if it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government, including the formulation or implementation of policies or programs.
 - (4) An APS employee must not disclose information which the APS employee obtains or generates in connection with the APS employee's employment if the information:
 - (a) was, or is to be, communicated in confidence within the government; or
 - (b) was received in confidence by the government from a person or persons outside the government;
 whether or not the disclosure would found an action for breach of confidence.
 - (5) Subregulations (3) and (4) do not prevent a disclosure of information by an APS employee:
 - (a) in the course of the APS employee's duties; or
 - (b) in accordance with an authorisation given by an Agency Head; or
 - (c) that is otherwise authorised by law.
 - (6) Subregulations (3) and (4) do not limit the authority of an Agency Head to give lawful and reasonable directions in relation to the disclosure of information.
- 29 Because reg 2.1 was made and tabled before the commencement of the Legislative Instruments Act 2003, the Acts Interpretation Act 1901 continues to apply to it (Legislative Instruments Act s 57). Section 48(6) of the Acts Interpretation Act provides that the disallowance of a regulation is to have the same effect as if it were repealed. However, s 48(7) negates the rule that the repeal of a regulation does not revive the law as in force before the repeal. The effect of this is that the regulation declared invalid in *Bennett* revives but as it is invalid, it is unenforceable. However, it will remain on the legislation register until it is formally repealed.

ADMINISTRATIVE LAW MEETS THE REGULATORY AGENCIES: TOURNAMENT OF THE INCOMPATIBLE?

*Justin Gleeson SC**

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Introduction

The focus of this paper is the interface between administrative law and decision-making by regulatory agencies across 2 broad areas. First, there is decision-making by the Australian Competition and Consumer Commission ('ACCC'), where it is concerned with the authorisation of contracts, arrangements or conduct which would otherwise breach Part IV of the Trade Practices Act 1975 (Cth) by reason of their anti-competitive purpose or effect. Second, the last 10 years in Australia has seen the corporatisation, followed by the privatisation, of many of the major utilities in the country, whether they be the supply and transmission of gas, electricity, water or essential transportation services like rail, shipping or airports. Coincident with the opening up of these activities to competition, there has been the passing of regulation which seeks to ensure that where the supplier has market power its behaviour, and in particular its pricing structure, should mirror what would pertain in a competitive market.

There are several broad themes which shall be identified and discussed in relation to decision-making across these two areas. The first theme, which will be given most attention, is that the available grounds and standards for review of such administrative decision-making vary widely, probably too widely, not only across different industries or instruments of regulation, but even within the one instrument. Linked with this, there are significant variations in the types of material, whether evidence or submission, which can be put before the relevant review body.

The second theme to be developed is that the statute or instrument which regulates decision-making by the administrative body regularly requires that body to address and make decisions against a series of incommensurable objectives, principles or standards, often in multiple layers. A body of administrative law is developing in relation to how the problem of incommensurability is to be solved.

A third broad theme is that both the administrative decision-makers and the bodies reviewing their decisions (whether they be Courts or superior Administrative Tribunals) have to grapple with the construction and application of statutes, codes or instruments which embody concepts which are derived from the field of regulatory economics.

The final theme of this paper is some practical suggestions as to how regulatory agencies grappling with these difficult questions, against the background of these varying administrative review processes, might better make their decisions.

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Varying Grounds of Review

(1) Trade Practices Act

Since the *Trade Practices Act 1975* was introduced in 1975, Part IV has proscribed certain contracts, arrangements or conduct which have a specified purpose or effect of lessening competition. However, the Trade Practices Commission, and more recently the ACCC, has had a power under s 88 of the *Trade Practices Act* to grant authorisation to contracts, arrangements or conduct which would otherwise breach the Act so as to exempt the relevant parties from a breach of the Act. Under s 90, the ACCC is not to grant authorisation unless it is satisfied that there is likely to be a benefit to the public which would outweigh the detriment to the public constituted by the lessening of competition in question. If a person is dissatisfied with the decision of the ACCC on an authorisation application, it may apply to the Australian Competition Tribunal ('ACT') for a review of the determination, which will be conducted as a rehearing of the matter: s 101. In these cases, the ACT will stand in the shoes of the ACCC. As a superior administrative body, the ACT will conduct a full merits review of the decision by the ACCC. As examples of cases in this area, the ACT reviewed (and overturned) the decision of the ACCC to authorise an arrangement between banks setting EFTPOS interchange fees at zero¹; the ACT reviewed (and affirmed, subject to condition) the decision of the ACCC to authorise exclusive dealing arrangements whereby private in-patients in New South Wales public hospitals were restricted to receiving pathology services from public pathology providers²; and the ACT reviewed (and set aside) the decision of the ACCC not to authorise certain agreements between Qantas and Air New Zealand which provided for co-ordinated behaviour by the airlines in respect to all Air New Zealand operated flights and all Qantas flights to or from or within New Zealand; further the ACT proceeded to grant its own authorisation to these agreements³. When the ACCC makes decisions on authorisation applications under s 88 of the *Trade Practices Act*, it needs to accept that it may well be subject to full merits review by the ACT.

A separate part of the *Trade Practices Act*, Part IIIA, regulates access to services. Under s 44H, the designated minister may, if there is the necessary recommendation by the National Competition Council, declare a service provided he or she is satisfied of all of six specified matters. The provider may apply to the ACT for a review of such declaration, as may the original applicant where the decision is not to declare: s 44K. That section also empowers the ACT to reconsider the matter and exercise the same powers as the designated Minister. The ACT must act on the evidence led before it. If the parties choose not to lead evidence before the ACT, it cannot be satisfied of the six criteria in s 44H and it must set aside the Minister's determination⁴. As a good example where the ACT conducted a very extensive review, on the evidence before it, of the Minister's decision to declare a service (namely, cargo handling facilities at Sydney international airport) and upheld that decision, see *Re Sydney International Airport*⁵.

Where there is a dispute concerning access by a third party to a service which has been declared, the ACCC has power to make determinations arbitrating the dispute: s 44V, and in doing so must take into account the matters specified in s 44X. The ACT has a power to review any decision by the ACCC on the access dispute on the basis of a re-arbitration of the dispute with the ACT having the same powers as the ACCC: s 44ZP. In this case also, the ACT sits as a superior administrative body with full powers of merits review.

(2) Gas Law and Code

Apart from the matters dealt with under the *Trade Practices Act*, the corporatisation and subsequent privatisation of utilities such as the gas, electricity and water industries has seen the conferral of administrative power on bodies to regulate the returns by service providers. In the gas industry, the *Gas Pipelines Access (South Australia) Act 1997* provides a model

for legislation across the Commonwealth. The schedules to that Act have been adopted by legislation in the various other states and are commonly referred to as the *Gas Law* and the *Gas Code*. Pursuant to the *Gas Law*, various gas pipelines across the country are either treated as 'covered' pursuant to the law itself, or covered by virtue of a decision of the relevant regulator. If a pipeline is covered, then the relevant regulator has the power to approve an appropriate access arrangement between the service provider and customers, or ultimately, in the absence of the submission of an acceptable access arrangement by the provider, to determine its own access arrangement. It is here that rather different grounds for administrative review come into play. Under s 38 of the *Gas Law*, if the decision is one on whether a relevant pipeline should be covered under the *Gas Code*, then the ACT has a full merits review role. This may be seen in the decision of *Re Duke Eastern Gas Pipeline Pty Limited*⁶ where the ACT set aside a decision by the Minister that the Eastern Gas Pipeline between Bass Strait and Horsley Park, Sydney should be a covered pipeline under the law. This decision was made after a full merits review hearing.

On the other hand, under s 39 of the *Gas Law*, if the relevant regulator (such as the ACCC) makes a decision under the *Gas Code* to approve its own access arrangement instead of that submitted by the service provider, there is an appeal to the ACT, limited to grounds of error of fact or that the exercise of the discretion was incorrect or unreasonable having regard to the circumstances or the occasion for exercising the discretion did not arise. The applicant for review cannot raise matters not raised in submissions before the relevant regulator before the decision was made: s 39(2)(b). The ACT cannot receive fresh evidence on the review: s 39(5). This may be regarded as an intermediate merits review: it is not a full merits review as contemplated by s 38, but on the other hand the applicant is not restricted to traditional judicial review grounds.

As was said in *Re Epic Energy (South Australia) Pty Limited*⁷, s 39(2) is not limited in its operation to decisions which are unreasonable in the sense of *Associated Provincial Picture Houses Limited v Wednesbury Corporation*⁸. It is sufficient if the exercise of the relevant regulator's discretion is unreasonable having regard to the totality of the relevant circumstances. It is not an examination at large. One has regard to the relevant materials which were before the regulator and the particular circumstances relied upon by the applicant to establish the decision was unreasonable.

Thus far, I have referred to a full merits review available under s 38 of the *Gas Law* in respect to the decision on coverage and an intermediate merits review available under s 39 in respect to a decision by a regulator to approve its own access arrangement. Another possibility within the spectrum is demonstrated by the decision of the Full Court of the Supreme Court of Western Australia in *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Limited*⁹. In that case the relevant regulator had made a draft decision as to the initial capital base of a covered pipeline for the purpose of calculating the relevant tariff. There was no express appeal or review mechanism available at that stage. Instead, the disgruntled applicant sought judicial review from the Court of the administrative decision on the ground that it involved an error of law in the construction of the *Gas Code*. The applicant in this case was confined to judicial review grounds.

(3) *Electricity Law and Code*

In the context of the regulation of the National Electricity Market, one can again see different standards of review of administrative action being applied. The regulatory scheme involves again South Australia as the lead state. It passed the *National Electricity (South Australia) Act 1996* which includes the *National Electricity Law* as a schedule to the *Act*. The other participating states then passed legislation adopting the *National Electricity Law* within their own states. The *Law* establishes the National Electricity Code Administrator Limited ('NECA') which administers a code of conduct known as the *National Electricity Code*. The

initial *Electricity Code* is a document approved by the Ministers of the participating jurisdictions. It may be amended from time to time. Clause 2.8.2 of the *Electricity Code* provides that persons who register as participants in the electricity industry are bound to comply with the *Code*. The *Code* is enforceable in accordance with the *Law* but does not constitute a contract between *Code* participants unless they otherwise agree.

Section 9 of the *National Electricity (South Australia) Act 1996* establishes a body known as the National Electricity Tribunal. Under s 17 of the *Electricity Law*, the functions of the Tribunal include to review decisions by NECA under s 11 (ie decisions that a *Code* participant is required to pay NECA a civil penalty for breach of the *Code*) or decisions of NECA or the National Electricity Market Management Company Limited (NEMMCO) that are described as reviewable decisions under either the *Electricity Law* or the *Code*. Under s 41 of the *Electricity Law*, the Tribunal may exercise all the powers of the person who made the reviewable decision. It may affirm, vary or set aside the decision under review. For example, under Clause 2.9.2 of the *Electricity Code*, a decision by NEMMCO that an applicant is not qualified to be registered as a *Code* participant is specified to be a reviewable decision. The disappointed applicant is entitled to a merits review of that decision before the Tribunal.

A second form of review arises under the dispute resolution provisions within s 8.2 of the *Electricity Code*. Where a dispute arises between two or more *Code* participants about inter alia the application or interpretation of the *Code*, the parties are obliged to comply with the dispute resolution procedures in Clause 8.2. There is a role for an appointed dispute resolution advisor which includes, if earlier attempts to resolve the dispute fail, the reference of the dispute to a Dispute Resolution Panel ('DRP') for determination. The DRP is to observe the rules of natural justice but is not bound by the rules of evidence: clause 8.2.6C. The DRP has power to make determinations requiring parties to take specified action, refrain from taking specified action or pay a monetary amount to another party: clause 8.2.6D.

Thus, for example, under clause 2.11.1 NEMMCO has a duty to develop, review and publish a structure for participant fees in the market. That structure should, to the extent practicable, be consistent with a number of stated principles. That decision is not stated to be a reviewable decision, so that a disgruntled participant cannot go to the Tribunal. If NEMMCO misinterprets, misapplies or fails to apply a provision of the *Electricity Code* in making its determination of the structure of participant fee, that can give rise to a dispute about the application or interpretation of the *Code* within clause 8.2.1 and thus can be resolved by a DRP. However, in resolving that dispute the DRP has a limited role of determining whether the *Code* has been misinterpreted, misapplied or not applied. It does not have any power to redetermine the fee structure or to order NEMMCO to make any redetermination in conformity with clause 2.11.1 as interpreted by the DRP¹⁰.

There are still further cases, where administrative decisions made under the *Code* are not reviewable decisions which can be taken to the Tribunal, and cannot be treated as disputes about the application or interpretation of the *Code* so as to be decided by a DRP. As a recent example in this area, the jurisdictional regulator of New South Wales, the Independent Pricing and Regulatory Tribunal ('IPART'), determined in June 2004 under clause 6.10.5 of the *Code* that the revenue requirement which the various distribution networks would be entitled to recover would be reduced from that which would otherwise obtain in order to ensure there was no price shock to consumers. There is no provision within the *Electricity Law* or the *Code* making this a reviewable decision to the Tribunal. Nor was there a provision in the statute governing the relevant regulator, IPART, giving a right of review. A DRP could not be constituted because the dispute with IPART was not a dispute with a *Code* participant. Thus, to have this decision reviewed would involve the disappointed party seeking a prerogative writ along the lines of *Re Michael*¹¹, or possibly an ordinary declaratory suit on the basis that IPART had not complied with the compact embodied in the *Electricity Code*.

To summarise at this point, this review of the relevant governing statutes and other regulatory instruments has identified that the grounds of review from administrative decision-making in competition matters vary markedly. The grounds can be either limited to traditional judicial review grounds, or involve an intermediate but limited merits appeal, or a full merits review. There can also be compulsory alternative dispute resolution which gives a form of review. In an attempt to establish forms of review of administrative action which are fair and appropriate in the interests of the various parties, who will usually, but not always, be the relevant service providers, a complex patchwork quilt has been established. It is not readily apparent that the quality of administrative decision-making by the regulators in question is aided by such disparate standards of review.

