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ANTI-TERRORISM LEGISLATION: ISSUES FOR THE COURTS

Murray McInnis*

There can be little doubt that there are significant challenges facing governments when dealing with terrorism. A recent article[1] in the New York Review of Books revealed the United Nations Office on Drugs and Crime (UNODC) based in Vienna estimates the value of all opiates produced in Afghanistan last year at $US2.8 billion of which $US600 million will be returned to Afghanistan and distributed amongst the farmers. The farmers are controlled by various 'mafia type' criminal organisations who appear to have successfully provided technological advice to the farmers to enable them to maximise the crops. The criminal elements also have an arrangement with the Taliban who in turn forward funds to Al Qaeda to be used for terrorist activities.

The massive scale of this drug production which according to UNODC estimates accounts for 87% of the world's heroin distributed illegally is worth noting in the context of the challenge faced by countries seeking to dealing with terrorism. It is clearly significant as the amounts of money generated by the sale of heroin puts into some context the reference made later in the paper that the cost of the entire operation of the suicide bombings in London was less than £8,000.[2]

One would hope that there will be very few applications requiring the courts to exercise powers of any kind under the non anti-terrorism laws and instead there will be co-operation between Federal and State enforcement agencies using current powers combined with intelligence obtained by Australian Security Intelligence Organisation (ASIO).

In this paper, I shall deal with issues arising out of the *Anti-Terrorism Act (No. 2) 2005* (the Act). The Act is part of what is described as an anti-terrorism legislative package and came into effect in December 2005.

I shall provide a brief overview of the Act and then deal specifically with practical issues arising under the Act for the courts, and in particular the Federal Magistrates Court (the FMC). It will be evident that the legislation raises a wide range of procedural fairness and natural justice issues which are fundamental to both administrative and criminal law.

The Act comprises a number of schedules and claims to be 'an Act to amend the law relating to terrorist acts and for other purposes'. The Act amends other relevant Commonwealth legislation.[3]

The Act is the product of a review of existing federal legislation which in part already dealt with terrorist activity. The Act confers powers on law enforcement and intelligence agencies designed to prevent and investigate terrorism and to strengthen existing laws which target terrorist acts and terrorist organisations.

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* *Federal Magistrate. Paper delivered to the Australian Institute of Administrative Law 2006 Administrative Law Forum, 23 June 2006.*

It is not possible in a paper of this kind to analyse in detail all the features of the legislation. The two key features of the new scheme which I regard as relevant when considering administrative law and natural justice issues are 'control orders' and provisions which permit police 'preventative detention'.

In the Attorney-General's second reading speech he states the following:

> Under the Control Order regime:
> - an 'interim' control order is made initially. The person the subject of the order may attend Court and make representations when the Court decides to confirm, void or revoke the order;
> - the control order does not come into effect until the person is notified;
> - the person can apply for the order to be revoked, varied or declared void as soon as the person is notified that an order has been confirmed.
> - the person and their lawyer may have a copy of the grounds for making or varying the order;

> Under the preventative detention regime:
> - the order, as well as the treatment of the person detained, would be subject to judicial review; There is also built in merits review including when the police seek a continued preventative detention order.
> - At that time the person detained or their legal representative can provide the police with additional information concerning the preventative detention order.
> - The issuing authority is required to consider afresh the merits of making the order to be satisfied, after taking into account relevant information, including information provided to the police by the person subject to the order, that the conditions for the order are met. This includes any information that has become available since the initial preventative detention order was made.
> - the person detained may contact a lawyer, a family member… their employer… and another person at the discretion of the police officer;
> - each year, the Attorney-General would report to Parliament on the operation of preventative detention orders
> - the regime will not apply to people under 16 and special rules will apply for people between the ages of 16 and 18 and people incapable of managing their own affairs." [4]

The new laws have attracted significant comment.

In a press release entitled, *Judges asked to do the work of police: law council*, the Law Council of Australia stated in part:

> Proposed anti-terrorism legislation would require Australian judges to perform the work of the police, compromising their independence ...

In the same press release the Council President, John North, stated:

> Requiring judges to make detention orders posed a grave risk of asking them to do tasks incompatible with their office.

Mr North further stated:

> Federal judicial officers would be asked to make continued preventative detention orders following an initial order made by an AFP officer.
>
> Judicial officers would be exercising what is obviously a police function, a function of the executive, and this will run the risk of prejudicing public confidence in the independence of the judiciary.[5]

In the Queensland Law Society publication 'Proctor', the President, Rob Davis, in the December 2005 issue stated:

> Make no mistake about it, the federal government's Anti-Terrorism Bill (No. 2) 2005 ("The Bill") is an unprecedented assault on our precious and hard-won civil rights, and it is impossible to understate the truly frightening and awesome provisions and wider implications of this proposed legislation.[6]

In a speech delivered in South Africa in November 2005, Kirby J of the High Court made the following comments:

> The great power of the idea of independent judicial examination of "control orders" and other decisions made under the ... legislation shows, once again, the potent metaphor that judicial review represents in modern democratic constitutional arrangements. It is as if many people recognise the need to counter-balance the swift, decisive, resolute and opinionated actions of officers of the Executive Government with the slower, more reflective, principled and independent scrutiny by the judicial branch, performed against timeless criteria of justice and due process.[7]

Control orders

In Sch 4 of the Act, a control order is defined to mean, 'an interim control order or a confirmed control order'.

An interim control order means an order made under ss 104.4, 104.7 or 104.9. Section 104.4 provides power to the issuing court to make an interim order. It is useful to refer to s 104.4 in the attachment.

Section 104.7 provides for the making of an urgent interim control order by electronic means, whilst s 104.9 provides for the making of those orders in person.

It is interesting to note that s 104.5 in the attachment sets out the terms of an interim control order.

A 'confirmed control order' means an order made pursuant to s 104.16. That section is set out in the attachment.

It will be noted that the control orders are made by an issuing court. An issuing court, pursuant to s 100.1(1) of the Criminal Code as amended by the Act, means:

(a) the Federal Court of Australia; or

(b) the Family Court of Australia; or

(c) the Federal Magistrates Court.

It will be readily apparent that significant information needs to be presented to the issuing court to enable it to be satisfied on the balance of probabilities that the making of the order would substantially assist in preventing a terrorist act or that the person has provided training to or received training from a listed terrorist organisation, and, further, that the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act (see s 104.4).

A number of observations may immediately be made in relation to the significance of a control order. The substantial observation, in my view, which is relevant, is that the standard of proof is only on 'the balance of probabilities' and the court, in being satisfied on the balance of probabilities in relation to the restrictions, need only consider that the order is 'reasonably necessary' and 'reasonably appropriate'.

The terms of an interim control order are significant. They provide a wide range of restrictions, though as noted earlier from the Minister's Second Reading Speech, the person who is the subject of such an order may apply for the order to be revoked, varied or declared void as soon as the person is notified that an order is being confirmed.

Preventative detention orders

Subdivision B of Sch 4 of the Act provides for preventative detention orders as described by the Minister in the Second Reading Speech earlier in this paper.

The object of the division is stated in s 105.1 to be 'to allow a person to be taken into custody and detained for a short period of time in order to prevent an imminent terrorist act occurring; or preserve evidence of, or relating to, a recent terrorist act.' (see attachment)

Of significance, when considering the role of the judiciary in relation to preventative detention orders are the persons who may be appointed as an issuing authority for the making of continued preventative detention orders. Pursuant to s 105.2 of the Act, the Minister may by writing appoint as an issuing authority for continued preventative detention orders the following:

> **105.2 Issuing authorities for continued preventative detention orders**
>
> (a) a person who is a judge of a State or Territory Supreme Court; or
>
> (b) a person who is a Judge; or
>
> (c) a person who is a Federal Magistrate; or
>
> (d) a person who:
>
> (i) has served as a judge in one or more superior courts for a period of 5 years; and
>
> (ii) no longer holds a commission as a judge of a superior court; or
>
> (e) a person who:
>
> (i) holds an appointment to the Administrative Appeals Tribunal as President or Deputy President; and
>
> (ii) is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory; and
>
> (iii) has been enrolled for at least 5 years.

The same section also provides, in subsection (2), that the Minister must not appoint a person unless the person has 'by writing consented to being appointed' and the consent is in force.

It should be observed that the categories of issuing authorities go beyond those currently holding judicial appointment in a state or territory or persons who may be a Judge or Federal Magistrate. They include persons who have served as a Judge in one or more superior courts for a period of five years and who no longer hold a commission as a Judge of a superior court or a person who holds an appointment to the Administrative Appeals Tribunal as a President or Deputy President and is enrolled as a legal practitioner of a Federal Court or of the Supreme Court of a State or Territory and has been enrolled for at least five years.

Judicial Presidents of the AAT are Federal Court judges. The Deputy Presidents, however, do not hold judicial office and not all the current appointments are tenured in the same manner as a Chapter III Justice or a Judge of a State or Territory Supreme Court.

A further observation may be made in relation to issuing authorities in that the Minister must not appoint a person to act as an issuing authority unless that person has consented to being appointed and that the consent is in force. Hence the legislation provides for what might be described as a self-nomination process.

The self-nomination process is one which operates under other legislation.[8]

The self-nomination process for issuing authorities, whilst on the one hand providing a degree of judicial supervision, may, if a small number of volunteers come forward, result in -

at least potentially - a narrow approach being adopted when considering orders which clearly have a significant impact upon the liberty of the subject.

It is significant to note that even where a Judge or Presidential Member of the AAT indicates in writing to the Attorney-General that he or she is prepared to accept an appointment as an issuing authority, there is a still a discretion in the Minister to decide whether to appoint that person. There is no guidance in the legislation as to the factors to be taken into account and the exercise of that discretion and it is not clear whether a decision of that kind would necessarily be reviewable. Hence, there is at least the potential for the government of the day to select certain persons to perform the task which may result in a small group of persons selected as issuing authorities for the purpose of preventative detention orders.

The other issue which will arise is the question of whether it would be preferable for all eligible persons to self-nominate or at least to be encouraged to nominate so that the number of persons dealing with applications will be greater and applications can then be allocated on a strict rotational basis.

Likewise the panel of Judges with appropriate expertise and knowledge established by the Courts to deal with applications under the legislation to the Court would need to ensure that those selected with appropriate knowledge and experience are all available on a strict rotational basis. This would avoid any suggestion of forum shopping or applicants seeking to obtain orders whether by persons acting in a persona designata role or in a Court role who are regarded as more likely to grant the order.

The basis for applying for and making preventative detention orders is set out in s 105.4 of the Act which I also include in the attachment.

Persona designata

It is further noted that the role performed by the issuing authority is properly described as a *persona designata* role. So much is clear from s 105.18 which provides:

> 105.18 Status of person making continued preventative detention order
>
> (1) An issuing authority who makes:
> (a) a continued preventative detention order; or
> (b) a prohibited contact order in relation to a person's detention under a continued preventative detention order;
> has, in the performance of his or her duties under this Subdivision, the same protection and immunity as a Justice of the High Court.
> (2) A function of:
> (a) making or revoking a continued preventative detention order; or
> (b) extending, or further extending, the period for which a continued preventative detention order is to be in force; or
> (c) making or revoking a prohibited contact order in relation to a person's detention under a continued preventative detention order;
> that is conferred on a judge, a Federal Magistrate or a member of the Administrative Appeals Tribunal is conferred on the judge, Federal Magistrate or member of the Administrative Appeals Tribunal in a personal capacity and not as a court or a member of a court.

The *persona designata* role raises a number of important issues, none the least of which concern the separation of powers. It is perhaps not surprising that as far as I know, very few Chapter III Justices in Australia have accepted a *persona designata* appointment as an issuing authority for preventative detention orders.

In an information paper on what was then the Anti-Terrorism Bill, Carmody J of the Family Court of Australia and Chair of the Family Court of Australia Law Reform Committee made

what I regard to be a helpful and appropriate comment in relation to the *persona designata* role of Judges when he stated:

> Individual judges have a right, and maybe even a duty, to act in their private capacities for the benefit of the community provided what they do and how they do it is not incompatible with their judicial role and functions. Whether an individual judge accepts a persona designata position is a matter entirely for their own conscience and decision except, perhaps, to the extent that their private action impairs community confidence in the court as a whole or somehow brings the judiciary into disrepute. The risk of being criticised for the manner in which they exercise their persona designata, ie. by issuing an invalid order, is an occupational hazard and not likely to cause public disquiet. However, if a judge was thought to be 'chosen' for his or her personal leanings, prejudices or predispositions, then there would be a real danger of a crisis of confidence in his or her capacity to act judiciously (as distinct from judicially) and even-handedly. This, arguably, could reduce the public standing of the court and adversely affects its integrity. [9]

There are significant security concerns in relation to the documentation and arrangements for the issuing of orders and the hearing of applications under the legislation. Security clearances, as I understand it, will need to be given to all persons handling the files and, what obviously will be on many occasions, sensitive security documents. This will involve the allocation of significant resources to ensure security of documents and all personnel dealing with these applications. I am not aware of the current arrangements in place to meet those requirements in the FMC, though no doubt arrangements will be made with the cooperation of all relevant courts.

Another practical matter of concern is the issue of security for both the judicial officers and staff when dealing with applications under the anti-terrorism legislation. Security concerns are valid and it is clear that all persons dealing with applications would need a security clearance and proper facilities need to be established throughout Australia to ensure that security needs can be met by the Courts. Security should also extend of course to personal security for those dealing with these sensitive cases which of their nature will obviously involve a higher risk than other applications which are dealt with by the Courts. No doubt the Court administrators are working hard to establish protocols and provide the appropriate resources and facilities to ensure that security clearances are obtained for the maximum number of staff which at the very least should include all associates to the Judges and appropriate registry staff. However, if security arrangements are only put in place for a selected small number of staff then that selection process itself may also result in effectively narrowing the field of judicial officers who may be approached to deal with these matters.

A further issue yet to be fully canvassed involves protocols and procedures to be adopted by issuing authorities. These include questions as to whether staff may be present during a hearing even though staff may not have a security clearance. Security clearances themselves are time consuming and presumably would need to be undertaken when there was a change in staffing arrangements. This is a common feature in the Federal Courts where associates are usually only appointed for a period of 12 months. The legislation does not appear to provide an obligation on applicants seeking orders from issuing authorities to disclose that earlier applications have been made and refused. No doubt individual Justices acting as issuing authorities may seek further information regarded as relevant. It would not be appropriate for an application to be refused by one issuing authority only to be repeated without additional information before another issuing authority.

In relation to control orders coming before the court, in my view the courts may need to put in place a system for the allocation of the cases which may require specialist panels. Panels will need to be constituted by a broad range of members of a court rather than a narrow group, and cases as a matter of fairness would need to be allocated on a strict rotational basis. Any alternative basis for allocating cases may lead to allegations that certain members of the court, whilst possessing appropriate skills and experience, may then become the favoured forum for those seeking orders under the new legislation.

Conclusion

Despite the absence of a 'Bill of Rights' in Australia, the civil liberties of Australiana have been traditionally protected in various ways by our common law and legislation.

Clearly the threat of terrorism has attracted attention from many governments throughout the world. Again, the problem may arise of a perception in these circumstances of apprehended bias which may be created simply by a failure to allocate the appropriate resources and arrange necessary security clearances for all relevant staff.

A brief comparative analysis of anti-terrorism legislation throughout the world reveals in my view that the Australian legislation seems to be more far reaching and significant in terms of the civil rights and natural justice concerns referred to earlier in this paper. Dealing with terrorism remains a significant challenge. In the United Kingdom the Parliament established the Intelligence and Security Committee by *the Intelligence Services Act 1994* (the ISC). The ISC was required to examine policy administration and expenditure of the Security Service, Secret Intelligence Service (SIS) and Government Communications Headquarters. The ISC examined intelligence and security matters which related to the London terrorist attacks which occurred on 7 July 2005. It produced a report to the Prime Minister dated 30 March 2006 entitled, *Report into the London Terrorist Attacks on 7 July 2005*. The Report was presented to the Parliament by the Prime Minister in May 2006. In its report the ISC makes the following observation in relation to the governments counter terrorism strategy,

> 11. Since 2002, Government work to counter Islamist terrorism has taken place under the Government's counter-terrorism strategy, known as CONTEST. This strategy has brought together the work of all departments (including that of the intelligence and security agencies) under one aim: 'to reduce the risk from international terrorism so that people can go about their business freely and with confidence'.

The ISC then proceeds to analyse the issue of counter-terrorist intelligence. When dealing with the attacks which occurred on 7 July the ISC noted that the security service 'had come across' two of the suicide bombers 'on the peripheries of other surveillance and investigative operations'. At the time the identities of the suicide bombers were not known to the security services and there was no appreciation of their subsequent significance. The ISC then states in its summary and conclusion the following:-

> 55 It is also clear that, prior to the 7 July attacks, the Security Service had come across Siddeque Khan and Shazad Tanweer on the peripheries of other surveillance and investigative operations. At that time their identities were unknown to the Security Service and there was no appreciation of their subsequent significance. As there were more pressing priorities at the time, including the need to disrupt known plans to attack the UK, it was decided not to investigate them further or seek to identify them. When resources became available, attempts were made to find out more about these two and other peripheral contacts, but these resources were soon diverted back to what were considered to be higher investigative priorities.
>
> 56 It is possible that the chances of identifying attack planning and of preventing the 7 July attacks night have been greater had different investigative decisions been taken in 2003-2005. Nonetheless, we conclude that, in light of the other priority investigations being conducted and the limitations on Security Service resources, the decisions not to give greater investigative priority to these two individuals were understandable.
>
> 57 In reaching this conclusion we have been struck by the sheer scale of the problem that our intelligence and security Agencies face and their comparatively small capacity to cover it. The Agencies had to reassess their capacity to cope as a result of the July attacks – an issue that we will consider in more detail in Sections 5 and 6.

As noted earlier the U.K. the Home Secretary estimates that the costs of the entire operation carried out by the four suicide bombers was less than £8,000.

I mention the report of the ISC and the U.K. experience simply to illustrate the significant and challenging problems confronting authorities when dealing with terrorism. It is not clear that strong anti-terrorism laws of the kind that we have in Australia, if introduced in the same form in the U.K. would have prevented the July 7 tragedy.

Administrative lawyers for many years have been acutely aware of the need to protect rights arising out of administrative decisions through due process. Decisions made under this new legislation, both in court and in the exercise of *persona designata* functions, raise what could only be described as decisions which to some extent may be described as administrative but clearly may be properly characterised as decisions which have wide implications for civil rights in this country.

I have raised practical concerns most of which have yet to be addressed in Australian Courts as they illustrate the need for extreme care and caution when dealing with this significant legislation. This legislation will have a dramatic impact upon the civil rights and freedoms which are so valued in our democratic society. Care should be taken to ensure that the administration of these laws is undertaken in a fair and impartial manner. To do otherwise would be to undermine the significant contribution that the judiciary may make in the administration of these laws both in a personal capacity and in their normal Court capacity.

Attachment to the anti-terrorism paper delivered to the AIAL 2006 Administrative Law Forum

104.4 Making an interim control order

(1) The issuing court may make an order under this section in relation to the person, but only if:

(a) the senior AFP member has requested it in accordance with section 104.3; and

(b) the court has received and considered such further information (if any) as the court requires; and

(c) the court is satisfied on the balance of probabilities:

(i) that making the order would substantially assist in preventing a terrorist act; or

(ii) that the person has provided training to, or received training from, a listed terrorist organisation; and

(d) the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

(2) In determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, the court must take into account the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances).

(3) The court need not include in the order an obligation, prohibition or restriction that was sought by the senior AFP member if the court is not satisfied as mentioned in paragraph (1)(d) in respect of that obligation, prohibition or restriction.

104.5 Terms of an interim control order

(1) If the issuing court makes the interim control order, the order must:

(a) state that the court is satisfied of the matters mentioned in paragraphs 104.4(1)(c) and (d); and

(b) specify the name of the person to whom the order relates; and

(c) specify all of the obligations, prohibitions and restrictions mentioned in subsection (3) that are to be imposed on the person by the order; and

(d) state that the order does not begin to be in force until it is served personally on the person; and

(e) specify a day on which the person may attend the court for the court to:

(i) confirm (with or without variation) the interim control order; or

(ii) declare the interim control order to be void; or

(iii) revoke the interim control order; and

(f) specify the period during which the confirmed control order is to be in force, which must not end more than 12 months after the day on which the interim control order is made; and

(g) state that the person's lawyer may attend a specified place in order to obtain a copy of the interim control order; and

(h) set out a summary of the grounds on which the order is made.

Note 1: An interim control order made in relation to a person must be served on the person at least 48 hours before the day specified as mentioned in paragraph (1)(e) (see section 104.12).

Note 2: A confirmed control order that is made in relation to a 16- to 18-year-old must not end more than 3 months after the day on which the interim control order is made (see section 104.28).

(1A) The day specified for the purposes of paragraph (1)(e) must be as soon as practicable, but at least 72 hours, after the order is made.

(2) Paragraph (1)(f) does not prevent the making of successive control orders in relation to the same person.

(2A) To avoid doubt, paragraph (1)(h) does not require any information to be included in the summary if disclosure of that information is likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*).

Obligations, prohibitions and restrictions

(3) The obligations, prohibitions and restrictions that the court may impose on the person by the order are the following:

(a) a prohibition or restriction on the person being at specified areas or places;

(b) a prohibition or restriction on the person leaving Australia;

(c) a requirement that the person remain at specified premises between specified times each day, or on specified days;

(d) a requirement that the person wear a tracking device;

(e) a prohibition or restriction on the person communicating or associating with specified individuals;

(f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the Internet);

(g) a prohibition or restriction on the person possessing or using specified articles or substances;

(h) a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);

(i) a requirement that the person report to specified persons at specified times and places;

(j) a requirement that the person allow himself or herself to be photographed;

(k) a requirement that the person allow impressions of his or her fingerprints to be taken;

(l) a requirement that the person participate in specified counselling or education.

Note: Restrictions apply to the use of photographs or impressions of fingerprints taken as mentioned in paragraphs (3)(j) and (k) (see section 104.22).

Communicating and associating

(4) Subsection 102.8(4) applies to paragraph (3)(e) and the person's communication or association in the same way as that subsection applies to section 102.8 and a person's association.

(5) This section does not affect the person's right to contact, communicate or associate with the person's lawyer unless the person's lawyer is a specified individual as mentioned in paragraph (3)(e). If the person's lawyer is so specified, the person may contact, communicate or associate with any other lawyer who is not so specified.

Counselling and education

(6) A person is required to participate in specified counselling or education as mentioned in paragraph (3)(l) only if the person agrees, at the time of the counselling or education, to participate in the counselling or education.

104.16 Terms of a confirmed control order

(1) If the issuing court confirms the interim control order under section 104.14, the court must make a corresponding order that:

(a) states that the court is satisfied of the matters mentioned in paragraphs 104.4(1)(c) and (d); and

(b) specifies the name of the person to whom the order relates; and

(c) specifies all of the obligations, prohibitions and restrictions mentioned in subsection 104.5(3) that are to be imposed on the person by the order; and

(d) specifies the period during which the order is to be in force, which must not end more than 12 months after the day on which the interim control order was made; and

(e) states that the person's lawyer may attend a specified place in order to obtain a copy of the confirmed control order.

Note: A confirmed control order that is made in relation to a 16- to 18-year-old must not end more than 3 months after the day on which the interim control order was made (see section 104.28).

(2) Paragraph (1)(d) does not prevent the making of successive control orders in relation to the same person.

105.1 Object

The object of this Division is to allow a person to be taken into custody and detained for a short period of time in order to:

(a) prevent an imminent terrorist act occurring; or

(b) preserve evidence of, or relating to, a recent terrorist act.

Note: Section 105.42 provides that, while a person is being detained under a preventative detention order, the person may only be questioned for very limited purposes.

105.4 Basis for applying for, and making, preventative detention orders

(1) An AFP member may apply for a preventative detention order in relation to a person only if the AFP member meets the requirements of subsection (4) or (6).

(2) An issuing authority may make a preventative detention order in relation to a person only if the issuing authority meets the requirements of subsection (4) or (6).

Note: For the definition of ***issuing authority***, see subsection 100.1(1) and section 105.2.

(3) The person in relation to whom the preventative detention order is applied for, or made, is the ***subject*** for the purposes of this section.

(4) A person meets the requirements of this subsection if the person is satisfied that:

(a) there are reasonable grounds to suspect that the subject:

(i) will engage in a terrorist act; or

(ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or

(iii) has done an act in preparation for, or planning, a terrorist act; and

(b) making the order would substantially assist in preventing a terrorist act occurring; and

(c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

(5) A terrorist act referred to in subsection (4):

(a) must be one that is imminent; and

(b) must be one that is expected to occur, in any event, at some time in the next 14 days.

(6) A person meets the requirements of this subsection if the person is satisfied that:

(a) a terrorist act has occurred within the last 28 days; and

(b) it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act; and

(c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

(7) An issuing authority may refuse to make a preventative detention order unless the AFP member applying for the order gives the issuing authority any further information that the issuing authority requests concerning the grounds on which the order is sought.

Endnotes

1 The New York Review of Books June 22, 2006 p.26

2 According to Home Secretary John Reid ,*Guardian Weekly* May 19-25, 2006

3 *Criminal Code Act 1995*, the *Crimes (Foreign Incursions and Recruitment) Act 1978*, the *Financial Transactions Reports Act 1988*, the *Australian Security Intelligence Organisation Act 1979*, the *Surveillance Devices Act 2004*, the *Administrative Decisions (Judicial Review) Act 1977*, the *Crimes Act 1914*, the *Migration Act 1958*, the *Aviation Transport Security Act 2004,* the *Proceeds of Crime Act 2002*, the *Customs Act 1901* and the *Customs Administration Act 1985.*

4 Attorney-General Second Reading Speech Anti-Terrorism Bill (No.2) 2005 House of Representatives Hansard 3 November 2005 p.102

5 Law Council of Australia, press released dated 27 October 2005.

6 Proctor, December 2005, page 2.

7 The Honourable Michael Kirby J, 'Judicial Review in a Time of Terrorism - Business as Usual', an essay delivered on 25 November 2005 at the University of Witwatersrand, School of Law and South Africa Journal of Human Rights, Johannesburg, South Africa.

8 *Telecommunications (Interception) Act 1979, Australian Security Intelligence Organisation Act 1979, Surveillance Devices Act 2004.*

9 Justice Tim Carmody, 'The Anti-Terrorism Bill (No. 2) 2005,' Information Paper, 24 November 2005. Carmody J acknowledges in his paper that he has relied upon two articles namely, '*Wilson & Kable:* The Doctrine of Incompatibility – An Alternative to Separation of Powers?' Associate Professor Gerard Carney (1997) 13 QUTLJ 175 and Elizabeth Handsley 'Do Hard Laws make Bad Cases? – The High Court's Decision in *Kable v Director of Public Prosecutions (NSW)*' (1997) 25 FedL Rev.171.

ADMINISTRATIVE REVIEW IN QUEENSLAND IN 2006

Bill Mitchell*

This paper considers whether the terms of reference of the Queensland Parliament's recent inquiry into 'access to administrative justice' should have been broadened to include merits review of administrative decisions (administrative review). Additionally, the paper considers recent announcements by the Queensland Attorney-General that the Queensland Government is considering reform of the administrative review system. Finally, the paper looks at some key issues that arise in respect of any proposal to reform the administrative review system in Queensland.