Incommensurable standards

I turn then to the second theme of this paper, which is that when administrative bodies like the ACCC are seeking faithfully to perform their function under the relevant statutes or governing instruments, they have often been charged with the task of reconciling a long list (or lists) of what are essentially incommensurable principles or objectives. The challenge arises because the governing instrument, rather than simply conferring a discretion on the regulator in broad terms, often now specifies a long list of considerations which the decision-maker may or must take into account. The considerations usually turn out to be conflicting and contradictory. How an administrative body deals with this challenge in a manner free from reviewable error is a difficult question. It provides fertile grounds for the challenge of administrative decision-making.

Where the challenge arises in a judicial review context, we know that if the regulator ignores any of the relevant factors or wrongly identifies the question it may fall into an error of law which can be corrected: *Minister for Immigration and Multicultural Affairs v Yusuf*¹². Taking the relevant matters into consideration calls for more than simply advertent to them. The regulator must display an understanding of the relevant matters and the significance of the decision to be made about them, and a process of evaluation, sufficient to warrant the description that the matters have been taken into consideration: *Weal v Bathurst City Council*.¹³ Judicial review would also be available if the manner in which the various considerations are identified and evaluated displayed irrationality, illogicality, or a failure to ground the decision in findings and inferences of fact supported by logical grounds: *Re Minister; Ex parte Applicant S 20/2002*.¹⁴ However, these general principles, while undoubtedly correct, need further application where the problem of incommensurability arises.

Some examples of this problem may be now illustrated, by reference to the *Gas Code* provisions set out in the annexure to this paper. In *Re Michael*¹⁵, the Western Australian Full Court was faced with the challenge, on a judicial review application, of dealing with a draft decision by the relevant regulator which would have allowed the service provider, Epic Energy, an initial capital base on its investment of approximately \$1.234 billion for the purpose of calculating a reference tariff. This was only about half of the actual purchase price which Epic Energy had recently paid for the asset in question. If one had regard to most of the concepts defined in the directly relevant provisions of the *Gas Code*¹⁶ and their economic underpinning, the initial capital base would properly have been confined to this amount of A\$1.234 billion as it represented the efficient cost (in strict economic terms) of providing the service. There was, however, at least one factor in clause 8.10 – the price paid for any asset recently purchased by the service provider – which might indicate a higher capital base. In order to resolve this conflict between essentially incommensurable objectives within clause 8.10, the Full Court considered that weight, indeed fundamental weight, ought to be given to very general objectives established in s 2.24 of the *Gas Code* which included the legitimate business interests of the service provider. Thus, the technique for reconciling incommensurable standards in the specific provision¹⁷ was to find some more

over-arching set of objectives in the preliminary provisions of the *Gas Code* which applied across the whole *Code*.

Interestingly, in the later decision of the ACT in *Re East Australian Pipeline Limited (EAPL)*,¹⁸ the ACT read down the decision in *Re Michael* as being one confined to its own facts and explicable by the need to give the *Code* a strained construction because the principles of judicial review of administrative action otherwise allowed only highly limited Court intervention. The approach taken in the *EAPL* decision, far from seeking some panacea to the reconciliation of incommensurable objectives through guiding objectives at the outset of the *Code*, is more a traditional black letter law construction of the provisions of the *Code* directly in issue to ascertain what guidance they may give. It is tolerably clear that the ACT had a fundamental difficulty with the approach taken by the Full Court of the Supreme Court of Western Australia in *Re Michael*.

In *EAPL*, the question, which arose on an intermediate merits review, was whether the ACCC had properly established an initial capital base for the pipeline between Moomba to Sydney for the purpose of the access arrangement. This raised a question under clause 8.10 of the *Gas Code*. The ACT took the view that clauses 8.10(a) – (d) required the ACCC to have regard to certain defined and well recognised asset valuation methodologies in determining an initial capital base. Although the ACCC was then permitted, and indeed required, to have regard to the other factors specified in clause 8.10(e) – (j) in coming up with its initial capital base, the ACT held that the ACCC was not permitted, as a matter of law, in that process to simply discard well recognised asset valuation methodologies and devise its own idiosyncratic or ad hoc methodology. This decision from the ACT, if it stands, and an application to the Federal Court for judicial review of it has been filed, provides an important lesson to the ACCC and other regulators in this area. They will be required to conform to a relatively black letter law interpretation of the governing statute, and to have regard to long established principles of common law, such as in the area of valuation of assets, rather than devising ad hoc solutions which justify particular pricing outcomes otherwise thought desirable for consumers.

Another case which illustrates the difficulties which arise in this area is *GasNet Australia (Operations) Pty Limited*¹⁹. In that case, again an intermediate merits review, the ACT was called upon to review under s 39 of the *Gas Law* an access arrangement approved by the ACCC in respect to the gas pipeline in Victoria. The decision of the ACCC was largely overturned. One of the important points made by the ACT was that the application of the reference tariff principles in the *Gas Code* involves issues of judgment and degree upon which reasonable minds could differ. Where those principles produce a tension, the relevant regulator has an overriding discretion to resolve the tensions in a way which best reflects the statutory objectives. However, where there are no conflicts or tensions in the application of those principles, and where the access arrangement proposed by the service provider falls within the range of choice reasonably open and consistent with those principles, it is beyond the power of the relevant regulator not to approve the proposed access arrangement because the regulator prefers a different access arrangement²⁰. This decision highlights a critical question for a regulator like the ACCC: does the particular provision of the statute or instrument in question require and entitle it to make a choice between available alternatives; or, on the other hand, is the only question for it whether the choice made by the service provider was one within the available range?

The specific manner in which the issue arose in *GasNet* was that the service provider chose, as it was entitled, the cost of service approach under clause 8.4 of the *Code* as the methodology to establish the revenue to be generated from sales of all services over the period of the access arrangement. The cost of service approach required it to establish a rate of return on the value of the capital assets which formed the covered pipeline. In turn, clause 8.30 provided that the rate of return used was to be commensurate with prevailing

conditions in the market for funds and the risk involved. Under clause 8.31, the return could be determined on the basis of a well accepted financial model such as the capital asset pricing model ('CAPM'). Once the provider had chosen the CAPM model and proffered a particular rate of return, in this case based on Commonwealth bonds with a 10 year maturity (the longest life bonds available), the only question for the ACCC was whether this was a conventional application of the CAPM model. Assuming it was, it was not open to the ACCC to say that it preferred some other rate of return (namely the use of 5 year bonds) because it considered that this would allow a better balance between the general objectives set out in clause 8.1 of the *Code*.

As in the *EAPL* decision, an error which the ACT found in the decision of the ACCC was that the ACCC did not answer the question posed by the specific provisions of the *Code* in question, but rather illegitimately sought refuge in more general objectives earlier in the *Code*. In doing so the ACCC asserted that it was given a more general discretion than was in fact the case.

It should be mentioned that similar problems of incommensurability and layered objectives arise under the *Electricity Code*. For example, under clause 6.10.5(d), when the regulator sets a regulatory cap for a particular network owner, it must take into account the owner's revenue requirements for the control period having regard to 11 specified matters. They include such incommensurable factors as expected demand growth, price stability, a fair and reasonable risk adjusted cash flow rate of return on efficient investment and ongoing commercial viability of the distribution industry. If this list of competing objectives does not of itself give the regulator a headache there is then the more general series of objectives in clause 6.10.3. That provides that the regime for regulation of revenues of owners is to be administered by the regulator in accordance with five principles, the fifth of which has within it multiple sub-principles. This list of objectives includes providing owners with incentives and opportunities to increase efficiency, providing fair and reasonable risk adjusted cash flow rates of return to owners on efficient investment, providing reasonable certainty and consistency over time of the outcome of regulatory processes, balancing the interests of users and owners and consistency with previous regulatory decisions.

At a higher level still there are key principles and core objectives of network pricing set out in clause 6.1.1 which include promoting competition, facilitating a transparent and stable and non-discriminatory commercial environment, seeking to replicate the outcomes of a competitive market, efficiency, price stability and equity.

Finally, at the highest level of generality, there are *Code* objectives in clause 1.4 which include that the regime should be a light handed regulation of the market to achieve market objectives, which include competition and choice for customers.

Meaning and proof of economic concepts

This discussion leads to a third broad theme, and one identified by Professor Robin Creyke in 'Current and Future Challenges in Judicial Review Jurisdiction: a Comment'²¹, namely the correct way to ascertain the meaning of economic terms in the construction of relevant statutes and instruments in the competition regulation area and the use of expert evidence in this task. The decision in *Re Michael*²² confirms that it is permissible for a Court on a judicial review application, and presumably for the administrative decision-making body itself, to take into account expert evidence from economists as to the meaning which particular terms used in the instrument may bear within the profession²³. Nevertheless, it remains a matter of law whether any particular meaning established by economists is the meaning intended in the instrument in question. In *Re Michael*, the court was ultimately unpersuaded that critical terms used in the *Gas Code* like 'efficient costs' in clause 8.1(a) had an established meaning even within the profession of economists at the date the *Code* came into force. This allowed

the court to adopt an ultimate meaning of the relevant terms which was more flexible than a meaning which might have been held by economists²⁴.

Another aspect of this issue arose in *Re East Australia Pipeline Limited*²⁵. In determining the initial capital base for the covered pipeline between Moomba and Sydney, one of the relevant questions in clause 8.10(b) of the *Code* was the meaning to be given to the expression 'depreciated optimised replacement cost' (DORC). This expression was recorded in parenthesis in the *Code*, suggesting that it had an accepted meaning within the profession. The evidence in this case demonstrated that the concept of DORC was, in fact, of relatively recent origin; within its relatively short history, it originally had been applied by using straight line depreciation, but there was recent discussion by certain economists and some regulatory bodies to suggest that the form of depreciation which better complied with the underlying principle of DORC was one based on net present value. Interestingly, the ACT held²⁶ that the theoretical underpinnings of DORC had progressed over the years to the point where it should now be recognised that an NPV approach would give the most reliable result. Straight line depreciation was rejected. This is an example where expert evidence as to developing concepts within the profession of regulatory economics, even post dating the instrument, is held to inform the relevant instrument.

The way forward

Finally, this paper turns briefly to some practical suggestions for decision-making by regulators, such as the ACCC, in these areas bedevilled by administrative law review. The first suggestion is one really for the legislators: asking bodies like the ACCC to perform the function of investigator, prosecutor and administrative decision-maker subject to review ranging from pure judicial review, intermediate merits review through to full merits review is really asking too much. No one body can perform such heterogeneous functions successfully. Philosophically and practically, the mindset needed to perform such functions differs. If the ACCC is to be left with such multifarious functions, the task of organising different units within the ACCC to perform such different functions is a heavy one.

As a related point, if the ACCC is to be left with strong administrative functions, but subject to careful oversight by either the ACT or the courts based on widely varying standards of review, its administrative decision-making process needs to conform to an exacting and transparent standard. Its reasoning may be subject to review either by traditional courts on judicial review grounds, or by the ACT (which includes a Federal Court Judge together with a qualified economist and business person) on varying standards. The nature and quality of its administrative decision-making needs to resemble that of the judgment of a superior court. Where facts need to be found, the reasoning process needs to be exposed as would be done by a superior court Judge. Where concepts of regulatory economics are involved, the competing expert evidence, and the ultimate decision-making needs, to be of a highly sophisticated and impartial level. Where discretions arise, it is important to identify whether the discretion resides in the ACCC or in the service provider. Where incommensurable standards are to be balanced, and there are layer upon layer of statutory objectives, the reasoning process needs to be carefully exposed. Crude notions that a result which achieves a lower tariff for customers is always to be preferred need to be avoided as they will be readily exposed as the product of error.

Second, a particular problem in this area arises from the question identified by Robin Creyke as to the stage at which administrative challenge is available. If a draft decision is to be the subject of detailed judicial review, as in *Re Michael*²⁷, that would seem to call forth an even higher and more cautious standard of conduct by the regulator before the draft decision is made. The price paid for this is that the decision-maker's views need to be more set in stone at this time, even though it is only supposed to be a draft. The same problem emerged in a different guise in *Re East Australia Pipeline Limited*²⁸. The draft decision there identified a

relatively low initial capital base which the ACCC then sought to hold onto in the final decision, notwithstanding circumstances had changed, by using a different form of reasoning and one which had little support in the instrument or in established valuation practice²⁹. The ACT clearly had grave concerns as to whether the ACCC was reasoning in its final decision to a pre-determined result, namely the result determined in the draft decision³⁰. A lesson for administrative decision-makers in this area is that there needs to be a genuine openness to submissions received in response to the draft decision and a very real possibility that the ultimate result may differ significantly. Otherwise the review body, whatever standard it be applying, may well find error.

Finally, we are seeing a transitional period in which regulators like the ACCC have been given immense power to make administrative decisions which have huge commercial consequences. Ten years ago, the relevant state governments, through their monopoly powers, and without any great transparency, simply made whatever decisions they thought fit. Now those decisions are made by a corporatised or privatised body but subject to the power of a regulator like the ACCC. There is a period required in which regulators will learn what is required of them. In that period they may fall foul, even often, of review by superior administrative bodies or courts. The process is a learning one. Ultimately the aim should be that the strike rate for successful appeals or reviews is low. The ACCC should not be criticised because at present it has lost a number of large cases. Nor should the ACT, or the courts, be criticised for regularly finding error in the ACCC's decisions. This process will work itself out over time.

Annexure

Relevant provisions of the Gas Code concerning the setting of the initial capital base

Directly relevant provisions:

Clauses 8.10 and 8.11

8.10 When a Reference Tariff is first proposed for a Reference Service provided by a Covered Pipeline that was in existence at the commencement of the Code, the following factors should be considered in establishing the initial Capital Base for that Pipeline:

- (a) the value that would result from taking the actual capital cost of the Covered Pipeline and subtracting the accumulated depreciation for those assets charged to Users (or thought to have been charged to Users) prior to the commencement of the Code;
- (b) the value that would result from applying the "**depreciated optimised replacement cost**" methodology in valuing the Covered Pipeline;
- (c) the value that would result from applying other well recognised asset valuation methodologies in valuing the Covered Pipeline;
- (d) the advantages and disadvantages of each valuation methodology applied under paragraphs (a), (b) and (c);
- (e) international best practice of Pipelines in comparable situations and the impact on the international competitiveness of energy consuming industries;
- (f) the basis on which Tariffs have been (or appear to have been) set in the past, the economic depreciation of the Covered Pipeline, and the historical returns to the Service Provider from the Covered Pipeline;
- (g) the reasonable expectations of persons under the regulatory regime that applied to the Pipeline prior to the commencement of the Code;
- (h) the impact on the economically efficient utilisation of gas resources;

- (i) the comparability with the cost structure of new Pipelines that may compete with the Pipeline in question (for example, a Pipeline that may by-pass some or all of the Pipeline in question);
- (j) the price paid for any asset recently purchased by the Service Provider and the circumstances of that purchase; and
- (k) any other factors the Relevant Regulator considers relevant.

8.11 The initial Capital Base for Covered Pipelines that were in existence at the commencement of the Code normally should not fall outside the range of values determined under paragraphs (a) and (b) of section 8.10.

More general provisions:

Clause 8.1

A Reference Tariff and Reference Tariff Policy should be designed with a view to achieving the following objectives:

- (a) providing the Service Provider with the opportunity to earn a stream of revenue that recovers the efficient costs of delivering the Reference Service over the expected life of the assets used in delivering that Service;
- (b) replicating the outcome of a competitive market;
- (c) ensuring the safe and reliable operation of the Pipeline;
- (d) not distorting investment decisions in Pipeline transportation systems or in upstream and downstream industries;
- (e) efficiency in the level and structure of the Reference Tariff; and
- (f) providing an incentive to the Service Provider to reduce costs and to develop the market for Reference and other Services.

To the extent that any of these objectives conflict in their application to a particular Reference Tariff determination, the Relevant Regulator may determine the manner in which they can best be reconciled or which of them should prevail.

Clause 2.24

The Relevant Regulator may approve a proposed Access Arrangement only if it is satisfied the proposed Access Arrangement contains the elements and satisfies the principles set out in sections 3.1 to 3.20. The Relevant Regulator must not refuse to approve a proposed Access Arrangement solely for the reason that the proposed Access Arrangement does not address a matter that sections 3.1 to 3.20 do not require an Access Arrangement to address. In assessing a proposed Access Arrangement, the Relevant Regulator must take the following into account:

- (a) the Service Provider's legitimate business interests and investment in the
- (b) firm and binding contractual obligations of the Service Provider or other persons (or both) already using the Covered Pipeline;
- (c) the operational and technical requirements necessary for the safe and reliable operation of the Covered Pipeline;
- (d) the economically efficient operation of the Covered Pipeline;
- (e) the public interest, including the public interest in having competition in markets (whether or not in Australia);
- (f) the interests of Users and Prospective Users;
- (g) any other matters that the Relevant Regulator considers are relevant.

Endnotes

- 1 *Re EFTPOS Interchange Fees Agreement* [2004] A Comp T 7 (25 May 2004).
- 2 *Re Australian Association of Pathology Practices Incorporated* [2004] A Comp T 4 (8 April 2004).
- 3 *Re Qantas Airways Limited* [2004] A Comp T 9 (12 October 2004).
- 4 *Re Asia Pacific Transport Pty Ltd* [2003] A Comp T 1.
- 5 [2000] A Comp T 1.
- 6 [2001] A Comp T 2.
- 7 [2003] A Comp T 5 at [9] – [16].
- 8 [1948] 1 KB 223 at 223 – 234.
- 9 (2002) 25 WAR 511.
- 10 See decision by DRP comprising Sir Anthony Mason, Hon John Clarke QC and Professor Allars given on 23 May 2002 in the *National Electricity Code Participants fee dispute*.
- 11 Above note 9.
- 12 (2001) 206 CLR 323 at [82].
- 13 (2000) 111 LGERA 181 at [13] and [80].
- 14 (2003) 198 ALR 59 at [5] and [34].
- 15 Above note 9.
- 16 ie clauses 8.10 and 8.11.
- 17 Clause 8.10.
- 18 [2004] A Comp T 8 (8 July 2004), at [20].
- 19 [2003] A Comp T 6 (23 December 2003).
- 20 *Ibid* at [29].
- 21 (2003) 37 *AIAL Forum* 42.
- 22 Above note 9.
- 23 *Ibid* at [107].
- 24 *Ibid* at [137]-[142].
- 25 [2004] A Comp T 8.
- 26 *Ibid* at [38].
- 27 Above note 9.
- 28 Above note 25.
- 29 *Ibid* at [28].
- 30 *Ibid* at [32] and [33].

ADMINISTRATIVE LAW MEETS THE REGULATORY AGENCIES: TOURNAMENT OF THE INCOMPATIBLE?

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Introduction

The objective of this paper is to present a regulator's perspective on the role of administrative and judicial appeals in relation to the regulation of utility services and the effect they have had on the practice of utility price regulation in Australia. The paper also makes some observations about the need for and direction of future reforms to the legal framework for such regulation and about the future role of appeal processes. I have had the opportunity to read Justin Gleeson's excellent paper on this topic prior to preparing these thoughts, and have sought to minimise the extent of duplication between the two papers, and also to expand upon some of his key themes from a regulator's point of view.

In the short time that the new legal framework governing utility price regulation has operated in Australia, there have been a number of appeals against regulators' decisions, both to the courts on traditional judicial review grounds, as well as to different types of administrative review bodies. In the energy sector alone, to date, there have been no fewer than three appeals to courts and five appeals to administrative tribunals in relation to utility pricing decisions,¹ as well as a number of appeals against pricing decisions in the rail and telecommunications sectors. While in many cases, the decisions of the relevant appeal bodies have wholly or largely upheld the decisions of the regulators, there have been a number of high-profile cases where large components of a regulator's decision have been overturned.

Although the threat of administrative review imposes pressures on regulators, I am firmly of the view that effective appeal mechanisms are an essential component of the new regulatory framework for utility pricing. And this view is shared by the overwhelming majority of my fellow regulators.

This is not to say that improvements cannot be made to the current appeal mechanisms and also to the laws under which the regulatory decisions are made, in light of the experience to date. Australian Governments currently are reviewing through the Ministerial Council on Energy many aspects of the policy, law and subordinate regulatory instruments that govern economic regulation of the electricity and gas sectors. In addition to a number of policy and institutional matters, this review will address the appeal mechanisms that are to apply to regulators' decisions on pricing in future. Accordingly discussion on these matters is highly topical.

* *Chair, Essential Services Commission of Victoria.*

The structure of the remainder of the paper is as follows.

An overview is provided first of the new framework for utility price regulation, how regulators undertake the task with which they are entrusted and the operational issues they face, as essential background to considering the appropriate role of appeals mechanisms. The paper then describes some of the effects that the appeal mechanisms and the decisions made to date have had on the work of regulators and their staff. Much of the impact has been positive, while some issues of concern have also been raised.

The paper then examines two broad themes or questions that flow from the appeals that we have seen to date. The first is to consider the appropriate role for the appeal mechanisms in utility pricing decisions, and whether the current appeal mechanisms are appropriate. The second question arises from Mr Gleeson's comments about the incommensurability of the objectives and criteria that some regulatory instruments oblige regulators to apply. An implication of this discussion is that the effectiveness of appeal mechanisms depends importantly on the clarity of the law that is being applied. That is, where judicial or merit review processes find laws and subordinate regulations to be unclear or internally inconsistent, it is preferable for the legislature to remedy the law, rather than leaving regulators and appeal bodies to make sense of poorly drafted regulatory frameworks.

Utility Price Regulation in Australia

Competition Policy Reforms and the Role of Appeals

The legal framework for the price regulation of utility services – that is, electricity, gas, water and like services – was introduced as part of the broader competition policy reforms adopted by federal and state governments in the early 1990s.

A key objective of the competition policy reforms was to put in place measures to permit competition in those parts of the utility service-chain where sustainable competition was feasible and socially desirable – such as in the generation and retail components of electricity supply. However, it was recognised from the start that the nature of the infrastructure technology involved meant that some parts of the utility service-chain would always be provided under monopoly conditions or at least conditions where the service provider would be in a position to exercise substantial market power. In these circumstances it was concluded that regulation of prices and the quality of supply in these sectors of the supply chain would be necessary.

This situation arises because the technology of electricity networks and gas grids is such that one provider is likely to supply the relevant market at a lower cost than two or more providers. In addition, as the assets required are sunk investments with little alternative use outside of the utility service, any potential new entrant faces a large risk of price discounting by the incumbent monopolist if it tries to enter the market. These two factors (economies of scale/scope and sunk investments) mean that competition in these parts of the supply chain is neither desirable nor likely.

The competition policy reforms described above were also accompanied by a fundamental change in the accepted view of the government's role in relation to the provision of utility services. In the preceding decades, most utility services were provided directly by governments by way of government owned business enterprises (GBEs). This involved government – through GBEs – trying to satisfy a number of competing objectives, including delivering appropriate industry policy outcomes, maximising the value of and their returns from the investments in the utility service, protecting customers with respect to price and service levels and regulating safety, environmental and like factors.

However, there was an increasing recognition that entities that are required to achieve multiple, conflicting objectives often met none of the objectives particularly well. The lack of clear objectives, performance measures and accountabilities often encouraged under performance and inefficiency, and the basis and implications of decisions on important trade-offs – such as between prices and service levels – were often made behind closed doors in environments that did not meet the community’s expectations in relation to the transparency or the outcome of these decision-making processes.

As a result, a related reform involved changes to the governance arrangements of utility service provision by GBEs by separating out the functions of government and regulation and by clarifying the role, objectives and accountabilities of the government businesses that supply utility services. GBEs are now largely corporatised and are required to operate on a commercial basis with effective corporate governance. The different roles that can now be distinguished for governments, regulators and government-owned utilities are as follows:

- 1 *industry policy* – remains a core government function, but is now delivered in the same way that industry policy is implemented for the economy as a whole, treating privately and government owned firms on a neutral basis;
- 2 *investor* – which typically involves one or more Ministers being deemed the shareholding Minister for GBEs, with a unit in the Treasury monitoring the performance of the entity and overseeing corporate governance requirements;
- 3 *economic regulator* – involving a decision-making body that is independent of government whose role is to decide the appropriate price and service levels for regulated businesses, taking account of the interests of investors and customers.
- 4 *non-economic regulation* – safety and environmental regulation is typically performed by specialist bodies, some of which are still housed in government departments, but some of which are independent bodies (such as the Victorian Office of the Chief Electrical Inspector);
- 5 *GBE business operation* – involving board oversight and governance, management of business operations, investment and service delivery on a corporatised, commercial basis.

A number of governments have gone a step further and sold some or all of the previously government-owned entities to private firms. That is, they have exited from the ‘investor’ function described above and passed the investment risk, service provision and corporate governance functions to private sector investors. In Victoria, almost all of the former State Electricity Commission of Victoria was sold between 1995 and 1997, and virtually all of the former Gas and Fuel Corporation of Victoria was sold in 1999.

Once the decision was made to separate-off the price and service regulation function from the government’s other functions and to entrust it to an independent body, a set of rules and procedures was required governing the regulatory decision-making process. Had the GBEs supplying utility services remained in government hands, a less robust regulatory framework may have sufficed than was considered appropriate for the oversight of privately owned utility service providers. However, the requirements of national competition policy and the community’s growing desire for more accountability and transparency in government-owned utility service provision and decision-making has resulted in similar regulatory requirements being imposed on utility service providers that remain under government ownership.

Importantly, however, the sale of the utility assets to private investors has imposed a high hurdle for both the transparency of the regulatory process, and for checks and balances in

the process. Utility services are vital to our economies and to the well-being of customers, and so continued provision of the services to the standards that customers seek – and the high levels of investment this requires – is paramount. The degree of confidence that private sector investors in particular have in the regulatory framework and decision-making processes under which their prices are determined will be a fundamental driver of their willingness to continue to invest in the infrastructure required for reliable and efficient service provision.

Accordingly, a necessary aspect of the new regulatory framework for providers of utility services, including gas and electricity services, involved the establishment of mechanisms to subject the decisions of the independent regulatory bodies to effective administrative review. The appeal mechanisms that have been established for this area of regulation represent an important means of holding regulators to account for the way they exercise the substantial powers they are given, in terms of both the merits of their decisions and their conformity to the powers and requirements of the laws they operate under. The checks and balances inherent in these appeal processes are also important means of providing investors in the delivery of services and the consumers of the services confidence in the regulatory process and the accountability arrangements that apply to it.

Setting Regulated Utility Prices

As noted above, the rationale for price regulation of the monopoly-parts of the utility service chain is to protect customers from excessive prices that the asset-owners may otherwise be able to (and have an incentive to) charge, while at the same time seeking to ensure that they receive efficient and reliable utility services. Generally, customers have an interest in lower prices for a given service level, whereas asset-owners have an interest in receiving higher prices and returns on their investments. The means of resolving the trade-off between the two sets of interests is to set prices with reference to the efficient cost of providing the service.

In this context, cost refers to economic cost, which includes a return on capital commensurate with the returns (adjusted for risk) that investors could earn from investing their capital in alternative investments. Prices are typically set for periods of five years, with adjustments for inflation (sometimes mitigated by an offset factor reflecting expected productivity improvement and possibly some well-defined events between reviews) with regulated prices otherwise remaining unchanged during the regulatory period.

While the idea of setting prices with reference to cost may appear straightforward, in practice it is far more complex.

First, when cost-based regulation is first introduced, a ‘cost’ or value must be assigned to the assets that are currently in existence.² However, economic principles do not provide an unambiguous answer to what this deemed asset value should be for purposes of determining prices for future services. It is generally accepted that consideration should be given to a range of factors (such as the expectations prior to the new regulatory regime, recent market valuations of comparable assets and the depreciated historical or replacement values of the assets). Even if a methodology were to be prescribed, the valuation of the existing assets of a utility service provider is something that generally cannot be observed (eg in a well informed and transparent market) and rather needs to be estimated.