Introduction and background

The impetus for this paper came from a joint submission made by Queensland Association of Independent Legal Services (QAILS)[1] and Queensland Council of Social Service (QCOSS)[2] earlier this year. The submission responded to the Queensland Parliament's Legal, Constitutional and Administrative Review Committee's (LCARC) inquiry into 'Accessibility of Administrative Justice'.[3] The submission highlighted a number of significant gaps in the administrative justice system in Queensland.

The inquiry (along with LCARC's FOI Inquiry)[4] represented one of the few opportunities for public discourse on the accessibility of administrative justice since the Electoral and Administrative Review Commission (EARC) published its series of reports in post-Fitzgerald Queensland.[5] EARC was established after the Fitzgerald Inquiry to investigate and report on ways of transforming Queensland into an open democracy with accountable and transparent government.[6]

The *Judicial Review Act 1991* (Qld) (as enacted) closely followed EARC's model for judicial review.[7] EARC's model in turn closely followed the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Whilst federal judicial review laws have been scrutinised, the Queensland laws have not been considered post-enactment. [8]

QAILS and QCOSS turned to the terms of reference of the LCARC Inquiry to see whether they promoted broad public input in the accessibility of administrative justice.

The scope of the LCARC inquiry

The scope of the LCARC inquiry was set out in terms of reference:

> The focus of this inquiry is the continuing effectiveness of statutory mechanisms under the Freedom of Information Act 1992 (Qld) (FOI Act) and the Judicial Review Act 1991 (Qld) (Judicial Review Act) which provide administrative justice in Queensland and, in particular, their accessibility. 'Administrative justice' is discussed in section 3.

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> The issues on which the committee invites discussion and submissions relate to:
>
> • the costs of access – see section 7;
> • the availability of information – see section 8;
> • access for a diversity of people – see section 9; and
> • efficiency of access – see section 10.[9]

LCARC also set out some general definitions in the paper. 'Administrative justice' was defined as 'rights conferred by Queensland's legislative scheme of administrative law.'[10] The terms of reference presupposed that accessibility of administrative justice should be limited to existing rights under Queensland legislation.

QAILS and QCOSS suggested the terms of reference should be redrawn:

> This paper refers to administrative justice in Queensland. This means rights to judicial and merits review conferred by Queensland's legislative scheme of administrative law.[11] (additions underlined)

It was their view that administrative justice meant much more than access to judicial review. LCARC noted that in Australian jurisdictions, administrative law included 'review by an independent tribunal of the merits of many administrative decisions made under statute.'[12]

The discussion paper also stated:

> To date, legislation to reform existing ad hoc statutory arrangements for the review of the merits of decisions made under statute has not been enacted in Queensland. For this reason, this aspect of administrative law is beyond the scope of the committee's inquiry[5].[13]

The reference noted:

> The Attorney-General and Minister for Justice recently announced that options for reforming the current ad hoc arrangements regarding merits review are being examined: Malcolm Cole, 'One-stop shop bid to end legal maze', Courier Mail, 26 September 2005, p 8.[14]

QAILS and QCOSS considered that because '*to date, legislation to reform existing ad hoc statutory arrangements for the review of the merits of decisions made under statute has not been enacted in Queensland*' was an overriding reason to include administrative review in any inquiry into the accessibility of administrative justice in Queensland.

Further, given the progress of structural reform in other states in the form of civil and administrative review systems, it seemed somewhat disingenuous to ignore administrative review in the context of access to administrative justice.

The concept of 'administrative justice' also seems a relatively new one. It certainly sounds sexier than administrative review rights. Of course, justice is a nebulous concept – It means different things to different persons. Access to justice obviously means more than systemic access to a legal system.

Certainly, the notion that Government was looking at the accessibility of administrative justice created some expectation that significant or structural reform is now on the agenda.

Administrative law reform in Queensland

To the outsider, it might appear that the Queensland Parliament is intent on reforming or amending[15] existing administrative law mechanisms only, for example:

- The introduction of the *Ombudsman Act 2001* took the office from that of a Parliamentary Commissioner to an Ombudsman 'proper';[16]

- Strategic management reviews were recently undertaken of the Office of the Queensland Ombudsman[17] and the Office of the Information Commissioner;[18]

- Changes to the Office of the Information Commissioner;[19]

- Review of the *Freedom of Information Act 1992* and amending legislation;[20]

- A number of changes to judicial review through related legal system reforms such as procedural reform.[21]

The area of administrative review has not been subject of open/public debate since EARC's reports more than decade ago. It seemed to have not been on the agenda. Whilst there are administrative review mechanisms in place in Queensland, it is generally accepted that they have developed in a pattern of ad hoc proliferation over a relatively long period of time.[22]

It seems no secret that Queensland might benefit from what Fitzgerald called 'a general mechanism for a determinative review of administrative decisions on their merits'.[23]

QAILS/QCOSS recommendations to LCARC

QAILS and QCOSS are peak bodies concerned with issues of access to justice and the legal system — an area where reports are legion.[24] The Senate's recent report canvassed administrative law quite widely in the context of legal aid and access to justice.[25] Increasingly, commentators have come to realise that administrative law takes in many facets of people's day-to-day lives such as social security, taxation etcetera. It also involves issues of public and political debate such as migration law.

Despite increased interest in administrative law, QAILS and QCOSS noted EARC's report on administrative review[26] seemed to have slipped below the consciousness of the legal and political community in Queensland. QAILS[27] and individual community legal centres[28] made submissions to EARC in 1991 in response to the issues paper on appeals from administrative decisions.[29] QAILS and QCOSS felt that the hiatus between EARC's work and LCARC's current inquiry meant that Government should be reminded about this significant institutional gap.

In revisiting EARC's report, QAILS and QCOSS agreed with EARC's point of view that:

> …the rationale for providing a comprehensive system of merits review of decisions includes that merits review:
>
> - Is the most efficient, effective and fair way in which people may be personally involved in the review of an administrative decision;
> - Must improve the quality of drafting of administrative powers in legislation, the quality of administrative decision-making, the quality of making and publicising of policy and the quality of merits review generally;
> - Adds to and provides openness and accountability of the bureaucracy and reduces the opportunity for public sector abuses or corruption;
> - By providing a speedy resolution, not only for citizens but also for companies, will significantly assist in the interaction between business, both large and small, and government;
> - May indirectly lead to a strengthening of Parliament vis-à-vis the executive and of accountability generally, which means a strengthening of democratic government in Queensland; and
> - Heightens the independence of any review and reduces the number of review bodies and personnel currently associated with review in Queensland.[30]

QAILS' and QCOSS' recommendations reflected EARC's general views from the merits review report. The recommendations included:

- A general merits review body should be established (Rec.4.1);
- Merits review was generally affordable (Rec.4.2);
- Merits review included costs savings for Government (Rec.4.3);
- Merits review timeframes were shorter than judicial timeframes (Rec.4.4);
- Merits review bodies were of great utility (Rec.4.5);
- Merits review bodies were more accessible than Courts (Rec.4.6);
- A general merits review body lead to consistent decision-making (Rec.4.7).[31]

None of these recommendations were controversial and all represented generally accepted characteristics of administrative review.

Is merits review back on the agenda?

The current and penultimate Attorneys-General of Queensland expressed a desire to put administrative review back on the Government's program. This was reinforced by LCARC's comments in the discussion paper.

The Legal, Constitutional and Administrative Review Committee

In addition to the reference in the LCARC discussion paper, LCARC's consultations included the following:

> Possible issues for discussion:
>
> - Availability of merits review/internal review of decisions, including consideration of new information.[32]

LCARC's discussion point included this reference:

> 11 Since the publication of the discussion paper, the committee has been advised by the Attorney-General that, as stated in the Courier-Mail in 2005 and quoted in the discussion paper, options for reform of administrative review arrangements in Queensland are being considered.[33]

LCARC's consultations produced 'conference outcomes'[34] which did not address the issue of administrative review beyond making some recommendations for reform under Topic B, Tables 1 & 2 and Topic C.[35] None of the recommendations addressed the issue of structural reform of the administrative review system.

Recent comments by the Attorney General

The Attorney-General for Queensland, the Honourable Linda Lavarch, MP spoke on the issue at the 3rd Annual General Meeting of the Queensland State Chapter of the Council of Australasian Tribunals (COAT).

The Attorney summarised the state of play as follows:

- Most of the States and Territories that have significantly reformed civil and administrative review jurisdictions have moved towards consolidation of jurisdictions in

the Courts (South Australia and Tasmania) or a generalist tribunal model (New South Wales, Victoria and Western Australia);[36]

- In Queensland, reform has been incremental, including small scale amalgamations (for example the Commercial and Consumer Tribunal) and co-location of tribunals (for example those located in Queen Street, Brisbane);[37]

- The approach has kept the impact on users to a minimum.[38]

The Attorney also noted that a discussion paper circulated amongst agencies in 2001 lead to findings that: [39]

- Over 30 review bodies existed;[40]

- Internal review processes varied substantially between agencies;[41]

- Aggrieved persons were not always notified of review rights;[42]

- Areas of decision making existed that were not subject of external merits review;[43]

- There was an absence of organisational arrangements to collate information emerging from review processes, including for use in improving the quality of decision-making.[44]

Other commentators

Whilst there have been many calls for establishment of a administrative review body, in more recent times, commentators such as Kingham have called for procedural reform.[45]

In Queensland, suggested reforms have included a wide range of proposals such as consolidation of existing tribunals and administrative review bodies into a "super-tribunal".[46] Other suggested reforms could include clustering of similar review bodies and/or procedural reform. Suggestions have also been made to give jurisdiction to courts at all levels from the Magistrates Court to the Supreme Court.

Lessons from the past

A significant amount of work has been done on amalgamation of tribunals at federal level.[47] Whilst the political history of federal tribunals is a matter for another paper, some clear lessons can be derived from the federal experience. At federal level, amalgamation proposals have met with responses varying from acceptance to outright opposition. The proposal to establish the Administrative Review Tribunal via the *Administrative Review Tribunal Bill 2000* and the *Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000* attracted considerable debate and the Bill was blocked in the Senate on 26 February 2001.[48] The Bill's Digest reported that:

> However, the majority of commentators, including senior members of the judiciary and both present and past AAT Presidents, are not opposed to amalgamation itself, but are concerned that the details of the proposal represent a downgrading of the existing system of administrative review.[49]

After passage of the Bill was blocked, the Government sought to enact some of the ART through amendments to the *Administrative Appeals Tribunal Act 1975* in the *Administrative Appeals Tribunal Amendment 2005*.[50]

The lesson for the Queensland Government is that any attempt to amalgamate or consolidate tribunals in Queensland into a single body will be subjected to serious scrutiny (as was the ART) in respect of:

- Whether a new Tribunal would have greater authority than the existing specialist tribunals;
- The risk that some of the major benefits of tribunals, such as accessibility, specialised expertise, diversity and innovation would be lost;
- Whether the changes may not bring the expected benefits of efficiency and economy, or there may be other ways to achieve these goals;
- The need for separate and distinctive approaches in different fields, and a separate identity from a client perspective; and
- Whether the changes represent a downgrading of independence and quality of merits review.[51]

Again, that these issues are raised is far from novel. They represent the sorts of features that are seen as key features (or perhaps not) of administrative review bodies.

Models of civil and administrative review

In her speech to COAT, the Attorney-General posed the question: W*here to from here?*[52] She suggested that the next step would be considering various models:

> During my term as Attorney-General, I will be considering how the civil and administrative review system in Queensland can be further rationalised. There is a range of options for reform. The broad options are:
> 1. consolidation of all administrative review within a specialist division of the court;
> 2. consolidation within a tribunal structure; or
> 3. a hybrid system with further smaller scale amalgamations amongst existing tribunals.[53]

Whilst some might be concerned by the use of the word 'rationalised' the three (3) options are worth reviewing. For the purposes of this paper only brief consideration is given to each option.

Option 1 - Consolidation of all administrative review within a specialist division of the court

This option seemed unpopular with the Attorney and her concerns seem related to some of the key differences between Courts and Tribunals:

> The courts play a key role in delivering administrative justice in Queensland. They have a presence in regional and rural areas and people generally feel confident that the judicial system will be fair and independent. While regional access can be provided by the existing court infrastructure, there are concerns that using the courts will decrease access because of formality and potential costs to users. I would also be concerned about the loss of specialist lay expertise.[54]

The Magistrates Court is often cited as a way of providing access to the legal system for the community. The Attorney noted:

> …Queensland faces unique challenges in relation to access because of its regionalised population. This has been a major impetus in using the court, particularly the Magistrates Court, as an administrative review body. Any move to consolidate administrative appeals into the tribunal system would need to be cognizant of this factor. There are, of course, opportunities to use technology to

> overcome the tyranny of distance and the use of technology would be a key consideration for any reformed system.[55]

After all, there are more than eighty (80) Magistrates Courts in Queensland. The opportunities for broad community access to such a widespread and established network are worth considering. Other commentators have echoed the concerns of the Attorney where the Courts have been seen as a possible framework for offering administrative review.

Option 2 - Consolidation within a tribunal structure

A primary issue is whether all existing tribunals (administrative review or otherwise) should be amalgamated or whether a cluster of like-jurisdictions should occur. There does not appear to be a consolidated list of tribunals in Queensland, though research reveals more than 30 tribunals currently operate.

The Attorney noted that:

> This option would require a significant investment of resources over a period of time. Decisions would have to be made about the current review jurisdiction of the courts, Ministers and public officials and the existing civil and occupational disciplinary jurisdictions of tribunals and boards. One of the most complex issues for this option is determining which bodies will be excluded from amalgamation. For example, would a generalist tribunal include the current jurisdictions of:
>
> - the Land and Resources Tribunal, the Planning and Environment Court and the Land Court?
> - the Commercial and Consumer Tribunal?
> - the Information Commissioner?
> - the Mental Health Review Tribunal?
> - the Guardianship and Administration Tribunal?
> - the Anti-Discrimination Tribunal?
> - the Small Claims Tribunal?
> - Community Corrections Boards?
> - Industrial Court and Industrial Magistrate?
> - the Legal Practice Tribunal and other professional and occupational disciplinary bodies?[56]

Whilst, the Attorney raised legitimate concerns, they are perhaps no greater difficulties than those faced in New South Wales, Victoria and Western Australia. An equally important question would be how would administrative review would be provided in areas where no review rights currently exist. The process therefore would need to be a process of consolidation and creation of external review rights.

Concerns about whether administrative review matters only would be subject of consolidation raise questions about the extent of jurisdiction of any new body.

Also, questions about excluding jurisdictions from consolidation arose in the federal arena when the ART proposal excluded the veterans review board from the amalgamation. In that case the Veterans Review Board was to be retained as an independent tribunal because of the special needs of veterans for a dedicated review body. In that case, the Attorney General stated:

> The Government has decided to retain the Veterans Review Board in its current from as a separate tribunal with full appeal rights to the ART. This recognises and respects the special needs of veterans in seeking review of Government decisions. The VRB is a very specialised, low cost, non-legalistic tribunal that has achieved significant improvements.[57]

Ultimately, one might expect that politics would play some role in determining which bodies would be subject of any consolidation effort.

There have also been concerns expressed that a move to a generalist model may result in lost specialist expertise, particularly in areas such as ‘guardianship, child protection, mental

health and land, environment and planning…'[58] Clearly this issue warrants close consideration.

Option 3 - A hybrid structure with small scale amalgamation amongst existing tribunals

The third option is small-scale amalgamation:

> The third option is amalgamation of civil and administrative review tribunals and boards and occupational disciplinary bodies of like jurisdiction or subject matter into a smaller number of larger tribunals. This option would build on the process that has been occurring in Queensland over the past few years.[59]

The Attorney noted the advantages as being:

- a greater capacity to ensure practice and procedure remains responsive to the needs of users;
- the risk of loss of specialist knowledge would not be as great as with a general tribunal;
- it would minimise the risks associated with amalgamating bodies with different jurisdictions, subject matter and culture;
- it can be achieved gradually over a period of time; and
- there is potential for some cost savings as demonstrated by the amalgamation process that resulted in the establishment of the CCT.[60]

After an internal review process, in 2003 the Queensland Parliament consolidated four tribunals into the Commercial and Consumer Tribunal under the *Commercial and Consumer Tribunal Act 2003* (Qld).[61] The Attorney General noted the benefits of small-scale amalgamation inherent within the CCT model:

> Since commencement, the CCT has accrued new jurisdictions in relation to architects, engineers, plumbers and drainers, building certifiers and residential services accreditation. The CCT has shown the benefits of smaller scale amalgamations of bodies with similar jurisdictions. According to its latest annual report, the CCT has achieved cost savings for government without additional costs to applicants. The CCT has been able to accrue additional jurisdiction over time at a lower cost than establishing new bodies and with minimal impact on users.[62]

There has also been a proposal to amalgamate the Land and Resources Tribunal, the Planning and Environment Court and the Land Court in Queensland which remains delayed while constitutional issues are considered.[63]

The Attorney also considered the potential disadvantages of clustering:

> The potential disadvantages of this option are:
> - it would not provide a single gateway for users;
> - the potential for ongoing proliferation of small specialist tribunals remains; and
> - rationalised bodies may remain attached to the portfolio whose decisions are reviewed by the body.[64]

It also goes without saying that a major disadvantage of this model is that it offers no expansion of administrative review beyond what already exists or what might be 'clustered'. Clustering can also potentially lead to poorly matched jurisdictions if not carefully thought through.

Co-location of tribunals

Co-location has also had benefits according to the Attorney-General:

> The intention of the relocation is to improve the working environment and promote collaboration, particularly in the area of case management, while maintaining the flexibility and expertise of specialist tribunals.

> It is also intended that the relocation provide job rotation and career opportunities for Tribunal staff which will result in more efficient and effective work practices. Training across the Tribunals will result in an improved skill base and enhance the delivery of services to clients.
>
> The co-location has created efficiencies in the use of resources through the sharing of registry space, hearing rooms and other physical and human resources.[65]

Many would no doubt argue that co-location fails to address concerns about access to administrative justice.

Other issues

The Attorney has made plain that the key elements of her approach will be:

- improving access for users and maintaining responsiveness;
- ensuring the independence of tribunals;
- maintaining specialist expertise where this is vital for high quality decision making; and
- establishing mechanisms within government to ensure that determinations of administrative review bodies have a systemic impact on primary decision making, to improve the quality of government decision making.[66]

There are a number of other issues that need to be considered when choosing a model:

- The extent of the jurisdiction: civil, administrative or judicial;
- The importance of procedural reform;
- Existing Queensland models such as QICAR;
- Models in other states and territories.

The Government's approach will need to also grapple with some of these bigger picture questions that will arise.

Extent of jurisdiction

Questions abound as to the extent of the jurisdiction of any new review body. To some extent the jurisdiction depends on a number of obvious factors:

- Are you simply consolidating or clustering existing jurisdictions;
- Are you seeking to create review mechanisms where none exist;
- Are you offering administrative review, appellate review and/or judicial oversight.

Some tribunals are strictly external administrative review. By this, I mean that the tribunal's *raison d'etre* is to provide independent review of administrative decisions made by specific agencies. The federal system contains many examples of this type of review body.[67] Whilst these tribunals may be described as "bulk processing" tribunals, their area of review is discrete and often complex.[68]

Other tribunals have mixed functions:

- Primary decision making functions (administrative functions);
- Administrative review functions; and

- Judicial functions.

Additionally, tribunals may have a range of jurisdictions:

- Original and referred jurisdiction; and

- Appellate, both internal and external appellate functions.

For example the West Australian State Administrative Tribunal (WA SAT) has original, disciplinary and review jurisdiction arising from 130 enabling acts. Administrative review is one part of what the WA SAT does. Likewise the Victorian Civil and Administrative Tribunal (VCAT) has a large range of referred jurisdictions and is not limited to administrative review.

Procedural reform

In looking at Tribunal reform, Kingham noted that one must keep in mind the rationale of tribunals:

> … compared with courts Tribunals are less formal; more accessible; more user-friendly; less concerned with legal forms and technicality; more focused on the merits; cheaper; and faster.[69]

Kingham suggested that procedural reform of existing structures is needed to address the needs of increasing numbers of self-represented litigants.[70] Tribunals, she argued, should be configured to objectives that address the needs of these litigants such as:

- To provide opportunities for effective involvement regardless of whether a party is legally represented;
- To create an early and enduring focus on issues rather than legal form or technicalities;
- To efficiently access technical expertise to assist resolution or determination of disputes;
- To promote and assist resolution by the parties not determination by the Tribunal; and
- To promote early determination by the Tribunal if a dispute cannot be resolved by other means.[71]

This idea is to recreate the arena in the image of the litigant rather than continuing to labour under an assumption of legal representation for all and struggling to work out how the Tribunal will address the needs of unrepresented/self represented litigants.[72]

The Attorney-General has also recognised the importance of tribunal procedures:

> Tribunal processes need to be flexible, clear and simple. Information about tribunal procedures and requirements should be given to users as early as possible. Ready assistance for the parties to identify the issues in dispute as early as possible in proceedings is also necessary for users to present their cases adequately. Unnecessary formalism needs to be avoided. Any amalgamation would need to ensure that the very reason tribunals are established – flexibility and responsiveness to users – is not lost.[73]

Procedural reform will be part and parcel of any serious review of existing administrative review arrangements in Queensland.

QICAR and Review of Administrative Decisions Bill

Of course one obvious potential model is the Queensland Independent Commission for Administrative Review (QICAR). EARC produced four volumes about review of appeals from administrative decisions. These volumes contained an analysis of merits review options, a synthesis of models and a recommended model. The reports annexed a Draft *Review of*

Administrative Decisions Bill, which amongst other things established QICAR.[74] The Attorney-General has acknowledged the work of EARC on merits review.[75]

EARC undertook an analysis of decisions that might become reviewable by QICAR. This would clearly be out of date and a new analysis would need to be done by the Department of Justice and Attorney-General. It would however be a good place to start. It may be that the whole QICAR model requires some renovations, particularly given:

- the changed political environment in Queensland;
- the changed legal system in Queensland;
- existing mechanisms of administrative justice in Queensland;
- post EARC merits review models such as the VCAT, NSW ADT and WA SAT; and
- the success or otherwise of merits review models relied on or referred to by EARC.

The Council of Australian Tribunals (COAT) Queensland Register lists nine State-based members.[76] Clearly there are a number not included on this list. COAT and its members and other tribunal members would clearly have views on administrative review models.

Other States and Territories

At State and Territory level, a number of merits review models have been implemented post EARC:

- the New South Wales Administrative Decisions Tribunal (NSW ADT);
- the Victorian Civil and Administrative Tribunal (VCAT);
- the West Australian State Administrative Tribunal (WA SAT).

The most recent legislative model is the WA SAT, which was established after the Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal.[77]

The SAT model was summarised thus:

> The Taskforce believes that the SAT it has recommended will avoid the proliferation of tribunals and boards and various court and ministerial administrative appeal avenues, reverse the apparent lack of uniformity and confusing variety of both procedures and administrative appeal avenues that currently exist, ensure effective and timely decision making, and provide the people of Western Australia with an administrative review and original decision making system which is independent and impartial and in which the people of the State may have the fullest confidence.[78]

Similar sentiments are echoed by commentators wherever and whenever models of merits review are considered.[79] The Taskforce also seemly acutely aware of the need to balance the tensions often inherent in administrative review.[80]

Conclusions

The notion of accessibility of administrative justice should include consideration of administrative review in Queensland, including currently available mechanisms and areas where review is not currently available.

Any consideration of administrative review in Queensland must also pay due respect to past reports including those by EARC as well as more recent internal Departmental reviews. Serious time must also be given to comparing existing models in other jurisdictions. Of course, there is a tension between avoiding 'reinventing the wheel' and ensuring that any model is a good fit for Queensland.

There also needs to be a reckoning around whether any structural reform (large scale or small scale consolidation) would be limited to administrative review or whether it will embrace the notion of a super tribunal with other functions and a wider jurisdiction. Clearly there are questions to be asked about how existing Queensland bodies would fit (or not) into any consolidation (small scale or large scale).

Additionally, there are some clear lessons from the past that need to be learned about how to go about consolidation if that is a serious option. Assumptions about the benefits of consolidation need to be explored. Questions need to be asked about who would benefit from such structural reform, but also who might be disadvantaged.

Perhaps Kingham is right in saying that a good first step would be to ask what model we need in our current legal system to offer access to administrative justice, particularly given that that legal representation is the exception rather than the rule. To be fair, any model must ensure that those who have or need representation are accommodated as well. Procedural modeling might give us a clearer idea of how to proceed. Looking at the needs of users might ensure that we don't put the cart before the horse.

Endnotes

1 QAILS is the state based peak body representing the 33 funded and unfunded community legal centres operating throughout Queensland. Community legal centres are independent, community organisations providing equitable and accessible legal services.
2 QCOSS is the peak body for over 700 welfare and community sector organisations in Queensland. For over 50 years the Queensland Council of Social Service has worked to promote social justice through the elimination of inequity and disadvantage. QCOSS exists to provide a voice for Queenslanders affected by poverty and inequality and acts as a State-wide Council that leads on issues of significance to the social, community and health sectors. QCOSS works for a Fair Queensland and to develop and advocate socially, economically and environmentally responsible public policy and action by community, government and business.
3 Queensland Parliament, Legal, Constitutional and Administrative Review Committee, *The Accessibility of Administrative Justice Discussion Paper*, December 2005.
4 Queensland Parliament, Legal, Constitutional and Administrative Review Committee, *Freedom of Information in Queensland*, Report no. 32, Goprint, Brisbane, December 2001.
5 Including (but not limited to) the following reports: EARC 90/R5, *Judicial Review of Administrative Decisions and Actions*, December 1990; EARC, 90/R6, *Freedom of Information*, December 1990; EARC 90/R6, *Protection of Whistleblowers*, October 1991; EARC 92/R1, *Review of Codes of Conduct for Public Officials*, May 1992; EARC 92/R3, *Review of Archives Legislation*, June 1992; EARC 93/R3, *Review of Appeals from Administrative Decisions*, August 1993.
6 Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (G.E. Fitzgerald, Chairman), *Report of a Commission of Inquiry Pursuant to Orders in Council*, Government Printer, Brisbane, 1989.
7 EARC, *Report on Judicial Review of Administrative Decision and Actions*, 1993, vol 1.
8 See for example, Administrative Review Council, *The Scope of Judicial Review Discussion Paper*, 2003, Administrative Review Council, *The Scope of Judicial Review Report to Attorney General*, Report No 47, April 2006.
9 Above note 4, 1.
10 Ibid.
11 QAILS/QCOSS, Submission to Queensland Parliament, Legal, Constitutional and Administrative Review Committee, *The Accessibility of Administrative Justice Discussion Paper*, December 2005.
12 Above note 4, 2.
13 Ibid, 3.
14 Ibid.

15 According to the Office of Queensland Parliamentary Counsel the *Judicial Review Act 1991* (Qld) has been reprinted twenty-three (23) times, the *Ombudsman Act 2001* (Qld) has been reprinted four (4) times, whilst the *Freedom of Information Act 1992* (Qld) has been reprinted forty-four (44) times.