Secondly, the regulated entities are generally large, complex businesses, and for their ongoing capital and operating costs, there is a large asymmetry in the information available to the regulated entity compared to the regulator about what needs to be spent to provide the relevant services, and even in some cases, what actually has been spent. The regulator is also not well placed to decide the optimal level of service for the regulated businesses

(such as reliability of electricity supply) or the design of their tariffs (such as the split between fixed and variable components). The usual regulatory response to this asymmetry of information about cost, service levels and tariff structures is to structure the regulatory regime and the decisions made under it so that the regulated entity has financial incentives (rewards and penalties) which encourage it to operate efficiently (that is, to incur only efficient cost, to provide the efficient level of service, and to set efficient prices). However, the structuring of regulatory decisions to provide such incentives has proved to be one source of disputation and administrative appeals.

Thirdly, the level decided for regulated prices is dependent upon forecasts of variables that are subject to a large degree of estimation imprecision, but which have a disproportionate impact on final prices approved for the regulated business. The estimate of the weighted average cost of capital for the entity is perhaps the most important of variable estimates that are involved and has been the subject of considerable disputation.

Finally, analysing and making decisions on all of the issues in a regulated price review is a long and complex task, which involves drawing on expertise from a number of disciplines (eg, engineering, economics/finance, law, etc) and assessing a substantial amount of material advanced during the review process. There are three specific aspects that need to be highlighted. First, the decision on prices will actually reflect a series of decisions on matters of principle or methodology, as well as findings of fact. The decisions of principle typically form a hierarchy, with positions on higher-level matters then determining the approach for considering issues at more detailed levels. Secondly, some of the decisions about methodology that are made in one price review are designed to assist with setting prices at the subsequent price review. Accordingly, part of the approach or methodology that is adopted at a particular price review may reflect decisions made five years previously. Thirdly, many of the issues are interrelated, requiring care and judgement in seeking to ensure consistency across all parts of the assessment.

By way of example, during the first review of the prices for the Victorian electricity distributors (that is, owners of the lower-voltage networks), the first consultation paper was released in June 1998, and the final determination made in September 2000 (and a redetermination after an appeal was made in November 2000). Between those two points in time, four further consultation papers were released on specific subjects, as well as a paper summarising the preliminary conclusions reached on certain higher-level matters of principle, a paper summarising the distributors' formal proposals for other interested parties, followed by a more detailed paper discussing the issues arising and a draft decision. Submissions were sought after the release of each of these papers, and volumes of material – both evidence and argument – were received and placed on the Commission's web site. Lastly, as well as a set of new controls over prices for the 2001-2005 regulatory period, another outcome of the review was a set of incentive arrangements designed to assist with the setting of prices for the following regulatory period – that is, the 2006-2010 period.³

The role of the regulatory decision-makers (and their staff) in resolving these matters can be a difficult one including in relation to achieving balance between the different interests involved under the legal rules that apply. The most effective advocates in the review are usually the owners of the regulated assets. While customers are the obvious beneficiaries of the regulatory process, the financial interests of utility customers are generally relatively small at the individual level and fragmented across many users compared to the substantial and concentrated interests of the regulated entities. It is inevitable, therefore, that while regulated entities can be relied upon to advocate their position professionally, it will often fall upon the regulator to identify and evaluate what may be the counter case, and to take it into account.

The Evolution of Regulatory Practice

As noted above, there have been a number of appeals against regulator's price review decisions. Some of these appeals have largely or wholly endorsed the regulator's decision,⁴ others have found a number of legal defects in the decision that need remedying,⁵ and yet others have made or required more substantial changes to the regulator's decision.⁶ Moreover, the precedent now exists for a regulator's decision to be challenged at the draft stage.⁷ There has been an evolution of the practice of utility price regulation in Australia since the new framework commenced operation in the mid 1990s, partly in response to the disciplines imposed by the experience obtained from the initial appeal decisions but also reflecting improvements that regulators have initiated themselves based on previous experience.

An important change to the practice of regulation over the period since the mid 1990s that has flowed directly from the appeals noted above has been the form of the written decisions. After the *Epic (WA)* decision in particular, most regulatory authorities have sought to document more carefully the reasons for decisions against the formal terms and requirements of their regulatory frameworks. This has included clear statements about their interpretation of the law governing the decision, clear statements of the decisions actually reached, and clear findings on any factual matters.

A second change that has occurred involves the internal operations of the regulatory authorities, in part in response to the influence of appeal decisions referred to above. Early in the life of a number of the regulatory authorities there was a blurring of the distinction between the decision-maker and the regulatory staff that managed the price review process, conducted the analysis and prepared recommendations for consideration. At that time the regulators tended to be more actively involved in the analysis of key issues that would influence the final decision.

In contrast, most regulators now seek to maintain a separation between the analysis and views formed by the staff and their own formal decision-making process, with internal processes being structured to maintain this distinction. This more formal separation between the staff and the statutory decision-makers has been an important influence in ensuring that decision-makers are able to make an independent assessment of each of the issues that have a bearing on the final regulated price decision and to make clear decisions on those matters. This has also been an important means of ensuring that the arguments advanced by all parties can be demonstrated to have been considered in reaching final decisions.

A complementary change has also been made to the structure of many of the statutory decision-making bodies. While many of the current state-based economic regulators were first established with a single person as the statutory decision-maker, almost all of the state economic regulators now have a commission comprising several members as the statutory decision-maker.⁸ The creation of multi-person commissions rather than individuals as the decision-makers provides a further enhancement to the regulatory process by ensuring that all issues raised in the context of a price review are given balanced consideration by a panel of experienced decision-makers.

Many of these changes have improved the practice of economic regulation. Placing a greater emphasis on ensuring that the law is applied correctly and that clear decisions are reached and articulated should enhance the confidence of all parties in the regulatory regime and may also assist in reducing the need for disputation and appeal on its outcomes. As noted previously, improving the confidence of all parties in the regulatory regime is essential for ensuring that the necessary investment is forthcoming for the continued high standard of utility services demanded by utility customers and the community at large.

However, not all of the changes that have occurred in the area of utility regulation have been unambiguously beneficial. For example, one consequence of applying the law more carefully has been that decisions have become less accessible and comprehensible to the wider public. While in earlier decisions regulators made an effort to explain their decisions in more readily understandable terms, the advice that they now receive is that such general explanations may leave them open to claims of having misdirected themselves. There is also the potential for the threat of appeal to cause regulatory authorities to adopt a more conservative approach in conducting their processes and reaching and explaining their decisions. Accordingly, there is now the potential for the time taken to make decisions to be extended unnecessarily, for decisions to be excessively formal and legalistic or for decisions to be structured to minimise the risk of being overturned on appeal rather than to make them readable and comprehensible to a wide range of interested stakeholders.

In any system of regulation which is subject to effective checks and balances, trade-offs are inevitably involved. Notwithstanding these potentially negative effects of appeals against regulatory decisions, the benefits of maintaining the right of administrative review has clearly outweighed the detriments. However, further improvement can still be made. For example, there is scope to enhance further the benefits obtained from appeal processes while minimising the detriments, by ensuring that both the role assigned to the appeal bodies and the law being applied by them, are appropriate. These two matters are examined further below.

Appropriate Role of the Appeal Mechanisms

At the time that the new frameworks for utility price regulation in Australia were introduced, there was a degree of uncertainty about how regulators would approach the task, and the positions that would be taken on key issues, such as the level of return that investors should receive on their invested capital. Since that time, however, there have been more than 30 decisions on regulated prices for energy utilities alone. Regulators now place substantial weight on the approaches that other regulators have followed and on their actual decisions to the extent that they are relevant. This is creating a form of 'regulatory precedent' which has increased substantially the predicability and replicability of regulatory decisions and processes.

There was also a degree of uncertainty about how the appeal processes would operate and how appeal decisions would impact on the interests of investors and consumers. There have now been a number of appeal decisions in the energy and other utility service industries and there is a better understanding of these processes and their implications.

It is relevant to consider, however, where the decisions of appeal bodies fit into this evolving regulatory process and how they have contributed to the emerging body of regulatory precedent.

As Mr Gleeson has noted, two forms of appeal may be initiated against a regulator's decision. The first is the normal avenue of judicial review of administrative decisions by the courts, and the second is a form of merits review by a range of tribunals and appeal bodies.

Turning first to the latter of these forms of appeal – the merits review – its essential feature is that the appeal body typically steps into the shoes of the original decision-maker (in this case, the regulator), and is able to question the judgements reached (and discretions exercised) by the regulator (either in general or in defined circumstances or on particular appeal grounds) and in some cases may issue its own decision⁹ in place of the regulator's initial decision.

Mr Gleeson has also noted that there are substantial differences in the scope of such merit appeals in relation to utility price regulation decisions and that there is a plethora of different appeal bodies.

By way of example, in the energy sector, while the scope of the merits review for gas pricing decisions is common across jurisdictions,¹⁰ the appeal bodies differ: the Australian Competition Tribunal (ACT) is the appeal body for decisions of the Australian Competition and Consumer Commission (ACCC) on transmission pricing issues, and each state and territory has its own appeal body for appeals against its regulator's decisions on distribution prices. In contrast, in the electricity industry there is no provision for merits appeal from the ACCC's decisions on electricity transmission prices, and the extent to which merits review is available in relation to state and territory regulators' electricity distribution pricing decisions varies from state to state.

By way of example, decisions of the Victorian Essential Services Commission can be appealed to a special appeal panel established under the Essential Services Commission Act 2001 but the scope of merits review for electricity distribution decisions available in Victoria differs from the scope of merit review for gas distribution decisions (the former adopting the general appeal mechanism that applies to all ESC decisions, whereas the latter adopts the specific provisions of the Gas Access Regime).¹¹

The level of differentiation between these appeal mechanisms raises important public policy questions. There is no obvious reason why owners of electricity transmission and distribution assets should have inferior rights to appeal than owners of comparable gas network assets, and the presence of such differentiation raises concerns about whether the pattern of investment may be distorted between the industries, as well as raising basic question about fairness and natural justice. It is also undesirable for the same regulatory authority to face a materially different level of scrutiny across the industries that it regulates as there is a risk that this may (unintentionally) influence its own allocation of resources and approach to decision-making as between the industries.

Some of the differences in the appeal mechanisms between electricity and gas and across jurisdictions have arisen because reforms to the electricity and gas industries have to date been pursued independently. They have arisen also because the states and territories currently retain the role of regulating the distribution sector of the energy networks while the Commonwealth (via the ACCC) is responsible for regulating energy transmission.

The current Ministerial Council on Energy (MCE) process for the reform of energy sector policy and regulation is likely to result in a greater degree of commonality in the approach to regulation between the electricity and gas industries and also in the decision-making and appeal bodies. As part of that process, Australian governments have committed to establishing a national energy regulator (the Australian Energy Regulator) to take over responsibility for regulating all of the gas transmission and distribution networks, and the electricity transmission and distribution networks for the interconnected southern and eastern states.¹² It is also to be hoped that these reforms will establish a single approach for merit appeals from the AER's decisions (if such appeals are to be retained), and a single appeal body across electricity and gas. This also raises the question, however, of which merits appeal model should be selected (if any) among those currently in operation.

Prior to considering that question, however, it is worth identifying some implications of the existing arrangements for judicial review of energy price regulation decisions and the potential for inconsistency of treatment that can arise under that form of administrative review. The differential degrees of prescription that are involved in the existing regimes for electricity and gas network price regulations have particular implications for the judicial review process. In broad terms, the opportunity for aggrieved parties to seek judicial review

of regulators' decisions is directly related to the degree of prescription in the regulatory framework that governs the regulator's decision, with more prescription generally extending the scope for judicial review.

As was observed in the *Epic Energy (WA)* case,¹³ the National Gas Code contains a range of objectives, criteria and rules including in relation to the methodologies to be applied by the relevant regulator when setting regulated prices. The regulator's interpretation and application of these detailed requirements can be challenged in the courts by means of judicial review. In the *Epic Energy (WA)* case, the court conducted a lengthy inquiry into the meaning of many provisions of the Code and presented a lengthy interpretation of the legal construction of the Code as part of its decision. The Court was therefore able to inquire into and make rulings on many aspects of the regulator's decision and to refer it back for re-determination in the light of those rulings.

At the other end of the prescriptiveness spectrum, the Victorian Essential Services Commission's decisions on electricity distribution prices are made under a much more general Victorian regulatory framework which provides high level objectives and guiding principles and includes only a small number of specific requirements. The Commission's decision on the electricity distribution prices for the 2001-2005 period was challenged in the Victorian Supreme Court on the grounds that it contravened one of these specific requirements.¹⁴ In finding in favour of the Commission, the Court acknowledged the broad scope of its discretion.¹⁵

The wording of cl.5.10, the purposes of the legislation and the objectives of the Office set out in the legislation, together with any relevant matters found in s.25(4) which were not inconsistent with the Tariff Order, establish that the task left to the Office involved the Office making its own decision with respect to the most appropriate methodology to achieve the incentive objectives of the price fixing exercise.

This involved the Office making its own investigations of material that it could, and making its own judgment as to relevant factors, the methodology used and the weight that should be attached to the various relevant factors. The task was entrusted by Parliament to the Office.

It would only be a very clear case of a determination made without power which would justify this Court's intervention. TXU carries a very heavy burden in the light of the flexibility, discretion and judgment making given to the Office in going about its task of price regulation.

In the final analysis, it was a matter for the Office to investigate and obtain what information it could, relevant to its assessment, to select relevant matters to take into account and to determine the proper methodology. The choice of techniques for estimation and analysis, and the utility of certain matters that should be taken into account were all properly left, in my view to, the expert discretion of the Office. The Office employed and engaged consultants in the fields of price regulation and economics, and the Parliament and the framers of the Tariff Order intended that these matters should all be left to the good judgment of the Office.

Apart from identifying a further potential for inconsistency in the role played by judicial review, the discussion above suggests that scope for appeals from a regulator's decision will reflect at least two factors:

- 1 the degree of prescription in the regulatory framework – which will determine the scope for judicial review, with a more prescriptive framework permitting more matters to be challenged in a court; and
- 2 the design features of the merit review – that is, choices about such matters as the timelines for the review, hurdles that must be met for an appeal to be considered, etc, will determine the scope of any merit review.