16 See the change from a Parliamentary Commissioner under the *Parliamentary Commissioner Act 1974* to an Ombudsman under the *Ombudsman Act 2001*.

17 Queensland Government, *Report of the Strategic Management Review of the Office of the Queensland Ombudsman*, April 2006.

18 Queensland Government, *Report of the Strategic Management Review of the Office of the Information Commissioner*, April 2006.

19 *Parliamentary Committees Act 1995* (Qld) and *Parliamentary Commissioner and Freedom of Information Amendment Act 1999* (Qld).

20 *Parliamentary Commissioner and Freedom of Information Amendment Act 1999* (Qld), *Freedom of Information Amendment Act 2001* (Qld), Freedom of Information Amendment Regulation 2001 (Qld), *Freedom of Information and Other Legislation Amendment Act 2005* (Qld).

21 See for example, the introduction of the *Uniform Civil Procedure Rules 1999* (Qld).

22 The Honourable Linda Lavarch MP, Attorney-General and Minister for Justice, Speech to Annual General Meeting of the Queensland State Chapter of the Council of Australasian Tribunals, 20 September 2005, 3.

23 Above note 7, 128.

24 For example, see: *Access to Justice: An Action Plan,* Report of the Access to Justice Advisory Committee, Commonwealth of Australia, 1994; *Justice Statement*; Attorney-General's Department, May 1995; Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System,* Second Report, June 1997; Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System*, Third Report, June 1998; Australian Law Reform Commission, *Managing Justice A Review of the Federal Justice System*, Report No 89, 2000; National Association of Community Legal Centres, *Doing Justice: Acting together to make a difference*, August 2003; Law Council of Australia, *Erosion of Legal Representation in the Australian Legal System*, February 2004; Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, June 2004.

25 Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, June 2004, For example, see recommendations 2.92, 4.123, 7.31, 7.50, 7.51, 10.43.

26 EARC 93/R3, *Review of Appeals from Administrative Decisions*, August 1993.

27 See submission No.25 dated 21 August 1991 and submission No. 42 dated 30 September 1991.

28 See submissions by Youth Advocacy Centre (Submission No. 36 dated 17 September 1991), Prisoners Legal Service (Submission No. 45 dated 23 March 1992) and Submission No. 65 dated 8 November 1991).

29 EARC, *Appeals from Administrative Decisions, Issues Paper No. 14*, June 2001.

30 Above note 27, xxii.

31 Above note 12, 20-24.

32 LCARC, Topic B: Litigation between government and individual – can inequality be minimised?, 1.

33 Ibid.

34 LCARC, The Accessibility of Administrative Justice Conference, Parliament House 27 April 2006, Outcomes document.

35 Ibid, 3-7.

36 Above note 23, 3-4.

37 Ibid, 4.

38 Ibid.

39 Department of Premier and Cabinet, *Appeals from Administrative Decisions*, Queensland Government, 2001.

40 Ibid, 5.

41 Ibid.

42 Ibid.

43 Ibid.

44 Ibid.

45 F. Kingham DP, *Reforming Queensland's Tribunals: Procedural reform to Realise the Rhetoric*, Land and Resources Tribunal, Articles and Papers, http://www.lrt.qld.gov.au/lrt/publications/pub_main.asp

46 'Super Tribunal' is a term that has been applied to the Victorian Civil and Administrative Tribunal, the proposed federal Administrative Review Tribunal, the Queensland Commercial and Consumer Tribunal and has even found its way into 'Tribunal Speak': see Report of President O'Connor of the New South Wales Administrative Decisions Tribunal, Annual Report 2000/2001.

47 See for example, Administrative Review Council, *Review of Commonwealth Merits Review Tribunals - Discussion Paper*, Australian Government Publishing Service, Canberra, 1994; Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, 1995.

48 Commonwealth of Australia Parliamentary Debates Senate Official Hansard, No.2, 2001, 26 February 2001.

49 Bill's Digest No 40 2000/2001, *Administrative Review Tribunal Bill 2000*, Conclusions.

50 Note that an exposure draft of the Administrative Appeals Tribunal Amendment Bill 2004 was released first.

51 These comments were noted in the Bill's Digest in respect of the Administrative Review Bill 2000 and represented comments from a range of sources.

52 Above note 23, 8.

53 Ibid, 8.
54 Ibid.
55 Ibid, 12.
56 Ibid, 10-11.
57 Darryl Williams QC, Attorney General for Australia, Media Release: Reform of Merits Review Tribunals, 3 February 1998.
58 Above note 23, 14.
59 Ibid, 11.
60 Ibid.
61 In 2001 a three-stage review was undertaken of tribunals within the responsibility of the then Department of Tourism, Racing and Fair Trading.
62 Above note 23, 5-6.
63 Ibid, 7.
64 Ibid, 11.
65 Ibid 7.
66 Ibid, 12.
67 See for example, the Social Security Appeals Tribunal, the Migration Review Tribunal, and the Refugee Review Tribunal.
68 For example the Social Security Appeals Tribunal and the Migration Review Tribunal have a discrete but very complex statutory review jurisdiction.
69 Above note 46, 2.
70 Ibid, 3.
71 Ibid, 4.
72 Ibid, 3-4.
73 Above note 23, 13.
74 EARC 93/R3, *Review of Appeals from Administrative Decisions*, August 1993, Volume Two, Appendix 1.
75 Above note 23, 4.
76 Including the Children's Services Tribunal, the Commercial and Consumer Tribunal, the Guardianship and Administration Tribunal, the Information Commissioner of Queensland, the Land and Resources Tribunal, the Mental Health Review Tribunal, the Misconduct tribunal, the Office of the Commissioner for Body Corporate and Community Management, Queensland Gas Appeals Tribunal.
77 Western Australian Civil and Administrative Review Tribunal Taskforce, *Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal*, May 2002.
78 Ibid, vi-vii.
79 See for example, Administrative Review Council *Review of Commonwealth Merits Review Tribunals - Discussion Paper*, Australian Government Publishing Service, Canberra, 1994; Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, 1995.
80 The tensions are neatly described by the objectives of Social Security Appeals Tribunal, which aims to provide a mechanism of review that is 'fair, just, economical, informal and quick'.

ACT TRIBUNALS: OPTIONS FOR STRUCTURAL CHANGE

Renee Leon*

This paper looks at the role of tribunals, how ACT tribunals are structured and what options exist for increasing efficiency and cost-effectiveness of ACT tribunals. A review of tribunal structures is being conducted by the Department of Justice and Community Safety – in accordance with a government announcement in the 2006 budget that the 'government will review tribunal structures, with a view to increasing efficiency and cost-effectiveness'.

But before I start I would like to make it clear that Government has not yet made any decisions about what changes will be made – that will occur later in the year – and will follow further discussions with those involved and our stakeholders.

A role for tribunals

Tribunals can be defined as 'bodies with judicial or quasi-judicial functions set up by statute and existing outside the usual judicial hierarchy'.[1] This general definition of tribunal includes three tests for whether an entity is a tribunal.

The three tests

Firstly, does the entity exercise judicial power or exercise quasi-judicial functions? That is not to say that a Tribunal must only exercise judicial or quasi-judicial functions. Tribunals may also exercise non-judicial functions, such as providing education, managing a trust fund, investigating complaints and issuing licences. Tribunals that also exercise these non-judicial functions are often called boards or councils.

Secondly, is the entity established by a law or is it established by the Executive? Tribunals are usually established by law – and, to be effective, that law should make clear provision for:

How the tribunal is constituted;

- What jurisdiction the tribunal has;
- What governance arrangements apply to the tribunal; and
- What tools the tribunal has for managing its business.

Thirdly, to what extent does the entity operate outside of the traditional judicial hierarchy? Although tribunals operate outside of the judicial hierarchy, they do have judicial oversight. In the ACT, the self-government Act has the effect that the Supreme Court may examine any tribunal hearing – and, in addition, most tribunal laws provide that an appeal may be heard by the Supreme Court Act 1933, in some cases de novo, in others just on questions of law.

**This speech was given by Ms Renée Leon, Chief Executive, ACT Dept of Justice & Community Safety to a joint AIAL/Council of Australasian Tribunals seminar on 22 September 2006.*

At a more pedestrian level, a number of our existing tribunals are legally distinct from the courts but share resources such as members, hearing rooms and libraries.

Discussion – access to justice

Tribunals are generally established outside of the judicial hierarchy where the needs of a particular jurisdiction are not fully met by the courts.

Tribunals serve an essential role in ensuring access to justice. Tribunals are as important as courts because they provide an accessible and affordable alternative to the courts. Tribunals deal with issues that often require the assistance of specialist or community members – whether in the area of mental health, guardianship or occupational matters.

Increasingly, in other jurisdictions, minor civil claims are being dealt with quickly and effectively by tribunals, outside the procedural niceties considered necessary for dealing with criminal or commercial disputes. Tribunals like the NSW Consumer, Trader and Tenancy Tribunal have broad jurisdictions concerning small disputes – particularly those types of disputes where the parties will have an ongoing relationship such as tenancy or unit title disputes.

In the ACT, a number of tribunals meet some of these needs. The Essential Services Consumer Council and the Residential Tenancies Tribunal deal with specific subject matters, but cannot deal with broader or underlying civil disputes between the parties which are outside narrowly confined jurisdictions.

How ACT tribunals are structured

There are about 20 ACT entities which act as tribunals. ACT tribunals tend to deal with four basic categories – civil disputes, rights, occupational review and administrative review. These tribunals deal with about 10,000 matters a year.

The tribunals cost the ACT about $2 million dollars per annum – about half of which goes to the remuneration of the 130 members. The rest goes towards accommodation and the salaries of the 28 people involved in supporting the tribunals and related on-costs, such as rental. There is only one full time tribunal member but there are more full-time support staff. Every one else in the tribunal system works part time – indeed, some tribunal members are yet to be called to sit on a matter.

ACT tribunals include:

- ACT Architects Board
- Administrative Appeals Tribunal
- Consumer and Trader Tribunal
- Credit Tribunal
- Discrimination Tribunal
- Essential Services Consumer Council
- Guardianship and Management of Property Tribunal
- Health Professionals Tribunal
- Legal Profession Disciplinary Tribunal
- Liquor Board of the ACT
- Mental Health Tribunal
- Remuneration Tribunal
- Residential Tenancies Tribunal
- Sentence Administration Board
- The Racing Appeals Tribunal

To this I might include a couple of offices, to the extent that they conduct hearings:

- Commissioner for Fair Trading
- Commissioner for Surveys
- Construction Occupations Registrar

Finally, having regard to the approach taken in other jurisdictions, I perhaps should include within this mix the broader range of small civil disputes, included in the small claims jurisdiction.

Systemic legislative problems

Considering these entities, my first observation is that there is no standard tribunal model in the ACT. My department's research suggests that ACT tribunals tend to be built from scratch, often drawing on older interstate models.

Because of this, ACT legislation dealing with tribunals deals inconsistently with important elements concerning the constitution, jurisdiction, governance or powers of the tribunal. These defects expose stakeholders - those people who use our tribunals to the risk of appeal or undeserved loss.

In examining the sufficiency of the legislative framework four questions should be asked.

Firstly, is the tribunal constituted so that it can operate effectively and independently? For example:

- Who should appoint members – and on what basis?
- Does the legislation give the power to the president to assign matters for hearing?
- Does the legislation provide rules of continuance to deal with the death or resignation of a member during a hearing?

Secondly, is the jurisdiction cast effectively? For example:

- Is the jurisdiction de novo or is it a review?
- Is the tribunal acting in an inquisitorial or adversarial environment?
- Do the rules of evidence apply – if not, what does?
- Is the role of the tribunal frustrated because of boundary issues – is the jurisdiction cast too narrowly?

Thirdly, are the governance arrangements clearly set out? For example:

- Does the legislation allow for active management of the tribunal by the president?
- Can the tribunal make quality referrals of matters outside jurisdiction?
- Can the president review decisions made by a tribunal member – or do they go on appeal to the Supreme Court?

Finally, does the legislation contain a full tool set of provisions? By this I mean does the tribunal have all the provisions and powers necessary to operate effectively and expeditiously. For example:

- Does the tribunal have the power to make the full range of orders necessary to deal with the jurisdiction of the tribunal?
- Does the tribunal have the power to compel witnesses?
- Can the tribunal deal quickly with vexatious or unmeritorious matters?
- Can the tribunal make recommendations for reform when necessary?

Other difficulties

Other difficulties might be identified with the current structure of ACT tribunals. For example, many tribunals sit infrequently. Members, staff and other resources may be under utilised and may not get experience in dealing with matters. The activities of COAT (Council of Australasian Tribunals) in supporting these members are welcomed. Because of fragmentary jurisdictions and the size of tribunals, access to existing tribunals may be problematic – there is no single entry point for the public to access tribunals.

These difficulties impact on access to justice, the cost of justice, support for members and support for officers in registries or secretariats. Faced with the same problems, in order to promote the goal of access to justice, some jurisdictions have chosen to:

- co-locate tribunals, near to the legal precinct, but outside of the court buildings;
- provide training for tribunal members and support staff;
- provide a single point of access to tribunals for the public; and
- establish standard application forms and information pack on what it means to be a party to a tribunal hearing.

If the ACT were to adopt a similar approach to improve access to justice, it would be necessary to streamline the legislation governing the existing tribunals and have common rules for the operation of ACT tribunals.

What options exist for increasing efficiency and cost-effectiveness?

I mentioned earlier that the cost to the ACT of the existing tribunal structure is approximately $2million. Reorganising this area may produce a number of benefits to our community – enhancing access to justice while enabling us to use savings from better utilising our resources to improve the skills of those people who have chosen to work in this area.

Any changes to the structure of tribunals should ensure that tribunal members are fully supported. Most of these members are paid, although some are voluntary positions. Some of the members sit infrequently, whereas others sit every week. There is currently no standard training for tribunal members; there is limited opportunity for career progression and no opportunity for members to hear matters outside of the jurisdiction they were appointed to.

Changes to tribunal structures should also ensure that officers in tribunal registries or secretariats are supported. The structure should provide opportunities for career advancement, training and expansion of skills as officers work across numerous tribunal jurisdictions.

In examining options for tribunal structures the review is guided by a number of principles for tribunals, taken from a speech by the Chief Minister, Mr Jon Stanhope MLA, on the *Future directions for tribunals in our Territory in 2004*. [2] The principles are that:

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

Further, in examining the structure of ACT tribunals it is important to recognise that it is not possible to remove all of the differences in the different tribunal jurisdictions. Some of the

differences in ACT tribunals are necessary to ensure that the needs of stakeholders in different jurisdictions are met. For example, the clients in the hardship jurisdiction of the Essential Services Consumer Council may require immediate action by the tribunal registry to restore power followed by a fast informal hearing process.

Stakeholders appearing before the Residential Tenancies Tribunal require similarly expedited proceedings. The relatively informal processes adopted in these jurisdictions provide a contrast with the level of formality expected by stakeholders appearing before disciplinary tribunals such as the Health Professionals Tribunal and the Legal Profession Disciplinary Tribunal. In disciplinary tribunals and in other specialist tribunals, it is sometimes also considered an advantage for the tribunal panel to include an expert in the relevant field under consideration.

Finally, any structure for ACT tribunals will need to be consistent with the *Human Rights Act 2004*. In particular, s 21 of the *Human Rights Act 2004* provides that everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

The review is considering four major options for change to the structure of ACT tribunals. The options are:

- Consolidation of tribunal secretariats;
- Cross appointment of members to different tribunals;
- Partial consolidation of tribunals; and
- Consolidation of tribunals.

The first option of consolidation of tribunal secretariats and registries could be achieved in a number of different ways. Ideally, all tribunal secretariats and registries would be combined and any functions not suited to a tribunal registry would be retained within the current area of the department. A combined secretariat could then report through the Courts Administrator or as a stand- alone secretariat.

The second option of cross appointment of tribunal members has commenced. To date there are a number of tribunal members who are appointed to more than one tribunal. As additional vacancies arise many are filled by existing tribunal members. However, cross appointments alone will not solve the problems identified with the current structure of tribunals.

The third option of the partial consolidation of tribunals recognises that the structure of tribunals could be improved but allows some flexibility in how tribunals would be consolidated. A partial consolidation could occur of those tribunals located in the court, with a policy of future consolidation of tribunals. Other options for consolidation include consolidation of like tribunals or consolidation of industry regulation tribunals.

The consolidation of tribunals is not a new idea. Victoria consolidated its tribunals in 1998 and New South Wales created the Consumer, Trader and Tenancy Tribunal in 2002.

The fourth option of the consolidation of tribunals would be similar to the model for the Victorian Civil and Administrative Tribunal. This Tribunal includes numerous lists representing the previous tribunals. The consolidated tribunal would be headed by a president and would have a number of deputy presidents heading up different divisions. The different divisions could represent the four tribunal categories that I mentioned earlier. That is, separate divisions could hear matters dealing with civil disputes, rights, occupational and administrative review.

The consolidated tribunal would have a common pool of members, would have an emphasis on single member hearings and would have modern streamlined legislation. In the future the consolidated tribunal could also include a small claims jurisdiction, like the consolidated tribunals in Victoria or New South Wales.

Even in this consolidated model, there are likely to be some tribunals not included in the consolidation. For example, the Remuneration Tribunal should remain as a stand-alone tribunal as it requires independence from other tribunals so that it can determine remuneration for tribunal members without feeling compromise or pressured to make a particular decision.

Where to from here?

So, where to from here? The next step is for the review team to meet with all ACT tribunals, to cost the different options for reform and then to put options to government. I anticipate that options will be put to government later this year, with a view to implementing changes to the structure of ACT tribunals next year.

Endnotes

1 Rutherford and Bone, Osborn's Concise Law Dictionary, 8th ed., 1993, 331. The ACT *Legislation Act 2001* includes a less comprehensive definition of tribunals. The Act defines tribunals as an "entity that is authorised to hear, receive and examine evidence". This broad definition includes some boards and committees and some statutory office holders.

2 Chief Minister Jon Stanhope MLA, Speech to Council of Australasian Tribunals, *Future directions for tribunals in our Territory*, 20 July 2004.

MERGING TRIBUNALS: SOME REFLECTIONS

Kevin O'Connor AM*

I am happy to share with you today some of my experiences and thoughts on the subject of appropriate tribunal structures and measures designed to increase efficiency and cost-effectiveness, the issues being examined in the review being undertaken by the ACT Department of Justice & Community Services. I have read with interest the speech given by your Chief Minister on this subject in 2004.[1]

I have had two exposures to this subject, as head of the Fair Trading Tribunal of New South Wales (FTT) between 1999 and 2001 and as head of the Administrative Decisions Tribunal of New South Wales (ADT) from 1998 to the present.

In contrast to the position that now prevails in Victoria and Western Australia, there remain several separate major tribunals in NSW – in order of volume, the Consumer Trader and Tenancy Tribunal (the CTTT, 60,000 filings a year, of which 45,000 are residential tenancies filings), the Mental Health Review Tribunal (9,000 matters a year), the Guardianship Tribunal (7,000 matters a year) and the ADT (1,100 filings a year). The Land and Environment Court, which has Supreme Court status, deals with planning matters – a jurisdiction typically located in tribunals in other jurisdictions (2,600 filings).

For comparison, the Victorian Civil and Administrative Tribunal (VCAT) (which covers all the jurisdictions mentioned except for mental health) had 89,000 applications for the year ending 30 June 2006 (66,000 being residential tenancies filings). One interesting difference in the case of the new WA State Administrative Tribunal is the fact that residential tenancies was kept separate and left with the Local Courts, having regard to the scale of the State and for reasons of accessibility.

Disadvantages of merger

The main criticism that is made of amalgamation of tribunals has to do with the risk of loss of a specialised, fine-tuned response to the community need that the tribunal was created to address. This view was rejected by a NSW Parliamentary Committee which examined the jurisdiction and operation of the ADT and looked more generally at merger issues. It reported in 2002.[2]

The criticism has some other strands to it. One goes to a common feature of tribunals as they have been created in the past – the multi-member bench combining legally-trained and community members. Some critics see the multi-member bench as the defining characteristic of a tribunal and the one that marks it out as different from a court. The lay members often, as you know, have specialist expertise.

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* *Paper presented at a Council of Australasian Tribunals/Australian Institute of Administrative Law Seminar, 22 September 2006 by HH Kevin O'Connor AM, President, NSW Administrative Decisions Tribunal*

I am not as wedded to the need for universal or near-universal multi-member benches. In my view there are categories of work in tribunals that can safely be left, at least most of the time, to a single member.

There is one major exception – professional discipline. Here the bench at final hearing should be multi-member and comprise a legally trained head, a member of high standing and integrity from the relevant profession and a community member, ideally with a consumer protection background. There should be provision for the addition of a second professional member if the complexity of the competence issues raised by the case warrants it.

My attitude that single member benches will often be sufficient is conditioned significantly by my experience as an occasional hearing commissioner with the federal Human Rights and Equal Opportunity Commission in the period 1989-1996 (when I was a member of the Commission as Privacy Commissioner). In my view, HREOC dealt with cases arising under the federal anti-discrimination legislation in an exemplary way, using well-qualified hearing commissioners who sat alone. There was a listing discretion allowing for multi-member panels, and this was exercised for some cases that were of a landmark kind (especially in the disability discrimination area). The reasons of the late 1970s that led governments to prescribe multi-member benches in equal opportunity matters are not, in my view, as relevant today. Similar arguments can be mounted, it seems to me, in relation to other jurisdictions including the protective jurisdictions.

Statutes can, it seems to me, give guidance as to the kinds of cases where it might be appropriate to have multi-member panels without prescribing them across the board. This approach, obviously, will produce savings and efficiencies as compared to an approach which mandates multi-member panels.

There is a risk in an amalgamated tribunal environment that there will be a loss of identity and status for the pre-existing separate tribunal. In the case of the ADT, I witnessed this sense of loss especially on the part of some of the members and staff that had been responsible for the work of the Legal Services Tribunal. There were also sentiments of this kind, not so widely shared, among members and staff of the former Equal Opportunity Tribunal. There is, no doubt, I think, that some loss of profile affects tribunals of the kind I have mentioned in the event of amalgamation.

Attention has to be given by the amalgamated tribunal to dealing with this change. Publicity materials, internet sites and the like have to seek to maintain clarity as to what matters can be brought to the Tribunal. Internal arrangements must ensure that appropriate separation of identity, culture and practice is maintained.

Advantages of merger

The major positive for the community in an amalgamated tribunals service is the common point-of-entry. The United Kingdom development is very interesting in that the creation of the common point-of-entry has been the first initiative. The amalgamation of the hearing tribunals themselves is being left to a later stage of the process. So we see a Tribunals Service being created, separate from the Courts Service, with over 3,000 staff and offices all over the country.

The benefits that can be achieved through common infrastructure, common electronic platforms, co-ordinating training and the like are obvious.

Most of the affected members, especially the lawyer members, in my experience, have welcomed integration of tribunals, with the prospect that they might be given the opportunity to work across a variety of jurisdictions. In the case of the ADT, we have members who

previously only did legal profession discipline work also sitting in retail leases cases and revenue cases. They enjoy the diversity of work. We have members in the General Division who sit on freedom of information matters, privacy matters, occupational licensing matters and guardianship matters (we have a review jurisdiction in relation to decisions of the Public Guardian and the Protective Commissioner). Some of them also sit in the Equal Opportunity Division.

Portfolio location

In my view it is highly desirable that large, amalgamated tribunals be housed in the Attorney General's (AG) or Justice portfolio.

Historically, the Attorney General's portfolio has had as its primary responsibility within government the administration and management of courts. There is, in my view, a much stronger tradition of understanding and practice in the Attorney General's portfolio in relation to such matters as the need to respect and uphold the judicial and decision-making independence of judicial bodies, including tribunals.

As you know, the process choices of courts and tribunals must also answer to the law as it has been developed in the higher courts in relation to procedural fairness. Sometimes procedural fairness requirements are at odds with the views of public service administrators as to the appropriate process. These matters have to be addressed in the setting of budgets and the provision of appropriate registry and member support facilities. In my view, this set of dilemmas is well understood in the Attorney General's portfolios within which I have had substantial experience (Victoria, the Commonwealth and NSW).

The AG's portfolios usually have well-developed protocols in place around such matters as representations by disappointed parties to the Minister and the Department over the handling and outcome of cases. In my view, these conventions are not as well understood in the non-AG's portfolios of government.

It is no surprise to me to see that the major reforms now taking place in the UK provide for the housing of the integrated tribunals structure in the Justice portfolio – the Department of Constitutional Affairs. This is the choice that has been made in Victoria and WA.

Another danger that can be avoided by having tribunals, whether amalgamated or not, housed in the one portfolio is disparity of treatment of tribunal functionaries in relation to remuneration and other conditions, whether they are members or registry staff. In New South Wales, there are variations across portfolios in members' fees and in the remuneration paid to senior registry personnel. Disparities should be avoided in relation to Tribunal members and registry staff that cannot be explained in differences in complexity or gravity of the work.

Judge head of merged tribunals

This has been the pattern in Victoria, WA, the UK and, in the instance of the Commonwealth, the AAT. In NSW there are judge heads at the ADT and for the Medical Tribunal (both District Court). The Land and Environment Court (LEC) has Supreme Court status and a judge head. The LEC has a number of other full-time judge members.

Having a judge head assists, I think, in conveying to the public that a significant level of practical independence from Government is present in the organisation. In the case of the ADT, I have as full-time Deputy, another judicial officer who is a magistrate. In addition a number of the Divisions have judge heads – the magistrate is head of the Equal Opportunity Division, and acting judges head the Legal Services Division and the Retail Leases Division.

The Revenue Division is headed by a Senior Counsel and I head the General Division. So it can be seen, I think, in these arrangements, that the key members of the Tribunal are likely to be seen as people possessing real independence.

Appointment and renewal of members

Perhaps the most contentious issues in the operation today of tribunals in Australia surrounds the appointment and renewal of members of tribunals.

Non-renewal is the most critical issue. Rumours abound in the world of tribunals that certain non-renewals of highly regarded, full-time members in recent years were for no better reason than that the particular minister found their decisions on matters affecting the particular government to be unwelcome.

As it happens, at the ADT non-renewal is not such a prominent issue, for the practical reason that the only full-time members are both judicial officers with tenure - myself, a judge, and my deputy, a magistrate. With two exceptions, our part-time judicial members and non-judicial members are used on an occasional basis. So they are not very concerned, in terms of financial impact and their career, over whether they are renewed or not. Nor have there been any non-renewals of a controversial kind.

On the other hand, when I was at the FTT there were 8 full-time members and, as well, several part-time members whose principal occupation was working for the FTT. (The successor CTTT, bringing together the FTT and the Residential Tenancies Tribunal has many more full-time members.) The full-time and key part-time members of the FTT were often lawyers who had given up other careers to become tribunal members. Age-wise they were commonly in their 40s or early 50s, with 15 or more years post-admission experience and at a point in their career where if they were not renewed they might have considerable difficulty in finding other equivalent rewarding and satisfying work. They dealt with cases which sometimes involved the portfolio Department as a party, and there was a risk that they might be intimidated in how they dealt with cases involving the Department by the prospect of non-renewal.

The renewal process needs, in my view, to be much more transparent than it has been in the past. Permanence and continuity should be fostered in the case of legal members and other members who are appointed because of their professional expertise. It seems to me similar considerations apply to fractional full-time members, or part-time members who give a high proportion of their time to the work of the tribunal. The issues are not so pressing in the case of sessional members who are called up only on an occasional basis.

In my view, if a member has been appointed to a full-time post and performs satisfactorily (by reference to measures that are known to the member and ultimately interpreted by someone of credible independence, perhaps a retired tribunal head) the government should be obliged to reappoint.

If there is a downturn in the business of the tribunal, or a restructure, as occurs in the case of a merger, there should be clear protocols over dealing with existing members, especially the full-time members and the significantly-involved part-time members. They should be continued at the same level unless there are proven performance grounds for non-continuation. If for budgetary reasons, it is decided to continue with a lesser number of members, those that are not reappointed should receive some compensation by way of exit package, honouring the principle that such appointments are ordinarily intended to be renewed. In the instance of the changeover from the FTT to the CTTT there were no exit packages for non-renewed full-time members. Their terms were simply allowed to expire.

It seems to me there can be a greater margin of flexibility allowed in relation to the appointment process than is allowed in the renewal process – but basic practices such as public calls for expressions of interest for members should be followed in connection with high-volume areas of work, followed by selection interviews leading to a recommendation. On the other hand, it remains desirable, I think, to allow to continue the traditional system of confidential invitations being extended in order to obtain individuals of particular distinction (say, a retired judge) or to meet a need in a highly specialist or complex area.

Administration of tribunal

The administrative arrangements, as I discern it, in the case of the Commonwealth AAT and the WA and Victorian super-tribunals, involve conferral of ultimate administrative and management responsibility on the judge head. Below the judge head, there is a CEO who has overall responsibility for the running of the registry functions. These organisations run separately from the portfolio Department, though obviously, they must continue to deal with it in relation to budget allocations and some infrastructure issues.

The NSW AG's model is a different one with the Registry functions of courts and tribunals being administered directly by the Department. That means that the Registrar of the Tribunal has a dual reporting line to the Department and the head of jurisdiction, the required one being to the senior officers of the Department.

The head of jurisdiction, under this model, must therefore liaise with the head of the Department over issues that might involve a difference of view, and at times the Registrar or CEO may find themselves in a difficult situation. These are merely, of course, introductory comments to a difficult and contentious discussion.

As for my own situation, the ADT is a small tribunal. It has 12 registry staff. It does not have the scale, as I see it, to warrant separation of the management function from the AG's Department. I suspect any amalgamation in the ACT, given the population differences between NSW and the ACT, is likely to produce a tribunal with a relatively small number of registry staff. In my view, it is desirable in dealing with small units of staffing to have the staff connected to a broader institutional structure so that they have ready access to promotion and other work opportunities.

Registry structure

The ADT does its business through a single registry. We rotate the staff through different aspects of operation every few months – counter and public enquiries work, initial registration of matters, listing and co-ordination of members for hearing, issuance and registration of orders, publication of decisions (including uploading to the internet). We do not have sub-registries matching the Divisions. We have not seen that as appropriate given the smallness of the number of staff, and the ease with which the staff can share knowledge with each other as to the differences in procedure and practice that we do have for different classes of business.

In bigger more high volume tribunals, it seems to me to be inevitable that one would have sub-registries. For example, if there was a mega-tribunal in NSW, there would at the least I think be sub-registries for residential tenancies, home building claims, retail lease claims, consumer claims, professional discipline, merits review and protective matters.

Appeal panel within the merged tribunal

A unique feature, I think, of the ADT as compared to other merged tribunals in Australia and the Commonwealth AAT is that it has an appellate tier. Most Divisional decisions are

appealable to the Appeal Panel. In addition the Appeal Panel has an external appeals jurisdiction, and has been given jurisdiction to hear appeals in relation to guardianship and estate management orders (orders usually made by the Guardianship Tribunal, and sometimes by the Mental Health Review Tribunal and Magistrates). For the year ending 30 June 2006, we had filed 82 internal appeals and 17 external appeals.

Initially, I was not convinced of the desirability of an internal appeal tier. I tended to the view that tribunals should, essentially, be trial-type bodies, with appeals going out to the courts. I was also concerned that the introduction of an appeal tier created another way station on the way to finality. In the instance of merits review matters, it is usual for the agency to have dealt with the matter twice (original decision, internal review decision). We have had cases that have gone to the primary level of the Tribunal, the Appeal Panel level and then to both tiers of the Supreme Court. This is excessive on any view.

With the exception of the professional discipline area, I think the Appeal Panel has proved to be useful. The Appeal Panel operates in a low cost and informal way, as compared to the situation that might apply if an appeal had to be taken to the Supreme Court. Many matters have been resolved at the Appeal Panel level and the rate of further appeal to the Supreme Court is low.

The right of appeal to the Appeal Panel has now been removed in the case of legal profession discipline matters. I have asked that it be removed in respect of the other discipline jurisdictions we have. To avoid double-handling by the Supreme Court of legal profession discipline matters, I try to list a judge member (by which I mean a judge of District Court status not a magistrate) to sit at trial level in serious cases, so that any appeal will, by virtue of provisions in the Supreme Court Act, go to the Court of Appeal. I try to do the same wherever possible with the Appeal Panel.

Costs awards

One of the usual characteristics of tribunal legislation is that the courts' costs-follow the-event rule is not applied. In the ADT the rule basically is that each party bears their own costs unless there are 'special circumstances' that warrant an order. Merely losing has not been seen by the ADT as sufficient to provide a 'special circumstance'.

I have, for some time, been an advocate of tribunal statutes taking a more fine-tuned approach to the costs issue. While I agree with the 'special circumstances' philosophy, I think the statute should give reasonably detailed guidance as to the kind of conduct that might attract a costs order and deal with issues such as offers of compromise that were better than the final orders made against the offeror. We have a commercial civil disputes jurisdiction – retail leases disputes – and the pressure has been consistent there from successful parties for there to be an automatic order for costs. Some of the Retail Leases Division decisions have tended to give weight to the contention that because of the 'commercial' character of this litigation there should perhaps be a greater preparedness to award costs. But we have remained firm that a costs-follow-the-event philosophy is not to be embraced. While either party to a lease can initiate proceedings, the usual pattern is retail shop lessee-in-difficulty bringing proceedings (to retain possession, or alleging some form of misconduct that has damaged their business) against a lessor, who usually is a major shopping centre owner.

I have seen the VCAT provisions as dealing well with the costs issue, though I probably would not be as fixed as those provisions are in relation to the procedures to be followed around offers of compromise.

Legal representation and agents

Limitations on legal representation are sometimes found in tribunal statutes. In my view legal representation should be allowed, perhaps with a 'reverse leave' provision – a right in the Tribunal to remove the legal representative. I am not convinced of the need to bar lawyers in, for example, small consumer claims. The respondent, especially if it is a corporation, will appear through an experienced officer, who sometimes will have legal qualifications. In my view, the bars on lawyers tend to disadvantage one-time applicants to a greater extent than respondents, who often are repeat participants with the advantage of experience in dealing with the tribunal.

Where a party seeks to appear through a lay representative, there should be a requirement to apply for leave to appear. There should also be some power in relation to managing persons who are introduced into the proceedings as McKenzie friends. In large, merged tribunals there may need to be provision for special classes of lay representatives to be allowed to appear as of right – such as building experts and planning experts, for those jurisdictions where typically professionals of this kind have appeared.

Litigants in person

In the ADT the typical paradigm is unrepresented applicant versus representative respondent. Some unrepresented persons have dysfunctions of various kinds. Some create great difficulties for the management of proceedings. Some are pursuing so many applications against a particular respondent that relations between the two sides are near or at breakdown. These experiences are, of course, common in many tribunals and the courts.

I think thought needs to be given to the kind of support or assistance structures that are available to registries and members, as well as the unrepresented party, to ameliorate these difficulties. There needs, I think, to be some form of duty solicitor or other type of assistance arrangements built into the structure. This kind of facility can, of course, be deployed in a relatively effective way in a larger tribunal environment.

Conclusion

I have sketched some of the issues that arise when considering the merger of tribunals. Tribunals have been seen by governments for the last hundred years as the preferred means for dealing with many types of disputes. Tribunals are seen as offering more practical and more flexible case-handling and decision-making procedures than the courts. They are often seen as the place to locate the primary determination of new legal rights (for example, the equal opportunity laws and appeals against administrative decisions). They have grown up ad hoc. In my view thoughtful merger can lead to significant gains in the professionalism, accessibility and independence of tribunals.

Endnotes

1 AIAL *Forum* No 43, 34

2 Parliament of New South Wales, Committee on the Office of The Ombudsman and the Police Integrity Commission, Report on the Jurisdiction of the Administrative Decisions Tribunal (November 2002), see esp. 42-44

RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Peter Prince*

Landmark FOI case

The High Court's decision in *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 (6 September 2006)[1] highlighted the role of 'conclusive certificates' in protecting internal government documents from release to the public. Treasurer Peter Costello issued a certificate in 2003 blocking disclosure of documents about the first home buyer's scheme and income tax 'bracket creep'. The Treasurer claimed that release of provisional deliberations on these matters would mislead the public and inhibit discussion by officials on controversial issues.

The High Court considered the process that the Administrative Appeals Tribunal should follow under s 58(5) of the *Freedom of Information Act 1982* in reviewing the use of a 'conclusive certificate'. In a 3:2 decision, the Court held that the Tribunal could not substitute its own opinion about whether disclosure would be contrary to the public interest – it could not 'undertake a full merits review', balancing the various factors for and against disclosure. The majority appeared to differ, however, on the appropriate approach. Justices Callinan and Heydon said that a certificate will be beyond review if only one reasonable ground exists for the public interest claim. This attracted much critical commentary.[2] Justice Hayne, on the other hand, said the Tribunal should consider whether the public interest claim is 'supported by logical arguments which, *taken together*, are reasonably open to be adopted', noting that the Tribunal must decide whether the public interest grounds as a whole are reasonable.

Scope of judicial review report

On 19 May 2006 Chief Justice Murray Gleeson and Attorney-General Philip Ruddock launched a report by the Administrative Review Council entitled *The Scope of Judicial Review*.[3] The report analyses the desirable scope of judicial review and the circumstances in which limitations might be justified. It considers the constitutional framework for judicial review, when legislative amendment to its scope might be appropriate, and how this could best be achieved. It concludes with some broad principles about the circumstances in which restrictions on judicial review can be justified, intended to assist drafters of new legislation.[4]

The report is intended to complement the Council's 1999 publication, *What Decisions are Subject to Merits Review?*[5]

AWB inquiry

(For further background see AIAL Forum No. 48.)

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At the time of writing, the Cole Royal Commission (*Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme*) was due to deliver its final report on 24 November 2006. The Royal Commission held extensive hearings between December 2005 and September 2006 into potential breaches of the UN sanctions regime for Iraq by Australian companies, including AWB Limited, BHP Billiton, Melbourne engineering firm Rhine Ruhr and Queensland pharmaceuticals company, Alkaloids of Australia. The role of government departments - especially the Department of Foreign Affairs and Trade (DFAT) - in overseeing Australian wheat exports to Iraq was also a key issue. Prime Minister John Howard, Minister for Foreign Affairs Alexander Downer and Minister for Trade Mark Vaile were asked to submit statements to the inquiry, with Mr Downer and Mr Vaile giving evidence in person.

Professor Stephen Bartos of the National Institute for Governance said that the source of the AWB oil-for-food scandal lay in governance: 'corporate governance arrangements within AWB, national regulatory arrangements for the oversight of AWB and, underlying both of these, national governance standards that apply to agricultural politics'. Professor Bartos said the terms of reference for the Royal Commission were restrictive and did not allow investigation of AWB's culture 'which is at the heart of why the alleged kickbacks occurred'. He also criticised DFAT's cable system, noting that evidence provided to the inquiry by Ministers showed that it 'is no longer working to ensure the flow of information – in fact it impedes information'.[6]

Attempts by AWB Limited to prevent the release of additional documents to the Royal Commission led to important Federal Court judgments on the scope of legal professional privilege as well as prompting changes to the *Royal Commissions Act 1902*.[7]

Citizenship testing discussion paper

In September 2006, the Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs, Andrew Robb, released a discussion paper entitled *Australian Citizenship: Much more than a ceremony. Consideration of the merits of introducing a formal citizenship test*.[8]

The paper suggests that a formal citizenship test could help people fully participate in the Australian community because 'it would provide a real incentive to learn English and to understand the Australian way of life.' To pass the test applicants would need 'a level of English which allows them to participate through education and employment.' They would also have to understand 'common Australian values' such as respect for the freedom and dignity of the individual, support for democracy, commitment to the rule of law, the equality of men and women, the spirit of a fair go, and mutual respect and compassion for those in need.

Prominent Government backbencher Petro Georgiou criticised the paper, saying he could find 'no detailed, robust analysis of a problem and no evidence of how the new measures would resolve a problem that has not been demonstrated'. He noted that applicants already face a citizenship 'test' during a compulsory interview, and asked why Australia should copy countries which already have formal tests such as the US, the UK, Canada and the Netherlands, which have 'a less distinguished record' than our own in multicultural harmony and integration.[9]

Failure of Migration Bill

On 14 August 2006 the Federal Government withdrew the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 from the Senate when it became clear that reservations about the Bill on the part of Government senators meant it would not be passed.[10] The Bill proposed to amend the *Migration Act 1958* by expanding the offshore processing regime - currently applying to 'offshore entry persons' and 'transitory persons' - to cover all people arriving on mainland Australia unlawfully by sea (including those airlifted to Australia at the end of a sea journey). According to the Minister for Immigration, Senator Vanstone, this would have eliminated the distinction 'between unauthorised boat arrivals at an excised offshore place and those who reach the mainland'.[11]

The Bill was introduced following a protest by Indonesia about the granting of temporary protection visas in March 2006 to 42 asylum seekers from its province of Irian Jaya (West Papua). The group landed on Cape York, avoiding the offshore islands 'excised' from Australia's migration zone under the Migration Act.[12]

Key concerns with the Bill, including on the part of some government members, were:

- All asylum seekers arriving by sea on the Australian mainland would have their claims processed on Nauru. Families with children would not live in the community but would be confined in a detention centre on the island.

- Asylum seekers on Nauru would not have access to legal protections available in Australia, especially the right of appeal to the Refugee Review Tribunal

- People with valid asylum claims could remain on Nauru indefinitely if other countries did not take the refugees Australia refused to accept.[13]

Health and services access card

On 26 April 2006 Prime Minister Howard announced that the 'Australian Government has decided to proceed in principle with a new access card for health and welfare services'.[14] According to the Government, the access card will use smart card technology to improve the access to and delivery of health and social services benefits. It will replace 17 health and social services cards, including the Medicare card, health care cards and veteran cards. The access card will be phased in over a two year registration period beginning in 2008. From early 2010, people will only be able to obtain government health and social services benefits if they have an access card.[15]

In May 2006 the Minister for Human Services Joe Hockey announced the formation of an Access Card Consumer and Privacy Taskforce headed by Professor Allan Fels.[16] The Taskforce released its first discussion paper on the access card on 15 June 2006.[17] In November 2006, Mr Hockey announced plans for legislation to prevent the smartcard being used as an identity card. The proposed laws would stop businesses such as hotels and banks, as well as State Governments, being able to demand the card to check a person's identity. In addition, individual holders would be given ownership of the card, in contrast to other cards such as driver's licences and credit cards which remain the property of the issuer.[18]

Electronic Frontiers Australia has established a website on the Access Card.[19]

Whistleblower report

On 2 November 2006, the Commonwealth Ombudsman, Queensland Ombudsman and New South Wales Ombudsman jointly released a paper calling for a coherent, national approach to the revision of whistleblower legislation. Prepared by Dr A J Brown of Griffith University, the paper highlights the inconsistencies between the nine Commonwealth, State and Territory Acts covering whistleblowing in Australia. It says that none of the whistleblower laws in Australia adequately provide the three elements needed to facilitate public interest disclosures, namely:

- Protecting whistleblowers
- Ensuring disclosures are properly dealt with, and
- Assisting the making of disclosures.[20]

RECENT CASES

Absorbed person visa no protection against removal
(See background in AIAL Forum No. 48.)

Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom (High Court, 8 November 2006).[21] The High Court held that a failure by the Minister for Immigration to consider the fact that Mr Nystrom was deemed to hold an 'absorbed person visa' under the *Migration Act 1958* did not amount to jurisdictional error. Mr Nystrom held a transitional (permanent) visa which was cancelled by the Minister on character grounds under s 501 of the Act because of his criminal record. Under s 501F, cancellation of a visa under s 501 is taken to be a decision to cancel any other visa, including an 'absorbed person visa'. The High Court said that there was 'no room for discretion in the matter' – the Minister was not required to consider the possible effect of s 501F on Mr Nystrom.

Media reports indicated that the High Court's ruling affected a number of other people whose visas had been cancelled on character grounds following criminal convictions, but whose removal from Australia had been delayed pending the decision.[22]

The High Court's decision in *Nystrom* allows the practise to continue of removing people who have not formally become citizens of Australia but who have been here since they were small children and know no other country. This has previously led to controversy where convicted criminals have been deported - after completing their sentences - to countries where they have few contacts and do not know the language. As noted in *AIAL Forum No. 48*, while the Full Federal Court was divided on the legalities of the *Nystrom* matter, it was unanimous in expressing strong concern about this practice.

Can 'self-employed' people be 'unemployed' under the Social Security Act 1991?

Secretary, Department of Employment and Workplace Relations v Joss (Federal Court, 10 July 2006).[23] Mr Joss helped select and prepare a boat for survey work. It was unclear

whether he was formally employed in this task. He applied for Newstart Allowance claiming that he was 'unemployed' within the meaning of s 593(1) of the *Social Security Act 1991* (Cth). The Social Security Appeals Tribunal was satisfied that he was 'unemployed'. The Administrative Appeals Tribunal (AAT) affirmed the decision. It said that possibly Mr Joss was 'self-employed' given his expectation of future partnership in the boat, but this 'would not prevent him … from being regarded as unemployed'.

In the Federal Court Justice Graham held that the AAT had erred in law by stating that a 'self-employed' person could be 'unemployed'. A person will be 'unemployed' if they are without work or employment and that situation is both temporary and involuntary. However, even if Mr Joss was not an 'employee', he was carrying on business or engaging in work with a view to profit. He could not be considered 'unemployed' for the purpose of s 593(1) of the Social Security Act.[24]

The AAT and litigation privilege

Ingot Capital Investments Pty Limited v Macquarie Equity Capital Markets Limited (NSW Supreme Court, 6 June 2006)[25]. This case considered whether the *Evidence Act 1995* applies to proceedings in the Administrative Appeals Tribunal. The issue was whether AAT hearings could be either 'proceedings' as that term is used in s 119 of the Act (litigation privilege) or 'legal proceedings' for the purpose of common law legal professional privilege. Justice Bergin noted that s 4 of the Act states that it applies to 'all proceedings in a federal court'. A 'federal court' in turn includes any person or body 'required to apply the laws of evidence'. The AAT is not 'required' to apply the laws of evidence and is therefore not a 'court'. So the Evidence Act does not apply to the AAT. Justice Bergin also said that the AAT stands outside the 'adversarial system of justice'. Therefore there was no proper basis upon which the common law litigation privilege should be extended to them.

Privacy issues

Privacy Legislation Amendment Act 2006

This Act was assented to on 14 September 2006. It amends *Privacy Act 1988* and the *National Health Act 1953* to:

- ensure medical practitioners can access health information through the Prescription Shopping Information Service without breaching the National Privacy Principles;

- ensure genetic information is covered by the National Privacy Principles about health and sensitive information;

- enable health care professionals to disclose genetic information to genetic relatives if there is a serious health risk to a genetic relative.[26]

Medicare and PBS Privacy Guidelines

On 1 August 2006, the Privacy Commissioner released a Review of the Privacy Guidelines for the Handling of Medicare and Pharmaceutical Benefits Scheme (PBS) claims information. The Privacy Commissioner announced that under new guidelines:

- individuals will be able to have their Medicare and PBS claims information linked by Medicare Australia in a single report;

- Medicare Australia will be able retain claims information indefinitely, rather than deleting it after 5 years as currently required, subject to a range of privacy protections;

- other Australian Government agencies will be prevented from storing Medicare and PBS claims information on the same database in. Currently, such restrictions only apply to Medicare Australia and the Department of Health and Ageing.[27]

Privacy Legislation Amendment (Emergencies and Disasters) Bill 2006

This Bill inserts a new Part VIA in the *Privacy Act 1988* to enhance information exchange between Australian Government agencies, State and Territory authorities, private sector organisations, non-government organisations and others, in an emergency or disaster situation. It is aimed at the practical issues highlighted during events such as the Asian tsunami in December 2004. Current exemptions concerning use and disclosure of personal information have proven difficult to apply in situations involving mass casualties and missing persons.[28]

The Bill was passed by the Senate on 17 October and at the time of writing was before the House of Representatives.

Endnotes

1 http://www.austlii.edu.au/au/cases/cth/high_ct/2006/45.html
2 See eg, Denis O'Brien, 'Reform needed to protect FOI', *The Canberra Times*, 7/9/06, p. 15.
3 http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_19_May_2006_-_New_Report_on_the_Scope_of_Judicial_Review_-_0922006.
4 http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Report_Files_Report_No._47.
5 http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_What_decisions_should_be_subject_to_merit_review.
6 Andrew Fraser 'System-wide rottenness drove AWB: academic', *The Canberra Times*, 10/11/06, p. 2.
7 See in particular *AWB Limited v Honourable Terence Rhoderic Hudson Cole(No 5)* [2006] FCA 1234 (18 September 2006) which held that communication between a client and a lawyer which facilitates a crime is not protected. Also *AWB Limited v Honourable Terence Rhoderic Hudson Cole* [2006] FCA 571 (17 May 2006) which held that a draft Statement of Contrition was not protected by litigation privilege because it was produced for use in an inquiry. This decision prompted the Government to introduce the *Royal Commissions Amendment Act 2006* (assented 14 June 2006), which clarified the power of a Royal Commissioner to demand documents subject to legal professional privilege. Under the new provisions, a decision by the Commissioner about privilege is reviewable by the Federal Court. See official Royal Commission website at http://www.ag.gov.au/agd/www/UNOilForFoodInquiry.nsf.
8 http://www.citizenship.gov.au/news/DIMA_Citizenship_Discussion_Paper.pdf.
9 http://theaustralian.news.com.au/story/0,20876,20523992-17281,00.html.
10 Phillip Coorey, 'PM dumps new asylum law', *Sydney Morning Herald* online edition at smh.com.au, viewed 14/8/06.
11 Senator Amanda Vanstone, media release 11 May 2006, 'Minister seeks to strengthen border measures'; see also Sue Harris-Rimmer, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, Parliamentary Library Bills Digest No 138 2005-06.
12 See Harris-Rimmer, op.cit., pp 3-5.

13 Petro Georgiou MP, Second reading speech, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, House of Representatives 9 August 2006, House Hansard, p. 40. Mr Georgiou described the Bill as 'the most profoundly disturbing piece of legislation I have encountered since becoming a Member of Parliament'. See also Senate Legal and Constitutional Affairs Committee report 13 June 2006 at http://www.aph.gov.au/senate/committee/legcon_ctte/migration_unauthorised_arrivals/report/index.htm
http://www.pm.gov.au/news/media_releases/media_Release1905.html.

15 See Office of Access Card home page at http://www.humanservices.gov.au/modules/resources/access_card/060615_taskforce_discussion_paper.pdf.
http://www.humanservices.gov.au/media/releases/060524.htm
http://www.humanservices.gov.au/modules/resources/access_card/060615_taskforce_discussion_paper.pdf.

18 Annabel Stafford, 'Smartcard laws to act on privacy', *The Age*, 8/11/06, p.7. See Minister Hockey's speech to National Press Club at http://www.joehockey.com/mediahub/speechDetail.aspx?prID=192.

19 http://www.efa.org.au/Issues/Privacy/accesscard.html#pmmr.

20 Commonwealth Ombudsman, Queensland Ombudsman, New South Wales Ombudsman, 'Whistleblower protection laws need national revision: new issues paper', media release, 2 November 2006.

21 [2006] HCA 50.

22 Andra Jackson and Jewel Topsfield, 'Detainees await impact of visa ruling', *The Age* online edition, theage.com.au, viewed 10/11/06.

23 [2006] FCA 884.

24 http://www.austlii.edu.au/au/cases/cth/federal_ct/2006/884.html.

25 [2006] NSWSC 530.

26 http://www.aph.gov.au/library/pubs/bd/2006-07/07bd009.htm.

27 http://www.privacy.gov.au/news/06_13.html.

28 http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2402&TABLE=EMS.

APOLOGIES – OVERCOMING PUBLIC SECTOR RELUCTANCE

Chris Wheeler*

INTRODUCTION TO APOLOGIES

The purpose of the paper

This paper looks at the importance of apologies, what are the essential elements of a full and effective apology, and current approaches to the encouragement and facilitation of apologies that may be relevant to the public sector.

What is an apology?

An apology is an expression of feelings – an expression of sorrow, remorse or regret and an acknowledgement of fault, a shortcoming or a failing. An apology is a communication of information – a message. It consists of words that are exchanged that pave the way for a reconciliation.

Nobody is perfect, and neither is any organisation – we all make mistakes. Things can and will go wrong. In such circumstances there are many different ways to go about making an apology. The most appropriate form and method of communication of an apology will depend on the circumstances of the particular case, the harm suffered, and what is hoped to be achieved by giving the apology. This might include restoration of reputation, acknowledgement of the wrong done, reconciliation, or an assurance that a problem has been addressed or will not recur.

There are a number of communications that go part way towards meeting the essential elements of a full apology, but are much less likely to be successful due to their limited nature - in particular a failure to acknowledge fault. These partial apologies include:

- expressions of sympathy or empathy (eg. '*I'm sorry this happened to you.'*)
- expressions of regret for the act or its outcome (eg. '*I regret that this happened.'*)
- expressions of sorrow ('*I'm very sorry for what has happened.'*)
- alternatively, there can be an acceptance of responsibility or fault ('*I take full responsibility for what occurred*.'), but without any expression of sympathy or regret.

Why do some people apologise?

When people apologise, they do so for various reasons. These can be conveniently categorised depending on whether they are motivated by factors internal or external to the individual giving the apology. Internal or personal motivations would include:

* *NSW Deputy Ombudsman*

- *politeness* – the automatic response to minor social infractions
- *conscience* – an attempt to address negative consequences such as shame or guilt
- *empathy* – feeling strongly for the suffering of others, or
- *ethics* – doing the 'right' thing.

External or more public motivations might include:

- *avoidance* – a desire to avoid actual or potential negative repercussions such as embarrassment, bad publicity, damaged reputation, legal action, etc;
- *strategic* – a mechanism to regain control or influence over an issue or a situation or to undercut/reduce the level of support for the wronged party by taking the moral high ground;
- *compliance* – meeting the expectations of colleagues, the public generally, or a segment of the public, that an apology be given in a particular circumstance;
- *reaction* – reacting to external pressures to apologise, for example media or political pressure, or
- *obedience* – complying with directions from superiors or an employer policy or directive on disclosure and apology.