Moreover, these two influences on the nature and scope of appeals are interdependent. In particular, if the rules and methodologies that a regulator is required to adopt when

assessing prices are prescribed in considerable detail, then judicial review alone may provide a sufficient check on the regulator's decision (ie, having clarified the interpretation of the law in areas under dispute, the matter can be referred back to the expert regulator to apply the law appropriately). On the other hand, however, a reduction in the degree of prescription in the Gas and Electricity Codes, would also reduce the scope for judicial review being reduced as a consequence. However, reducing the degree of prescription in the regulatory frameworks would expand the discretion of the regulator and so strengthen the case for retaining some form of merit review appeal.

It is argued in the next section of this paper that a problem with the current regulatory frameworks in the energy sector is that greater prescription brings with it a greater risk of ambiguity, inconsistency and inflexibility. The conclusion reached in that section is that a model that deserves consideration is for the governing law to contain well-defined objectives, high level guiding principles and key constraints on regulatory decision-making, but otherwise leave the regulator with discretion as to how it went about setting prices.

In relation to the jurisdiction of the merit review body, a sound case can be made that the most appropriate role for merit review is to focus on remedying clearly unreasonable decisions on important matters of principle, rather than on questioning each of the many judgements that a regulator is required to make when setting regulated prices.

It was noted above that price review decisions are complex tasks, with many interrelated elements and even with interrelationships between separate decisions over time. An implication is that it would be impracticable in any event for merit review bodies to be tasked with replicating entirely the pricing decisions made by regulatory bodies over much longer periods and with the support of expert analysts and staff. The resources required for this task would be excessive, a further element of uncertainty and variability would be introduced and the time taken to set new prices would increase substantially.

It was also noted earlier that a key reason for retaining both merit and judicial review is to provide a level of confidence in the overall system sufficient to ensure that investors remain willing to invest the capital required to provide the level of service demanded by the community over the long term. Satisfying this objective can be quite consistent with an approach of restricting the focus of administrative reviews to important matters of principle and interpretation while retaining a presumption in favour of the regulator's independent expertise and experience in relation to the more detailed aspects of the decision.

The role proposed above for the merit review bodies is very similar to the role that the courts in the United States decided to adopt in the landmark *Hope* case, albeit after nearly 50 years of judicial debate over complex regulatory pricing issues including the appropriate regulatory valuation to place on sunk assets:¹⁶

Under the statutory standard of just and reasonable it is the result reached not the method employed which is controlling ... It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial enquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgement which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.

A desire to focus on the strategic issues would suggest that one of the models of 'intermediate merits review', as described by Mr Gleeson, that appear in a number of instruments may be the most appropriate. By way of example, the Gas Access Regime requires aggrieved parties seeking review of a pricing decision to demonstrate an error in the regulator's finding of fact, that the exercise of the regulator's discretion was unreasonable or

that the occasion for exercising the discretion did not arise. These limited grounds for appeal establish a hurdle to be met by including merit review and also provide the merit review body with considerable discretion over which matters it hears. Administered appropriately, this mechanism permits the appeal body to focus only on those matters that are considered to be of sufficient weight and importance having regard to the specified grounds of appeal. The Gas Access Regime also contains further desirable features including the preclusion against considering material that was not before the original regulator.

The effectiveness of the merit review mechanism will also depend on the capacity of, and approach taken by, the members of the body themselves. The tribunal chair and members need to be able to distinguish the matters that should be heard within the jurisdiction of the appeal process and to reject others that fall outside of it. They also need to be able to manage the appeal hearing and decision-making processes often to very demanding time lines. When faced with a battery of barristers and a large number of complex submissions for review, some appeal body members may be more easily persuaded to consider matters beyond their jurisdiction than would be the case for a judge presiding over a judicial review.

Indeed, of the merit reviews that have been heard to date, there have been a number of instances where appeal bodies have been drawn into matters that would appear not to have been of sufficient materiality. By way of example, the appeal body hearing the merit review of the Victorian Essential Services Commission's pricing decision on electricity distribution services was drawn into pronouncing on whether the Commission had appropriately included an allocation of overheads to streetlighting charges, notwithstanding that the amounts involved were immaterial in the context of the review.¹⁷ Equally, one could question, on grounds of materiality, whether the Australian Competition Tribunal should have considered the issue of whether five or ten year bonds provide the better estimate of a risk free rate when deriving a rate of return.¹⁸ There have also been instances where merits appeal bodies appear to have made rulings on matters of law which are appropriately the province of the courts under judicial review¹⁹.

On the basis of this discussion, it is worth reflecting on how the decisions of merit review bodies could be considered to fit within the hierarchy of the emerging 'regulatory precedent' referred to above. Given the diversity of these merit review bodies and their roles and having regard to the experience to date, it is evident that their decisions on price review matters could not be expected to carry the same precedent weight as would superior court judicial review decisions. As most of the regulatory and analytical expertise necessary to assess the merit of price regulation decisions is necessarily possessed by the regulatory authorities, it would be unfair to expect the merit review bodies to be in a position to lead the development of regulatory methodology and practice. It is likely, however, that the decisions of merit review bodies will progressively be reflected in the evolving processes and methodologies of energy regulators and in that way will have influenced the emerging regulatory precedent.

Incommensurable Standards and the Clarity of the Current Law

As noted above, difficulties arise in interpreting and applying regulatory frameworks that prescribe in detail objectives, principles and criteria that are incapable of being objectively measured and compared and also prescribe in detail the methodologies that regulators are to follow when making their decisions. Such regulatory instruments involve a considerable potential for their instructions to be unclear or inconsistent, and to place regulators in the position of facing a high likelihood of appeal irrespective of the decision that they make. Indeed, one of the main outcomes of the appeals that have occurred to date has been a demonstration of the shortcomings and ambiguities of the current statutes and regulations that govern energy price regulation.

As noted by Mr Gleeson in his paper, it is evident that the law and regulatory instruments that apply for the regulation of gas and electricity industry prices are overly complex structures embodying a range of ‘incommensurable’ objectives, principles, criteria and regulatory rules that provide the potential for confusion, disputation and appeal on a broad range of issues. The National Gas Code has been the subject of most of the appeals to date and, as Mr Gleeson has commented at some length, the various appeal decisions have produced a body of precedent which provide some assistance to regulators in assigning priority to the hierarchy of criteria and principles that are required to be considered or applied in reaching a decision under the Code. Nevertheless, to date, those decisions have not produced a clear roadmap that a regulator can apply and have reasonable confidence that its decision will not be subject to appeal.

As Mr Gleeson has also noted, two of the more substantial appeal decisions in the area – the West Australian Supreme Court in the *Epic Energy (WA)* matter and the Australian Competition Tribunal in the *East Australian Pipeline* matter – provide quite different (and arguably, irreconcilable) views as to the application of the hierarchy of the criteria and principles in the Gas Code. From the point of view of regulators, one of the more important differences is the role that each review body considered that economic principles should play in guiding the regulator’s interpretation of the Code and exercise of discretion.

In the *Epic Energy (WA)* matter, the impression that one has from the reasoning in the decision is that the Court tended to downplay the weight that should be placed on economic principles, and rather, in a number of places, emphasised the need to focus on a broader set of guiding principles. By way of example, when considering the relevance of the actual purchase price of a pipeline (which may have contained capitalised monopoly rents) in the determination of the pipeline’s value for regulatory purposes the Court noted that:²⁰

A sale at market value may well involve the capitalisation of some monopoly returns. These will have been paid to the original owner by the new purchaser. While economic theory would turn its face against such a market value, a sale in these circumstances introduces, as an additional factor, the legitimate investment and businesses interests of the new purchaser ... Economic theory aside, this investment has social, political and public interest dimensions and it is not a surprising circumstance that the Act and the Code should seek to accommodate them.

The Court also considered the italicised ‘overview’ comments at the front of the chapter of the Code dealing with pricing principles which state that ‘efficient cost’ is an overarching element of the principles governing the setting of regulated prices, and concluded that:²¹

it follows that the submissions ... insofar as they advanced the view that section 8.1(a) [efficient costs] had an overarching effect, must be rejected.

In contrast, however, in the *East Australian Pipeline* matter, the overall impression that one gains is that the Australian Competition Tribunal took the view that economic principles are a primary consideration in giving appropriate meaning to the provision of the Gas Code, for example, in the following:²²

the primary quest is for a proper contemporaneous value from which to deduce a tariff that will replicate a hypothetical competitive market.

Moreover, somewhat in contrast to the views of the West Australian Supreme Court, it noted that:²³

DORC is the methodology most in keeping with the recovery of efficient costs ... which the Overview describes (in our opinion correctly) as the ‘overarching’ requirement of the Tariff principles.

As economic principles provide an internally consistent framework for analysing economic regulation problems (with economic efficiency being a principal element), the view of the

Australian Competition Tribunal is the more attractive one from the view point of economic regulators. However, the different view taken by the Western Australian Supreme Court simply emphasises the ambiguity that remains in interpreting and applying the Gas Code in its current form and the potential that remains for disputation and appeal in relation to its application by regulators.

Against that background, while the efforts of the appeal bodies at attempting to clarify the current law are to be applauded, there is a limit to the extent to which regulators, the courts and appeal bodies can clarify law that is ambiguous and even contradictory in terms of its objective and interpretation. This appears to be the case in relation to the Gas Code in the light of various rulings on appeals against decisions made under it. While there have not been any appeals against regulators' decisions under the pricing elements of the National Electricity Code (Chapter 6) (largely due to the absence of merit appeals under that instrument), these provisions are arguably as unclear as the equivalent provisions of the Gas Code.

The first priority for policy and the legislatures, therefore, should be to subject these instruments to review and reform in the light of the experience to date. One important objective of such a review should be to establish clearly a single overarching objective of the Codes, to simplify their guiding principles and criteria and to provide less prescription and greater discretion for regulators in their application of the Codes. As discussed in the previous section, a substantial reduction in the prescription of the regulatory framework that applies under the Gas and Electricity Codes would also be highly desirable in reducing the scope and need for administrative review, and in focusing future reviews on those elements that are of most importance.

One issue raised by Mr Gleeson that deserves further comment was the finding of the Australian Competition Tribunal in a recent *GasNet* matter, which can be described as establishing a 'point within a range' rule. In that case, the Tribunal concluded that where an estimate or value proposed by a regulated entity is deemed to fall within the range reasonably consistent with the requirements of the Gas Code, then it is beyond power for the regulator to reject the proposal merely because it prefers an alternative estimate or valuation.²⁴ Specifically in relation to the rate of return, the Tribunal held that:²⁵

Contrary to the submission of the ACCC, it is not the task of the Relevant Regulator under s 8.30 and s 8.31 of the Code to determine a '*return which is commensurate with prevailing conditions in the market for funds and the risk involved in delivering the Reference Service*'. The task of the ACCC is to determine whether the proposed AA in its treatment of Rate of Return is consistent with the provisions of s 8.30 and s 8.31 and that the rate determined falls within the range of rates commensurate with the prevailing market conditions and the relevant risk.

There is a danger that the Tribunal's view on this matter, if accepted, would substantially change the nature of the regulatory regime, as well as increase the complexity of its administration. The plausible 'range of rates' that can be established through defensible empirical and statistical analyses is sufficiently wide as to imply that regulatory intervention under this rule would be a rare event indeed. Moreover establishing the plausible range is likely to be at least as complex a matter as establishing an appropriate estimated value.

The evident intention of governments when legislating to establish the Gas and Electricity Codes was to ensure that there were bodies in place – the regulators – with the independence and expertise to stand above the commercial interests of both asset owners and customers, to act independently of the short-term political pressures on governments and to make decisions that are in the public interest under the requirements of the law. This latest decision risks cutting across this public policy objective and would seem to provide a further imperative for review of the codes and the basis for appeals under them.

Conclusions

The title of this session, ‘the tournament of the incompatible’ may be taken to imply that there is tension and conflict between regulation, regulators and the administrative appeal processes to which they are subject. However, regulators, in general, support the need for robust checks and balances in their regulatory frameworks and processes including the accountability of an effective administrative review process. Indeed, many of the reactions of regulators to the reality of appeal have been positive. Appeals have provided pressure to improve the quality of analysis, and have also provided an additional source of pressure for organisational reforms to improve the quality of decisions – such as introducing a clearer separation between the decision-makers and staff, and replacing individual decision-makers with multi-person commissions.

With the corporatisation and, in some cases, privatisation of many of our utility services, it is imperative that private investors have confidence to continue to invest as necessary to meet the levels of service that customers will seek over the long term, and that governments have confidence that customers’ interests are protected. Appeal mechanisms have also played an important part in providing this confidence as well as in holding independent regulatory decision-makers to account and ensuring that fairness and natural justice requirements are satisfied.

At the same time, both this paper and Mr Gleeson’s have identified shortcomings as well as benefits arising from the experience to date with processes of administrative reviews applied to energy price regulation decisions. Both papers have also identified opportunities for strengthening the outcomes that can be achieved from future appeal processes while minimising the negatives.

One of the shortcomings with the appeal mechanisms is the degree of inconsistency currently in the scope of appeals from price review decisions between industries and jurisdictions. There is wide variation in the design features of the merit review mechanisms – such as grounds of appeal, evidence that can be considered and timelines – as well as in the extent to which merit review is available at all. In addition, the extent of prescription differs across the various regulatory frameworks, which necessarily implies varying scope for judicial review. These inconsistencies raise public policy concerns, and are one of the matters that are expected to be reviewed by the current reforms to energy sector regulation being pursued through the Ministerial Council on Energy. This review also provides an opportunity to inquire into the most appropriate role for appeal mechanisms in the energy sector.

The characteristics of price reviews provide essential background to the design of the appeal mechanisms from regulators’ decisions. Unlike many matters that come before the various appeal bodies for which either a ‘yes’ or ‘no’ answer is required, pricing decisions are based on the exercise of judgement on numerous interrelated and complex matters, ranging from general principles to findings on specific facts. The process is based on detailed analysis requiring substantial expertise and generally takes more than a year of consultation, fact-finding and analysis. The reality is that appeal bodies would not be able to perform effectively the role of replicating all of the analyses and findings that form the basis of a price review decision. Both the time and resources required for these roles would be prohibitive.

Against this background, this paper has suggested that the most appropriate role for merit review bodies would be to focus on the application of high-level principles the application of which has a material effect on the balance and impact of the decision, and to intervene only where decisions are manifestly unreasonable. Such an approach would be consistent with achieving the objective of creating confidence in the system, while also reducing the likelihood that the threat of appeals would lead to delays in regulators issuing decisions, the

introduction of formality and inflexibility into their decisions and reasons and increased risk and uncertainty as to the likelihood and outcome of appeals on the decisions. Some of the current 'intermediate merit review' mechanisms identified in this paper and Mr Gleeson's may provide a useful model for such a mechanism, noting however, the role performed by appeal bodies inevitably is determined largely by the decisions of the appeal body members themselves.

A second shortcoming with the current appeal mechanisms relates not to the structure of the appeal mechanisms themselves, but to the structure of the regulatory frameworks that are in place. One of the main outcomes of the appeals that have occurred to date has been to demonstrate the ambiguity that exists in the current regulatory frameworks, including the adoption in some cases of what are often 'incommensurable' objectives, principles, criteria and regulatory rules to be applied at different levels of the decision-making process. While there are a number of precedents now providing guidance on how to navigate through these regulatory instruments, to date, those decisions have not produced a clear roadmap that a regulator can apply and have reasonable confidence that its decision will not be subject to appeal.

Indeed, two of the major cases in the area – the West Australian Supreme Court decision on the *Epic (WA)* matter and the Australian Competition Tribunal's decision in the *East Australian Pipeline* matter – stand at odds on an issue that is of fundamental interest to economic regulators. That is, the role of economic principles in guiding decisions under the National Gas Code. In addition, more recent decisions that have suggested that a regulator's task is only to disallow a pricing proposal if it is outside of a 'reasonable range' have the potential to substantially change the application of the existing regulatory regimes, and in a manner that was unlikely to have been intended by governments.

While the efforts of the various appeal bodies in seeking to clarify the legal structure and interpretation of these regulatory instruments is to be encouraged, the more appropriate remedy for uncertain law is for it to be remedied by the legislature. Accordingly, a priority for policy makers and the legislature should be to review the instruments in light of the experience to date, with a view to establishing clearly the overarching objective of the relevant instruments, preferably simplifying the guiding principles and criteria and providing less prescription and greater discretion for regulators. The current review of energy sector regulation being undertaken by the Ministerial Council on Energy provides a platform for such desirable reform.

It would be inappropriate, however, to conclude a discussion about energy sector regulation and the role of appeals therein, without emphasising the substantial positives that have flowed from the experience to date.

The Australian economy as a whole is better off as a result of the complementary reforms of competition policy and GBE corporatisation. Moreover, the injection of private participation into this previously government owned and operated domain of utility service provision has been an additional spur to efficiency and improved consumer service. These developments have and will continue to benefit all Australians for years to come. While experience has shown that improvements are possible to overcome shortcomings that exist in the regulatory frameworks and appeal mechanisms that currently exist, these shortcomings have not undermined the success of the wider reforms or the delivery of substantial benefits from the judicial and merit review decisions that have been made to date.

On the contrary, since the introduction of the reforms we have seen the development of a substantial body of regulatory thinking and practice that has substantially improved the predicability and replicability of regulatory decisions and processes. The threat – and occurrence – of appeals has been an important part of the development of this regulatory

precedent, and will continue to provide a positive pressure for improved regulatory decision-making into the future.

Endnotes

- 1 The court appeals that have been concluded are *TXU Electricity Limited v Office of the Regulator-General & Ors* [2001] VSC 153 (17 May 2001) and *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Limited* [2002] WASCA 231. The appeals to merit review bodies that have been concluded are *In the matter of the Office of the Regulator-General Act 1994 and in the matter of an appeal pursuant to s.37 of the Act brought by AGL Electricity Limited, United Energy Limited, TXU Electricity Limited and Powercor Australia Limited* (16 October 2000), *Re Application for Review of the Decision by the Australian Competition and Consumer Commission Published on 17 January 2003 in connection with Revisions to the Access Arrangement for the Gas Transmission System owned by GasNet Australia (Operations) Pty Ltd* (23 December 2003), *Application by Epic Energy South Australia Pty Ltd* [2002] ACompT 4 (27 November 2002) and *Application by East Australian Pipeline Limited* [2004] ACompT 8 (8 July 2004). In addition, the ACCC has sought leave to appeal the Australian Competition Tribunal's decision in the *East Australian Pipeline* matter to the Federal Court, and a merit review of the West Australian Economic Regulatory Authority's decision on the Epic Energy (WA) access arrangement is currently in process.
- 2 In economic regulation, the deeming of a 'cost' for an asset and assigning a 'value' for that asset refer to the same process. This is because the goal of cost-based regulation is to provide a revenue stream that is equal to the costs incurred, and so a deemed cost to the entity causes the same amount of revenue, and so is also a value.
- 3 By way of example, the incentive arrangements reward the distributors for reducing their cost below that forecast by the Commission. Because of the existence of these incentives, at the following review, the Commission will be able to draw an inference that the distributors' actual expenditure has been efficient, and obviate the need independently to assess the efficiency of their operation.
- 4 For example, *TXU Electricity Limited v Office of the Regulator-General & Ors* [2001] VSC 153 (17 May 2001).
- 5 For example, *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Limited* [2002] WASCA 231.
- 6 For example, *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Limited* [2002] WASCA 231.
- 7 For example, *Application by East Australian Pipeline Limited* [2004] ACompT 8 (8 July 2004).
- 8 The economic regulators in Victoria, South Australia, Western Australia, the ACT, Tasmania and the Northern Territory were all established with an individual as the statutory decision-maker. Now, multi-person commissions exist in all jurisdictions except for Tasmania and the Northern Territory.
- 9 All of the administrative appeal bodies for appeals from energy-sector pricing decisions are also able to remit matters to the regulator to redetermine subject to its findings if they so choose, and this choice has been exercised (for example, by the Australian Competition Tribunal in *Application by East Australian Pipeline Limited* [2004] ACompT 8 (8 July 2004)). However, the Tribunal has also chosen to issue its own replacement decision, including recalculated prices, for example, in *Re Application for Review of the Decision by the Australian Competition and Consumer Commission Published on 17 January 2003 in connection with Revisions to the Access Arrangement for the Gas Transmission System owned by GasNet Australia (Operations) Pty Ltd*, 23 December 2003.
- 10 This is because the Gas Access Regime governs all appeals. The Gas Access Regime comprises the Gas Access Pipelines Law, the National Third party Access Code for Natural Gas Pipeline Systems and the Inter-Government Natural Gas Pipelines Access Agreement (7 November 1997).
- 11 The principal differences relate to the restrictions that apply to appeals, and the evidence that may be considered.
- 12 South Australia, Tasmania, Victoria, the ACT, New South Wales and Queensland.
- 13 *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Limited* [2002] WASCA 231.
- 14 The Commission was then the Office of the Regulator-General.
- 15 *TXU Electricity Limited v Office of the Regulator-General & Ors* [2001] VSC 153 (17 May 2001), paras 314-317.
- 16 *Federal Power Commission v Hope Natural Gas* 320 US 591 (1945). The debate in the courts about the valuation of assets for regulatory purposes dated back at least to *Smyth v Ames* 169 US 466 (1898).
- 17 *In the matter of the Office of the Regulator-General Act 1994 and in the matter of an appeal pursuant to s.37 of the Act brought by AGL Electricity Limited* (16 October 2000).
- 18 *Application for Review of the Decision by the Australian Competition and Consumer Commission Published on 17 January 2003 in connection with Revisions to the Access Arrangement for the Gas Transmission System owned by GasNet Australia (Operations) Pty Ltd*, 23 December 2003.

- 19 The Australian Competition Tribunal's decision on the 'rate of return' issue in the GasNet matter is a possible example (*Application for Review of the Decision by the Australian Competition and Consumer Commission Published on 17 January 2003 in connection with Revisions to the Access Arrangement for the Gas Transmission System owned by GasNet Australia (Operations) Pty Ltd*, 23 December 2003). In that case, the Tribunal's decision, for the most part, reflected its view that the ACCC had interpreted the law incorrectly, rather than having reached an inappropriate judgement.
- Comments to this effect were also made in the court decision on *TXU Electricity Limited v Office of the Regulator-General & Ors* [2001] VSC 153 (17 May 2001)
- 20 *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Limited* [2002] WASCA 231, para 178.
- 21 *Ibid*, para 160.
- 22 *Application by East Australian Pipeline Limited* [2004] ACompT 8 (8 July 2004), para 34.
- 23 *Ibid*, para 38.
- 24 *Application for Review of the Decision by the Australian Competition and Consumer Commission Published on 17 January 2003 in connection with Revisions to the Access Arrangement for the Gas Transmission System owned by GasNet Australia (Operations) Pty Ltd*, 23 December 2003, para 29.
- 25 *Ibid*, para 42.

MIGRATION MERITS REVIEW AND RIGHTS OF APPEAL IN AUSTRALIA

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The last 100 years

Migration law and practice is a rapid moving river. So much change has occurred in the last 100 years. Before World War I passports, identification cards, visas, and even driving licences were unknown. People moved from country to country at a more sedate pace yet with greater ease. As a boy in Scotland in the 1950s I can remember a red poster in the local country post office window saying '£10 to go to Australia'. I did not know until many years later it was a one way ticket! Now people are desperate to get a permanent visa to live in Australia whatever the cost.

With the introduction of border controls, after World War I, came increased administrative regulation and it was administrative regulation, rather than judicial determination, that decided grants of entry. Legal action to test the validity of adverse immigration decisions occurred even before Federation but statutory powers of government to exclude, detain and deport aliens were handled under a broad governmental statutory discretion.

As late as 1977 the High Court ruled in *R v Mackellar; Ex parte Ratu*¹ that the Minister, in ordering deportation of a Tongan, who had overstayed a visitor's visa, was not required to observe the principles of natural justice. Then a new approach was signalled in 1985 with the decision of *Kioa v West*² which effectively reversed *Ratu's* case. One consequence is that in immigration decision-making generally there is a greater chance a decision may be ruled invalid.

In 1990 the High Court ruled that the Minister was obliged by the rules of natural justice to provide a hearing to Mr Haoucher³ before rejecting a recommendation of the Administrative Appeals Tribunal ('AAT') that he not be deported.

Two years later parliament enacted a new scheme for review of immigration decision-making. Departmental decisions were reviewable on the merits by the Immigration Review Tribunal (later the Migration Review Tribunal ('MRT')); the Refugee Review Tribunal ('RRT') and the AAT. This framework heralded a much greater judicial involvement in the migration area.

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Increase in Federal Court case load

In 1987 - 1988 there were 84 migration cases filed in the Federal Court. By 2000/2001 it was 1,340. By 2002 over 50% of the decisions of the Federal Court and Full Bench were in migration matters ⁴.

The reaction of both Labor and Liberal governments to this increased role of judicial intervention is evident, particularly in the asylum area but also more widely. There was the introduction of temporary protection visas; then the excision or removal of certain territories and islands around Australia so as to prevent access to the courts; and then the introduction of a privative clause provision in s 474 of the Migration Act 1958 (Cth) ('the Act') intended to radically restrict rights of appeal to the Federal Court. This last measure was intended to extend to appeal rights open to unsuccessful visa applicants in general. The High Court still retained, through s 75(v)⁵ of the Constitution, original jurisdiction to issue constitutional writs against Commonwealth officers, such as the Minister for Immigration. The inevitable consequence of cutting off rights of appeal to the Federal Court was to flood the High Court with applicants for protection visas -- although this course ultimately was frustrated, as we shall see, by the High Court's interpretation of the privative clause.

Merits and judicial review distinguished

Merits and judicial review point to dissimilar procedures and practices. In the case of merits review the Tribunals, whether they be the AAT, the RRT, or the MRT, conduct a complete rehearing of the applicant's case. The role of a Tribunal is not confined to reviewing the correctness of the delegate's decision. It is an opportunity for the applicant to canvass material which was not before the delegate. Conversely, any further appeal to the Federal Court is confined to a review of the material which had been lodged with the Department of Immigration ('DIMIA') and the Tribunal.

This difference of approach points to the critical importance of the applicant's advisors ensuring that all relevant material is before the Tribunal to satisfy it that the applicant qualifies for a visa.

This should not mean merely ensuring that there is some material to satisfy the Tribunal in respect of each necessary condition for a grant of a visa. It is vitally important to provide corroborative material, by which I mean material that independently supports the truth of matters which are asserted by the applicant. For example, in an application for a spousal visa, where there is a question whether, and at what stage, the de facto relationship became a genuine and continuing relationship to the exclusion of all others, an assertion that the happy couple spent a weekend together in Margaret River at a hotel at a specific time ought to be supported by a hotel receipt recording the event. Certainly in nearly all cases Tribunals have an understandable scepticism about unsupported assertions by applicants.

Where a Tribunal refuses an applicant a visa, the prospects of reversing the decision on appeal to the Federal Court are much less if there is a serious deficiency in the evidence lodged with DIMIA and the Tribunal, particularly where adverse findings had been made on the applicant's credibility. If the evidence is sufficient but the error is one of misapplying the law, then an appeal stands a much better prospect of success.

Conduct before the Tribunal

There are many good articles about how to conduct cases before the Tribunal⁶. I will not canvass that area. Recent case law has significantly limited the obligation placed upon a Tribunal, as an inquisitorial body, to explore for itself evidence to support claims not presented to the Tribunal on behalf of the applicant. Indeed, it has been held that where a

client is represented by a lawyer or migration agent at the primary merits review level this can result in the court presuming that all relevant matters were drawn to the attention of the decision-maker ⁷.

In particular, the High Court has taken a very restricted view of how far Tribunals have a duty to engage in inquiries of their own to verify the facts relevant to an applicant's claims. The Tribunal does have a duty to address the claims advanced before it, but this may mean no more than analysing the sufficiency of evidence led by the applicant to support the claim ⁸. It cannot be taken for granted that a Tribunal will look beyond the evidence presented to it in arriving at its decision.