While these various motivations could be seen as ranging from positive to negative, the particular motivation of the person giving an apology does not necessarily impact on the effectiveness of the apology. As indicated later in this paper, the effectiveness of an apology depends on how well it addresses the perceptions and motivations, and meets the needs, of the recipient.

Why is it often difficult for people to apologise?

It is a fact of life that most people do not like to admit they are wrong – which is a necessary pre-condition to a sincere apology. Reasons why people often find it difficult to admit fault and to apologise may include:

- admitting being wrong is a truth many people don't wish to face;
- concern that giving an apology could be seen as a sign of weakness or will put them at a disadvantage;
- fear that an apology will damage their reputation, that they will suffer a loss of dignity, face or respect;
- concern about confirming responsibility for something that was otherwise only speculated or assumed;
- a reluctance to acknowledge incompetence or inappropriate behaviour;
- fear of accepting legal liability or blame, or providing evidence that can be used against the giver;
- an inability to accept responsibility for their actions or ownership of the problem;
- a desire to avoid a difficult interaction with the person who was wronged, or
- fear that their apology will not be accepted – that there will not be forgiveness.

Apologies are a bit like a largely untested foul tasting medicine for an embarrassing condition. You might know that the medicine is likely to be very effective, but are embarrassed about admitting the problem, concerned about the likely taste and afraid of possible adverse side effects.

PART 2 – THE IMPORTANCE OF APOLOGIES

The importance of apologies from the perspective of people who experience harm

Experience shows that when things go wrong, many of the people who experience harm or have otherwise been wronged want no more than to be listened to, understood, respected and, where appropriate, provided with an explanation and apology. A prompt and sincere apology for any misunderstanding is likely to work wonders. It will often avoid the escalation of a dispute and the significant cost and time and resources that can be involved.

Apologies can also start a process that can lead to resolution of a conflict or dispute, particularly if there's an ongoing issue that needs to be dealt with. Apologies can help to build trust – a necessary first step to a better understanding in a damaged relationship.

When something goes wrong, the injured party or their family don't immediately call a lawyer or begin calculate the quantum of possible compensation. They want to know what went wrong, who was responsible and how those responsible are going to address the problem. They also want to know that the injured party/family will be properly cared for or compensated for damage or loss. The problem therefore often isn't the event that caused the damage or injury – it is the way the person was treated afterwards, for example, a failure to communicate or a failure to acknowledge that something went wrong and admit error.[1]

If answers are not forthcoming, if there is a failure to acknowledge the problem and its cause, or if the person suspects a cover up, this is likely to result in resentment and anger. When people are angry they often want to lash out – to cause pain. This is when they are likely to start to think about money – a way to measure the pain they want to cause. When up against powerful organisations or individuals, the best way for individuals to fight back is to go to a lawyer.

Research in the area of customer satisfaction shows that giving an apology is often the most effective way to deal with a complaint. Many complainants just want an organisation or responsible staff to listen to, understand and respect their concerns, and give them an explanation and apology. Studies undertaken in the US in the 1990s showed that over one third of patients and families who filed medical malpractice suits might not have done so if they had been given a proper explanation and a full apology – factors they considered more important than monetary compensation.

A good example was given in evidence to a recent inquiry into complainants handling in the NSW Health Department[2] where Professor Clifford Hughes, Chief Executive Officer of the NSW Clinical Excellence Commission, recalled the following incident:

> … we had 11 patients in our unit who were given a contaminated solution that we injected into the heart to stop it while we operate. Five of those patients were to go on and to die. There was an error somewhere in the system; but it was never discovered, despite the coronial inquiries. But long before we knew what had happened, one of my senior colleagues called all the families together and he and I sat down with the 11 families and said, "This is a terrible thing that has happened. It is awful. We are truly sorry that this has happened. We are not going to do another operation until we have got these patients out of the woods". And we did not. We said, "We are going to leave no stone unturned until we find out what the cause is." We knew it was an infection; we knew it had occurred somewhere in the processing of that solution, which was beyond our control as individual clinicians. But we said sorry. None of those patients took legal action…
>
> Not only did none of those patients take legal action, but two of them came back to the same hospital and the same surgeons to have repeat surgery many years later because they had confidence that the clinicians were actually on their side and were empathic with them. And, surely, in this day and age we can allow our clinicians to be empathic with the people that, after all, they went to work to help.

A 'full' apology given at the right time can:

- restore dignity/face/reputation
- provide vindication or a sense of justice or an acknowledgement that the recipient was right
- allow for an acceptance of responsibility for actions or ownership of a problem – it assures the recipient that he or she is not at fault – a common response to mishaps.

The importance of apologies from the perspective of public officials responsible for the problem

From the perspective of the public officials responsible for the problem, failing to acknowledge that something went wrong:

- is dishonest, or at least lacking in full honesty;
- is often counter productive, and
- can leave the person(s) responsible living a lie or experiencing feelings of shame or guilt.

On the other hand, if they do acknowledge the problem and give a full apology it may:

- lead to forgiveness – a liberating and therapeutic experience that helps the giver deal with any shame or guilt;
- reduce the possibility of retaliation or embarrassment;
- improve or establish the credibility of the giver and trust between and giver and receiver, and
- create or lay the groundwork for a restored relationship.

The importance of apologies from the perspective of the public interest and good administrative practice

From the perspective of the public interest and good administrative practice, where public officials make full apologies this:

- ensures that public officials and public sector agencies are held properly accountable for their actions;
- ensures proper transparency in public administration, and
- is the appropriate ethical and moral response where an action or inaction has caused harm.

PART 3 – MAKING APOLOGIES – A SEVEN POINT CHECKLIST FOR AN EFFECTIVE APOLOGY

What happened and who is responsible?

The first step is to work out what happened and who was responsible. It is very important to identify at the outset the nature and scope of a problem, and whether the organisation, or a person or persons within the organisation were responsible. This may require an inquiry or investigation to be conducted.

In many cases, some assessment will be needed to be in a position to properly assess whether an apology is an appropriate response to events or circumstances, and if it is, to be in a position to properly structure a meaningful and effective apology. This may require some

initial contact with the person concerned - an opportunity that can also be used to get a sense of whether they want or would be open to an apology.

If it was the organisation or person(s) within the organisation who was/were responsible:

- is this responsibility certain, highly likely, more likely than not, or merely a possibility?
- were they fully or only partially responsible for the wrong?

However, if neither the organisation nor its staff were in any way responsible for the wrong, an explanation should be provided but no apology given (although it may be appropriate to express sympathy).

It is also important to establish the full nature and scope of the harm caused to the person concerned and the relationship between that harm and the wrong, ie, the degree to which the harm is referrable to or caused by the wrong.

Should there be any initial communication with the person(s) concerned?

The second step is to identify if there is a need to conduct inquiries into the nature and cause of, and responsibility for a problem. If so, it may be necessary to communicate this fact to the person(s) concerned. This communication could include an expression of sympathy for the plight or circumstances of the person(s) concerned, which does not admit fault or responsibility.

If an apology is requested or demanded, or is otherwise warranted, and the case is complex and/or sensitive, it may be important to discuss the issue with the intended recipient for the purpose of:

- reaching a common position on the nature and scope of the wrong that occurred and the details of the harm experienced;
- identifying or clarifying what the person wants from the apology and believes is appropriate to address or redress the wrong.

The particular content and method of communication necessary for an apology to be effective can be significantly influenced by the perceptions, needs and motivations of the person or persons who have (or perceive they have) been harmed by a wrong. Prior to the giving of a formal apology, it will therefore often be necessary for there to be preliminary discussions, written communications, or even negotiations (possibly conducted by a third party).

What are the options for redressing the wrong and addressing the harm?

The third step is to consider options to redress the wrong and address the harm. Often a mere expression of sorrow, remorse or regret alone will not be sufficient to resolve a dispute or a problem. Such an expression needs to be accompanied by or packaged with an acceptance of fault or responsibility and information about how the giver of the apology intends to redress the wrong and address the harm it caused.

There are a wide range of possible options for redress that can help achieve a fair and reasonable resolution. The general principle is that, wherever practicable, people harmed by a wrong (including a failure to meet expected standards of care or service, incompetence, misconduct, negligence, etc) should be put back in the position that they would have been in had the wrong not occurred. Often this will not be practicable, particularly where the harm is not amenable to quantification in financial terms. In such circumstances, people harmed by

maladministration should be offered other options aimed at satisfying their legitimate concerns in ways that are reasonable and fair to all concerned.

Where a wrong has led directly to harm that can be readily quantified in financial terms, compensation is generally the core of the appropriate response. However, where this is not possible or the harm is the indirect result of a wrong, other options for redress should be considered. The range of options for redress can be grouped into the following five categories – communication, rectification, mitigation, satisfaction and compensation[3]:

i) Communication

The first option for redress is to communicate with the person who has suffered detriment as a result of a wrong – an integral part of a full apology. Communication involves a two-way process of listening, discussing, explaining and negotiating. Options include:

- providing an explanation, and information about the facts of the case and legal options;
- giving reasons for decisions;
- discussing with the person who has been wronged the outcomes that they believe are necessary to provide or ensure appropriate redress, or
- reaching an agreement through mediation, conciliation or other informal approaches to resolution.

ii) Rectification

The second option for redress is for the organisation or responsible person to act to correct the original action or inaction – another integral part of a full apology. When harm has resulted or is anticipated to result from an agency's maladministration, rectification is generally the agency's foremost obligation. Options include:

- reconsidering conduct and taking any necessary action, stopping action that should not have been started, or cancelling an intended action;
- ensuring compliance with law, procedure, practice or policy;
- ensuring compliance with obligations, whether legal or otherwise;
- correcting records that are incomplete, incorrect, out of date or misleading.

iii) Mitigation

The third option for redress is to mitigate the adverse consequences of a wrong, ie, to take practical action to alleviate problems caused by, arising, or likely to arise out of a wrong. Mitigation involves attempting to deal with the consequences arising out of the wrong. Options include:

- ceasing action that has, is, or will cause further harm;
- publishing an apology for, and correction of, defamatory matter;
- correcting records that are incomplete, incorrect, out of date or misleading;
- repairing physical damage to property, or replacing damaged or lost property;
- refunding fees or charges, or waiving fees, charges or debts, or
- providing assistance and support.

iv) Satisfaction

The fourth option for redress is to satisfy, through non-material means, the reasonable concerns of the person who has suffered harm. 'Satisfaction' may include actions of a symbolic nature, and is distinguishable from mitigation or compensation in that it does not

involve the provision of material benefit to the person who suffered the wrong. 'Satisfaction' is the core element of a full apology, which can include an expression of sorrow or remorse, an admission of fault or responsibility.

v) Compensation

The fifth category of redress that should be considered is whether it is appropriate to pay compensation for harm sustained directly or indirectly as a result of a wrong. Under the *Sorry Works!* program (discussed later in this paper), compensation is an integral part of the disclosure and apology process. Compensation can include a monetary 'equivalent' for a loss or an 'adequate substitute' for it. Options include:

- *restitution* for loss or damage to property or loss of earnings or financial or other benefits; or injury or damage to health;
- *reimbursement* for costs or damage incurred arising out of the wrong, eg, medical costs resulting from injury or damage to health, or
- *satisfaction or appeasement* for damage to reputation or humiliation, worry, distress or inconvenience, including 'bother', ie, the inconvenience of having to complain in the first place.

What are the motivations of persons who have been wronged?

The fourth step is to consider the motivations and needs of persons harmed by a wrong. Such persons may want or expect an apology (including an admission and acceptance of responsibility) for a range of reasons. These reasons could include one or more of the following:

- *reassurance* – that something was a mistake and not indicative of an attitude or approach (eg, an '*I'm sorry for the delay'* when a person has been left waiting for attention at the front counter for an unreasonable period of time);
- *restoration of reputation* – to save or restore face, dignity, reputation, respect or honour, requiring symbolic apologies for a person to regain face or reputation (eg, a public retraction and apology for a defamatory comment in a newspaper);
- *vindication* – an acknowledgement that the recipient was right (or at least was not in the wrong or otherwise at fault);
- *explanation*/r*eason or communication* – an explanation of what happened and why;
- *'the right thing'* – there is a principle at stake about which the individual is not prepared to compromise – the person responsible must do the right thing;
- *recognition/acknowledgement of hurt* – an acknowledgement that the recipient was harmed;
- *revenge, humiliation or punishment* – a desire to humiliate or punish those responsible – to make them suffer;
- *responsibility (admission)* – an admission that somebody else was responsible for the wrong (that the recipient was right, or at least was not in the wrong otherwise at fault);
- *responsibility (acceptance)* – an acceptance of responsibility by those responsible for a wrong to rectify the problem or compensate for the harm;
- *rectification* – to ensure that a problem will not re-occur, either for the recipient of the apology, other people or both;
- *reparation or redress* – to be returned to the position they would have been in but for the wrong or to achieve some other form of redress (such as symbolic compensation);
- *resolution* – a first step towards or part of the resolution process for a conflict or dispute - to enable a fresh start to a relationship.

The particular content and method of communication necessary for an apology to be effective can be significantly influenced by the perceptions, needs (both physical and psychological) and motivations of the person or persons who have been harmed by a wrong.

What should be the contents of an apology?

The fifth step is to craft the apology. In principle, a 'full' apology should incorporate each of the following ten elements. These elements can be grouped under the six 'R's – recognition, responsibility, reasons, regret, redress and release:

***Recognition*:**

(i) *description of the wrong* – an adequate description of or statement about the relevant problem, act or omission (the wrong) to which the apology applies[4].

(ii) *recognition of the wrong* – an explicit recognition that the action or inaction was incorrect, wrong, inappropriate, unreasonable, harmful, etc (an acknowledgement of the grievance from the other party's perspective is a key element in a 'full' apology);

(iii) *acknowledgement of the harm* – an acknowledgement that the affected person has suffered embarrassment, hurt, pain, damage or loss (ie, an expression of empathy and an indication of respect for the person's feelings about the wrong and the harm)[5].

***Responsibility*:**

(iv) *acceptance of responsibility* – an acknowledgement/admission of responsibility for the wrong and harm caused[6] (another key element in a 'full' apology);

***Reasons*:**

(v) *explanation of the cause* – a simple, plain English explanation of the reasons for or cause of the problem[7], or a promise to investigate the cause[8]. It may be appropriate to indicate any mitigating circumstances, for example that the person or organisation responsible had no choice as to whether or not to act in that way and/or that the action or inaction was unintentional[9].

***Regret (or remorse)*:**

(vi) *apology* – an expression of sincere sorrow or remorse, ie, that the action or inaction was wrong[10] (the third key element in a 'full' apology);

(vii) *sincerity of communication* – the form or means of communication of an apology is very important as such matters can indicate or emphasise the level of sincerity of the apologiser.

***Redress (or reparation/rectification)*:**

(viii) *action taken or proposed* – a statement of the action taken or specific steps proposed to address the grievance or problem, by mitigating the harm or offering restitution or compensation[11];

(ix) *promise not to repeat* – a promise or undertaking that the action or inaction will not be repeated[12].

***Release*:**

(x) *request for forgiveness* – a release from blame or the reconciliation of a relationship (an optional element in a full apology[13] (an optional element in a full apology).

When should an apology be given?

The sixth step is to decide when would be the most appropriate time to make the apology.

Apologies should generally be given at the earliest practical opportunity. Although it is best to apologise as soon as a wrong is identified, it may be important to delay a full apology to allow time for inquiries or an investigation to establish the nature and cause of the problem, to allow one or both parties time for cool reflection to calm down or, as stated by Dr Gregory Tillett (an author and lecturer in ADR) in a recent symposium[14], '*Most people need to ventilate before they can negotiate*'.

The best time to make an apology depends on the nature and seriousness of the wrong and the harm caused:

- in commonplace social interactions not involving deliberate hostile acts or serious impacts (such as bumping in the street, short delays in attending to customers at a counter, interruptions to conversation, etc) – apologies should be offered immediately;
- where the event/interaction is 'private' in nature involving a less serious personal offence (such as rudeness, anger, insensitivity, etc) – apologies should be offered immediately;
- where the event/interaction is 'private' in nature involving a more serious personal offence (such as a betrayal of trust, lying, cheating, etc) – it may be best to delay an apology to allow time for cool reflection and for initial discussions, communications or negotiations (possibly through third parties) as to the appropriate content and method of communication of the apology;
- where the event/interaction is 'public' in nature, for the wrong or harm caused would reasonably be perceived by the aggrieved party and/or third parties to be serious and responsibility or blame is clear – apologies should be offered immediately;
- where the event/interaction is 'public' in nature, the wrong or harm caused would reasonably be perceived by the aggrieved party and/or third parties to be serious, but responsibility or blame is not clear – the aggrieved party, and if necessary the wider audience who are aware of the event/interaction, should be informed that inquiries are being made or an investigation is being held and that the result will be conveyed to them at the earliest opportunity (such advice could be accompanied by expressions of sympathy or regret that do not amount to a full apology and acceptance of responsibility).

How should an apology be communicated?

The seventh step is to decide who should make the apology, who the apology should be made to and how it should be communicated.

Apologies must be given **by** the right person, ie, by the person who committed or is responsible for the wrong that caused the harm or by a person who is clearly perceived as speaking on behalf of the organisation that is responsible for the wrong and resulting harm.

An apology must be given **to** the right person, ie, the person who was harmed. Apologies to third parties generally only work for governments or large corporations as no forgiveness can be given.

Where the wrong and harm experienced are public, particularly if reputation, honour, pride or face is involved, the apology should be public, or at least in writing so that recipients can make it public should they so choose. Where the harm is a more private matter, the apology should also be private.

The form or means of communication of an apology is very important as they can indicate or emphasise the level of sincerity of the giver. A written apology implies time, effort and personal investment in its preparation, yet a face to face apology may be more appropriate where a person concerned wishes to express the depth or intensity of their pain, embarrassment or anger directly to the person responsible. Where an apology can be adequately expressed in a short letter, a handwritten apology generally will have a more powerful impact than a typed apology.

Depending on the circumstances, the most effective method of apologising may be to give a verbal (face to face) apology, followed up by a written apology that goes into more detail.

PART 4 – FACILITATING AND ENCOURAGING APOLOGIES

Different approaches to the facilitation/encouragement of apologies

Where the importance of apologies has been recognised, approaches that have been adopted to encourage and facilitate the making of apologies in appropriate circumstances include:

- *full statutory protection* – some governments in Australia have introduced legislative protection for apologies – apologies can include an admission of fault or liability, however liability and compensation issues are left to be addressed in a different forum (eg, the NSW *Civil Liability Act*);
- *partial legislative protection/partial open disclosure policies* – individual organisations introduce a partial open disclosure and apology policy – the apologies advocated under these policies do not include admissions of fault or liability, which together with compensation are issues left to be addressed in a different forum (eg, the NSW Health Open Disclosure Policy and the Australian National Standard on Open Disclosure);
- *full open disclosure policies* – individual organisations introduce a full open disclosure and apology policy – the apologies advocated under these policies include an admission of fault or liability, with liability and compensation issues being addressed as part of the open disclosure and apology policy (eg, *Sorry Works!*, an approach increasingly being used in the medical sector in the USA – discussed later in this paper).

'Full' statutory protection for apologies

'Full' statutory protection for apologies from civil liability generally

In March 2001 the NSW Ombudsman made a suggestion to the NSW government that statutory protection be introduced for public officials making apologies for the purpose of resolving complaints. The government decided that this was a good idea and that the protection should apply generally across the whole community.

New South Wales introduced a broad statutory protection for apologies through amendments to the *Civil Liability Act 2002* that commenced on 6 December 2002.

Whenever papers are given at legal seminars and conferences on the provisions of the NSW *Civil Liability Act*, they generally focus on the provisions of the Act that:

- limit the circumstances where a person must take precautions against a risk of harm to others;
- create a presumption of awareness of obvious risks;
- limit liability for harm resulting from an obvious risk of a dangerous recreational activity;
- limit the ability of intoxicated persons to recover damages for personal injury or property damage;
- limit the liability of professionals when they act in a manner widely accepted by their peers as competent professional practice, and/or
- limit liability of public authorities[15].

Such papers generally skip over or ignore the part of the Act that deals with apologies. This is unfortunate as these apology provisions are potentially far more relevant to the everyday lives of the people in NSW than the rest of the provisions of the Act put together.

The relevant part of the Act provides that if you apologise, in most circumstances it can't be used against you in a court. In other words, in most aspects of daily life you don't need to worry about legal liability if you say sorry. With apologies hopefully now being largely a lawyer-free zone, this may well lead to a more 'civil' society in NSW.

Apologies are defined in the *Civil Liability Act* to be '*an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter,* ***whether or not the apology admits or implies an admission of fault in connection with the matter'*** (s 68 – emphasis added).

The general effect of an apology on liability is set out in the Act in the following terms:

> **69 Effect of an apology on liability**
>
> (1) An apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person:
>
> (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and
> (b) is not relevant to the determination of fault or liability in connection with that matter.
>
> (2) Evidence of an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

In other words, the apology provisions of the Act mean that an apology does not constitute an admission of liability and will not be relevant to the determination of fault or liability in connection with civil liability of any kind. Furthermore, evidence of an apology is not admissible in a court hearing as evidence of fault or liability.

The protections under the Act do not apply to all civil proceedings. While in most cases our legal system now can't make you sorry you've said sorry, there are still some circumstances where an apology could still be a problem, for example traffic accidents, intentional violent acts intended to cause injury or death, or workplace injuries (see s 3B of the Act). Unfortunately the exclusion of these disparate areas of civil liability from the protections provided for apologies is likely to create confusion as to the actual coverage of the protection.

While some of the items in the list make some sense, several are almost bizarre – for example there is no protection for an apology for contraction of a dust disease, or a personal injury caused by smoking! There is also no protection for an apology made in connection with a car accident – which might be seen to discriminate against women given that some studies suggest women are more likely than men to apologise after a car accident. The exclusions contained in s 3B appear to make little good sense in the context of the protection for apologies in s 69.

While an apology cannot be used in court to prove fault or liability on the part of the person or body who made the apology, it must be recognised that on the other hand, the giving of the apology does not absolve the person or body from any potential liability, although it may help in mitigation of damages.

Full statutory protection for apologies is also in force in the Australian Capital Territory (*Civil Law (Wrongs) Act 2002*), and for health care providers in various states in the USA, such as the Colorado Revised Statute 13-25-135 (2003), and Vermont S198 Sec.1.12 V.S.A. 1912 (2006).

Statutory protection for apologies from liability in defamation

An indication that the various State, Territory and Commonwealth governments in Australia see the protections in the NSW *Civil Liability Act* as working well is that, when defamation laws were comprehensively reviewed three years after the introduction of those statutory protections for apologies, the revised legislation in most if not all jurisdictions incorporated statutory protections for apologies largely equivalent to the provisions in the NSW Act.

The NSW *Defamation Act 2005* now contains similar protection from liability to that in the *Civil Liability Act*:

> **20 Effect of apology on liability for defamation**
>
> (1) An apology made by or on behalf of a person in connection with any defamatory matter alleged to have been published by the person:
>
> (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and
> (b) is not relevant to the determination of fault or liability in connection with that matter.
>
> (2) Evidence of an apology made by or on behalf of a person in connection with any defamatory matter alleged to have been published by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.
>
> (3) Nothing in this section limits the operation of section 38. …
>
> **38 Factors in mitigation of damages**
>
> (1) Evidence is admissible on the behalf of the defendant, in mitigation of damages for the publication of defamatory matter, that:
>
> (a) the defendant has made an apology to the plaintiff about the publication of the defamatory matter; or
> (b) the defendant has published a correction of the defamatory matter,…

Each Australian jurisdiction has now introduced largely similar defamation legislation, including an equivalent provision to s 20 of the NSW Act protecting apologies.

Has full statutory protection for apologies achieved good results?

Since the introduction of full statutory protection for apologies in the NSW *Civil Liabilities Act*, it appears from the matters dealt with by the NSW Ombudsman and from various newspaper reports that public sector agencies have become far more prepared to offer an apology to a complainant, in appropriate circumstances, than they were prior to the introduction of the legislation. It appears that the offering of apologies by public sector agencies is now widely considered to be almost an unremarkable day-to-day event. Prior to the legislation, the offering of an apology was almost unheard of, other than in circumstances where, for example, a 'political' imperative was seen to outweigh any potential liability issues that could arise. If this general perception of a change in agency attitude and approach is correct, the apologies part of the legislation would appear to be working well.

Further, there does not appear to be any evidence to indicate that the statutory protection for apologies has created any problems or caused any damage to the interests of government or any person or body. It is important to note here that making apologies inadmissible in civil proceedings does not in practice result in any detriment to the rights or interests of members of the public – in the absence of such a protection it is extremely unlikely that public officials in particular would give an apology in circumstances where this could be seen as an admission of liability. In contrast, the practical consequence of this legislation should be that more public sector officials will be encouraged to say '*sorry'* and more members of the public are likely to feel satisfied that their grievance has been taken seriously. An apology shows an agency taking moral, if not legal, responsibility for its actions and the research shows that many people would be satisfied with that. Therefore, the introduction of the protections for apologies can be said to have had either at least a neutral effect or very possibly a beneficial effect.

It is still too early to see the effect of the protections that have been introduced into defamation legislation around Australia in the last few years.

'Partial' statutory protection and 'partial' open disclosure policies

'Partial' statutory protection for apologies

Since the incorporation of that provision into the *Civil Liability Act*, every other State and Territory has followed the NSW lead and brought in legislation that provides varying levels or protection for apologies or expressions of regret in relation to civil liability. While the scope of the protection provided in each jurisdiction varies significantly, it appears that a simple '*I am sorry'* will in most circumstances be protected in all States and Territories in Australia.

While in NSW and the ACT a person will be protected if they go on to say '*it was my fault'*, such an admission will not be protected in any other jurisdiction (ie, in NT, Qld, SA, Tas, Vic, WA). This is unfortunate as an admission or acknowledgement of responsibility is generally essential for an apology to be effective. The only jurisdiction in Australia where an apology does not appear to have any legal protection (other than in the defamation context) appears to be the Commonwealth!

NSW Health Open Disclosure Policy

On 24 August 2006, NSW Health issued a Policy Directive entitled *Open Disclosure*.[16] The policy aims to establish a standard approach to communication with patients, families/ carers and other stakeholders after incidents involving potential injury, damage, loss or other harm to patients. The *Open Disclosure* policy is based on the *National Open Disclosure Standard* (discussed further below). While both policies are very commendable, they advocate only

partial apologies, ie, both warn against the making of admissions of liability. For example, under the heading *Steps in Open Disclosure*, staff of NSW Health are instructed that:

> **5.2 Communicating with the patient or carer**
>
> …An apology is not an admission of liability and health care professionals should not make any proactive admission of liability or verbal or written statement indicating that:
>
> - they, or another health care professional, are liable for the harm caused to the patient
> - the health service is liable for the harm caused to the patient
> - the incident could have been avoided….

However, even though health care professionals are instructed in the policy not to make admissions of liability, the policy does require that there will be a full disclosure of the findings of investigations, including any Root Cause Analysis Final Report (other than in certain defined circumstances).[17]

Given the protections available in ss 68-69 of the NSW *Civil Liability* Act, it is unfortunate that the NSW policy advocates such a limited approach to apologies.

Australian National Open Disclosure Standard

The Australian National Open Disclosure Standard prepared by the Australian Council for Safety and Quality in Health Care was adopted and published in 2003[18]. The national standard sets out principles to address the interests of patients, health care professionals and other key stakeholder groups including openness and timeliness of communication; acknowledgement of error; expression of regret/apology, recognition of the reasonable expectations of patients and their support person; staff need for support; and confidentiality.

Handbooks have been prepared and published to assist hospital managers and health care professionals with the implementation of the Open Disclosure Standard. These handbooks[19] cover such topics as: what is open disclosure, the ethical basis for open disclosure, the challenges, strategies to facilitate open disclosure, legal issues, insurance considerations, and frequently asked questions. Under this last heading, the following answer is given to the question: *Does an apology or expression of regret mean admitting liability?*

> The Open Disclosure Legal Review[20]… identified that an apology is not an admission of liability; there are no legal impediments to an appropriately worded apology. It is not an admission of liability to:
>
> - Explain how an adverse outcome occurred;
> - Acknowledge that the patient is not happy with the outcome;
> - Express your concern for the patient.

However, the answer to this question goes on to say:

> **If you admit fault then you may be admitting liability. Avoid statements such as:**
>
> ‘I’m sorry – I appear to have made an error in judgement’;
> ‘I apologise for this mistake’;
> ‘It is my fault that this happened’.

The related handbook for health care professionals includes the following advice:

> **Step 5** Inform the patient of what has happened and what has been done to prevent a further harm. Include an expression of empathy or regret …

However, the answer then goes on to say:

> **Don't**:…
> - Blame yourself…
> - Admit liability.

Under the heading *Open Disclosure and Legal Issues for Health Professionals*, the advice in the handbook includes:

> Health care professional need to be aware of the risk of making an admission of liability during the open disclosure process. In any discussion with the patient and their support person during the open disclosure process, the health care professional should take care to avoid the following:
>
> - state or agree that they are liable for the harm caused to the patient;
> - state or agree that another health care professional is liable for the harm caused to the patient; or
> - state or agree that the health care organisation is liable for the harm caused to the patient.

In answer to the question: *What is an admission of liability?* the handbook notes that the Standard states:

> … there is a clear distinction between an admission of fact on the one hand ('we lacerated your liver during the course of the operation') versus an admission of liability for negligence ('the liver laceration constituted a breach of my duty of care to you and the breach has caused your injury') on the other…

However, the Standard goes on to state that:

> … in discussions with the patients and their support person under the open disclosure process, health care professionals may:
>
> - acknowledge that an adverse event has occurred;
> - acknowledge that the patient is unhappy with the outcome;
> - express regret for what has occurred;
> - provide known clinical facts and discuss on-going care (including any side effects to look out for);
> - indicate that an investigation is being or will be undertaken to determine what happened and prevent such an adverse event happening again; and
> - agree to provide feedback information from the investigation when available;…

'Full' open disclosure policies

In the United States an organisation called the *Sorry Works! Coalition* was established in early 2005[21]. The *Coalition* promotes the *Sorry Works!* program, which is a response to medical errors that emphasises the importance of apologies and doing the right thing.

The *Sorry Works!* protocol is based on the open disclosure program developed at the Department of Veterans Affairs Hospital in Lexington, Kentucky. After losing two major malpractice suits in the 1980s, this Veterans Affairs Hospital adopted a revolutionary approach to medical errors – extreme honesty. The hospital administration directed its staff to fully disclose all medical errors, to apologise to harmed patients and their families, and to propose ways to prevent recurrence. The hospital then offered fair compensation to those harmed. A study published in the 1999 edition of the Annals of Internal Medicine showed that the Hospital's average cost of error-related payouts was in the bottom quartile of the 35 comparable Veterans Affairs hospitals in the United States. Since that time, these results

have largely been replicated by all Veterans Affairs hospitals, private hospitals and hospital systems that have adopted a similar approach.

The *Sorry Works!* program or protocol is simple:

(1) after an adverse event or a bad outcome occurs, the hospital conducts a root cause analysis to see whether or not the standard of medical care was met (ie, was the problem due to medical error or negligence, or was it simply a bad outcome);

(2) if the standard of medical care was **not** met (ie, an error, system breakdown, etc) the patient/ family is contacted:

   (a) they are encouraged to retain legal counsel (it has been found by Sorry Works! that this adds to the credibility of the program and further reduces litigation)
   (b) a meeting is held with the patient/family where **the error is disclosed, fault admitted**, explanation is given as to what went wrong and how it will be fixed, and an offer made of fair compensation (as determined by an actuary or some other qualified expert);

(3) if the standard of medical care **was** met, the patient/family is still contacted:

   (a) the records are opened and explained, and all questions are answered to demonstrate that the proper standard of medical care was met and that there is no cover up;
   (b) no apology is offered (although this would not prevent an expression of sympathy for the patient's plight);
   (c) no compensation is offered, and
   (d) if sued, the cases are **never** settled and are fought to their conclusion.

Implementation of the program is not reliant on the availability of any statutory protection for apologies, although several states in the USA have adopted *Sorry Works!* type legislation or other approaches to the partial statutory protection of apologies.

It is worth noting here that when an admission of responsibility or fault has been given, if there is any subsequent legal action the court's role is primarily be limited to establishing just compensation, which avoids the need for long, painful and embarrassing proceedings where the plaintiff is arguing that the defendant was negligent/incompetent.

PART 5 – CONCLUSIONS

The components of a 'full' apology

To ensure that an apology has the best chance of being effective in resolving a problem, it should cover at least the following matters:

i) *recognition* – including a description of the wrong, a recognition that the occurrence was wrong and an acknowledgement of the harm done;

ii) *responsibility* – an acceptance of responsibility for the wrong and harm (the key missing element from partial apologies);

iii) *reasons* – an explanation of the cause of the problem;

iv) *regret/remorse* – an apology sincerely expressed;

v) *redress/reparation/rectification* – a statement of the action taken or proposed and a promise or undertaking that the problem will not be repeated.

A further matter that could be included in an apology is a request for forgiveness – a *release* from blame.

Comparing approaches to the facilitation and encouragement of apologies

Looked at in terms of risk management, the statutory protection and 'partial' open disclosure approaches are based on risk avoidance – risk aversion being effectively the 'default' position for the public sector (and many professions, for example medicine and the law). By way of contrast, the 'full' open disclosure policy is based on confronting risks head-on to properly address and minimise the consequences of risks when they occur.

Statutory protections for apologies, however, are not necessarily a pre-condition to the making of full apologies. As stated by Dr Lucian Leape, a Professor of Health Policy at Harvard University:

> For decades, lawyers and risk managers have claimed that admitting responsibility and apologizing will increase the likelihood of the patient filing a malpractice suit and be used against the doctor in court if they do sue.
>
> However, this assertion, which on the surface seems reasonable, has no basis in fact. There is to my knowledge not a shred of evidence to support it. It is a myth.
>
> The reality, in fact, appears to be just the reverse. Patients are much more likely to sue when they feel you have not been honest with them.[22]

It is certainly true that people who are affected by an adverse event often want someone to blame or someone to take responsibility for what occurred. It is one thing to be given a detailed account of what occurred – it is a completely different thing to be told that some identified person or organisation has taken responsibility or accepted the blame or liability for what has occurred.

Therefore, looked at in terms of effectiveness, the statutory protection and full open disclosure approaches encourage and facilitate 'full' apologies. The partial open disclosure approach only allows for the far less transparent or effective, and potentially even damaging, 'partial' apology.

The open disclosure policy of NSW Health and the Australian National Open Disclosure Standard, while leaders in the field in this area in Australia, are not 'full' open disclosure policies because the apologies they advocate are only 'partial' – they do not include an acceptance of responsibility or an admission of fault or liability. It is open to serious question whether an apology given in accordance with the NSW Health Open Disclosure Policy or the National Standard is the best and most effective way to assist them to deal with what has happened and move on with their lives.

While the *Sorry Works!* approach appears to be very successful in dealing with single 'injured party' (for want of a better term) problems, it does not appear to be a program that is well designed to address problems that affect multiple injured party – the sort of problems that can result from public sector negligence, maladministration, mismanagement or failures to act. It is also often difficult to quantify the harm, damage or other consequence that can flow from problems that arise in the public sector generally, and particularly in relation to problems that affect multiple injured parties. This would be a significant issue for any insurer

whose agreement would be needed for such an approach to be adopted by a public sector agency.

The *Sorry Works!* program is most commendable in its aims and appears to be very successful in the results achieved. However, implementation of the program does require strong moral fibre and the courage to make what presumably is often in practice a 'leap of faith' (that full disclosure and apology will not backfire on the individual or the organisation concerned). In this context the readiness of US medical professionals and hospitals, and importantly their insurers, to consider and trial what many people would see as a 'courageous' new approach may be significantly influenced by what US medical professionals perceive to be the heavy burden placed on them by the level of litigation for medical negligence in the USA.

Prerequisites for the facilitation and encouragement of apologies in the public sector

In Australia and the USA the awareness of the importance of apologies has grown significantly over the last 4 to 5 years. While views seem to differ as to the best way to facilitate and encourage apologies, statutory protection for apologies is an important way to remove what is widely perceived in the public sector (as well as in many professions) to be the major impediment to the giving of a full apology – legal liability. However, addressing the legal liability issue will not, by itself, guarantee that full apologies are given in appropriate circumstances.

To facilitate and encourage apologies in the public sector there appear to be six prerequisites that need to be met. Public officials need to:

1. be aware that they will be legally protected from liability if they do so – particularly important in a risk averse environment such as a public sector (as well as in risk averse professions such as medicine and the law);

2. know that they are authorised by their employer or the government to make an apology;

3. be prepared to admit they have made a mistake;

4. accept that making an apology is the right thing to do;

5. believe that an apology may serve a good purpose;

6. know when and how to make an appropriate apology.

Statutory protections for apologies only address the first prerequisite. The other five prerequisites need to be addressed by the management of a public sector agency:

- ensuring there is a strong ethical culture throughout the organisation
- adopting and implementing a robust open disclosure and apology policy, which could include such matters as:

    - the circumstances in which apologies can or should be given;
    - the content of such apologies, including the admissions that can be made and the information that should be conveyed;
    - the preferred methods of communication of apologies;
    - responsibility for the giving of apologies;
    - responsibility for the coordination of the apologies process;

- what forms of redress may be relevant to the types of circumstances likely to arise (in relation to the functions and activities of the agency) where an apology is warranted;
- delegations of authority to make apologies, offer redress, etc, and

- providing practical training to staff at all levels on when and how to make apologies.

Endnotes

1 *Mediation Skills Model to Manage Disclosure of Errors and Adverse Events to Patients*, Liebman, CB, & Hyman, CS (2004), Health Affairs, 23(4), 22-32.

2 Proceedings before the General Purpose Standing Committee No. 2 *Inquiry into Review of Complaints Handling within New South Wales Health*, 14 September 2006, NSW Parliament.

3 These are not firm or fixed categories and various options for redress may fit into more than one category. A detailed discussion of each category of options can be found in '*Options for Redress'*, NSW Ombudsman, 2006 [see www.omb.nsw.gov.au].

4 It is best if both parties have a common understanding of what went wrong and what would be an appropriate response, which may require a preliminary discussion, communication, or negotiations possibly by a third party.

5 Avoiding the passive voice, eg, '*mistakes were made'* without taking ownership, the conditional tense, eg, '*if I have offended anyone…*' to qualify the apology, or questioning whether the injured party should have been damaged, eg, '*if you were offended…*' (per Aaron Lazare, *On Apology*, Oxford University Press, 2004 (pp.88, 90 & 92).

6 The admission must be about something done by the apologiser not the recipient, therefore it is not appropriate to say '*I'm sorry you took offence at what I did*'.

7 Although the information conveyed in an apology should not be admissible in NSW or the ACT, the apology may convey information that can be used to obtain information in an admissible form for use in court proceedings.

8 It is totally inappropriate to say '*I am sorry, but'* followed by an explanation as to why what was done was correct or justified. What is more appropriate is to say '*I am sorry because…'*.

9 If the wrong was solely caused by events outside the control of the organisation, its staff, or was caused by a third party, then it may be appropriate to express sorrow or regret without making any admission of responsibility.

10 Technically speaking, an expression of regret is not really an apology as it is a wish that the action or harm had not occurred rather than an admission that what occurred was wrong.

11 In proceedings relating to liability for negligence, '*the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk*' (s.5C of the NSW *Civil Liability Act*).

12 Particularly where there will be an ongoing relationship or the two parties are likely to interact at some point in the future.

13 The giving of forgiveness is the clear sign of a successful apology, and at the very least an apology can prepare the grounds for forgiveness. Forgiveness does not mean that the problem, wrong or hurt will be forgotten, merely that it will be remembered without bitterness – that is, will not be held against the giver, will not be brought up again, will be 'let go' and the person will move on.

14 6th National Investigations Symposium, Sydney, 2 November 2006 in discussions following delivery of a paper '*Mediated through plastic: Dispute resolution by telephone*'.

15 Maybe a more appropriate title for this legislation could have been the 'S**t Happens Act'!

16 NSW Health, PD 2006_069.

17 **'5.3 Investigation and feedback**

…

There will be complete disclosure of the findings of investigations from information in the patient's medical record, discussions with staff members, findings from clinical review meetings and final reports from clinical SAC 1[Severity Assessment Code 1] RCAs [Root Cause Analysis] unless information is restricted as follows: [which is followed by a list of certain circumstances where various statutory privilege against disclosure apply]…'.

'5.4 Completing the open disclosure process

After completing the investigation, feedback to the patient will take the form of a face-to-face interview, a letter or both. The interview and/or letter must include:

- Reference to the clinical and other relevant facts

- RCA [Root Cause Analysis] Final Report where applicable
- Reference to details of the concerns or complaints of the patient and the support person
- An apology and expression of regret for the harm suffered
- A summary of the factors contributing to the incident
- Information on measures to be implemented to prevent a similar event occurring
- What has been and will be done to avoid repetition/recurrence of the incident and how these improvements will be monitored.'

18 *Open Disclosure Standard: A National Standard For Open Communication in Public and Private Hospitals, following an Adverse Event in Health Care*, Australian Council for Safety and Quality in Health Care, July 2003.

19 Open Disclosure, Manager's Handbook, and Open Disclosure, Health Care Professional's Handbook, *Australian Council for Safety and Quality in Health Care*.

20 *Open Disclosure Legal Review* (2002) prepared by Corrs Chambers Westgarth for the Open Disclosure Project. Copies available on the Open Disclosure CD Rom or from the Australian Council for Safety and Quality in Health Care.

21 *http://www.sorryworks.net*

22 *Full disclosure and apology: An idea whose time has come*, Leape L. *Physician Exec 32:16-18*, Mar.-Apr.2006

THE SCOPE AND MEANING OF 'IN PRIVATE' HEARINGS: THE IMPLICATIONS OF *SZAYW**

Zac Chami**

On 5 October 2006 the High Court of Australia handed down its decision in an administrative law (migration) matter which may have far wider ramifications than the operations of Refugee Review Tribunal ('RRT').

The matter concerns the meaning and construction of s 429 of the *Migration Act* 1958 ('Act') which provision requires that oral hearings conducted by the RRT, when reviewing protection visa decisions, 'must be in private'.

The case is also important because it rejects the literal approach to the construction of statutes.

Factual summary and procedural history

Four stateless Palestinians (the appellant and three friends) arrived in Australia in 1998. They applied for protection visas claiming that if they returned to their country of former habitual residence, they would suffer reprisals for deserting Hezbollah. A delegate of the Minister for Immigration refused all four applications for protection visas.

All four applicants, represented by the same advocacy group (Refugee Advice and Casework Service) sought review of the delegate's refusal decision in the RRT. At their request, one RRT tribunal member was assigned to deal with all four applications for review. Also at the request of the applicants, each of them wished to act as witness in the other's case.

The RRT eventually rejected the claims of each of the four applicants.

The appellant (SZAYW) then sought judicial review of the RRT decision in the Federal Magistrates Court. His specific complaints to the court were:

a) the RRT breached s 429 of the Act because the hearing was not conducted in private - the other 3 applicants were present in the RRT hearing room during the period that he gave his evidence;

b) the RRT breached the rules of procedural fairness because, in giving his evidence, he felt inhibited and did not put his case in its best light.

The first complaint was upheld by Federal Magistrate Driver who also held that a breach of s 429 of the Act was a jurisdictional error and consequently, he quashed the RRT's decision[1].

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* *This article was prepared by Zac Chami , a Senior Associate at Clayton Utz and the views expressed are those of the author's alone.*

* *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 49.

The second complaint was rejected on the facts by Federal Magistrate Driver and is not relevant to any further issue in this article.

The Minister for Immigration appealed Federal Magistrate Driver's decision. The Full Court of the Federal Court of Australia reversed the Federal Magistrate's decision (Moore and Weinberg JJ, Kiefel J dissenting)[2] and the appellant then sought and was granted leave to appeal to the High Court of Australia.

Decision and reasoning

Five Justices of the High Court unanimously upheld the decision of the Full Court of the Federal Court. In doing so they rejected as 'unduly narrow and inflexible' the appellant's submission that the statutory obligation of privacy required 'only the Tribunal member and necessary officers...and the applicant and his [representative] be present when the [appellant] gave his evidence'.

The High Court, in rejecting the appellant's strict approach to the meaning of the words 'in private', embarked upon an analysis which had as its starting point the principal objective imposed on the RRT that it conduct a review which was fair, economical and informal. This higher objective was considered within the statutory context of other provisions which impact on s 429 of the Act. That context includes obligations imposed on the RRT which deal with the giving of evidence by statutory declaration, obtaining information that the RRT considers relevant from third party sources and the conveyance of adverse information to and obtaining information from the applicant.

Other sections of the Act used to contextualise the meaning of the words 'in private' were:

(a) s 425 which provides that the Tribunal must invite the applicant to appear before the Tribunal to give evidence;

(b) s 426 which entitles the applicant to notify the Tribunal that the applicant wants the Tribunal to obtain evidence from some other person or persons;

(c) s 365 which may be contrasted with s429. In relation to oral evidence taken before the Migration Review Tribunal, such evidence must be taken in public;

(d) s 439 which imposes obligations of confidentiality upon Tribunal members and officers. Notably, the obligation of confidentiality does not apply to the applicants or others.

In considering context, the High Court observed that the concept of privacy is imprecise and is not to be equated with secrecy or isolation[3]. Furthermore, privacy is not necessarily the result of a hearing that does not take place in public. Rather, 'public' and 'private' are words used in contrast, but they do not cover the entire range of possibilities[4]. As a guide, the High Court intimated that a hearing cannot be said to be in private if it is 'open to the general public' but will be private if, by mutual consent, one of the parties to the meeting is accompanied by a friend or supporter - as happened in this case[5]. Similarly, the presence of any person who is reasonably required to perform functions in connection with the RRT hearing does not mean that the hearing ceases to be in private.

In this regard the High Court recognised that persons required to perform functions at or connected to the hearing include interpreters, security officers, necessary administrative staff, witnesses and persons who provide 'moral support' to a person. Finally, the High Court accepted that s 429 does not prevent hearings which are wholly or partly 'concurrent', that is, a joint hearing as occurred in this case.

Implications of decision on other legislation

Section 429 of the Act, as was recognised by the High Court, was enacted for the benefit of refugee applicants. That is, they should feel uninhibited in presenting their case to the RRT and also to protect them against the threat of reprisals, either in Australia or abroad[6] because of the allegations they are likely to have made against persons or the government of their country of origin. These beneficial reasons imply a personal or protective purpose for having a private hearing. In that sense therefore the requirement of a private hearing may be distinguished from regulatory or commercial legislation which may have, as part of its provisions, that certain investigative procedures or examination hearings be held in private. The dichotomy appears to be that there are 'personally protective' private hearings and 'sanctions based/prosecutorial' private hearings (or investigations preparatory to the imposition of a sanction/prosecution). As examples of the latter, the following pieces of legislation serve as a useful starting point.

(1) s 597 of the *Corporations Act 2001* concerns the examination of a person about a corporation's examinable affairs. Such an examination is required to be held in public except if the Court considers that, by reason of special circumstances, it is desirable to hold the examination in private;

(2) s 596F(1)(c) of the *Corporations Act 2001* which operates subject to s 597, empowers the Court to make orders concerning who may be present at an examination while it is being held in private;

(3) ss 913B and 914A of the *Corporations Act 2001* which concern the refusal to grant an applicant a financial services licence and the imposition of conditions on such a licence after the person is given an opportunity to attend a hearing conducted in private;

(4) s 915B of the *Corporations Act 2001 w*hich concerns the suspension or cancellation of a financial services licence after the person is given an opportunity to attend a hearing conducted in private;

(5) s 920A of the *Corporations Act 2001* which concerns the power of the Australian Securities and Investments Commission to impose a 'banning order' on a person providing financial services after the person is given an opportunity to attend a hearing conducted in private;

(6) s 152CZ(1)of the *Trade Practices Act* 1974 which concerns arbitration hearings in connection with telecommunications access disputes which are to be held in private.

A common feature of the provisions above as well as the protection afforded to refugee applicants by virtue of s 429 of the Act is the need to protect confidential information or evidence in the service of a *personally protective* function, a *commercially protective* function or *sanctions/prosecutorial* function. In this way a private hearing serves to guard the interests of the applicant or alternatively the integrity of the information received by the relevant tribunal or decision maker whether it be the RRT, ASIC or the Australian Competition Tribunal. It follows that if there is no real danger that the information given in the course of a (private) hearing will be released to the public, there is no good reason to exclude persons other than the applicant and the tribunal officers from that hearing. Certainly, the general public will not be entitled to attend the hearing but other parties connected with the applicant or who attend at the applicant's request[7] will not change the character of the hearing from being a private one. Many examples can be imagined where an applicant would seek to have a connected third party attend the hearing including, for example, a spouse, a relative, a business partner, a spiritual adviser, a medical assistant and, as in the case of SZAWY, a support person. None of those would, according to the

High Court, turn a private hearing into a public one so as to offend the legislation discussed in this article.

Moreover, there may be situations in which a concurrent private hearing takes place in connection with matters under the *Corporations Act 2001.* Readily imaginable situations may include, for example, the cancellation of a financial services licence held by two partners of a financial advisory house. If the partners in making a case as to why their licences should not be cancelled seek to rely on their 'shared experiences'[8] or the 'consistency of the[ir] claims'[9] this seems a powerful reason why a private hearing can accommodate both of them simultaneously.

Finally, there is one other common feature of significance between the obligation imposed on the RRT under s 429 of the Act and the obligations imposed on ASIC and the Australian Competition Tribunal under the legislation referred to above. Both the RRT, ASIC and the Australian Competition Tribunal in deciding issues as to whether a protection visa ought to be granted, a financial services license ought to be cancelled or whether telecommunications access ought to be given, are exercising inquisitorial powers. Evidence is not adduced, tested and debated as it would, say, in an adversarial trial. The RRT, ASIC or the Australian Competition Tribunal considers the information and claims within the process of administrative merits review. From that standpoint, the High Court's decision in *SZAWY* cannot be dismissed as a mere peculiarity of immigration law and thus of limited application.

Endnotes

1 *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 187 FLR 104
2 *Minister for Immigration and Multicultural and Indigenous Affairs v SZAYW* (2005) 145 FCR 523.
3 Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ at [23]
4 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 226 [42]
5 Gleeson, Gummow, Hayne, Callinan and Crennan JJ at [26]
6 Gleeson, Gummow, Hayne, Callinan and Crennan JJ at [25]
7 Assuming that the relevant tribunal permits this course and accedes to the request.
8 SZAYW at [11].
9 ibid.

COLLATERAL ATTACKS ON ADMINISTRATIVE DECISIONS: ANOMALOUS BUT EFFICIENT

Dr Roger Douglas*

The review of administrative decisions has traditionally been the prerogative of the superior courts. The power to issue the public law writs and their equivalents is confined to the Superior Courts. Judicial review legislation normally restricts the relevant jurisdiction to superior courts.[1] Inferior Courts generally lack the jurisdiction to issue public law writs or to make declarations in relation to the validity of administrative acts.[2]

Yet there are numerous examples of cases where administrative law matters are raised incidentally to matters within the jurisdiction of inferior courts. There is ample English authority and considerable Australian authority for the proposition that the validity of any administrative decision can be challenged in any criminal or civil proceeding in which the validity of the decision is relevant to the question of guilt or liability, and that it is immaterial that it is raised in a court which otherwise lacks an administrative law jurisdiction. Moreover the criteria for determining whether a decision is to be treated as valid may depend on whether the issue is raised collaterally or in public law proceedings. These considerations have prompted some English courts to attempt to limit the scope of collateral attack,most notably in the case of *Bugg v DPP*.[3]

The formulae used for doing so were unsatisfactory, and soon abandoned, but, I shall argue, the conceptual problems which inspired the decisions remain. Part I of this paper examines the authority for the proposition that administrative law matters may be canvassed in any case to which they are relevant, beginning with a summary of the case law prior to *Bugg*, followed by an analysis of *Bugg*, and concluding with a review of English and Australian courts' reaction to *Bugg*.

In Part II I discuss the difficulty of reconciling the generous rules relating to the availability of collateral attack with the restrictive rules governing jurisdiction in administrative law cases, and the difficulty of reconciling the strict doctrine of nullity which underpins collateral attack with the fact that public law relief may occasionally be refused on discretionary grounds even when the decision would otherwise be a nullity. While these considerations rarely give rise to problems, they received some attention in the recent South Australian decision in *Jacobs v Onesteel Manufacturing Pty Ltd.*[4]. Part III examines the implications of this analysis for understanding administrative law in general.

PART I: COLLATERAL ATTACK[5]

The validity of administrative decisions may occasionally be relevant to criminal or civil liability. Guilt may depend on the validity of a regulation or a by-law under which someone is charged. An offence may involve disobedience to orders in a formal notice, such that no

* *This is a revised version of a paper presented to Victorian Chapter, Australian Institute of Administrative Law, 12 April 2006. Dr Douglas is Associate Professor, School of Law, La Trobe University, Bundoora Vic 3086.*

offence is committed if the notice is invalid. The validity of administrative acts may also be relevant to civil cases. The invalidity of an administrative act may mean that an act which would otherwise be legal becomes trespass. An agreement which on its face would be enforceable may be unenforceable if one of the parties lacked the authority to enter into the relevant agreement. Property seized pursuant to an unlawful decision may be recoverable by the person from whom it has been seized. Much will depend on the relevant legislation. If legal consequences attach to *de facto* acts, their actual legality may be immaterial. If the error does not deprive the act of legal operation at relevant times, the error will be irrelevant. But if guilt or liability turns on the validity of administrative acts, validity questions are of obvious relevance.

Prior to 1992, it was generally accepted that validity issues could be canvassed in the court in which they arose, notwithstanding that the court lacked the jurisdiction to entertain a direct attack on the validity of the decision in question. In 1992, a somewhat unsatisfactory English decision, *Bugg v Director of Public Prosecutions*,[6] cast doubt on whether this was the case. *Bugg* was however, soon over-ruled by the House of Lords: *Boddington v British Transport Police*,[7] and Australian courts have followed *Boddington.*

Pre-1992 authority

Prior to *Bugg*, courts had accepted that validity of administrative acts might be raised in criminal or civil proceedings where validity was relevant to the issues posed by the relevant case, and that those wishing to do so need not have previously sought judicial review of the relevant act.