Tribunal members usually allow the adviser at the outset to inform the Tribunal of the witnesses available to be heard. It is desirable that full proofs of the evidence of these witnesses has been obtained and forwarded to the Tribunal in advance of the hearing. It is entirely in the Tribunal's discretion whether or not the Tribunal wishes to hear from a witness in person ⁹. If the Tribunal declines to do so, and it can be shown that the Tribunal overlooked evidence supplied in the witness's statement, or rejected such evidence without regard to its availability, the applicant is then in a much stronger position to argue on appeal a jurisdictional error once an adverse finding is made to which some evidence would have been relevant. If there is no statement from the witness available to the Tribunal, the adviser may not get the opportunity during the hearing to explain adequately, or sometimes at all, the nature of the specific evidence that the witness would have been able to give if the Tribunal had chosen to call the witness.

Generally the Tribunal will want to hear from the applicant first. Again, it is important to appreciate that the Tribunal will be unaware of what evidence an applicant can give unless that material is available to the Tribunal from DIMIA documentation and departmental interviews conducted before the hearing takes place. Although some Tribunal members invite the adviser to suggest questions which may be asked additional to those from the Tribunal, many do not. Furthermore, usually questions are asked by the Tribunal of an applicant in a way which does not prompt the applicant or elicit from the applicant any more than what the applicant chooses to volunteer in answer to the questions. This being so, it is generally desirable to supply the Tribunal with a detailed statement before hand of what the applicant will say. This serves the purpose of enabling the Tribunal to appreciate the full scope of what it is that the applicant can say, and forms a record of evidence before the Tribunal which the applicant has furnished, whether or not this evidence is brought out during questioning by the Tribunal.

Although a signed statement from the applicant, forwarded to the Tribunal ensures the Tribunal knows what the applicant can say, it should be appreciated that the Tribunal will then compare the evidence elicited from the applicant at hearing with both the statement forwarded and with other previous statements made by the applicant to DIMIA. Usually what the applicant has said to the Departmental delegate is available to the Tribunal including any of the delegate's notes of the interview, and also what the applicant said in the initial application for the visa. On the other hand, a statement of evidence by the applicant will be a further account of relevant events available to the Tribunal in making an assessment of credibility based upon the consistency and reliability of the applicant's evidence. So if the applicant is someone with an unreliable memory, given to contradictory accounts, and inclined to volunteer information when not sure of its accuracy, then you may decide not to provide a statement prior to the hearing of the applicant's evidence before the Tribunal.

In deciding whether to forward statements in advance of the hearing, much will depend upon the nature of the visa sought, whether the applicant will be able to provide all necessary information without elaboration when asked by the Tribunal, whether previous statements supplied by the applicant to DIMIA cover all necessary evidential issues and so on. In any

event you should take a detailed proof of evidence. If time allows, proof the applicant more than once. It is remarkable how memory of events improves the more frequently a witness is questioned.

At the conclusion of the hearing the Tribunal member usually invites the adviser to make a closing statement. This should emphasise those aspects of the applicant's legal and factual case which your analysis of the Tribunal's examination of the witnesses suggests the Tribunal is most interested in addressing.

Since the recent Federal Full Court decision in *Zubair v MIMIA*¹⁰ there has been a series of decisions holding that a delegate's invalid decision because of some defect in the hearing before the delegate may be 'cured' by proper procedures being followed by the Tribunal. Accordingly, the emphasis in addressing the Tribunal has inevitably shifted to convincing the Tribunal of the merits of the applicant's argument in the Tribunal itself, rather than exposing deficiencies in the delegate's approach. Of course, in preparing a case for a Tribunal hearing, particular regard should be had to the delegate's reasons for refusing the visa because those reasons may well influence the Tribunal in its consideration of the matter afresh. But it is quite open to the Tribunal to reject the reasoning of the delegate and still find that the visa was correctly refused or cancelled for reasons which differ from those of the delegate. In the *Zubair* case it was said that mere invalidity by the delegate in decision-making did not necessarily mean the Tribunal could not remedy the deficiency. In that case there had been before the delegate insufficient particulars of the grounds alleging breach of a student visa and insufficient opportunity for the student to answer the breach allegations. Nevertheless these deficiencies could be remedied by a proper approach before the Tribunal. Much will depend on the nature of the delegate's decision being impugned. *Zubair* may not be the final word upon this controversial area.

While oral submissions to the Tribunal may need to be confined to salient aspects which you think would exercise the attention of the Tribunal, it is always open to you to tell the Tribunal that you would appreciate a limited time to forward submissions (and any documentary material) which may canvass the law and the evidence in greater detail.

Rights of appeal

Both in Australia and England there have been increased efforts by the government to limit visa applicants' access to the courts. The large number of asylum seekers, the protracted nature of the judicial process, and the cost of superintending unauthorised arrivals, prompted strategies to be employed in Australia to limit court process. One strategy has been to excise various parts of Australia's territories from being treated as Australia for the purposes of judicial review. A second has been to restrict access to lawyers in the detention centres unless the detainee expressly asks for a lawyer under s 256 of the Migration Act.¹¹ A third was the introduction of a privative clause provisions (s 474 of the Migration Act) which was intended to severely limit access by applicants to the courts in all visa classes after administrative tribunal review had been completed. Under this provision, it was intended that the Federal Court would have no power to hear appeals from the RRT, MRT and AAT in relation to the grant, refusal or cancellation of visas. While the Federal Court had a limited power under s 39B of the Judiciary Act to review cases, the privative clause provision in s 474 was intended to remove the means to overturn visa cancellations and refusals. The privative clause provision replaced limited rights of appeal that previously existed under Part VIII of the Act.

In one of the High Court's most influential decisions, *Plaintiff S157 of 2002 v Commonwealth of Australia*¹², the Court found that the privative clause purporting to prevent appeals to the Federal Court would not apply where the decision of the Tribunal was made in excess of its jurisdiction. The court reasoned that where a jurisdictional error was made by the Tribunal in

the course of reaching a decision, the decision was nullified and for the purposes of s 474(2) of the Act it could not be construed as 'a decision ... made under this Act'.

The High Court's opposition to the government's legislative approach, which sought to use a privative clause decision to prevent appeals, was based on constitutional principle. Administrative decision-makers cannot be left to determine the boundaries of their own jurisdiction. While the executive government may properly determine administratively the merits of applications, it is not open to it to also interpret and determine the permissible boundaries of the law that a statute requires them to administer.

It is for the primary decision-maker and the Review Tribunal to determine the merits of the particular case for that is the administrator's function. In determining the merits of an application for a visa, the decision-maker makes findings on credibility and, provided these are not illogical, irrational, or so unreasonable that no reasonable Tribunal could make them (known as *Wednesbury* unreasonableness) the appeal court will not disturb those findings. As we will see it, it is probably the law in Australia now that even *Wednesbury* unreasonableness is not available as a ground of appeal¹³.

One consequence of the court's restricted review function is that it prevents an applicant from adducing additional evidence where this was not either before DIMIA or supplied to the Tribunal before it made its decision. Although the theoretical basis for admitting evidence in the Federal Court is very broad, in practice the Court will not generally allow deficiencies in the applicant's case to be remedied. After all, the appeal is a review of the Tribunal's decision based upon the material available to the Tribunal and not a review of the merits of the application. This is discussed in more detail later.

What happens when the Tribunal decides adversely to the applicant?

The first notification of an adverse decision is of course the delivery of the decision itself together with the reasons. With the delivery of the decision time for lodging an appeal commences and, if an appeal is not lodged within the prescribed time¹⁴ to the Federal Court, then the Court has no jurisdiction to hear the matter. It is therefore important to have the reasons advanced for the decision appraised quickly.

In the first instance this involves an examination of the reasons for the decision, though very often the reasons do not disclose legal errors.

It is therefore very important to obtain the tape of the oral hearing before the Tribunal and, where possible, also any tape of the hearing before the delegate. These should then be transcribed. Sometimes a transcript of the oral hearing before the Tribunal will reveal that the Tribunal ignored or misstated evidence; failed to give the applicant an opportunity to comment upon information that forms part of the reason for an adverse finding; addressed itself to the wrong issues; or committed some other irregularity.

Another important step is to carry out a Freedom of Information search to ascertain what material it was that the delegate and the Tribunal had regard to in arriving at their adverse decisions. This can sometimes produce surprising results. On one occasion it was discovered that there was a draft letter prepared by the Tribunal member seeking additional information from the applicant which was then never sent. Sometimes one finds interesting inter-departmental correspondence. For example, where a student visa has been refused, following a report by an education provider to DIMIA about the applicant's poor academic performance, there is sometimes correspondence, emails, or notes of telephone conversations that throw important light on the reason why the education provider issued a notice under s 20 of the Education Services for Overseas Students Act 2000 (Cth) or the basis upon which DIMIA cancelled the student's visa.

So where an appeal is being seriously contemplated, it is strongly recommended to get: the reasons for decision, the transcript of the oral hearing, and the FOI material. Whilst the reasons are usually immediately available, the transcript may take some days to arrange if the tape is not available, and the FOI information usually takes longer to obtain than the prescribed appeal period. If an appeal is to proceed then this will usually have to be lodged before the FOI material is available. Copies of much of the material may be on the agent's file but other FOI material may not. Grounds of appeal can be amended once information comes to hand but if the notice of appeal is not itself lodged within the prescribed period then the applicant's claim is defeated. Notices of appeal can be discontinued if subsequent information reveals no basis for the appeal to proceed.

In the case of an application for constitutional writs under s 75(v) of the Constitution the legislation purports to place a time limit of 35 days upon such a review¹⁵. However, usually a constitutional writ in the High Court is not sought before an applicant has exhausted grounds of appeal to the Federal Court. Generally speaking the High Court will not permit a constitutional writ under s 75(v) to go unless and until satisfied that all other avenues of appeal have been exhausted so usually, though not always, proceedings have been completed in the Full Court of the Federal Court.

Drafting grounds of appeal

The grounds of appeal require very careful work because those grounds will ultimately determine the success or failure of the appeal. As time goes on and further FOI information comes to hand, grounds are frequently amended. My own preference is to provide significant detail in the grounds of appeal so that it reads almost like a skeleton outline of argument. This degree of detail can have its draw backs in that it commits the applicant to a precise position. However, by the time the matter goes on appeal the applicant's advisers have to pinpoint with some confidence those grounds which merit close examination.

First, detailed grounds have the advantage that the court is clear about what the appellant's argument is. Secondly, costs may be saved in that quite often the Minister will concede a meritorious appeal before the day of argument because her legal advisers do not have to wait until the eve of the hearing when the appellant makes written submissions to appreciate what the argument will be. Thirdly, if the primary judge fails to address a specific argument of the appellant, which is detailed in the grounds of appeal itself, the Full Court on further appeal can see for itself that the primary judge has ignored the appellant's argument. Just as judges are no doubt justified in reproaching counsel on occasion for grounds of appeal which may be insufficiently particularised, or too prolix or diffuse, counsel often feel aggrieved when judges do not address the arguments which are advanced before them. The remedy lies in the appellant's hands.

What constitutes jurisdictional error?

In the leading case of *Plaintiff S157 of 2002 v Commonwealth* (which frustrated the government's intentions to block judicial review by introducing 'privative clause decision(s)' under s 474(2) of the Act), five of the Judges said:

Breaches of the requirements of natural justice found a complaint of jurisdictional error under s 75(v) of the Constitution.¹⁶

Their Honours also said that:

This court has clearly held that an administrative decision which involves jurisdictional error is 'regarded, in law, as no decision at all'. Thus if there has been jurisdictional error because for example of a failure to discharge 'imperative duties' or to observe 'inviolable limitations or restraints', the

decision in question cannot properly be described in the terms used in s 474(2) as 'a decision ... made under this Act'.¹⁷

Plaintiff S157 of 2002 reaffirmed that where it can be said that a Tribunal has breached the requirements of natural justice or in some other way failed to discharge 'imperative duties' or to observe 'inviolable limitations or restraints' then it commits jurisdictional error.

In the earlier case of *Minister for Immigration and Multicultural Affairs v Yusuf*,¹⁸ McHugh, Gummow and Hayne JJ said:

It is necessary, however, to understand what is meant by 'jurisdictional error' under the general law and the consequences that follow from a decision-maker making such an error. As was said in *Craig v South Australia*¹⁹ if an administrative tribunal (like the Tribunal) falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

'Jurisdictional error' can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law.²⁰

It may therefore be said that the scope of jurisdictional error matches, and very possibly exceeds, the width of the earlier statutory provisions allowing for judicial review in Part VIII. Further, the outer boundaries of jurisdictional error have probably not been fully explored. I set out here some of the main grounds.

Procedural fairness

The new rule established by the High Court in *Kioa v West*²¹ was that in the ordinary case the validity of a deportation decision depends on whether there had been a proper observation of the rules of natural justice. In that case Mr Kioa was providing pastoral support to other illegal Tongan immigrants and an internal memorandum said:

Mr Kioa's alleged concern for other Tongan illegal immigrants in Australia and his active involvement with other persons who are seeking to circumvent Australia's immigration laws must be a source of concern.

The majority considered that the remarks were extremely prejudicial and, in failing to give Mr Kioa a chance to respond to them, gave rise to a breach of natural justice. Mason J thought that if the only reason for deporting a person was their status as a prohibited immigrant a hearing would not be required nor was there a general obligation to allow a person to respond to material on file. However, Deane J thought that a person should have a prior and adequate opportunity to answer reasons which appear to favour deportation²³. Brennan J considered that a person should have an opportunity to respond to 'adverse information that is credible, relevant and significant'²⁴.