The Australian High Court accepted that parties could raise the invalidity of legislation as a defence to criminal charges, notwithstanding that the court in which they were charged had no jurisdiction to entertain direct attacks on the validity of the legislation.[8] There was ample English authority to similar effect. [9] There have also been cases in which defendants based their defence on the invalidity of administrative acts, a well-known example being *Director of Public Prosecutions v Head*,[10] where the fact that a person had not been lawfully detained in an institution was held to constitute a defence to a charge of having sexual intercourse with a person detained in an institution under the *Mental Deficiency Act* 1913 (UK). There was also old authority permitting collateral attack by prosecutors on the validity of decisions which, if valid, would constitute the basis for a successful criminal *defence*.[11]

There were numerous examples of collateral attack in the course of civil cases, sometimes by plaintiffs[12] and sometimes by defendants.[13] Indeed, prior to the rise of certiorari, tort actions were the normal way in which a person aggrieved by a decision of in inferior court or quasi-judicial body attacked the validity of the decision,[14] and even after the development of certiorari as a tool for quashing unlawful decisions, collateral attack continued. Illustrative authority is provided by none other than *Cooper v Wandsworth District Board of Works*,[15] a trespass action, in which the defendant's denial of procedural fairness to the plaintiff meant that it lacked what would otherwise have been a defence to its having demolished the plaintiff's building.

More recently, in another case involving the Wandsworth local authority, the Court of Appeal held that a defendant in an action to recover unpaid rent could rely on the defence that the local authority's decision to increase the rent involved jurisdictional error: *Wandsworth London Borough Council v Winder*.[16] In Australia, one well-known example of collateral attack being used by a plaintiff is the challenge in the *Jehovah's Witnesses case* to the validity of the *National Security (Subversive Associations) Regulations* (Cth) which, like *Cooper*, took place in the context of an action for trespass, albeit one brought in a court with a public law jurisdiction.[17] Conversely, in *Australian Broadcasting Commission v Redmore*,[18]

the defendant to a breach of contract action argued in its defence that it had not been empowered to enter into the contract in question.

Collateral attack was not possible in all cases of administrative error. First, the error had to be relevant, and collateral attack was not possible if guilt or liability depended not on the validity of the act, but on its existence. Even when acts were flawed by jurisdictional error, courts were sometimes willing both to give them some legal effect. Courts were sometimes willing to interpret legislation as conditioning outcomes on the existence, rather than the validity of decisions,[19] and there is old authority suggesting that liability for action taken pursuant to warrants issued without jurisdiction might be limited to cases where the error was apparent on the face of the warrant.[20]

Second, successful collateral attack normally required that the relevant error be jurisdictional.[21] The significance of this requirement was reduced by the growing tendency of courts to classify almost all legal errors as 'jurisdictional' when the decision-maker was an administrator rather than a judicial officer. But Australian courts recognise that there exists a class of 'non-jurisdictional' errors.[22]

But subject to these exceptions, the cases suggested that collateral attack was possible even when the error was not apparent in the absence of evidence, and even when the prosecution or claim was brought in a court which otherwise lacked an administrative law jurisdiction. In *Cooper* the error was, of course, denial of natural justice, a jurisdictional error, but not one which was obvious from the decision itself. In none of the High Court cases challenging the validity of regulations, did either the magistrate who first heard the case or the High Court appear to have any doubt as to the legality of raising the invalidity of the legislation as a defence to charges under the legislation.

From Bugg to Boddington

In *Bugg v Director of Public Prosecutions*,[23] the English Divisional Court cast doubt on these principles, holding that it was not open to a criminal defendant to raise the invalidity of an administrative act as a defence to a criminal charge. *Bugg* was one of a series of cases arising out of prosecutions of anti-war protesters for trespassing on military land. Bugg's defence was that he was free to be present on the land in question on the grounds that by-laws purportedly prohibiting him from being present on the land were legally flawed and therefore invalid.

Bugg's case involved two appeals. One, by Bugg, was against a conviction after a magistrate had held that he lacked the jurisdiction to consider the validity of the by-law in question. The other was a prosecution appeal against the acquittal of the defendant, on the grounds that the by-law was invalid. The Divisional Court (Woolf LJ and Pitt J) distinguished between 'substantive' and 'procedural' invalidity, and in relation to the latter category, between invalidity which could be proved in the absence of evidence, and invalidity which could be established only on the basis of evidence. In the former case, the invalidity of the by-law could be raised in the magistrates' court as a defence. In the latter case, it could not.[24] However the Court considered that the by-laws fell into the former category and, on their face, were invalid. It therefore found in favour of the defendants.

Bugg was in many ways an unsatisfactory decision. The Court considered that if a by-law was procedurally flawed, and if the flaw was a latent one, the by-law was to be given effect unless its validity had been successfully challenged in judicial review proceedings prior to the alleged offence.[25] This would mean that even if a criminal defendant sought and obtained a declaration that a by-law was (and therefore always had been) invalid, the criminal court would nonetheless be required to convict. This seems to go well beyond what is necessary to achieve the policy goals underlying the decision, and it is difficult to see how

the conviction of a defendant could be justified if, hypothetically, in a public law action, with the prosecutor joined as a defendant, the defendant-applicant had obtained a declaration that the by-law was and always had been invalid.

The concept of non-patent errors smacked of the administrative law of a by-gone age[26] and it was not clear why collateral challenges should be permitted in response to latent substantive errors (such as bad faith), but not latent procedural errors. Nor was it clear why some errors were to be treated as substantive while others were to be classed as procedural. Yet classification of an error would determine whether a defendant could be convicted of an offence against subordinate legislation or a notice flawed by jurisdictional error.

Nonetheless, *Bugg* can be partly understood as a response to concerns about the appropriateness of allowing collateral attack on administrative decisions. One potential source of difficulty arose from developments in administrative law which had meant that virtually all errors were to be classed as jurisdictional. This had the potential vastly to increase the range of decisions which could be attacked collaterally, as well as the complexity of issues surrounding their legality.[27] Another was that collateral attack meant that the Magistrates Court could be asked to handle matters which properly belonged in the Divisional Court. The hearing of cases by magistrates could give rise to a number of difficulties. First, English magistrates were usually laypeople, with no formal legal qualifications.[28] Second, given the decentralised nature of the courts, permitting collateral attack might mean that there were apparently inconsistent decisions concerning the validity of administrative acts, especially where findings of validity turned on evidence.[29] Third, decisions relating to the validity of administrative acts might be made without the relevant decision-maker being heard.[30]

In England, *Bugg* aroused mixed responses. Some judges considered that it might not have gone far enough in the direction of bringing public law litigation back into the Divisional Courts where it belonged.[31] Others considered that it was probably wrongly decided, and that justice demanded that criminal defendants be able to raise any relevant matter in their defence, without having to go to the trouble of initiating judicial review proceedings. In *Reg v Wicks*[32] the House of Lords was extremely critical of Woolf LJ's reasoning in *Bugg*.

Wicks was an appeal from a conviction on a charge of failing within the prescribed time to comply with a notice under the *Town and Country Planning Act 1990* (UK). Wicks had argued in his defence that the notice was invalid. The House of Lords dismissed his appeal on the grounds that the offence was not conditional on the existence of a valid notice, but on the existence of a formally valid notice which had not been set aside. This meant that it was not necessary for the Lords to decide whether *Bugg* was correctly decided. Nonetheless, criticisms of the case by Lords Nicholls and Hoffmann[33] (with whom the other Lords agreed) indicated that their Lordships regarded the decision as fundamentally flawed. Nonetheless, Lord Nicholls was not unsympathetic to the problems which prompted Woolf LJ's attempt to limit collateral attack, suggesting that perhaps:

> the guiding principle should be that prima facie all challenges to the lawfulness of an impugned order may be advanced by way of defence in the criminal proceedings, but that the criminal court should have a discretionary power to require an unlawfulness defence to be pursued, if at all, in judicial review proceedings.[34]

Moreover the decision in *Wicks* represented an alternative approach to some of the problems inherent in collateral attack. The Lords' interpretation of the legislation meant that problems which otherwise would have arisen from permitting collateral attack disappeared. But this might not always be the case. *Wicks* ultimately turned on the legislation, and in interpreting the legislation as they did, the Lords took into account the fact that the notice

was one which related to a single person, rather than being one of general application, along with the fact that it was a notice which had to be served on the person affected, which meant that person was in a position to decide what do about it, and to act on that decision. It was clear that collateral attack would almost invariably be feasible when subordinate legislation was being attacked.

In *Boddington v British Transport Police*[35] the House of Lords formally overruled *Bugg*. The case arose from a prosecution for smoking in a railway carriage in which a non-smoking sign was conspicuously displayed contrary to a by-law made under the *Transport Act* 1962 (UK). The defendant contended that the decision to post the no smoking signs was invalid since it reflected a decision to prohibit smoking in all carriages and not only in some. He was convicted and appealed to the Divisional Court which upheld the conviction, finding that a defendant in a criminal case was not entitled to raise the invalidity of a by-law or administrative act as a defence to a criminal charge.

The House of Lords gave special leave to appeal, ruling that the validity of administrative acts could be collaterally attacked, but that the act in question was valid. Their Lordships considered that it was irrelevant whether the alleged invalidity was bad on its face, or such that it could be established only on the basis of evidence. Their decision was partly based on an analysis of the relevant authorities, which the Lords concluded, did not support *Bugg*.[36] Their Lordships also considered that the distinctions which underlay *Bugg* were unworkable, and uncertain in their application, and should certainly not be the basis for differentiating between cases where a criminal defendant could be convicted pursuant to an ultra vires administrative act, and those in which conviction would be not possible.[37] Their decision was also based on policy considerations, and in particular, the primacy of the rule of law, and the importance to be attached to the rights of criminal defendants.[38]

Bugg and Boddington in Australia

In Australia *Bugg* was followed in the Victorian case of *Flynn v DPP*,[39] a case which, like *Bugg*, had its origins in protest, this time in the forests of Eastern Victoria. The defendants had been charged under the *Conservation, Forests and Lands Act 1987* (Vic) s 95A(1)(b) with hindering or obstructing the lawful carrying out of forestry operations. Their defence was that the relevant licences had been improperly granted and were therefore had no legal effect. The defendants were therefore not guilty.

This argument failed before the Magistrates' Court, the County Court and in the Supreme Court, which followed *Bugg*. If *Bugg* was correct, *Flynn* was correct. The alleged errors were procedural and not patent and their proof would have required evidence. But otherwise Australian courts showed little enthusiasm for *Bugg*, even prior to *Boddington*, and insofar as they have referred to *Flynn*, they have not followed it. [40]

The High Court's decision in *Ousley v The Queen*[41] (in which *Bugg* was neither cited nor relevant) left open the question of whether collateral attack would be permitted in cases where the error was a latent one. Following earlier authority, it held that the validity of warrants to install listening devices could be collaterally attacked in any court, notwithstanding that the warrant had been issued by a Supreme Court judge, but a majority of the court considered that this would be the case only if the alleged error was apparent on the face of the warrant.

Toohey J considered that 'it is not open to the judge to adjudicate on the sufficiency of a warrant or whether the issuing authority was in fact satisfied as to any statutory requirements'.[42] Gummow J agreed and (unlike Toohey J) considered that this even precluded an argument that the warrant was invalid on the grounds that it did not contain an endorsement by the issuing judge to the effect that he was satisfied as to the existence of a

relevant jurisdictional fact.[43] Kirby J did not consider it necessary to decide the question, but also inclined to the view that the issuing judge's subjective satisfaction was not relevant to the validity of the warrant.[44] Gaudron J did not expressly address the question of whether the issuing judge's actual satisfaction could be examined in the course of collateral attack.[45] McHugh J however, considered that warrant decisions could be collaterally attacked in criminal trials, notwithstanding that the alleged error was one which could be established only with evidence.[46]

But the Court did not have to consider whether the validity of the warrant could be collaterally attacked for latent error, since the appellant's argument was that the alleged defect was either apparent on the face of the warrant, or one which could be inferred from the failure of the warrant to refer to the judge's satisfaction as to the existence of a relevant jurisdictional fact. Moreover, the ground for limiting collateral challenge was that the effect of the legislation and case law governing warrants was to condition the validity of warrants on their face validity rather than on the legality of the processes which had led to their issue. There was therefore nothing in the decision to suggest that collateral attack should not be available in cases where a defendant was asserting latent *jurisdictional* error, and where guilt or liability were predicated on the validity of some administrative act.

But McHugh J's acceptance that this was the case coexisted with observations which suggest that that he entertained reservations about the desirability of collateral attack in certain circumstances. He regretted the fact that collateral attacks could fragment the criminal trial process:

> To some extent, the problem of fragmentation can be overcome by having collateral challenges to the validity of warrants determined in pre-trial hearings. Even so, the time of criminal trial judges and the courts of criminal appeals is taken up on matters that should be dealt with in proceedings for judicial review.[47]

He concluded that:

> The matter is one which seems to call for examination by the legislature, particularly since the costs sanction that is available in civil proceedings, a sanction that acts as a deterrent against barely arguable applications, is not applicable in a criminal trial on indictment.[48]

Writing shortly after the decision (which he regarded as flawed), Aronson treated it as tending to the establishment of a position 'whereby the grounds for collateral attack might be frozen to those few grounds of judicial review which were available before the massive expansion of the scope and grounds of judicial review'.[49] However, he argued that it was likely to be read down.

State and federal superior court decisions have borne out that prediction. There is a judicial consensus that collateral attack is permissible whenever the validity of an administrative decision is relevant to a criminal guilt or civil liability,[50] and regardless of whether the error is patent or latent,[51] and regardless of whether the court hearing the case is a superior or an inferior court.[52] Courts have been willing to permit collateral attack notwithstanding that they are state courts hearing attacks on federal decisions.[53]

Moreover, courts have been reluctant to conclude that the relevant legislation might condition guilt or liability on the existence of an administrative act as distinct from its validity. Except in warrant cases, the cases rarely posed the question of whether there might be a legislative intention that the outcome should depend not on the validity of the decision but on the fact that a 'decision' had been made.

In *Grey*, where the issue was canvassed, Whealy J considered that it was arguable that the relevant statutory scheme envisaged that people who did not avail themselves of the

statutory appeal procedures should not be entitled to raise validity as a collateral issue, but he concluded that the better view was that guilt required that the order also be a valid order. Unlike the somewhat analogous English legislation, the New South Wales Act did not preclude persons aggrieved by decisions under the Act from resorting to appeal procedures other than those for which the Act provided. Moreover, following *Boddington*, he considered that 'only the clearest language in a statute should be held to have taken away the right of a defendant in criminal proceedings to challenge the lawfulness of an administrative decision made against him where the prosecution is premised on its validity'.[54] (He found, however, that the order was valid.)

However, some litigants have been wary about relying on collateral attack, even when it seems to have been clearly available. In the proceedings which culminated in *Jarratt v Commissioner of Police for New South Wales*,[55] the plaintiff, who was removed from his position as a Deputy Commissioner in the New South Wales Police Service, sought damages for breach of contract, arguing that his purported removal was unlawful since he had not been afforded procedural fairness, and that in consequence the termination of his contract was unlawful. Rather than attack the decision collaterally, his claim in the New South Wales Supreme Court included both a claim for a declaration that his purported dismissal was invalid and claims for relief (including damages) for breach of contract.[56]

Moreover, a recent South Australian case suggests that there might or ought to be some limits to the circumstances in which collateral attack will be permitted. In *Jacobs v Onesteel Manufacturing Pty Ltd*[57] a five member Full Court of the Supreme Court of South Australian considered whether a tribunal with the jurisdiction to determine questions of law had jurisdiction to determine the validity of its Rules in the context of a collateral attack on their validity. The Full Court opted to follow *Boddington* and held that the validity of subordinate legislation could be collaterally attacked, regardless of whether relevant error was substantive rather than procedural or latent rather than patent, and regardless of whether the collateral attack took place in a superior or an inferior court.[58] But it left open the question of whether collateral attack would be permitted when the decision under attack was an *administrative* as distinct from a legislative one.

No other court seems to have regarded this distinction as relevant. Indeed, the relevant decisions in *Boddington* itself, and in *Ousley*, *Aerolineas Argentinas, Selby*, *Robinson*, and *Grey* were all administrative decisions. The reason the Full Court seems to have regarded the legislative/administrative distinction as potentially relevant was an earlier Full Court decision, *Hinton Demolitions Pty Ltd v Lower (No 2)*, [59] in which the Court had held that a collateral challenge to the validity of an administrative decision could not be maintained. In choosing to distinguish *Hinton* on the ground that the decision in *Hinton* was an administrative decision, the Full Court seems to have been inspired by caution rather than by commitment to the idea that administrative decisions should not be subject to collateral attack.

Hinton is tenuous authority for the proposition that the validity of administrative acts cannot be attacked collaterally. Bray CJ had held that administrative decisions could be attacked collaterally if they were void, but not if the alleged error made them no more than voidable. He found that the relevant error was intra-jurisdictional and that collateral attack was therefore precluded. Wells J had concluded that administrative decisions could not normally be attacked collaterally even if void, and Mitchell J had unhelpfully agreed with the reasoning of both Bray CJ and Wells J. *Hinton* left open the question of whether 'void' administrative acts could be attacked collaterally, but it can scarcely be treated as having resolved it. Moreover there is no suggestion in the judgments in *Jacobs v Onesteel* that the distinction between legislative and administrative acts had any substantive merit. Indeed, the policy arguments given in favour of allowing collateral attack on rules would also apply to collateral attacks on administrative acts.[60]

The significance of *Jacobs v Onesteel* lies rather in the fact that the Court concluded that it might be desirable that courts should have a discretion to refuse to permit collateral attack. Besanko J identified a number of factors which might bear on the exercise of the relevant discretion:

1. Are the grounds of challenge likely to involve the adducing of substantial evidence?

2. If collateral attack is permitted, will all proper parties be heard before the court or tribunal in which the collateral challenge is to be heard?

3. In the particular case, does the allowing of a collateral challenge by-pass the protective mechanisms associated with judicial review proceedings such as the rules as to standing,[61] delay and other discretionary considerations?

4. Is there a statutory provision which bears in one way or another on the question of whether a collateral challenge should be permitted?

5. Is the issue raised by the collateral challenge clearly answered by authority?

6. Are there other cases pending which raise the same issue?

7 (Possibly) Is there a more appropriate forum in terms of expertise and perhaps court procedures such that a collateral challenge should not be permitted?[62]

The Court concluded that in the circumstances, the tribunal had not erred in considering the validity question as a collateral issue. But it left open the question of whether courts and quasi-judicial tribunals did or should possess a discretion in relation to the consideration of collateral issues and how it might be exercised. This was a matter for the High Court or the legislature.[63]

PART II: IMPLICATIONS

Acceptance of the principle that the validity of administrative decisions can be collaterally attacked on any ground and in any court has much to commend it.

- It is consistent with administrative law's reluctance to intervene in relation to the legality of criminal justice decisions when these can be adequately handled by the criminal courts.[64]

- It makes for efficiency, by ensuring that litigants can have their matters disposed of in a single trial and in a court which is normally appropriate in the light of the stakes at issue.[65]

- It makes for fairness and social justice in that it avoids the danger that an innocent defendant might be convicted through being unable to afford or run an administrative law case in a higher court.[66]

- But allowing collateral attack has the potential to cause difficulties. There may be cases where it is inappropriate that administrative law cases be determined by magistrates' courts. And problems may arise from the fact that the criteria for determining whether administrative decisions are to be treated as valid appear to vary, according to whether the decision is attacked collaterally or in a public law action.

Hearing public law issues in inferior courts

Some legal scholars have expressed concern at the fact that collateral attack means that administrative decisions can be attacked in courts which otherwise lack a public law jurisdiction[67] and this possibility has caused concern to English courts even in cases where the court has found in favour of collateral attack.[68]

In *Boddington*, the House of Lords recognised that there were conflicting interests: on one hand, the rule of law and fairness to criminal defendants; on the other, the 'public interest in orderly administration'. Insofar as there was a tension between these two principles, the 'balance between them is ordinarily to be struck by Parliament'.[69] Lord Slynn of Hadley considered that some of the problems which might arise could be dealt with by the setting up of a system whereby magistrates' courts could refer questions of invalidity to the Divisional Court.[70] But the Lords were not unduly perturbed by the fact that collateral attack could mean that administrative law matters were being decided by magistrates' courts. Problems posed by conflicting or incorrect decisions could be corrected on appeal.[71] Moreover there was no reason to assume that magistrates were not up to handling administrative law matters:

> They sometimes have to decide very difficult legal questions and generally have the assistance of a legally qualified clerk to give them guidance on the law. For example, when the Human Rights Bill now before Parliament passes into law, the magistrates' courts will have to determine difficult questions of law arising from the European Convention on Human Rights.[72]

Australian courts have rarely commented on this issue. In *Selby v Pennings*[73] Owen J considered the qualifications of Western Australian magistrates were among the reasons why courts should permit collateral attack, but in *Jacobs v Onesteel*, Besanko J suggested that collateral attack should possibly not be permitted if there was 'a more appropriate forum in terms of expertise and perhaps court procedures'.[74] Otherwise, Australian courts have not addressed this issue. Nonetheless the matters which have carried weight with the English courts are of obvious relevance to Australia. Prosecutors may appeal or seek judicial review of magistrates' decisions, thereby reducing the (largely theoretical) possibility of conflicting decisions relating to the validity of the one administrative decision. In addition, there are procedures for transferring *civil* cases which give rise to complex questions of law to higher courts.[75] Moreover, Australian magistrates are professionally qualified, and if English lay magistrates, assisted by a legally trained clerk of court, can handle administrative law, it follows, a fortiori, that Australian magistrates can do so.

Different validity criteria

A second problem potentially associated with collateral attack stems from the fact that the criteria applied to determine validity may vary according to whether the validity question arises in relation to a criminal or civil law matter on one hand, or an administrative law matter on the other. One difference between direct attack and collateral attack lies in the fact the burdens of proof may vary. If the validity of the act depends on questions of fact, the standard of proof required of the person asserting the validity of the act should logically vary according to whether the issue arises in a public law case, a civil law case or a criminal law case.

In a public law or a civil case, a person challenging the validity of an administrative act must establish facts fatal to the act's validity on the balance of probabilities. In a criminal case, where validity depends on the existence of particular facts and where the existence of those facts is in dispute, the prosecution must establish those facts beyond reasonable doubt. In the criminal case, the prosecution receives assistance from the presumption in favour of the validity of official acts, but once evidence is led casting doubt on the existence of facts on

which validity depends, the defendant has discharged its burden of adducing evidence and it is for the prosecution to prove the relevant facts beyond reasonable doubt.[76] This means that, other things being equal, a person might be unable to win an application for judicial review of a particular administration, while simultaneously being able to rely on its invalidity in the course of defending a criminal case. The reason for this is that it is logically possible for the probability of the existence of a factual basis for the decision to be both high enough to ensure that an application for judicial review will fail, but not high enough to warrant a conviction in a criminal case. It also follows that the outcome of different cases, all predicated on the validity of the same administrative act could vary depending on the evidence adduced in each case.

But while this might yield apparently anomalous findings, it is inherent in the existence of different standards of proof and in the fact that in cases involving different parties, outcomes may depend on the evidence produced in each case. There would be fewer potential anomalies if all validity issues were dealt with in administrative law proceedings, but this would come at a price, namely a relaxation of the standards protecting criminal defendants. Reducing one type of apparently anomalous finding (the coexistence of decisions upholding and rejecting the validity of a given act) would come at the price of another (different standards of proof of criminal guilt, depending on the issues raised in a criminal case). The law accepts that the outcome of the same factual issue may vary depending on whether it is resolved in a civil or a criminal case, and there is no reason why the same rule should not govern questions relating to the validity of administrative acts. In any case, the issue rarely – if ever – arises. [77]

A second and more problematic difference is that the role of 'discretionary factors' appears to vary depending on whether a matter is challenged directly or collaterally. There are suggestions that the discretionary considerations which can occasionally surround the making of orders in public law cases may be irrelevant where validity issues are raised collaterally, although a case has yet to arise which turns on this point. While such a difference (assuming it to exist) does not appear to be inherent in collateral attack, it is nonetheless one with the potential to give rise to problems when issues are canvassed collaterally rather than directly, given current statements of the law.

The issue was discussed in *Federal Airports Corporation v Aerolineas Argentinas* where the Full Federal Court concluded that it was irrelevant that relief might have been refused on discretionary grounds had the matter been brought as a public law case.[78] In *Wicks*, Lord Hoffmann assumed that in collateral attack, the court could not exercise the discretions which a Divisional Court would exercise in determining whether to grant public law relief in relation to the decision in question.[79] In *Boddington* Lord Steyn also considered that a defendant might rely on the invalidity of an administrative act, even if, in judicial review proceedings in relation to the same act, a court would refuse relief.[80]

In none of the cases was it necessary to resolve this issue. In *Aerolineas Argentinas* the Full Court concluded that it was open to the trial judge to find that there were no reasons why the plaintiff would not have been permitted to make an ADJR application. In *Wick* their Lordships held that guilt was not conditioned on the validity of the notice, and in *Boddington*, their Lordships all agreed that the administrative decision was valid.

But cases might arise in which a court would conclude that an application for judicial review would have failed on the grounds that the applicant was out of time or on some other discretionary ground. In such a case, a court might be tempted to conclude that the relevant legislation could nonetheless be interpreted as conditioning the outcome of collateral attack on the presumptive invalidity of an act, rather than on the basis of whether in a public law case, a court would quash the decision or declare it invalid.

But there may be cases where the problem could not be disposed of in this way. For instance, consider *Hodgens v Gunn; Ex parte Hodgens*.[81] This case involved an application for orders quashing a decision to take the prosecutor's dogs into care, on the grounds that the prosecutor was not a fit and proper person to have them in his possession. The prosecutor argued that the decision was a nullity on the grounds that he had been denied procedural fairness. The court agreed that this might have been so, but considered that relief should be refused. The final hearing of the case was delayed as a result of the prosecutor's unpreparedness for trial, and the delay had meant that it might be impossible and undesirable to undo transactions entered into in reliance on the validity of the taking of the dogs.

Suppose that following the purported forfeiture of the dogs, the Minister had given the dogs to people who would give them a good home. The logic of permitting collateral attack and of not conditioning its success on discretionary considerations is that if after some delay, Hodgens had demanded the return of the dogs and sued those who refused to return them, in detinue, in the Magistrates Court, he would have succeeded (assuming that the new donees were not purchasers for value).

Indeed he would have been entitled to sue even after losing his case in the Supreme Court case. The outcomes of public law actions would not necessarily preclude an unsuccessful applicant raising the validity issue again in non-public law litigation. First, the parties in the public law case might be different to the parties in the collateral attack case. If so, there would be no question of issue estoppel between the plaintiff and the 'new parties' in the tort action. Second, if discretionary factors are irrelevant to the validity of an act for the purposes of collateral attack, criminal and civil courts may be asking different questions in relation to the act to those asked in judicial review proceedings.

There are two objections which can be made to this kind of outcome. One is that it is hard to avoid the conclusion that the outcome in the hypothetical case given above could bring the courts into a certain amount of disrepute. In the dogs scenario, an order by the Supreme Court dismissing an application for a declaration that a decision was invalid would have been followed by an order by a magistrates court which effectively said that the Supreme Court's decision was irrelevant to the question of whether a plaintiff could sue on the basis that the order was invalid, and effectively, that the Supreme Court litigation was largely pointless.

This is almost certainly correct, but it is not conclusive. Apparent anomalies are inherent in the possibility that validity issues in relation to a given act may turn on different evidence, different parties and different standards of proof. What matters is not whether there are apparent anomalies, but whether they can be justified.

This raises the second question: why should validity in collateral attack cases depend on a strict doctrine of nullity while validity in public law proceedings depends ultimately on whether there are discretionary grounds against ordering relief? If, say, there are good reasons for not taking dogs from their new custodians and these reasons are good enough to warrant refusal of relief in the event of an application challenging their taking, why should their old custodian be allowed to rely on the invalidity of their taking as a basis for a cause of action in detinue, or a defence to trespass following self-help? Conversely, if it is proper that a strict doctrine of nullity apply in relation to validity for the purposes of collateral attack, why should the same strict doctrine not apply to direct attack?

The reality, however, is that the problem appears to be a largely hypothetical one. Cases in which relief is refused on discretionary grounds are exceptional and in none of the reported collateral attack cases does it seem that relief might have been refused on discretionary grounds. This is why the issue can be treated as open. The fact that it has been open for so

long suggests that in practice it is one of Administrative Law's less pressing issues, but that does not strip it of its theoretical importance.

PART III CONCLUSIONS

Despite the potential anomalies inherent in collateral attack, it is difficult to show that laws permitting collateral attack have ever given rise to absurd or anomalous outcomes. There appear to be several reasons for this. One is that that there are a number of obstacles to the use of collateral attack as a means of ensuring de facto judicial review. For one thing, it can be used only where the relevant decision is one which directly impinges on a person's rights or duties. It is not available in cases where a person is aggrieved because they have not been afforded a right or privilege which, if afforded, would provide the basis for a claim or a defence.[82] It is not available when the alleged error is intra-jurisdictional rather than jurisdictional, since in this event the decision has legal validity and operation until quashed by a court with the jurisdiction to do so. It is not available if the relevant law conditions rights or liabilities on the existence of a purported decision, rather than on the existence of a legally valid decision. For instance, criminal guilt may be predicated on the existence of a purported decision rather than on whether the decision was validly made.[83] Warrants may legitimate intercepts, listening devices, searches and arrests so long as they are valid on their face.[84]

Legislation may provide immunity in tort for officials who act in good faith and who are not negligent,[85] and there is some old authority for the proposition that no action lies for false imprisonment if the arrest is pursuant to an apparently regular, extra-jurisdictional order of a judicial officer.[86] If, in a given context, permitting collateral attack would produce an absurd outcome, this would count in favour of interpretation which conditioned the outcome on the fact, rather than the validity of a purported decision.

Such considerations (along with lack of access to good legal advice) may explain why collateral attack cases appear to be uncommon. Given the apparent rarity of collateral attack cases, and given the rarity with which relief is refused on discretionary grounds in judicial review cases, it is perhaps not surprising that there appear to be no cases in which it is possible that the outcome of the substantive matter would have been different had it been the subject of a judicial review application.

Consistent with this is that it is rare to find legislative attempts to deal generally with the problems which might theoretically arise from collateral attack. Victorian legislation once provided that the validity of municipal by-laws might not be challenged collaterally, following a decision which held that Courts of Petty Sessions could entertain challenges to the validity of Council by-laws.[87] But no other Australian jurisdiction seems to have followed this legislative precedent, which, in any case, was confined to municipal by-laws and was repealed in 1989.[88]

Collateral attack does, however, raise awkward theoretical questions about administrative law. The contrast between the legal absolutism underpinning collateral attack and the vaguely discretionary nature of judicial review reflects two slightly different images of administrative law. Collateral attack reflects the logic of ultra vires and the rule of law. No decision may have legal effect unless the decision maker has the legal power to make it. Doctrinally the law of judicial review has largely accepted this principle: the withering of the class of errors once called intra-jurisdictional reflects administrative law's contemporary commitment to legality. But procedures and discretions reflect ambivalence about the logic of jurisdictional error and of nullity. Time limits and their application reflect recognition that finality and certainty may occasionally be preferable to legality; discretionary remedies reflect equity's traditional recognition that there may be circumstances in which rights should be subordinated to the other interests.

The contrast between the accessibility of collateral attack and the practical restrictions on access to judicial review in state courts raises the question of why judicial review proceedings may not be initiated in courts which are seemingly capable of hearing administrative law cases. One answer is that there may in fact be no good reason why they shouldn't and that it is indeed possible that one day magistrates' courts might be given a general administrative law jurisdiction.

But even in decisions which have upheld collateral attack in magistrates' courts, judges have sometimes expressed unease about administrative law matters being handled by lower courts. While contemporary magistrates almost certainly possess the legal competence needed to handle administrative law issues, problems could arise as a result of the decentralised nature of magistrates' court justice.[89] If a particular administrative decision were to be attacked both on legal and factual grounds, there is a theoretical possibility of inconsistent decisions. Moreover while inconsistency could be normally be cured by appeals, this will not necessarily be the case if the different findings reflect the different evidence which has been produced in different cases. This point cannot be pressed far, however. The problem could also arise in cases heard if the relevant validity issue were to be raised in separate trials in higher courts.

Another and in some ways less reputable reason for limiting the judicial review to the superior courts may be to limit access to judicial review by placing a considerable price tag on those who seek judicial review. McHugh J's observations in *Ousley* suggest that he might consider this to be a good thing, and there may be cases where he is right. But while there may be a case for maintaining the Supreme Courts' near monopoly over judicial review applications, the rarity of collateral attack and the absence of problems arising therefrom suggests that nothing is lost by allowing collateral attack in courts which lack an administrative law jurisdiction. Indeed, something is gained, namely enhanced access to justice.

It is tempting to conclude with the suggestion that the law relating to collateral attack be rationalised to remove potential anomalies.[90] Given the state of current case law, it would be preferable if this were done by legislation rather than by judicial development of the common law, since, except perhaps in South Australia, the latter would almost certainly defeat legitimate expectations arising from the current state of the common law. Legislation might tackle the problem either in an ad hoc manner (such as making explicit whether particular rights or duties depend on the existence of purported decisions, legally valid decisions, or decisions which would be declared invalid if attacked in judicial review proceedings).

Alternatively, legislation might provide that a party to proceedings might make an application for a validity question to be referred to a superior court and that if this were to happen, its status would depend on whether in the exercise of its public law jurisdiction, the court chose to quash the decision or declare it to be void. The criteria suggested by Besanko J in *Jacobs* would constitute a basis for a statutory regime which would maintain the advantages of the status quo while ensuring that an anomalous case could be transferred were one ever to arise.

The former approach would add to the complexity of legislation and it may well be that courts can be trusted on the whole, to anticipate what legislatures would have done had they adverted to the question. The latter approach would be simpler. In practice it would make little difference since there would rarely be occasions for parties either to seek the exercise of the power or for courts to accede to their applications. It would mean that if an anomaly-producing case were to arise, there would be a procedure for dealing with it. But the problems to which collateral attack gives rise seem to be theoretical rather than practical. The possible problems to which I have adverted have not arisen in any of the reported

cases, and in most if not all of them, collateral attack seems to have been the best way of handling the relevant administrative law issues.[91]

So, theoretically unsatisfying though this might be, the best thing to do may be to accept the status quo, with all its potential messiness. Theoretically elegant legislation would add to legislative complexity, and its contribution to additional interlocutory disputation might outweigh its substantive weaknesses. Tolerance of ambiguity can be a virtue, and one of the functions of the current slightly illogical system may be to symbolise the messiness which can sometimes make administrative law so theoretically interesting.

Endnotes

1 The exception is the Federal Magistrates Court which is an inferior court and which possesses jurisdiction under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

2 This result is usually achieved by legislation which fails to confer the relevant jurisdiction eg *District Courts Act* 1983 (NSW) (see Part 3); *Local Courts Act* 1982 (NSW) (see Part 7); *District Court of Queensland Act* 1967 (Qld) (see Part 7); *Magistrates Court Act* 1921 (Qld) (see Part 2); *Magistrates Court Act* 1991 (SA) (see s 8); *Magistrates Court (Civil Division) Act* 1992 (Tas) (see Part 3) (but note the Court's Administrative Appeals jurisdiction: *Magistrates Court (Administrative Appeals Divisions) Act* 2001 (Tas)); *District Court of Western Australia Act* 1969 ss 50, 51; *Magistrates Court (Civil Proceedings Act)* 2004 (WA) (see Part 2). In some jurisdictions, legislation specifically provides that inferior courts lack the jurisdiction to entertain applications for public law writs: *Local Court Act* (NT) s 14(3); *District Court Act* 1991 (SA) s 8(1)(b) (also any other direct challenges to the validity of administrative acts); *County Court Act* 1958 (Vic) s 37(2)(c); *Magistrates' Court Act* 1989 (Vic) s 100(2) (also any other direct challenges to the validity of administrative acts). In the Northern Territory and in the Victorian County Court, applications for equitable relief may be brought if the value of the relief sought is within the jurisdictional limit, or by consent: *Local Court Act* (NT) ss 14(i)(b), 14(1)(d)(ii); *County Court Act* 1958 (Vic) ss 37, 39. This seems to permit applications for equitable remedies in relation to administrative acts, subject to it being possible either to attach a value (within the jurisdictional limit) to the declaration, or to the other party's consent. Such applications could, however, be transferred to a superior court.

3 [1993] QB 473.

4 [2006] SASC 32.

5 As Aronson points out, the term 'collateral attack' is used in a number of ways. A common usage involves treating an attack as 'collateral' if it constitutes an abuse of process (as, for example where a person seeks to assert a state of affairs inconsistent with a prior decision which resolves relevant questions of fact and/or law as between the parties to the case): see Mark Aronson, 'Criteria for restricting collateral challenge' (1998) 9 *Public Law Review* 237, 238-9. For the purposes of this paper, 'collateral attack' is used in a non-pejorative sense simply to denote the raising of an administrative law issue in the context of a criminal case or where the plaintiff is seeking some form of private law relief (whether the administrative law issue is raised by the plaintiff or the defendant) and in this respect, follows Aronson and also Amnon Rubinstein, *Jurisdiction and illegality* (1965), 37-39. The paper is concerned with its availability in cases where it would not constitute abuse of process.

6 *Bugg*, note 3.

7 [1999] 2 AC 143.

8 Examples include *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73; *Wishart v Fraser* (1941) 64 CLR 470. See too *Widgee Shire Council v Bonney* (1907) 4 CLR 977; and *Foley v Padley* (1984) 154 CLR 349 (validity of by-laws).

9 See, eg *Reg v Reading Crown Court. Ex parte Hutchinson* [1988] QB 384, the Divisional Court (Lloyd LJ and Mann J) held that justices could, and were obliged to entertain challenges to the validity of relevant byelaws.

10 [1959] AC 83.

11 For some old authority, see Aronson, note 5, 250 (n 7); Rubinstein, note 5, 7-8, 42-43. There appear to be no recent examples, but this may reflect a mixture of stricter *mens rea* requirements and prosecutorial good sense. Illustrative of judicial hostility to such prosecutions is *Pearson v*

Broadbent (1871) 36 JP 485 (cited by Rubinstein, note 5, 43), where the appellant had been convicted, notwithstanding that he had not been aware of the defect of a licence which had been issued to him, but where no order as to costs was made in relation to his unsuccessful appeal.

12 Rubinstein, note 5, 44-45 (challenges to distress of goods), 121 (action for wrongful denial of right to vote), 124-127 (liability of enforcement officers), 127-139 (liability of decision-makers and officials under 'ministerial' duties).

13 Rubinstein, note 5, 44.

14 Rubinstein, note 5, 54-80, 122.

15 (1863) 14 CB (NS) 180; 143 ER 414.

16 [1985] AC 461.

17 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116.

18 (1989) 166 CLR 454.

19 Rubinstein, note 5, 44-5, 158-59. Recent English authority to this effect includes: *Quietlynn Ltd v Plymouth City Council* [1988] 1 QB 114; *Reg v Wicks* [1998] AC 92 ('enforcement notice' for the purpose of a charge of non-compliance with an enforcement notice meant a formally valid enforcement notice which had not been set aside.

20 Rubinstein, note 5, 124-126.

21 Rubinstein, note 5, 44, but cf 124-126, 170-193, 221-223. Rubinstein notes old authority for the proposition that there are circumstances in which actions in tort may lie in connection with the execution of warrants even if the irregularity surrounding the warrant does not amount to jurisdictional error, but argues that these may have been erroneously decided and may have confused the requirements with collateral attack with those for certiorari. There is, however, no reason in principle why criminal or civil liability should not sometimes depend not on the validity of an administrative act, but on whether an administrative act is or appears to be legally flawed in particular ways. Just as legislation may attach legal consequences to an 'invalid' administrative act, so it may implicitly provide that for some purposes, no consequences are to attach to an act flawed by non-jurisdictional error. Rubinstein argues that the House of Lords majority in *DPP v Head* considered that it was an element of the relevant offence that the victim's detention was pursuant to a properly made order, whether the order was a nullity or not: at 186.

22 See for instance, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 507-8 ([81]) (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), 522-3 ([125]) (Callinan J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 24-5 ([76]-[77]) (McHugh and Gummow J); *Dranichnikov v Minister for Immigration and Multicultural Affairs; Re Minister for Immigration and Multicultural Affairs* [2003] HCA 26 at [87] (Kirby J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30 at [59] (McHugh and Gummow JJ), [122]-[123] Kirby J. Kirby J has expressed doubts about the utility and coherence of the distinction. See eg *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 123 ([212]) where he described the distinction as 'chimerical' and hoped for its interment, and *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1, where he observed at 33-4 ([97]) that 'Trained lawyers often find it difficult to distinguish jurisdictional from non-jurisdictional error. I have confessed to difficulty myself'. The decision in *ABC v Redmore* note 18 is an example of collateral attack failing on the grounds that the error was non-jurisdictional (although the language of jurisdictional error was not used in the decision).

23 [1993] QB 473.

24 The court distinguished *Hutchinson* (note 9) on the grounds that in that case the court had not discussed the distinction between latent and patent procedural errors.

25 *Bugg* note 3, 500.

26 As to whether there was a time when extrinsic evidence was inadmissible to sustain collateral attack based on want of jurisdiction, see Rubinstein, note 5, 74-79, 168

27 *Bugg* note 3, at 492-5.

28 *Bugg* note 3, at 497.

29 *Bugg* note 3, at 499.

30 *Bugg* note 3, at 499-500.

31 In the Divisional Court hearing in *Boddington v British Transport Police* Auld J had concluded that there was no place for collateral attack in the magistrates courts.

32 Note 19.

33 *Wicks* , note 19 at 108-9 and 113-7 respectively.

34 *Wicks* , note 19 at 107.

35 *Boddington*, note 7.

36 *Boddington*, note 7, at 152-7 (Lord Irvine), 172-3 (Lord Steyn.
37 *Boddington*, note 7, at 159 (Lord Irvine), 169-70 (Lord Steyn).
38 *Boddington*, note 7, at 159-62 (Lord Irvine), 171-3 (Lord Steyn).
39 [1998] 1 VR 322.
40 *Flynn* has been expressly rejected in two Federal Court cases involving the availability of collateral attack in superior courts: *Re Churchill* (2001) 109 FCR 105, [17] (Finkelstein J) and *Elliott v Knott* [2002] FCA 1030 (Finkelstein J).
41 (1997) 192 CLR 69.
42 *Ousley*, note 41at 80.
43 *Ousley*, note 41 at 126-127.
44 *Ousley*, note 41 at 151.
45 She accepted that warrants could not be challenged on the basis of insufficiency of the material supporting the application for the warrant, and that decisions to issue interception and listening device warrants were effectively unreviewable, except for patent jurisdictional error: *Ousley*, at 87, 89-90.
46 *Ousley*, note 41 at 101-3 (McHugh J).
47 *Ousley*, note 41 at 104-5.
48 *Ousley*, note 41 at 105.
49 Aronson, note 5 at 241.
50 *Federal Airports Corporation v Aerolineas Argentinas* (1997) 76 FCR 582 (Full Court, dismissing appeal from Beazley J; claim for recovery of money paid pursuant to an allegedly invalid determination of airport charges): *Selby v Pennings* (1998) 19 WAR 520 (Full Court, allowing appeal from Parker J; defence to a charge that the appellant had entered an area of forest classified under conservation legislation as a 'temporary control area' was that the notice purporting to classify the relevant area as a temporary control area was invalid, since the wording of the notice suggested that the notice may not have been issued in accordance with statutory requirements); *Robinson v Vanston* [1999] VSC 541 (Ashley J, allowing an appeal against a Magistrates' Court decision to convict the appellants of charges under the *Classification (publications, Films and Computer Games) (Enforcement) Act* 1995 (Vic). One of the grounds of appeal was the alleged invalidity of certificates issued under the *Classification (Publications, Films and Computer Games) Act* 1995 (Cth)); *Gray v Woollahra Municipal Council* [2004] NSWSC 112 (Whealy J, allowing appeal against a magistrate's decision to convict on a charge under the *Environment Planning and Assessment Act* 1979 (NSW) of failing to comply with an order under the Act, defendant having argued that she was not obliged to do so because the relevant order was invalid, the Council having allegedly committed a variety of legal and procedural errors.
51 *Aerolineas Argentinas*, note 50 at 599 (Lehane J with whom Beaumont and Whitlam JJ agreed); *Robinson v Vanston*, note 50 (not explicitly discussed, but implicit given some of the grounds for alleging that the certificate was flawed); *Gray v Woollahra Municipal Council*, note 50.
52 Re lower courts, see *Selby v Pennings* note 50; *Robinson v Vanston*, note 50; *Gray v Woollahra Municipal Council*, note 50.
53 *Robinson v Vanston*, note 50.
54 *Robinson*, note 50 at [111].
55 [2005] HCA 50.
56 In his analysis of the case, Michael Will points out that Jarratt was able to claim damages only because he had already been removed from office. Had he sought judicial review of the Commissioner's failure to afford him procedural fairness prior to the termination of his contract, he would have won, but he would not have had a cause of action for breach of contract, and would have had no right of redress if he had received his hearing and nonetheless been dismissed: 'From Barratt to Jarratt: Public sector employment, natural justice, and breach of contract' (2006) 49 *AIAL Forum* 9.
57 Note 4.
58 *Jacobs*, note 4 at [14]-[24] (Debelle J), [74]-[96] (Besanko J, with whom Duggan, Vanstone and Layton JJ agreed).
59 (1971) 1 SASR 512. A Court of five justices had been convened on the basis that it might have been necessary to reconsider *Hinton*: [3] (Debelle J).
60 *Jacobs*, note 4 at [18] (Debelle J), [93] (Besanko J with whom Duggan, Vanstone and Layton JJ agreed).
61 It is not clear why collateral attack would ever enable a person to 'by-pass' standing requirements. If the validity of an administrative act were relevant to a person's criminal or civil

liability this would suffice to give the person the kind of 'special interest' needed for an application for a an application for declaratory and injunctive relief in relation to the decision: *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493.

62 *Jacobs*, note 4 at [93] (Besanko J with whom Duggan, Vanstone and Layton JJ agreed).

63 *Jacobs*, note 4 at [[95]-[96].

64 As to this consideration *Selby*, note 50, 550 (Owen J), *Ousley*, note 41 at 147 (Kirby J, who also concluded that there were (somewhat weaker) arguments to the effect that collateral attack could fragment the trial process.

65 See eg *Selby*, note 50 at 550 (Owen J); *Jacobs*, note 4 at[18] (Debelle J).

66 See eg *Selby*, note 50 at 543 (Wallwork J), 550 (Owen J); *Boddington*, note 174-5 (Lord Steyn).

67 Carl Emery, 'Collateral attack – Attacking *ultra vires* action indirectly in courts and tribunals' (1993) 56 *Modern Law Review* 643, 654-5, and see his analysis of whether the English law relating to collateral attack also means that parties to tribunals may attack the validity of decisions indirectly related to the subject matter of an appeal to a tribunal: 655-9. See too: P P Craig, 'Collateral attack, procedural exclusivity and judicial review' (1998) 114 *Law Quarterly Review* 535, 539-40.

68 *Bugg* note 3, at 499-500; *Wicks*, note 19 at 106-7 (Lord Nicholls), 116 (Lord Hoffmann).

69 *Boddington*, note 7 at 152 (Lord Irvine of Lairg LC), with whom Lord Browne-Wilkinson agreed (164); 165-66 (Lord Steyn).

70 *Boddington*, note 7 at 164.

71 See eg *Ousley v The Queen*, note 41 at 148 (Kirby J).

72 *Boddington*, note 7 at 162 (Lord Irvine of Lairg LC).

73 *Selby*, note 50 at 550.

74 *Jacobs*, note 4 at [93].

75 See n 89.

76 *Selby*, note 50 at 527-33 (Ipp J). The Full Court noted however, that the authorities in this area were not always easy to reconcile.

77 But the facts of *Selby* suggest circumstances in which courts might indeed make different findings. Suppose, for example, that the magistrate in *Selby* had accepted that he was entitled to consider the validity of the notice, and further that he made a finding that the notice was invalid for the reasons given by the Full Court. Warned by this precedent, the prosecution might well have learned its lesson, so that in other forest protest prosecutions, it would have supported its case with evidence that the Minister had indeed acted on the recommendation of the relevant authority. An alternative scenario is that the outcome in *Selby v Pennings* could have been avoided. Wallwork J observed that it had been suggested at the hearing of the appeal that 'when the question of the defect in the notice was raised at the hearing, the prosecution should have applied for leave to adduce evidence to clear up the doubts raised on the fact of the notice': note 50 at 529.

78 It relied on *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137, a case in which a plaintiff (B) sued for moneys had and received, following an earlier decision in which another plaintiff (M) had successfully challenged the validity of the by-law under which M and B had purportedly been required to pay money to the Shire. The High Court had not regarded the collateral nature of the attack as posing problems to B's action. Lehane J (with whom Beaumont and Whitlam JJ agreed) noted that there was no discussion of whether discretionary considerations might have defeated B's claim, but this might simply be because the defendants did not consider that there might be any such considerations: *Aerolineas Argentinas*, note 50 at 597. In particular, it is hard to imagine a court ruling that a by-law was invalid as against one defendant, but valid as against anyone who had not challenged its validity 'in time'. The Full Court's observations were also obiter in the sense that it considered that the judge at first instance had not erred in concluding that the plaintiff's delay would not have precluded its bringing an ADJR application in connection with the relevant decision.

79 *Wicks*, note 19 at 132.

80 *Boddington*, note 7 at 176.

81 [1990] 1 Qd R 1.

82 *Cook v Buckle* (1917) 23 CLR 311, where the court considered that this would be the case even if mandamus would lie to require the making of a particular decision. See generally Rubinstein, note 5, 36-37.

83 *Quietlynn*, note 19; *Wicks*, note 19.

84 *Ousley*, note 41, and see *Von Arnim v Federal Republic of Germany (No 2)* [2005] FCA 662, [5] (Finkelstein J, warrants under the *Extradition Act* 1988 (Cth)).

85 See for example, the following Victorian Acts which exempt officials from *personal* liability both for acts done under legislation and acts which the person reasonably believes to have been done under legislation: *Building Act* 1993 ss 127, 128; *Country Fire Authority Act* 1958 s 92; *Dental Practice Act* 1999 s 81; *Infertility Treatment Act* 1995, s 132; *Medical Practices Act* 1994 s 76; *Professional Standards Act* 2003 ss 8, 11. See more generally, Rubinstein, note 5, 139-145.

86 See *Von Arnim*, note 84 at [6], where Finkelstein J cited these authorities and suggested that they were probably fatal to a claim for damages for false imprisonment, pursuant to a warrant issued under the *Extradition Act* 1988 (Cth). But it was not necessary for His Honour to resolve this issue, given his finding that the applicant had not shown that the respondent's decisions were in any way flawed. In dismissing the applicant's appeal the Full Court agreed that error had not been demonstrated and expressed no views as to whether the applicant might have had a cause of action had error been demonstrated: *Von Arnim v Ellinson* [2006] FCAFC 49.

87 The decision was *Gunner v Holding* (1902) 28 VLR 303. The legislation was *Local Government Act* 1903 (Vic) s 213, which after successive consolidations appeared in the *Local Government Act* 1958 Vic) as s 232(2).

88 *Local Government Act* 1989 (Vic). The Act retained a section equivalent to old s 232(1) which provided a relatively accessible procedure whereby a ratepayer could challenge the validity of a by-law in the Supreme Court, on payment of a small charge as security for costs: see *Local Government Act* 1989 (Vic) s 124; *Supreme Court Act* 1986 s 103. The 1903 amendment followed a decision that this section did not preclude collateral attack. In *Widgee Shire Council*, note 8, in which the High Court upheld a conviction under a collaterally attacked by-law, Griffith CJ and Higgins J made no comment on whether a similarly worded Queensland statute (*Local Authorities Act* 1902 (Qld) s 187)) precluded collateral attack, but Isaacs J expressly stated that it didn't.

89 In any case, even if magistrates were not capable of handing administrative law cases, a party to a civil case could apply to have the case transferred to the Supreme Court: *Magistrates Court Act* 1930 (ACT) s 270 (by order of Supreme Court); *Local Court Act* (NT) s 18 (by order of Local Court); *Civil Procedure Act* 2005 (NSW) ss 140(1); *Supreme Court of Queensland Act* 1991 (Qld) s 75; *Magistrates Court (Civil Division) Act* 1992 s 30 (by order of Supreme Court); *Courts (Case Transfer) Act* 1991 (Vic) s 17 (on application to the Magistrates' Court, and with consent of the Supreme Court); *Magistrates Court (Civil Proceedings) Act* 2004 (WA) s 39. Similar provisions exist in relation to the transfer of cases from intermediate courts (where they exist) to the Supreme Court. In several jurisdictions, procedures exist for referring questions of law in criminal cases to the Supreme Court: *District Court Act* 1991 (SA) s 44(2); *Criminal Law Consolidation Act* 1935 (SA) ss 350, 351; *Magistrates' Court Act* 1921 (Qld), s 46. Even in the absence of such provisions, defendants and prosecutors both have a right to appeal against, and to seek judicial review of, magistrates' decisions.

90 For some suggested reforms, see Carl Emery, 'The vires defence – 'ultra vires' as a defence to criminal or civil proceedings' (1992) 51 *Cambridge Law Journal* 308, 344-8; Enid Campbell, 'Collateral challenge to the validity of governmental action' (1998) 24 *Monash University Law Review* 272, 288-9. In *Jacobs*, note 4 at [93], Besanko J concluded that courts might possess a discretion in relation to whether they would permit collateral attack and that this discretion should be exercised on the basis of criteria similar to those suggested by Campbell and Aronson.

91 While problems may have arisen in relation to cases which never reached the superior courts, this seems unlikely. One would expect that cases which gave rise to anomalies would be particularly likely to generate appeals.