In 2000 an application for judicial review was brought under s 75(v) of the Constitution arguing that the applicant had been denied natural justice by the Tribunal. The Tribunal had indicated in general terms to Mr Aala that it had before it the earlier Tribunal and court

papers. Through an inadvertent oversight the Tribunal did not have four handwritten documents provided by Mr Aala to the Federal Court on a previous appeal that had led to his application being referred back to the Tribunal for reconsideration. In failing to have regard to the documents the decision-maker deprived the applicant of a chance to answer by evidence an argument as to adverse inferences relevant to credibility. Gaudron and Gummow JJ said:

... if an officer of the Commonwealth exercising power conferred by statute does not accord procedural fairness and if that statute has not, on its proper construction, relevantly (and validly) limited or extinguished any obligation to accord procedural fairness, the officer exceeds jurisdiction...

²⁵.

Their Honours cited Lord Diplock in *Mahon v Air New Zealand Limited*²⁶ where His Lordship said:

... any person represented at the inquiry who will be adversely affected by the decision to make the findings should not be left in the dark as to the risk of a finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker *might* have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result²⁷.

Since the decision in *Aala* the government has introduced amendments to the Act which purport to limit procedural fairness by stating that the respective divisions of the Act relating to the MRT and RRT are 'taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with'. The 'natural justice hearing rule' is not defined and the further words 'in relation to the matters it deals with' imports a more specific limitation upon the scope of s 357B and s 422B than might have been achieved by a global reference to the conduct of reviews by the Tribunal. The 'matters' Division 4 deals with are therefore to be identified by reference to its particular provisions and not by reference to its general subject matter, that is the conduct of reviews by the Tribunal²⁹.

Section s 359A and s 424A are concerned with the respective obligations of the MRT and RRT to give to the applicant particulars of any information that the Tribunal considers would be a reason or part of the reason for an adverse determination. Likewise, s 360 and s 425 require the Tribunal to invite an applicant to appear before the Tribunal and present arguments. In *Minister for Immigration and Multicultural Affairs v SCAR*³⁰ a Full Court of the Federal Court held that s 425 was breached because the Tribunal failed to provide a 'real and meaningful invitation'. The Tribunal had found the applicant's evidence vague and made adverse credibility findings on that basis. The applicant had produced a psychological report stating that he was in no condition to handle an interview. Likewise, where the applicant was unable to attend a hearing because of ill-health the provision was breached³¹.

It can be seen from these examples that procedural unfairness (and it is not of course all cases of procedural unfairness that found jurisdictional error but serious breaches of the rule) includes statutory breaches under the Act. In such circumstances they may also be regarded as jurisdictional error because they involve a failure to discharge 'imperative duties' or observe 'inviolable limitations or restraints'.

Sometimes these statutory contraventions are to be found in the failure of a Tribunal to meet a condition precedent to the Minister's satisfaction under s 65 of the Act. That is to say there is a misapplication of the law by the Tribunal or perhaps it failed to give consideration to some necessary legal component for the grant of a visa.

The Craig Grounds ³²

There are then those categories of cases where a court has found that a Tribunal may have identified the wrong issue and thereby have fallen into error of law which constitutes jurisdictional error. For example, a Tribunal is empowered to revoke a student visa cancellation if it finds that there have been 'exceptional circumstances beyond the applicant's control'. Where the Tribunal has equated 'exceptional circumstances' with 'emergency circumstances', error may be shown. The student may have attended a doctor, and therefore missed attendance at the required 80% of lectures. To find the applicant was 'so ill' as not to be able to attend was held to constitute a wrong identification of the relevant issue ³³.

Another sometimes fertile source of appeal can be 'ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power'. The reference is to 'considerations' and 'factors' and this probably includes relevant or irrelevant 'evidence' as well as 'no evidence' ³⁴. An example would be if a Tribunal rejected an applicant's account that he is of adverse interest to the authorities in his country of origin and ignored a letter which he produced to the Tribunal which recorded that he is required to report at the local police station to answer charges of a political nature.

More usually the Tribunals scrutinise documents forwarded to them but there are many instances where they have held documents to be fabricated. Where this occurs there may be an issue that arises as to whether the applicant has had an opportunity to meet the criticism that the document was not authentic ³⁵.

New Evidence on Appeal

Under s 27 of the Federal Court of Australia Act 1976 (Cth), a court may receive further evidence. Although the circumstances are limited in which a court will hear further evidence, given its review function, one circumstance where additional affidavit evidence is important is where it is alleged that the applicant was deprived of the opportunity of addressing information that formed part of the Tribunal's adverse conclusion. Another maybe where it is not so much 'information' under s 359A or s 424A which has not been put to the applicant, but that the applicant was not given the chance to comment upon some conclusion that the Tribunal arrived at, eg that a document produced by the applicant was not genuine. In these cases an affidavit from the applicant should explain what evidence the applicant would give had he or she been asked about the issue, eg 'had I been asked by the Tribunal, I would have said, etc...'

It is important to appreciate that even where the appeal court finds that there has been a jurisdictional error, a prerogative writ pursuant to s 39B of the Judiciary Act will not be issued unless there is some utility in this course being followed. For example, if the appeal court considers that the Tribunal ignored relevant material in the form of diary notes, being a contemporaneous record of persecutory conduct suffered by an applicant, the court would need to be persuaded that these notes, if taken into account and accepted as genuine, could have brought about a different conclusion by the Tribunal.

As the High Court explained in *Applicant NAFF v MIMIA*, ³⁶ there are circumstances where it would become essential for an applicant to explain why a Tribunal's error might have a decisive effect on the outcome of the application.

Wednesbury unreasonableness

There remains still an area of uncertainty as to the scope of judicial review. It seems now accepted, since *Lam v Minister for Immigration and Multicultural and Indigenous Affairs* ³⁷,

that while procedural unfairness may be jurisdictional error, substantive unfairness is not. Again this is explained because of the restrictions placed in the Constitution upon judicial intervention in matters which are essentially administrative decisions. Traditionally the rationale for judicial review was that it was an aspect of the rule of law and could be explained by the principle of ultra vires (that is, acting beyond statutory or common law power). More recently the English courts have expressed the basis for judicial review as being to prevent executive abuse but this has not thus far been accepted in Australia³⁸.

In *Associated Provincial Picture Houses Limited v Wednesbury Corporation*³⁹ the English Court of Appeal held that the exercise of a discretion will be invalid if the result is 'so absurd that no sensible person could ever dream that it lay within the power'. In Australia, *Wednesbury* unreasonableness will only be entertained if it can be said that the Tribunal's unreasonableness results in the Tribunal exceeding its jurisdiction. Even then it is only so-called '*Wednesbury* unreasonableness' and not simply 'unreasonableness' that can be invoked.

In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S/20 of 2002*⁴⁰ the comments of McHugh and Gummow JJ can be viewed as accepting that where a Tribunal makes findings which are 'illogical, irrational, or lacking a basis in findings or inferences of facts supported on logical grounds' this may ground jurisdictional error though certainly it would not where there was some evidence, albeit insufficient evidence, for the Tribunal to arrive at its adverse conclusion.

It has been held that, where a conclusion reached by a Tribunal rests upon a misconception as to the applicant's explanation, it may be that the requirement that the Minister be 'satisfied' that the visa should be refused has not been attained. Likewise, to make adverse findings as to credit based on non-existent facts may amount to a failure to act 'according to substantial justice' under s 420(2)(b) of the Act; and misapprehension or misstatement of the evidence might also ground review. But these are all areas of law where the application turns very much on how far the errors affected the determination of the Tribunal and the composition of the court hearing the matter.

Despite the already extensive jurisprudence, advisers will remain corks on this rapidly moving river and we should not be surprised if the river of legislation and expanding case law will be taking many more twists and turns in the years to come.

Endnotes

- 1 (1977) 137 CLR 461.
- 2 (1985) 159 CLR 550.
- 3 (1990) 169 CLR 648.
- 4 These statistics are taken from various sources including DIMIA fact sheets referred to in footnote 8 of John McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 *Fed L Rev* 335 at 337 to which article I am indebted for some of the introductory information.
- 5 Section 75(v) of the Constitution states that the High Court has original jurisdiction 'in all matters in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.
- 6 One such article is by Regina Perton and Roz Germov, 20 February 2004, *Seminar & Workshop Course Materials: Migration Practice Essentials Pty Ltd 2004*.
- 7 *Emiantor v MIMA* (1997) 48 ALD 635 at 648-9, 653 per Merkel J.
- 8 *Muin v RRT* [2002] 190 ALR 601 [7], [97], [208], [263]; *MIMA v SGLB* (2004) 207 ALR 12 [43], though Gummow and Hayne JJ's comments there are directed and confined to the absence of a statutory power being placed on a Tribunal to obtain medical reports.
- 9 Section 361(3) for MRT and s 426(3) for RRT.
- 10 *Zubair v MIMIA* (2004) 211 ALR 261.
- 11 *Wu Yu Fang & 118 Ors v MIMA* (1996) 135 ALR 583.
- 12 (2003) 211 CLR 476.

- 13 *Eshetu v MIMIA* (1999) 197 CLR 611. Gleeson CJ and McHugh J appear to consider *Wednesbury* unreasonableness does not permit s 75(v) constitutional relief [45]; Gummow J contemplates it might do so [126], [133] but not necessarily [139]; Hayne J and Callinan J express no concluded view [159] and [187].
- 14 28 days to the Federal Court (s 477(1)) and 21 days to the Full Court of the Federal Court though leave may be granted for good cause in the case of an appeal to the Full Court outside the 21 days.
- 15 Section 486A(1).
- 16 (2003) 211 CLR 476 at [45].
- 17 (2003) 211 CLR 476 at [76].
- 18 (2001) 181 ALR 1.
- 19 (1995) 184 CLR 163.
- 20 (2001) 181 ALR 1 at [82].
- 21 (1985) 159 CLR 550
- 22 *Kioa*, Mason J at 588.
- 23 *Kioa*, Deane J at 633.
- 24 *Kioa*, Brennan J at 629.
- 25 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 [41].
- 26 [1984] AC 808.
- 27 *Ex parte Aala*, per Gaudron and Gummow JJ at [78] (original emphasis).
- 28 Section 357 of the Act for the MRT matters (covering Division 5 of Part 5) and s 422B for the RRT matters (covering Division 4 of Part 7).
- 29 *WAJR v MIMIA* (2004) 204 ALR 624 per French J [57].
- 30 (2003) 198 ALR 293.
- 31 *NAHF of 2002 v MIMIA* [2003] FCA 140.
- 32 (1995) 184 CLR 163 at 179.
- 33 *Lei Chen v MIMIA* [2005] FCA 229.
- 34 Sir Anthony Mason, 'The Scope of Judicial Review' (2001) 31 *AIAL Forum* 21 at 32-33.
- 35 *WAJR v MIMIA* (2004) 204 ALR 624 at [52].
- 36 *NAFF of 2002 v MIMIA* (2004) 211 ALR 660.
- 37 *Re MIMA ex parte Lam* (2003) 195 ALR 502.
- 38 Bradley Selway QC, 'The Principle behind Common Law Judicial Review of Administrative Action - the Search Continues' (2002) 30 *Fed L Rev* 217. This is an excellent article on the origins and development of judicial review to which I am indebted.
- 39 [1948] 1 KB 223 per Lord Greene MR.
- 40 (2003) 198 ALR 59 per McHugh and Gummow JJ at [34].

OBITUARY

KATHLEEN ANNE MALCOLM

11 February 1948 – 30 July 2005

On Saturday 30 July 2005, the Australian Institute of Administrative Law lost Kathy Malcolm, a long-serving and much-loved member of its Secretariat. Kathy passed away, in Canberra, after a 4 month battle with cancer. More than losing a Secretariat member, many of us in the Institute (including many people outside of Canberra) also lost a very dear friend.

Born Kathleen Anne McAlinden in Bright, Victoria on 11 February 1948, Kathy lived on a farm for her early years then moved to Wodonga, where she lived until she moved to Canberra in 1971. While in Canberra, Kathy met Terry Malcolm. She married him in 1973.

Kathy started work with the ACT Division of the Institute of Public Administration Australia in late 1986. It was there that she met Jenny Kelly, who was to become her close friend. It was also through IPAA that Kathy became involved with the Institute when, in the early '90s, IPAA took on the role as Secretariat for the Institute.

In her eulogy at Kathy's funeral, Jenny Kelly said that the Institute was Kathy's "special baby" and that this was a role that she both cherished and put her usual full effort into. As Secretary of the Institute over all that time, I can only say that this was evident to me in the wonderful service that I always received from Kathy.

That said, we shouldn't pretend that Kathy was necessarily blinded by the intelligence and the importance of those representatives of the Institute that she routinely dealt with. As Jenny reminded us at the funeral, Kathy would often say "They're only bloody lawyers – what can we expect?!"

Someone said recently that Kathy was "the human face of the Institute". If this is correct then it is no small achievement, as lawyers often struggle to find anything even approximating a human face. Even if it is not, it has to be said that Kathy was the attractive, welcoming face of the Institute. She was the cheery voice that answered the telephone and was never short of either a caring response or (when appropriate) a witty riposte. More than anything else, Kathy will be missed for her ready and genuine smile, which was seldom absent.

Kathy was particularly missed at the recent Administrative Law Forum, held in Canberra on 30 June and 1 July 2005. She was mentioned fondly in both the opening and closing addresses and was very much in the thoughts of all the attendees who knew her. As I said in my closing address to the Forum, a feature of the annual Forums (for me at least) is that they are fun. A large part of my enjoyment had always been that, at the Forums, I spent lots of time with Kathy and with Jenny. I missed Kathy at this year's Forum and will always think of her at Forum time.

Kathy's funeral was held in Canberra on Wednesday 3 August. As a testament to the regard and the love that Kathy attracted, the funeral venue was filled to overflowing, with approximately 250 people in attendance. The Institute was well-represented, including by the current President and by 6 former Presidents. Moving eulogies were delivered by Kathy's husband, Terry, and by her "twin", Jenny Kelly. There weren't many dry eyes. Mine certainly weren't.

I know that I speak for many people connected with the Institute when I say that I will miss Kathy terribly. I spoke to her several times a week and always looked forward to our too-few encounters face-to-face.

On behalf of the Institute, I extend heartfelt condolences to Terry, to her sons Ryan and Trent, daughter Julie, grandson Jack, and to her brothers, Pat and Frank.

Stephen Argument
Secretary
Australian Institute of Administrative Law